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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0854**

Creekridge Capital, LLC,
Appellant,

vs.

Eric Diedrich, et al.,
Respondents.

**Filed March 17, 2009
Reversed and remanded
Klaphake, Judge**

Hennepin County District Court
File No. 27-CV-07-15944

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Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

In this contract dispute, appellant Creekridge Capital, LLC challenges the district
court's grant of summary judgment to respondents Eric Diedrich and Patrick von
Tscharner, former employees of appellant, in its actions for recovery of commission

draws paid to respondents in excess of their earned commissions. Because the provisions in the agreements at issue are ambiguous, the district court erroneously granted summary judgment, and we therefore reverse and remand.

D E C I S I O N

On appeal from summary judgment, this court must determine whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Hermann v. McMenemy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999). Generally, summary judgment is not proper if a contract is ambiguous. *Donnay v. Boulware*, 275 Minn. 37, 45, 144 N.W.2d 711, 716 (1966). If the language of a contract is susceptible to more than one interpretation, the contract is ambiguous. *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, on which the reviewing court owes no deference to the district court’s determination.” *Murray v. Puls*, 690 N.W.2d 37, 343 (Minn. App. 2004), *review denied* (Minn. Mar. 15, 2005). Upon a finding of ambiguity, the district court is obliged to hold an evidentiary hearing to consider “facts, circumstances and conditions surrounding” the execution of the contract and the relevant conduct of the parties in order to arrive at an understanding of what the parties intended. *Donnay*, 275 Minn. at 45, 144 N.W.2d. at 716. When extrinsic evidence is necessary to resolve ambiguity, construction of a contract becomes a question of fact unless the evidence is conclusive. *Id.* at 44, 144 N.W.2d at 716; *see also Hickman v. SAFECO Ins. Co.*, 695 N.W.2d 365, 369 (Minn. 2005).

Respondents each signed letter agreements prior to commencement of their employment that include compensation in the form of an annual salary and a variable commission. The agreements also provide for a monthly draw of a fixed amount and specify that “[t]his draw is a loan against future commissions and needs to be repaid” and that “[n]o taxes are taken out of the draw amount.” The agreements further state that upon termination, the employees “will be entitled to unpaid commissions less any outstanding draw.” Neither agreement addresses specifically how draws taken in excess of earned commissions will be treated upon termination. The question presented here is whether the provision in the agreements that states “[t]his draw is a loan against future commissions and needs to be repaid” obligates respondents to personally repay any draws they received in excess of earned commissions upon termination of their employment.

We agree with the district court’s conclusion that this contract language is ambiguous because it does not address the obligation to repay the draws upon employee termination. The language is susceptible to more than one construction—one creating only an offset of draws against future commissions and another creating personal liability. However, the district court incorrectly determined that this ambiguity required it to grant respondents’ motions for summary judgment based on caselaw requiring an employee’s obligation to repay commissions to be clear.

In general, “[w]here a salesman working on commission has a draw account against commissions, there can be no recovery against him for overdrafts received in the absence of a specific contractual obligation or an express or implied agreement of repayment.” *Hubley v. Cram*, 404 N.W.2d 389, 390 (Minn. App. 1987) (quoting *St.*

Cloud Aviation, Inc. v. Hubbell, 356 N.W.2d 749, 751 (Minn. App. 1984)), *review denied* (Minn. June 25, 1987). The ambiguity of the provisions in the letter agreements as to respondents' personal obligation to repay draws from sources other than future commissions does not preclude a finding of an express or an implied agreement of repayment from them. It means only that the express or implied agreement cannot be found in the language of the contract alone. The ambiguity does not require summary judgment; in fact, it precludes summary judgment. The law regarding recovery of commissions does not alter the standard applicable to summary judgment. Summary judgment is inappropriate, given the ambiguity in the contract and the other evidence available as to the parties' intent. *See Donnay*, 275 Minn. at 44-45, 144 N.W.2d at 716 (reversing and remanding summary judgment where contract terms were ambiguous and preliminary negotiations and the parties' acts and conduct should have been considered to determine intent).

Further, whether there was an express or implied agreement of repayment is a question of fact to be decided upon remand. The record includes evidence of e-mails exchanged before execution of the agreements and revised agreements proposed after execution, as well as other provisions in the agreements that must all be considered to shed light on the parties' intent. *See St. Anthony Motor Co. v. Patterson*, 175 Minn. 624, 221 N.W. 719 (1928) (affirming an order requiring repayment of advances to a salesman

on a record that disclosed ample evidence to sustain a finding of an express or implied agreement to repay).

Reversed and remanded.