STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2139
A08-0014
A08-0044

Esera Tuaolo,
Respondent (A07-2139, A08-14),
Appellant (A08-44),

vs.

Want Some Weather, Inc.,
Defendant (A07-2139),
Respondent (A08-14, A08-44),

Weather Eye, Inc., et al.,
Appellants (A07-2139, A08-14),
Respondents (A08-44).

Filed December 9, 2008
Affirmed in part and reversed in part
Kalitowski, Judge

Hennepin County District Court
File No. 27-CV-06-10575

Paul W. Chamberlain, Ryan R. Kuhlmann, Chamberlain Law Firm, 1907 Wayzata Boulevard, Suite 130, Wayzata, MN 55391 (for respondent/appellant Esera Tuaolo)

Christopher A. Neisen, O'Neill, Traxler, Zard, Neisen & Morris, Ltd., 222 East Main Street, P.O. Box 105, New Prague, MN 56071 (for defendant/respondent Want Some Weather, Inc.)

Benjamin R. Skjold, Christopher P. Parrington, Skjold – Barthel, P.A., Campbell Mithun Tower, 222 South Ninth Street, Suite 3220, Minneapolis, MN 55402 (for appellants/respondents Weather Eye, Inc. and Steven Wohlenhaus)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Bjorkman, Judge.

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

KALITOWSKI, Judge

These consolidated appeals are taken from judgments entered in a case arising from a failed investment in private equity. In May 2000, respondent Esera Tuaolo invested $150,000 in a fledgling Internet weather business, Want Some Weather, Inc. (WSW). Nearly six years later, after learning that the business venture had not been successful, Tuaolo brought suit against appellants WSW, its CEO Steve Wohlenhaus, and a related company Weather Eye, Inc. (WE). Tuaolo claimed that his investment was fraudulently induced by Wohlenhaus, and also challenged appellants' conduct following the investment. Tuaolo's claims were tried to a jury that returned a special verdict in Tuaolo's favor. Based on the special verdict and its own equitable determinations, the district court entered judgments against appellants, holding them jointly and severally liable for $150,000 in damages and $181,950.51 in attorney fees.

Wohlenhaus, WE, and Tuaolo appeal, challenging multiple orders issued by the district court before, during, and after trial. We reverse the verdict against Wohlenhaus on Tuaolo's breach-of-contract claim, but affirm the jury's verdicts on Tuaolo's fraud and conversion claims and the resulting damages judgment against Wohlenhaus and WSW. Because there is no evidentiary basis for WE's direct liability, and the district court erred in piercing the corporate veil to hold WE liable, we reverse the judgments

entered against WE. In addition because there is no statutory basis for an award of attorney fees on Tuaolo's fraud and conversion claims, we reverse the attorney fees judgment. And, finally, we conclude that the district court did not err in issuing an injunction in aid of garnishment proceedings.

D E C I S I O N

I.

Wohlenhaus and WE challenge the district court's denial of their motions to dismiss for failure to state a claim upon which relief may be granted under Minn. R. Civ. P. 12.02(e), for summary judgment under Minn. R. Civ. P. 56.02, and for judgment as a matter of law under Minn. R. Civ. P. 50.02. They assert not only that the evidence was insufficient as presented at trial, but that the district court erred in denying their motions under rules 12 and 56 based on deficiencies in the pleadings and proof offered by Tuaolo at the time those motions were made.

Orders denying motions to dismiss and for summary judgment generally are not appealable. *See* Minn. R. Civ. App. P. 103.03 (identifying appealable orders). But under Minn. Civ. App. P. 103.04, the scope of review in an appeal from a final judgment extends to any order "involving the merits or affecting the judgment." Minn. R. Civ. App. P. 103.04; *see Schoer v. West Bend Mut. Ins. Co.*, 473 N.W.2d 73, 75 (Minn. App. 1991) (applying rule 103.04 to review a summary judgment order). An order denying a motion to dismiss for failure to state a claim does not involve the merits or affect the

judgment in a case: "It does nothing more than retain the action for trial." *Indep. Sch. Dist. No. 84 v. Rittmiller*, 235 Minn. 556, 557, 51 N.W.2d 664, 664 (1952).

We have applied rule 103.04 to review legal issues decided on summary judgment that have affected the litigation but were not relitigated at trial. *See Schoer*, 473 N.W.2d at 75 (reviewing and affirming district court's conclusion that no-fault act did not apply to circumstances of case). But Wohlenhaus and WE cite no authority to support reversal of a jury verdict based on the assertion that summary judgment or dismissal should have been granted *on a factual basis* earlier in the case. And other courts that have addressed this issue have held otherwise. *See North Carolina State Bar v. Rossabi*, 645 S.E.2d 387, 392 (N.C. Ct. App. 2007) (explaining that "the denial of a motion for summary judgment based on the sufficiency of the evidence is not reviewable following a trial") (quotation omitted); *Wagner v. Fleming*, 139 S.W.3d 295, 304 (Tenn. Ct. App. 2004) (characterizing same rule as well-established); *Svendgard v. State*, 95 P.3d 364, 371 (Wash. Ct. App. 2004) (identifying same rule). We therefore decline to review the district court's determinations with respect to the sufficiency of Tuaolo's pleadings and the existence of genuine issues of material fact precluding summary judgment at the time that the rule 12 and rule 56 motions were made.

We review de novo the district court's denial of a motion for directed verdict, or judgment as a matter of law. *Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 864 (Minn. 2003). We must affirm "if, in the record, there is any competent evidence reasonably tending to sustain the verdict." *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn.

1998) (quotations omitted). "The evidence must be considered in the light most favorable to the prevailing party and an appellate court must not set the verdict aside if it can be sustained on any reasonable theory of the evidence." *Id.*; *see also Nihart v. Kruger*, 291 Minn. 273, 276, 190 N.W.2d 776, 778 (1971) (explaining that appellate court need not determine "on what theory the jury arrived at its verdict," as long as the verdict is consistent with some theory).

Breach of Contract

Wohlenhaus and WE assert that Tuaolo's breach-of-contract claim should not have been submitted to the jury because there was insufficient evidence of contract formation. We agree. Notably, Tuaolo does not base this claim on a breach of his subscription agreement with WSW. Rather, he asserts that a contract was created by Wohlenhaus's alleged promise to "roll over" Tuaolo's investment into a larger company (WE) if WSW failed. We conclude that this breach-of-contract theory should have been dismissed both under the parol evidence rule and because the contract alleged was so indefinite as to be unenforceable.

The parol evidence rule provides that the "terms of a final and integrated written expression may not be contradicted by parol evidence of previous understandings or negotiations for purpose of contradicting the writing." *Apple Valley Red-E-Mix, Inc. v. Mills-Winfield Eng'g Sales, Inc.*, 436 N.W.2d 121, 123 (Minn. App. 1989) (quotations omitted), *review denied* (Minn. Apr. 26, 1989). The question of whether a contract is completely integrated and not subject to variance by parol evidence is an issue of law. *Id.*

Such a determination is made upon consideration of the writing itself, along with "the subject matter and purposes of the transaction, and like attendant purposes." *Bussard v. College of St. Thomas, Inc.*, 294 Minn. 215, 224, 200 N.W.2d 155, 161 (1972) (citations omitted). "[I]f the alleged oral agreement is one that parties similarly situated would embody in the written agreement, then the written document is complete." *Id.*, 200 N.W.2d at 162 (quotation omitted).

Here, the district court rejected appellants' parol evidence arguments, apparently concluding that, because the subscription agreement lacked an integration clause, parol evidence was appropriately considered. But the absence of an integration clause is not dispositive. *See Minn. Teamsters Public & Law Enforcement Employees Union, Local 320 v. County of St. Louis*, 726 N.W.2d 843, 848 (Minn. App. 2007) ("[T]he absence of a merger clause in writing does not necessarily open the door to parol evidence") (quotation omitted), *review denied* (Minn. Apr. 25, 2007).

The facts here compel the conclusion that the subscription agreement was integrated. The subscription agreement governed the terms of Tuaolo's investment in WSW, specifying the purchase price, the number of shares purchased, and the limitations on sale or transfer of the shares. Had the parties reached an agreement that WSW shares could be converted into WE shares, those terms should have been included in the subscription agreement. This is particularly so given Tuaolo's allegation regarding the importance of this term to his investment decision. Thus, Tuaolo's breach-of-contract claim should have been dismissed under the parol evidence rule.

Tuaolo's breach-of-contract claim also should have been dismissed as void for vagueness or indefiniteness. "If an alleged contract is so uncertain as to any of its essential terms that it cannot be carried into effect without new and additional stipulations between the parties, it is not a valid agreement." *Druar v. Ellerbe & Co.*, 222 Minn. 383, 395, 24 N.W.2d 820, 826 (1946) (quotation omitted). Here, Tuaolo has failed to even allege the ratio at which his WSW shares would be exchanged for WE shares, much less the conditions under which such an exchange would take place. Under these circumstances, the alleged oral agreement with Wohlenhaus is "fatally defective" and unenforceable. *See King v. Dalton Motors, Inc.*, 260 Minn. 124, 126, 109 N.W.2d 51, 52 (1961) (stating "where substantial and necessary terms are specifically left open for future negotiation, the purported contract is fatally defective.").

Common Law Fraud

Wohlenhaus and WE assert that there was insufficient evidence to submit Tuaolo's fraud claim to the jury because the representations alleged by Tuaolo were not statements of existing fact and because Tuaolo did not detrimentally rely upon them. "Fraud must relate to past or existing fact and cannot be predicated on statements of intention or opinion." *Dollar Travel Agency, Inc. v. Northwest Airlines, Inc.*, 354 N.W.2d 880, 883 (Minn. App. 1984). And a party must show action taken in detrimental reliance on an alleged misrepresentation. *Saltou v. Dependable Ins. Co., Inc.*, 394 N.W.2d 629, 634 (Minn. App. 1986). We conclude that although many of the statements

alleged by Tuaolo are not actionable, Tuaolo presented an adequate basis to submit a claim of fraudulent inducement to the jury.

At trial, the jury heard testimony that Wohlenhaus represented to Tuaolo that at the time that Tuaolo made the investment the infrastructure for WSW was in place and all that was needed to begin operations was a supercomputer that Tuaolo would help fund. These were representations of existing fact and Tuaolo presented sufficient evidence at trial for the jury to find the representations were false and induced his investment. Accordingly, we conclude that this claim was properly submitted to the jury.

Conversion

Wohlenhaus and WE assert that Tuaolo's conversion claim should have been dismissed because he voluntarily invested his money in WSW. We disagree. Conversion is "an act of willful interference with the personal property of another that is without justification or that is inconsistent with the rights of the person entitled to the use, possession, or ownership of the property." *Fawcett v. Heimbach*, 591 N.W.2d 516, 519-20 (Minn. App. 1999). Although consent is a defense to conversion, consent through fraud is ineffective. Restatement (2d) of Torts § 252A. Thus, "[t]he commission of fraud may be sufficient interference with property to support a claim of conversion." 18 Am. Jur. 2d Conversion § 27.

At trial, Tuaolo asserted conversion of his $150,000 investment. Once Tuaolo transferred those funds to WSW under the terms of the subscription agreement, he no longer had the right to use, possession or ownership. But a viable claim for conversion

could be stated based on fraudulent inducement of the investment. Thus, as with his fraud claim, we conclude that this claim was properly submitted to the jury.

II.

WE challenges the judgments entered against it because it was not a party to any transaction with Tuaolo and did not make fraudulent misrepresentations to him. We agree that the claims against WE should have been dismissed as a matter of law.

The district court entered judgment against WE based on the court's post-verdict equitable determination that the corporate veil between WSW and WE should be pierced. The district court took this action on its own motion and without notice to WE. We find no authority supporting this sua sponte exercise of the court's equitable powers. But even assuming that this action was procedurally permissible, we conclude that there is an insufficient evidentiary basis for piercing the corporate veil to hold WE liable.

Initially, we note that the record does not establish the nature of the relationship between WE and WSW. But even if we assume that WE and WSW are interrelated, we conclude that there is insufficient evidence to support piercing the corporate veil between them. "Piercing the corporate veil is an exception to be used only under limited circumstances." *Groves v. Dakota Printing Servs., Inc.*, 371 N.W.2d 59, 62 (Minn. App. 1985). Minnesota courts apply a two-prong test in determining whether to pierce the corporate veil, first considering numerous factors relevant to whether the corporation was formed as the shareholders' "alter ego" or "mere instrumentality" and second determining if there is an "element of injustice or fundamental unfairness." *Almac, Inc.*

v. JRH Dev. Corp., Inc., 391 N.W.2d 919, 922 (Minn. App. 1996), *review denied* (Minn. Oct. 17, 1980) (citing *Victoria Elevator Co. v. Meriden Grain Co.*, 283 N.W.2d 509, 512 (Minn. 1979)).

Here, the district court made findings with respect to several factors relevant to the first prong of the *Victoria Elevator* test, a number of which appear to be erroneous. But we need not review those findings because we conclude that the district court erred in its application of the second prong of the *Victoria Elevator* test. The evidence in this case demonstrated that Tuaolo knew that WSW was a corporate entity separate from WE, and that it was a start-up business. Thus, the second prong of the *Victoria Elevator* test, which requires "elements of injustice or fundamental unfairness," is not met. *See Almac*, 391 N.W.2d at 924 (holding that second prong was not met in part because the "transaction between the parties was conducted openly in the name of [the] corporation"); *Groves*, 371 N.W.2d at 63 (holding that second prong was not met because respondents knew they were dealing with a corporation). The district court concluded that failing to pierce the corporate veil between WSW and WE would work an injustice because WSW could not satisfy the judgment entered against it. But Minnesota courts have recognized that insulating oneself from liability is not in and of itself improper. Indeed, it is a valid purpose for incorporating. *See Victoria Elevator*, 283 N.W.2d at 512.

Because we conclude that judgment should have been granted to WE as a matter of law and the district court erred in piercing the corporate veil to hold WE liable, we reverse the judgments entered against WE.

III.

Wohlenhaus and WE challenge the district court's award of attorney fees to Tuaolo. "The general rule in Minnesota is that attorney fees are not recoverable in litigation unless there is a specific contract permitting or a statute authorizing such recovery." *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 554 (Minn. 2008) (quotation omitted). Tuaolo asserts that the fee award is based on Minn. Stat. § 302A.467 (2006), which authorizes courts to grant equitable relief for violations of the Minnesota Business Corporation Act (MBCA), "including attorneys' fees and disbursements." Tuaolo alternatively asserts that the award is justified under Minn. Stat. § 302A.751, subd. 4 (2006), which allows the court to award fees in an action by an oppressed shareholder when a party has engaged in conduct that is arbitrary, vexatious, or lacks good faith. We disagree.

The district court did not identify a specific violation of the MBCA on which the fees award was based. *See Isaacs v. Amer. Iron & Steel Co.*, 690 N.W.2d 373, 379 (Minn. App. 2004) (affirming dismissal of claim under section 302A.467 because plaintiff failed to identify the section of statute violated and plaintiff was allowed to proceed under section 302A.751). In addition, the court failed to make any factual findings to support an award of fees under Minn. Stat. § 302A.751. On this record, we cannot uphold an award of attorney fees.

Furthermore, it is not clear that attorney fees are available under either section 302A.467 or section 302A.751 when the court orders no other equitable relief under

those sections. The Minnesota Supreme Court addressed a similar issue in *Dunn*, where the appellants urged that attorney fees were available for a violation of the Minnesota Franchise Act even if the plaintiff receives no relief under the act. 745 N.W.2d at 554. Under the Minnesota Franchise Act, a plaintiff may bring an action to recover "actual damages sustained . . . together with costs and disbursements plus reasonable attorney's fees." Minn. Stat. § 80C.17, subd. 3 (2006). But the court "decline[d] to stretch the statutory language that far," holding instead that "an award of attorney fees . . . requires that the plaintiff seek and recover some relief under the franchise act." *Dunn*, 745 N.W.2d at 554.

Similarly, we conclude that attorney fees were not available to Tuaolo because he did not seek and obtain relief under the MBCA. Section 302A.467 provides a mechanism by which shareholders may compel compliance with the requirements of the MBCA. Minn. Stat. § 302A.467. And actions under section 302A.751 are generally brought for dissolution, buy-out or some other relief for an oppressed shareholder. *See* Minn. Stat. § 302A.751. Here, the court awarded fees not in conjunction with MBCA remedies, but in relation to respondent's common-law damages. Accordingly, we reverse the attorney fees award.

IV.

Wohlenhaus and WE assert that the district court erred in denying their motion for a new trial based on numerous alleged evidentiary and procedural errors. We review the district court's denial of a motion for a new trial for abuse of discretion. *See Lake*

Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc., 715 N.W.2d 458, 476-77 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006). We "will not set aside a jury verdict on an appeal from a district court's denial of a motion for a new trial unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Id.* at 477 (quoting *Navarre v. S. Washington County Schs.*, 652 N.W.2d 9, 21 (Minn. 2002)). The mere possibility that impaneling another jury and conducting a new trial may bring about an opposite result is not grounds for a new trial. *See Heggstad v. Dubke*, 304 Minn. 129, 132, 229 N.W.2d 34, 36 (1975) (affirming denial of motion for new trial).

After a thorough review of the record, we conclude that there is no basis for a new trial. Rather, we conclude that the district court acted within its discretion in managing the trial, admitting evidence, and instructing the jury, and that any errors in these regards were harmless. *See Lake Sup. Ctr. Auth.*, 715 N.W.2d at 480-82 (allowing district court's broad discretion with respect to admissibility of evidence, jury instructions, and special verdict form); Minn. R. Civ. P. 61 (providing that harmless error may not provide basis for new trial).

V.

Wohlenhaus and WE also contend the district court erred by issuing a temporary injunction restraining them from withdrawing funds from an account at Fidelity Bank. We disagree.

The record indicates that at the time that Tuaolo sought injunctive relief, Fidelity Bank had already been served with a garnishment summons under Minn. Stat. § 571.73, subd. 1 (2006), requiring it to hold funds in an amount up to 110% of the judgments. The service of the garnishment summons created a lien, which at the time was subordinate to Fidelity's lien in connection with its letter of credit issued to Travelers as surety for a supersedeas bond. *See* Minn. Stat. § 571.81, subds. 1, 2 (2006) (stating service of garnishment summons creates a lien and providing for priority of lien).

Because the district court found the bond, which covered only the amount of the damages judgment, insufficient to stay enforcement of the combined judgments against Wohlenhaus and WE, the district court issued an injunction discharging the supersedeas bond and ordered release of the funds held by Fidelity. Thus, the injunction had the same effect as an order for execution. *See* Minn. Stat. § 550.04 (2006) (outlining requirements for writ of execution); Minn. Stat. § 571.78, subd. 3(a) (2006) (obligating garnishee to deliver garnished property "upon levy, written authorization of the debtor, court order, or operation of law"). On these facts we conclude that the district court did not err in ordering the release of funds held by Fidelity.

VI.

Tuaolo challenges the amount of the damages judgment entered by the district court, arguing that the district court erred by (1) remitting the award to $150,000; and (2) denying Tuaolo's request for double damages under Minn. Stat. § 604.14. We reject these arguments and affirm the award of $150,000 in damages.

Remittitur

By special verdict the jury found Wohlenhaus liable for $150,000 on the breach-of-contract claim, $138,705 on the fraud claim, and $150,000 on the conversion claim. The district court reduced the damages judgment to $150,000. Although it was characterized as a remittitur, we conclude that the court's action was a recognition that double recovery is not permitted for the same harm. *See Wirig v. Kinney Shoeld Corp.*, 461 N.W.2d 374, 379 (Minn. 1990) (allowing parallel actions but disallowing double recovery for the same harm).

Tuaolo asserts that the damages awarded by the jury were attributable to separate harms and thus cumulative rather than duplicative. Specifically, Tuaolo asserts that the jury's $138,705 award on his fraud claim must be related to post-investment misrepresentations because it does not equal the full amount of the investment. But a fraud damages award of less than $150,000 is consistent with the district court's instruction to the jury to calculate fraud damages by determining the difference between the actual value of the property received and the price paid for it. Moreover, the evidence was insufficient to support a fraud claim based on post-investment misrepresentations. Because there is no basis for damages in excess of the original investment, we conclude that the district court properly reduced the amount of damages to $150,000.

Double Damages

Tuaolo asserts that the district court erred by failing to award double damages under Minn. Stat. § 604.14 (2006), which provides for punitive damages in civil actions

for theft in an amount between $50 and 100% of the value of the property converted. But the record indicates that Tuaolo failed to request jury instructions or a special verdict interrogatory on civil theft punitive damages. Accordingly, we conclude that he waived his right to this recovery. *See H Window Co. v. Cascade Wood Prods. Inc.*, 596 N.W.2d 271, 275 (Minn. App. 1999) (concluding failure to object to instruction resulted in waiver), *review denied* (Minn. Aug. 17, 1999).

Finally, Tuaolo asserts that the district court erred by not awarding interest on the jury's breach-of-contract award from the date of the subscription agreement. Because we reverse the district court's denial of judgment as a matter of law with respect to Tuaolo's breach-of-contract claim, we do not reach this issue.

Affirmed in part and reversed in part.