This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1471

FKS Enterprises, Inc., et al.,
Respondents,

vs.

Matthew Whebbe, et al.,
Appellants.

Filed June 6, 2022
Affirmed
Ross, Judge

Hennepin County District Court
File No. 27-CV-19-13794

Charles K. Maier, Richard C. Landon, Maria de Sam Lazaro, Lathrop GPM LLP, Minneapolis, Minnesota (for respondents)

Sarah E. Crippen, Kyle R. Hardwick, Best & Flanagan LLP, Minneapolis, Minnesota (for appellants)

Considered and decided by Ross, Presiding Judge; Cochran, Judge; and Cleary, Judge.[*]

NONPRECEDENTIAL OPINION

ROSS, Judge

Matthew Whebbe agreed to buy six Farm King agricultural supply stores in Illinois and Iowa, representing that the two companies he formed to complete the purchase were

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

financially able to close the deal. Contrary to his assurances, the two companies were insolvent and unable to meet the financial obligations necessary to close the deal. The district court found Whebbe and his companies jointly and severally liable for breaching the contracts and fraud. Because the record supports the district court's judgment, we affirm.

FACTS

Respondent brothers Rick and Brad Severs are majority owners of respondent FKS Enterprises Inc., which in turn owns and operates Farm King—a chain of six farm supply stores in Iowa and Illinois. In 2017 the Severses decided to sell Farm King. Their investment banker introduced them to a prospective buyer, appellant Matthew Whebbe, whose company, Tea Olive I LLC, had recently purchased Big R, which is a chain of 23 competing farm supply stores.

Whebbe soon signed a letter of intent proposing terms for Tea Olive to purchase Farm King. After signing the letter of intent on behalf of Tea Olive, Whebbe informed the Severses that his two recently formed companies—appellants Flowering Crab Apple LLC and Pampas I LLC—would be the buyers instead, with one purchasing the Farm King real estate and the other purchasing the Farm King business.

The Severses worried that Whebbe's two new companies lacked the financial wherewithal to purchase Farm King, so they asked Whebbe to personally guarantee the purchase. Whebbe responded dismissively, repeatedly assuring the Severses that money would not be an issue. He specifically cited his recent purchase of the 23-store Big R chain and insisted that buying Farm King "was basically a layup. It was not a financial problem

for him whatsoever." He also assured the Severses that he and the previous owner of Big R "gave our word that we certainly don't want to leave you at the altar." The Severses became satisfied "that there was good backing from Matt Whebbe." And Whebbe's attorney also assured Farm King's attorney that Whebbe "had plenty of money, had plenty of resources, and that financing wasn't an issue." Based on the repeated assurances, the Severses agreed to negotiate the sale without Whebbe's personal guaranty.

The parties spent substantial time and effort on due-diligence investigation and negotiating the deal, settling on a $36.8 million purchase price. After about four months of negotiations, the parties signed a stock purchase agreement for the business sale and a real estate purchase agreement for the real-estate sale. Under the stock purchase agreement, Flowering Crab Apple agreed to pay the total purchase price and guaranteed that it "has, on the date hereof, and will have on the Closing Date, the financial capability to consummate the transactions contemplated by this Agreement and the other Transaction Documents," including the real estate purchase agreement. Despite signing on behalf of his companies, however, Whebbe knew that they lacked the means to complete the deal—neither of his companies had more than $100 in assets or any income or credit relationships, and both were substantially indebted to other Whebbe-owned entities.

Whebbe postponed the agreed-upon closing date five times over a two-month period after signing the deal. During that time, he explored two financing options. Both options failed.

Whebbe first sought to secure a $30 million line of credit from Bank of America. He proposed that Flowering Crab Apple would assign its rights in the stock purchase

agreement to Magnolia I LLC (another Whebbe-owned company) to consolidate multiple potential lines of credit. But Whebbe scuttled this arrangement after he secured the line of credit, using the loan instead to refinance another soon-to-mature promissory note so that he could complete his Big R purchase obligation—an obligation for which he was personally liable.

Whebbe's second option fared no better. He proposed a sale-leaseback arrangement with Store Capital, a real estate investment trust, with which Tea Olive had signed a letter of intent to fund the transaction. But in a recorded phone call with a Store Capital representative, Whebbe disclosed, "[A]s we kept delaying, and delaying, and delaying [his companies' closing of the Farm King purchase,] it just kind of gave me a chance to say wait a second, . . . is this the best deal?" He boasted that he had been "talking to the Farm King guys and I'm keeping them scared and talking purchase price reductions. So maybe there's a chance to even knock a couple million bucks off the purchase price." He predicted that the "Farm King guys are going to be a little upset." But he gloated, "[T]hey don't really have a move."

Despite Whebbe's ancillary maneuvering and after four previous postponements, Whebbe's attorney finally emailed his Farm King counterpart to confirm the latest closing date, writing, "[O]ur client is prepared to and able to close tomorrow, April 30, . . . including the transfer of funds." The confirmation was illusory. That same day Whebbe cancelled the closing for the fifth time.

Farm King sued Whebbe, Flowering Crab Apple, Pampas, Magnolia, and Tea Olive. It alleged seven contract, fraud, and equitable theories. Its civil complaint urged the district

court to pierce the corporate veil and hold Whebbe personally liable. The district court conducted a bench trial and found mostly in Farm King's favor. It also pierced the corporate veil, entering judgment against Whebbe along with his businesses.

This appeal follows.

DECISION

Whebbe and his companies challenge the district court's judgment against them for fraud and its decision to pierce the corporate veil. Their appeal raises a variety of factual, legal, and discretionary questions, requiring a mixed review. We review a trial court's findings of fact for clear error, viewing the facts in the light most favorable to its findings. Minn. R. Civ. P. 52.01. We review its legal conclusions de novo. *Bergstrom v. McEwen*, 960 N.W.2d 556, 560 (Minn. 2021). And we review its grant of equitable relief for an abuse of discretion. *Equity Tr. Custodian ex rel. Eisenmenger IRA v. Cole*, 766 N.W.2d 334, 339 (Minn. App. 2009). For the following reasons, we affirm the judgment.

I

We begin with Whebbe and Pampas's contention that the independent-duty rule shields them from fraud liability. The independent-duty rule limits contracting parties to contract-law remedies except when a tort duty exists independent of the contract. *E.g.*, *Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*, 896 N.W.2d 115, 125–26 (Minn. App. 2017), *aff'd on other grounds*, 913 N.W.2d 687 (Minn. 2018). A fraud claim is independent of a contract claim if the tort duty would exist without the contract. *Hanks v. Hubbard Broad., Inc.*, 493 N.W.2d 302, 308 (Minn. App. 1992), *rev. denied* (Minn. Feb. 12, 1993). Although the district court dismissed the fraud claim against Flowering Crab

Apple under this theory, it determined that Whebbe's and Pampas's tort duties are independent of Flowering Crab Apple's contractual duty to be financially able to close the purchase. We see no legal error in this conclusion.

Fraudulently inducing another to enter into a contract is a tort independent of a claimed breach of the resulting contract. Provided a plaintiff does not recover the same damages for the two causes of action, "a district court may conclude that the evidence supports separate claims for both common-law fraud and breach of contract." *Sorchaga v. Ride Auto, LLC*, 909 N.W.2d 550, 557 (Minn. 2018) (*Sorchaga II*); *see also McDonald v. Johnson & Johnson*, 776 F.2d 767, 770 (8th Cir. 1985) (observing that "fraud in inducing a contract and a later breach of that contract represent two distinct causes of action under Minnesota law"). Although the district court here appears to have conflated Farm King's fraud and contract damages, it found that Farm King incurred "other damages" beyond its contract damages based on its reliance on Whebbe's false assurances. And despite the integrated nature of the contracts, only Flowering Crab Apple was the "buyer" in the stock purchase agreement, binding it alone under the financial-capacity clause. Whebbe's and Pampas's tort duties sounding in fraud are sufficiently independent of the contractual financial-viability duty.

We reject Whebbe's and Pampas's related arguments that the record cannot support the district court's finding that Farm King reasonably relied on any oral representations outside the contract. Reasonable reliance is an element of fraud. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 369 (Minn. 2009). They base this argument first on the contract language disclaiming all representations other than those included in the stock

purchase agreement. And they base it second on testimony that they maintain demonstrates that Farm King relied only on the sufficient-funds clause in the agreement and not on any of Whebbe's representations. Neither argument is convincing.

The contract-language argument is like the one we rejected in *Sorchaga v. Ride Auto, LLC*, 893 N.W.2d 360, 371 (Minn. App. 2017) (*Sorchaga I*), *aff'd*, 909 N.W.2d 550 (Minn. 2018). In that case, we held that an automobile dealership's "as-is" warranty disclaimer did not preclude a finding that the purchaser reasonably relied on the dealership's representations about the vehicle's condition. *Sorchaga I*, 893 N.W.2d at 371. The disclaimer here in essence has the same effect as the as-is disclaimer in *Sorchaga I*—to limit or foreclose tort liability based on alleged representations independent of those stated in the contract. But we repeat with equal applicability here, "The Minnesota Supreme Court has held that a party who makes fraudulent representations to induce another to make a contract cannot escape liability for his fraud by incorporating a disclaimer of fraud in the contract." *Id*. (quotation omitted). We reject the disclaimer argument here. The disclaimer did not preclude the district court from finding that Farm King relied on Whebbe's multiple inducing representations made on Pampas's behalf about his and Pampas's financial wherewithal.

We also reject the appellants' fact-based contention that certain testimony by Rick and Brad Severs precludes the finding that Farm King relied on Whebbe's assertions. Both men testified that they "relied completely upon . . . the language in those agreements that he had the financial capability of" closing on the agreements. The district court correctly recognized that "completely" and "exclusively" carry different meanings. We

acknowledge that a colloquial speaker might use the terms synonymously. But as used formally, and we think more commonly, "completely" instead means entirely. This common usage is necessarily what Rick and Brad Severs applied here, as they clarified that they relied on Whebbe's oral assurances, not just the contract assurances. They then detailed their efforts and the expenses that resulted from their relying on those oral assurances—efforts they made and expenses they incurred beginning weeks before the parties signed the contract. The district court did not clearly err by finding that Farm King relied on Whebbe's financial-viability assurances independent of the contracted financial-viability commitment.

Our decision is limited to the issues raised and argued by the parties. We therefore offer no opinion about whether Whebbe's assurances were sufficiently definite, false statements of fact to support the claim. We hold only that the district court did not err by concluding that Farm King's fraud claim is not defeated by the independent-duty rule, the contractual disclaimer provision, or the cited Farm King testimony.

II

We next consider Whebbe's contention that the district court erred by piercing the corporate veil and holding him jointly and severally liable with his companies. We review for clear error a district court's factual findings in support of its decision to pierce the veil. *Cole*, 766 N.W.2d at 339. But the district court maintains discretion when weighing the relevant factors, and we would reverse only if it abused that discretion. *Id*. Whether to pierce the corporate veil to find personal liability involves a two-step test. *Victoria Elevator Co. of Minneapolis v. Meriden Grain Co.*, 283 N.W.2d 509, 512 (Minn. 1979). The first

step involves multiple factors to determine whether the corporation is the alter ego of the shareholder. *Id.* The second step is determining whether recognizing the corporate form would result in an injustice or fundamental unfairness. *Id.* Our review of the record and the district court's veil-piercing factual findings informs us that this is a close case but that the district court acted within its discretion by piercing the corporate veil.

A

We are satisfied that the district court did not clearly err in its factual findings bearing on the first step of the veil-piercing test. The district court was required to consider whether the corporation (1) was undercapitalized, (2) observed corporate formalities, (3) paid dividends, (4) was insolvent, (5) siphoned or commingled funds, (6) has other officers and directors, (7) kept corporate records, or (8) existed as a façade for individual dealings. *Id.* The record supports the conclusion that at least four of the factors are present. Whebbe concedes that his companies were undercapitalized, insolvent, and had no officers or directors other than himself. And sufficient evidence supports the district court's observation that Whebbe treated the LLCs interchangeably as a façade for his own personal dealings. He blurred the lines between his various companies and himself by giving his word that he stood behind the transaction and by emphasizing his role in a separate company's purchasing the 23-store Big R chain. The record amply suggests that he did so to foster the false impression that his companies had the financial weight to easily absorb Farm King.

We are not persuaded otherwise by Whebbe's citation to recent amendments to the Minnesota Revised Uniform Limited Liability Company Act, Minn. Stat.

§§ 322C.0101–.1205 (2020). Whebbe contends that the law now displaces the traditional veil-piercing test for single-member, single-purpose, limited liability companies. The law includes a new provision that failing "to observe formalities relating exclusively to the management of [a limited liability company's] internal affairs is not a ground for" piercing the veil, Minn. Stat. § 322C.0304, subd. 2, and that, otherwise, the traditional veil-piercing test applies, *id.*, subd. 3. The companies' undercapitalization, insolvency, and existence as a façade are not "internal affairs," but are conditions affecting their making and performing contracts with external entities like Farm King. The district court therefore correctly applied the veil-piercing caselaw and did not err by finding that the LLCs were Whebbe's alter ego under the first step of the veil-piercing test.

B

We also see no reason to reverse based on the second step of the veil-piercing test. Here we ask if the presence of the *Victoria Elevator* factors discussed above would promote injustice or fundamental unfairness, shown by "evidence that the corporate entity has been operated as a constructive fraud or in an unjust manner." *Groves v. Dakota Printing Servs., Inc.*, 371 N.W.2d 59, 62–63 (Minn. App. 1985) (quotation omitted). Because the evidence supports the conclusion that Whebbe used the corporate shield to gain an unfair business advantage, this second step supports the district court's decision.

Whebbe's words go a long way to supporting this result. At the point when he was certain his companies were undercapitalized and insolvent (and therefore judgment-proof), he first successfully allayed Farm King's concern that it needed his personal guaranty with his false assurances that his companies could close the deal and that he stood behind the

transaction. Then after he delayed the closing repeatedly, he surreptitiously implied to a potential lender that the delays were intentional and strategic in order to leverage a lower, renegotiated purchase price because the "Farm King guys . . . don't really have a move." Whebbe sought to capitalize on his false assurances to Farm King that his insolvent companies had the means to close the deal. He sought an unfair business advantage further justifying the district court's veil-piercing conclusion.

We emphasize again that this is a close case. The four *Victoria Elevator* factors present here may not in all cases support a veil-piercing decision. But piercing the veil and imposing personal liability is an equitable remedy, *Cole*, 766 N.W.2d at 339, and we are mindful of the "broad latitude" that we must give to district courts to fashion equitable remedies, *Bolander v. Bolander*, 703 N.W.2d 529, 548 (Minn. App. 2005), *rev. dismissed* (Minn. Nov. 15, 2005). On this standard, we cannot say that the district court abused its discretion here.

III

We decline Whebbe's urging to reduce the damages award. He contends that the district court should have measured the fraud damages by Farm King's out-of-pocket expenses rather than its lost benefit of the bargain. But having affirmed the district court's decision to pierce the corporate veil and hold Whebbe jointly and severally liable along with his two companies, Whebbe is jointly and severally liable for the entire amount of damages attributable to Farm King's breach-of-contract claim. Reducing the overlapping damages attributable to the fraud claim would not affect the judgment amount, and we

therefore will not address whether the district court appropriately measured the fraud damages.

The record supports the district court's judgment against Whebbe and his companies. And it supports the district court's decision to pierce the veil to hold Whebbe personally, jointly, and severally liable for the damages.

Affirmed.