STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1037

Credo Salon and Spa, Inc.,
Appellant,

vs.

Liberty Village I, LLC, et al.,
Respondents.

Filed May 2, 2022
Affirmed
Bryan, Judge

Washington County District Court
File No. 82-CV-20-2724

Christopher L. Olson, Peter J. Frank, GDO Law, White Bear Lake, Minnesota (for appellant)

Jack E. Pierce, Bernick Lifson, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Bryan, Presiding Judge; Jesson, Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

Appellant challenges the district court's decisions to grant respondents' motion for summary judgment, to deny appellant's motion to amend the complaint, and to deny appellant's motion to compel additional discovery. We affirm the district court's decision to grant summary judgment because the materials submitted to the district court in

connection with this motion did not contain evidence that could create a genuine issue of material fact regarding damages. We affirm the denial of appellant's motion to amend the complaint because we conclude that the district court did not abuse its discretion in determining that permitting the requested amendment after the close of discovery would prejudice respondents. Finally, we affirm the denial of appellant's motion to compel additional discovery because we conclude that the district court did not abuse its discretion in determining that respondents had provided sufficient disclosures in response to appellant's discovery requests.

FACTS

On July 7, 2020, appellant Credo Salon and Spa, Inc. (Credo) filed a civil lawsuit against respondents[1] stemming from a commercial lease. The following facts are not contested. Liberty Village owns various units in the common interest community Liberty Village Lofts (hereinafter the property). The units at the property are subject to a common interest community declaration, pursuant to Minnesota Statutes section 515B.1-101 (2020). The declaration provides, among other things, that the units on the second floor of the property shall be used and occupied "exclusively for office purposes." The declaration also provides that units on the first floor are to be used for "office, commercial, retail," and other uses permitted by the zoning code.

[1] In this opinion, we refer to respondents Liberty Village I, LLC, Liberty Village II, LLC, and Liberty Village Lofts Condominium Association collectively as Liberty Village. There are also three other respondents: Renew and Recover Massage Therapy LLC, Inner Swan Aesthetics L.L.C. (referred to as ISA), and Michael Oreck.

In May 2012, Credo entered into a lease with respondent Liberty Village under which terms Credo would operate a salon spa business for a term of 11 years. At the time of executing the lease, Credo and Liberty Village agreed to a restrictive covenant prohibiting Liberty Village from leasing additional space at the property to any businesses offering services similar to those offered by Credo. In September 2015, ISA began leasing a unit from Liberty Village on the second floor of the property. ISA operates a medical spa that offers medical-grade services by a licensed physician. Prior to ISA's lease, Liberty Village and Credo discussed ISA's potential tenancy. After receiving a list of services and products offered by ISA, Credo initially indicated ISA's business would not interfere with Credo's business operations. However, Credo later learned of services that it believed were similar to its own and subsequently objected to ISA's tenancy.

In July 2020, Credo served respondents with a summons and complaint, asserting ten claims: breach of the restrictive covenant; breach of the lease; misrepresentation; violation of the Deceptive Trade Practices Act, Minn. Stat. Ch. 235D; unjust enrichment; tortious interference with a contract; tortious interference with a prospective economic advantage; violation of the declaration; breach of fiduciary duty; and a claim that respondents Liberty Village I, LLC and Liberty Village II, LLC were alter egos of respondent Michael Oreck. For each and every count, Credo provided a generalized estimate of damages, repeating the same statement: "Credo has been damaged in an amount in excess of $50,000, the precise amount to be proven at trial, together with costs and disbursements herein."

That same month, respondents filed their answer, denying Credo's claims and asserting defenses. The parties also submitted a joint discovery plan which stated that discovery "should be completed by November 27, 2020," and in September 2020, the district court signed a scheduling order requiring that "[a]ll discovery shall be completed by November 27, 2020." The scheduling order does not mention any specific deadlines for disclosure of expert reports.

Respondents served interrogatories to Credo, specifically asking to describe in detail the damages incurred for each of the claims in the complaint. Credo generally objected, claiming attorney-client privilege, but did state that "[a]t this time damages are thought to be in excess of $50,000 to be proven at trial. Discovery is continuing." In their discovery requests, respondents requested that Credo "produce all documents reflecting on all damages you have incurred as a result of any alleged breach of the Restrictive Covenant." In response, Credo stated the following: "All documents, to the extent they exist, are not privileged, and have not already been produced will be provided to Defendants at a time mutually convenient to the parties at the offices of GDO Law." Through depositions, respondents repeatedly questioned multiple witnesses about the damages and any impact of ISA's tenancy on Credo's business. Counsel for Credo consistently objected and the witnesses did not provide any testimony in support of the damages claimed in the complaint.

On December 31, 2020, respondents moved for summary judgment on various grounds, including that there was insufficient evidence of damages to create a genuine question of material fact on that element of each claim. Specifically, respondents argued

that the disclosures made by the discovery deadline did not include evidence regarding the amount of damages, the calculation of damages, or the causal connection between these damages and ISA's tenancy. In response to the portion of the summary judgment motion regarding damages, Credo filed a memorandum of law and two affidavits with attached exhibits on January 15, 2021. Credo argued that the summary judgment motion was premature because an expert was required to offer an opinion regarding Credo's hypothetical revenues "in the absence of [respondents'] breaches of the Restrictive Covenant and the Declaration." In addition, Credo argued that disclosure of its revenues was sufficient to establish damages: "evidence of its revenues over the applicable time frames . . . is all the evidence necessary. . . . The facts that will form the basis of Credo's damages claim are its own revenues and the revenues of ISA." The affidavits and attached exhibits filed on January 15, 2021, however, do not include any tax documents, information regarding Credo's or ISA's customers, or any documents showing revenues, expenses, sales, profits, or any other financial information about Credo.

After the case was reassigned to a new district court judge, respondents refiled its summary judgment motion on February 12, 2021. Credo subsequently filed another affidavit with attached exhibits on February 26, 2021. In this supplemental affidavit, the attorney stated that Credo has retained an expert and attached "a true and correct copy of the financial records Credo is providing to [the expert]." The records attached included documents titled "Employee Service Deductions" and "Employee Retail Summary" for one employee and for the time period October 2012 through October 2020. All of the annual totals and many of the subtotals on the "Employee Service Deductions" for the time

period October 2014 through October 2020 are blacked out. The attached records do not include tax documents, information regarding changes to Credo's or ISA's customers, or any documents showing annual revenues,[2] expenses, or profits. Respondents filed a second reply memorandum of law on March 5, 2021, objecting to the consideration of the February 26, 2021 submissions and reiterating its argument that none of the submissions to the court regarding the summary judgment motion could create a genuine issue of material fact regarding lost profits.

Before the district court issued a written decision on the summary judgment motion on May 7, 2021, Credo filed an informal request, by letter, to "reopen the summary judgment record." Credo attached an expert report, supplemental discovery responses, and an attorney affidavit to the informal request. The letter stated that the supplemental evidence was not "in existence at the time the motion was taken under advisement." The affidavit provided the following three reasons why Credo chose to wait to hire an expert until after the close of discovery and after the summary judgment motion was filed: (1) Credo's counsel advised Credo that "the Rules of Civil Procedure did not require the disclosure of expert testimony until ninety days prior to trial;" (2) the "highly specialized" facts made it difficult to find an expert; and (3) Credo "did not want to incur the cost of an expert witness and report when the parties were engaged in settlement discussions."

[2] Given the redactions to the documents included in the appellate record, we cannot determine any annual totals for the time period after October 2014. *See* Minn. R. Civ. App. P. 110.01 (setting forth what constitutes the appellate record); *Custom Farm Servs., Inc. v. Collins*, 238 N.W.2d 608, 609 (Minn. 1976) ("An appellant has the burden of providing an adequate record for appeal.").

The four-page expert report submitted on May 7, 2021, includes three charts, labelled figures 1, 2, and 3. According to the report, the expert relied on tax documents and internal financial statements provided to the expert by Credo: "The data used for Figure 1 comes from Credo's 1120S federal tax filings for the years 2013-2019. The data used for Figures 2 and 3 comes from internal financial statements generated by Credo." The expert assumed compound annual growth rates of 3.8%, 4.94%, and 8.56% to project Credo's expected revenues for 2016-2020. By comparing these expected revenues to Credo's actual revenues (derived from "federal tax filings") and by comparing these projections to actual annual total sales (derived from "internal financial statements"), the expert opined that Credo had lost profits in the amount of $292,779. The expert did not address or rule out any potential causes for the difference between the projected revenues and the actual revenues.

On June 22, 2021, the district court granted respondents' motion for summary judgment. Among other conclusions, the district court determined that the submissions of the parties did not create a material question of fact regarding damages.[3] Specifically, the district court determined that the submissions did not include any computation of damages and that Credo's general statements of damages in its discovery responses were speculative because "it provide[d] no basis, calculation, or rationale supporting its 'thought' of over $50,000 in damages." The district court did not consider the expert report filed on May 7,

[3] Respondents made their motion for summary judgment on multiple grounds. The district court also granted summary judgment on several of these other theories. Given our decision regarding damages, we need not address Credo's challenge to the other bases for summary judgment.

2021, because it was submitted after the summary judgment motion was made, and instead analyzed the discovery responses and the evidence submitted prior to the summary judgment hearing.

On the same day that it granted summary judgment in favor of respondents, the district court also denied Credo's January 4, 2021 motion to amend its complaint to add a claim of fraudulent inducement regarding the services that ISA was to provide. Although the district court first determined that Credo's motion to amend was moot because of the order granting summary judgment, the district court also denied the motion on its merits. Specifically, the district court determined that Credo had knowledge that the alleged statements were fraudulent for years prior to filing the original complaint. Despite this knowledge, the original complaint did not include a count of fraudulent inducement and the parties conducted extensive discovery prior to the November 27, 2020 deadline. As a result of the prejudice that respondents would experience having to conduct discovery anew using many of the previously deposed witnesses, the district court concluded that Credo failed to show good cause to amend its complaint.

On June 22, 2021, the district court also denied Credo's January 4, 2021 motion to compel discovery. Credo requested that the district court compel respondents to disclose any and all remaining documents regarding Credo's allegations that Liberty Village overcharged Credo for the portions of its rent relating to management fees and common area maintenance costs. The district court denied the motion because it determined that respondents had disclosed hundreds of pages of bills and statements from vendors and contractors who worked in the common areas of the building and because Credo's CEO

conceded that respondents had already provided sufficient documentation on this issue. In addition, the district court observed that the agreement between the parties allowed Liberty Village to charge either a minimum monthly management fee of $2,000 or "an amount equal to 15% of gross monies collected monthly." The district court then concluded that because Liberty Village only charged the contractual minimum amount for management fees, the alleged deficiencies regarding "gross monies collected" by Liberty Village were irrelevant.

Credo appeals the decisions granting summary judgment, denying the motion to amend, and denying the motion to compel discovery.

DECISION

I. The District Court's Decision to Grant Summary Judgment

Credo challenges the grant of summary judgment, arguing that the expert report submitted on May 7, 2021, and the financial records submitted on February 26, 2021, are sufficient to create a genuine issue of material fact regarding lost profits. We are not convinced. First, we conclude that the district court did not abuse its discretion in declining to consider the untimely expert report submitted on May 7, 2021. Second, we conclude that the information submitted to the district court does not include information necessary to create a genuine issue of material fact regarding the elements of a claim for lost profits at trial. We, therefore, affirm the decision to grant summary judgment on all counts.

Summary judgment is proper if "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. A genuine issue of material fact exists if a rational trier of fact could find for the nonmoving

party on each essential element of a claim, considering the record as a whole. *Lund as trustee of Revocable Tr. of Kim A. Lund v. Lund*, 924 N.W.2d 274, 284 (Minn. App. 2019) (affirming summary judgment where record contained insufficient evidence of damages), *rev. denied* (Minn. March 27, 2019); *Leeco, Inc. v. Cornerstone Bank*, 898 N.W.2d 653, 657 (Minn. App. 2017), *rev. denied* (Minn. Sept. 27, 2017).

We review a grant of summary judgment de novo, viewing "the evidence in the light most favorable to the nonmoving party." *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 874 (Minn. 2019) (quotation omitted). However, "[s]peculative assertions are insufficient to create a genuine issue of material fact on a motion for summary judgment." *Minn. Sands, LLC v. County of Winona*, 940 N.W.2d 183, 197-98 (Minn. 2020) (citation omitted), *cert. denied* 141 S. Ct. 1054 (2021). Likewise, "promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial." *Nicollet Restoration v. St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995) (citation omitted). If the evidence is merely colorable, summary judgment may be granted. *Anderson v. Liberty Lobby*, *Inc.*, 477 U.S. 242, 249-50 (1986); *see also Gradjelick v. Hance*, 646 N.W.2d 225, 230-231 (Minn. 2002) (citations omitted).

As an initial matter, we affirm the district court's decision not to consider the expert report and additional submissions filed on May 7, 2021. Minnesota Rule of General Practice 115.03(b) requires parties responding to dispositive motions to serve and file all supplementary affidavits and exhibits "at least 14 days before the hearing." "If irreparable harm will result absent immediate action by the court, or if the interests of justice otherwise require, the court may waive or modify time limits . . . ." Minn. R. Gen. Prac. 115.07. In

addition to the rules governing timeliness of submissions, a party may make a motion under rule 56.04 if for some reason that party is not able to disclose facts necessary to respond to a summary judgment motion. Rule 56.04 gives a district court discretion to defer consideration of the summary judgment motion, deny the motion, allow additional time to complete discovery, or issue any other appropriate order, but the rule requires the party requesting relief under the rule to show "by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition [to the summary judgment motion]." Minn. R. Civ. Pro. 56.04. An affidavit filed pursuant to rule 56.04 "must be specific about the evidence expected, the source of discovery necessary to obtain the evidence, and the reasons for the failure to complete discovery to date." *City of Maple Grove v. Marketline Constr. Cap., LLC*, 802 N.W.2d 809, 818 (Minn. App. 2011) (citation omitted).

We review the district court's decision to exclude evidence from its consideration on a summary judgment motion for an abuse of discretion. *Antonello v. Comm'r of Revenue*, 884 N.W.2d 640, 644-45 (Minn. 2016). Similarly, a district court has broad discretion to permit or deny requests made pursuant to rule 56.04. *E.g.*, *Am. Warehousing & Distrib., Inc. v. Michael Ede Mgmt., Inc.*, 414 N.W.2d 554, 557 (Minn. App. 1987) (holding that the district court did not abuse its discretion when it refused to consider an untimely affidavit), *rev. dismissed* (Minn. Jan. 20, 1988).

In this case, Credo requested that the district court "reopen the summary judgment record" to accept the report. The affidavit accompanying the expert report explained that Credo waited until after discovery had closed and after the summary judgment motion was filed to hire an expert because Credo's counsel advised Credo that disclosure of expert

testimony was not required until ninety days prior to trial, the "highly specialized" facts made it difficult to find an expert, and Credo wanted to avoid the costs of an expert witness while the parties were engaged in settlement discussions. These three explanations do not establish the harm required by rule 115.07. Nor do they provide any explanation of the efforts made to obtain the necessary evidence, or of the impediments to completing the necessary discovery, as required by *City of Maple Grove* and rule 56.04. It is not sufficient to simply acknowledge that the report did not exist at the close of discovery or at the time of the summary judgment hearing. Rule 56.04 requires an explanation why it was not possible to prepare the report earlier. Given these stated reasons and in the absence of an explanation that satisfies rules 115.07 or 56.04, we discern no abuse of discretion in the district court's decision not to consider the untimely report and submissions filed on May 7, 2021, which was more than five months after the close of discovery, and nearly two months after the summary judgment hearing on March 12, 2021.[4]

We now turn to the primary issue on appeal: whether the submissions made as of February 26, 2021, create a genuine issue of material fact regarding the claim of lost profits in excess of $50,000 for each cause of action.[5] To establish lost profits at trial, a plaintiff

[4] To the extent that the documents submitted on February 26, 2021, contain unredacted totals, we observe that these viewable totals differ from those used in the expert report. We also note that the figures in the expert report include additional data not reflected on the documents submitted on February 26, 2021. In addition, the report does not discuss customers or address potential causes for the purported decrease in revenue, beyond the assumption that ISA's tenancy is the sole cause for any decrease in profits. Nevertheless, we need not determine whether the expert report creates a genuine issue of fact because we affirm the district court's decision to exclude the untimely report.

[5] The parties agree that damages is an essential element for each cause of action and that the complaint included identical damages language for each cause of action.

must show the following three components by a preponderance of the evidence: (1) profits were lost, (2) the loss was directly caused by the defendant's conduct; and (3) the amount of such causally related loss is capable of calculation with reasonable certainty rather than benevolent speculation. *B & Y Metal Painting, Inc. v. Ball*, 279 N.W.2d 813, 816 (Minn. 1979) (rejecting argument that plaintiff established damages at trial because evidence that plaintiff's actual rate of growth fell behind the expected rate of growth "failed to . . . establish a causal relationship"); *see also Cardinal Consulting Co. v. Circo Resorts, Inc*., 297 N.W.2d 260, 266 (Minn. 1980) (requiring a plaintiff to prove that lost profits were "the natural and probable consequences of the act or omission complained of" and that the requested amount of lost profits "is shown with a reasonable degree of certainty and exactness." (citation omitted)); *Polaris Indus. v. Plastics, Inc.*, 299 N.W.2d 414, 419 (Minn. 1980) (requiring plaintiff to prove that lost profits resulted from the alleged defect: "the plaintiff failed to isolate the losses attributable to the defective tanks" from "losses due to all of the other variable and imponderable factors which may have accounted for its decline in earnings"). "[D]amages need not be proved with certainty; it is legally sufficient that a reasonable basis for approximating loss is shown." *Jensen v. Duluth Area YMCA*, 688 N.W.2d 574, 579 (Minn. App. 2004) (citing *Polaris Indus*., 299 N.W.2d at 419).

Neither Credo's answers to interrogatories nor the responses of the witness deposed prior to the discovery deadline constitute evidence of damages.[6] Instead, Credo's

[6] The district court concluded that Credo failed to satisfy the rule governing initial disclosures regarding damages, which requires "a computation of each category of damages claimed by the disclosing party," and "the documents or other evidentiary material . . . on which each computation is based, including materials bearing on the nature

responses echoed the general statement in its complaint: Credo believed damages would be in excess of $50,000, with a precise amount to be proven at trial. In terms of documentary evidence, none of the documents submitted in its initial response to the motion for summary judgment include information relating to taxes, revenues, changes in customers, sales, finances, or otherwise relate to lost profits.

Turning to the financial documents submitted on February 26, 2021, we conclude that neither the "Employee Service Deductions" records nor the "Employee Retail Summary" documents include information regarding annual revenues, changes to the customers of Credo or ISA, expenses, credits, liabilities, or otherwise indicate what Credo's profits were at a given point in time.[7] Nor do these documents, by themselves, shed any light on whether the lost profits were directly caused by respondents' conduct. Likewise, these records do not permit any calculation of lost profits to a reasonable degree of certainty. Accordingly, we conclude that summary judgment was appropriate because

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and extent of injuries suffered." Minn. R. Civ. P. 26.01(a)(1)(C); *see also* Minn. R. Civ. P. 37.03(a) (precluding a party from using any information that was not disclosed "to supply evidence on a motion . . . unless the failure was substantially justified or is harmless"). The district court also properly noted that the rules distinguish the these required initial disclosures from rule 26.01(b), which governs disclosure of expert witnesses. The issue on appeal, however, is not the sufficiency of the initial disclosures or whether Credo satisfied the computation requirements of rule 26.01(a)(1)(C). Therefore, we need not determine whether Credo satisfied rule 26.01(a)(1)(C).

[7] Based on the appellate record, it appears that Credo did not submit tax documents to the district court or any profit and loss statements in connection with the motion for summary judgment. While Credo may have disclosed these or similar financial records to Liberty Village prior to the close of discovery, we can only review the documents submitted to the district court and included in the appellate record.

the financial documents that Credo submitted to the district court do not establish a genuine issue of material fact regarding Credo's claim for damages.

II. The District Court's Decision to Deny the Motion to Amend

Credo also challenges the denial of its motion to amend the complaint to add a claim of fraudulent inducement. We conclude that the district court did not abuse its discretion when it denied the motion to amend because its analysis was not against logic or the facts.

Rule 15.01 provides that, after service of a responsive pleading, a party may amend only by leave of court, and that such leave "shall be freely given when justice so requires." Minn. R. Civ. P. 15.01. Leave to amend, however, should not be granted when doing so "would result in prejudice to the other party." *Schober v. Comm'r of Revenue*, 853 N.W.2d 102, 112-13 (Minn. 2013) (quoting *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993)). In addition, district courts consider whether the moving party acted with diligence in their attempts to amend. *Meyer v. Best W. Seville Plaza Hotel*, 562 N.W.2d 690, 694 (Minn. App. 1997), *rev. denied*, (Minn. June 26, 1997). "Generally, the decision to permit or deny amendments to pleadings is within the discretion of the district court and will not be reversed absent a clear abuse of discretion." *Johns v. Harborage I, Ltd.*, 664 N.W.2d 291, 295 (Minn. 2003); *see also Fabio*, 504 N.W.2d at 761 ("The trial court has wide discretion to grant or deny an amendment, and its action will not be reversed absent a clear abuse of discretion."). A district court abuses its discretion when its decision is against logic or the district court's uncontested factual findings. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984).

Here, the district court determined that Credo had knowledge of the alleged fraudulent statements for many years prior to filing the original complaint and did not provide a sufficient explanation to support the request to amend the complaint after the close of discovery and after the motion for summary judgment had been filed. In addition, the district court emphasized the discovery that had occurred prior to the November 27, 2020 deadline and the prejudice that respondents would experience in having to conduct discovery with respect to a new claim. For instance, the district court believed that the proposed fraudulent inducement allegations did not necessarily and entirely overlap with the waiver defense asserted by respondents, and amendment would require many (if not all) of the fact witnesses to be deposed again. We discern no clear abuse of the district court's wide discretion in our review of the district court's analysis, and we affirm the decision to deny Credo's motion to amend the complaint.[8]

III. The District Court's Decision to Deny the Motion to Compel

Credo next challenges the denial of its motion to compel discovery regarding being overcharged for management fees and common area maintenance costs. Again, we conclude that the district court acted well within its discretion in denying the motion. *See*

[8] The district court also denied the motion to amend on the grounds that the motion was moot in light of the district court's decision to grant summary judgment. We acknowledge that Credo did not make any argument to distinguish the damages resulting from the alleged fraudulent inducement from the damages resulting from the other claims. Given our determination that the district court did not abuse its discretion in denying the motion to amend, we need not address whether the above discussion regarding insufficient evidence of damages would also prove fatal to the proposed fraudulent inducement claim. *See Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. App. 2001) ("A motion to amend a complaint is properly denied when the additional claim could not survive summary judgment."), *rev. denied* (Minn. Oct. 16, 2001).

In re Comm'r of Pub. Safety, 735 N.W.2d 706, 711 (Minn. 2007) ("[A] trial judge has wide discretion to issue discovery orders and, absent a clear abuse of that discretion, its discovery orders will not be disturbed." (citation omitted)).

In this case, the district court denied the motion because it determined that respondents had disclosed hundreds of pages of bills and statements from vendors and contractors who worked in the common areas of the building and because Credo's CEO conceded that respondents had already provided sufficient documentation on this issue. In addition, the district court emphasized that Liberty Village only charged the contractual minimum amount for management fees: $2,000. The discovery requests regarding gross rent collected by Liberty Village, therefore, had little relevance because they related to the calculation of an alternative to the minimum $2,000 charge. The district court's decision is consistent with logic, and on this record, we can discern no clear abuse of discretion.

Affirmed.