STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0935

Michael N. Palm, Sr.,
Appellant,

vs.

Bernie McBain,
Respondent.

Filed June 4, 2018
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-15-9924

Michael N. Palm, Sr., Wayzata, Minnesota (pro se appellant)

Kay Nord Hunt, Michael C. Glover, Jason E. Engkjer, Lommen Abdo, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Smith, Tracy M., Judge; and Bratvold, Judge.

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

CONNOLLY, Judge

Appellant challenges the judgment granted to respondent after a court trial on appellant's claims of breach of fiduciary duty and misrepresentation by omission, arguing

that the record does not support the district court's findings that respondent's breaches of fiduciary duty did not cause appellant's damages and that appellant did not rely on respondent's omissions. Because ample evidence supports the district court's findings, we affirm.

FACTS

In 2006, appellant Michael Palm and respondent Bernie McBain formed Rink Properties LLC (Rink) and 88s Rink LLC (88s) (collectively, Rink Entities) to start an ice arena. Appellant and respondent were the managing partners, officers, members, and directors of Rink Entities. Rink Entities borrowed money from a group of five lenders; the loan was repaid.

Appellant individually had previously borrowed from four of those lenders, who had formed TNNL Capital Inc. (TNNL), for his own purposes. In 2004, he borrowed $225,000 and $500,000; in 2005, he borrowed $350,000, and in 2006, he increased the $500,000 note to $808,131.94. In 2007, appellant defaulted on his loans. He gave TNNL a confession of judgment, entered into the 2007 Forbearance Agreement, and later defaulted on that agreement.

In 2008, TNNL agreed to the 2008 Forbearance Agreement, which required appellant to repay a consolidated loan of $1,150,000 by December 31, 2008, and to pledge his shares in Rink Entities. Respondent executed two Joinder of Member statements consenting to appellant's pledge of his shares in Rink Entities. Appellant defaulted on the 2008 Forbearance Agreement.

In 2009, appellant promised TNNL that he would provide a guarantor and pay the loans and interest, but he did neither. TNNL decided to foreclose on appellant's shares in Rink Entities, and a foreclosure sale was scheduled for June 2009.

In May 2009, respondent received a call from a principal of TNNL, who asked respondent if he was interested in purchasing appellant's shares. Respondent said he was interested. TNNL foreclosed on appellant's shares and notified appellant that it would pursue enforcement of the confession of judgment; judgment was entered for TNNL against appellant in the amount of $1,408,509.09. In December 2009, this amount was reduced to $800,000 in the Stipulation of Settlement, in which appellant agreed to the validity of the sale and said he had transferred all his known and unknown interests in Rink Entities to TNNL.

In June 2015, appellant, acting pro se, brought this action against respondent. Following respondent's motion to dismiss and appellant's motion to amend the complaint, two claims survived: breach of fiduciary duty and misrepresentation by omission. The district court denied respondent's motion for summary judgment and, following a court trial, entered judgment for respondent on both claims.

Appellant challenges that judgment, arguing that the record does not support the district court's findings of fact and conclusions of law that appellant failed to prove the causation requisite to his breach-of-fiduciary-duty claim and that respondent is not liable to appellant for misrepresentation by omission.

D E C I S I O N

> In an appeal from a bench trial, we do not reconcile conflicting evidence. We give the district court's factual findings great deference and do not set them aside unless clearly erroneous. However, we are not bound by and need not give deference to the district court's decision on a purely legal issue. When reviewing mixed question of law and fact, we correct erroneous applications of law, but accord the [district] court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard.

Porch v. Gen. Motors Acceptance Corp., 642 N.W.2d 473, 477 (Minn. App. 2002) (alteration in original) (quotations and citations omitted), *review denied* (Minn. June 2, 2002).

1. Breach-of-Fiduciary-Duty Claim

The elements of a breach-of-fiduciary-duty claim are the same as the elements of a negligence claim. *Padco, Inc. v. Kinney & Lange*, 444 N.W.2d 889, 891 (Minn. App. 1989). Those elements are: (1) a duty, (2) breach of that duty, (3) causation, and (4) injury, harm, or pecuniary damage. *Gradjelick v. Hance*, 646 N.W.2d 225, 233 (Minn. 2002).

Respondent had a fiduciary duty to appellant under Minn. Stat. § 322C.0409, subd. 1 (2016) (providing that members of member-managed limited liability companies owe one another fiduciary duties). The district court concluded that respondent breached that duty by informing a principal of TNNL, John Trautz, that respondent was interested in purchasing appellant's shares if TNNL foreclosed. But the district court rejected "[appellant's] assertion that the main reason TNNL executed on his Rink and 88s collateral was that [respondent] informed TNNL that he was interested in purchasing [appellant's] shares" and concluded that "[respondent's] interference with [appellant's] efforts to avoid

foreclosure or protect his shares [] did not cause [appellant's] ultimate loss of his shares." The district court continued,

> It was [appellant's] failure to satisfy his lenders [i.e., TNNL]—and not any incidental interference by others—that resulted in [appellant's] loss of his interests in Rink and 88s. If [appellant] had satisfied his loan with TNNL, or obtained a satisfactory third party guarantee, TNNL would not have foreclosed on his interests in Rink and 88s. TNNL did not have a collusive agreement with [respondent] for [respondent] or the companies [i.e., Rink and 88s] to purchase [appellant's] shares in advance of TNNL's foreclosure sale.

To support this conclusion, the district court relied on the testimony of Trautz and another TNNL principal, Steven Loe, noting "[They] testified, and the [district c]ourt finds, that [appellant] had made too many broken promises, a situation which was exacerbated by the pressure TNNL's own banks were putting on them to make good on non-performing loans. As a consequence TNNL scheduled a foreclosure sale . . . ."

The transcript supports the district court's finding. Loe testified that he took over dealing with appellant's TNNL loans, that he had not met respondent, that respondent had no part in TNNL discussions about requiring appellant to provide his shares in Rink Entities as collateral; and that neither respondent nor respondent's purchase of appellant's shares in Rink Entities had any influence over TNNL's decision to foreclose.

Trautz testified that TNNL initially believed appellant could find ways to repay his loans, that respondent was not part of and had no influence in TNNL's discussions as to what should be done with appellant's unpaid loans, that respondent was not part of the discussion or decision to foreclose on appellant's Rink Entities shares, and that there was

no prearranged sale of the share to respondent and no discussion of the price of the shares with him.

Thus, the district court's finding that respondent was not the cause of TNNL's decision to foreclose was not clearly erroneous, and that finding supports the district court's conclusion that appellant did not show the causation necessary for his breach-of-fiduciary-duty claim.

2. Misrepresentation-by-Omission Claim

A claim for misrepresentation by omission requires a showing that one party had a duty to disclose and did not disclose a fact to another party, that the nondisclosing party intended the other party to rely on the omission, that the other party did rely on the omission, and that the other party had pecuniary damage as a result of the reliance. *See Specialized Tours v. Hagen*, 392 N.W.2d 520, 532 (Minn. 1986) (giving elements of misrepresentation).

Appellant alleged in his complaint that "[respondent] deceitfully conspired with [TNNL] to acquire [appellant's] shares of membership units without disclosing or communicating this secretive plan to [appellant]." The district court found that "the communications between TNNL (Trautz) and [respondent] occurred on or about May 15, 2009, only days before [respondent] informed [appellant] of the conversation. Further, [respondent] informed [appellant] of his communication with Trautz prior to the date of the foreclosure sale."

Appellant provides no evidence other than his own speculative testimony to refute this finding, and the transcript supports the finding. When Trautz testified that he recalled

asking respondent if respondent had any interest in buying appellant's shares, appellant asked, "When was that?" and Trautz answered, "It was shortly before the foreclosure sale." Thus, there was no misrepresentation by omission in regard to that conversation.

Moreover, even if there had been such a misrepresentation, appellant does not explain either how he relied on it or what pecuniary damage he suffered as a result of that reliance. The record supports the conclusion that appellant failed to make a claim for misrepresentation by omission.

Affirmed.