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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1782**

Steve Dupuis,
Appellant,

vs.

GATR of Sauk Rapids, Inc.,
d/b/a GATR Truck Center,
d/b/a GATR Volvo & GMC Center; et al.,
Respondents.

**Filed July 30, 2018
Affirmed
Schellhas, Judge**

Benton County District Court
File No. 05-CV-17-970

Sarah R. Jewell, Christopher A. Jensen, Franz Hultgren Evenson, P.A., St. Cloud,
Minnesota (for appellant)

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Minnesota (for respondents)

Considered and decided by Schellhas, Presiding Judge; Reilly, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges the dismissal of his claims under Minn. R. Civ. P. 12.02(e).

We affirm.

FACTS

Respondent Robert Neitzke is the chief executive officer of respondent GATR of Sauk Rapids, Inc., a Minnesota Corporation. In March 2015, Neitzke and appellant Steve Dupuis began discussing Dupuis's possible employment as president of GATR. Dupuis claims that during their discussions, "Neitzke held himself out . . . as a successful business person, as having a good reputation in the community, and doing well financially with his various business entities." At the time, Dupuis was employed as president of a Memphis company, where he earned approximately \$600,000 annually.

In early August 2015, Dupuis became president of GATR under a written employment agreement that provided for an approximate annual income of \$350,000, plus deferred and equity compensation that would vest after employment of a set number of years. Dupuis claims that when he signed the employment agreement, he was unaware that Neitzke had been convicted of soliciting a prostitute in April 2013. According to Dupuis, he became aware of Neitzke's conviction in July 2016, when the St. Cloud Times newspaper published Neitzke's photograph, among others, in an article, captioned "Men Convicted Following Sex Trafficking Task Force Stings."

Dupuis also claims that, during his employment at GATR, he became aware of "Neitzke's unlawful day-to-day employment practices at GATR, involving the sexual harassment of GATR's female employees," and discussion of female employees' body parts. Dupuis also claims that during his employment, he became aware of fraudulent company practices such as "over-financing of used truck inventory" and cheating salespersons out of earned commissions by maintaining a second set of accounting books

or logs. Dupuis claims that respondents expected him, as president, to “be complicit in such illegal and fraudulent employment and accounting practices.”

Dupuis claims that through his employment, he learned of “Neitzke’s severely damaged reputation in the truck sales industry throughout the region,” and that his mention to others in the industry of his employment with GATR “was met with outright refusals to do business, . . . unfavorable remarks, comments, or other types of behavior because he was associated with . . . Neitzke.” Dupuis claims that Neitzke’s prostitution-solicitation conviction “tainted the potential markets where [Dupuis] may have otherwise seen sales growth.” He claims that all of the above substantially diminished the benefits of his employment agreement, and that he therefore resigned from his position as president of GATR in October 2016.

In May 2017, Dupuis sued Neitzke and GATR, alleging fraudulent inducement to contract and breach of contract related to the above claims. Dupuis alleged that if he had remained employed by GATR, he “would have been required to remain complicit with, and potentially be held liable as an officer of the company, for any civil liability or criminal charges which could arise from such illegal conduct.” Respondents moved to dismiss under Minn. R. Civ. P. 12.02(e). The district court granted the motion, concluding that because Dupuis’s complaint only includes allegations of statements by Neitzke “that were subjective statements or opinions that constitute non-actionable puffery, [he] has failed to establish the first element of his claim for fraudulent inducement to contract.” The district court also determined that because the contract was between Dupuis and GATR, Dupuis failed to state a claim for breach of contract against Neitzke. Finally, the district court

concluded that Dupuis failed to state a claim against GATR for breach of contract because the complaint fails to identify which provisions of the contract were breached by GATR or that entitle him to compensation under the facts as alleged in his complaint.

This appeal follows.

DECISION

Dupuis challenges the district court's rule 12.02(e) dismissal of his claims for fraudulent inducement to contract and breach of contract. "When a case is dismissed pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim for which relief can be granted, [appellate courts] review the legal sufficiency of the claim de novo to determine whether the complaint sets forth a legally sufficient claim for relief." *Graphic Commc'ns Local 1B Health & Welfare Fund "A" v. CVS Caremark Corp.*, 850 N.W.2d 682, 692 (Minn. 2014). In so doing, this court "accept[s] the facts alleged in the complaint as true and construe[s] all reasonable inferences in favor of the nonmoving party." *Frederick v. Wallerich*, 907 N.W.2d 167, 172 (Minn. 2018) (quotation omitted). A reviewing court also considers statements or documents incorporated as exhibits into the pleadings. Minn. R. Civ. P. 10.03 ("A copy of any written instrument which is an exhibit to a pleading is part of the statement of claim or defense set forth in the pleading.").

Fraudulent Inducement to Contract

To succeed on his claim that Neitzke fraudulently induced him to enter into the employment agreement, Dupuis must prove: (1) a false representation by Neitzke of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made without knowing if it was true or false; (3) with the intention

to induce Dupuis to act in reliance thereon; (4) that the representation caused Dupuis to act in reliance thereon; and (5) that Dupuis suffered pecuniary damages as a result of the reliance. See *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 368 (Minn. 2009) (listing elements of claim for fraudulent inducement).

Dupuis argues that the district court erred in determining that Neitzke's "false statements about himself, his reputation, and that his solely owned business were mere puffery." We disagree. "Misrepresentations, in order to constitute actionable fraud, must be as to material facts of a nature to affect the conduct of others, and, generally, a mere statement of an opinion is not enough." *Griffin v. Farrier*, 32 Minn. 474, 474, 21 N.W. 553, 553–54 (1884). "Employers frequently boast of good benefits, competitive salaries, excellent working conditions and the like. To anoint such puffing language with contractual import would open the door to a plethora of specious litigation and constitute a severe and unwanted intrusion on the ability of business enterprises to manage internal affairs." *Martens v. Minnesota Min. & Mfg. Co.*, 616 N.W.2d 732, 744–75 n.25 (Minn. 2000) (quotation omitted); see *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998) ("Puffery is exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely and is not actionable." (quotation omitted)). "False descriptions of specific or absolute characteristics of a product and specific, measurable claims of product superiority based on product testing are not puffery and are actionable." *United Indus.*, 140 F.3d at 1180.

Dupuis contends that Neitzke's representations are capable of being proved false with evidence that (1) he was arrested and convicted for soliciting a prostitute and his

picture was printed in the local newspaper acknowledging the offense, (2) he made sexually inappropriate comments about company employees, and (3) he was defrauding employees. But, even if true, these facts fail to disprove that Neitzke was a successful business person, had a good reputation in the community, and did well financially within his business enterprise, because the representations are subjective and matters of opinion. And to the extent that the publication of Neitzke's picture in the local newspaper, alerting the public of his solicitation of a prostitute, negatively affected his public image, the picture was not published until 2016, after Dupuis signed the employment contract. As the district court therefore found, the newspaper article referenced by Dupuis "is not relevant to what . . . Neitzke's reputation was within the community at the time of their negotiations."

In *Stowman v. Carlson Cos.*, 430 N.W.2d 490, 492 (Minn. App. 1988), *review denied* (Minn. Jan. 13, 1989), an employee, Stowman, left his former employer of approximately 25 years to become employed by Carlson Companies. *Id.* at 492. A few months later, Carlson Companies informed its employees that it had been sold to another company. *Id.* The company was again sold a month later, and Stowman's employment was terminated. *Id.* Stowman brought suit against Carlson Companies for fraudulently inducing his employment, alleging that he "justifiably relied on" Carlson Companies' owner's reputation in assuming that his employment was guaranteed. *Id.* On appeal from summary judgment in favor of Carlson Companies, this court affirmed, concluding that the facts, standing alone, did not give Stowman a basis to claim fraudulent inducement. *Id.* at 493 (stating that "Stowman cites no authority that raises the reliance he placed on [the Carlson Companies' owner's] reputation to the level of a fraudulent inducement").

Here, as in *Stowman*, Dupuis cites no authority that raises the reliance he placed on Neitzke's reputation to the level of a fraudulent inducement. To the contrary, the alleged misrepresentations that Neitzke was a successful business person, who had a good reputation in the community, and did well financially, are subjective opinions and constitute puffery because they merely exaggerate and boast about Neitzke's opinion about himself. The alleged misrepresentations therefore are not actionable.

In his reply brief, Dupuis claims that Neitzke had a duty to disclose information regarding (1) his arrest for soliciting a prostitute; (2) GATR's unlawful business practices; and (3) his habit of making sexually inappropriate comments about company employees. Dupuis contends that these facts were material and may have influenced his decision whether to accept the position at GATR. Dupuis argues that because he sufficiently pleaded his claim for fraudulent inducement based upon Neitzke's omissions of material fact, the district court erred by granting respondents' rule 12 motion to dismiss. We disagree.

For nondisclosure to constitute fraud, a legal or equitable duty to communicate the information must exist. *Richfield Bank & Trust Co. v. Sjogren*, 309 Minn. 362, 365, 244 N.W.2d 648, 650 (1976). "The general rule is that one party to a transaction has no duty to disclose material facts to the other." *L & H. Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 380 (Minn. 1989) (quotation omitted). Looking specifically at commercial entities, "[c]ourts applying Minnesota law have been reluctant to impose a duty to disclose material facts in arm's-length transactions." *Driscoll v. Standard Hardware Inc.*, 785 N.W.2d 805, 813 (Minn. App. 2010), *review denied* (Minn. Sept. 29, 2010).

In *Williams v. Smith*, a candidate for an assistant basketball-coach position at the University of Minnesota brought an action against the board of regents and head basketball coach for negligent misrepresentation and other claims arising out of the head coach's offer of employment. 820 N.W.2d 807, 810–11 (Minn. 2012). The supreme court concluded that the legal relationship between the assistant-coach candidate and head coach is not the type of relationship entitled to legal protection, and therefore no duty of care against negligent misrepresentation is owed. *Id.* at 818. The court referenced three reasons as supportive of its decision. *Id.* First, the parties' "relationship in negotiating potential employment was not a professional, fiduciary, or special legal relationship in which one party had superior knowledge or expertise." *Id.* Second, the nature of the parties' relationship, as "two sophisticated business people, both watching out for their individual interests while negotiating at arm's length," did not support recognizing a duty of care. *Id.* at 819. Third, "no reason or public policy warranted imposing a duty of care in the context of a prospective government employment relationship involving negotiations by sophisticated parties who do not stand in a special relationship." *Id.* The court therefore held that "in the absence of a duty of care," the employment candidate's "claim for negligent misrepresentation failed as a matter of law." *Id.* at 822.

Here, although no governmental entities are involved, the relationship between the parties is the same as the relationship between the parties in *Williams*—an employer and a prospective employee. Under *Williams*, Neitzke owed no duty of care to disclose the alleged material facts to Dupuis. Accordingly, the district court did not err by granting

respondents’ rule 12 motion to dismiss Dupuis’s claim for fraudulent inducement to contract.

*Breach of contract*¹

Dupuis contends that the district court erred by granting GATR’s rule 12 motion to dismiss his breach-of-contract claim. “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. Ill. Paper and Copier Co.*, 848 N.W.2d 539, 543 (Minn. 2014). A claim for breach of contract requires the plaintiff to show “(1) formation of a contract, (2) performance by plaintiff of any conditions precedent to his right to demand performance by the defendant, and (3) breach of the contract by defendant.” *Id.* (quotation omitted). In pleading his breach-of-contract claim, Dupuis’s complaint had to “contain a short and plain statement of the claim showing that the pleader is entitled to relief.” *See* Minn. R. Civ. P. 8.01 (stating requirements for pleading claim).

“Compensation and Benefits,” “Fixed Deferred Compensation,” and “Equity Compensation” are addressed in paragraphs four through six of Dupuis’s employment agreement. Dupuis’s complaint alleged that GATR breached these provisions of the agreement because GATR’s conduct of fraudulently misrepresenting company accounting books, and making sexually inappropriate statements regarding female employees, frustrated the purpose and substantially diminished the benefits of the employment

¹ As noted above, the district court dismissed the breach-of-contract claim against Neitzke because he was not a party to the employment agreement. Dupuis does not challenge that conclusion on appeal.

agreement. The district court concluded that Dupuis failed to state a claim for breach of contract against GATR because “frustration of purpose is a defense to a breach of contract claim” and therefore Dupuis’s claim that GATR’s actions constituted a “frustration of the purpose” of the employment agreement was not a proper basis for a breach-of-contract claim. The district court was correct. See *J.J. Brooksbank Co., Inc. v. Budget Rent-A-Car Corp.*, 337 N.W.2d 372, 377 (Minn. 1983) (stating that the doctrine of frustration of purpose has at its “core a requirement that some event must occur, the nonoccurrence of which was a basic assumption of the contract at the time it was made”) (citing Restatement (Second) of Contracts, §§ 261, 265 (1981)). Dupuis does not appear to challenge the district court’s conclusion that frustration of purpose is not a proper basis for a breach-of-contract claim. We conclude that the district court did not err by determining that Dupuis’s frustration-of-purpose argument failed to state a claim upon which relief could be granted.

The district court noted that Dupuis’s employment agreement “clearly states that [Dupuis] is an employee-at-will, that he is entitled to a base salary during his employment and that if he voluntarily resigns, [GATR’s] total liability ‘shall be limited to the payment of Compensation and Benefits through and including the date of termination.’” The district court concluded that although Dupuis alleged that GATR breached paragraphs four through six of the employment agreement, which address elements of his compensation, he failed “to identify any provision in the Employment Agreement that addresses a remedy in circumstances where [respondents] engage[] in alleged illegal business and accounting practices or that entitles him to any compensation where he voluntarily resigns because of

such allegations.” Dupuis argues that the district court erred because he “sufficiently pled that respondents prevented him from obtaining the benefit of the bargain with regard to his employment agreement because it would require him to remain complicit in [the alleged illegal and inappropriate] activities.”

Although Dupuis claims that GATR breached paragraphs four through six of the employment agreement, he does not claim that he is entitled to any compensation under those provisions of the employment agreement. Indeed, the employment agreement plainly states that Dupuis’s “employment with [GATR] is AT WILL and may be terminated, by either party at any time.” When Dupuis resigned, GATR’s obligations under the employment agreement therefore expired. Moreover, the employment agreement specifically provides that if Dupuis “voluntarily terminates his employment with [GATR] prior to the fifteenth (15th) anniversary of this Agreement, [Dupuis] will not be entitled to any Fixed Deferred Compensation hereunder.” And because Dupuis’s equity compensation is also “controlled by the terms of the Deferred Compensation Plan,” any equity compensation would not vest until Dupuis had been with the company for 15 years. Because Dupuis voluntarily resigned from his employment at GATR approximately 14 months after he started, GATR was under no obligation under the employment agreement to pay Dupuis any deferred or equity compensation. And Dupuis points to no provision of the employment agreement that GATR breached as a result of Neitzke’s alleged behavior. As a result, Dupuis’s complaint failed to state a claim for breach of contract. The district court’s dismissal of Dupuis’s claims is thoroughly analyzed and well reasoned. We

therefore conclude that the district court properly granted respondents' rule 12 motion to dismiss.

Affirmed.