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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1376**

Estate of Annetta Faye Zaudtke,
Respondent,

vs.

Timothy L. Zaudtke,
Appellant.

**Filed May 6, 2013
Affirmed
Klaphake, Judge***

Pine County District Court
File No. 58-CV-10-728

J. Vincent Stevens, Miller & Stevens, P.A., Wyoming, Minnesota (for respondent)

Diana Longrie, Maplewood, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Kirk, Judge; and Klaphake, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Timothy L. Zaudtke challenges the district court's decision, arguing that (1) the district court erred by failing to dismiss the estate's fraud claim because it was not pleaded with particularity; (2) the evidence was insufficient to support the district court's

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

conclusion that he had committed fraud; and (3) the conversion statute of limitations expired prior to the complaint being filed. We affirm.

DECISION

I.

Zaudtke argues that the estate failed to state “a particularized claim of fraud.” Appellate courts “review de novo whether a complaint sets forth a legally sufficient claim.” *Hardin Cnty. Sav. Bank v. Hous. and Redevelopment Auth. of City of Brainerd*, 821 N.W.2d 184, 191 (Minn. 2012). “In reviewing the complaint, we consider only the facts alleged in the complaint.” *Id.* “We accept those facts as true and construe all reasonable inferences in favor of the nonmoving party.” *Id.*

A complaint must “contain a short and plain statement of the claim” demonstrating that the plaintiff is entitled to relief. Minn. R. Civ. P. 8.01. While every averment in the complaint must be “simple, concise, and direct,” no specific or technical form of pleading is required. Minn. R. Civ. P. 8.05(a). But parties pleading fraud must meet a heightened pleading standard. Minnesota Rule of Civil Procedure 9.02 provides that “[i]n all averments of fraud, . . . the circumstances constituting fraud . . . shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.” “To plead with particularity is to plead the ultimate facts or the facts constituting fraud.” *Hardin Cnty.*, 821 N.W.2d at 191 (quotation omitted). “A party pleads the ultimate facts of a fraud claim when it pleads facts underlying each element of the fraud claim.” *Id.*

But even assuming that the complaint lacked specificity, reversal is not necessarily required. On appeal, Zaudtke must demonstrate prejudicial error. *See Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that to prevail on appeal, an appellant must show both error and prejudice resulting from the error); *Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845 (Minn. App. 1993) (stating that the appellant bears the burden of demonstrating that error is prejudicial), *review denied* (Minn. June 28, 1993). Zaudtke does not argue that he was prejudiced by the lack of specificity in the complaint. We therefore deny Zaudtke's request for reversal on this basis.

II.

Zaudtke also argues that the record evidence was insufficient for the district court to find that he had committed fraud. The elements of fraud are: (1) a false representation by a party of a past or existing material fact; (2) made with knowledge of the representation's falsity or made as of the party's own knowledge without knowing whether it was true or false; (3) with intent to induce another to act in reliance on that representation; (4) the other party acted in reliance on that representation; and (5) the other party suffered pecuniary damage as a result of that reliance. *Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C.*, 736 N.W.2d 313, 318 (Minn. 2007). Nondisclosure may constitute fraud, but "nondisclosure does not give rise to a fraud claim unless there is a legal or equitable obligation to communicate facts to a particular person and that person is entitled to the information." *Jane Doe 43C v. Diocese of New Ulm*, 787 N.W.2d 680, 690 (Minn. App. 2010) (quotation omitted).

“In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.” Minn. R. Civ. P. 52.01. “Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses.” *Id.* In applying Minn. R. Civ. P. 52.01, appellate courts “view the record in the light most favorable to the judgment of the district court.” *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). “The decision of a district court should not be reversed merely because the appellate court views the evidence differently.” *Id.* “Rather, the findings must be manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” *Id.* (quotation omitted). “Findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made.” *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation omitted). And “[i]f there is reasonable evidence to support the district court’s findings, we will not disturb them.” *Rogers*, 603 N.W.2d at 656. Essentially, “[t]he scope of review in a case tried by the court without a jury is limited to determining whether the court’s findings are clearly erroneous and whether it erred in its conclusions of law.” *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn. 1990).

Zaudtke held a power of attorney for his mother, Faye, and handled her finances for a period of time extending over several years. The district court found that “Faye wrote many checks to [Zaudtke] which were loans to be repaid. In fact, [Zaudtke]

testified that all the money he received were loans and were not to be considered as being gifts. . . . At trial, [the estate] presented both direct evidence by way of bank records and witness testimony, and circumstantial evidence, showing that while [Zaudtke] repaid some of the loans, many thousands of dollars went unpaid.” The district court further found that “the evidence shows that [Zaudtke] was able to convince his mother to loan him money by playing to her sympathies and making promises of repayment. Faye’s daughter . . . described [Zaudtke’s] salesperson-like ability to influence people to invest with him or loan him money. She described how [he] used a combination of sympathy and intimidation to defraud people or obtain loans.” In addition, the district court found that “Faye had sympathy for [Zaudtke] and offered him loans which required repayment. However, [Zaudtke] took advantage [of her] and broke promises of repayment.”

The circumstantial evidence in this case is sufficient to support a fraud determination. Faye made numerous loans to Zaudtke. Zaudtke claims that he repaid all of the loans, mostly with cash. But the record evidence demonstrates that many thousands of dollars went unpaid. And several witnesses testified that Faye demanded repayment from Zaudtke up until her death. A teller at Faye’s bank testified that the bank employees “were unhappy with [Zaudtke] because they believed he was taking advantage of Faye or making transfers without her consent, and essentially supporting himself with Faye’s money.” She further testified that Zaudtke would routinely transfer money from Faye’s account, but he would not transfer the same amount back into her account.

The district court concluded that Zaudtke “was able to pull off his scheme of converting Faye’s money over a period of years through fraud or misrepresentations to

Faye. As the power of attorney and by monitoring Faye's finances, [Zaudtke] made false promises and lied to Faye and the other children. . . . [Zaudtke] could not have orchestrated his rampant conversion without using lies and concealing it." These conclusions are supported by the district court's factual findings, which, in turn, are supported by evidence in the record.

Zaudtke argues that "[n]ot one person at trial identified a material past or present fact that Zaudtke falsely represented to [Faye]" and "no one affirmatively testified to his intention NOT to pay when he made that promise to [Faye]." But "a misrepresentation of a present intention [can] amount to fraud. However, it must be made affirmatively to appear that the promisor had no intention to perform at the time the promise was made." *Vandeputte v. Soderholm*, 298 Minn. 505, 508, 216 N.W.2d 144, 147 (1974). The district court found that Zaudtke made "false promises" to Faye and that Zaudtke "made repeated promises of repayment in order to procure loans from Faye." These statements, and the district court's final conclusion, that Zaudtke had no intention of performing at the time that he made the promise, are supported by the record evidence. *See Umphlett v. Comm'r of Pub. Safety*, 533 N.W.2d 636, 639 (Minn. App. 1995) (holding that implicit findings may be derived from the district court's final resolution of the matter), *review denied* (Minn. Aug. 30, 1995). Based on the evidence before us, the district court did not err by concluding that Zaudtke had committed fraud.

III.

Zaudtke also argues that the conversion statute of limitations expired prior to the complaint being filed. The construction and applicability of a statute of limitations is a

question of law reviewed de novo. *Benigni v. Cnty. of St. Louis*, 585 N.W.2d 51, 54 (Minn. 1998).

Zaudtke raised a statute of limitations defense generally in his answer and in a reply brief supporting his motion in limine. The district court did not address the statute of limitations in its decision. Zaudtke thereafter filed a motion for amended findings and again made a general argument about application of the statute of limitations. But in the memorandum accompanying the motion, Zaudtke did not discuss the statute of limitations applicable to a conversion claim. Because Zaudtke merely mentioned the statute-of-limitations defense sporadically throughout his court filings, without providing any legal argument as to its applicability, we conclude that he waived this defense. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that generally appellate courts will not consider matters not argued to and considered by the district court); *see also Reed v. State*, 793 N.W.2d 725, 732 (Minn. 2010) (“In summary, we conclude that a statute-of-limitations defense is a claim-processing rule, which is subject to waiver.”).

Affirmed.