STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1911

Shoppes at Prairie Run Property Group, LLC,
Appellant,

vs.

Kathy Draeger, et al., d/b/a D's Family Pizza, LLC,
Respondents.

Filed June 30, 2014
Affirmed
Halbrooks, Judge

Wright County District Court
File No. 86-CV-13-274

James T. Martin, Gislason, Martin, Varpness & Janes, PA, Edina, Minnesota (for appellant)

Kathy Draeger, Albertville, Minnesota (pro se respondent)

Scott Draeger, Albertville, Minnesota (pro se respondent)

Chris Barrett, Albertville, Minnesota (pro se respondent)

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

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

HALBROOKS, Judge

Following summary-judgment dismissal of its claims against respondents, who are members of its limited-liability-company tenant, appellant landlord argues that the district court erred when it ruled that respondents are not liable for the tenant's lease obligations. We affirm.

FACTS

In late 2010, appellant-landlord Shoppes at Prairie Run Property Group, LLC (Shoppes), entered into negotiations with respondent D's Family Pizza, LLC (D's Pizza) regarding the lease of a mall site to be used as a dine-in pizza restaurant. On behalf of Shoppes, Tom Cloutier negotiated with respondent Kathy Draeger, a member and manager of D's Pizza, whom Cloutier had known for 30 years.

By January 2011, Kathy Draeger had orally committed D's Pizza to leasing the space, and Shoppes had agreed to advance money for improvements and equipment that D's Pizza would later reimburse. Shoppes contends that Kathy Draeger orally promised Cloutier that she and respondents Scott Draeger and Chris Barrett (collectively "owners") would personally guarantee D's Pizza's lease obligations. In early June 2011, D's Pizza began occupancy.

On June 20, 2011, on behalf of D's Pizza, Kathy Draeger and Scott Draeger signed a written lease agreement with a start date of January 10, 2011. Appended to the lease agreement was a written guaranty with signature blocks for the owners, none of

whom ever executed it. D's Pizza made its last lease payment in October 2011, and never repaid the amounts that were advanced for improvements and equipment.

Shoppes served, and later filed, a complaint captioned as Shoppes versus "Kathy Draeger, Scott Draeger and Chris Barrett, d/b/a D's Family Pizza." D's Pizza failed to respond to the complaint, and the district court granted Shoppes's motion for default judgment against the limited liability company in the amount of $59,793.88 plus attorney fees, interest, costs and disbursements. The owners responded to the complaint with a motion to dismiss for failure to state a claim upon which relief may be granted.

The district court granted the individual respondents' motion to dismiss, which it converted to a summary-judgment motion after considering an affidavit of Tom Cloutier that was not referenced in the pleadings.[1] *See N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 491 (Minn. 2004) (holding that under Minn. R. Civ. P. 12.02, when matters outside the pleadings are considered by the district court, a motion to dismiss must be converted to one for summary judgment). The district court ruled that the statute of frauds barred claims against the owners for unsubscribed promises to pay the debts of the limited-liability company and that the parol-evidence rule precluded evidence that oral promises of a guaranty were part of the lease agreement.

The district court also ruled that Shoppes's promissory-estoppel claim failed because any reliance by a commercial landlord on a promise to later execute a guaranty

[1] Shoppes had filed a motion for summary judgment against the owners, supported by an affidavit of Tom Cloutier, in which he asserted that Kathy Draeger had promised personal guarantees. Shoppes withdrew its summary-judgment motion after the owners responded with an affidavit of Kathy Draeger in which she denied making any such promise.

was unreasonable as a matter of law and need not be enforced to prevent an injustice; Shoppes's equitable-estoppel claim failed because the character or magnitude of the detrimental reliance was not so great as to take the agreement out of the statute of frauds; and Shoppes's unjust-enrichment claim failed because of the existence of an express contract. This appeal follows.

D E C I S I O N

In reviewing the district court's grant of summary judgment, we determine whether there are genuine issues of material fact and whether the district court properly applied the law. *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). "[A] moving party is entitled to summary judgment when there are no facts in the record giving rise to a genuine issue for trial as to the existence of an essential element of the nonmoving party's case." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997) (quotation omitted). We review de novo whether a genuine issue of material fact exists. *STAR Centers, Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76 (Minn. 2002). We also review de novo whether the district court erred in its application of the law. *Id.*

Generally, "a member, governor, manager, or other agent of a limited liability company is not, merely on account of this status, personally liable for the acts, debts, liabilities, or obligations of the limited liability company." Minn. Stat. § 322B.303, subd. 1 (2012). A member of a limited-liability company is not a proper party to a proceeding against the limited-liability company unless "the proceeding involves a claim of personal liability or responsibility of that member and that claim has some basis other than the member's status as a member." Minn. Stat. § 322B.88 (2012). Shoppes argues that the

owners are liable based on oral promises to personally guarantee D's Pizza's lease obligations.

The parol-evidence rule precludes evidence of oral representations made prior to or contemporaneous with the execution of an integrated, unambiguous written agreement. *Norwest Bank Minn., N.A. v. Midwestern Mach. Co*., 481 N.W.2d 875, 881 (Minn. App. 1992), *review denied* (Minn. May 15, 1992). Shoppes does not argue that the lease, which contains a merger clause, is ambiguous, or that the alleged promises were made after the lease was signed in late June 2011. If Shoppes were arguing that the oral promises were part of the lease, evidence of the promises would be precluded by the parol-evidence rule.

But Shoppes insists that the parol-evidence rule does not affect its claims because it is not arguing that Kathy Draeger's promises are part of the lease agreement between Shoppes and D's Pizza. Rather, Shoppes contends that the promises are part of "a separate and independent agreement" between Shoppes and the owners, and that "[t]he evidence is not relied upon to vary or alter the terms of the contract between it and D's [Pizza]."

If the alleged promises to guarantee D's Pizza's lease obligations were separate from the lease, they can only be characterized as promises "to answer for the debts . . . of another." Minn. Stat. § 513.01 (2012). Under Minnesota law, "[n]o action shall be maintained" on a "special promise to answer for the debt, default, or doings of another" unless "some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party charged therewith." *Id.* The district court ruled that any oral

guaranty would be unenforceable under the statute of frauds because, although there was a writing attached to the lease, it was not executed and thus not "subscribed" as required by the statute.

Shoppes does not contend that the writing satisfies the statute of frauds, but argues that the agreement should be taken out of the statute of frauds by equitable considerations. Specifically, Shoppes argues that principles of promissory and equitable estoppel and unjust enrichment apply here.

Promissory Estoppel

To assess a claim for promissory estoppel, courts ask the following: "(1) Was there a clear and definite promise? (2) Did the promisor intend to induce reliance, and did such reliance occur? (3) Must the promise be enforced to prevent injustice?" *Olson v. Synergistic Techs. Bus. Sys., Inc*., 628 N.W.2d 142, 152 (Minn. 2001). Stated another way, "[p]romissory estoppel will be found where a party makes a promise knowing another party reasonably relies and acts upon that promise, and the promise must be enforced to avoid injustice." *Norwest*, 481 N.W.2d at 880. Our courts have held that the presence of equitable or promissory estoppel may take an agreement outside of the statute of frauds.[2] *Id*.

[2] In at least one other case, our courts have concluded that promissory estoppel is *not* available when a contract exists but is unenforceable due to the statute of frauds. *See Schumacher v. Schumacher*, 627 N.W.2d 725, 728 (Minn. App. 2001) (citing *Del Hayes & Sons, Inc. v. Mitchell*, 304 Minn. 275, 285, 230 N.W.2d 588, 594 (1975)). Because of our resolution of Shoppes's promissory-estoppel argument, we need not address this inconsistency today.

Here, there is no evidence in the record that either Scott Draeger or Chris Barrett made a "clear and definite promise" to Shoppes to personally guarantee D's Pizza's lease obligations. The Cloutier affidavit asserts only that Kathy Draeger made a promise that the owners would each provide a guaranty. A "party resisting summary judgment must do more than rest on mere averments." *DLH*, 566 N.W.2d at 71. Shoppes's promissory-estoppel claim against Scott Draeger and Chris Barrett therefore cannot survive summary judgment.

With respect to Kathy Draeger, there is conflicting evidence about whether she promised to execute a guaranty. Her affidavit asserts that she did not. The Cloutier affidavit asserts that she did. E-mails submitted as exhibits to the Cloutier affidavit show that Shoppes contemplated a personal guaranty as part of the lease agreement, but not that Kathy Draeger committed herself, or anyone else, to providing one. Shoppes argues that the dispute about whether Kathy Draeger promised a guaranty presents a genuine issue of material fact that precludes summary judgment. But the district court determined that even if Kathy Draeger did promise that she—or her partners—would execute a personal guaranty, it was not reasonable for Shoppes to rely on such a promise and that the promise need not be enforced to avoid an injustice.

The district court acknowledged that whether a party's reliance on a promise was reasonable is generally a fact question, but nevertheless determined that it was unreasonable as a matter of law for a sophisticated, commercial landlord to spend considerable sums on equipment and improvements before it had any signed documents to protect its interests. We agree. When the record is devoid of any facts that would

support a conclusion that reliance was reasonable, there is no genuine issue of material fact, and summary judgment is proper. *See Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995).

Even if Shoppes's reliance *was* reasonable or if the reasonableness of reliance presents a question of fact, Shoppes's inability to collect under the lease from its tenant's members does not rise to the level of an injustice that would allow Shoppes to invoke the doctrine of promissory estoppel to avoid the statute of frauds. We conclude that the district court correctly granted summary judgment to the owners on Shoppes's promissory-estoppel claim.

Equitable Estoppel

When an application of the statute of frauds will protect, rather than prevent, a fraud, equity requires that the doctrine of equitable estoppel be applied. *Lunning v. Land O'Lakes*, 303 N.W.2d 452, 457 (Minn. 1980). The following conditions must first be met:

> 1. There must be conduct—acts, language or silence—amounting to a representation or a concealment of material facts. 2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon by him. 4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. * * * 5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. 6. He must in fact act upon it in such a manner as to change his position for the

> worse, in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it.

Id. The circumstances in which the character and magnitude of the detrimental reliance are so great as to take an agreement out of the statute of frauds on equitable estoppel grounds are rare. *See Sacred Heart Farmers Coop. Elevator v. Johnson*, 305 Minn. 324, 327, 232 N.W.2d 921, 923 (1975) ("As we noted in *Hayes*, there is always some degree of reliance on an oral contract. To take a contract out of the statute of frauds on the basis of the buyer's reliance in reselling would be to seriously weaken the force of the statute of frauds . . . .").

Here, Shoppes argues that it would not have made improvements to the property or purchased equipment without the promise of a guaranty. But Shoppes's detrimental reliance on its understanding that the owners would ultimately guarantee the limited-liability company's lease obligations does not rise to the level of an injustice such that the statute of frauds must be set aside. The district court correctly determined that Shoppes's failure to secure an enforceable guaranty was not reasonable business conduct, and its detrimental reliance was not so great as to avoid the statute of frauds.

Unjust Enrichment

To succeed in a claim of unjust enrichment, a claimant must show "that another party knowingly received something of value to which he was not entitled, and that the circumstances are such that it would be unjust for that person to retain the benefit." *Schumacher*, 627 N.W.2d at 729. "An action for unjust enrichment does not lie simply

because one party benefits from the efforts of others; instead, it must be shown that a party was unjustly enriched in the sense that the term 'unjustly' could mean illegally or unlawfully." *Id.* at 729 (quotation omitted). The cause of action for unjust enrichment has been extended to apply where the defendants' conduct in retaining a benefit is morally wrong. *Id.*

Here, Shoppes argues that the owners have had the benefit of the premises despite making no payments of any kind since October 2011. But D's Pizza is the tenant, and Shoppes has a judgment against D's Pizza for the full value of its damages claim. The equipment and improvements paid for by Shoppes remain the property of Shoppes, and Shoppes need not allow D's Pizza—or its owners—continued access to the property. We conclude that the district court correctly granted summary judgment to the owners on Shoppes's unjust-enrichment claim. Shoppes is limited to what it can recover from its tenant, the limited-liability company.

Affirmed.