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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-460

TranCentral, Inc.,
Respondent,

vs.

Great Southern Xpress, Inc., et al.,
Appellants,

and

Ellex Transportation, Inc.,
a Georgia corporation,
Appellant,

vs.

TranCentral, Inc., et al.,
Respondents.

Filed February 2, 2010
Affirmed
Worke, Judge

Dakota County District Court
File Nos. 19-C6-08-006609, 19HA-CV-08-296, 27-CV-08-4041

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Considered and decided by Worke, Presiding Judge; Shumaker, Judge; and Ross, Judge.

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

WORKE, Judge

Appellants challenge the district court's summary judgment rulings in two consolidated matters, specifically arguing that the district court erred by (1) granting summary judgment in favor of respondents on appellant Ellex Transportation, Inc.'s claims for tortious interference and fraud, and (2) concluding as a matter of law that respondent's claim for breach of contract against appellant Great Southern Xpress, Inc. was not precluded by contractual terms. We affirm.

FACTS

This appeal involves two related contracts. In November 2007, appellant Great Southern Xpress, Inc. (GSX), a trucking company, and respondent TransCentral, Inc. (TCI), a transportation factor, entered into a factoring agreement (2007 TCI/GSX factoring agreement). Pursuant to the terms of the agreement, TCI was to advance GSX 93% of the face value of "such open accounts receivable[] . . . as are acceptable to TCI." GSX represented that every account sold was open, not "subject to any set off or counterclaim and will not be contingent upon the fulfillment of any condition," and "will be paid in full on or before the due date." TCI could require GSX to immediately repurchase any account remaining uncollected after 90 days of TCI's purchase and any account TCI discovered to be imperfect or otherwise uncollectable. GSX would be declared in default of the agreement if it failed to perform any obligation provided therein

and would be required to repurchase all uncollected accounts plus fees and interest from TCI.

The second contract is a November 2007 buyout agreement entered into by GSX, TCI, and GSX's previous factor, Transportation Alliance Bank, Inc. (TAB), on the day after the 2007 TCI/GSX factoring agreement was brokered (2007 TCI/TAB buyout agreement). GSX and TAB had entered into a factoring agreement in 2004 (2004 TAB/GSX factoring agreement). Under the terms of the 2007 TCI/TAB buyout agreement, TCI agreed to purchase all uncollected GSX accounts receivable previously bought by TAB by virtue of the 2004 TAB/GSX factoring agreement. The terms of the 2007 TCI/TAB buyout agreement provided that "[u]pon TAB's receipt [of] good funds of the Buy-Out Amount . . . TAB shall sell, transfer, and convey to [TCI] all of TAB's right, title, and interest, *without recourse* . . . in the presently existing and hereafter arising accounts receivable." (Emphasis added.) The rights and obligations provided within the 2004 TAB/GSX factoring agreement were virtually identical to the rights and obligations contained within the 2007 TCI/GSX factoring agreement: GSX could be forced to immediately repurchase any account receivable remaining unpaid after 90 days or deemed disputed, uncollectible, or otherwise imperfect.

Less than one month after the agreements were brokered, TCI began experiencing difficulty collecting on the GSX accounts purchased under both the factoring agreement and the buyout agreement. Because of these problems and the large outstanding balance owed by GSX as a result of the accounts receivable yet to be collected, TCI began withholding funds under the factoring agreement and soon stopped providing funding

altogether. GSX ceased operations in January 2008 due to the lack of cash flow resulting from TCI's termination of funding.

The owner of GSX, Stephen Cipich, also owned another trucking company, appellant Ellex Transportation, Inc. (Ellex). Once GSX became insolvent, Cipich began using GSX's trucks to make shipments for Ellex in an attempt to generate cash flow to resuscitate GSX's operations. Ellex billed several of GSX's clients for shipments for which GSX was listed as the carrier on the bill of lading. These invoices were property of TCI by virtue of the factoring and buyout agreements, and TCI immediately filed a UCC financing statement when it learned of this conduct. Contemporaneously, TCI also sent a notice of assignment to GSX clients on February 1, 2008,[1] notifying them that TCI had taken assignment of Ellex's accounts receivable, and all payments made toward Ellex invoices were to be paid to TCI. The notice of assignment was drafted by TCI's treasurer, Darlene Spencer, and was signed electronically by TCI's owner/president, Daniel Robbins.

In conjunction with the notice of assignment, and without the awareness or consent of Robbins, Spencer also sent a letter to GSX customers purportedly on behalf of Ellex, announcing that Ellex had obtained a new line of credit with TCI. The letter was signed on behalf of Ellex by Spencer as "attorney in fact," and was drafted on Ellex letterhead that Spencer appears to have created herself. Cipich was never provided with a copy of either the notice of assignment or the letter from Spencer. Despite the notice of

[1] The notice of assignment is actually dated January 2, 2008, but Spencer admitted in her deposition that she did not send the notice until February 1, 2008.

assignment and letter from Spencer, TCI asserts that it never received or retained any other money or property that belonged to Ellex. Similarly, Cipich was unable to identify any specific funds belonging to Ellex that were paid to TCI. Ellex was insolvent by mid-March 2008 and ceased operating.

TCI filed suit against GSX and Cipich, individually, alleging breach of the 2007 TCI/GSX factoring agreement as well as breach of the rights and obligations assigned to TCI under the 2007 TCI/TAB buyout agreement. GSX filed an answer and counterclaim, alleging that TCI's failure to pay the full 93% of the face value of the accounts receivable constituted a breach of the 2007 TCI/GSX factoring agreement. Ellex filed a separate action against TCI alleging conversion, money had and received, fraud, unjust enrichment, tortious interference with contractual relationship, and tortious interference with prospective economic advantage. The suits were consolidated by stipulation.

TCI moved for summary judgment on its claim against GSX, on GSX's counterclaim, and on Ellex's claims. The district court granted summary judgment in favor of TCI on the Ellex claims, but denied summary judgment on the claim filed by TCI against GSX as well as GSX's counterclaim. Although the district court found sufficient issues of material fact in dispute within the competing breach-of-contract claims of TCI and GSX, the court issued two conclusions of law: that the accounts receivable purchased by TCI from TAB under the 2007 TCI/TAB buyout agreement were not separate from the accounts receivable covered by the 2007 TCI/GSX factoring agreement, and that the "without recourse" language provided in the buyout agreement did not preclude TCI from suing GSX, as GSX contended. Subsequently, the parties

stipulated to a contingent settlement of the remaining claims. Ellex now appeals the district court's grant of summary judgment in favor of TCI, and GSX challenges the court's conclusions of law that TCI's breach claim was not foreclosed by contractual terms.

D E C I S I O N

Summary Judgment On Ellex's Claims

In granting summary judgment in favor of TCI on Ellex's claims, the district court found that Ellex failed to show that TCI had obtained any monies rightfully belonging to Ellex, and thus no issues of material fact were in dispute in Ellex's claims for conversion, money had and received, and unjust enrichment. Similarly, the district court found no issues of material fact with respect to Ellex's tortious-interference claims. The district court also granted summary judgment on Ellex's fraud claim under common-law elements and, alternatively, statutory elements. Ellex challenges the court's ruling pertaining only to the tortious-interference and fraud claims.

When reviewing a grant of summary judgment, this court determines whether there are genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). A motion for summary judgment is appropriately 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 of material fact and that either party is entitled to judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citing Minn. R. Civ. P. 56.03). A party resisting summary judgment may not rely on

mere averments "creat[ing] a metaphysical doubt as to a factual issue." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). Whether a genuine issue of material fact exists and whether the district court erred in its application of the law is reviewed de novo. *Id.* at 77. This court may affirm a grant of summary judgment if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 827 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

Tortious Interference with Contractual Relationship

Tortious interference with a contractual relationship has five elements: "(1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages." *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994) (quoting *Furlev Sales and Assocs., Inc. v. N. Am. Auto. Warehouse, Inc.*, 325 N.W.2d 20, 25 (Minn. 1982)). The district court found that Ellex failed to produce evidence of any of these elements.

Ellex argues that issues of material fact exist to survive summary judgment because it demonstrated the five elements of a tortious-interference-with-contractual-relationship claim. Ellex claims that it is undisputed that it had contracts with clients, and that TCI knew about these contracts. Next, it asserts that an unjustified, intentional interference occurred when Spencer, under the guise of Ellex's "attorney-in-fact," sent a letter on forged Ellex letterhead along with the notice of assignment directing all of Ellex's clients to forward any invoice payments to TCI. This interference, Ellex asserts,

resulted in damages in the form of customers refusing to pay Ellex, drivers quitting, and Ellex becoming insolvent.

Ellex was in the start-up phase of its operations when the alleged interference occurred. Ellex was incorporated on September 26, 2007, as GSX was experiencing financial difficulty. Ellex did not obtain automobile and cargo insurance until January 17, 2008, and did not receive operating authority from the U.S. Department of Transportation until January 18, 2008, right as GSX was winding down operations. Ellex did not have trucks to use until GSX provided vehicles after January 25, 2008, after GSX ceased operating. Cipich even admitted that Ellex operated in "February of 2008 and . . . sometime in March"—either contemporaneous to or after the notice of assignment and the letter from Spencer were sent on February 1, 2008. In support of their claim, Ellex provided only an affidavit from Cipich and one communication sent by a client on February 5, 2008, claiming that the client was "currently doing business" with Ellex. Ellex failed to demonstrate a single customer that wrongly paid invoices to TCI as a result of the notice of assignment or the letter from Spencer. Instead, Ellex's sole proof of damages is its bald assertion that "customers stopped paying Ellex" as a result of TCI's actions.

"Speculative, remote, or conjectural damages are not recoverable at law." *Lassen v. First Bank Eden Prairie*, 514 N.W.2d 831, 839 (Minn. App. 1994), *review denied* (Minn. 29, 1994). Additionally, "proof of loss of profits in a new business is too speculative to be the basis for recovery." *Leoni v. Bemis Co.*, 255 N.W.2d 824, 826 (Minn. 1977). Any damages incurred by Ellex appear to have been either speculative

future contracts or anticipated profits from contracts where the services were yet to be rendered. Thus, while disputes of material facts may exist within the first four elements required for a claim of tortious interference with a contractual relationship, Ellex has failed to produce facts in the record which could lead a rational trier of fact to find in its favor as to damages. "No genuine issue of material fact exists when the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Frieler v. Carlson Marketing Group, Inc.*, 751 N.W.2d 558, 564 (Minn. 2008) (quotations omitted). Because there is no evidence from which a factfinder could reasonably conclude that Ellex incurred any damages by TCI's conduct, the district court did not err in granting summary judgment in favor of TCI on the claim of tortious interference with a contractual relationship.

Tortious Interference with Prospective Economic Advantage

Three elements must be established to prove a claim of tortious interference with prospective economic advantage: a plaintiff must show that (1) the defendant "intentionally and improperly interfere[d] with [the] prospective contractual relation," (2) which caused "pecuniary harm resulting from loss of the benefits of the relation," and (3) the interference either (a) induced or otherwise caused a third person not to enter into or continue the prospective relation or (b) prevented the continuance of the prospective relation. *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 633 (Minn. 1982).

Ellex contends that TCI's actions in sending clients the notice of assignment and the letter from Spencer raises, at a minimum, issues of material fact in dispute regarding this tortious-interference claim. Again, however, the record is devoid of any proof as to a

necessary element, namely that TCI's conduct jeopardized *any* contractual relationships Ellex had developed within its nascent stages of operations. TCI correctly counters that "general loss of possible unspecified customers does not establish the tort of intentional interference with prospective economic relations under Minnesota law." *Int'l Travel Arrangers v. NWA, Inc.*, 991 F.2d 1389, 1405 (8th Cir. 1993). Similar to the speculative nature of the damages asserted in the claim for tortious interference with a contractual relationship, the district court did not err in granting summary judgment on Ellex's claim for tortious interference with prospective economic advantage because Ellex was unable to demonstrate any specific customers or profits lost through TCI's conduct.

Fraud

The district court analyzed Ellex's claim for fraud under the elements of both common-law fraud and statutory fraud, due in large part to Ellex's deficient pleadings. Ellex's challenge of the district court's summary-judgment order on the fraud claim thus poses two questions: whether Ellex pled common-law fraud or statutory fraud, and whether summary judgment was appropriate under the elements of whichever fraud claim was appropriately pled.

Statutory Fraud

We must first address whether Ellex properly pled statutory fraud in its complaint. Indeed, count three of Ellex's complaint is captioned merely "Fraud" but later clarifies within the body of the complaint: "[TCI's] above conduct constitutes common law fraud since they engaged in deceit and acted with the specific intent of defrauding [Ellex]." Ellex argued that the complaint was simply mislabeled, and that the amended complaint

alleged statutory fraud under the Minnesota Consumer Fraud Act (MCFA). As the district court noted, however, "[t]he problem with this claim is that [it] is simply untrue. The [c]ourt [] reviewed the [a]mended [c]omplaint and [found] no mention of a statutory fraud claim." A review of the original complaint and the amended complaint confirms the district court's conclusion: with the exception of some differing capitalizations, the counts of fraud in the original and amended complaints are identical.

Ellex now argues that we should ignore the fact that the fraud counts appear verbatim in the original and amended complaints and conclude that the district court "confused the lack of a label with the absence of sufficiently [pled] facts, violating the principles of notice pleading." But Minn. R. Civ. P. 9.02 expressly requires that "[i]n *all* averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." (Emphasis added.) This rule encapsulates the underlying legal elements of a claim for fraud in addition to the underlying facts and events. *See Stubblefield v. Gruenberg*, 426 N.W.2d 912, 914 (Minn. App. 1988) (explaining that, although rule 9.02 "does not specify what constitutes sufficient particularity, the Minnesota Supreme Court has held that all of the elements of fraud cause of action must be pleaded"). While Minnesota state courts have yet to specifically hold that rule 9.02 applies in cases involving the MCFA as it does to cases pleading common-law fraud, the U.S. District Court of Minnesota has stated as much. *See, e.g., Russo v. NCS Pearson, Inc.*, 462 F. Supp 2d 981, 1003 (D. Minn. 2006) (applying the "heightened" pleading requirements of Fed. R. Civ. P. 9(b) to a case alleging a violation of the MCFA). As such, Ellex's failure

to plead statutory fraud under the MCFA should confine a review of its claim to the elements of common-law fraud.

Common-Law Fraud

A claim of common law fraud requires eight elements: (1) a representation, (2) that was false, (3) concerning a past or present material fact, (4) which was susceptible of knowledge, (5) made by a person who knew of its falsity or asserted the representation without awareness of its truthfulness, (6) the person intended to induce others to act, (7) the complaining party was induced to act by the representation, and (8) the complaining party suffered damages from the reliance. *Davis v. Re-Trac Mfg. Corp.*, 276 Minn. 116, 117, 149 N.W.2d 37, 38-39 (1967). The district court concluded that Ellex's common-law-fraud claim failed as a matter of law apparently because—although not entirely clear from the order—TCI never knowingly made a false representation of material fact that induced Ellex to act and there is insufficient evidence of damages incurred. There is no basis, and Ellex advances no argument, for concluding that the district court erred in dismissing this claim under the elements of common-law fraud.

Breach-of-Contract Claims by GSX and TCI

In denying summary judgment within the competing breach-of-contract claims of TCI and GSX, the district court concluded that (1) the accounts receivable purchased by TCI from TAB under the 2007 TCI/TAB buyout agreement were not separate from the accounts receivable covered by the 2007 TCI/GSX factoring agreement, and (2) the

"without recourse" language provided in the 2007 TCI/TAB buyout agreement did not preclude TCI from suing GSX, as GSX contended. GSX challenges these conclusions, presenting questions of contract interpretation.

The construction of a written contract is a question of law, unless there is ambiguity. *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). "A contract is ambiguous if its language is reasonably susceptible to more than one interpretation." *Brookfield Trade Ctr. Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). Whether a contract is ambiguous is a question of law reviewed de novo. *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008). Otherwise, unambiguous language is given its plain and ordinary meaning. *State ex rel. Humphrey v. Philip Morris USA, Inc.*, 713 N.W.2d 350, 355 (Minn. 2006). Unambiguous words are not to be read in isolation, but rather "in accordance with the obvious purpose of the contract . . . as a whole." *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 324 (Minn. 2003). "[W]e will attempt to avoid an interpretation of the contract that would render a provision meaningless." *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 526 (Minn. 1990).

Accounts Receivable Under the Factoring and Buyout Agreements

GSX first argues that the 2007 TCI/TAB buyout agreement was not a sale or assignment of contract rights and that TCI purchased GSX accounts receivable from TAB free and clear of any obligations on the part of GSX. This argument is unavailing. The language of the buyout agreement expressly provided that "TAB shall sell, transfer, and convey to [TCI] all of TAB's right, title, and interest, without recourse or warranty either

express or implied, in the presently existing and hereafter arising accounts receivable." The buyout agreement thus unambiguously assigned all rights to TCI which TAB enjoyed under the 2004 TAB/GSX factoring agreement. The 2004 TAB/GSX factoring agreement provided that:

> [TAB] may require that [GSX] repurchase . . . (i) any [p]urchased [a]ccount, the payment of which has been disputed by the [a]ccount [d]ebtor obligated thereon . . . (ii) all [p]urchased [a]ccounts upon the occurrence of [GSX's] [d]efault . . . and (iii) any [p]urchased [a]ccount which remains unpaid beyond [90 days].

TAB's rights to force GSX to repurchase bad accounts receivable under the 2004 TAB/GSX factoring agreement were fundamentally identical to the rights enjoyed by TCI under the 2007 TAB/TCI factoring agreement. TAB's rights were unambiguously assigned to TCI through the 2007 TCI/TAB buyout agreement. Thus, GSX's contention that it had no obligations to TCI for any accounts receivable sold within the buyout agreement is unsupported. The district court accordingly did not err in this conclusion.

"Without Recourse" Language

GSX's second argument is that it is insulated from liability for the accounts receivable contained within the buyout agreement by the appearance of the "without recourse" language. This argument is similarly unconvincing. As cited above, the language of the buyout agreement provides that "TAB shall sell, transfer, and convey to [TCI] all of TAB's right, title, and interest, *without recourse* or warranty either express or implied, in the presently existing and hereafter arising accounts receivable." (Emphasis added.) "Without recourse" is a technical term that means, according to Black's Law

Dictionary, "without liability to subsequent holders." *Black's Law Dictionary* 1740 (9th ed. 2009). There is no conceivable, reasonable interpretation available that would lend credence to GSX's argument that this excerpt prevents TCI from seeking recourse against GSX. This language unmistakably relates to TAB—not GSX—and precludes TAB from being held liable to TCI or any other subsequent holder of the accounts receivable governed by the 2004 TAB/GSX factor agreement. The district court thus did not err in concluding that the "without recourse" language did not preclude TCI from suing GSX for bad accounts receivable previously sold to TAB and purchased by TCI in the buyout agreement.

Affirmed.