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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0362**

Patrick Takuanyi,
Appellant,

vs.

Jorge Zepeda Gonzalez, Defendant,

Mobil Auto Rescue & Repair, LLC,
Respondent.

**Filed January 22, 2019
Affirmed
Rodenberg, Judge**

Dakota County District Court
File No. 19HA-CV-16-3691

Jon E. Paulson, Paulson Law Firm PLLC, Eagan, Minnesota (for appellant)

Wade T. Johnson, Keith J. Kerfeld, Tewksbury & Kerfeld, P.A., Minneapolis, Minnesota
(for respondent)

Considered and decided by Rodenberg, Presiding Judge; Hooten, Judge; and
Klaphake, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant Patrick Takuanyi appeals from the district court's summary judgment in favor of respondent Mobil Auto Rescue & Repair, LLC (Mobil). Appellant argues that the record reveals genuine issues of material fact that preclude summary judgment. We affirm.

FACTS

Appellant and Jorge Zepeda Gonzalez signed a written agreement, providing: "I Jorge Zepeda Gonzalez, an auto body/paint technician, doing business as Mobil auto rescue & repair acknowledge receiving (three thousand six hundred dollars) \$3,600 from Patrick Takuanyi to pay my rents in exchange to repair his seven vehicles." The agreement states that the \$3,600 was "paid in full," and identifies seven vehicles, by year and model, which Gonzalez agreed to repair and deliver by the end of March 2015. The signature block where Gonzalez signed the agreement identifies him as "shop owner."

Gonzalez started, but never completed, repairs of the vehicles. Appellant sued Gonzalez and Mobil, asserting six causes of action: (1) conversion, (2) civil liability for theft pursuant to Minn. Stat. § 604.14, (3) breach of contract, (4) loss of business opportunity, and (5) theft by conversion. Appellant alleged that Gonzalez and Mobil are jointly and severally liable for his damages.

Appellant served the summons and complaint on Gonzalez and Mobil. Gonzalez made no appearance, but Mobil interposed an answer, after which appellant and Mobil exchanged written discovery. Mobil is owned by Marshall Franzman, who stated by affidavit that he subleased one garage stall to Gonzalez. Franzman's affidavit said that

Gonzalez was never a Mobil employee, that Gonzalez had complete control over the work he performed and the space he rented from Mobil, and that Gonzalez was never authorized to act as an agent of Mobil. Franzman's affidavit also stated that Mobil had no agreement with appellant to repair any vehicles.

Mobil's attorney deposed Gonzalez. Appellant was not present for that deposition and moved the district court to suppress the Gonzalez deposition, arguing that Mobil did not properly notify appellant under Minn. R. Civ. P. 30.02(a). The rule requires a party deposing a witness to give every other party reasonable written notice of the name of the witness, the witness's address, and the location of the deposition. Minn. R. Civ. P. 30.02(a). The district court granted appellant's motion, reasoning that Mobil did not send written notice via mail to appellant until four days before the Gonzalez deposition. Such short notice, the district court reasoned, gave appellant (who was then pro se) insufficient time to either seek legal counsel or prepare for the deposition.

Appellant obtained a default judgment against Gonzalez. Mobil moved the district court for summary judgment dismissing appellant's complaint against it, asserting that it is entitled to judgment as a matter of law because appellant failed to provide any evidence that Mobil is liable to appellant under any theory of recovery. The district court found no genuine issue of material fact and granted Mobil's motion for summary judgment. It concluded that the record allowed no conclusion other than that Gonzalez did not own Mobil, did not have ability to enter into contracts on behalf of Mobil, was not an employee of Mobil, and was not otherwise a person for whom Mobil would be liable for his tortious conduct.

This appeal followed.

DECISION

“The court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.”¹ Minn. R. Civ. P. 56.01. “The fact that the nonmoving party is unlikely to prevail at trial does not warrant granting summary judgment.” *Writers, Inc. v. W. Bend Mut. Ins. Co.*, 465 N.W.2d 419, 422 (Minn. App. 1991). “The district court’s function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

On appeal from a grant of summary judgment, we review de novo: “(1) whether there exists a genuine issue of material fact; and (2) whether the district court erred in its application of the law.” *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007). “[W]e view the evidence in the light most favorable to the party against whom summary judgment was granted.” *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008) (quotation omitted).

¹ The district court applied the former version of rule 56, which was recently “revamped” to more “closely follow” the federal rules. Minn. R. Civ. P. 56 2018 advisory comm. cmt. When promulgating amendments to rule 56, effective on July 1, 2018, and applicable to pending cases, the supreme court specifically indicated that amended language on the standard for granting summary judgment reflects recent Minnesota caselaw. *Order Promulgating Amendments to Rules of Civil Procedure*, No. ADM04-8001 (Minn. Mar. 13, 2018). Because the legal standard is unchanged, we cite to the current version of rule 56.01, even though the district court’s decision was issued before the amended rule took effect.

I. The district court acted within its discretion when it excluded the Gonzalez deposition from its consideration on the summary-judgment motion.

Appellant argues on appeal that the district court should have considered the deposition of Gonzalez in ruling on Mobil's summary-judgment motion. He argues that the district court's failure to consider it was an abuse of discretion.

The Gonzalez deposition was suppressed as a result of appellant's motion. *Cf. Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003) (“[A] party cannot complain about a district court's failure to rule in [the party's] favor when one of the reasons it did not do so is because that party failed to provide the district court with the evidence that would allow the district court to fully address the question.”), *review denied* (Minn. Nov. 25, 2003). Having successfully suppressed the Gonzalez deposition, the original transcript of which was never filed with the district court and is not part of the record, appellant cannot now argue that there is a fact issue to be found in that deposition.

“It is well settled that an appellate court may not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered.” *Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977). Appellant does not argue on appeal that the district court erroneously suppressed the deposition. And, as noted, the original deposition transcript is not in the record. Consequently, the district court properly declined to consider the Gonzalez deposition in ruling on the summary-judgment motion.

II. There are no genuine issues of material fact.

Appellant asserts that there is a genuine issue of material fact because the agreement between appellant and Gonzalez represents that Gonzalez was acting as an agent for Mobil, and Mobil's responses to interrogatories are contradictory to Gonzalez's deposition testimony (which is not part of the record).

Summary judgment is appropriate 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).

There is no record evidence that creates a genuine issue of material fact concerning the status of Gonzalez; the only admissible evidence of his status in the record is that he rented a space from Mobil and is not Mobil's employee or agent. As the district court properly identified, appellant presented no facts that Mobil took any action to convert appellant's property, stole appellant's property, or interfered with a business opportunity lost by appellant. Franzman's affidavit and Mobil's responses to interrogatories are consistent, and uncontroverted, in stating that Gonzalez was never employed by, nor did he have authority to enter into contracts on behalf of, Mobil.²

Appellant failed to provide sufficient evidence to establish that Mobil was a party to the written agreement, and vicarious liability is not available based on actions in breach of contract. *Hagen v. Burmeister & Assocs., Inc.*, 633 N.W.2d 497, 503 (Minn. 2001).

² Appellant does not argue that Gonzalez had apparent authority to enter into contracts on behalf of Mobil.

Consequently, there is no evidence in the record from which Mobil could be directly liable to appellant for any claims asserted in the complaint.

The district court addressed whether appellant presented sufficient facts to show that there was an employee-employer relationship between Mobil and Gonzalez that would allow the case to proceed to trial on the issue of respondeat superior, or vicarious liability, against Mobil.³ Under respondeat-superior principles, an employer may be vicariously liable for torts committed by an employee acting within the course and scope of his or her employment. *Fahrendorff ex rel. Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 910 (Minn. 1999). Whether a worker is an employee or an independent contractor involves a mixed question of law and fact. “Once the controlling facts are determined, the question whether a person is an employee becomes one of law.” *Jenson v. Dep’t of Econ. Sec.*, 617 N.W.2d 627, 629 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. Dec. 20, 2000).

The factors to be considered when distinguishing between an employee and independent contractor are: “(1) [t]he right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of material or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge.” *Guhlke v. Roberts Truck Lines*, 128 N.W.2d 324, 326 (Minn. 1964). The most

³ Although appellant did not specifically plead vicarious liability in his complaint, the district court correctly considered the issue because the parties argued the issue. See *Hagen*, 633 N.W.2d at 501 (treating the respondeat-superior claim as if it had been pleaded because the parties argued the issue before the district court); *T.W. Sommer Co. v. Modern Door & Lumber Co.*, 198 N.W.2d 278, 281 (Minn. 1972) (stating that issues litigated either by express or implied consent are treated as if they had been pleaded).

important factor for consideration is the employer's right to control the means and manner of performance. *Id.*

The record evidence here is limited. In response to written interrogatories, Mobil stated that Gonzalez leased a space from Mobil and operated his own business, did not perform work on behalf of Franzman or Mobil, Mobil has not credited Gonzalez's rent payment in exchange for services performed by Gonzalez, and Gonzalez was never employed by Mobil. Mobil was not aware that Gonzalez had held himself out to be an employee of or affiliated with Mobil. Franzman, in his affidavit, stated that he subleased a one-stall garage to Gonzalez on a month-to-month basis and Gonzalez had complete control over the work he performed and the space he rented. This evidence provided by Mobil is uncontroverted.

Appellant's argument—that there are genuine issues of material fact precluding summary judgment—fails for several reasons. First, the only evidence appellant provided was the agreement between Gonzalez and appellant that stated that Gonzalez was “doing business as Mobil auto rescue and repair.” Here, and in the absence of any record evidence that Mobil adopted or endorsed that representation, that is insufficient to withstand summary judgment. *See Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006) (stating that the nonmoving party must provide sufficient evidence to permit reasonable persons to draw different conclusions on issues to which the nonmoving party has the burden of proof). Appellant could have deposed Gonzalez, Franzman, or others. He did not.

Second, in opposition to the motion for summary judgment, appellant only provided general assertions that Gonzalez was an employee of Mobil. In opposing summary judgment, “general assertions” are not enough to create a genuine issue of material fact. *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995).

Finally, appellant argues that the suppressed Gonzalez deposition contradicts the written interrogatories and creates a genuine issue as to whether Gonzalez was a Mobil employee. But evidence offered to support or defeat a summary judgment motion must be admissible at trial. *Hopkins by LaFontaine v. Empire Fire & Marine Ins. Co.*, 474 N.W.2d 209, 212 (Minn. App. 1991).

On this record, no reasonable factfinder could find that Gonzalez was an employee of Mobil. Appellant failed to offer evidence sufficient for a reasonable factfinder to find that Mobil was directly liable to appellant. The district court properly granted Mobil’s motion for summary judgment dismissing appellant’s complaint.⁴

Affirmed.

⁴ Appellant also argues that it was reversible error for the district court to have stated that appellant wrote the agreement between him and Gonzalez. But it was appellant who alleged in his complaint that he was the party who wrote the agreement, and no evidence was offered that would contradict this assertion. At oral argument, appellant’s counsel conceded that the record reflects that appellant wrote the agreement, and so claimed in his complaint.