STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0942

Richard Pomije,
Respondent,

vs.

Digitaltown, Inc.,
Appellant.

Filed April 1, 2019
Reversed and remanded
Jesson, Judge

Dakota County District Court
File No. 19HA-CV-17-124

Mark A. Olson, Olson Law Office, Burnsville, Minnesota (for respondent)

Craig M. Byram, John S. Beckmann, Samantha E. Steward, Hoversten, Johnson, Beckmann & Hovey, LLP, Austin, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Jesson, Judge.

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

JESSON, Judge

This case centers on the employment agreement between respondent Richard Pomije and appellant Digitaltown, Inc. The district court granted summary judgment on Pomije's employment agreement claim, dismissed Digitaltown's counterclaims, and awarded Pomije damages and attorney fees and costs. Because there are genuine issues of material fact regarding the validity of the employment agreement and whether Digitaltown's counterclaims state a claim upon which relief may be granted, we reverse and remand.

FACTS

Respondent Richard Pomije formed and became president and chief executive officer (CEO) of appellant Digitaltown, Inc. in 1982. Around 2000, Digitaltown became a publicly-traded company. Pomije was the majority shareholder until September 2015. His brother, Thomas Pomije, also became a shareholder in 2005. Digitaltown was an asset-based corporation, meaning it would buy assets and the value of the company was based on those assets. Digitaltown primarily bought high school website domain names that were not previously owned and made money from the website traffic, generating revenue from advertising and leasing domain names.

While Pomije was CEO, he was also a member of Digitaltown's board of directors, where he served as secretary. In early May 2015, Digitaltown's board of directors consisted only of Pomije and Jeffrey Mills, a board member since 2003, who also served as the sole audit committee member. But on May 11, 2015, Pomije resigned from his positions as CEO and president effective May 18, 2015. And he resigned from his position on Digitaltown's board of directors effective May 31, 2015. After Pomije resigned, two additional directors were appointed. Later, Mills became Digitaltown's board secretary.

After resigning, Pomije stayed on at Digitaltown as a nonofficer employee. Pomije drafted a document titled "employment agreement," stating that Digitaltown would employ Pomije for one year, to be renewed annually, unless Pomije was notified in writing 30 days before expiration of the agreement. Under the purported employment agreement, Pomije would be paid $125,000 for the first year, and five percent more for the second year of employment. Both Pomije and Mills signed this document, which stated it began on May 11, 2015. But the parties dispute the date that Mills signed the employment agreement. And neither Pomije's nor Mills's signatures are dated. Digitaltown asserts that Mills did not sign the agreement until June 2015, when he did not have authority to sign on behalf of the company. This lack of authority stems, Digitaltown contends, from the fact that the agreement was never presented to the new board of directors, which then included two additional members.

In August 2015, Digitaltown no longer had the funds to pay its employees. Pomije agreed to temporarily forego his salary, in order to have enough money to pay the rest of the employees. When he agreed to this arrangement, he contends that payments were to resume the following week. But Pomije did not receive any additional paychecks after August 28, 2015. He continued to work for Digitaltown until February 2016, when his email account was shut-off. At this time, Pomije took another full-time job as the vice president of a company called Smart Express.

Digitaltown asserts that in the fall of 2015, as its financial situation worsened, Mills learned from Digitaltown shareholders that had purchased shares from Pomije's brother, Thomas, that the purchases were solicited by Pomije. Thomas originally acquired these shares in 2005 and 2007, and in 2010, Digitaltown amended the pricing terms of Thomas's 2007 shares, reducing the purchase price from $2.50 per share to $0.75 per share. These shares were at least partially resold to Digitaltown shareholders sometime before

April 15, 2009.[1] According to Mills, the shareholders had never even spoken to Thomas. And the shareholders told Mills that Pomije told them that purchasing the shares from his brother was the only way to acquire stock in Digitaltown.

Digitaltown was troubled by this information, Mills stated, as Pomije had previously reported to the United States Securities and Exchange Commission (SEC) that he was not involved in any way in these transactions, as his involvement (according to Digitaltown) would violate SEC regulations, because these sales were not reported to the SEC. Digitaltown asserts that because Pomije coordinated the stocks to be purchased from his brother, it lost corporate opportunities to sell stock to interested buyers, and further lost money by reducing the purchase price of the 2007 shares. It would not have reduced the price if it had known Pomije was coordinating the resales, in violation of SEC regulations, Digitaltown contends.

Almost a year after his last day of work, in January 2017, Pomije filed a breach-of-contract lawsuit against Digitaltown, requesting the amount of wages due to him pursuant to the alleged employment agreement as well as attorney fees and penalties pursuant to Minnesota Statutes sections 181.13 and 181.171 (2018). Within its amended answer, Digitaltown asserted three counterclaims: that Pomije breached his fiduciary duty to Digitaltown; that he committed fraudulent misrepresentation and fraudulent omission

[1] It is unclear when the shares were resold to Digitaltown's current shareholders. The share purchase agreements reflecting these transactions are not included in the record. But the SEC inquired about the resale of Thomas's shares and Pomije responded to its inquiry in April 2009, indicating that the shares were resold before April 2009.

regarding the sale of his brother's Digitaltown shares; and that he unlawfully interfered with Digitaltown's property by soliciting and transacting share sales for his own benefit.[2]

In December 2017 (and after several months of discovery), Pomije filed two motions: a motion to dismiss Digitaltown's counterclaims for failure to state a claim and a motion for summary judgment on his employment claims. The district court granted Pomije's motion for summary judgment on his breach-of-contract employment claim. And it granted Pomije's motion to dismiss the counterclaims on the basis that they were barred by the statute of limitations and not pleaded with particularity. Later, the district court summarily determined Pomije's damages, concluding that Pomije was entitled to recover reasonable costs, disbursements, witness fees, and attorney fees under Minnesota Statutes section 181.171, subdivisions 1 and 3, and indemnification under Minnesota Statutes section 302A.521, subdivision 2(a) (2018).[3] Digitaltown appeals.

D E C I S I O N

On appeal from summary judgment, this court reviews de novo whether there are any genuine issues of material fact and whether the district court erred in applying the law. *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53, 56 (Minn. 2013). "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn.

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[2] As part of the counterclaims, Digitaltown asserts that Pomije breached his duty of loyalty by usurping corporate opportunities because Digitaltown had an opportunity to sell stock directly to buyers interested in investing in the company, but Pomije instead directed these opportunities to his brother.

[3] The district court awarded Pomije $256,488.16 in contract damages and $296,488.16 for attorney fees and costs, for a total of $552,976.32.

2002). A genuine issue of material fact exists when there is sufficient evidence that could lead a rational trier of fact to find for the nonmoving party. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

I. The district court erred by granting summary judgment on Pomije's contract claim.

Digitaltown asserts that the district court erred in granting summary judgment regarding the employment document because there is a genuine issue of material fact as to whether a valid employment contract was formed. Specifically, Digitaltown points to a dispute over *when* Mills signed the document, which impacts whether Mills had the authority to sign on behalf of the corporation.

A plaintiff must show that a contract has been formed, to prevail on a breach-of-contract claim. *Cargill Inc. v. Jorgenson Farms*, 719 N.W.2d 226, 232 (Minn. App. 2006). It is generally a question of fact whether a contract exists. *Id.* "But if taking the record as a whole, a rational trier of fact could not find for the nonmoving party, summary judgment is appropriate." *Id.* The district court determined that there was no genuine issue of material fact as to whether an employment contract existed. We disagree.

Here, Digitaltown disputes the date that the document was signed by Mills, and as a result, contends Mills lacked authority to enter into the contract on behalf of Digitaltown. Mills's affidavits and deposition testimony state that he signed Pomije's employment agreement on June 15, 2015—not on May 11, 2015. In support of its argument, Digitaltown asserts that Jeffrey Mills was presented the employment document on June 15, 2015. In his affidavit Mills stated that "[he] signed the document, but informed [Pomije] that [he] did not have the authority to execute it on behalf of Digitaltown and that it needed to be approved by the full board." On June 15, 2015, the board consisted of Mills and two other members, neither of whom signed nor approved the employment document. And Mills stated that Pomije showed him how he planned to manipulate the metadata of the document to show the last edit date as being May 11, 2015, to avoid needing the new board of directors' approval.[4] Finally, Mills's appointment book contains a page that states that on June 15, 2015, Pomije backdated his employment agreement.

When the district court concluded that there was no genuine issue of material fact regarding when the employment document was signed, it relied on its finding that "Jeffrey Mills lacks credibility." This is error. A district court should not weigh evidence or assess credibility at the summary judgment stage. *Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C.*, 736 N.W.2d 313, 320 (Minn. 2007).

But Pomije asserts that the dispute as to the date that the contract was signed is not material given the overwhelming evidence of the contract's validity. We disagree. Here, Mills's affidavits and deposition testimony, along with the page from his appointment book, presents more than a metaphysical doubt as to the factual issue of the formation of the employment agreement. *See DLH, Inc.*, 566 N.W.2d at 71 (noting that "there is no genuine issue of material fact for trial 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

[4] Metadata typically shows the history of a document that is created on a computer.

reasonable persons to draw different conclusions"). Reasonable persons could draw different conclusions from the evidence presented. *See Ill. Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978). And established caselaw is clear: on summary judgment, it is error for the district court to assess credibility. *Hoyt*, 736 N.W.2d at 320.

Because we conclude that genuine issues of material fact exist regarding the date that the employment contract was signed by Mills and whether he had authority to enter into the contract on behalf of Digitaltown, we reverse and remand.[5]

II. The district court erred in dismissing Digitaltown's counterclaims based on this record.

Digitaltown asserted three counterclaims in its answer, all of which relate to Pomije's alleged role in the sales of his brother Thomas's Digitaltown stock: breach of fiduciary duty; fraudulent misrepresentation and omission; and conversion. The district court dismissed Digitaltown's counterclaims because it concluded they were barred by the statute of limitations. In addition the court concluded that they were not pleaded "with particularity."[6] We disagree as to the first basis for dismissal and conclude, with regard to

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[5] Because we reverse and remand, and the issues of damages, attorney fees, and statutory penalties depend on the outcome of this contract issue, we do not address these contingent issues here.

[6] The district court dismissed the counterclaims pursuant to rule 12.02 of the Minnesota Rules of Civil Procedure, which states that "[e]very defense, in law or fact, to a claim for relief in any pleading, whether a claim [or] counterclaim . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (e) failure to state a claim upon which relief can be granted." But if "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." Minn. R. Civ. P. 12.03. Because the district court here considered matters outside the pleadings, we review Pomije's motion as one for summary judgment. Minn. R. Civ. P. 56.

the second, that the record on appeal does not provide an adequate basis for appellate review.

We first address whether Digitaltown's counterclaims are barred by the statute of limitations, a question which we review de novo. *Ryan v. ITT Life Ins. Corp.*, 450 N.W.2d 126, 128 (Minn. 1990).

There is no dispute that the purchases of shares at the heart of the counterclaims occurred in 2005 and 2007. Because of the six-year statute of limitations governing actions for fraud, the district court correctly concluded that the claims were barred unless fraudulent concealment extended the statute. Minn. Stat. § 541.05, subd. 1(6) (2018); *Sletto v. Wesley Constr. Inc.*, 733 N.W.2d 838, 845 (Minn. App. 2007). Digitaltown asserts that Pomije's April 2009 representation to the SEC that neither he nor anyone at Digitaltown was directly involved with any resales of his brother's stock constitutes fraudulent concealment. And it was only in the fall of 2015, Mills asserts, that Digitaltown learned from stockholders that they were directed, by Pomije, to purchase stock directly from his brother in 2005 and 2007.

To prove fraudulent concealment, resulting in a tolling of the statute of limitations, "a party must show (1) the defendant made a statement that concealed plaintiff's potential cause of action, (2) the statement was intentionally false, and (3) the concealment could not have been discovered by reasonable diligence." *Sletto*, 733 N.W.2d at 846. "The six-year period begins to run when the facts constituting fraud were discovered or, by reasonable diligence, should have been discovered." *Toombs v. Daniel*, 361 N.W.2d 801, 809 (Minn. 1985).

The district court dismissed this fraudulent-concealment argument with the statement that "[a]ll information regarding the buying and selling of Digitaltown stock was available to Digitaltown's board of directors, auditors and regulators when they occurred." Based upon this finding, the court implicitly concluded that, with reasonable diligence, Digitaltown could have discovered the alleged fraud.

But "[r]easonable diligence is generally a question of fact." *Appletree Square I Ltd. P'ship v. Investmark, Inc.*, 494 N.W.2d 889, 894 (Minn. App. 1993), *review denied* (Minn. Mar. 16, 1993). Our review of the record reveals a dispute over whether Digitaltown should have discovered that Pomije's statement to the SEC was misleading before 2015. Neither the district court nor Pomije point to specific records which undisputedly should have placed Digitaltown on notice. And we are concerned, given the district court's scant attention to the concealment allegation, that the district court's conclusion that Digitaltown did not act with reasonable diligence was based, at least in part, on its credibility finding regarding Mills. It was Mills's affidavit that set out the facts underlying Pomije's concealment. It was Mills who served on the board and audit committee during the relevant time. And it was Mills who had the 2015 conversations with the shareholders. Again, assessing credibility is not appropriate at the summary-judgment stage. *See Hoyt*, 736 N.W.2d at 320. Given the brief analysis of the concealment issue and its intertwinement with Mills's testimony and based on our review of the record, we conclude the district court erred in determining the counterclaims time-barred as a matter of law.

Finally, the district court found that Digitaltown's counterclaims failed to plead fraud with particularity as required under Minnesota Rules of Civil Procedure 9.02. The court focused on Digitaltown's "fail[ure] to show how any actions by [Pomije] have caused specific damage" to the company. The record before us does not permit thorough appellate review of this decision. Some of Digitaltown's damage evidence is contained in an affidavit from Willard Olson which was included as an exhibit to an affidavit in support of Digitaltown's motion to amend its answer and counterclaim. Digitaltown's proposed amended answer and counterclaim included additional specificity and clarification, including on the issue of damages. But it is unclear whether Digitaltown's proposed amended answer and counterclaim are properly before us.

The district court's order of dismissal makes no reference to the proposed amended answer and counterclaim. While the district court's law clerk sent an email to the parties indicating that "[i]t is the Court's intent to deny all outstanding motions," which may have included the motion to amend, the district court itself never issued a ruling on Digitaltown's motion to amend. As such, it is unclear to this court whether the amended answer and counterclaim, together with Olson's affidavit, are included in the record and can be considered on appeal. Accordingly, the record does not provide an adequate basis for appellate review of the district court's decision that the counterclaims were not pleaded with particularity. We remand for the district court to rule on Digitaltown's motion to amend and subsequently consider whether Digitaltown's counterclaims of fraud are pleaded with particularity.

In sum, we reverse the district court's summary judgment in favor of Pomije and its dismissal of Digitaltown's counterclaims. Disputed material facts cloud each claim, and the district court's improper credibility determination permeates each as well.

Reversed and remanded.