STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0971

Leonard, Street and Deinard Professional Association,
Respondent,

vs.

Richard A. Broms, et al.,
Appellants.

Filed January 27, 2014
Affirmed
Smith, Judge

Hennepin County District Court
File No. 27-CV-12-4664

Keith S. Moheban, Leonard, Street & Deinard, P.A., Minneapolis, Minnesota (for respondent)

William R. Skolnick, Adam R. Strauss, Skolnick & Shiff, P.A., Minneapolis, Minnesota (for appellants)

Considered and decided by Smith, Presiding Judge; Hudson, Judge; and Bjorkman, Judge.

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

SMITH, Judge

We affirm the district court's grant of summary judgment in favor of respondent because appellants failed to demonstrate the existence of a genuine issue of material fact on either of respondent's claims.

FACTS

Bernard L. Madoff—now in federal prison—founded an investment firm and worked a multi-billion-dollar Ponzi scheme. Appellants Richard A. Broms, et al. (Broms) invested with Madoff's firm and profited substantially. In November 2010, the trustee overseeing the liquidation of Madoff's investment firm sued Broms in an attempt to "claw back" nearly $9.46 million. Hoping to retain some of this profit, Broms hired respondent Leonard, Street and Deinard Professional Association (Leonard Street) "solely to negotiate a settlement with the trustee."

The parties' engagement letter, signed on January 31, 2011, explains Leonard Street's fees and costs, instructs Broms to call Leonard Street attorney Allen Saeks with any questions regarding the monthly invoices, and states that Leonard Street expects each invoice to be paid within 30 days. In March 2011, Leonard Street sent Broms an initial invoice for $28,000, which encompassed legal services rendered from December 2010 through February 2011. Thereafter, Leonard Street sent Broms monthly invoices. On June 14, Broms paid the March invoice.

After several months of preparation, a settlement conference was scheduled for August 17, 2011, in Minneapolis. On June 1, Broms's estate-planning attorney, Brian Weisberg, told Leonard Street that Broms was "ok with pushing things until the face to face in late July or early August." On July 21, however, Weisberg reported to Broms that he had told Leonard Street that Broms was "concerned about the costs to date and the costs to get an answer" from the trustee, and that Broms "didn't want to spend any more money to get an unacceptable offer from the [t]rustee." On August 3, 2011—

approximately two weeks before the scheduled settlement conference—Broms terminated Leonard Street and hired a New York law firm for representation in the related bankruptcy litigation. Leonard Street immediately stopped providing legal services to Broms. Thereafter Broms refused to pay Leonard Street for services performed after its first invoice; the outstanding invoices total $29,914.14.

On March 1, 2012, Leonard Street filed a complaint against Broms, alleging breach of contract and account stated. On April 13, Broms answered the complaint, asserting as an affirmative defense that Leonard Street "breached the contract by providing legal services of little or no value." In a counterclaim, Broms also asserted that Leonard Street "breached the contract. . . by charging [Broms] for legal services that had little or no value."

Broms testified that he "expressed concern to Mr. Weisberg. . . that the bills [from Leonard Street] seemed high," but he never contacted Saeks regarding a bill; rather, "[i]f there were any discussions, it would be between Mr. Weisberg and Mr. Saeks." Weisberg testified that, although on one occasion he questioned what tasks remained before the settlement conference, he never, during Leonard Street's representation, complained to Saeks about the bills on Broms' behalf; rather, when Saeks asked why Broms had not paid his bills, Weisberg "referred him to his client." Saeks testified that "[a]t no time during the engagement did [Broms] or their representatives complain to [him] about the size of the bills or object to any entry for legal services reflected on the bills."

Leonard Street moved for summary judgment and Broms opposed the motion. Following a hearing, the district court granted summary judgment in favor of Leonard Street.

D E C I S I O N

Broms challenges the district court's grant of summary judgment in favor of Leonard Street, arguing that the district court erroneously concluded that Broms waived the affirmative defense of failure of consideration to Leonard Street's breach-of-contract claim and that there are no genuine issues of material fact regarding both this affirmative defense and Broms's assent to Leonard Street's statement of account.

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, 77 (Minn. 2002). In doing so, we view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). Mere averments set forth in the pleadings are insufficient to defeat a motion for summary judgment. Minn. R. Civ. P. 56.05. Rather, a party opposing summary judgment "must demonstrate that there are specific fact issues in existence which create a genuine issue for trial." *Sphere Drake Ins. Co. v. Tremco, Inc.*, 513 N.W.2d 473, 477 (Minn. App. 1994), *review denied* (Minn. Apr.

28, 1994). Evidence that "merely creates a metaphysical doubt as to a factual issue" is not sufficient. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

I.

It is undisputed that Leonard Street in fact performed the services referenced in the invoices. Broms nevertheless argues that, "because there was no reasonable prospect for settlement," Leonard Street intentionally rendered services that had "no value," resulting in a "failure of consideration."[1]

To support his claim that Leonard Street "knew that a settlement was not achievable but . . . continued to charge unnecessary fees that were of no value," Broms relies heavily on a January 2011 conversation between Saeks and the trustee's counsel. But the record demonstrates that, although this conversation established that the trustee did not "have as much leeway in settlement negotiations as he had before," it also established that there were "no hard and fast rules [for settlement discounts,]" a defendant's ability to pay was very relevant, and there was a potential five percent discount "just for being a good guy and paying the money back that was requested." This does not create a genuine fact issue regarding the futility of Leonard Street's efforts.

[1] Broms argues that, because he asserted that Leonard Street "breached the contract by providing legal services of little or no value" in his answer, he did not waive the affirmative defense of failure of consideration. We agree with Broms because Minnesota civil procedure employs a system of notice pleading. *See Barton v. Moore*, 558 N.W.2d 746, 749-50 (Minn. 1997). Under this system, a party is not required to name the theory for a claim explicitly, as long as the factual allegations provide fair notice of that theory. *Id.* Therefore, although Broms failed to use the phrase "failure of consideration" in his answer, he pleaded this affirmative defense with enough specificity to avoid waiver.

To the contrary, the record establishes that Saeks, on Broms' authority, offered to settle the claim for $2.8 million and the offer was not rejected; rather, counsel for the trustee asked for documentation of Broms' financial ability and health issues. The record also demonstrates that in July 2011 Saeks contacted the trustee's counsel regarding a rumor that there was a maximum settlement discount of 10 to 15 percent. In response, the trustee's counsel said this information was "not true," that they "look at each case individually," and that with proper documentation they "could probably do business or negotiate out a settlement" with Broms. In pursuit of this goal, Leonard Street arranged for a settlement conference in Minneapolis on August 17, 2011. As Broms concedes on appeal, it was a "fact that the trustee was willing to consider a possible settlement in the range of $2.8 million to $3 million, an amount that would have been acceptable to [Broms]," compared to the nearly $9.46 million initially sought by the trustee.

Broms has failed to demonstrate a genuine fact issue for trial on his failure-of-consideration defense. Because his affirmative defense rests on mere averments, the district court did not err by granting summary judgment in favor of Leonard Street on its breach-of-contract claim.

II.

An account stated is "a manifestation of assent by a debtor and creditor to a stated sum as an accurate computation of an amount due the creditor. A party's retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent." *Cherne Contracting Corp. v. Wausau Ins.*

Cos., 572 N.W.2d 339, 345 (Minn. App. 1997) (quotation omitted), *review denied* (Minn. Feb. 19, 1998).

Broms argues that there is a genuine issue of material fact regarding whether he objected to Leonard Street's statement of account within a reasonable period of time. It is undisputed that between April 2011 and September 2011 Broms received detailed monthly invoices from Leonard Street, billing him for legal services provided through August 4, 2011. Pursuant to the parties' engagement letter, payment of each invoice was expected within 30 days and Broms was to call Saeks with any billing questions.

Broms asserts that he "made numerous complaints throughout the course of the representation." But the record establishes that Broms never contacted Saeks regarding a bill; rather, he merely "expressed concern to Mr. Weisberg. . . that the bills [from Leonard Street] seemed high." On appeal, Broms claims that "Weisberg testified that he did complain to [Leonard Street]," and this is "confirmed [by Weisberg's] email to [Broms] and [Leonard Street's] email to Weisberg." But Broms mischaracterizes the record. Weisberg testified that shortly before Broms terminated Leonard Street, Leonard Street informed Weisberg that they needed to "spend some time getting ready" for the upcoming settlement conference and Weisberg questioned "what else possibly needed to be done and that hadn't been done." Weisberg echoed this sentiment in an email to Broms on July 21: "I told [Leonard Street] we were concerned about the costs to date and the costs to get an answer out of [the trustee's counsel]. I said . . . we didn't want to spend any more money to get an unacceptable offer from the [t]rustee." Weisberg's email also states that Leonard Street will "[e]stimate cost to get through the August 17th

meeting. They claimed not much more was needed but I asked for a firm number." In response, Leonard Street provided its "best estimate of [its] fees to prepare for and meet with the [t]rustee's lawyers next month to discuss settlement." Contrary to Broms's assertions, Weisberg's "complaints" do not constitute objections to a statement of account.

The undisputed evidence supports Leonard Street's account-stated claim. Broms testified that he never contacted Saeks regarding a bill and Weisberg testified that, during Leonard Street's representation of Broms, he never complained to Saeks about the bills on Broms's behalf. Additionally, Saeks testified that "[a]t no time during the engagement did [Broms] or their representatives complain to [him] about the size of the bills or object to any entry for legal services reflected on the bills."

Because Broms points to no evidence of an objection communicated directly to Leonard Street or an explicit objection to any bill, he has failed to demonstrate a genuine fact issue for trial and the district court did not err by granting summary judgment in favor of Leonard Street on its account-stated claim.[2]

Affirmed.

[2] Broms also argues that, because failure of consideration voids a contract, the parties are no longer in a debtor and creditor relationship. *See Franklin*, 309 Minn. at 422, 244 N.W.2d at 495 ("[w]hen there is failure of consideration, a contract valid when formed becomes unenforceable"). Because Broms's failure of consideration argument is without merit, the contract remains valid and the parties are debtor and creditor.