IN THE COURT OF APPEALS OF IOWA

No. 3-867 / 12-2242
Filed December 5, 2013

AMERICAN BANK AND TRUST COMPANY, N.A.,
Plaintiff,

vs.

CHRISTINE LEYDEN, JEFF GENNARELLI and BRIDGEVIEW BANK MORTGAGE COMPANY, LLC,
Defendants.

JEFF GENNARELLI,
Counterclaimant-Appellant,

vs.

AMERICAN BANK AND TRUST COMPANY, N.A.,
Counterclaim Defendant-Appellee.

Appeal from the Iowa District Court for Scott County, Mary E. Howes, Judge.

Former bank employee appeals following a jury verdict in favor of the bank on his breach-of-contract counterclaim. **AFFIRMED**.

Bridget R. Penick of Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, and Ari Karen and Stanley Todman of Offit Kurman, P.A., Maple Lawn, Maryland, for appellant.

Cameron A. Davidson and Jeffrey D. Wright of Pappas, Davidson, O'Connor & Fildes, P.C., Rock Island, Illinois, for appellee.

Heard by Doyle, P.J., and Tabor and Bower, JJ.

TABOR, J.

This case involves an employment dispute between American Bank and Trust Company (ABT) and Jeff Gennarelli, its former regional vice president. After Gennarelli quit his job, ABT sued for an alleged breach of restrictive covenants. Gennarelli filed a counterclaim, alleging ABT first breached the employment contract by failing to pay agreed-upon commissions. The district court denied Gennarelli's motion for partial summary judgment and a jury returned a verdict in favor of ABT.

Gennarelli now challenges the rejection of his counterclaims for breach of contract and fraud. First, he asserts the district court erred in denying his motion for partial summary judgment. Alternatively, he contends the jury's verdict was against the weight of the evidence. Second, Gennarelli claims the court abused its discretion in excluding evidence from other former employees who claimed ABT did not honor their compensation agreements. Third, he argues the court erred in granting ABT's motion for a directed verdict on his counterclaim for fraud. Fourth, he claims the court abused its discretion by allowing ABT's corporate designees to present inconsistent testimony.

Viewing the evidence in the light most favorable to ABT, we find substantial evidence to support the jury's verdict on the breach-of-contract counterclaim. On the second issue, we see no abuse of discretion in the court's exclusion of the other complaints. On the third issue, we conclude the district court properly granted a directed verdict on Gennarelli's fraud claim. The fourth claim was not properly preserved for our review. Accordingly, we affirm.

I. Background Facts and Proceedings

In October 2007, Brian Boyles, the president of ABT's mortgage division, hired Gennarelli to be the regional vice president for its Chicago markets. Boyles was Gennarelli's boss. Under his written employment agreement, Gennarelli was entitled to commissions based upon the monthly net revenue of ABT's Chicago markets and commissions based upon his personal production as a mortgage loan officer. The agreement defined the calculation for monthly net revenue. The agreement also stated any changes or modifications to the contract had to be in writing and signed by both parties.

ABT's Chicago mortgage division started turning a profit in December 2008. ABT paid Gennarelli monthly net revenue commissions of $131,302.04 from December 2008 through November 2009. ABT contends that by November 2009 Gennarelli's compensation structure was changed "orally" with his assent. Specifically, his compensation "was changed to include a salary, personal production commission, and 7.5% of net income from Iowa and Illinois, including [ABT's] Iowa City and Quad Cities markets."

After the change to Gennarelli's compensation, he received monthly spreadsheets by e-mail from either Naomi Jones in payroll or Dale Dollenbacher, ABT's chief financial officer. ABT asserts "Gennarelli consistently responded by approving his own pay, despite the spreadsheets not including the monthly net revenue commissions" and not including "personal production commissions based on secondary gain-money."

"Secondary gain" refers to money from the sale of ABT's mortgage loans to buyers or investors on the secondary market. ABT retained some of its mortgages "in house" and sold some of its mortgage loans. ABT explains secondary gain is not realized from the closing of a loan but rather from the sale of the loan. Because Gennarelli did not sell ABT's loans on the secondary market, ABT asserts he did not "personally produce" the secondary loan gain. ABT also asserts Gennarelli was aware ABT was profiting from the secondary-market sales and despite this awareness, he sent Boyles a monthly e-mail with a spreadsheet containing the personal production commissions ABT owed him and "never included personal production commissions off the secondary gains."

While still working for ABT, Gennarelli began discussing employment opportunities with ABT competitor, Bridgeview Bank Mortgage Company (BBMC). On May 19, 2010, Gennarelli signed a transition agreement with BBMC stating that to the best of his knowledge there were "no actions, suits, proceedings, orders, investigations, or claims pending" or "threatened" against ABT. Gennarelli left his employment with ABT in June 2010.

In June 2010, ABT filed a petition alleging Gennarelli breached restrictive covenants in his employment agreement, breached his confidentiality agreement, breached the fiduciary duty he owed to ABT, and engaged in a civil conspiracy against ABT.[1] Gennarelli answered, alleging the affirmative defense that he was "excused from performing his obligations under his Employment Agreement"

[1] ABT's lawsuit also included claims against BBMC and former ABT employee Christine Leyden, who likewise joined BBMC. In 2012 ABT voluntarily dismissed its claims against BBMC with prejudice. Leyden was a co-defendant at trial but is not a party to this appeal.

because ABT first materially breached the agreement by failing to pay him commissions. Gennarelli also filed a counterclaim alleging (1) ABT breached the employment agreement by failing to pay him the compensation he was entitled to receive (i.e., ABT did not pay a portion of the personal production commissions he earned and did not pay any of the monthly net revenue commissions), and (2) ABT's conduct constituted fraud (i.e., ABT misrepresented it would pay him under the contract terms but instead it "skimmed" funds from revenue used to calculate commissions).[2] Gennarelli asserted ABT owed him $57,370.03.

Gennarelli sought partial summary judgment on his claim ABT breached the employment contract. The district court found genuine issues of material fact existed and denied the motion on September 25, 2012.

A jury trial started on October 8, 2012. At trial, Gennarelli claimed ABT failed to pay him in accordance with his employment agreement. Gennarelli testified he repeatedly complained to his boss, Boyles, about the pay discrepancy, and Boyles assured him he would be paid everything he was owed. In contrast, Boyles testified ABT did not owe Gennarelli any additional compensation. At the close of evidence, the district court granted ABT's motion for a directed verdict on Gennarelli's counterclaim for fraud.

On October 17, 2012, the jury decided Gennarelli breached his employment agreement, breached his confidentiality agreement, breached his

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[2] ABT moved for partial summary judgment. In September 2012 the district court dismissed two counts of the counterclaim alleging (1) breach of the duty of good faith and fair dealing and (2) violation of the Illinois Wage Payment and Collection Act. The next day, Gennarelli voluntarily dismissed his counterclaim for Iowa Wage Payment and Collection Act violations. After the close of evidence at trial, Gennarelli voluntarily dismissed his counterclaims for unjust enrichment and quantum meruit.

fiduciary duty, and engaged in a civil conspiracy against ABT. On Gennarelli's breach-of-contract counterclaim, the jury returned a verdict for ABT. Gennarelli appeals the rejection of his counterclaims.

II. Scope and Standards of Review

The issues raised by Gennarelli on appeal call for varying standards of review. We review his evidentiary claims for an abuse of discretion. *See Scott v. Dutton–Lainson Co*., 774 N.W.2d 501, 503 (Iowa 2009). But to the extent that his challenges to the district court's decisions to exclude or admit evidence implicate the interpretation of rules of evidence or civil procedure, our review is for errors at law. *See id.*

We review the district court's grant of a motion for directed verdict for legal error. *Royal Indem. Co. v. Factory Mut. Ins. Co*., 786 N.W.2d 839, 849 (Iowa 2010). We must decide whether reasonable minds could differ on the issue presented, and, if so, we should find the grant was inappropriate. *See* i*d.* We view the facts in a light most favorable to the nonmoving party. *See Pierce v. Staley*, 587 N.W.2d 484, 485 (Iowa 1998).

The sufficiency of the evidence supporting a jury verdict also presents a legal question reviewed for the correction of errors at law. *Estate of Hagedorn ex rel. Hagedorn v. Peterson,* 690 N.W.2d 84, 87 (Iowa 2004).

III. Analysis

A. Did the district court properly enter judgment for ABT on Gennarelli's counterclaim for breach of contract?

Gennarelli first contends the district court improperly denied his motion for partial summary judgment on the breach-of-contract counterclaim. ABT counters that the district court's denial of the summary judgment motion is not appealable because the case proceeded to a trial on the merits of that claim. We agree with ABT. After a trial on the merits, the denial of the motion for summary judgment merges with ultimate judgment. *Lindsay v. Cottingham & Butler Ins. Services, Inc*., 763 N.W.2d 568, 572 (Iowa 2009). Accordingly, we cannot consider the assignment of error relating to the denial of the motion for partial summary judgment.

The next question is whether Gennarelli preserved error on his claim regarding the sufficiency of the evidence concerning monthly net revenue compensation under his contract with ABT. Gennarelli claims he preserved error by filing a notice to appeal within thirty days of the entry of the judgment. "While this is a common statement in briefs, it is erroneous, for the notice of appeal has nothing to do with error preservation." Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice,* 55 Drake L. Rev. 39, 48 (Fall 2006) (footnote omitted); *see State v. Lange*, 831 N.W.2d 844, 846–47 (Iowa Ct. App. 2013). To preserve error, Gennarelli was required to move for directed verdict. A motion for a directed verdict must be specific, and on appeal, a litigant may only raise the grounds asserted at trial. *Mitchell v. Cedar Rapids Comm. Sch. Dist*., 832 N.W.2d 689, 695 (Iowa 2013).

Gennarelli's counsel asserted in the district court:

> I guess I would call [my motion] a partial directed verdict only in regards to the portion of the Employment Agreement that pertained to Mr. Gennarelli being paid on the revenue generated for his personal production . . . . I think there's uniform evidence on that point and that we're entitled to a directed verdict on that specific portion of the contract.

Because counsel specifically directed the district court to the personal production compensation, but did not mention the monthly net revenue compensation, Gennarelli may only challenge the personal production evidence on appeal.

We now turn to the sufficiency of the evidence that ABT breached the contract by not properly paying Gennarelli the commissions he was owed based on his personal production. Gennarelli argues he provided the "paramount evidence" in proving his breach of contract claim against ABT. He asserts none of ABT's witnesses presented at trial were a part of the negotiations to hire him. According to Gennarelli, only he and Boyles, whose deposition was read into the record, could interpret the employment contract.

Gennarelli and Boyles provided the jurors with differing views on the promised compensation. The jury, as finder of fact, was free to believe or disbelieve the testimony presented by those witnesses. See *Blume v. Auer*, 576 N.W.2d 122, 125 (Iowa Ct. App. 1997). After our review of the record, we find the weight of the evidence supports the jury's verdict. Boyles's opinion that ABT did not owe Gennarelli any additional commissions based on his personal production was echoed by the testimony of Dale Dollenbacher, ABT's chief financial officer. The evidence also supports the jury's conclusion that Gennarelli was not entitled to personal production commissions from the secondary gain as it was defined. In addition, Gennarelli's own representations to his new employer

BBMC in their transition agreement that he had no claims pending against ABT when he left his job there is consistent with the jury's verdict. On this record, the jury could reasonably conclude ABT did not breach the employment contract.

B. Did the district court properly grant a directed verdict on Gennarelli's fraud claim?

Gennarelli criticizes the district court for not letting the jury consider his fraud claim. The court determined Gennarelli did not establish a prima facie case of fraud. To prove common law fraud, Gennarelli had to show: (1) ABT made a representation to him, (2) the representation was false, (3) the representation was material, (4) ABT knew the representation was false, (5) ABT intended to deceive him, (6) he acted in justifiable reliance on the truth of the representation, (7) the representation was a proximate cause of his damages, and (8) the amount of damages. *See Dier v. Peters*, 815 N.W.2d 1, 7 (Iowa 2012). Gennarelli had to establish each element by a preponderance of clear, satisfactory, and convincing proof. *See id*.

ABT describes Gennarelli's fraud allegation as a repackaged version of his breach-of-contract claim, arguing any damages suffered by Gennarelli would stem from the original breach of contract and alleged promise to repay. ABT also argues the record contains no evidence it intended to deceive Gennarelli. Instead, ABT asserts the record reveals a legitimate dispute as to the terms of the employment contract.

The district court agreed with ABT, stating, "[I]t was a legitimate disagreement as to terms of the original contract and the later amendments."

The district court did not detect proof for the elements of fraud when "Mr. Gennarelli is saying . . . he wasn't paid under his contract, and I just don't know how you get to fraud with that."

We agree with the district court's rationale for granting the directed verdict. Simply breaching a promise is not enough, on its own, to establish fraud. As our supreme court explained:

> When a promise is made in good faith, with the expectation of carrying it out, the fact that it subsequently is broken gives rise to no cause of action, either for deceit, or for equitable relief. Otherwise any breach of contract would call for such a remedy. The mere breach of a promise is never enough in itself to establish the fraudulent intent.

Smidt v. Porter, 695 N.W.2d 9, 23 (Iowa 2005) (quoting *Magnusson Agency v. Pub. Entity Nat'l Co.-Midwest*, 560 N.W.2d 20, 29 (Iowa 1997)).

On appeal, Gennarelli tries to remove his fraud claim from the breach-of-contract realm: "The total failure to comply with the contract or explain its own actions raises a sufficient inference for a jury to conclude that ABT had no intention of compensating Gennarelli in the manner set forth in the Employment Agreement." We are not persuaded. ABT offered evidence to explain its interpretation of the employment agreement, and to show Gennarelli's assent to modification of the compensation structure. The disagreement over his commissions did not rise to the level of a knowingly false representation or intent to deceive by ABT. The directed verdict is not ground for reversal.

C. Did the district court abuse its discretion by prohibiting Gennarelli from offering evidence of other employees' experiences at ABT?

ABT filed a motion in limine seeking to prevent Gennarelli from offering evidence of the payment complaints of other former ABT employees. The district court granted ABT's motion and prohibited Gennarelli from offering evidence ABT allegedly failed to pay other employees in accordance with their agreements. At issue is the proffered testimony of Craig Stewart, a former ABT senior vice president for real estate lending hired in February of 2007, and of Frank Sommese, a former ABT regional vice president for the Chicago markets, hired in April 2008. The district court decided allowing their testimony would result in "trials within trials" and would force ABT to defend against three separate employment claims at one time.

On appeal, Gennarelli argues the district court's ruling ignored Iowa Rule of Evidence 5.404(b).[3] Gennarelli asserts he should have been allowed to present this evidence to bolster his fraud claim, citing *Midwest Home Distributor, Inc. v. Domco Indus. Ltd.*, 585 N.W.2d 735 (Iowa 1998). In *Domco*, our supreme court upheld the admission of testimony from two former distributors and a former employee on the plaintiff's fraud claim. *Domco*, 585 N.W.2d at 744-45 (finding challenged evidence was admissible to prove Domco's motive, intent, plan and knowledge regarding its scheme to defraud Midwest). Gennarelli

[3] That provision states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

argues his proffered evidence was likewise admissible to prove ABT's motive, intent, plan, and knowledge of its scheme to defraud him.

Gennarelli also argues similar claims by Stewart and Sommese were admissible under Iowa Rule of Evidence 5.406.[4] He contends their testimony would have demonstrated ABT's routine practice, through Boyles, of promising, but ultimately failing to pay commissions pursuant to employment contracts.

ABT counters the proposed testimony from its former employees raised breach-of-contract complaints that were dissimilar in kind, and in the case of Sommese, post-dated the employment agreement entered with Gennarelli. ABT also argues the probative value of the evidence would have been substantially outweighed by the danger of unfair prejudice. *See* Iowa R. Evid. 5.403. Further, ABT contends the alleged breaching of similar contracts is not habit evidence.

The district court ruled the evidence inadmissible under Rule 5.403 and 5.406. Under Rule 5.403, "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The district court had broad discretion under rule 5.403 to exclude evidence of other complaints by ABT employees, even if they were similar to Gennarelli's claim, if their admission would have required a "trial within a trial" and posed the risk of unfair prejudice,

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[4] That rule states: "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

trial delay, and jury confusion. *See Mercer v. Pittway Corp.*, 616 N.W.2d 602, 617 (Iowa 2000).

We conclude the trial court acted within its discretion in excluding this evidence. The probative value of the other acts evidence was not strong, given the difference in the employment contracts, and was substantially outweighed by the risk of unfair prejudice to ABT in defending against these collateral claims. Before us is "basically a question of practicality involving the inconvenience of trying collateral issues. The determination of the relevancy and similarity of other acts is for the trial court." *See Kunkle Water & Elec., Inc. v. City of Prescott*, 347 N.W.2d 648, 653 (Iowa 1984). Because the court did not abuse that discretion, we decline to overturn its decision.

We also agree with the district court that the evidence was not admissible under Rule 5.406. The proffered testimony of two former employees did not reveal a routine practice by Brian Boyles or other ABT officers. Gennarelli's evidence did not show the frequency of specific actions necessary to prove systematic conduct admissible under the rule. *See Simplex, Inc. v. Diversified Energy Sys., Inc*., 847 F.2d 1290, 1294 (7th Cir. 1988) (rejecting proffered evidence of other similar contract disputes).

D. Did Gennarelli preserve his claim concerning inconsistent testimony from corporate designees?

Gennarelli's final issue challenges the testimony of ABT corporate designees Julie Klaus and Dale Dollenbacher.[5] Gennarelli contends he was prejudiced because those witnesses professed to have no knowledge of his employment agreement in their depositions and then asserted at trial that they did have knowledge of the agreement. He claims he reasonably relied on their deposition testimony in preparing for trial. On appeal, he argues ABT should have been precluded from offering such inconsistent testimony or, at a minimum, the court should have instructed the jury on this issue.

ABT challenges error preservation. ABT argues Gennarelli did not timely object to the corporate designee testimony and did not submit a requested jury instruction or object to the court's failure to include an instruction. Gennarelli insists he preserved this issue for review by objecting to "the inconsistent corporate designee testimony of Klaus and Dollenbacher." In support of his claim of error preservation, Gennarelli cites to seven appendix pages, each of which include four condensed pages from the trial transcript. Accordingly, we are left to search through twenty-eight pages to discern where Gennarelli raised the precise issue before the district court that he is advancing on appeal.[6]

Moreover, when we do review those twenty-eight pages, we find no request by Gennarelli to the district court to strike or otherwise disallow the

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[5] In federal court, corporate designee depositions are governed by Federal Rule of Civil Procedure 30(b)(6). The counterpart in our state law is Iowa Rule of Civil Procedure 1.707(5).

[6] Iowa Rule of Appellate Procedure 6.904(4)(a) requires proof briefs to contain references to the transcript page and lines supporting each particular proposition. It would greatly assist our court if those page and line references were retained in the final brief.

allegedly inconsistent testimony. In fact, just the opposite transpired. When the judge opined Iowa law did not allow her to "throw out [the corporate designee's] testimony or anything like that," Gennarelli's counsel replied: "I'm not asking for that."

Gennarelli did mention needing an "accurate instruction" and the court responded: "you prepare the submitted instruction, I'll consider it." But we are unable to find anywhere in the pages cited by Gennarelli on appeal that his counsel submitted a proposed jury instruction or objected to the court's failure to give an instruction on the corporate designee issue. Iowa Rule of Civil Procedure 1.924 requires "all objections to giving or failing to give any instruction [to be] be made in writing or dictated into the record, out of the jury's presence, specifying the matter objected to and on what grounds." If a litigant does not do so, we cannot consider the objection on appeal. Iowa R. Civ. P. 1.924; *see State v. Smith*, 240 N.W.2d 693, 695 (Iowa 1976) (finding nothing to review when party did not request an instruction or raise an objection).

We decline to consider Gennarelli's request for a new trial based on the allegedly inconsistent testimony of the corporate designees because he did not preserve error on his claims at trial.

AFFIRMED.