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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0602

Aaron Houseman, et al.,
Appellants,

vs.

Thomas D. Whittington,
Respondent.

Filed September 17, 2012
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CV-11-15400

Paul W. Chamberlain, Ryan R. Kuhlmann, Wayzata, Minnesota (for appellants)

Richard T. Ostlund, Brooke D. Anthony, Anthony Ostlund Baer & Louwagie, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Bjorkman, 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

WORKE, Judge

Appellants argue that the district court erred by granting respondent's motion to dismiss, Minn. R. Civ. P. 12.02(e), appellants' claims of anticipatory breach of contract, breach of fiduciary duty, and unjust enrichment, all arising out of the cancellation of appellants' stock options as the result of a company merger. We affirm.

FACTS

The parties in this case are appellants Aaron Houseman, his wife, Nancy, and Houseman Enterprises, Inc., and respondent Thomas D. Whittington, an attorney and shareholder of HealthPort Technologies, LLC (HealthPort). The Housemans owned a medical-records information business that was sold to Universata, Inc. (Universata) on May 15, 2006, for nine million dollars. The purchase agreement provided for periodic payments and permitted the Housemans to "recapture" the business upon Universata's default.

After Universata made a late payment and missed a payment, the parties amended the purchase agreement to include a renegotiated payment schedule, effective July 1, 2007. Universata made another late payment of $763,125 in mid-2008, and for that payment appellants agreed to waive late fees and interest. Appellants alleged that in retaliation for notifying Universata of late payments, Universata first dismissed Houseman from his position with the company and then revoked his severance pay.

In July 2009, Universata failed to make a $758,750 payment. According to appellants, by this time respondent had become a "controlling shareholder and director of Universata,"[1] and he insisted upon renegotiating the purchase agreement a second time. In a contract dated July 16, 2009, the parties agreed to convert one-third of Universata's remaining debt to appellants to 525,000 shares of Universata stock. On October 16,

[1] The July 16, 2009 agreement resolving these issues states that respondent "is the Chairperson of the Board and a Shareholder of Universata[.]"

2009, the parties signed an agreement including a put-option[2] personally guaranteed by respondent. The put-option guaranteed appellants a minimum purchase price of Universata stock at $2.10 per share, exercisable between December 30, 2012 and December 30, 2013.

In 2011, HealthPort offered to purchase Universata "for a base price of approximately $1.02 per share." Although respondent "unsuccessfully pressured [appellants] to execute a release of [respondent's] guarantee," appellants declined to do so, did not agree to sell their Universata shares to HealthPort, and refused to release respondent from the put-option guarantee. The merger agreement between Universata and HealthPort was dated May 11, 2011.

Thereafter, appellants initiated an action against respondent, and respondent moved to dismiss for failure to state a claim, arguing that (1) the anticipatory breach-of-contract count was "barred by the doctrine of impossibility and due to failures of certain conditions precedent"; (2) the fiduciary-duty claim failed because respondent had no fiduciary duty towards appellants; and (3) the unjust-enrichment claim failed because "the parties' relationship is governed by a valid contract."

Following a hearing, the district court granted respondent's motion to dismiss. The court reasoned that respondent could not have anticipatorily breached the put-option contract because Universata stock was cancelled by operation of law when the merger occurred, that although respondent could have acted as a fiduciary in his other capacities

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[2] A "put-option" is defined as "[a]n option to sell something (esp. securities) at a fixed price even if the market declines; the right to require another to buy." *Black's Law Dictionary* 1204 (9th ed. 2009).

with Universata, he did not act as a fiduciary to appellants in negotiating the put-option contract, and that appellants failed to allege any unlawful conduct that would support a claim for unjust enrichment. This appeal follows.

D E C I S I O N

In our review of a district court's decision on a motion to dismiss under Minn. R. Civ. P. 12.02(e), we must decide "whether the complaint sets forth a legally sufficient claim for relief[,] . . . consider[ing] only the facts alleged in the complaint, accept[ing] those facts as true, and constru[ing] all reasonable inferences in favor of the nonmoving party." *In re Indiv. 35W Bridge Litig.*, 787 N.W.2d 643, 647 (Minn. App. 2010) (citations omitted), *aff'd* 806 N.W.2d 820 (Minn. 2011); *see Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). We apply a de novo standard of a review and "may consider matters outside the pleadings if the pleadings refer to or rely on the outside matters." *35W Bridge Litig.*, 787 N.W.2d at 647.

Respondent submitted an affidavit with exhibit attachments in support of his motion to dismiss, but in reaching its decision the district court cited and relied only on the pleadings and the pertinent contracts. Respondent's affidavit included schedules that were part of the contract. Under these circumstances, the district court applied the proper standard of review and properly declined to treat the motion as one for summary judgment. *See* Minn. R. Civ. P. 12.02 (stating that when the district court considers matters outside the pleadings, the dismissal motion shall be treated as a motion for summary judgment); *compare N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490-91 (Minn. 2004) (finding error when district court failed to consider motion as one for summary judgment when it considered affidavits from parties in ruling on motion to dismiss under rule 12.02 (e)).

The October 16, 2009 put-option agreement between appellants and respondent includes a choice-of-laws provision that makes the contract "subject to the laws of the State of Minnesota and the Jurisdiction of the District Court of Hennepin County, Minnesota." *See Hagstrom v. Am. Circuit Breaker Corp.*, 518 N.W.2d 46, 48 (Minn. App. 1994) ("Minnesota traditionally enforces parties' contractual choice of law provisions"), *review denied* (Minn. Aug. 24, 1994). By its terms, the May 2011 merger agreement is subject to the laws of Delaware.

Anticipatory Breach-of-Contract Claim

Appellants first argue that the district court erred by ruling that respondent did not anticipatorily breach the terms of the put-option contract because the merger cancelled appellants' put-option rights. In Minnesota, anticipatory breach of contract is defined as an express, unqualified renunciation of contract performance by giving notice to the other party of the intent not to perform. *Space Ctr., Inc. v. 451 Corp.*, 298 N.W.2d 443, 450 (Minn. 1980). But Minnesota also recognizes the doctrine of impossibility of performance, which excuses performance of an otherwise valid contract if performance becomes impossible. *Central Baptist Theolog. Seminary v. Entm't Commc'ns, Inc.*, 356 N.W.2d 785, 787 (Minn. 1984). Under this theory,

> [W]here a contract is entered into . . . to be performed at a future time, dependent upon the continued existence of a particular . . . thing, . . . subsequent . . . destruction . . . will excuse the obligor from compliance with the terms of the contract. A condition is implied that if the performance

> becomes impossible . . . by the perishing of the thing, performance of the contract is excused, and this implication arises in spite of the unqualified character of the promissory words.

Dow v. State Bank of Sleepy Eye, 88 Minn. 355, 363, 93 N.W. 121, 123 (1903). Courts of this state have applied the doctrine of impossibility of performance under a variety of factual scenarios. *See Central Baptist*, 356 N.W.2d at 789 (excusing contract to provide radio tower space for duration of lease when windstorm destroyed radio tower); *Smith v. Zuckman*, 203 Minn. 535, 536-37, 540, 282 N.W. 269, 270, 272 (1938) (excusing personal services contract upon death of one of the parties); *Merritt v. Haas*, 113 Minn. 219, 221, 225, 129 N.W. 379, 380, 381 (1911) (excusing party from paying insurance premium when insurer went out of business); *Nat'l Farmers Union Prop. & Cas. Co. v. Fuel Recovery Co.*, 432 N.W.2d 788, 791 (Minn. App. 1988) (excusing insurer from fuel recovery work following a fuel spill caused by insured when a unforeseen supervening event, a second fuel spill, occurred), *review denied* (Minn. Feb. 10, 1989).

The facts here demonstrate an impossibility of contract performance that has excused contract performance in similar cases. Here, because of Universata's merger with HealthPort, Universata stock was cancelled. The merger contract provides that "[t]he shares shall be automatically cancelled and retired and shall cease to exist immediately prior to the [merger]." The merger contract further provides:

> From and after the Effective Time the Shareholders shall cease to have any rights with respect to the Shares and the sole right of each Shareholder will be to receive its allocated share of the proceeds of the Purchase Price. All warrants and stock options described on Schedule 1.2 shall be terminated by agreement and cancelled immediately prior to the

> Effective Time and no consideration shall be delivered in exchange therefor, except for the holders of in the money options who shall receive their net issuance merger consideration per share (the per share amount less their respective exercise price).

Schedule 1.2 lists "Aaron Houseman" as having a total of 46,500 in stock options that are "in the money."

Normally, an "in-the-money" put-option is one in which "the strike price is higher than the prevailing market price of the underlying stock." *www.optiontradingpedia.com.* However, if an option is not exercisable until a future date, at that future date the option may be either in-the-money or out-of-the money, depending upon whether the value of the stock at that time is above or below the strike price. Because of this variability in value, the failure of appellants' 525,000 shares to be listed among appellants' in-the-money options was accurate. Thus, under the terms of the merger agreement, appellants' put-option was cancelled at the time of the merger, and the shares held by them were subject to the merger valuation of $1.02 per share.

The terms of the merger agreement are consistent with Delaware law. In Delaware, it is "settled" that "minority stock interests may be eliminated by merger" and as a matter of law a party is not "immun[e] from the operation of [a] cash merger provision." *Rothschild Int'l Corp. v. Liggett Group Inc.*, 474 A.2d 133, 136-37 (Del. 1984); *see Shields v. Shields*, 498 A.2d 161, 167 (Del. Ch. 1985) (stating that "[t]he statutory conversion of stock in a constituent corporation into stock in the surviving corporation that is effected by a stock for stock merger ought not be construed to constitute a sale, transfer or exchange of that stock for purposes of an agreement among shareholders restricting their power to transfer their stock"[3]).

Appellants argue that *Shields* is not controlling because *Shields* involved a stock-for-stock merger, rather than a cash merger, which is at issue here. In *Rothschild Int'l*, however, the Delaware Supreme Court applied the rule permitting stock interests to be extinguished by a cash merger, without making any distinction between a "cash merger" and a stock-for-stock merger. *Rothschild Int'l*, 474 A.2d at 137.

Further, the case cited by appellants as supporting this claim, *AT&T Corp. v. Lillis*, 953 A.2d 241, 255 (Del. 2008), is not controlling. In *AT&T*, the Delaware Supreme Court noted that a distinction commonly exists between stock-for-stock mergers and cash mergers:

> [i]n the case of a stock for stock merger, options holders expect to have their old options replaced with new options because the old (underlying) stock is being replaced with new (underlying) stock. In such a transaction, by its very nature, the 'economic position' of the options will invariably incorporate the expected time value of the new options.

Id. at 254-55. However, the language of the merger agreement in *AT&*T included an "anti-destruction, anti-dilution clause . . . that preserved the option holders' 'economic position' upon the happening of certain specified events, including a merger." *Id*. at 244. Here, the put-option did not survive the merger of Universata and HealthPort under either the specific provisions of the merger agreement or under Delaware law. Under these

[3] In dicta, the *Shields* court noted that vested shareholder rights may be abolished during a merger because the stock that is the subject of a shareholder agreement ceases to "exist legally" after a merger. *Id*. at 168.

circumstances, the district court did not err by concluding that appellants' anticipatory breach-of-contract claim failed as a matter of law.[4] While appellants urge that genuine issues of material fact exist concerning the validity and effect of the merger, the language of the merger agreement and its schedules do not support appellants' claims.

As a separate issue, appellants contend that the district court erred by considering the merger schedules attached to an affidavit submitted by respondent's attorney in deciding to dismiss the case under rule 12.02. But the complaint references the contracts at issue in this case, and in deciding a motion to dismiss, "the court may consider the entire written contract when the complaint refers to the contract and the contract is central to the claims alleged." *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995). Because the schedules of the merger agreement were part of the merger agreement and central to appellants' claims, the district court did not err by considering them.

Breach-of-Fiduciary-Duty Claim

Appellants' second claim is that respondent's conduct constituted a breach of his fiduciary duty to them. They allege that respondent improperly (1) "repudiate[ed] his obligations" under the stock purchase agreement, (2) leveraged his position of control over Universata and HealthPort to coerce appellants to agree to the stock-purchase

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[4] Appellants also argue that the following language contained in the put-option contract constituted anti-destruction language: "Whittington shall purchase such Universata stock, or any Option taken by Houseman in lieu of the stock, owned by Houseman, up to [525,000] shares." This language does not have an anti-destruction import—it merely offers appellants the right to take another option in lieu of Universata stock upon exercising the put-option. This contingency did not occur, and the provision did not prevent Universata from cancelling its stock upon merging with HealthPort.

agreement, and (3) threatened "escheatment and a zero return" unless appellants agreed to the deep payment discounts in the restructuring of payments on the sale of their business, as reflected in the July 16, 2009 stock-purchase agreement. The district court rejected appellants' claims, reasoning that these allegations "ha[d] nothing to do with [respondent's] fiduciary duty." The court also reasoned that because the stock agreement was an arm's length transaction, it was not a fiduciary transaction.

As suggested by the district court, appellants' complaint appears to conflate two distinct legal claims: breach of contract and breach of fiduciary duty. "A fiduciary is a person who is required to act for the benefit of another person on all matters within the scope of their relationship." *Swenson v. Bender*, 764 N.W.2d 596, 610 (Minn. App. 2009)(quotation omitted), *review denied* (Minn. July 22, 2009). In order to establish a cause of action for breach of fiduciary duty, appellants were required to "establish that the two [parties] were in a fiduciary relationship." *Id*. The general rule is that "when confidence is reposed on one side and there is resulting superiority and influence on the other, a fiduciary relation exists." *Stark v. Equit. Life Assur. Soc.*, 205 Minn. 138, 145, 285 N.W. 466, 470 (1939). However, parties to a contract involving competing interests, such as in this case for the sale price of a business, negotiate at arm's length, and such a relationship is not fiduciary. *See Cherne Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d 339, 343 (Minn. App. 1997) (concluding that fiduciary relationship does not exist between insurer and insured), *review denied* (Minn. Feb. 19, 1998); *see also Rice v. Perl*, 320 N.W.2d 407, 410 (Minn. 1982) (noting that fiduciary relationship is premised on trust); *St. Paul Fire & Marine Ins. Co. v. A.P.I., Inc.*, 738 N.W.2d 401, 406 (Minn.

App. 2007) ("Ordinary business relationships may involve reliance on a professional, a degree of trust, and a duty of good faith, and yet not fall within the class of fiduciary relationships."), *review denied* (Minn. Dec. 11, 2007).

Essentially, appellants' breach-of-fiduciary-duty claim is a recasting of their breach-of-contract claim. Each alleged breach relates only to the facts surrounding the parties' July 16, 2009 stock-purchase agreement. As such, appellants have not alleged any conduct that would involve a breach of a fiduciary duty. *See Swenson*, 764 N.W.2d at 603 (rejecting a breach-of-fiduciary-duty claim that was "a weak substitute for [a] dismissed defamation claim," relying on prior caselaw suggesting that a breach of contract claim may not be repackaged as a breach of fiduciary duty claim).

For these reasons, the district court did not err by dismissing appellants' breach-of-fiduciary-duty claim.

Unjust-Enrichment Claim

Appellants' final claim is that they are entitled to an award of damages because respondent was unjustly enriched at their expense. They argue that respondent "manipulate[d] [his] corporate authority to uniquely enrich himself at the direct expense of [appellants] and that "[i]t would be unjust under the circumstances to allow [respondent] to avoid his personal guaranty under the [put-option agreement] without compensating [appellants.]"

Unjust enrichment is an equitable remedy. *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 305 (Minn. 1996). Except in rare circumstances, a valid contract controlling the rights and obligations of two parties precludes an unjust-enrichment claim. *Stein v. O'Brien*, 565 N.W.2d 472, 474-75 (Minn. App. 1997).

Appellants have not shown a proper factual basis to support an unjust-enrichment claim. The conduct that appellants characterize as a "manipulation" of respondent's "corporate authority" was also conduct in support of the interests of the 72% majority of shareholders represented by respondent as the purported shareholder's representative. As such, respondent's conduct in advancing a corporate merger, which occurred nearly two years after execution of the stock-purchase agreement, was an action permitted by law, and likely supported by economic circumstances.[5] Presumably, appellants knew in 2009 that they were taking some risk in accepting a put-option with a guarantee rather than a cash payment. Under the terms of the put-option, appellants, during the one-year exercise period that did not begin until the end of 2012, agreed that they could either choose not to exercise the option if the value of Universata went up, or exercise the option if the value of Universata stock went below $2.10 per share.[6] Instead, they received the same discounted stock value that other shareholders were required to accept under the terms of the merger; this is not unfair or illegal. If appellants believed that the terms of the merger were unfair to them as minority shareholders, their proper remedy

[5] Universata had financial difficulties, as evidenced by its recurrent inability or failure to make periodic payments for the purchase of the business. The July 16, 2009 stock-purchase agreement notes that Universata "has had difficulty complying with" the terms of the original purchase agreement because of "the current economic environment."

[6] In effect, "betting" 525,000 shares on the value of Universata stock declining and planning to recoup the reduction in stock value by exercise of the put-option during its one-year exercise period was a risky strategy, as a lesser value than $2.10 is quite near zero, and the viability of the company would be at stake under those circumstances.

was to dissent to the merger and seek a pre-merger payout on the pre-merger share price. *See generally* Harry G. Henn & John R. Alexander, *Laws of Corporations* 997-99 (3d ed. 1983); *see also ServiceMaster*, 544 N.W.2d at 305 ("A party may not have equitable relief where there is an adequate remedy at law available."). Under the facts alleged, appellants have not established a proper factual basis for an unjust-enrichment claim.

Affirmed.