STATE OF MINNESOTA
IN COURT OF APPEALS
A10-185

Glacial Plains Cooperative,
Respondent,

vs.

Gerald Wayne Lindgren,
Appellant.

Filed August 24, 2010
Affirmed
Lansing, Judge

Swift County District Court
File No. 76-CV-07-237

Amy J. Doll, Fluegel, Anderson, McLaughlin & Brutlag, Chtd., Morris, Minnesota (for respondent)

Douglas D. Kluver, Nelson Oyen Torvik P.L.L.P., Montevideo, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Lansing, Judge; and Muehlberg, Judge.*

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

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

LANSING, Judge

In this appeal after remand in a breach-of-contract case governed by the Uniform Commercial Code, Gerald Lindgren challenges the district court's decision confirming breach-of-contract damages, assessing attorneys' fees, and denying Lindgren's motion to amend his answer to add a counterclaim. Because the record does not present a genuine issue of material fact on either the breach of contract or the attorneys' fees, and because the district court acted within its discretion by denying the motion to amend the pleadings, we affirm.

F A C T S

Gerald Lindgren is a farmer who entered into a series of oral contracts to sell grain to Glacial Plains Cooperative. Glacial Plains sued Lindgren after he failed to perform on two of the contracts, and Lindgren, acting pro se, asserted a defense under the statute-of-frauds provision included in the sales section of Minnesota's Uniform Commercial Code (UCC), Minn. Stat. §§ 336.2-101 to .2-725 (2008).

Glacial Plains moved for summary judgment, and the district court granted the motion. The district court rejected Lindgren's statute-of-frauds defense, finding, as a matter of law, that Lindgren was a merchant and that the oral agreements were therefore enforceable as reflected in confirmatory memoranda that Lindgren had failed to object to within ten days. *See* Minn. Stat. § 336.2-201(2) (defining merchant exception to UCC statute of frauds). The district court's finding that Lindgren was a merchant was necessary not only to its conclusion that the statute of frauds did not apply to bar Glacial

Plains' claim, but also to its conclusion that attorney-fee obligations included in the confirmatory memoranda were enforceable additional terms to the oral agreements. *See* Minn. Stat. § 336.2-207(2) (providing circumstances under which additional terms in confirmatory memoranda become incorporated into contract between merchants).

Lindgren appealed, focusing his challenge to the summary judgment on whether Glacial Plains' claims were barred by the statute of frauds. Lindgren argued that the district court erred by determining that he is a merchant under the UCC and, therefore, finding the oral agreements enforceable. In that first appeal, Lindgren did not appear to separately challenge the district court's imposition of attorneys' fees, although our resolution of whether Lindgren was a merchant would have been dispositive of that issue as well. *Glacial Plains Coop v. Lindgren*, 759 N.W.2d 661, 664-65 (Minn. App. 2009) (*Glacial Plains I*).

We affirmed the district court's determination that the UCC statute of frauds did not provide a defense to enforcement of the contract, but did so applying the admissions exception, Minn. Stat. § 336.2-201(3)(b), rather than the merchant exception applied by the district court. *Glacial Plains I* explained that, "[w]here the making of a contract is admitted in court, no additional writing is necessary for protection against fraud, and the contract [between Lindgren and Glacial Plains is] enforceable notwithstanding the provisions of the statute of frauds" because "[Lindgren] has made such an admission . . . ." 759 N.W.2d at 664. The opinion further concluded that Lindgren had admitted not only the existence but also the price and quantity terms of the oral grain contracts:

> During his deposition and in his summary judgment papers, [Lindgren] acknowledged that he made two oral agreements in April 2006 for the sale of corn to be delivered in 2006 and 2007, and that he operated under the assumption that he was obligated under these agreements throughout the summer of 2006. He further admitted that he found the unsigned contracts, decided they were unenforceable, and stopped performing on the 2006 corn contract and never performed on the 2007 corn agreement. [Lindgren] also set forth the specific terms to which the parties orally agreed in April 2006 in his opposition to summary judgment and argued that any additional terms should not be part of any agreement. Based on these admissions by [Lindgren], we conclude that the admissions exception applies here, removing the agreement from the UCC statute of frauds.

Id. at 664-65. Based on our conclusion that the UCC statute of frauds did not provide a defense, we affirmed the district court's decision only in part, and remanded for further proceedings. *Id.* at 666.

On remand, the district court requested comment and direction from Lindgren and Glacial Plains on how to proceed. When they could not agree, the district court ordered mediation, which was unsuccessful. Lindgren, now represented by counsel, filed a motion to amend his answer to assert a breach-of-fiduciary-duty counterclaim, and the district court held a hearing. Following the hearing, the district court denied the motion to amend and reaffirmed its previous judgment, determining that Lindgren had provided no legal or factual basis for a fiduciary relationship between Lindgren and Glacial Plains and that the post-judgment motion to amend was untimely. The district court explained that "[b]ecause the judgments of this court regarding the damages to [Glacial Plains] for breach of contract and for attorney[s'] fees were not reversed or modified on appeal, the court finds that the prior judgments stand."

Lindgren again appeals, arguing that the district court failed to follow this court's directions on remand and asserting that the district court erred by failing to hold a trial on the breach-of-contract claims; enforcing the assessment of attorneys' fees; and denying his motion to amend his answer to add a counterclaim for breach of fiduciary duty.

D E C I S I O N

The primary argument advanced by Lindgren is that the district court's reaffirmance of its earlier judgment is precluded by the decision in *Glacial Plains I*. The district court's "duty on remand is to execute the mandate of the remanding court strictly according to its terms." *Duffey v. Duffey*, 432 N.W.2d 473, 476 (Minn. App. 1988). When this court does "not give specific directions [on] how a district court should proceed on remand, the district court has the discretion to proceed in any manner consistent with our decision." *In re Margolis Revocable Trust*, 765 N.W.2d 919, 927 (Minn. App. 2009). We review for abuse of discretion the district court's compliance in remand proceedings. *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 763 (Minn. 2005).

The remand instruction in *Glacial Plains I* states that "[w]e affirm" the district court's denial of Lindgren's statute-of-frauds defense and "remand for further proceedings." 759 N.W.2d at 666. Because the remand instruction was general rather than specific, we determine whether the district court's course of proceeding on remand was inconsistent with the *Glacial Plains I* decision. Lindgren asserts that the decision implicitly required a trial, relying on this court's citation to an Eighth Circuit case for the proposition that "meeting the statute of frauds does not prove the terms of the contract

but merely allows a fact-finder to determine the issue." *Id.* (citing *Melford Olsen Honey, Inc. v. Adee*, 452 F.3d 956, 964 (8th Cir. 2006)). Glacial Plains asserts, and the district court concluded on remand, that the terms of the contracts already had been determined on summary judgment, and that these portions of the summary-judgment order were not altered on appeal.

We conclude that the district court's course of proceedings on remand was consistent with the decision in *Glacial Plains I* and was not an abuse of discretion. In concluding that the case fell within an exception to the UCC's statute of frauds, the *Glacial Plains I* decision reasoned that Lindgren had admitted not just the existence but also the essential terms of the oral grain contracts. 759 N.W.2d at 664-65. The attorney-fee provisions, however, were not part of Lindgren's admissions and were not addressed at oral argument in the first appeal. Because of this omission and because *Glacial Plains I* was relying on a different statute-of-frauds exception from the one relied on in the district court, the remand may have been aimed, in part, at giving Lindgren an opportunity to make any uncompleted arguments on the issue of attorneys' fees.

Whatever the general purpose for the remand in *Glacial Plains I*, the procedural disposition does not alter the substantive effect of the decision. Meeting the merchant exception to the UCC's statute of frauds does not necessarily establish the terms of a contract. *See* Minn. Stat. § 336.2-201(2) (stating that meeting merchant exception satisfies requirements of UCC statute of frauds). But applying the admissions exception establishes both the exception and any admitted contract terms. *See* Minn. Stat. § 336.2-201(3)(b) (defining admission exception to UCC statute of frauds). And section 336.2-

207(a) establishes additional terms when merchants are involved. Consequently, the admitted terms of the agreement were affirmed in *Glacial Plains I*, but whether Lindgren was a merchant for purposes of an assessment of attorneys' fees was not finally determined until remand. The *Melford* cite, which relates to the merchant exception rather than the admission exception, does not advance the clarity of the remand, but it does not change the holding of *Glacial Plains I.* Notably, although Lindgren argues that *Glacial Plains I* implied that a trial was necessary on remand, he has not pointed to any genuine issue of fact on the essential terms of the contracts. On this record, the district court's proceedings on remand were consistent with the decision in *Glacial Plains I* and not an abuse of the district court's discretion.

II

Lindgren's second challenge is to the district court's imposition of attorneys' fees in accordance with a provision in the confirmatory memoranda sent by Glacial Plains. Generally, additional terms in a written confirmation of an oral agreement are deemed "proposals for addition to the contract." Minn. Stat. § 336.2-207(2). When the parties to the contract are merchants, however, the additional terms become part of the contract subject to certain exceptions not argued in this case. *Id.*

Lindgren's argument appears to be limited to asserting that *Glacial Plains I* holds that he is not a merchant. This is not a correct reading of the decision. Because *Glacial Plains I* relied on the admissions exception to the UCC statute of frauds, the opinion did not address whether Lindgren was a merchant. *See* 759 N.W.2d at 665 (declining to address merchant exception). To the extent that Lindgren seeks to challenge the

enforcement of additional terms under section 336.2-207, this argument was not raised in the previous appeal, despite argument about the merchant exception under 336.2-201. An appellant waives an issue by failing to raise it in appellate briefing. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982). And, although "an appellant acting pro se is usually accorded some leeway in attempting to comply with court rules, he is still not relieved of the burden of, at least, adequately communicating to the court what it is he wants accomplished and by whom." *Carpenter v. Woodvale, Inc.*, 400 N.W.2d 727, 729 (Minn. 1987); *cf. Thorp Loan & Thrift Co. v. Morse*, 451 N.W.2d 361, 363 (Minn. App. 1990) (rejecting pro se appellant's attempt to raise issues not raised below), *review denied* (Minn. Apr. 13, 1990). Lindgren's sole challenge in the first appeal was to the district court's application of the merchant exception to the UCC's statute of frauds. This court did not reach the issue of whether Lindgren was a merchant because we concluded that the case fell within the admissions exception to the statue of frauds.

The issue is complicated, however, by the fact that both parties predominantly argued the merchant exception before the district court and on appeal to this court. We recognize that a ruling from this court in *Glacial Plains I* on whether Lindgren was a merchant could have resolved both the breach-of-contract issue and the enforceability of the attorney-fee provision, based on section 336.2-207. Under all of the circumstances, and particularly considering Lindgren's self-representation in the first appeal, we conclude that the interests of justice compel our review of the attorney-fee issue despite any waiver. *See* Minn. R. Civ. App. P. 103.04 (extending scope of review "as the interest of justice may require").

We now turn our attention to the merits of the attorney-fee challenge, addressing the issue not decided in *Glacial Plains I*, namely, whether the district court erred by determining, as a matter of law, that Lindgren was a merchant within the meaning of the UCC. In this respect, we are reviewing the district court's grant of summary judgment, determining whether there are any genuine issues of material fact and whether the district court erred in applying the law. *See* Minn. R. Civ. P. 56.03 (stating legal standard for grant of summary judgment); *see also STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002) (stating that appellate court independently reviews whether summary judgment is appropriate). We view the evidence in the light most favorable to the party against whom judgment has been granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

A merchant is defined by the UCC as

> a person who deals in goods of the kind or otherwise by occupation holds out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by employment of an agent or broker or other intermediary who by occupation holds out as having such knowledge or skill.

Minn. Stat. § 336.2-104(1).

Although neither the Minnesota Supreme Court nor this court has addressed the issue, relatively recent decisions from other state courts have concluded that a farmer may be a merchant within the meaning of the UCC. *E.g.*, *Smith v. Gen. Mills, Inc.*, 968 P.2d 723, 727 (Mont. 1998); *Colo.-Kan. Grain Co. v. Reifschneider*, 817 P.2d 637, 640 (Colo. Ct. App. 1991); *Agrex, Inc. v. Schrant*, 379 N.W.2d 751, 754 (Neb. 1986); *Nelson*

v. Union Equity Coop Exch., 548 S.W.2d 352, 355 (Tex. 1977); *Rush Johnson Farms, Inc. v. Mo. Farmers Ass'n*, 555 S.W.2d 61, 64 (Mo. Ct. App. 1977). These decisions reject the reasoning of an older line of authority suggesting that a farmer, as a "simple tiller of the soil," cannot be a merchant under the UCC. *Rush Johnson*, 555 S.W.2d at 64. The more recent trend observes that

> the cases which hold that farmers may be merchants reflect on the fact that today's farmer is involved in far more than simply planting and harvesting crops. Indeed, many farmers possess an extensive knowledge and sophistication regarding the purchase and sale of crops on the various agricultural markets. Often, they are more aptly described as agri-businessmen.

Colo.-Kan. Grain Co., 817 P.2d at 640; *see also Rush Johnson*, 555 S.W.2d at 64 (explaining that "the marketing of a crop is certainly as important as the raising of it"). We are persuaded by the more recent line of caselaw and likewise conclude that a farmer can be a merchant under the UCC for some purposes.

"The status of a [particular] farmer as a merchant is typically a question for the trier of fact, and the issue becomes one of law only if reasonable minds could not draw different conclusions from the facts." *Colo.-Kan. Grain Co.*, 817 P.2d at 640; *see also Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006) (explaining that party opposing summary judgment must present "sufficient evidence to permit reasonable persons to draw different conclusions" (emphasis added)). Factors relevant to determining whether a farmer is a merchant may include:

> (1) the length of time the farmer has been engaged in the practice of selling his product to the marketers of his product; (2) the degree of business acumen shown by the farmer in his

> dealings with other parties; (3) the farmer's awareness of the operation and existence of farm markets; and (4) the farmer's past experience with or knowledge of the customs and practices which are unique to the particular marketing of the product which he sells.

Colo.-Kan. Grain Co., 817 P.2d at 640-41.

The facts relevant to the merchant determination in this case are not in dispute. Lindgren has been running his own farming operation since 1973. He owns about 836 acres of land, on which he grows soybeans and corn. Lindgren grew up on a farm and took agricultural and business classes while in college. He makes all of the marketing decisions in the disposition of his crops. Over the years, Lindgren has chosen to sell his crops to a variety of buyers, including Cenex Harvest States, Cargill, United Farmers Elevator, and Glacial Plains. Lindgren has experience with both cash sales and futures contracts, and also has the capacity to store his crops for future sale.

On these facts, we conclude that the district court did not err by determining that Lindgren was a merchant as a matter of law. *See, e.g.*, *Smith*, 968 P.2d at 727 (affirming determination that farmer was merchant as matter of law based on years of experience with grain marketing and familiarity with "all facets of marketing the grain, including knowledge of the product, how to produce it, how to store it, where and how to sell it, and how to negotiate the best terms possible for its disposition"); *Colo.-Kan. Grain Co.*, 817 P.2d at 640 (holding that defendant's "twenty years of experience in selling corn establishes that he is a 'person who deals in goods of the kind'"); *Rush Johnson*, 555 S.W.2d at 65 (affirming merchant determination for "experienced farmer who was well conversant with the marketing of his bean crop").

Lindgren argues that he cannot be considered a merchant because he does not buy grain for trade and thus cannot be a dealer in grain, referring to language in the UCC defining a merchant as a "person who *deals* in goods of the kind . . . involved in the transaction." Minn. Stat. § 336.2-104(1) (emphasis added). Lindgren contends that the word "deals" means to buy and sell, not to grow and sell. We reject this constrictive definition, which would limit merchants to brokers and retailers and exclude any sellers who manufacture their own product. *See Nelson*, 548 S.W.2d at 355-56 (concluding that raising and selling crops fell within plain meaning of term "deal"); *Colo.-Kan. Grain Co.*, 817 P.2d at 640 (explaining that "farmer who regularly sells his crops is a person who deals in goods of that kind").

Notably, the definition of merchant extends not only to one who deals in the goods, but one who "by occupation holds out as having knowledge or skill peculiar to the practices or goods involved in the transaction." Minn. Stat. § 336.2-104(1). This definitional extension focuses on a party's "occupation, and not on whether he made any representations or on his actual knowledge or skill." *Nelson*, 548 S.W.2d at 356 (emphasis added). The uncontroverted evidence in this case reflects Lindgren's long experience as a farmer and marketer of his own crops. Thus, even were we to accept Lindgren's narrow definition of the term "deals," we would nevertheless conclude that the district court did not err by determining that Lindgren is a merchant within the meaning of the UCC.

Lindgren's admissions establish an enforceable contract. His status as a merchant establishes the attorney-fee terms of the contract, because those terms were included in

confirmatory memoranda to which Lindgren did not object. Accordingly, the district court did not err by ordering Glacial Plains to pay attorneys' fees.

III

Lindgren's final challenge is to the district court's denial of his motion to amend his answer to add a counterclaim for breach of fiduciary duty. An answer may be amended once as a matter of course within twenty days of when it is served. Minn. R. Civ. P. 15.01. Thereafter, the answer can be amended only by leave of court, which "shall be freely given when justice so requires." *Id.*; *see also Nw. Nat'l Bank of Minneapolis v. Shuster*, 388 N.W.2d 370, 372 (Minn. 1986) (construing Minn. R. Civ. P. 13.05 and 13.06 to require leave of court under rule 15.01 to assert after-acquired or omitted counterclaim). We review an order denying a motion to amend a pleading for abuse of discretion. *Bjerke v. Johnson*, 727 N.W.2d 183, 196 (Minn. App. 2007), *aff'd*, 742 N.W.2d 660 (Minn. 2007).

A motion to amend may properly be denied based on the stage of the proceedings, the potential for substantial delay, or the absence of a viable claim in the proposed amendment. *Envall v. Ind. Sch. Dist. No. 704*, 399 N.W.2d 593, 597 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987). Additionally, "a party must act with due diligence in attempting to amend." *Hempel v. Creek House Trust*, 743 N.W.2d 305, 313 (Minn. App. 2007). The district court determined that Lindgren's motion to amend was both untimely, because it was filed after judgment had been entered, and futile, because no factual or legal basis supports the assertion of a fiduciary relationship. We conclude that the district court properly exercised its discretion to deny Lindgren's motion to amend on

these grounds. *See, e.g.*, *Metag v. K-Mart Corp.*, 385 N.W.2d 864, 866 (Minn. App. 1986) (affirming denial of motion to amend brought almost four years after commencing action and six months after pretrial conference because court "undoubtedly would have had to reschedule the trial in order to allow respondent to prepare"), *review denied* (Minn. June 23, 1986); *see also Shema v. Thorpe Bros.*, 240 Minn. 459, 467, 62 N.W.2d 86, 91 (1953) (stating that no fiduciary relationship arises when parties are dealing at arm's length).

Affirmed.