STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0936

Winthrop Resources Corporation,
Respondent,

vs.

GroupEx Financial Corporation, et al.,
Appellants,

JRJ Express, Inc.,
Defendant.

Filed December 10, 2012
Affirmed
Hooten, Judge

Hennepin County District Court
File No. 27-CV-11-7816

Thomas H. Boyd, Matthew R. McBride, Winthrop & Weinstine, P.A., Minneapolis, Minnesota (for respondent)

Thomas J. Conley, Law Office of Thomas J. Conley, LLC, Minneapolis, Minnesota (for appellants)

Considered and decided by Connolly, Presiding Judge; Rodenberg, Judge; and Hooten, Judge.

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

HOOTEN, Judge

Appellants GroupEx Financial Corporation and Jose Leon (GroupEx) challenge the district court's grant of summary judgment to respondent Winthrop Resources

Corporation, arguing that the parties' lease agreements are ambiguous, Winthrop should be equitably-estopped from asserting a breach of those agreements, and Winthrop fraudulently concealed material facts. Because there are no genuine issues of material fact and the district court did not err as a matter of law, we affirm.

FACTS

Winthrop is a financial-services company that finances and leases computer equipment. Winthrop and GroupEx's predecessor, Mejico Express, entered into lease agreement ME091902 (lease agreement), which included lease schedules 001X and 002R, on September 19, 2002. The lease agreement defined the following terms:

> . . . The *term* of this Lease Agreement, as to all Equipment designated on any particular Lease Schedule, shall commence on the Installation Date for all Equipment on such Lease Schedule and shall continue for an initial period ending that number of months from the Commencement Date as set forth in such Lease Schedule (the "Initial Term") and shall continue from year-to-year thereafter until terminated. The term of this Lease Agreement as to all Equipment designated on any particular Lease Schedule may be terminated without cause at the end of the Initial Term or any year thereafter by either party mailing written notice of its termination to the other party not less than one-hundred twenty (120) days prior to such termination date.
>
> . . . .
>
> The *Installation Date* for each item of Equipment shall be the day said item of Equipment is installed at the Location of Installation, ready for use, and accepted in writing by the Lessee. The *Commencement Date* for any Lease Schedule is the first of the month following the installation of all the Equipment of the Lease Schedule, unless the latest Installation Date for any Equipment on the Lease Schedule falls on the first day of the month, in which case that is the Commencement Date. The Lessee agrees to complete,

> execute and deliver a *Certificate of Acceptance* to Lessor upon installation of the Equipment.

(Emphasis added.) The lease agreement also set forth requirements for the return of the leased equipment, including, "[i]f the Equipment on the applicable Lease Schedule is not at the Return Location within ten (10) days of the Return Date . . . then any written notice of termination delivered by Lessee shall become void, and the Lease Schedule shall continue in accordance with this Lease Agreement." Later that year, Mejico's president, Jose Leon, entered into an "Unconditional Continuing Personal Guaranty" with Winthrop in which he agreed that he would personally guarantee payments due under the agreement and lease schedules. In 2005, Mejico, GroupEx, and JRJ Express, Inc., which was a defendant in the district court action but is not party to this appeal, entered into an assumption and assignment agreement with Winthrop which made them jointly and severally liable for the lease agreement and all associated obligations.

On July 26 and August 21, 2006, Leon signed certificates of acceptance for equipment that was purchased by Winthrop and leased back to Mejico, GroupEx, and JRJ pursuant to lease schedule 004. Both of the executed certificates of acceptance expressly stated that "all of the items of equipment [contained therein] were accepted on the date the Lessee signed the purchase agreement selling the equipment . . . to Winthrop Resources Corporation (the 'Installation Date')." The purchase agreements were signed on the same dates as the certificates of acceptance.

On August 30, 2006, Winthrop, Mejico, GroupEx, and JRJ entered into lease schedule 004R. Lease schedule 004R expressly replaced lease schedule 004. Lease

schedule 004R also expressly incorporated the terms and conditions of the certificates of acceptance executed pursuant to schedule 004, including installation dates. The term of lease schedule 004R was 36 months. Lease schedule 004R also provided that:

> Upon the following events occurring, Lessor will cease all Lease Charges associated with *Lease Schedules Numbered 001X and 002R of Lease Agreement Number ME091902* (the "*Lease Schedules*"): (i) Receipt by Lessor of all Lease Charges (and taxes) due (or levied) through November 30, 2005 associated with the *Lease Schedules*; (ii) execution, delivery and commencement of this Lease Schedule Number 004R; and (iii) return of all of the equipment listed on the Attachment A under the words Returning Equipment (the "Returning Equipment") by September 30, 2006. . . . Lessee hereby certifies that all of the Equipment listed on this Lease Schedule Number 004R that was listed on the *Lease Schedules* is (i) in its possession, (ii) in good working order and satisfactory in all respects, and (iii) irrevocably accepted as of December 1, 2005. Therefore, the Installation Date of *such Equipment* shall be December 1, 2005.

(Emphasis added.)

On February 16, 2009, GroupEx[1] notified Winthrop of its intent to terminate lease schedule 004R effective August 1, 2009. Winthrop responded on March 10 that the end of the lease term was actually August 31. On August 7, Winthrop sent GroupEx instructions on returning the equipment and directed that all equipment must be shipped on, or before, the day after the lease-end date. But GroupEx did not return the equipment. In accordance with the terms of the lease agreement, Winthrop renewed lease schedule 004R for another year and GroupEx continued to make the monthly lease payments.

[1] Mejico merged with GroupEx on January 1, 2007.

On July 28, 2010, GroupEx notified Winthrop, again, of its intent to terminate lease schedule 004R, this time effective December 1, 2010. GroupEx indicated that December 1, 2005 represented the installation and commencement date for all equipment associated with lease schedule 004R. According to GroupEx, its notification was clearly timely since it was in excess of the 120-days' notice required by the lease agreement.

On August 4, Winthrop confirmed that it received the termination letter, but informed GroupEx that it was working on a formal response. The next day, Winthrop alerted GroupEx that its notice was untimely. According to Winthrop, consistent with the terms of its 2002 agreement, three installation dates—December 1, 2005, July 26, 2006, and August 21, 2006—established a commencement date of September 1, 2006 for lease schedule 004R. Because the July 28 notification was not within 120 days' required notice, Winthrop renewed the lease for another year.

Nevertheless, GroupEx responded that the termination of the lease schedule 004R would take effect on December 1 and requested information on returning the equipment. After receiving return instructions, GroupEx returned all available equipment on November 30, 2010. GroupEx paid the lease charge associated with lease schedule 004R for September, October, and November 2010, but thereafter ceased making payments.

Winthrop sued GroupEx, JRJ, and Leon for breach of lease and guaranty. GroupEx, JRJ, and Leon asserted counterclaims of breach of lease and unjust enrichment, and raised various affirmative defenses, including equitable estoppel. GroupEx later asserted a fraudulent misrepresentation defense. The district court granted Winthrop's motion for summary judgment and dismissed GroupEx's counterclaims with prejudice,

concluding that (1) the parties' lease agreements were unambiguous; (2) GroupEx's equitable-estoppel claim failed as a matter of law; and (3) GroupEx failed to raise a genuine issue of material fact that Winthrop fraudulently concealed material facts. This appeal follows.

D E C I S I O N

On appeal from summary judgment, this court reviews de novo whether a genuine issue of material fact exists and whether the district court erred in its application of the law. *Star Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). No genuine issue of material fact exists when a party fails to present evidence that is "sufficiently probative with respect to an essential element of the . . . party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). We view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

I.

GroupEx first challenges the district court's conclusion that the lease documents were clear and unambiguous. A lease is a form of a contract. *Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700, 704 (Minn. 1999). The language of a contract is ambiguous if it is susceptible to two or more reasonable interpretations. *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010). If a contract is ambiguous, the court construes ambiguities against the drafting party and adopts the interpretation more favorable to the party who did not draft it, absent "a clear showing that a contrary

meaning was intended by the parties at the time of its execution." *Ecolab, Inc. v. Gartland*, 537 N.W.2d 291, 295 (Minn. App. 1995) (quotation omitted). But a court will not read an ambiguity into an unambiguous document in order to alter or vary its terms. *Polk v. Mut. Serv. Life Ins. Co.*, 344 N.W.2d 427, 430 (Minn. App. 1984). Instead, the contract will be enforced even if the result is harsh. *Lor*, 591 N.W.2d at 704. Whether a contract is ambiguous is a question of law reviewed de novo. *Dykes*, 781 N.W.2d at 582.

Here, the district court, in a well written and cogent order, concluded that since it was undisputed that the last installation of equipment under lease schedule 004 and 004R took place on August 21, 2006, the commencement date for lease schedule 004R was September 1, 2006. The district court reasoned that according to the unambiguous language of the 2002 agreement, September 1, 2006, was "the first of the month following installation of all the Equipment on the Lease Schedule."

But GroupEx contends that because December 1, 2005 was identified as an installation date in lease schedule 004R, there is at least an ambiguity as to the commencement date which must be resolved against Winthrop, the drafter of the documents. In support of this purported ambiguity, GroupEx argues that the use of the word "equipment" as set forth in lease schedule 004R refers to all of the leased equipment, including all of the equipment under lease schedule 004 and 004R.

However, as was noted by the district court, lease schedule 004R, which was signed on August 30, 2006, dealt with not only the equipment listed on lease schedule 004, but also included equipment set forth in lease schedules 001X and 002R of Lease Agreement Number ME091902. The district court was correct in concluding that lease

schedule 004R sets forth December 1, 2005 as the installation date for the equipment which was transferred from lease schedules 001X and 002R, not the equipment that was installed on July 26 and August 21, 2006 under lease schedule 004.

And contrary to GroupEx's argument, the 2002 lease agreement does not support its claim that any time that "equipment" is utilized in the lease agreement or lease schedules, such reference means "all leased equipment." Rather, the 2002 lease agreement merely refers to the rights and obligations of the parties to "the equipment, software and services" that is "listed . . . on the Lease Schedule(s) attached hereto or incorporated herein by reference from time to time." Moreover, "equipment" is used interchangeably in lease schedule 004R to refer to both identifiable groups of equipment and all equipment, depending on the context of the sentence. For example, "equipment" in the first paragraph of 004R, which incorporated the terms and conditions of acceptance executed pursuant to schedule 004, including installation dates, refers to the equipment contained in lease schedule 004; the phrase "[r]eturning [e]quipment" refers specifically to equipment leased under lease schedule 001X and 002R of Lease Agreement Number ME091902.

Similarly, GroupEx argues that the phrase "such equipment" as utilized in the phrase "the Installation Date of such Equipment shall be December 1, 2005" refers to all of the equipment listed on lease schedule 004R. GroupEx's interpretation ignores the plain meaning of the word "such" that precedes "Equipment" in the critical sentence of lease schedule 004R. Dictionary definitions may be helpful insofar as they set forth the ordinary, usual meaning of words, but, ultimately, this court must determine whether the

words are ambiguous in the context of the specific contract at issue. *Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co.*, 480 N.W.2d 368, 375 (Minn. App. 1992), *review denied* (Minn. Mar. 26, 1992). "Such" is defined as "1. Of this or that kind . . . . 2. That or those; having just been mentioned." *Black's Law Dictionary* 1570 (9th ed. 2009). Considering the plain meaning of "such," the phrase "such Equipment" refers to that equipment which was listed on "the Lease Schedules." The phrase "Lease Schedules" was earlier defined as lease schedules numbered 001X and 002R. According to the unambiguous language of the provision, then only the equipment that was "listed on the Lease Schedules [001X and 002R]," in "[GroupEx's] possession," "in good working order and satisfactory in all respects," and which was "irrevocably accepted as of December 1, 2005" has an installation date of December 1, 2005. Since the equipment under lease schedule 004 was not installed until July 26 and August 21, 2006, well after December 1, 2005, it is not reasonable to conclude that "such Equipment" referred to all of the equipment listed on lease schedule 004R.

GroupEx also argues that the inclusion of a specific installation date on lease schedule 004R is inconsistent with Winthrop's usual practice of not identifying specific dates on lease schedules and that the installation dates of lease schedules 001X and 002R were already determined by their associated certificates of acceptance and purchase agreements. While one Winthrop employee testified that it is rare to include a commencement date on a lease schedule, lease schedules 001X and 002R are not included in the record, thus precluding our analysis of whether they included a specific installation date. *See Thiele v. Stich*, 425 N.W.2d 580, 582–83 (Minn. 1988) (stating that

the court of appeals may neither base its decision on matters outside of the record on appeal nor consider matters not produced and received in evidence at the district court).

GroupEx further contends that the use of multiple installation dates contradicts the lease agreement. GroupEx points to a provision in the lease agreement that states, "[t]he term of this Lease Agreement, as to all Equipment designated on any particular Lease Schedule, shall commence on the Installation Date for all Equipment on such Lease Schedule and shall continue for an initial period . . . of months from the Commencement Date." But the lease agreement also states that "[t]he Installation Date for each item of Equipment shall be the day said item of Equipment is installed . . . unless the latest Installation Date for any Equipment on the Lease Schedule falls on the first day of the month." This clearly establishes that an installation date for one item of equipment may not be the same as another. Thus, the lease agreement contemplates multiple installation dates within a specific lease schedule, but only one commencement date.

Finally, GroupEx faults Winthrop's use of the word "subsequent" in its reply letter to GroupEx's second notice of termination, which stated:

> [T]here were actually three Installation Dates . . . under Schedule 004R. Equipment transferring from Lease Schedules Numbered 001X and 002R of Lease Agreement Number ME091902 was accepted on the face of Schedule 004R effective December 1, 2005. There were two *subsequent* acceptances of equipment on Schedule 004R, however, on July 26, 2006 and August 21, 2006. . . . Therefore, the Commencement Date of Schedule 004R was September 1, 2006, not December 1, 2005, and the term end date is August 31, not November 30.

(Emphasis added.) GroupEx argues that Winthrop's use of the word "subsequent" is incorrect, since lease schedule 004R was not signed until August 30, 2006, after the installation of the equipment on July 26 and August 21, 2006. We conclude that based upon our analysis of the lease agreement and the language in schedule 004R, Winthrop's use of the word "subsequent" as used in its letter refers to the acceptance of leased equipment by GroupEx subsequent to or after the installation date of December 1, 2005.

II.

GroupEx challenges the district court's conclusion that its equitable-estoppel and fraudulent misrepresentation claims fail as a matter of law. Because the elements of equitable estoppel and fraudulent misrepresentation overlap, we consider them together. The doctrine of equitable estoppel applies if: (1) a misrepresentation of fact exists; (2) the party to be estopped knew that the representation was false; (3) the party to be estopped intended that representation be acted upon; (4) the party asserting estoppel did not have knowledge of the true facts; and (5) the party asserting estoppel relied on the misrepresentation to his detriment. *Transamerica Ins. Grp. v. Paul*, 267 N.W.2d 180, 183 (Minn. 1978). While estoppel is ordinarily a question of fact, when only one inference can be drawn from the facts, estoppel is a question of law. *City of North Oaks v. Sarpal*, 797 N.W.2d 18, 23 (Minn. 2011). To make out a claim for fraudulent misrepresentation, a party must show that:

> (1) there was a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false; (3) with the intention to induce another to

> act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) that the party suffered pecuniary damage as a result of the reliance.

Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C., 736 N.W.2d 313, 318 (Minn. 2007) (quotation omitted). Where the false representation is a concealment of a material fact, one party must knowingly conceal a material fact that is peculiarly within his own knowledge. *Flynn v. Am. Home Prods. Corp.*, 627 N.W.2d 342, 350 (Minn. App. 2001).

GroupEx asserts that genuine issues of material fact exist as to whether Winthrop misrepresented the fact that December 1, 2005 was the installation date for lease schedule 004R or fraudulently concealed the actual installation date, knew that the installation date of lease schedule 004R was false, and intended that GroupEx rely on the December 1 installation date set forth in lease schedule 004R. GroupEx states that Winthrop's intentional omission of a specific commencement date in lease schedule 004R, utilization of confusing agreements, and alleged litigiousness[2] support its claims of equitable estoppel and fraudulent misrepresentation. We disagree.

The installation dates and commencement date of lease schedule 004R were not falsely represented to GroupEx. Rather, GroupEx had access to the lease agreement, certificates of acceptance, and the lease schedules—all of which were necessary to determine the correct commencement date for lease schedule 004R. While GroupEx may have had to consult several documents in order to determine the correct commencement date for lease schedule 004R, nothing in the record indicates that Winthrop

[2] GroupEx points to multiple other lawsuits in various courts involving Winthrop as a party, some of which may involve contract disputes similar to this one.

misrepresented or concealed facts regarding the actual commencement date of the lease. Second, GroupEx, when it noticed its intent to terminate in February 2009, was advised in a March 2009 e-mail from Winthrop that the "the last date of charge is August 31, 2009, and not August 1, 2009."[3] Winthrop followed-up with GroupEx on August 7 with instructions on returning equipment and again stated that the lease term for lease schedule 004R would end on August 31. GroupEx did not return the equipment as scheduled, and according to the terms of the lease agreement, the lease automatically renewed for one year. Finally, GroupEx cites no authority to support its argument that Winthrop's alleged litigiousness is a basis for showing inequitable or fraudulent conduct.

Based upon our review of the record and the lack of any material issues of fact, we find that the district court did not err in holding that the lease documents clearly and unambiguously demonstrate that September 1, 2006 was the commencement date of lease schedule 004R and that GroupEx's equitable-estoppel and fraudulent misrepresentation

[3] GroupEx challenges the use of the e-mail by Winthrop and the district court, characterizing it as an "unauthenticated hearsay document." The document does not appear to be hearsay. The e-mail is not purported to assert the truth of the matter asserted—i.e., that the termination date was August 31—but to indicate that either Winthrop provided notice to GroupEx of the termination date or GroupEx had knowledge of the termination date. *See* Minn. R. Evid. 801 1989 comm. cmt. ("If the out of court statement is being offered for some other purpose, such as to prove knowledge, notice, or for impeachment purposes it is not hearsay."). Even if it is hearsay, GroupEx must provide a transcript or include that portion of the transcript documenting its objection at summary judgment in order for this court to consider whether the district court erred in relying on it. *See* Minn. R. Civ. App. P. 110.02, subd. 1(a) (stating that it is an appellant's duty to order a transcript "of those parts of the proceedings not already part of the record which are deemed necessary for inclusion in the record."); *Truesdale v. Friedman*, 267 Minn. 402, 404, 127 N.W.2d 277, 279 (1964) (stating that the record must be "sufficient to show the alleged errors and all matters necessary for consideration of the questions presented.").

claims are without merit. Accordingly, we agree that Winthrop is entitled to judgment as a matter of law.

Affirmed.