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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0865**

Paul Stepnes,
Appellant,

vs.

Beth Trautman, et al.,
Respondents.

**Filed April 20, 2020
Affirmed; motion denied
Reyes, Judge**

Hennepin County District Court
File No. 27-CV-18-17644

Lisa Lodin Peralta, Peralta Appellate Law, PLLC, St. Louis Park, Minnesota (for appellant)

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Considered and decided by Reyes, Presiding Judge; Bratvold, Judge; and Bryan, Judge.

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

REYES, Judge

Following removal of his conciliation-court claim for real-estate commission to district court and its dismissal, appellant argues that the district court (1) improperly granted summary judgment to respondents because (a) respondents forfeited their claims; (b) a genuine issue of material fact exists; and (c) appellant has standing because his

bankruptcy estate did not have an interest in his commission and (2) improperly denied his motion for summary judgment based on a claimed agreement to settle the underlying claim. We affirm.

FACTS

Appellant Paul Stepnes is a licensed real-estate agent. He has worked with respondent Beth Trautman to market properties that Trautman purchases to remodel and resell. On February 2, 2018, Stepnes filed for Chapter 7 bankruptcy. He did not report any earned real-estate commissions or any contingent or unliquidated claims in his bankruptcy filings. On February 8, 2018, Trautman listed a property with Bridge Realty on which Stepnes had previously worked, but that had not sold, and listed herself as the listing agent and Stepnes as the co-listing agent. The listing cover sheet provided for zero-percent commission for each party. The property sold on February 21, 2018, and closed on March 29, 2018. Trautman did not make any profit on the sale or pay a commission to Stepnes.

On June 13, 2018, Stepnes brought an equitable claim in conciliation court for \$15,000 in commission. In his statement of claim, Stepnes referenced working for eight months as the listing agent, “marketing the property with open houses etc. and even finding the buyers.” The conciliation court issued a \$10,070 judgment for Stepnes, stayed until October 24, 2018, to allow time for removal to district court.

The parties discussed a settlement agreement via email under which Trautman would pay Stepnes \$7,500 for a release of all claims against her related to her properties, but Stepnes did not agree with the release Trautman presented to him. As the parties discussed the settlement, Trautman filed for removal to district court the day before the end

of the stay of the conciliation court judgment. The district court vacated the judgment pursuant to Minn. Gen. R. Prac. 521(d).

Stepnes filed motions to dismiss, to vacate “the order vacating the judgment on appeal,” to enforce the settlement agreement, and for penalties. The district court construed these motions as “advancing a motion for summary judgment premised on the alleged agreement to compromise the underlying claim.” Without filing any other responsive pleading, Trautman filed a motion for summary judgment based on (1) Stepnes’s lack of standing and (2) a bar under Minn. Stat. § 82.85 (2018) against claims for commission on the sale of real property without a written agreement. The district court granted Trautman’s motion because it determined that Stepnes lacked standing, and it did not reach her statutory argument. It denied Stepnes’s motion. This appeal follows.

D E C I S I O N

I. Stepnes’s motion to strike portions of Trautman’s brief is denied as moot.

Stepnes moved to strike portions of Trautman’s brief the evening before oral arguments on the basis that Trautman referred to materials outside of the record. The appellate record is limited to “documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any.” Minn. R. Civ. App. P. 110.01. Because these portions are not relevant to our analysis and we did not rely on them, we deny Stepnes’s motion as moot. *See In re Purported Fin. Statement in Dist. Court of Ramsey Cty.*, 745 N.W.2d 878, 882 (Minn. App. 2008) (denying motion to strike portions of respondent’s brief as moot when this court did not rely on material).

II. The district court properly granted summary judgment for Trautman.

Stepnes argues that the district court improperly granted summary judgment to Trautman because (1) Trautman forfeited¹ both of the issues on which she sought summary judgment by not raising either as an affirmative defense; (2) a genuine issue of material fact exists; and (3) he had standing because his bankruptcy estate did not have an interest in his commission. We address each issue in turn.

We review a grant of summary judgment de novo to determine “whether there are genuine issues of material fact and whether the district court erred in its application of the law.” *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotation omitted).

A. Trautman did not forfeit the issues of standing or the application of Minn. Stat. § 82.85.

Stepnes argues that Trautman forfeited her challenge to his standing as well as her argument that section 82.85 bars his claim by raising them in a motion for summary judgment and not pleading either issue as an “affirmative defense.” We disagree.

As an initial matter, Stepnes did not argue forfeiture to the district court, so he cannot now argue it on appeal. See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Even if we consider his claim, however, it lacks merit.

First, standing requires a litigant to suffer an injury in fact or to have a “sufficient stake in the outcome.” See *Cochrane v. Tudor Oaks Condo. Project*, 529 N.W.2d 429, 433

¹ Stepnes describes this as waiver, but forfeiture refers to “the failure to make a timely assertion of a right.” See *Halvorson v. B&F Fastener Supply*, 901 N.W.2d 425, 429 n.1 (Minn. 2017) (quotation omitted).

(Minn. App. 1995) (contrasting standing with capacity to sue), *review denied* (Minn. May 31, 1995). Whether a bankruptcy estate or debtor has an interest in disputed property raises an issue of standing. *See Leffler v. Leffler*, 602 N.W.2d 420, 422-23 (Minn. App. 1999). Trautman argues that any claim for commission that Stepnes has is the property of his bankruptcy estate and that he therefore lacks standing to pursue the commission. Trautman’s argument raises an issue of standing that may be addressed at any time. *See In re Custody of D.T.R.*, 796 N.W.2d 509, 512 (Minn. 2011); *Davidner v. Davidner*, 232 N.W.2d 5, 7 (Minn. 1975).

Second, as Stepnes argues, a defense based on a statute of frauds, such as section 82.85, is an affirmative defense. *See* Minn. R. Civ. P. 8.03. “Every defense . . . shall be asserted in the responsive pleading thereto if one is required.” Minn. R. Civ. P. 12.02. Generally, failure to include an affirmative defense in a responsive pleading results in forfeiture. *See Sletten v. Ramsey Cty.*, 675 N.W.2d 291, 299 (Minn. 2004). However, “[i]ssues litigated by either express or implied consent are treated as if they had been raised in the pleadings.” *Septran, Inc. v. Indep. Sch. Dist. No. 271*, 555 N.W.2d 915, 919 (Minn. App. 1996) (quotation omitted), *review denied* (Minn. Feb. 26, 1997). Accordingly, we have found no forfeiture when a party raises an issue for the first time in a motion for summary judgment if the nonmoving party does not object to the defense, the district court hears the issue, and the parties litigate the issue. *See, e.g., Bradley v. First Nat. Bank of Walker, N.A.*, 711 N.W.2d 121, 128 (Minn. App. 2006) (allowing statute-of-limitations defense first raised in moving party’s reply memorandum to motion for summary judgment); *Wessling v. Johnson*, 424 N.W.2d 795, 799 (Minn. App. 1988) (concluding no

forfeiture of res judicata claim first raised in motion for summary judgment), *review denied* (Minn. July 28, 1988).

Here, Stepnes addressed Trautman's claims in his response to Trautman's motion for summary judgment. The district court heard arguments from each party on the claims at a motion hearing. Stepnes argued at the hearing and in his written response that the bankruptcy estate had no interest in his claim and that the parties met the requirements of section 82.85. Because Stepnes did not object, he litigated the issues, and the district court heard the issues, we treat them as though Trautman raised them in her pleadings. *See Septran*, 555 N.W.2d at 919.

The cases to which Stepnes cites to support his forfeiture argument do not involve situations in which no pleadings were required or filed or in which the parties litigated the issue by consent. *See Beutz v. A.O. Smith Harvestore Prod., Inc.*, 431 N.W.2d 528, 532 n.3 (Minn. 1988) (affirming district court's decision to allow amendment of pleading to include affirmative defense one week before trial); *Minnesota-Iowa Television Co. v. Watonwan T.V. Imp. Ass'n*, 294 N.W.2d 297, 301, 305 (Minn. 1980) (declining to consider on appeal respondent's affirmative defenses not raised in pleadings or considered by district court); *Kilton v. Richard G. Nadler & Assocs.*, 447 N.W.2d 468, 471 (Minn. App. 1989) (concluding no error in district court requiring defendant to proceed by general denial after failing to serve answer with affirmative defense following removal from conciliation court, but no indication of any pretrial motions), *review denied* (Minn. Jan. 12, 1990). Neither these cases nor Minn. R. Civ. P. 8.03 or 12.02, which address how a party

required to file a responsive pleading must preserve an affirmative defense, preclude Trautman's claims.

B. There is no genuine issue of material fact.

Stepnes next argues that he raised a genuine issue of material fact regarding what portion of his work marketing the property occurred after his bankruptcy petition. We are not persuaded.

We review the existence of a genuine issue of material fact de novo. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). A fact is material if its resolution will affect the case outcome. *Zappa v. Fahey*, 245 N.W.2d 258, 259-60 (Minn. 1976). At summary judgment, the nonmoving party must produce specific, probative evidence of the existence of a genuine issue of material fact. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). This requires more than “mere averments” by the nonmoving party, *id.*, and more than reference to “unverified and conclusionary allegations in his pleading.” *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) (quotation omitted).

Stepnes acknowledges that “[t]he evidence viewed most favorably to [him] establishes that he marketed the [p]roperty for eight months total.” Yet he argues that only his marketing services from the February 8, 2018 property list date to its February 21, 2018 sale date contributed to the sale and therefore to his commission. Stepnes did not present evidence sufficient to controvert his statement in his pleadings that he worked for eight months marketing the property and finding its buyer. *See Russ*, 566 N.W.2d at 70. Approximately seven of the eight months he worked would have occurred before he filed

his bankruptcy petition. The district court properly concluded that Stepnes raised no genuine issue of material fact.

C. Stepnes lacked standing to bring a claim based on pre-petition, but not post-petition, work.

Stepnes argues that the district court incorrectly determined that his bankruptcy estate had an interest in his suit for commission² and that he therefore lacked standing to pursue it. We agree.

We review de novo questions of standing, see *D.T.R.*, 796 N.W.2d at 512, as well as whether property is part of a bankruptcy estate, *Parsons v. Union Planters Bank*, 280 F.3d 1185, 1188 (8th Cir. 2002). On a motion for summary judgment, “the moving party has the burden of proof and [] the nonmoving party has the benefit of that view of the evidence which is most favorable to him.” *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955). State law governs what is the debtor’s “property” at the time of the bankruptcy petition, but whether it becomes property of the bankruptcy estate is a question of federal law. *In re N.S. Garrott & Sons*, 772 F.2d 462, 466 (8th Cir. 1985); see also *Raleigh v. Illinois Dep’t of Revenue*, 530 U.S. 15, 20, 120 S. Ct. 1951, 1955 (2000).

A bankruptcy debtor lacks standing in causes of action over property that belongs to the bankruptcy estate, as the debtor no longer has an interest in that property. See *Leffler*, 602 N.W.2d at 423. When a debtor files a bankruptcy petition, “all legal or equitable interests of the debtor in property as of the commencement of the case” become interests

² While Stepnes did not specify a cause of action in his pleadings, he asserted in response to Trautman’s motion for summary judgment that the case presents an issue of unjust enrichment.

of the bankruptcy estate. 11 U.S.C. § 541(a)(1) (2014); *see also Sundaev. Scot*, 529 N.W.2d 362, 363 (Minn. App. 1995), *review denied* (Minn. May 31, 1995). Chapter 7 bankruptcy estates do not include the debtor’s earnings from post-petition services. *See* 11 U.S.C. § 541(a)(1); *Harris v. Viegelahn*, 575 U.S. 510, 135 S. Ct. 1829, 1835 (2015); *Longaker v. Bos. Sci. Corp.*, 715 F.3d 658, 661 (8th Cir. 2013). When a post-petition payment is based on “the debtor’s *pre- and post-petition services*, the payment is divided, pro rata.” *Longaker*, 715 F.3d at 661 (emphasis added) (citing *In re Wick*, 276 F.3d 412, 416-17 (8th Cir. 2002)).

Here, viewing the evidence in the light most favorable to Stepnes shows that he marketed the property for eight months, including approximately one month post-petition. The bankruptcy estate has an interest in Stepnes’s pre-petition work, but Stepnes has an interest in his post-petition work.

Trautman acknowledges that Stepnes claims that he worked post-petition, but she relies on *Segal v. Rochelle*, 382 U.S. 375, 380, 86 S. Ct. 511 (1966), *Parsons*, 280 F.3d 1185, and *Sundaev*, 529 N.W.2d 362, to argue that his claim “arose out of his pre-petition marketing efforts” and is “rooted in his pre-bankruptcy past.” Trautman’s reliance on these cases is misguided, as they did not involve payments based on the debtor’s post-petition services. *See Segal*, 382 U.S. at 380-81, 86 S. Ct. at 515-16 (involving loss-carryback tax-refund claims earned from pre-petition payment of taxes and net operating losses, which could not be claimed until post-petition tax filing); *Parsons*, 280 F.3d at 1188 (concluding debtor’s commission from pre-petition work and pre-petition property sale became estate property because debtor entitled to commission at time of petition and post-petition

services not necessary); *Sundae*, 529 N.W.2d at 363, 365 (involving defamation and abuse-of-process claims based on post-petition statements by others about pre-petition real property already part of estate). Here, the property sold after Stepnes’s petition, and Trautman points to no legal or equitable theory that would have entitled Stepnes to the compensation he now seeks at the time of his February 2, 2018 petition.

We conclude that Stepnes has an interest in the payment based on his post-petition work and therefore has standing.

D. Summary judgment is proper because Minn. Stat. § 82.85 bars Stepnes’s claim.

The district court did not reach Trautman’s argument that section 82.85 bars Stepnes’s equitable claim for commission. “[W]e may affirm a summary judgment if there are no genuine issues of material fact and if the decision is correct on other grounds.” *Winkler v. Magnuson*, 539 N.W.2d 821, 827 (Minn. App. 1995) (quoting *Northway v. Whiting*, 436 N.W.2d 796, 798 (Minn. App. 1989), *review denied* (Minn. Feb. 13, 1996)).³

In both his response to Trautman’s motion for summary judgment and his arguments at the summary-judgment motion hearing, Stepnes asserted that the Bridge Realty listing cover sheet served as the written agreement needed for him to pursue a commission. The parties do not dispute the existence or contents of this document, but only whether it meets the requirements of a “written agreement” under section 82.85. The interpretation of a

³ Stepnes does not provide appellate briefing on this issue beyond a footnote stating that the issue is not before this court because the district court did not reach it and that Trautman “waived” it by not including it in an answer. Trautman provided thorough briefing on the issue in her motion for summary judgment, and she references it on appeal.

statute presents a question of law, which we review de novo. *Cocchiarella v. Driggs*, 884 N.W.2d 621, 624 (Minn. 2016).

Section 82.85 prohibits civil suits for commission for the sale of real estate without a written agreement. Minn. Stat. § 82.85, subd. 2 (2018). We have repeatedly held that allowing claims for commission under equitable theories such as unjust enrichment would undermine this written-agreement requirement. *See, e.g., Cityscapes Dev., LLC v. Scheffler*, 866 N.W.2d 66, 72-73 (Minn. App. 2015); *Krogness v. Best Buy Co., Inc.*, 524 N.W.2d 282, 286-87 (Minn. App. 1994) (interpreting Minn. Stat. § 82.33 (Supp. 1993), renumbered to section 82.85), *review denied* (Minn. Jan. 25, 1995). Parties can meet the written-agreement requirement through substantial compliance with the 11 listing-agreement requirements in Minn. Stat. § 82.66, subd. 1(a), (b) (2018). *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 325 (Minn. 2004) (interpreting Minn. Stat. § 82.195 (2002), renumbered to Minn. Stat. § 82.21, renumbered to section 82.66).

The parties here did not have a written agreement that substantially complied with Minn. Stat. § 82.66, subd. 1(a), (b). The cover sheet is not signed by either party, as required by subdivision 1(a), and it lacks a majority of the other requirements, such as “a clear statement explaining the events or conditions that will entitle a broker to a commission” and specific notice language “relating to compensation of the licensee.” Minn. Stat. § 82.66, subd. 1(b)(5), (8). Moreover, it lists Trautman as the listing agent and Stepnes as the co-listing agent, but, to the extent that it includes “the amount of any compensation or commission or the basis for computing the commission,” as required by subdivision 1(b)(4), it lists zero-percent commission next to each party. The cover sheet

does not provide for the commission that Stepnes seeks, which he claimed before the district court “comes out of the cost of doing business and not the profits.” Stepnes provides no related written agreement. Because Stepnes has not produced a written agreement between the parties that substantially complies with section 82.66, subdivision 1(a), (b), section 82.85 bars his claim for commission, and summary judgment for Trautman is proper on that basis.

III. The district court properly denied Stepnes’s motion for summary judgment to enforce a settlement agreement.

Stepnes argues that he is entitled to summary judgment because he and Trautman entered into a settlement agreement, which Trautman breached by filing for removal to district court. We disagree.

A party may seek to enforce a settlement agreement by filing a motion for summary judgment in the underlying lawsuit. See *Voicestream Minneapolis, Inc. v. RPC Properties, Inc.*, 743 N.W.2d 267, 271-72 (Minn. 2008). “A settlement agreement is a contract.” *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 581-82 (Minn. 2010). The existence of a contract is a question of fact, *Morrisette v. Harrison Int’l Corp.*, 486 N.W.2d 424, 427 (Minn. 1992), but summary judgment is appropriate if “a rational trier of fact could not find for the nonmoving party” based on the record as a whole, *Cargill Inc. v. Jorgenson Farms*, 719 N.W.2d 226, 232 (Minn. App. 2006). A contract requires “a definite offer and acceptance” with assent of the parties to the essential terms of the agreement. *Jallen v. Agre*, 119 N.W.2d 739, 743 (Minn. 1963).

The district court denied Stepnes's motion for summary judgment, determining that, even viewing the emails between the parties in the light most favorable to Stepnes, Stepnes and Trautman did not enter into an enforceable settlement agreement. It reasoned that Trautman's email to Stepnes proposing the settlement required a "full release" for "any related properties" and contemplated a later finalized agreement. It further explained that Stepnes's agreement to Trautman's email formed only an "agreement to agree," which is not a binding contract. *See First Trust Co. v. Holt*, 361 N.W.2d 476, 479 (Minn. App. 1985), *review denied* (Minn. Apr. 18, 1985); *see also Northway*, 436 N.W.2d at 799 (concluding preliminary agreement conditioned on later final agreement not enforceable).

The parties' emails show that Trautman's offer contemplated a later agreement. Her email asks for a signed release of the judgment as well as a full release of her, her company, and any related properties. Her email did not define these related properties. After Stepnes responded, "Ok, I will agree," Trautman stated that she would begin drafting the paperwork. The release Trautman sent was the later agreement that her first email contemplated. Stepnes rejected this agreement. The terms of the release were essential terms on which the parties failed to agree. *See Jallen*, 119 N.W.2d at 741.

Stepnes nonetheless claims that these actions form an enforceable agreement. But he characterizes the settlement agreement as an accord and cites to caselaw regarding executory accords, such as *Daly v. Chicago & N. W. Ry. Co.*, 114 N.W.2d 682, 684-85 (Minn. 1962). These cases are factually distinguishable from the case here. *See Dykes*, 781 N.W.2d at 581-82 (describing settlement agreements); *see also Don Kral Inc. v.*

Lindstrom, 173 N.W.2d 921, 923 (Minn. 1970) (describing when an accord and satisfaction discharge prior debt).

Stepnes also argues that the district court should have construed his motion as one to amend his pleadings to present a breach-of-settlement-agreement claim. We give “wide discretion” to the district court’s decision to permit or deny amendments to pleadings. See *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But Stepnes did not present his motion as one to amend his pleadings, and he filed it after the 21 days within which Minn. R. Civ. P. 15.01 allows for an amendment of pleadings. Moreover, “[a] motion to amend a complaint is properly denied when the additional claim could not survive summary judgment.” *Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). The district court effectively determined this when it stated that the parties did not form an agreement. The district court did not abuse its discretion by construing his motion as one for summary judgment and not one to amend his complaint to add an underlying breach-of-settlement-agreement claim. Because we conclude that the undisputed evidence shows that the parties did not form an agreement, the district court properly denied Stepnes’s motion for summary judgment to enforce a settlement agreement.

Affirmed; motion denied.