STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0422

Tad Ware & Company, Inc.,
Appellant,

vs.

Schwan's Home Service, Inc.,
Respondent.

Filed December 17, 2018
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CV-16-17706

Gregory J. Stenmoe, Emily M. Peterson, Kristin M. Emmons, Briggs and Morgan, P.A., Minneapolis, Minnesota (for appellant)

Sharon L. Van Dyck, Shannon M. McDonough, Tyler P. Brimmer, Fafinski Mark & Johnson, P.A., Eden Prairie, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Klaphake, Judge.*

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

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

In this breach-of-contract action, appellant marketing communications agency challenges the district court's grant of summary judgment in favor of respondent grocery-delivery company, arguing that the district court erred in concluding that the parties' contract had expired or was effectively terminated and that respondent did not breach the contract. Because we conclude that if the contract was in effect, it was not breached and that it was properly terminated, we affirm.

FACTS

Appellant Tad Ware & Company, Inc. and respondent Schwan's Home Service, Inc. (Schwans) began their business relationship in the 1990s and entered into a new one-year contract in October 2010. Under its terms, Tad Ware would provide "design, copywriting, photography and digital file production" services for Schwans's consumer catalogs and was the "catalog agency of record" to produce six 72-page catalogs for Schwans. The contract also stated that "any photography performed by [Tad Ware] shall be at [Schwans's] written request in [Schwans's] sole discretion."

With respect to duration and termination, the contract provided:

> This Agreement shall commence as of October 1, 2010 and shall continue in full force and effect through September 30, 2011 ("Initial Term"), unless terminated by either party for any reason upon one hundred twenty (120) days prior written notice. . . . This Agreement shall renew for additional one-year terms after the Initial Term, renewal to be executed and recorded by mutual written agreement of the parties, unless cancelled in writing by either party upon one hundred twenty

> (120) days prior written notice before the then expiration date of the Agreement.

The parties never executed a written renewal, but Tad Ware continued to produce catalogs through late 2015, and performed some photography services as well. For the final two catalogs that Tad Ware produced, a different vendor supplied all photography services.

On June 30, 2015, Schwans notified Tad Ware by letter that it was terminating the contract effective October 29, 2015, and issuing a request for proposals (RFP) for future catalog work. It invited Tad Ware to respond. Schwans issued its RFP in mid-August, and Tad Ware and two other vendors submitted proposals. Schwans notified Tad Ware in mid-September that it was awarding its catalog business to a different vendor.

One year later, Tad Ware filed suit against Schwans on the theories of breach of contract, promissory estoppel, and misrepresentation. Only breach of contract is at issue in this appeal. On that claim, the district court granted summary judgment to Schwans on the ground that the 2010 contract had expired by its terms in 2011, and therefore was not in effect in 2015. The district court also determined that, even if the contract were in effect, Schwans properly terminated it, and in any event, did not breach it. This appeal follows.

D E C I S I O N

On appeal from summary judgment, we review the district court's grant of summary judgment de novo and "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).

We view the evidence in the light most favorable to the nonmoving party. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). Here, the material facts are undisputed. "[W]e may affirm a grant of summary judgment if it can be sustained on any grounds." *Doe 76C v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012).

The district court determined that the 2010 contract expired by its terms because it required a written renewal, which the parties agree did not occur. Tad Ware argues that the district court erred in failing to consider whether the parties impliedly renewed the contract by their conduct, citing *Fischer v. Pinske*, 243 N.W.2d 733 (Minn. 1976). In *Fischer*, the supreme court held that when both parties to an employment contract behaved as if bound by an expired contract that required written renewal, waiver of the writing requirement could be inferred. 243 N.W.2d at 735.

Here, the district court declined to consider whether the parties' conduct supported an implied renewal, determining that the contract was unambiguous and, therefore, there was no need to consider extrinsic evidence. We need not determine whether the district court erred in declining to consider whether the contract was impliedly renewed, because, even if the contract remained in effect in June 2015, the grant of summary judgment can be affirmed. For purposes of our analysis, we will assume that the October 2010 contract remained in effect in June 2015, having renewed despite the lack of a writing.

The district court determined that, if the contract had not expired and remained in effect, Schwans gave proper notice to terminate the contract as of October 30, 2015. Tad Ware argues that the district court misinterpreted the contract's termination requirements.

Contract interpretation presents "a question of law which we review de novo." *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). When a contract is unambiguous, the contract language "must be given its plain and ordinary meaning, and shall be enforced by courts even if the result is harsh." *Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700, 704 (Minn. 1999) (footnotes omitted). We are required "to construe a contract as a whole so as to harmonize all provisions, if possible, and to avoid a construction that would render one or more provisions meaningless." *Stiglich Constr., Inc. v. Larson*, 621 N.W.2d 801, 803 (Minn. App. 2001), *review denied* (Minn. Mar. 27, 2001).

The contract contains both a termination clause, which states that it may be terminated with 120 days written notice, and a renewal clause, which states that the contract renews unless notice of termination was given at least 120 days before the expiration of the term. Reading the two clauses to give effect to both, as we must, we conclude that the district court properly determined that if the contract renewed on October 1, 2015, the clock nevertheless kept running on the termination notice that had been given on June 30, 2015.

We reject Tad Ware's argument that, because the notice of termination was given only 93 days before the contract's September 30, 2015 expiration date, the notice of termination was ineffective, and the contract renewed for another 12 months. To adopt Tad Ware's construction would render the 120-day termination provision meaningless. The relevant language does not state that the contract may only be canceled if notice is given 120 days before expiration of the term of the contract, and we will not add such a requirement to the contract. Accordingly, the district court did not err in determining that

if the contract was in effect in October 2015, Schwans's notice of termination was effective as of October 30, 2015.

Tad Ware also argues that the district court erred in determining that Schwans did not breach the contract before October 30, 2015, by using a different vendor for certain photography services. Tad Ware argues that because it was Schwans's "catalog agency of record," it was the exclusive provider of photography services for all catalogs.[1] The contract provides otherwise. It states:

> [Tad Ware] will provide design, copywriting, photography and digital file production for [Schwans's] consumer catalogs. [Tad Ware] will work with [Schwans] as the [Schwans] Catalog agency of record to produce six (6), seventy-two (72) page Catalogs each calendar year. Any photography performed by [Tad Ware] shall be at [Schwans's] written request in [Schwans's] sole discretion . . . .

We construe this provision to mean that Tad Ware would provide various catalog services to Schwans and was its exclusive catalog producer, but that Schwans was not required to utilize Tad Ware for photography services. Accordingly, the district court did not err in determining that Schwans did not breach the contract by awarding photography work to another vendor. Having concluded that the district court properly determined that Tad Ware was not the exclusive photography vendor and that Schwans properly terminated the contract, we affirm the district court's grant of summary judgment.

Affirmed.

[1] The parties agree that "agency of record" is an industry term denoting an exclusive relationship.