STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1544

John Shelander,
Appellant,

vs.

Johnstech International Corporation,
Respondent.

Filed April 14, 2014
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CV-12-15761

Richard A. Williams, Jr., Megan A. Spriggs, R.A. Williams Law Firm, P.A., St. Paul, Minnesota (for appellant)

Robert C. Castle, William J. Egan, Elizabeth A. Patton, Oppenheimer Wolff & Donnelly LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Kirk, Presiding Judge; Worke, 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 to respondent, arguing that a "napkin agreement" varied the terms of the parties' at-will employment agreement. We affirm.

FACTS

Respondent Johnstech International Corporation hired appellant John Shelander as a Senior Product Marketing Manager in March 2010. Shelander was hired to launch a new Johnstech product called Verticon. Shelander's compensation included an annual salary of $115,000, as well as a $2,500 signing bonus. Shelander signed an employment agreement stating that he was an at-will employee and that any modification of the agreement required a writing signed by an authorized officer of Johnstech.

In April 2010, Johnstech announced that if the company reached total sales of $35 million that year, it would hold a sales event in Hawaii. During a sales meeting in July 2010, Johnstech sought informal sales commitments from the company's salespeople in an effort to reach its sales goal. The commitments were written on napkins. Shelander memorialized his goal on a napkin, which was $1 million. Shelander testified at his deposition that the "only thing [written] on the napkin was Verticon and the sales goal and [Shelander's] signature." On August 31, 2010, Johnstech terminated Shelander's employment.

Shelander sued Johnstech for breach of contract, unjust enrichment, defamation, and tortious interference with prospective economic advantage, and the district court granted Johnstech's motion for summary judgment. In this appeal, Shelander challenges the district court's grant of summary judgment on his breach-of-contract claim.[1]

[1] Shelander does not challenge the district court's award of summary judgment on his other claims.

D E C I S I O N

"A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "[T]here 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). "[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party's case, [that] party must make a showing sufficient to establish that essential element." *Id.* The moving party "is entitled to summary judgment as a matter of law 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).

"[Appellate courts] review a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). "On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio*, 504 N.W.2d at 761.

"To prevail on a breach-of-contract claim, a plaintiff must show that a contract has been formed." *Cargill Inc. v. Jorgenson Farms*, 719 N.W.2d 226, 232 (Minn. App. 2006). "The formation of a contract requires communication of a specific and definite offer, acceptance, and consideration." *Thomas B. Olson & Associates, P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008) (quotation omitted), *review denied* (Minn. Jan. 20, 2009). The formation of a contract "requires mutual assent among the parties involved in the transaction." *SCI Minnesota Funeral Services, Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855, 864 (Minn. 2011). "Mutual assent entails a meeting of the minds concerning a contract's essential elements." *Id.* (quotation omitted). "Whether mutual assent exists is tested under an objective standard." *Id.* A contract does not exist unless the parties have agreed "with reasonable certainty about the same thing and on the same terms." *Peters v. Mut. Benefit Life Ins. Co.*, 420 N.W.2d 908, 914 (Minn. App. 1988). "Contracts must be certain in terms, and not so indefinite and illusory as to make it impossible to say just what is promised." *Druar v. Ellerbe & Co.*, 222 Minn. 383, 395, 24 N.W.2d 820, 826 (1946) (quotation omitted).

"Generally speaking, a promise of employment on particular terms of unspecified duration, if in form an offer, and if accepted by the employee, may create a binding unilateral contract. The offer must be definite in form and must be communicated to the offeree." *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626 (Minn. 1983). "Whether a proposal is meant to be an offer for a unilateral contract is determined by the outward manifestations of the parties, not by their subjective intentions." *Id.* "An

employer's general statements of policy are no more than that and do not meet the contractual requirements for an offer." *Id.*

"Whether a contract exists is generally a question of fact." *Cargill*, 719 N.W.2d at 232; *see also Dwyer v. Illinois Oil Co.*, 190 Minn. 616, 620, 252 N.W. 837, 838 (1934) ("All in all, it quite properly was a fact question for the jury as to whether or not the original contract had been subsequently modified."). "But if taking the record as a whole, a rational trier of fact could not find for the nonmoving party, summary judgment is appropriate." *Cargill*, 719 N.W.2d at 232.

Shelander's theory is that the memorialization of his sales goal on a napkin constitutes "a separate and independent agreement . . . for a specific term with respect to the marketing of the specific product for which he was responsible," which "modified the terms of his at-will employment contract." Shelander asserts that the agreement "varied the terms of his prior at-will employment agreement and created a right to employment until the end of the year 2010" and that Johnstech breached the agreement by terminating his employment before the end of 2010. Shelander contends that there is a jury issue regarding "whether the actions of Johnstech created a contract which superseded or modified the previous contract with respect to at-will employment." Shelander argues that the record contains "objective evidence as to the parties' intent" and that "a jury could conclude that the clear intent was that this was an agreement, one of the terms of which was that performance would be measured at the end of the calendar year." For the reasons that follow, we disagree.

Although the record could lead a reasonable person to conclude that Johnstech intended to measure Shelander's performance against his proffered sales commitment at the end of the year so long as Shelander was employed by Johnstech at that time, there simply is no record evidence that Johnstech made any representations objectively manifesting intent to modify Shelander's at-will employment status through the end of 2010. Shelander testified at his deposition that "with this [napkin] contract I should've been working through the end of the year at a minimum" and that "[b]y signing it, I expected to have at least to the end of the year to make good on those goals. So I did—that's what I believed." But Shelander's subjective belief that the napkin and the surrounding circumstances resulted in an agreement that "varied the terms of his prior at-will employment agreement and created a right of employment until the end of the year 2010" does not establish the formation of a contract. *See Rios v. Jennie-O Turkey Store, Inc.*, 793 N.W.2d 309, 315 (Minn. App. 2011) ("Minnesota courts apply an objective standard of contract formation."); *Beer Wholesalers, Inc. v. Miller Brewing Co.*, 426 N.W.2d 438, 440 (Minn. App. 1988), *review denied* (Minn. Aug. 24, 1988) ("Whether a pre-existing agreement has been modified depends on the parties' objective manifestations, not their subjective understanding.").

To survive summary judgment, Shelander had to present evidence of some objective manifestation by Johnstech showing its intent to modify Shelander's at-will employment status. Johnstech's request for Shelander's commitment to a year-end sales goal and the words "Verticon" and "$1 million" written on a napkin, along with Shelander's signature memorializing his commitment, would not lead a reasonable

person to conclude that Johnstech intended to modify Shelander's at-will employment status. *See DLH*, 566 N.W.2d at 71 ("[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence . . . 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.").

Moreover, the parties' existing employment agreement states that any modification of the agreement requires a writing signed by an authorized officer of Johnstech. Based on Shelander's deposition testimony, it is undisputed that the "only thing on the napkin was Verticon and the sales goal and [Shelander's] signature." Shelander also testified that he does not know whether an officer of Johnstech signed the napkin. Because Shelander fails to present any evidence suggesting that an authorized officer of Johnstech signed the purported napkin agreement, a rational trier of fact could not find that the at-will provision in the employment agreement had been modified under the terms of the agreement. *See Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993) ("Mere speculation, without some concrete evidence, is not enough to avoid summary judgment.").

Shelander makes several arguments in an attempt to avoid summary judgment. None is persuasive. For example, Shelander argues that "[e]ven if it is assumed that the employer never signed the document, the record reflects that . . . Johnstech's founder and CEO[] referred to the document signed by Shelander as being in [his] pocket during subsequent conversations." Because there is no evidence that Johnstech objectively manifested intent to modify the at-will provision of the parties' employment agreement,

we fail to discern why a reasonable person would view the CEO's reference as anything other than a reference to a sales goal.

Shelander also argues that "[t]he purpose of the [n]apkin [a]greement is [a]mbiguous" and therefore presents a question of fact for the jury. *See Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003) ("[T]he interpretation of an ambiguous contract is a question of fact for the jury."). Shelander's ambiguity argument fails because it presumes the existence of a new or modified contract. A court considers whether or not a contract is ambiguous to determine whether parol evidence may be considered to determine the parties' intent. *See Lamb Plumbing & Heating Co. v. Kraus-Anderson of Minneapolis, Inc.*, 296 N.W.2d 859, 862 (Minn. 1980) ("The initial question of whether a contract is ambiguous is a question of law to be decided by the [district] court . . . ."); *Mrozik Const., Inc. v. Lovering Assocs., Inc.*, 461 N.W.2d 49, 52 (Minn. App. 1990) ("[P]arol evidence of the parties' intent may . . . be considered when the terms of a contract are ambiguous."). Because there is inadequate evidence of contract formation or modification in this case and therefore no new contract to construe, Shelander's ambiguity argument misses the mark.

Shelander further argues that because Johnstech "either lost or discarded" the napkin agreement, "to whatever extent there may be ambiguities regarding the scope or purpose of the language on the [n]apkin [a]greement, they can be resolved against Johnstech." Once again, that argument rests on the unsupported theory that the napkin memorializes contractual terms.

In sum, no rational trier of fact could find that the circumstances surrounding the writing on the napkin formed a new contract or modified the parties' existing employment agreement. Thus, on this record, there is a complete lack of proof regarding an essential element of Shelander's breach-of-contract claim: a new or modified contract under which Johnstech promised to provide Shelander with employment that was other than at-will through the end of 2010. Johnstech is therefore entitled to judgment as a matter of law. *See Cargill*, 719 N.W.2d at 232 ("[I]f taking the record as a whole, a rational trier of fact could not find for the nonmoving party, summary judgment is appropriate."); *Lubbers*, 539 N.W.2d at 401 (stating that summary judgment is appropriate "when the record reflects a complete lack of proof on an essential element of the plaintiff's claim").

Affirmed.