STATE OF MINNESOTA
IN COURT OF APPEALS
A09-377

Viking Produce, Inc.,
Appellant,

vs.

Northstar Produce, LLC, et al.,
Respondents.

Filed March 2, 2010
Reversed and remanded
Wright, Judge

Hennepin County District Court
File No. 27-CV-07-22943

Arlo H. Vande Vegte, Long Lake, Minnesota (for appellant)

Norman J. Baer, Aaron R. Hartman, Anthony, Ostlund, Baer, Louwagie & Ross, Minneapolis, Minnesota (for respondent)

Considered and decided by Wright, Presiding Judge; Larkin, Judge; and Crippen, Judge.[*]

U N P U B L I S H E D O P I N I O N

WRIGHT, Judge

Appellant Viking Produce, Inc., (Viking) challenges the summary judgment granted to respondents Northstar Produce, LLC, and Northstar Produce, Inc.,

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

(collectively Northstar) and Brandon Melz. Because a genuine issue of material fact exists precluding summary judgment, we reverse and remand.

FACTS

Viking, a broker of fresh produce, was established by business partners Terry Heitland and Bobby Thomas in 1986. Heitland's nephew, Melz, joined Viking as a broker in 1988. Melz became a vice-president of Viking in the late 1990's, and Heitland became its sole owner in 2004. Heitland planned to pay Thomas $1.2 million for his 49-percent share of Viking's stock when Thomas retired in May 2006. He also planned to sell the business and retire in May 2007.

Around March 2006, while still employed by Viking, Melz, who had expressed an interest in buying Viking, formed Northstar, of which he was the sole owner. On Tuesday, June 6, after Heitland had refused Melz's offer to purchase Viking, Melz resigned. On Friday, June 9, Northstar sent faxes to members of the produce industry, including Viking, announcing that Northstar was now open for business. Viking's four remaining brokers resigned that afternoon. The following morning, Saturday, June 10, the brokers met Melz at Northstar's place of business and became Northstar employees.

Heitland attempted to run Viking on his own, but he was unable to do so. In November 2006, Viking ceased operations. Viking brought this action against Northstar and Melz, alleging tortious interference with contract, breach of the duty of loyalty, unfair competition, and, in an amended complaint, breach of fiduciary duties.[1] The district court granted summary judgment to Northstar and Melz and dismissed all of

[1] Viking's motion to amend was denied as to a proposed fraud claim.

Viking's claims. Viking challenges the summary judgment, alleging that it is precluded by genuine issues of material fact.

D E C I S I O N

Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from summary judgment, we review de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

When deciding a motion for summary judgment, it is the district court's sole function to determine whether genuine factual issues exist, not to decide issues of fact. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). It is not the district court's province to weigh the evidence when determining whether to grant summary judgment. *Id.*; *see also Smith v. Woodwind Homes, Inc*., 605 N.W.2d 418, 423, 425 (Minn. App. 2000) (citing *DLH*, 566 N.W.2d at 70, for the proposition that "on a motion for summary judgment, the [district] court may not make factual findings that require it to *weigh* the evidence" and reversing in part because "[t]he district court impermissibly weighed disputed facts in its memorandum granting summary judgment"). Rather, "[t]he evidence must be viewed in the light most favorable to the non-moving party." *Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 265 (Minn. 1992). And

any doubt as to the existence of a material fact shall be resolved by finding that the fact issue exists. *Id*.

The issue underlying each of Viking's claims is whether, while he was still a Viking officer and employee, Melz solicited the other Viking brokers to leave Viking and work for him and Northstar.[2] The district court found that, "[a]ccording to the only evidence on the issue, [the Viking brokers] were not offered jobs at Northstar Produce until after they left their employment with [Viking.]" This finding ignores a piece of evidence that establishes the existence of a genuine issue of material fact, namely, Melz's answer to an interrogatory question.

The question asked Melz to "[i]dentify all current or former employees of Viking that [he] contacted, solicited, spoke to, or corresponded with regarding possible employment on behalf of [himself or Northstar] . . . from January 1, 2004, until the present." His answer stated:

> Approximately three months prior to his departure from Viking, Melz informed his colleagues (including [the Viking brokers]) that he planned to attempt to buy Terry Heitland's interest in Viking. Melz informed his colleagues (including [the Viking brokers]) that if he was unsuccessful in his efforts to buy Heitland's interest, he was likely to go into business for himself. In context of these conversations, Melz informed his colleagues that in the event his hope came to pass, the door would be open for them to become employees of his company.

This answer refutes the district court's finding that "the only evidence" showed Melz did not offer the brokers jobs until after they had left Viking.

[2]Viking concedes, and we agree, that issues related to Melz's inquiring about office equipment and office space, establishing a legal entity, and arranging financing with a bank are not dispositive of any of its claims. Rather, whether Melz recruited the Viking brokers is the dispositive issue.

Moreover, Melz's interrogatory answer is directly contradicted in all four of the brokers' depositions. One broker answered "No" when asked, "[P]rior to him leaving Viking Produce, [Mr. Melz] had no conversation with you of any sort at any time about employment in which he would be your employer in some business setting?" The second broker answered "No" when asked, "Had Mr. Melz, prior to his leaving Viking Produce, ever made a general statement to you that if at some time in the future he went into business for himself, the door would always be open for you to work for him?" The third and fourth brokers both answered "No" when asked, "Did Mr. Melz ever say to you that if he left Viking, he would have a job for you?" and "Did [Mr. Melz] ever tell you that if he went into business for himself, the door would be open for you to work for him?"

Given the diametric opposition between Melz's assertion in his interrogatory answer that he did tell the brokers they could become his employees if he began his own produce business and the brokers' assertions in their depositions that Melz did not tell them this, a jury could conclude either that Melz recruited Viking's brokers or that he did not. When reasonable persons might draw different conclusions from the evidence presented, summary judgment is not appropriate. *DLH*, 566 N.W.2d at 69.

Because a genuine issue of material fact exists on the dispositive question here, namely, whether Melz recruited Viking's brokers while still at Viking, we reverse the summary judgment and remand for further proceedings. In light of our decision, we need not reach Viking's argument that the district court employed an erroneous legal standard as to the duty of loyalty Melz, an officer of Viking, owed his employer.

Reversed and remanded.