This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0711

A Business Solutions Company LLC,
d/b/a AFOX Solutions, LLC, a LGBTE Company, et al.,
Appellants,

vs.

American Business Forms, Inc. d/b/a
American Solutions for Business,
Respondent.

Filed March 4, 2024
Affirmed
Segal, Chief Judge

Pope County District Court
File No. 61-CV-21-452

Anna M. Swiecichowski, V. John Ella, Fafinski Mark & Johnson, P.A., Eden Prairie, Minnesota (for appellants)

Joseph A. Nilan, Joshua A. Dorothy, Gregerson, Rosow, Johnson & Nilan, Ltd., Minneapolis, Minnesota (for respondent)

Considered and decided by Schmidt, Presiding Judge; Segal, Chief Judge; and Ross, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellants—an independent sales representative company and its owner—challenge the district court's grant of summary judgment to respondent distributor, dismissing appellants' claims for unpaid commissions and tortious interference with contractual relations. Appellants also challenge the district court's grant of summary judgment to respondent on its counterclaim for sums allegedly owed under the parties' independent-contractor agreement. Because appellants fail to establish the existence of a genuine issue of material fact and we discern no error of law, we affirm.

FACTS

This case arises out of a dispute over an order for face masks placed shortly after the start of the global COVID-19 pandemic. The following facts are undisputed, except as otherwise noted.

Respondent American Business Forms, Inc., which does business as American Solutions for Business (ASB), is a national distributor of promotional and other products. Appellant A Business Solutions Company LLC, doing business as AFOX Solutions, LLC entered into an independent sales representative agreement with ASB in 2018 (the agreement). Appellant Lori Edgington is the owner and chief executive officer of A Business Solutions Company. We refer hereinafter to appellants collectively as AFOX.

Under the terms of the agreement, ASB was to fulfill product orders and handle client billing for AFOX, while AFOX was to provide "marketing and selling efforts." Section six of the agreement specified that "[c]omissions shall be earned by and paid to [AFOX] based on sales of and receipt of payment for the [p]roducts . . . less any deductions permitted by this Agreement (i.e., uncollectible accounts, returned items, Bad Debts, inventory write off, etc. . . .)."

In April 2020, after the start of the global COVID-19 pandemic, ASB began offering personal protective equipment for sale through a supplier, Hit Promotional Products. The items available were shared with AFOX via a deck of PowerPoint slides. The slide deck was divided into sections setting out the available varieties of protective eye wear, isolation gowns, disposable gloves, "regular 3-ply face masks," and KN95 face masks. The applicable section of the slide deck—the "regular 3-ply face masks" section—contained eleven slides. The first slide identified different varieties of the masks. In a row labeled "Certifications" positioned at the top of the slide were the following series of letters and numbers: "CE EN 1463:2014 testing, CE, LA, FDA ISO13485, ISO9001, ISO14001 certificates." This slide was followed by three slides with photographs of masks and a carton, and seven slides picturing various certification documents.

AFOX shared information about the masks available from Hit with a customer, L.G. & E. The customer advised Edgington in an email that it wanted to order 50,000 disposable masks as highlighted on the attachment. The attachment, which appears to be the same slide that had been sent to AFOX by ASB, contained four different mask types with the SKU numbers CUSTOM-DM, CUSTOM-MM, CUSTOM-SM, and CUSTOM-SM2. The first three masks were described by the weights of the three layers, with the only difference being an increasing weight for the middle layer of the three-ply mask. The fourth mask, the CUSTOM-SM2 mask, was described as a "Level 2 Surgical 3-ply Mask." The masks varied in price, with the least expensive mask being the CUSTOM-DM. The CUSTOM-MM mask was next in line, followed by the CUSTOM-SM. The CUSTOM-SM2 mask was the most expensive. While the highlighting is not apparent in the copy of the attachment in the exhibits, the record reflects that L.G. & E. selected the CUSTOM-MM mask after AFOX assured L.G. & E. that the CUSTOM-MM masks met an "EN 14683 – Type II" standard. AFOX then placed an order with ASB for 50,000 of the "CUSTOM-MM" face masks. The wholesale cost of the order to AFOX was $21,500. ASB in turn ordered 50,000 masks from Hit on behalf of AFOX. After Edgington emailed ASB that the order appeared to have been placed for the CUSTOM-DM mask, ASB advised Edgington that the error had been corrected and was for Hit's CUSTOM-MM mask.

The face mask order was delayed and AFOX ultimately purchased face masks for L.G. & E. from a different supplier at a higher cost. The president of ASB then advised AFOX that ASB would "cancel the Hit order unless you have a customer that is going to prepay for that order." Edgington chose to keep the Hit order, stating, "I know I can sell and re-coup my losses on this order." ASB confirmed that AFOX wanted to keep the order and ASB's president advised Edgington in an email, "I'll agree to keeping this order going and you can find someone to buy them or we will hit your [ledger of commission payments] for the cost when they arrive." The masks arrived at ASB's warehouse in June 2020 and ASB provided AFOX with a sample from the order a few days later.

AFOX did not find a buyer for the face masks ordered from Hit and, in October 2020, ASB billed AFOX's account for $21,500 for the 50,000 face masks sitting in its warehouse.

In March 2021, AFOX requested additional samples and copies of the certifications for the masks. ASB provided a sample box of the masks that had been delivered along with a test report from Guangdong Testing Institute reflecting that the masks passed testing for the "GB/T 32610-2016 Technical specification of daily protective mask." AFOX emailed ASB in early April and told them that the masks in the warehouse were not the masks it ordered because they were not "FDA certified" and did not have a "level 1 ASTM rating." ASB responded to AFOX with its own communications and information from Hit, advising Edgington that the Hit masks she ordered were never represented as FDA certified or as medical/surgical masks with a level 1 ASTM rating.

ASB terminated its agreement with AFOX on April 27, 2021. A day later, ASB sent a letter to AFOX's customers serviced by ASB, stating "your salesperson from [ASB], Lori Edgington, is no longer affiliated with our company." ASB directed customers to an ASB employee for "this time of transition."

AFOX subsequently commenced this suit against ASB. The complaint contains seven counts, including a count seeking a declaratory judgment that AFOX "is owed at least $21,500 in earned and unpaid commissions," two counts for breach of contract, and one count each for unjust enrichment, breach of covenant of good faith and fair dealing, and recovery of unpaid commissions pursuant to Minn. Stat. § 181.145 (2022). The complaint also includes a count for tortious interference with contractual relations alleging that ASB improperly interfered with AFOX's agreements with its clients after ASB terminated its relationship with AFOX. ASB asserted a counterclaim for breach of contract against AFOX seeking unreimbursed costs and expenses. After the close of discovery, ASB moved for summary judgment in its favor on both the complaint and its counterclaim.

The district court granted ASB's motion. As the grounds for dismissing AFOX's complaint, the district court determined that AFOX had failed to establish the existence of a genuine issue of material fact to counter ASB's evidence that

> (1) [ASB] delivered the masks that were ordered and that no Level 1 ASTM certification was promised or guaranteed with respect to the masks at, or before, the order; (2) ASB provided AFOX an opportunity to cancel the order and not be charged for the order, but AFOX confirmed the order and accepted that their account would be charged; (3) ASB has no claim to the masks although AFOX has not taken delivery of them (but may); (4) ASB was unaware of any exclusive contract between AFOX and its customers; and (5) that the communication sent to AFOX's customers after the end of the AFOX/ASB relationship was accurate.

On ASB's counterclaim, the district court determined that ASB was entitled to summary judgment in its favor in the amount of $20,831.87. Finally, after ASB submitted affidavits detailing its expenses, the district court awarded ASB attorney fees and costs pursuant to the terms of the agreement.

DECISION

On appeal, AFOX argues that the district court's order granting summary judgment must be reversed because AFOX presented evidence demonstrating that there are genuine issues of material fact and that the district court misapplied Minn. Stat. § 181.145. AFOX further argues that the district court erred in granting summary judgment to ASB on its counterclaim because AFOX's account should not have been charged for the mask order and because ASB's evidence of damages was speculative and therefore insufficient. In our analysis, we address first AFOX's challenges to the dismissal of its complaint and then address AFOX's challenge to the grant of summary judgment on ASB's counterclaim.

Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01. This court reviews "a district court's summary judgment decision de novo." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). "Summary judgment is appropriate as a matter of law when the record is devoid of proof of an essential element of the plaintiff's claim." *Cargill Inc. v. Jorgenson Farms*, 719 N.W.2d 226, 232 (Minn. App. 2006). In reviewing the record, the evidence is viewed 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. 2002). In opposing a motion for summary judgment, the nonmoving party must do more than rely on "unverified and conclusionary allegations" to establish a genuine issue of material fact. *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) (quotation omitted); *see Peterson v. Am. Fam. Mut. Ins. Co.*, 160 N.W.2d 541, 545 (Minn. 1968).

I. The district court did not err in granting summary judgment dismissing AFOX's complaint.

A. AFOX failed to establish a genuine issue of material fact that the order it placed with ASB was for FDA certified masks with a level 1 ASTM rating.

The counts in AFOX's complaint, with the exception of the tortious interference count, are all premised on the same factual claim—that the masks that were delivered to ASB's warehouse were not the "type, quality, and certification level" of the masks AFOX ordered and, consequently, AFOX should not have been charged for the order.[1] Because the counts share this factual premise, we address the counts as a group.

In support of its motion for summary judgment, ASB presented evidence that the CUSTOM-MM masks were never represented as being either "FDA certified" or having a "level 1 ASTM" rating. This placed the burden on AFOX to present evidence establishing a genuine issue of fact that ASB made such representations, a burden never fulfilled by AFOX.

AFOX claims that representations of an FDA certification and ASTM rating were contained in the PowerPoint slides ASB provided to AFOX. The slides, however, fail to support AFOX's claim. The slide referenced by L.G. & E. when it was placing its order, which appears to be the same slide ASB represents that it provided to AFOX, described the CUSTOM-MM mask only as a three-ply mask with three layers of different weights: "PP non woven 25g, melt blown 25-28g, PP non woven 20g." The slide also identified a mask that may have satisfied L.G. & E.'s criteria, the "CUSTOM-SM2" mask, which is described as a "Level 2 Surgical 3-ply Mask." But that is not the mask that AFOX ordered.

AFOX asserts that the letters "FDA" appeared at the top of the slide in the list of certifications and that this meant that the CUSTOM-MM mask had been certified by the FDA. However, this assertion appears to be based on mere conjecture by AFOX. *See*

[1] AFOX also argues that the location of the masks is an issue of fact, but AFOX presented no evidence in opposition to ASB's evidence that the masks are at its warehouse, ready to be picked up or delivered. The argument thus falls short of establishing an issue of fact. Moreover, the argument appears to be nothing more than a restatement of AFOX's claim that the masks at the warehouse are not the masks AFOX ordered.

Dyrdal v. Golden Nuggets, Inc., 689 N.W.2d 779, 783 (Minn. 2004) ("The party opposing summary judgment may not establish genuine issues of material fact by relying upon unverified and conclusory allegations, or postulated evidence that might be developed at trial, or metaphysical doubt about the facts."). While "FDA" appears in the list of certifications at the top of the first slide, it was followed immediately by several ISO numbers, which reference quality manufacturing standards, not product certifications. To this point, two of the subsequent slides in the "regular 3-ply face masks" section of the slide deck contained copies of certificates that indicate compliance with the ISO 9001:2015 and ISO 13485:2016 quality manufacturing standards.

Two other slides included in that section of the deck contained copies of certificates showing that the manufacturing companies have "completed the FDA Establishment Registration (as manufacturer, foreign exporter)." But again, these certificates do not state that the FDA has certified any model of mask; the slides appear to show only that the manufacturing companies have FDA registration numbers.

Finally, there is no reference anywhere in the "regular 3-ply masks" section of the slide deck, or in any other communication from ASB in the record, that the CUSTOM-MM masks had a "level 1 ASTM" rating. Indeed, "ASTM" appears nowhere in the "regular 3-ply masks" section of the slide deck.

As its next line of argument, AFOX asserts that ASB represented that the CUSTOM-MM masks satisfied the standards for an EN 14683 rating. AFOX contends that an EN 14683 rating is equivalent to a level 1 ASTM rating.[2] But even if that is true, AFOX still fails to establish that ASB represented the CUSTOM-MM face masks as satisfying the EN 14683 standard.

The section of the PowerPoint slide deck for the three-ply masks included a slide showing a copy of a "Declaration of Conformity" with the requirements of "EN 14683: 2014." A second slide contained a copy of a test report showing compliance with a GB2626-2006 standard for respiratory protective equipment. Neither slide identified the mask type that was tested—the CUSTOM-DM, CUSTOM-MM, CUSTOM-SM, or CUSTOM-SM2. AFOX presented no evidence to demonstrate that the EN 14683 certification document related to the CUSTOM-MM mask, as opposed to the CUSTOM-SM2 or another mask. This argument thus also falls short of the mark.

Finally, AFOX points to a test report, the Intertek report, claiming that this report demonstrates that ASB represented the CUSTOM-MM face masks as satisfying the EN 14683 rating. The Intertek report reflects that it tested for "Bacterial Filtration Efficiency," "Differential Pressure," and "Resistance to Penetration by Synthetic Blood" under several different parts of the "EN 14683:2019" standard. While the Intertek report is in the record, AFOX failed to provide any evidence about when the Intertek report was provided to AFOX and what, if any, representations were made by ASB in connection with that report.

[2] Edgington stated in her declaration filed in support of AFOX's opposition to ASB's summary-judgment motion, that an EN 14683 rating is the same as a level 1 ASTM rating. AFOX provided no support for this allegation other than a website page allegedly prepared by the Kansas Department of Health and Environment that sets out three different ASTM levels and that references "EN 14683:2019, Annex C" in connection with one of the five performance tests of "ASTM F2100."

In the Edgington declaration provided by AFOX in opposition to summary judgment, it simply states that the Intertek report was provided, but not when it was provided. This is a significant omission because the Intertek report is dated May 6, 2020. AFOX placed its order for the CUSTOM-MM masks on April 7, 2020, almost a month *before* the date of the Intertek report. And it was also in April that AFOX was given the opportunity to cancel the Hit face mask order but declined. In addition, AFOX provided no evidence to show that the mask tested by Intertek was the CUSTOM-MM mask. This argument thus also fails to demonstrate the existence of a genuine issue of material fact.

In short, while the record contains communications between AFOX and L.G. & E. about whether the CUSTOM-MM mask had an EN 14683 rating, AFOX points to no representation *by ASB* to that effect. And AFOX's order specified only that it was ordering Hit's CUSTOM-MM mask, not that it was ordering a mask certified by the FDA or that had a "level 1 ASTM" or an "EN 14683" rating. We therefore conclude that AFOX failed to establish a genuine issue of material fact that ASB represented the CUSTOM-MM masks as meeting any of the ratings that AFOX is claiming. Because all but AFOX's claim for tortious interference with contractual relations are premised on its argument that the masks delivered were not the masks that it ordered, we affirm the district court's order granting summary judgment on these claims.

B. The district court did not err in dismissing AFOX's claim under Minn. Stat. § 181.145.

AFOX argues that, regardless of whether it established a genuine issue of material fact concerning the mask certifications, it is owed commissions and a statutory penalty for nonpayment pursuant to section 181.145 of the Minnesota statutes. That section provides in part that when a commission salesperson is terminated or resigns, the firm "shall promptly pay the salesperson, at the usual place of payment, commissions earned through the last day of employment." Minn. Stat. § 181.145, subd. 2(a). Subdivision 1 of the statute states that "the phrase 'commissions earned through the last day of employment' means commissions due for services or merchandise which have actually been delivered to and accepted by the customer by the final day of the salesperson's employment." *Id.*, subd. 1.

AFOX maintains that ASB violated the statute because it was not paid all commissions earned through the last day of employment. The statute, however, specifically allows an employer to "audit and adjust the accounts of the salesperson before the salesperson can demand commissions," if the commission involves "collection, disbursement, or handling of money or property." *Id.*, subd. 2(d). Here, the commissions involved face masks—a type of "property"—and the statute thus allowed ASB to "audit and adjust" AFOX's account. The parties' independent contractor agreement specifically allowed ASB to make deductions from AFOX's account for such items as "uncollectible accounts, returned items, Bad Debts, inventory write off, etc." In addition, Edgington was specifically advised by ASB's president that her account would be charged for the cost of the face mask order if she was not able to find a buyer.

We thus conclude that, because the statute explicitly allows for an audit and adjustment of an independent contractor's commissions, the district court did not err in dismissing AFOX's claim under Minn. Stat. § 181.145.

C. AFOX failed to present evidence that ASB had knowledge of an allegedly exclusive contract between AFOX and its clients and the district court thus did not err in dismissing AFOX's claim for tortious interference with contractual relations.

AFOX asserts that it had a "verbal agreement with each client to work exclusively with [Edgington] to source the client's branded marketing products." In its tortious-interference claim, AFOX alleges that ASB interfered with those alleged agreements when ASB sent letters to AFOX's clients advising them that AFOX was no longer affiliated with ASB, but that ASB could still handle their accounts. The elements of a tortious-interference-with-contract claim are: "(1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages." *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994) (quotation omitted). The district court dismissed AFOX's tortious-interference claim on the ground that AFOX failed to provide evidence to support the second element—that ASB had knowledge of any exclusive contract between AFOX and its clients.

We discern no error in the district court's conclusion. Through Edgington's declaration, AFOX asserted that it invested time and effort in developing its client relationships and that it had an exclusive "verbal agreement" with each client, but nowhere does AFOX even allege, let alone offer evidence, that ASB had any knowledge of such agreements.

AFOX also alleges that ASB disparaged AFOX and that this constituted improper interference. But AFOX did not plead a claim for tortious interference with *prospective* contractual relations. *See Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 219 (Minn. 2014) (stating elements of a claim for interference with prospective economic advantage, also known as interference with prospective contractual relations). And even if AFOX had pleaded such a claim, AFOX failed to bring forward evidence to support the claim.

As the district court noted, the letter from ASB to AFOX's clients did not contain any disparaging comments. The letter merely advised AFOX's customers that "your salesperson from [ASB], Lori Edgington, is no longer affiliated with our company." The letter then provided the name of another individual who could help "work thru this time of transition" and would "be able to help you with any questions and provide you with the name of a new sales associate as your contact with [ASB] to help you in the future." The mere act of sending such a letter does not constitute improper interference under the circumstances presented here. *See United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 633 (Minn. 1982) (holding that soliciting and entering into contracts with prospective customers of former employer was not improper interference); *Glass Serv. Co. v. State Farm Mut. Auto. Ins. Co.*, 530 N.W.2d 867, 871 (Minn. App. 1995) (noting there is "no liability for interference on part of one who merely gives truthful information to another" (citing Restatement (Second) of Torts § 772 cmt. b (1979))), *rev. denied* (Minn. June 29, 1995).

AFOX's claim for tortious interference thus fails as a matter of law and the district court did not err in granting ASB's motion for summary judgment on this claim.[3]

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[3] AFOX argues on appeal that ASB violated the terms of their agreement because ASB terminated the agreement without providing 30 days' notice. The agreement only allows

II. The district court did not err in granting ASB summary judgment on its counterclaim.

AFOX argues that the district court erred in granting summary judgment to ASB on ASB's breach-of-contract counterclaim because the cost of the CUSTOM-MM mask order should not have been charged against Edgington's commissions account and because the ledger ASB provided as evidence of the amounts owed by AFOX failed to satisfy ASB's burden of proof to support its counterclaim. We are not persuaded.

The agreement between ASB and AFOX allowed ASB to charge back against AFOX's commissions any "Bad Debts." Bad debts, as denoted in the agreement, included "Any vendor invoice which for any reason cannot be billed to a customer, plus 20% of the invoiced amount." The cost of the CUSTOM-MM order was a bad debt under the agreement because the cost of the order could not be "billed to a customer." And under the agreement, AFOX's commissions were paid "less any deductions permitted by this Agreement (i.e., uncollectible accounts, returned items, Bad Debts, inventory write off, etc. . . .)." Thus, we discern no error by the district court in its determination concerning ASB's deduction of $21,500 from AFOX's commissions account.

As to AFOX's argument that ASB's evidence was too speculative, ASB provided ledger reports indicating specific dates and totals for each charge to AFOX's commissions account with its summary-judgment motion. We agree with the district court's conclusion

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for termination without notice when the termination is for "good cause." AFOX, however, failed to assert a claim for breach based on this allegation in its complaint and did not argue this before the district court. We thus decline to address this new issue on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

that ASB's evidence was sufficient to shift to AFOX the burden of producing evidence contesting the ledger items. AFOX, however, failed to provide any evidence to challenge the ledger calculations, other than its argument that it should not have been charged for the CUSTOM-MM mask order. In the absence of any evidence provided by AFOX to counter the ledger calculations, we discern no error by the district court in granting summary judgment to ASB on its counterclaim.[4]

Affirmed.

[4] We also note, contrary to AFOX's argument, that the district court does not appear to have double counted amounts in the two ledger reports submitted by ASB. Although the reports overlap in time periods covered, the entries in the two reports appear to relate to different items.