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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1917**

Christensen Law Office, PLLC,
Respondent,

vs.

Serge Ngouambe, et al.,
Appellants.

**Filed May 21, 2018
Affirmed in part, reversed in part, and remanded
Larkin, Judge**

Hennepin County District Court
File No. 27-CV-17-2178

Carl E. Christensen, Christensen Law Office PLLC, Minneapolis, Minnesota (for respondent)

Timothy R. Maher, Joseph D. Kantor, Guzior Ambrecht Maher, Minneapolis, Minnesota (for appellants)

Considered and decided by Larkin, Presiding Judge; Bjorkman, Judge; and Reilly, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

In this dispute regarding attorney fees, appellants, an individual and an LLC, challenge the district court's award of summary judgment to respondent law firm on respondent's breach-of-contract and unjust-enrichment claims, as well as its award of attorney fees. We affirm the district court's award of summary judgment and attorney fees to respondent on its breach-of-contract claim against appellant individual. We reverse the district court's award of summary judgment and attorney fees to respondent on its breach-of-contract claim against appellant LLC and on its unjust-enrichment claims against both appellants. We remand for further proceedings consistent with this opinion.

FACTS

This appeal stems from the district court's award of summary judgment. The summary-judgment record establishes the following undisputed facts.

On October 8, 2013, appellant Cameco Technologies LLC (Cameco) borrowed \$85,976.05 from World Business Lenders LLC (WBL). The attendant promissory note and security agreement provided that Cameco's initiation of a bankruptcy proceeding would constitute a default. Appellant Serge Ngouambe signed the promissory note and security agreement on behalf of Cameco as its president and provided a continuing guaranty. Ngouambe also granted WBL a mortgage on his home as security.

On January 14, 2014, Cameco filed for Chapter 11 bankruptcy. WBL initiated foreclosure proceedings on the mortgage on Ngouambe's property and scheduled a sheriff's sale for December 2, 2014. Ngouambe entered into a forbearance agreement with

WBL to prevent the foreclosure. Ngouambe agreed to refinance the debt from the WBL loan. Ngouambe was unable to do so, and on September 8, 2015, his home was sold by sheriff's sale.

On February 26, 2016, Ngouambe hired respondent Christensen Law Office PLLC (CLO) to represent him "in connection with defense of foreclosure of [his] home." The attorney-fee agreement identified the "Client" as "Serge Ngouambe" and "Sakina Ngandu," Ngouambe's wife. Although Ngouambe's wife was listed as a client in the fee agreement, she did not sign the agreement. Ngouambe signed the fee agreement under the heading "Client." The fee agreement did not mention Cameco.

The agreement provided that CLO's representation would include "all tasks reasonably necessary to litigating [the] action, including investigation, legal research, preparation of pleadings, conducting discovery, correspondence, engaging in negotiations, and preparing for and conducting trial." The agreement provided that the client would pay CLO legal fees according to an hourly-rate schedule and would pay CLO "for all expenses incurred in performance of the representation." The agreement provided that the client would pay a retainer of \$4,000 and an additional \$3,500 on March 31, 2016. The agreement further provided that "[i]f it is necessary to institute a collection action to enforce this agreement, costs of collection, including reasonable attorney's fees, will be payable to the Christensen Law Office PLLC" and that "8% per annum interest will accrue on past-due balances in collection." Ngouambe paid CLO the \$4,000 retainer.

In March 2016, CLO filed an adversary complaint on Cameco's behalf in bankruptcy court. The complaint alleged that WBL violated the bankruptcy court's orders

by failing to comply with the reorganization plan, failing to credit payments received from Cameco, and by commencing foreclosure proceedings and selling Ngouambe's home without authorization from the bankruptcy court. The complaint asked the bankruptcy court to declare the sheriff's sale void, to rescind that sale, to enjoin WBL from future foreclosure actions against Ngouambe's home during the 48-month reorganization plan payment period, and to hold WBL in contempt. Cameco and WBL each moved for summary judgment.

By April 2016, CLO's \$4,000 retainer was depleted, and Ngouambe had failed to deliver the additional \$3,500 under the fee agreement. In late June or early July 2016, Ngouambe delivered a check for a partial payment in the amount of \$1,803.50. The check was dishonored, but Ngouambe later paid CLO the full amount of the check. CLO sent Ngouambe an invoice dated August 30, indicating that he owed CLO \$7,878.75 for legal services as of that date. In September 2016, Ngouambe delivered a check from Cameco's operating account to CLO in the amount of \$1,517.75. The check was not honored because Cameco's account had insufficient funds. On September 22, 2016, the bankruptcy court denied Cameco's summary-judgment motion and awarded WBL summary judgment.

Although CLO made several demands for payment, Ngouambe did not make any payments after the dishonored September 2016 check. In February 2017, CLO sued Ngouambe, Cameco, and Ngandu, asserting claims for dishonored check, breach of contract, services rendered, account stated, and unjust enrichment. In March 2017, CLO voluntarily dismissed its claims against Ngandu. In June 2017, CLO moved for summary judgment against Ngouambe and Cameco.

The district court granted summary judgment for CLO on its breach-of-contract claims against Ngouambe and Cameco, reasoning that Ngouambe intended that both he and Cameco would be bound by the fee agreement. The district court also granted summary judgment for CLO on its unjust-enrichment claims against Ngouambe and Cameco, reasoning that “even if [Ngouambe and Cameco] did not become bound by the written Fee Agreement, [CLO] would still be entitled to judgment against either or both [of them] under the unjust enrichment doctrine.” The district court denied summary judgment on the remaining counts. The district court entered a judgment of \$18,575.44 for CLO, which consisted of \$12,293.95 in unpaid fees under the fee agreement and \$6,281.49 in collection-related attorney fees and costs. On October 3, 2017, CLO dismissed the remaining counts, and the district court entered an amended judgment of \$18,575.44 for CLO. This appeal follows.

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). No genuine issue of material fact exists “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). Likewise, “the party resisting summary judgment must do more than rest on mere

averments.” *Id.* If reasonable minds might draw different conclusions from the evidence presented, summary judgment is inappropriate. *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 665 (Minn. 2015).

This court reviews a district court’s grant of summary judgment de novo. *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 150 (Minn. 2014). “We view the evidence in the light most favorable to the party against whom summary judgment was granted to determine whether there are any genuine issues of material fact and whether the district court correctly applied the law.” *Id.* The district court may not weigh evidence or find facts when ruling on a summary-judgment motion. *DLH*, 566 N.W.2d at 70.

I.

We first consider the district court’s award of summary judgment against Ngouambe.

Breach-of-Contract Claim

Ngouambe contends that the district court “erred in granting [CLO’s] motion for summary judgment on its breach of contract claim,” arguing that “there are genuine issues of material fact regarding whether [he] breached the Attorney Fee Agreement” because there “was no evidence that [CLO] provided any services to [him].”

“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). “In order to state a claim for breach of contract, the plaintiff must 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.” *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 833 (Minn. 2011).

This court looks to the language of a contract to determine the parties’ intent. *Storms, Inc. v. Mathy Constr. Co.*, 883 N.W.2d 772, 776 (Minn. 2016). “When the language is clear and unambiguous, [appellate courts] enforce the agreement of the parties as expressed in the language of the contract.” *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010). “But if the language is ambiguous, parol evidence may be considered to determine intent.” *Id.* A contract is ambiguous if it is “susceptible to two or more reasonable interpretations.” *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008). Whether a contract is ambiguous is a question of law that this court reviews de novo. *Dykes*, 781 N.W.2d at 582.

The fee agreement in this case establishes a fairly broad scope of representation. According to the agreement, CLO would represent Ngouambe “in connection with defense of foreclosure of [his] home,” including “all tasks reasonably necessary to litigating this action, including investigation, legal research, preparation of pleadings, conducting discovery, correspondence, engaging in negotiations, and preparing for and conducting trial.” The legal services that CLO provided are undisputed: CLO filed an adversary complaint on Cameco’s behalf in bankruptcy court and prosecuted that complaint until the bankruptcy court granted summary judgment for WBL. The issue here is whether CLO’s prosecution of the complaint on Cameco’s behalf in bankruptcy court constitutes “representation of [Ngouambe] in connection with defense of foreclosure of [his] home.” Ngouambe argues that these legal services did not constitute legal representation on his

behalf because CLO “did not bring any litigation in [his] name to defend the foreclosure.” We are not persuaded.

WBL foreclosed on Ngouambe’s home because Ngouambe had granted WBL a mortgage on his home to secure his guaranty of Cameco’s loan from WBL, and Cameco defaulted on that loan by filing for bankruptcy. Because Cameco’s bankruptcy filing was the reason for the foreclosure, Cameco’s bankruptcy proceeding was relevant to the foreclosure. Cameco’s adversary complaint in the bankruptcy proceeding challenged the foreclosure of Ngouambe’s home. Although CLO filed the complaint on behalf of Cameco, CLO asked the bankruptcy court to declare the sheriff’s sale of Ngouambe’s home void, to rescind that sale, to enjoin WBL from future foreclosure actions against Ngouambe’s home during the 48-month reorganization plan payment period, and to hold WBL in contempt.

These facts support only one reasonable conclusion: although CLO did not bring litigation in Ngouambe’s name, it represented Ngouambe’s interests by filing and prosecuting Cameco’s adversary complaint in bankruptcy court. Ngouambe does not point to any evidence that CLO filed the adversary complaint for any other reason. CLO’s performance of those services is consistent with the terms of the attorney-fee agreement. Ngouambe breached that agreement by failing to compensate CLO for its legal services. Because there is no genuine issue of material fact precluding an award of summary judgment for CLO on its breach-of-contract claim against Ngouambe, we affirm that award.

Unjust-Enrichment Claim

Ngouambe contends that the district court “erred in determining that [he] was liable for unjust enrichment because his rights were determined by the attorney fee agreement.”

“Unjust enrichment is an equitable doctrine that allows a plaintiff to recover a benefit conferred upon a defendant when retention of the benefit is not legally justifiable.” *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 838 (Minn. 2012). “It does not apply when there is an enforceable contract that is applicable.” *Id.* Because the attorney-fee agreement is an enforceable contract between CLO and Ngouambe and CLO has recovered against Ngouambe under that contract, CLO is not entitled to summary judgment on its unjust-enrichment claim against Ngouambe as a matter of law.

Reasonableness of Attorney Fees

Ngouambe contends that the district court erred in awarding CLO \$12,293.95 as damages for unpaid attorney fees and in awarding \$5,160.86 in collection-related attorney fees. Ngouambe argues that the district court erred in making both awards because “the reasonableness of an award of attorney’s fees presents a question of fact” and “an award of attorney’s fees is not available for unjust enrichment.”

Ngouambe quotes *Thomton, Sperry & Jensen, Ltd. v. Anderson*, for the proposition that “[i]t is fundamental that the reasonable value of attorneys’ fees is a question of fact.” 352 N.W.2d 467, 468 (Minn. App. 1984). Ngouambe argues that the district court was not permitted to find that the fees charged by CLO were reasonable and that the district court made that finding without analyzing any of the factors in Minn. R. Prof. Conduct 1.5. *See id.* at 469 (considering provisions of the Minnesota Code of Professional Responsibility

regarding attorney fees in determining whether jury's determination of excessiveness was supported by the evidence). Ngouambe argues that "[a]t the very least, the fourth factor [in Minn. R. Prof. Conduct 1.5], 'the amount involved and the results obtained,' should have been considered, where the representation of Cameco in its bankruptcy rendered absolutely no benefit to [him] in defending his house from foreclosure."

CLO submitted a number of invoices in support of its requests for attorney fees detailing (1) the number of hours CLO expended on the bankruptcy proceedings and on its collection efforts, (2) the work CLO staff performed during those hours, and (3) the relevant hourly rates. These hourly rates are consistent with the applicable hourly rates set forth in the attorney-fee agreement. To the extent that the issue of the reasonableness of CLO's fees is an issue of fact, Ngouambe failed to establish a genuine issue of material fact. For example, Ngouambe did not submit evidence indicating that CLO overbilled for the work it performed or that CLO's billing records are inaccurate.

"[T]he party resisting summary judgment must do more than rest on mere averments." *DLH*, 566 N.W.2d at 71. And although the district court did not explain how it determined the amount of its attorney-fee award, its award of \$12,293.95 in attorney fees as damages on the breach-of-contract claim and \$5,160.86 in collection-related attorney fees is consistent with the terms of the attorney-fee agreement and the billing records that CLO submitted. In sum, we are not persuaded that the district court erred in awarding CLO \$12,293.95 as damages for unpaid attorney fees and \$5,160.86 in collection-related attorney fees.

Ngouambe concedes that “[t]he Attorney Fee Agreement allows [CLO] to recover attorney’s fees in the event of collection. Thus, they are available to [CLO] on its breach-of-contract claim, but not on its claim for unjust enrichment.” Given our conclusion that summary judgment was appropriate on CLO’s breach-of-contract claim against Ngouambe and the lack of any genuine issue of material fact regarding the reasonableness of the requested attorney fees, we affirm the award of attorney fees against Ngouambe.

II.

We now consider the district court’s award of summary judgment against Cameco.

Breach-of-Contract Claim

Cameco contends that the district court “erred in granting [CLO’s] motion for summary judgment on its breach of contract claim” against Cameco because Cameco was not “bound by the attorney fee agreement.” Cameco notes that “[t]he contract does not identify [it] as a party” and the word “Cameco” does not appear anywhere in the attorney-fee agreement.

In granting summary judgment for CLO against Cameco, the district court made “findings of fact,” including that “Ngouambe agreed, both for himself and as president of his company Cameco, that Christensen Law Office would represent both him individually along with Cameco Technologies, LLC in the adversary proceeding in order to prevent the foreclosure.” The district court’s conclusions of law included that “Ngouambe executed the [attorney-fee] agreement not only for himself but intended that [CLO] also represent Cameco and that Cameco also be bound by the agreement” and that “[a]s president of Cameco, Ngouambe had the right and intent to bind Cameco to the Agreement.”

The district court's approach is concerning for a couple of reasons. First, the district court is not allowed to weigh evidence or make findings of fact in a summary-judgment proceeding. *DLH*, 566 N.W.2d at 70. The district court's finding and conclusion regarding Ngouambe's agreement and intent indicates that the district court did so in granting summary judgment against Cameco.

Second, the district court's finding and conclusion regarding Ngouambe's agreement and intent is not the only reasonable conclusion to be drawn from the evidence. The attorney-fee agreement defines "Client" as "Serge Ngouambe" and "Sakina Ngandu." Ngouambe signed the agreement under the heading "Client." The agreement does not mention Cameco or Ngouambe's status as president of that company, and Ngouambe did not sign as president of Cameco. A reasonable mind could therefore conclude that Ngouambe signed the attorney-fee agreement in his individual capacity, and not in his capacity as president of Cameco, and that Cameco therefore was not a party to the contract and is not liable for damages under the contract.

The supreme court has refused to consider extrinsic evidence that signatories of a contract entered into the contract on behalf of a limited liability entity where "nothing contained in the writing" would indicate that the signatories were acting on behalf of the entity. See *Anchor Cas. Co. v. Bird Island Produce, Inc.*, 249 Minn. 137, 143, 82 N.W.2d 48, 52 (1957) (refusing to consider parol evidence that individuals applied for surety bond on behalf of corporation where "nothing contained in the writing" would indicate that the application for the bond was for anyone except the named principal in each instance). Because the language of the written attorney-fee agreement supports a reasonable

conclusion that Ngouambe and CLO are the only parties to that agreement, there is a genuine issue of material fact regarding CLO's breach-of-contract claim against Cameco.

CLO notes that an attorney-representation contract can be based on an oral agreement. *See Kittler & Hedelson v. Sheehan Props., Inc.*, 295 Minn. 232, 235, 203 N.W.2d 835, 838 (1973) (stating that the essentials of attorney-fee agreements "whether oral or written, express or implied, are the same as any other contracts."). CLO argues that "[b]y providing services to Cameco in reliance [on] its promise to pay for those services [it] can maintain a claim of breach of Contract against Cameco for breach of [an] oral agreement." CLO further argues that "[i]f it was an oral agreement[,] there are no issues of fact as to the terms of that agreement, because the terms were set out in the Agreement with Ngouambe."

However, in district court, CLO did not argue that there was an oral attorney-representation agreement. This court generally will not consider issues that were not "presented and considered by the [district] court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). "Nor may a party obtain review by raising the same general issue litigated below but under a different theory." *Id.* Because CLO's theory that Cameco breached an oral agreement with CLO was not presented to and considered by the district court, and the record therefore is not adequately developed, we do not consider this theory for the first time on appeal. And because the language of the attorney-fee agreement supports a reasonable conclusion that Cameco was not a party to the agreement, the district court's award of summary judgment to CLO on its breach-of-contract claim against Cameco was improper.

Unjust-Enrichment Claim

Cameco contends that the district court “erred in its alternative granting of [CLO’s] motion for summary judgment on its unjust enrichment claim,” arguing that “there is a genuine issue of material fact as to whether [CLO] conferred a benefit on [Cameco].” Specifically, Cameco argues that it did not receive a benefit from CLO’s legal services because “[r]egardless of the amount of services [CLO] rendered to [it] . . . , they yielded no positive results” as “[its] case was dismissed and Ngouambe’s house was lost to foreclosure.”

Unjust enrichment is an equitable doctrine that “allows a plaintiff to recover a benefit conferred upon a defendant when retention of the benefit is not legally justifiable.” *Caldas*, 820 N.W.2d at 838. To prevail on an unjust-enrichment claim, a plaintiff must establish “(1) a benefit conferred; (2) the defendant’s appreciation and knowing acceptance of the benefit; and (3) the defendant’s acceptance and retention of the benefit under such circumstances that it would be inequitable for him to retain it without paying for it.” *Dahl v. R.J. Reynolds Tobacco Co.*, 742 N.W.2d 186, 195 (Minn. App. 2007), *review granted* (Minn. Feb. 27, 2008) *and order granting review vacated* (Minn. Jan. 20, 2009).

“To establish an unjust enrichment claim, the claimant must show that the defendant has knowingly received or obtained something of value for which the defendant in equity and good conscience should pay.” *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 306 (Minn. 1996) (quotation omitted). “Unjust enrichment claims do not lie simply because one party benefits from the efforts or obligations of others, but instead it must be shown that a party was unjustly enriched in the sense that the term ‘unjustly’

could mean illegally or unlawfully.” *Id.* (quotation omitted). “The theory of unjust enrichment is based on what the person allegedly enriched has received, not on what the opposing party has lost.” *Georgopolis v. George*, 237 Minn. 176, 185, 54 N.W.2d 137, 142 (1952).

Cameco’s argument that it did not receive any benefit from CLO’s legal services because the services did not yield positive results is not persuasive. A party’s representation by counsel in a legal proceeding has value, even if the party does not ultimately prevail in the proceeding. However, even if Cameco received some benefit from CLO’s representation, reasonable minds might draw different conclusions regarding whether Cameco was unjustly enriched. Whereas Ngouambe was a named party to the attorney-fee agreement and expressly required to pay attorney fees to CLO, Cameco was not mentioned in the agreement. And although CLO represented Cameco in the bankruptcy proceedings, the requested relief focused on helping Ngouambe defend against the foreclosure of his home and not on obtaining a benefit for Cameco. Thus, reasonable minds could reach different conclusions regarding whether Cameco’s uncompensated receipt of legal representation constitutes “illegal” or “unlawful” enrichment justifying an award of equitable relief.

Reasonable minds might also question whether CLO, as a law firm, should have simply insisted on including Cameco in the attorney-fee agreement if it wanted to look to Cameco for compensation under the agreement. Caselaw suggests that an award of unjust-enrichment may be inappropriate under these circumstances. For example, in *Iverson v. Fjoslien*, the Minnesota Supreme Court found no unjust enrichment even though

landowners “undoubtedly benefited by the efforts of the defendants to acquire [real property] in their names” because it had not been shown that the landowners “were unjustly enriched in the sense that the term ‘unjustly’ could mean illegally or unlawfully” where the defendants did not allege, and there was no evidence of, “fraud, violation of a confidential or a fiduciary relationship, or breach of any duty or agreement by” the landowners on which to base an award. 298 Minn. 168, 171, 213 N.W.2d 627, 629 (1973). Moreover, because the defendants had the opportunity to obtain the relief sought by other means and “failed to do [so],” the supreme court reasoned that it “[would] not remedy that oversight” by granting equitable relief. *Id.*

In awarding CLO summary judgment against Cameco based on unjust-enrichment, the district court does not appear to have considered all of the relevant circumstances or to have meaningfully weighed the equities. Instead, it supported its award with a one-line conclusion: “[Cameco] accepted and knowingly retained the benefit of [CLO’s] services.” We conclude that there are genuine issues of material fact regarding CLO’s unjust-enrichment claim against Cameco and therefore reverse the award of summary judgment on this claim.

Conclusion

We affirm the district court’s award of summary judgment to CLO on its breach-of-contract claim against Ngouambe, as well as the district court’s award of attorney fees against Ngouambe. We reverse the district court’s award of summary judgment and attorney fees to CLO on its breach-of-contract claim against Cameco and on its unjust-

enrichment claims against Ngouambe and Cameco. We remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.