STATE OF MINNESOTA
IN COURT OF APPEALS
A10-256

Joel Twaiten,
Appellant,

vs.

Timothy A. Murphy,
Respondent,

and

Associated Bank, National Association, as successor in interest to First Federal Capital Bank, as successor in interest to First Federal Savings Bank f/k/a First Federal Savings and Loan Association,
Respondent,

vs.

Joel Twaiten a/k/a Joel A. Twaiten, defendant and third party plaintiff,
Appellant,

vs.

Knife River Corporation, as successor in interest to Roverud Construction, Inc., third party defendant,
Respondent,

Timothy Murphy, third party defendant,
Respondent.

Filed August 17, 2010
Affirmed
Larkin, Judge

Houston County District Court
File No. File No. 28-C9-98-000355

William L. French, Rochester, Minnesota (for appellant); and

Michael W. Gill, Francis M. Doherty, LaCrosse, Wisconsin (for respondent-Murphy)

Christopher P. Renz, Thomsen & Nybeck, P.A., Bloomington, Minnesota (for respondent-Knife River)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges the district court's award of summary judgment in respondents' favor. Because appellant's fraud and breach-of-contract claims fail as a matter of law, we affirm.

FACTS

This appeal arises from a dispute over the ownership of a 2.75-acre parcel of land, known as Oak Ridge Quarry, located in Houston County. It is undisputed that appellant Joel Twaiten once owned Oak Ridge Quarry jointly with his wife Beverly. Respondent Roverud Construction claims that it purchased Oak Ridge Quarry from appellant in the late 1960s. In or around January 2004, Roverud discovered that title to the Oak Ridge Quarry was still in the name of appellant and his wife. Roverud contacted its attorney, respondent Timothy Murphy, and asked him to correct the situation. Murphy then called appellant and asked him to issue a deed that would establish Roverud as the property owner.

Appellant presents a different version of the events. Appellant claims that he only allowed Roverud to use the land in return for paying the property taxes on it. The parties agree that Roverud has paid the property taxes on the land since the late 1960s. Appellant maintains that Roverud grew tired of merely using the land and sought to own it. Appellant also asserts that Murphy told him that Murphy also represented First Federal Capital Bank, which had a judgment against appellant that eventually grew to exceed $200,000. Appellant further asserts that he told Murphy that he would provide Roverud with the deed if Murphy could resolve the judgment and that Murphy said that he believed the judgment could be resolved "for pennies on the dollar." At his deposition, appellant described the conversation as follows:

> You know, he said we, we can settle that for pennies on the dollar. Well that's great, I said. There should be, you know, as I remember I think I've probably got $5,000 maybe 10 back then, and that's a while ago, that should be enough to cover that, can you get it released for me? And he told me he could, but he needed the deed overnight mail. He needed it immediately. And I said I don't have a problem with that, as long as you release the judgment. And, and he agreed to do it.

Appellant and his wife executed a warranty deed conveying Oak Ridge Quarry to Roverud and sent it to Murphy. Appellant claims that he included a letter with the deed that described his alleged agreement with Murphy to settle the First Federal judgment against him and stated "[i]f for any reason you can not settle this with First Federal and give me a release in full, return the deed so that we can sell the property for today[']s value." Appellant alleges that he sent several follow-up letters to Murphy after Murphy failed to contact him about settling the judgment.

The deed that appellant executed contained a provision stating that consideration for the deed was less than $500. Appellant added another provision to the deed stating that "any interest that anyone may have in the property other than [appellant and his wife] are only deeding any interest that they may have in the property and are not responsible for any other claims anyone may have in this property."

At his deposition, Murphy admitted that he and appellant talked about the possibility of settling the First Federal judgment. But Murphy claims that he only told appellant that he would tell First Federal that appellant was interested in talking with them and that Murphy could not "do any more than that." Murphy testified that he had represented First Federal in the past, but did not represent them when he had this conversation with appellant. Murphy denies the existence of any agreement to settle the First Federal judgment in exchange for the deed to Oak Ridge Quarry. Murphy claims that appellant merely expressed interest in settling the judgment and that Murphy relayed appellant's sentiments to First Federal. Murphy also denies receiving the letter appellant claims to have included with the deed that purportedly described the agreement and asked Murphy to return the deed if the judgment against appellant could not be resolved.

First Federal was eventually acquired by respondent Associated Bank. After Murphy conveyed the Oak Ridge Quarry deed to Roverud, Associated pursued collection efforts against appellant.

In July 2004, appellant filed suit against Murphy, alleging breach of contract and fraud and requesting damages in excess of $50,000. Murphy counterclaimed against appellant alleging fraud and malicious prosecution and requested money damages in

excess of $50,000. Associated also filed a complaint against appellant requesting renewal of its judgment against him. Appellant answered, alleging that Murphy and Roverud (and respondent Knife River Corporation, as Roverud's successor in interest) should indemnify him if Associated prevailed in its attempt to obtain its judgment from appellant. This claim derived from appellant's breach-of-contract claim against Murphy. Subsequently, appellant paid Associated approximately $111,000 to satisfy the judgment. Associated's claim against appellant was then dismissed with prejudice, but the action, which included appellant's claims for contribution and indemnification against Murphy and Knife River, was consolidated with appellant's complaint against Murphy. Murphy and Knife River moved for summary judgment, and the district court awarded judgment in their favor. This appeal follows.

D E C I S I O N

On an appeal from summary judgment, we review de novo whether there are any genuine issues of material fact and whether the district court erred in applying the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). Summary judgment is appropriate only 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 judgment as a matter of law." Minn. R. Civ. P. 56.03. Evidence must be viewed in the light most favorable to the party against whom judgment was granted, and a reviewing court must accept as true the factual allegations of that party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). There is no genuine issue of material fact for trial "when

the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

We will affirm a district court's grant of summary judgment if it can be sustained on any grounds. *Winkler v. Magnuson*, 539 N.W.2d 821, 827 (Minn. App. 1995). The district court concluded that appellant's claims were barred under the merger doctrine[1] and that appellant's evidence was inadmissible under the parol evidence rule, the statute of frauds, and the rule against hearsay. But summary judgment may be granted "when the record reflects a complete lack of proof on an essential element of the plaintiff's claim." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). Thus, summary judgment was appropriate if appellant failed to show a genuine issue of material fact as to one or more essential elements of his fraud and breach-of-contract claims.

Fraud Claim

The elements of fraud are: (1) a false representation by a party of a past or existing material fact; (2) made with knowledge of the representation's falsity or made as of the party's own knowledge without knowing whether it was true or false; (3) with intent to induce another to act in reliance on that representation; (4) the other party acted in reliance on that representation; and (5) the other party suffered pecuniary damage as a

[1] The merger doctrine states that, unless a party alleges fraud or mistake, when a deed is delivered in performance of an executory agreement, any condition of the agreement left unsatisfied is considered waived or abandoned. *In re Brown's Estate*, 126 Minn. 359, 362-63, 148 N.W. 121, 122 (1914).

result of that reliance. *Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.*, 736 N.W.2d 313, 318 (Minn. 2007); *see also JEM Acres, LLC v. Bruno*, 764 N.W.2d 77, 83-84 (Minn. App. 2009) (ruling that the elements of fraud were proven in a real estate transaction that would otherwise have been subject to the merger doctrine). Appellant argues that the following statements by Murphy were fraudulent: (1) that he was authorized to represent the interests of First Federal with respect to its claims against appellant, (2) that the First Federal judgment could be settled for "pennies on a dollar," and (3) that the First Federal judgment would be settled if appellant and his wife executed the deed and returned it. Combined, these statements constitute the purported false representation that underlies appellant's fraud claim.

Where an alleged promise is vague and indefinite, fraud and breach-of-contract claims are properly dismissed. *See Ruud v. Great Plains Supply, Inc*., 526 N.W.2d 369, 372 (Minn. 1995) (holding, on appeal from a grant of summary judgment, that as a matter of law, certain promises were not sufficient to create an offer of permanent employment). Respondents argue that appellant's fraud claim fails because Murphy's alleged representation that the judgment "could be settled for pennies on a dollar" was too vague to support an actionable fraud claim. *See Swedeen v. Swedeen*, 270 Minn. 491, 495, 134 N.W.2d 871, 875 (1965) (determining that phrases used in advertisements were "too general and indefinite to constitute actual misrepresentations of fact"). The phrase "pennies on a dollar," absent more specific language, is vague and indefinite. It leaves the amount for which the judgment could be settled—while still satisfying appellant's expectations—to speculation and completely fails to address the timeframe in which the

judgment would be settled, and any other terms of the settlement. Accepting appellant's allegations as true, Murphy's representation was not sufficiently definite to support a claim of fraud. *See id.*; *Ruud*, 526 N.W.2d at 372.

Appellant's fraud claim fails for other reasons as well. First, appellant did not present evidence that Murphy made an unqualified representation to appellant. "To be actionable, a misrepresentation should be unqualified." *S. Minn. Mun. Power Agency v. City of St. Peter*, 433 N.W.2d 463, 470 (Minn. App. 1988). At his deposition, appellant testified that Murphy stated that the judgment against him *could* be settled for "pennies on a dollar." Appellant admitted that Murphy did not tell him that he had the authority to settle the judgment at that time, and that he believed that Murphy would need to "go to someone" to see if the judgment could be settled. Appellant also testified that he was aware of the possibility that Murphy would not be able to settle the judgment, although appellant testified that in that instance, he assumed that Murphy would send the deed back to him. Assuming the truth of appellant's recollection of his conversation with Murphy, it is insufficient proof of an unqualified representation because Murphy did not state that he *would* settle the judgment.

Respondents also argue that appellant's fraud claim fails because Murphy's alleged representation that he would settle the judgment was one of future, rather than past or present, fact. Generally, a claim of fraud "must relate to past or existing fact and cannot be predicated on statements of intention or opinion." *Dollar Travel Agency, Inc. v. Northwest Airlines, Inc.*, 354 N.W.2d 880, 883 (Minn. App. 1984). But a representation as to future acts may support an action for fraud if the promisor did not

intend to perform at the time the promise was made. *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 202 (Minn. 1990), *rev'd on other grounds*, 501 U.S. 663, 111 S. Ct. 2513; *see also Martens v. Minn. Min. & Mfg. Co.*, 616 N.W.2d 732, 747-48 (Minn. 2000) (ruling that a fraud claim failed for lack of evidence that the defendant had no intentions of fulfilling the representations he made at the time). "[A] misrepresentation does not constitute fraud unless affirmative evidence indicates that the promisor did not intend to perform at the time he or she made the promise." *Kramer v. Bruns*, 396 N.W.2d 627, 631 (Minn. App. 1986).

Appellant offered no such affirmative evidence; rather, he testified only that Murphy represented that the judgment could be settled for "pennies on a dollar," but did not represent that he had the authority to do so at that time. Appellant also testified that he understood Murphy would need to "go to someone" to see if the judgment could be settled. But he offered no evidence showing that Murphy had no intention of doing so. In fact, Murphy testified that he communicated appellant's interest in settling the judgment to First Federal. Appellant's fraud claim fails for this reason as well.

Contract Claim

A breach-of-contract action fails when the promise on which the contract is based is vague or indefinite. "A claim of breach of contract requires proof of three elements: (1) the formation of a contract, (2) the performance of conditions precedent by the plaintiff, and (3) the breach of the contract by the defendant." *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008), *review denied* (Minn. Jan. 20, 2009). A contract between parties requires the parties to

have agreed "with reasonable certainty about the same thing and on the same terms." *Peters v. Mut. Ben. Life Ins. Co.*, 420 N.W.2d 908, 914 (Minn. App. 1988); *see also Anderson v. Backlund*, 159 Minn. 423, 425, 199 N.W. 90, 91 (1924) ("Contracts must be certain in terms, and not so indefinite and illusory as to make it impossible to say just what is promised."). An alleged contract is unenforceable when it is "so vague, indefinite, and uncertain as to place the meaning and intent of the parties in the realm of speculation." *King v. Dalton Motors, Inc.*, 260 Minn. 124, 126, 109 N.W.2d 51, 52 (1961); *see also Ruud*, 526 N.W.2d at 372 (ruling that the statements "Good employees are taken care of," and "You are considered a good employee," were not definite enough to form an employment contract). Murphy's alleged agreement to settle the judgment for "pennies on a dollar" is vague, indefinite, and uncertain. *See Ruud*, 526 N.W.2d at 372. The amount for which the judgment might have been settled was indeterminate and could have spanned a wide range; as such, the indeterminate amount placed the parties' intent "in the realm of speculation."

In conclusion, Murphy's alleged representation that the judgment against appellant could be settled for "pennies on a dollar" was too vague and indefinite to support appellant's fraud and breach-of-contract claims. Thus, appellant's claims against Murphy and Knife River for fraud and breach of contract, and his claims for indemnification and contribution in the Associated Bank action that derive from his breach-of-contract claim,

fail as a matter of law. For these reasons, summary judgment was appropriate. We affirm on this ground without reviewing the theories relied on by the district court.

Affirmed.

Dated:

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Judge Michelle A. Larkin