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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1647**

Manor Warehouse & Delivery, Inc.,
Appellant,

vs.

Tracy Gratton, et al.,
defendants and third party plaintiffs,
Respondents,

vs.

Gail Bendt,
third party defendant,
Appellant.

**Filed June 11, 2018
Affirmed
Hooten, Judge**

Hennepin County District Court
File No. 27-CV-16-11718

Andrew Carlson, Carlson Law Office, LLC, St. Louis Park, Minnesota (for appellants)

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Considered and decided by Smith, Tracy M., Presiding Judge; Rodenberg, Judge;
and Hooten, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

Appellants contend that the district court erred by granting summary judgment in favor of respondents on all of appellants' claims. We affirm.

FACTS

This dispute involves two businesses, two individuals, and an asset purchase agreement. Respondent Tracy Gratton is the sole member of respondent Signature Designer Services, LLC. Appellant Gail Bendt is the CEO of appellant Manor Warehouse & Delivery, Inc. Signature and Manor are both in the furniture storage and delivery business. Beginning in early 2015, Gratton and Bendt met on behalf of their respective companies to discuss a merger or an asset purchase. Ultimately, the two agreed that Signature would purchase all of Manor's tangible and intangible assets, engage Bendt as an independent contractor for 24 months, and pay Manor 50% of Signature's net income for four years. Bendt and Gratton, on behalf of Manor and Signature, signed an asset purchase agreement (APA) on March 18.

In the APA, Manor represented and warranted that it "is the owner of and has good and marketable title to all the assets being sold herein." Within 15 days, the parties were to enter into a profit sharing agreement, a consulting agreement, and a non-compete agreement. None of those three documents were ever executed. The APA set the closing date as May 1, 2015, and "set[] forth the entire understanding of the parties, and may not be changed except by written documents signed by all parties hereto."

Bendt began working on completing the deal, notifying Manor's customers about a "new venture/merger," and coordinated sending current shipments to Signature's warehouse. Manor cancelled its warehouse lease one month early, and Bendt and Gratton worked together to cancel Manor's Comcast account and increase the network speed on Signature's account. In late March, Manor delivered its tangible assets to Signature, and on April 2, Bendt emailed Manor's customer list to Gratton. Bendt and Gratton continued working together and coordinating their businesses. The deal did not close as scheduled on May 1.

Then, on May 12, Gratton emailed Bendt informing her that she had discovered that the Minnesota Department of Revenue had a lien against Manor for unpaid sales tax and that Gratton considered Manor to be "in complete breach of the asset purchase agreement." Gratton also stated that she would "be exploring all options available to [her] to remedy this situation" and requested that Bendt contact her at her "earliest convenience with any legitimate proposals [she] may have." Bendt responded that same day, informing Gratton that she was working on getting funds transferred and would get the lien paid off. Gratton did not respond. At some point in June, Bendt was not allowed in Signature's office.

On June 15, Bendt informed Gratton that the lien had been paid. Gratton stated that she was "glad the lien is paid for" and asked Bendt to call her when she had "the final paperwork to set up time to talk." Bendt sent Gratton the lien release from the Department of Revenue on June 29. The next day Gratton acknowledged receipt of the release, and, in response to Bendt's request to move forward with the closing, informed her that they "need to complete the transaction before we can go forward. Please give me a copy of the drafts

for the proposed agreement.” Bendt expressed confusion, and Gratton informed her that “[t]he profit sharing and employment contract need[] to be created. We need to have everything in place and then we can proceed forward.”

On July 22, Bendt sent Gratton proposed drafts of the additional agreements and, without consulting Gratton, set the closing date for July 29. Gratton responded to Bendt that she was forwarding the agreements to her attorney for review, and that “[t]he closing date may need adjustment depending on his schedule.” On July 29, Gratton informed Bendt that she had not yet heard back from her attorney, and that “[w]e will need to reschedule the meeting.” In her response, Bendt expressed some confusion, asking, “What do you mean by meeting?” On August 11, Gratton sent Bendt a letter informing her that she had

discovered there are several representations you made to induce me to sign the Asset Purchase Agreement that are simply false or inaccurate. For example, you indicated the assets of Manor Warehouse & Delivery were good and marketable. In fact, all of these assets were subject to a tax lien by the State of Minnesota.

Gratton also stated that she was “no longer willing to enter any sort of Profit Sharing Agreement or Employment Agreement,” and that Manor needed to remove its assets from Signature’s warehouse within 30 days.

The parties’ attorneys exchanged letters, but were unable to resolve the dispute. Manor’s tangible assets were returned in October. Then, on May 31, 2016, Manor sued Signature and Gratton for: (1) breach of contract for the profit sharing agreement in the APA; (2) breach of contract for the consulting agreement in the APA; (3) unjust

enrichment; (4) unreimbursed moving expenses; (5) equitable estoppel; and (6) an accurate accounting of Signature's business records. Bendt was not named as a plaintiff in the original complaint. Respondents brought Bendt into the suit by filing a third-party complaint against her along with a counterclaim against Manor. The district court issued a scheduling order setting December 30, 2016 as the deadline for joinder of additional parties, and March 14, 2017 as the deadline for all motions to be heard. The motion hearing deadline was later extended to May 5, 2017.

Respondents filed a motion for summary judgment on March 20, 2017 and the district court heard the motion on May 5. Realizing that Manor did not have standing on its breach of contract claim for the consulting agreement, appellants filed a motion to extend time and to amend the complaint in order to add Bendt as a plaintiff on May 17. The district court heard the motion to amend on May 31. On June 23, the district court granted Signature's summary judgment motion, dismissing all of Manor's claims,¹ and denied Manor and Bendt's motions.

D E C I S I O N

"Summary judgment is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law." *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017). The grant of summary judgment is a legal issue we review de novo. *See Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn.

¹ Manor does not argue that the district court erred in granting summary judgment against it on its claims for moving expenses and its accounting demand, and any argument on those claims is waived. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (holding that issues not briefed are deemed waived).

2010). “In reviewing the record, we view the evidence in the light most favorable to the party against whom summary judgment was granted.” *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). “However, when determining whether a genuine issue of material fact for trial exists, the court is not required to ignore its conclusion that a particular piece of evidence may have no probative value, such that reasonable persons could not draw different conclusions from the evidence presented.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

I. Breach of Contract-Profit Sharing

“A breach of contract is a failure, without legal excuse, to perform any promise that forms the whole or part of the contract.” *Lyon Fin. Servs., Inc. v. Illinois Paper & Copier Co.*, 848 N.W.2d 539, 543 (Minn. 2014) (citation omitted). To prove a breach of contract, Manor must establish: (1) that a contract was formed, (2) that it performed any conditions precedent to its right to demand performance by Signature, and (3) breach by Signature. *See id.* If a party’s assent to a contract “is induced by either a fraudulent or a material misrepresentation by the other party, and is an assertion on which the recipient is justified in relying,” the contract is voidable. *Carpenter v. Vreeman*, 409 N.W.2d 258, 260–61 (Minn. App. 1987). If a misrepresentation is material, meaning that “it would be likely to induce a reasonable person to manifest his or her assent” to the contract, the other party can rescind the contract based on the misrepresentation regardless of whether the misrepresentation was fraudulent. *See id.* at 261.

In the APA signed by the parties on March 18, 2015, Manor represented and warranted that it “is the owner of and has good and marketable title to all the assets being

sold herein.” But Manor did not have good and marketable title of the assets at that time, nor did it have good and marketable title on May 1, the scheduled closing date, because the assets were encumbered by the State of Minnesota.² Because it is undisputed that Manor’s statement was false and the representation and warranty was a material provision in the APA relied upon by Signature, Signature had the right to rescind the contract. *See id.*

Manor’s primary argument on appeal is that Signature waived its right to rescind the contract, highlighting several communications between Bendt and Gratton in June and July that discussed drafting and executing the ancillary agreements to the APA. “The burden of proving waiver rests on the party asserting it.” *Safety Signs, LLC v. Niles-Wiese Constr. Co.*, 840 N.W.2d 34, 42 (Minn. 2013). “To establish a waiver or ratification of fraud, there must be evidence that the waiving party had full knowledge of the facts and his or her legal rights, and intended to relinquish these rights.” *Carpenter*, 409 N.W.2d at 262; *see also Frandsen v. Ford Motor Co.*, 801 N.W.2d 177, 182 (Minn. 2011) (“Waiver is the intentional relinquishment of a known right.”). Waiver is a question of the intent of the waiving party, which “must be manifested in some unequivocal manner.” *Ohio Confection Co. v. Eimon Mercantile Co.*, 154 Minn. 420, 424, 191 N.W. 910, 911 (1923). Although waiver may be implied from conduct, the facts provided in support of waiver must “fairly and reasonably . . . lead to the inference that the person . . . did in fact intend to waive his known right.” *Pruka v. Maroushek*, 182 Minn. 421, 424, 234 N.W. 641, 642

² Manor argues that the representations “were mistakes and not intentional misrepresentations,” but whether the misrepresentation was intentional does not matter because it was material to the contract. *See Carpenter*, 409 N.W.2d at 260–61.

(1931); *see also* *Pierowicz v. Farmers Mut. Fire Ins. Co.*, 176 Minn. 31, 35–36, 222 N.W. 514, 515 (1928) (noting that “the conclusion of waiver is not supported unless the inference can reasonably be drawn that the intention to waive has been formed and expressed”); *BOB Acres, LLC v. Schumacher Farms, LLC*, 797 N.W.2d 723, 727 (Minn. App. 2011) (“Waiver is an intentional relinquishment of a known right that must clearly be made to appear from the facts disclosed.” (quotation omitted)), *review granted* (Minn. June 14, 2011) *and appeal dismissed* (Minn. Aug. 12, 2011). Waiver cannot be inferred from mere inaction, but “must be an expression of intent to relinquish the right at issue.” *Safety Signs*, 840 N.W.2d at 42 (quotation omitted). “When the facts are undisputed, waiver is a legal question.” *City of Minneapolis v. Minneapolis Police Relief Ass’n*, 800 N.W.2d 165, 176 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011).

Accepting the facts as presented by appellants, we conclude that appellants have failed to show that there is a genuine dispute of material fact over whether Signature waived its right to rescind the contract based on Manor’s material misrepresentation of the marketability of its assets. After discovering the existence of the tax lien against Manor a few weeks after the scheduled closing date, Gratton informed Bendt that she considered Manor to be in complete breach of the APA and that she would be exploring all available options to remedy the situation. This put Manor on notice that Signature was exploring its right to rescind the contract and that it considered the misrepresentation to be a material breach of the APA. While Bendt responded that she was working on getting funds transferred and would get the lien paid off, *Gratton never responded to Bendt’s proposal*. Even appellants admit that, at some point in June, Bendt was not allowed in Signature’s

office, and from May 13 until June 15 there is no evidence in the record that Gratton communicated with Bendt.

Manor points to emails from Gratton to Bendt that reference completing the ancillary agreements contemplated in the APA as sufficient to create a genuine dispute of material fact over whether Signature waived its right to rescind the contract. But the statements in the emails are not enough to “fairly and reasonably . . . lead to the inference” that Signature intended to waive its right to rescind the APA. *See Pruksa*, 182 Minn. at 424, 234 N.W. at 642. Gratton had informed Bendt that she was exploring all of Signature’s options, had not responded to Bendt for over a month, and was not allowing Bendt into Signature’s office. And, in late July, Bendt referred to an upcoming meeting as the closing for the deal, while Gratton referred to it as a meeting. Bendt expressed confusion. The parties were still not on the same page about what they each intended to do. None of this evidence supports Manor’s claim that Signature intentionally and unequivocally waived its right to rescind the contract.

To avoid summary judgment on the waiver issue, Manor was required to present specific facts showing that there is a genuine issue of waiver for trial. *See Valspar Refinish, Inc. v. Gaylord’s Inc.*, 764 N.W.2d 359, 368 (Minn. 2009). Even when viewing this evidence in the light most favorable to Manor, a reasonable jury could not conclude that Signature, by unequivocal conduct, clearly waived its right of rescission prior to Gratton’s August 11 letter. *See id.* (affirming summary judgment on the basis that a reasonable jury could not conclude that Valspar waived its contractual right). Because Signature voided the APA on August 11 based on Manor’s material misrepresentation, there is no contract

for Signature to breach, and summary judgment is appropriate in favor of Signature on Manor's breach-of-contract claim.

II. Breach of Contract-Consulting

Manor acknowledges that it does not have standing on its claim that respondents breached the APA by failing to compensate Bendt as a consultant to Signature. Because we affirm the district court's denial of appellants' motions to extend time and amend the complaint to add Bendt as a plaintiff, we also affirm the district court's grant of summary judgment on this claim.

On May 17, appellants moved for an extension of the district court's order that all motions be scheduled to be heard by May 5, 2017, and requested to amend the complaint to add Bendt as a plaintiff. The district court denied both motions.

A. Motion to Extend Time

We review a district court's decision whether to amend its scheduling order deadlines for an abuse of discretion. *Mercer v. Andersen*, 715 N.W.2d 114, 123 (Minn. App. 2006). The Minnesota Rules of Civil Procedure allow a court to extend the deadlines set in an order of the court. Minn. R. Civ. P. 6.02. If the deadline has already passed, the district court may only extend a deadline "where the failure to act was the result of excusable neglect." *Id.* Excusable neglect exists where "the plaintiff has a reasonable case on the merits," a reasonable excuse for not complying with the time limit in the order, "acted with due diligence," and where the defendant will not be prejudiced by extending the time limit. *Mercer*, 715 N.W.2d at 123.

Appellants focus their arguments on whether they have a reasonable excuse for not complying with the time limits and whether they acted with due diligence. Appellants' counsel claims that it was not only his neglect, but also that of his client, which resulted in the failure to include or add Bendt as a plaintiff. Appellants explained that Bendt suffered from a serious medical condition during the course of this litigation. But the condition did not affect Bendt until February of 2017, long after the litigation commenced and the pleadings were filed. Bendt's medical condition did not affect her when the complaint was drafted and served, or when she failed to assert the claim after respondents brought her in as a party by filing a third-party complaint against her. Counsel does not explain, and we, like the district court, do not understand how Bendt's medical condition affected appellants' ability to realize that Bendt needed to be a named plaintiff at the outset.

Appellants also argue that courts often excuse a party when the fault lies with counsel rather than the party. They cite to a Minnesota Tax Court case, which is not binding on this court, and all of the Minnesota Supreme Court cases cited in the tax court opinion dealt with setting aside a default judgment. *See In re Gillette Children's Specialty Healthcare*, 867 N.W.2d 513, 521 (Minn. App. 2015) (explaining that tax court is executive branch agency and its decisions are not binding precedent), *aff'd*, 883 N.W.2d 778 (Minn. 2016). Appellants do not explain why those cases are comparable to this situation. And appellants argue that the mistake was also the fault of Bendt, and a party's forgetfulness is not excusable neglect. *Whipple v. Mahler*, 215 Minn. 578, 583–84, 10 N.W.2d 771, 775 (1943).

Appellants have failed to offer an understandable explanation for why they or their counsel did not include Bendt as a plaintiff in the complaint, or file the claim on her behalf when she was brought into the lawsuit as a third-party defendant. Based upon this record, we conclude that the district court did not abuse its discretion in denying appellants' motion to extend the time for amendments.

B. Motion to Amend the Pleadings

We review a district court's decision whether to permit a party to amend the pleadings for an abuse of discretion. *Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*, 896 N.W.2d 115, 126 (Minn. App. 2017), *review granted in part* (Minn. June 28, 2017) (granting review of contract interpretation issue). After a responsive pleading is served, "a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Minn. R. Civ. P. 15.01.

Appellants' sole argument is that the district court failed to apply the law and ask what justice requires. The district court did ask what justice requires when it tried to understand why the mistake was made and why it should be excused. It determined that justice did not require allowing appellants to amend the pleadings to add a plaintiff almost a year after the lawsuit began and almost five months after the deadline to add a party by amendment had passed, and appellants do not identify on appeal why justice required allowing the amendment.

III. Unjust Enrichment

An unjust enrichment claim “requires that: (1) a benefit be conferred by the plaintiff on the defendant; (2) the defendant accept the benefit; [and] (3) the defendant retain the benefit although retaining it without payment is inequitable.” *Zinter v. Univ. of Minn.*, 799 N.W.2d 243, 247 (Minn. App. 2011), *review denied* (Minn. Aug. 16, 2011). Unjust enrichment does not arise merely because one party benefited from the efforts of another. *Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. App. 2001). Rather, a party is unjustly enriched in the sense that unjustly means illegally, unlawfully, or where retention of the benefit is morally wrong. *Id.*; *see also Cady v. Bush*, 283 Minn. 105, 110, 166 N.W.2d 358, 361–62 (1969) (“The theory of unjust enrichment . . . has been invoked in support of claims based upon failure of consideration, fraud, mistake, and in other situations where it would be morally wrong for one party to enrich himself at the expense of another.”).

Manor failed to produce evidence sufficient to create a material dispute of fact that the delivery of Manor’s customer list to Signature enriched Signature. Manor introduced an email showing that Bendt sent Gratton Manor’s customer list, and financial statements from Signature showing that Signature operated at a loss from March through December of 2015, and operated at a profit in 2016. There is no evidence in the record to connect those two events, or to support the argument that Signature used Manor’s customer list. There is no evidence that Signature ever used the customer list, or that receipt of the customer list at the beginning of April 2015 is why Signature became profitable in 2016. Manor’s evidence is “not sufficiently probative with respect to an essential element . . . to

permit reasonable persons to draw different conclusions” and relies on nothing more than speculation that Signature used the customer list. *DLH*, 566 N.W.2d at 71; *cf. Navarre v. S. Washington Cty. Sch.*, 652 N.W.2d 9, 31 (Minn. 2002) (holding that district court abused its discretion by submitting loss of reputation claim to jury because respondent and her father’s “conclusory and unsubstantiated statements” were “speculative at best and insufficient to support a claim for loss of reputation”).

IV. Equitable Estoppel

“Equitable estoppel prevents the assertion of otherwise valid rights where one has acted in such a way as to induce another party to detrimentally rely on those actions.” *Pollard v. Southdale Gardens of Edina Condo. Ass’n, Inc.*, 698 N.W.2d 449, 454 (Minn. App. 2005). “A party seeking to invoke the doctrine of equitable estoppel has the burden of proving three elements: (1) that promises or inducements were made; (2) that it reasonably relied upon the promises; and, (3) that it will be harmed if estoppel is not applied.” *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 919 (Minn. 1990). Typically, equitable estoppel is an affirmative defense. *See Opheim v. County of Norman*, 784 N.W.2d 90, 99 (Minn. App. 2010) (“Equitable estoppel is an affirmative defense which must be raised in the pleadings or litigated at trial by the consent of the parties.” (quotation omitted)), *review denied* (Minn. Sept. 29, 2010). A party invoking estoppel must be attempting to prevent the other party from asserting an otherwise valid legal right. *Cf. Pollard*, 698 N.W.2d at 452, 454–55 (discussing equitable estoppel claim where plaintiffs sought to prevent condominium association from enforcing its rule prohibiting pets,

arguing that history of nonenforcement of rule and previous allowance of pets on premises should estop association from enforcing rule).

Manor fails to explain what valid right it wants to prevent Signature from asserting. And if it is attempting to prevent Signature from rescinding the APA, contract law already allows Manor to argue that Signature waived its right to rescind. *Cf. Engstrom v. Farmers & Bankers Life Ins. Co.*, 230 Minn. 308, 312–13, 41 N.W.2d 422, 424 (1950) (recognizing that “estoppel may exist when there is also a waiver, but waiver may be established even though the acts, conduct, or declarations are insufficient to establish an estoppel”). Even under that theory, equitable estoppel is not a separate claim, but is an argument related to the breach of contract claim advanced to counter Signature’s argument that it rescinded the contract. Equitable estoppel is not a separate legal claim in this case.

Affirmed.