STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1326

Aaron Gates, individually and on behalf of A Verse Unsung,
Appellant,

Kenny Fritze, individually and on behalf of A Verse Unsung, et al.,
Plaintiffs,

Bruce Gates, et al.,
Co-Appellants,

vs.

Jacob Scherer, Dan Garland, Ryan Guanzon, Matt Brady,
each individually and as general partners of
New Medicine, et al.,
Respondents,

A Verse Unsung,
Nominal Defendant,

Jacob Scherer, et al.,
Counterclaim Plaintiffs,

Aaron Gates, et al.,
Counterclaim Defendants.

Filed April 2, 2012
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-09-21901

Russell M. Spence, Jr., Maxwell S. Felsheim, The Spence Law Firm, Minneapolis, Minnesota (for appellant)

Norman Taple, Bridget A. Sullivan, Gurstel Chargo, P.A., Golden Valley, Minnesota (for Co-Appellants)

Kay Nord Hunt, Diane M. Odeen, Timothy C. Matson, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Stauber, Judge.

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

CONNOLLY, Judge

Appellant challenges the district court's judgment and orders denying pretrial and posttrial motions, in an action to enforce settlement of the underlying claims. In their notice of related appeal, co-appellants challenge the district court's Minn. R. Civ. P. 41.02(a) dismissal of their claims as creditors in the underlying breach-of-contract action for failure to prosecute. We affirm.

FACTS

In 2006, appellant Aaron Gates and plaintiff Kenny Fritze,[1] along with respondents Jacob Scherer and Dan Garland, formed a band called A Verse Unsung (AVU). At some point after it was formed, the band solicited loans from the parents of Fritze and from co-appellants, the parents of Gates. The combined total of the loaned funds was approximately $70,000. In May 2008, appellant was expelled from the band. On May 9, 2008, appellant demanded an accounting and access to AVU's partnership business records and a winding-up of AVU's business. In January 2009, Atlantic records

[1] Kenny Fritze did not join in this appeal.

made an offer of a recording contract and related tours and merchandise income to "Jake Scherer currently p/k/a 'A Verse Unsung.'"[2] Soon thereafter, in February 2009, Fritze was also expelled from AVU, and he also demanded an accounting, access to business records, and a winding-up of the band's business.

On July 21, 2009, a complaint was filed. There were two sets of claims in the complaint. The first set of claims was brought by appellant and plaintiff Fritze against their former band mates, respondents Scherer and Garland, and against AVU as a nominal defendant, asserting partnership claims, unjust enrichment, conversion, and breach of contract. These claims were also brought against Matt Brady and Ryan Guanzon, members of Scherer and Garland's new band, New Medicine. The second set of claims involved the co-appellants and the parents of Fritze, who brought breach-of-contract claims against AVU and its current and former members, alleging they had made loans to AVU that remained unpaid. Originally, all plaintiffs, including the parents of Fritze and Gates, were represented by the same counsel, but the district court disqualified the attorney from representing both sets of claims because the parents' claims were adverse to their children. The parents subsequently retained their own counsel.

On December 22, 2009, the district court issued scheduling orders, ordering mediation to be completed by April 30, 2010 and set trial for the September 13-October 1, 2010 trial block. The parties scheduled a mediation on May 19, 2010. The parents and their attorney did not attend the mediation because the attorney had filed a Confession of Judgment with the district court the day before, on May 18, 2010,

[2] P/k/a is an acronym for "professionally known as."

purporting to settle the parents' claims against AVU. Only appellant and Fritze signed the Confession of Judgment; none of the defendants signed the document.

The parties disagree over what happened at the mediation. Appellant claims that a settlement agreement was reached, while respondents claim that no agreement was reached and that the parties were still working on the proposed terms of the settlement. Appellant claims that the mediator stated, "[w]e have a deal," and that the settlement agreement's material and essential terms were reduced to two, two-page written documents. Respondents argue that an agreement was never signed and that several material and essential terms remained unresolved, including who was bound by the settlement and whether the settlement would resolve all claims. The parties continued to make changes to the "settlement agreement" during the summer of 2010.

On August 12, 2010, respondents' counsel informed the trial court that the matter would likely not settle. Appellant moved for enforcement of the alleged settlement agreement. The district court denied appellant's motion, holding that the parties had never agreed to the essential settlement terms, including the "identification of the parties and terms of payment of the settlement," and had therefore failed to form a valid contract. Appellant sought discretionary review of the order denying the motion to enforce the alleged settlement agreement, and this court denied the petition.

The trial began on November 29, 2010. Before trial, the district court granted respondents' motion to dismiss the parents' claims for failure to prosecute because the parents did not participate in mediation, they did not submit pretrial documents, and the parents' counsel had informed the court that the parents had settled their claim. The jury

returned their verdict on December 7, 2010 and found that Scherer and Garland each breached a fiduciary duty to both Fritze and appellant. They awarded damages as a proportion of the dollar amount in AVU's bank accounts. The jury also found that Scherer and Garland converted appellant's and Fritze's property and damages amounted to one dollar for appellant and one dollar for Fritze. The district court entered judgment on December 22, 2010, terminated the partnership, and reserved the issue of the legitimacy of the Confession of Judgment. Co-appellants filed an appeal of the order dismissing their claims with prejudice, and this court dismissed the appeal as taken from a nonappealable order. In May 2011, the district court denied appellant's motion for posttrial relief and co-appellant's motion for a new trial. The district court also awarded disbursements to respondents as the prevailing party. This appeal follows.

D E C I S I O N

I. Enforcement of the Settlement Agreement

Appellant contends that the district court erred by failing to enforce the settlement agreement negotiated on May 19, 2010. The district court found that "[t]he parties had not yet fully delineated which defendants would be parties to the settlement agreement. The parties had also not agreed on payment terms." Because the purported agreement was missing these essential terms, the district court denied appellant's motion to enforce the settlement. Respondents argue that the district court should be affirmed because no contract existed because the parties had not intended to be bound by the proposed terms and the alleged settlement agreement was missing essential terms.

Whether a document constitutes an enforceable contract is a question of law that this court reviews de novo. *Mohrenweiser v. Blomer*, 573 N.W.2d 704, 706 (Minn. App. 1998), *review denied* (Minn. Feb. 19, 1998). A settlement agreement is a contract. *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 581-82 (Minn. 2010). "To constitute a full and enforceable settlement, there must be such a definite offer and acceptance that it can be said that there has been a meeting of the minds on the essential terms of the agreement." *Jallen v. Agre*, 264 Minn. 369, 373, 119 N.W.2d 739, 743 (1963). When determining whether a contract has been formed, courts look to the objective conduct of the parties and not their subjective intent. *Gresser v. Hotzler*, 604 N.W.2d 379, 382 (Minn. App. 2000). "No contract is formed by the signing of an instrument when one party knows the other does not intend to be bound by the document." *Hansen v. Phillips Beverage Co.*, 487 N.W.2d 925, 927 (Minn. App. 1992). Moreover, no contract exists where the parties work on the details of a proposed agreement with the understanding that the final agreement will be embodied in a formal written document. *Id.*

Here, the district court properly determined that the alleged settlement agreement was missing essential terms and that there was no valid contract formed on May 19, 2010. The proposed agreement was only signed by appellant's attorney; it was never signed or executed by the defendants. *See* Minn. Stat. § 572.33, subd. 4 (2008) (defining mediated settlement agreement to require signatures of the parties). The parties continued to discuss the proposed agreement and exchanged drafts with various edits to the agreement on June 25, July 2, and August 23, 2010. When "parties know that an essential term of their intended transaction has not yet been agreed upon, there is no

contract." *Malevich v. Hakola*, 278 N.W.2d 541, 544 (Minn. 1979). Critically, the parties were still working out which parties would be bound by the agreement and what claims would be included. The parties disagreed over whether the parents of appellant, the parents of Fritze, or respondents' new band, New Medicine, would be bound by the agreement. The issue of whether the claims would be dismissed with or without prejudice was also in dispute. Since the proposed settlement was never signed by the defendants and because the parties continued to negotiate over essential terms of the agreement, there was no meeting of the minds sufficient to form a contract.

Respondent argues that, even if this court does not find that there was a written settlement agreement, we should enforce the oral agreement between the parties to settle. "[A] written agreement is not a prerequisite to the enforcement of a settlement." *Schumann v. Northtown Ins. Agency, Inc.*, 452 N.W.2d 482, 483 (Minn. App. 1990). "Minnesota follows the objective theory of contract formation, under which the parties' outward manifestations are determinative, rather than either party's subjective intent." *Riley Bros. Const., Inc. v. Shuck*, 704 N.W.2d 197, 202 (Minn. App. 2005).

Here, the record does not support appellant's argument that an oral settlement contract was formed. Specifically, the conduct of the parties after the mediation does not suggest that a settlement occurred. Neither the parties nor the mediator reported to the court that the matter had settled. They continued to exchange drafts with proposed changes to the agreement. Appellant argues that mutual assent was manifested at the mediation when the mediator announced, "[w]e have a deal!" However, a mediator has no authority to bind the parties. *See, e.g.*, Minn. Stat. § 572.33, subd. 2 (2010) (defining

"mediator" as "a third party with no formal coercive power"); Minn. Stat. § 572.33, subd. 4 (2010) (defining a "mediated settlement agreement" as a "written agreement . . . signed by the parties . . . ."). Appellant also argues that respondents manifested their assent to the settlement by booking themselves on a national tour during the scheduled trial block. While respondents' decision to go on tour during the scheduled trial block may support appellant's theory that a settlement had occurred, the decision also supports respondents' contention that they wanted to settle and worked toward a mutually agreeable settlement, but were unable to agree. Because the parties' outward behavior did not clearly demonstrate that an oral settlement agreement had been reached, the district court did not err in denying appellant's motion to enforce the settlement.

Finally, appellant argues that the respondents should be estopped from repudiating the settlement. Equitable estoppel is a doctrine designed to prevent a party from unfairly benefitting from his or her own actions. *Rosenberg v. Townsend, Rosenberg & Young, Inc.*, 376 N.W.2d 434, 437 (Minn. App. 1985). "To invoke this doctrine, a party must show that another party made representations or inducements upon which the first party reasonably relied that will cause the first party harm if estoppel is not applied." *Id.* (quotation omitted).

Here, appellant has failed to show how he was harmed by respondents' assertion that no settlement occurred. The time for discovery had already ended on March 31, 2010. Respondents sent appellant notice in mid-August that the case may not settle and copied appellant on a letter to the court asking for an October 11 trial date, which the court granted, and to which appellant did not object. Appellant then failed to produce

materials for trial. The district court considered imposing sanctions, but decided to grant appellant a continuance to prepare for trial. Appellant was given several opportunities and extensions to prepare for trial and has failed to show that respondents should be estopped from repudiating the alleged settlement.

II. Prevailing Party

Appellant argues that the district court abused its discretion in determining that respondents were the prevailing parties for purposes of awarding disbursements under Minn. Stat. § 549.04 (2010), while awarding costs to appellant pursuant to Minn. Stat. § 549.02 (2010). Appellant challenged the finding in a posttrial motion but the district court dismissed the motion on procedural grounds and explained that the finding was based on the fact that the jury had ruled in accord with respondents' theory of the case.

Minn. Stat. § 549.02 states that in actions commenced in district court, costs shall be allowed "[u]pon a judgment in the plaintiff's favor of $100 or more in an action for the recovery of money only . . . ." A separate statute provides that a prevailing party in a district-court action is entitled to reasonable disbursements. Minn. Stat. § 549.04. This court reviews a district court's determination of a prevailing party for an abuse of discretion. *Benigni v. Cnty. of St. Louis*, 585 N.W.2d 51, 54-55 (Minn. 1998). "The right to costs or disbursements is controlled by the final result of the suit." *Cardoff v. Cardoff*, 152 Minn. 399, 400, 189 N.W. 124, 124 (1922). "The prevailing party in any action is one in whose favor the decision or verdict is rendered and judgment entered." *Borchert v. Maloney*, 581 N.W.2d 838, 840 (Minn. 1998). Determining the prevailing party involves "a careful weighing of the relative success of the parties to a lawsuit, a process

that invests a certain amount of discretion in the district court." *Posey v. Fossen*, 707 N.W.2d 712, 715 (Minn. App. 2006).

First, because the jury awarded the plaintiffs over $100, the district court properly awarded appellant and Fritze costs pursuant to Minn. Stat. § 549.02. This is based, not on a determination of who is the prevailing party, but on the amount of the money judgment. Second, as to the issue of who is the prevailing party for the award of disbursements, appellant and plaintiff Fritze sued respondents for breach of fiduciary duty, unjust enrichment, and conversion of partnership property. The district court stated that appellant's theory of the case regarding breach of fiduciary duty was that AVU was a successful, financially viable entity, and concluded that the jury's nominal award to appellant and Fritze of a portion of AVU's bank account balances, totaling $5,906, demonstrated that the jury believed otherwise. The jury awarded nothing to appellant and Fritze on the unjust enrichment claim, and only a total of two dollars on the conversion claims.

At oral argument, appellant's counsel conceded that, during closing argument at trial, appellant had asked for an award "in the low six-figures," a value arrived at by including the value of the recording contract. The fact that the jury awarded less than $6,000 when appellant sought an award over $100,000 supports the district court's determination that, for purposes of determining the prevailing party under Minn. Stat. § 549.04, the jury's decisions "show that the jury believed Defendant's theory of the case that the A Verse Unsung partnership had little to no value for distribution." "This is the type of pragmatic analysis the district court must make in identifying the prevailing

party." *Id.* The district court's determination of the prevailing party is well-supported by the evidence and the district court did not abuse its discretion in determining that respondents were the prevailing parties for purposes of awarding disbursements under Minn. Stat. § 549.04.

III. Co-Appellants' Dismissal

Before trial, respondents brought a motion to dismiss the claims of co-appellants pursuant to Minn. R. Civ. P. 41.02 for failure to prosecute. The district court granted the motion, finding that co-appellants had informed the court their claims had settled, did not participate in the litigation, and had not presented pretrial submissions. After the trial, co-appellants made a motion for a new trial, which the district court dismissed on procedural grounds, finding that they could not move for a new trial if they had never had a first trial. The district court also noted that co-appellants would have lost on the merits because their delay in submitting trial documents was unreasonable and allowing them to proceed to trial would have prejudiced respondents. In their notice of related appeal, co-appellants challenge the district court's Rule 41.02(a) dismissal of their claims as creditors in the underlying breach-of-contract action for failure to prosecute.

The district court's decision to dismiss under Rule 41.02 is reviewed for abuse of discretion. *Zuleski v. Pipella*, 309 Minn. 585, 586, 245 N.W.2d 586, 587 (1976). The court may dismiss an action for failure of the party to prosecute its claims, or for failure to comply with the rules of court or the court's orders. Minn. R. Civ. P. 41.02(a). Unless an exception applies, a dismissal under Rule 41.02 operates as an adjudication upon the merits. Minn. R. Civ. P. 41.02(c). This rule allows the trial court to manage its calendar

and to "eliminate delays and obstructionist tactics by use of the sanction of dismissal." *Lampert Lumber Co. v. Joyce*, 405 N.W.2d 423, 425 (Minn. 1987). On the other hand, "an order of dismissal on procedural grounds runs counter to the primary objective of the law to dispose of cases on the merits." *Hous. & Redevelopment Auth. of St. Paul v. Kotlar*, 352 N.W.2d 497, 499 (Minn. App. 1984) (quotation omitted). Thus, the supreme court has stated, "Rule 41.02(1) permits dismissal for trial management reasons, not for lack of substantive merits of a claim." *Lampert Lumber Co.*, 405 N.W.2d at 425. "[D]ismissal for failure to prosecute [is] appropriate *only when* (1) the delay prejudiced the defendants; *and* (2) the delay was unreasonable and inexcusable." *Bonhiver v. Fugelso, Porter, Simich and Whiteman, Inc.*, 355 N.W.2d 138, 144 (Minn. 1984) (emphasis in original).

The complaint in this case was filed in July 2008, and trial did not occur until December 2010. Discovery and trial orders were issued in December 2009, giving clear deadlines for conducting discovery, making motions, and for submitting pretrial documents. Discovery ended in March 2010, and mediation was held in May 2010. The trial was initially scheduled for October 2010, but was rescheduled for late November 2010. Co-appellants had ample time to prepare for trial. However, co-appellants did not take advantage of this time. They did not participate in discovery or mediation. They attempted to resolve their claims against AVU through a Confession of Judgment that was not signed by respondents. They did not submit any trial documents or pleadings to the district court prior to their dismissal, and represented to the court that their claims had settled.

In the order denying co-appellants' motion for a new trial, the district court found that this record supported the conclusion that co-appellants' delay in prosecuting their claims was unreasonable and inexcusable, and that respondents would be prejudiced if their claims were allowed to proceed to trial. The district court found that co-appellants had not submitted witness and exhibit lists and would have been conducting "a trial by surprise." This delay was inexcusable because the order outlining the deadlines for these documents had been issued several months before the trial. The district court's decision is amply supported by the record and the district court did not abuse its discretion in dismissing the claims of co-appellants pursuant to Minn. R. Civ. P. 41.02 for failure to prosecute.

Affirmed.