This opinion is nonprecedential except as provided by Minn.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
A21-1707

Tony Jacobson,
Appellant,

vs.

AOM Holdings, LLC,
Respondent.

Filed August 1, 2022
Affirmed
Smith, Tracy M., Judge

Hennepin County District Court
File No. 27-CV-20-10259

K. Jon Breyer, Andrew R. Shedlock, Kutak Rock LLP, Minneapolis, Minnesota (for appellant)

David R. Marshall, Leah C. Janus, Rachel L. Dougherty, Fredrikson & Byron, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Appellant Tony Jacobson challenges the district court's grant of summary judgment to respondent AOM Holdings, LLC, on his claims for fraudulent inducement, negligent misrepresentation, fraud/intentional misrepresentation, and breach of the implied covenant of good faith and fair dealing in connection with a contract that Jacobson entered into with

AOM to buy membership units in the company. Because Jacobson has failed to demonstrate any genuine issue of material fact barring summary judgment, we affirm.

FACTS

AOM is an advertising and digital media business. Jacobson founded AOM in 2002. In 2015, Jacobson sold his majority interest in AOM to the Audax Group, a private equity firm, but he retained a minority interest in AOM and continued to serve as AOM's chief executive officer (CEO). Jacobson was CEO and a board member of the company at the time of the events at issue in this case. He has a long history in business and is an experienced investor.

In spring 2016, AOM was experiencing financial difficulties. The company had covenants in lender agreements that required it to maintain certain performance metrics, and AOM was concerned that it may not meet those covenants. As CEO, Jacobson was aware of AOM's financial difficulties, participated in meetings about those difficulties, and sent and received emails regarding those difficulties. In May 2016, Jacobson sent an email to AOM's chief revenue officer noting AOM's debt problems: "As we sit today, we are weeks away from blowing our covenants—that is a big, big deal and we saw this coming in January."

AOM sought to alleviate these concerns by raising money through the sale of membership units in the company. On June 8, 2016, AOM's president and chief financial officer, Shaun Nugent, sent Jacobson an email attaching a term sheet for the sale of Class B preferred equity units of AOM. The term sheet provided for the sale of these units for $6 million and included the following term regarding the payment of dividends:

> Dividends on the Class B Units will accrue daily at a per annum rate equal to 10.0%. Dividends will be paid in cash to the extent distributions to the Company to make such payments are not prohibited under AllOver Media, LLC's credit agreements. If dividends on the Class B Units cannot be paid in cash then they will be paid in kind, and compound quarterly.

Jacobson forwarded this email and the term sheet to his friends and business associates Richard Enrico and Mark Ploen for their possible investment.[1]

On June 20, Nugent sent an email to Jacobson, Enrico, and Ploen describing the proposed transaction. The deal was increased to $9 million, with each investor paying $3 million for their units. The email explained that the $9 million infusion would be used to reduce AOM's bank and mezzanine debt.[2] The email stated that 10% cash dividends would be paid quarterly but further stated, "If we get out of compliance with the two senior debt covenants . . . we may not be able to pay a cash dividend (interest) but will make an 'in-kind' payment."

Jacobson had notice that he would be buying membership units in AOM, rather than making a loan to the company. In addition to the communications described above, Jacobson's banker, on June 21, sent an email to Jacobson and Ploen explaining that, based on his review of the purchase documents provided by Jacobson, "[i]t appears that there are no notes between you guys [and AOM]" and that the proposed transaction was a "purchase" of membership units in the company. On June 27, Ploen forwarded to Jacobson

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[1] Enrico and Ploen are not parties to this action, but they have also brought suits against AOM asserting similar claims of fraud.

[2] AOM had two sets of lenders: senior (or bank) lenders and mezzanine lenders. Mezzanine debt sits below senior debt but above equity in priority rights.

an email from Ploen's lawyer that said, "The primary investment document is the Amendment No. 1 that creates the Class B Units that earn a 10% annual dividend and are entitled to preferential payments prior to any payments to the Class A Units." On June 27, Nugent emailed Jacobson regarding the proposed agreement. In the email, Nugent stated that the investment "will have a quarterly dividend of 10%" and further stated that "[t]here is no term on [the investment] as it is not debt but our expectations are that we will 'buy back' the equity in 18 to 24 months." On June 27, in an email that was also forwarded to Jacobson, Ploen's lawyer confirmed that the transaction was for the sale of membership units.

Meanwhile, and up until the deal closed, AOM communicated with Jacobson regarding AOM's financial condition and setbacks that the company was suffering. On June 16, Nugent sent an email to Jacobson and others regarding an upcoming AOM operations review meeting. The email addressed the possibility that AOM might lose a large contract with State Farm and the effect that would have on AOM's debt covenants:

> Seems to me that the last Forecast they saw showed a $3M problem in June that we are solving with a $6m infusion. This is giving us less than $500k of cushion? Clearly our forecast is down again.
>
> Anyway, I know how the[y] think and it is very incremental. We just need to explain our assumptions and logic. This is particularly important if [State Farm] does not come in. That would possibly blow the [third quarter] covenants.

Jacobson replied to the email, asking whether the total amount of the Class B investment was going to be $6 million or $9 million.

On July 5, 2016—the day before the transaction closed—Jacobson received emails from AOM staff discussing the loss of a $600,000 deal with Starbucks and the broader state of the business. One of those emails said, “We came in below our July forecasted bookings by a total of $1 million dollars. We’ll have to make some updates to the forecast in the next couple weeks and decide how we want to handle this month’s bookings shortfall.” The next day, July 6, before signing the agreement, Jacobson received an email from Nugent stating that AOM had lost its contract with State Farm and that AOM would need to adjust its forecasts downward. The email said, “Just got the word: State Farm is out. . . . Not sure what that means for the business but I think we need to make a downward adjustment to our Forecast by at least [$2 million]. This is going to hurt!!”

Later that same day, Jacobson, Enrico, and Ploen signed a subscription agreement to each purchase 3,000 Class B units for $3 million, for a total of $9 million to AOM. In the agreement, Jacobson represented that he has “such knowledge and experience in financial and business matters that he [was] capable of evaluating the merits and risks of such investment,” that he was “able to incur a complete loss of such investment and [was] able to bear the economic risk of such investment for an indefinite period of time,” that he “had and continues to have an opportunity . . . to question, and to receive information from the Company concerning the Company and [his] investment in the Company,” and that he had and continues to have an opportunity “to obtain any and all additional information necessary to verify the accuracy of any information which [he] deems relevant to make an informed investment decision as to the purchase of the Subscription Securities.” The agreement included the term of AOM paying quarterly 10% dividends, provided that AOM

met certain conditions in its lender agreements. If cash dividends were prohibited by those agreements, "dividend[s] shall be made in-kind."

On August 9, 2016, AOM amended its agreements with its bank and mezzanine lenders. Jacobson signed those amendments in his role as AOM's CEO. The amendments directed how AOM would use the money that it raised from the Class B units: AOM would apply $7 million to the senior debt, and $2 million to the mezzanine debt. The amendments also prevented AOM from paying cash dividends on the Class B units unless it could meet certain conditions.

AOM has not paid Jacobson cash dividends; it has issued him in-kind dividends. It is undisputed that AOM did not meet the conditions in its lender agreements for the payment of cash dividends.

Jacobson left AOM in 2017. In 2020, Jacobson sued AOM. He alleged fraudulent inducement of the subscription agreement, negligent misrepresentation, fraud/intentional misrepresentation, and breach of the implied covenant of good faith and fair dealing. He alleged that AOM falsely represented, through affirmative statements or omissions, the company's financial condition and ability to pay dividends and acted in bad faith by creating conditions that led to the company not meeting its lender covenants.[3]

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[3] We note that, in his complaint, Jacobson alleged that AOM represented that the transaction was a "loan" and that Nugent stated that AOM expected to "repay the loan within 18-24 months." AOM argues that Jacobson's fraud claims have always been based on the assertion that AOM misrepresented the agreement as a loan. But, on appeal, Jacobson distances himself from any such theory of his case. He states in his reply brief that, though AOM "does its best to make this case about whether [Jacobson] was duped into believing that he was making a loan to AOM, rather than purchasing membership units," in fact "the gravamen of Jacobson's case . . . is that AOM promised to pay Jacobson

Following discovery, AOM moved for summary judgment, which the district court granted. The district court first determined that Delaware law applied to Jacobson's claims under the governing-law provision of the parties' agreement. As to the merits of Jacobson's claims, the district court concluded that Jacobson had failed to present evidence of a misrepresentation or fraudulent omission by AOM. The district court observed that Jacobson was CEO of AOM, knew that the company was having financial problems, by his own admission had access to AOM's financial documents and did not read many of the documents sent to him, and as CEO was himself responsible for directing how AOM spent the infusion of money from the transaction.

Jacobson appeals.

DECISION

Summary judgment is proper if the moving party shows that "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. Appellate courts review the grant of summary judgment de novo. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). In determining whether the record creates a genuine issue of material fact, appellate courts must "view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn.

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a 10% dividend on this $3 million investment if AOM was in compliance with its debt covenants" when "it knew that it would never be in compliance with its debt covenants." Consistent with Jacobson's framing of his case, our focus is on his claims with respect to AOM's nonpayment of cash dividends, not on any purported obligation on AOM to "repay" the "loan."

2002). A genuine issue of material fact exists "when reasonable persons might draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). To the extent that review of summary judgment involves questions of law, appellate courts also review those questions de novo. *Montemayor*, 898 N.W.2d at 628.

I. Governing Law

Before turning to our analysis of Jacobson's claims, we first address Jacobson's argument that Minnesota law, rather than Delaware law, applies. The subscription agreement states, "This Agreement and all claims arising hereunder or in connection herewith shall be governed by and construed in accordance with the domestic substantive laws of the State of Delaware." Jacobson argues that this choice-of-law provision does not apply because his claims are based on conduct that preceded the subscription agreement and therefore do not arise from and are not connected with the agreement. AOM counters that Delaware law applies to all of Jacobson's claims.

We note that not all of Jacobson's claims are based on conduct preceding his entry into the subscription agreement; his claim of breach of implied covenant of good faith and fair dealing, for example, is based on only post-agreement conduct. Under the choice-of-law provision of the agreement, Delaware law applies to that claim because it arises under the covenant of good faith and fair dealing that is implied within the agreement. As to Jacobson's claim that the agreement was fraudulently induced by pre-agreement conduct, Minnesota appellate courts have not addressed whether and when a choice-of-law provision in a contract applies to such a claim.

But we need not reach the issue because Jacobson has not demonstrated that the application of Minnesota law would change the outcome. Jacobson does not identify any difference between Delaware and Minnesota law as to the substantive elements of his claims, nor does he analyze his claims under Minnesota law or explain how the application of Minnesota law rather than Delaware law would affect the outcome. Because Jacobson has not demonstrated that the choice of law makes a difference and because he briefed his claims based only on Delaware law, we will apply Delaware law.

II. Fraud and Misrepresentation Claims

Jacobson asserts that he has presented evidence giving rise to genuine disputes of material fact regarding whether AOM fraudulently misrepresented its financial condition and its intent and ability to pay cash dividends, barring summary judgment on his fraud and misrepresentation claims.

Under Delaware law, the elements of fraud are:

> (1) the defendant falsely represented or omitted facts that the defendant had a duty to disclose; (2) the defendant knew or believed that the representation was false or made the representation with a reckless indifference to the truth; (3) the defendant intended to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted in justifiable reliance on the representation; and (5) the plaintiff was injured by its reliance.

DCV Holdings, Inc. v. ConAgra, Inc., 889 A.2d 954, 958 (Del. 2005).[4]

Under Delaware law, the elements of negligent misrepresentation are: "(1) the defendant had a pecuniary duty to provide accurate information, (2) the defendant supplied

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[4] Jacobson contends that the law is materially identical for each of his fraud-based claims. We agree and apply the law for intentional fraud to those claims.

false information, (3) the defendant failed to exercise reasonable care in obtaining or communicating the information, and (4) the plaintiff suffered a pecuniary loss caused by justifiable reliance upon the false information." *Steinman v. Levine*, No. Civ.A. 19107, 2002 WL 31761252, at *15 (Del. Ch. Nov. 27, 2002).

Jacobson asserts that AOM committed fraud and negligent misrepresentation by both affirmative statements and omissions that led him to believe that AOM would be able to pay him cash dividends, even though it knew it would not be able to do so, and that he relied on AOM's misrepresentations in deciding to enter into the subscription agreement. But a review of the evidence reveals that he failed to submit sufficient evidence to create a genuine dispute of fact regarding his claims.

We begin with the evidence of false statements or omissions. Jacobson argues that AOM misrepresented its financial state to him on June 15 when it presented him with a slide deck, which was to be used in a meeting with majority-owner Audax the following day, forecasting that, with a $6 million infusion, AOM would be in compliance with its debt covenants. Jacobson argues that a June 8 email from Nugent to others at AOM and Audax shows that AOM knew that forecast to be false. Jacobson points to the part in the June 8 email where Nugent wrote, "I think it is safe to conclude that we will blow [one of the debt covenants] on 6/30/16." But Jacobson does not quote the rest of the June 8 email. In it, Nugent goes on to explain that, with the then-anticipated $6-million equity infusion, it appeared that AOM would still have a problem of around $400,000. But the email goes on to identify several actions that AOM could take that could yield $450,000 and that "[t]he combination of these efforts 'should' get us past any issues.'" The June 8 email—which

states that efforts should resolve the debt-covenant problem—does not create an issue of material fact regarding whether AOM affirmatively misrepresented its financial forecast to Jacobson on June 15.

Jacobson also alleges that AOM omitted crucial facts by withholding from him "perilous information" that AOM received hours before the closing of the transaction—specifically, $1 million less than expected in booked business in the month of June, the loss of a $600,000 contract with Starbucks, and the loss of State Farm as a client. But the record reflects that Jacobson *was* informed about these setbacks. The day before the closing, Jacobson received an email from AOM financial analyst Sam Von Hon stating, "We came in below our July forecasted bookings by a total of $1 million dollars. We'll have to make some updates to the forecast in the next couple of weeks and decide how we want to handle this month's bookings shortfall." Among the sales that fell through was "$600k for Starbucks." And, on July 6, before the transaction closed, AOM told Jacobson that its potential large contract with State Farm also fell through. Nugent emailed Jacobson, "Just got the word: State Farm is out. . . . Not sure what that means for the business but I think we need to make a downward adjustment to our Forecast by at least $2M." Jacobson does not deny that he received any of these emails. He therefore fails to create a genuine issue of fact as to whether AOM failed to inform him of these business setbacks.

Jacobson also cites, as evidence of a fraudulent omission, a financial forecast that was produced on the day the deal was closed that showed that AOM would be out of compliance with its debt covenants. Jacobson argues that this forecast shows that "AOM knew prior to closing that it would never be in a position to pay cash dividends to

Jacobson." But that forecast was part of an analysis that Nugent sent to AOM employees at 6:35 p.m. on July 6, *after* the deal had closed. That analysis was run to reflect the loss of State Farm as a client—a setback that Jacobson was informed of before closing.

Jacobson also argues that evidence about AOM's budgets proves that AOM misled him about the company's financial state. He cites the testimony of Jon DeRock, a former AOM employee who said he "was often critical of the budgeting, forecasts and projections prepared by AOM, as they were always extremely optimistic and not reasonably based on the company's past or present performance." Jacobson also points to the report of his expert, which concluded that the variance between AOM's budgeted and actual revenues was so large as to render the budgeting "materially inaccurate." But other than the forecasts already discussed above, Jacobson does not identify which allegedly overly optimistic budgets he reviewed before entering into the subscription agreement.

In addition to failing to identify evidence sufficient to create a genuine issue of material fact regarding false statements and omissions, Jacobson also fails to identify sufficient evidence to create a genuine issue of fact as to whether he justifiably relied on any false statements or omissions regarding AOM's financial condition in making his decision to invest. Jacobson was AOM's CEO and a board member at the time of the transaction.[5] It is not disputed that he had access to all of the company's financial

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[5] Jacobson argues that the district court erred by concluding that, because he was CEO, Delaware law imputed to him knowledge of AOM's finances. Jacobson appears to be correct that the caselaw relied upon by the district court does not establish such a presumption. While the case cited by the district court establishes that Delaware law imputes a corporation with the knowledge of its officers, the case does not state that officers are imputed with the knowledge of all corporate affairs. *See Vichi v. Koninklijke Philips*

information, including its actual revenues. Additionally, the evidence indisputably shows that, in the first part of 2016, Jacobson knew AOM was having financial difficulty—that is why AOM proposed the transaction in the first place. And, before the deal closed on July 6, Jacobson was indisputably informed of serious financial setbacks that AOM was suffering—including, specifically, the loss of a large State Farm contract, which would require a downward adjustment to AOM's forecast and was "going to hurt!!" Given these undisputed facts, Jacobson has not shown a genuine dispute of material fact regarding whether he justifiably relied on any of the purported false statements or omissions in making his decision to purchase the membership units.

III. Breach of Implied Covenant of Good Faith and Fair Dealing

Jacobson asserts that the evidence shows a genuine issue of material fact regarding his claim that AOM breached an implied covenant of good faith and fair dealing by intentionally manipulating its finances to avoid paying him cash dividends.

Delaware law requires good faith in contracts and corresponding performance. *Kuroda v. SPJS Holdings, LLC*, 971 A.2d 872, 888 (Del. Ch. 2009). A party to a contract cannot act arbitrarily or unreasonably to prevent the other party from receiving the fruits of the bargain. *Id.* "General allegations of bad faith conduct are not sufficient. Rather, the plaintiff must allege a specific implied contractual obligation and allege how the violation of that obligation denied the plaintiff the fruits of the contract." *Id.* "[W]here the subject at

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Elecs., N.V., 85 A.3d 725, 794 (Del. Ch. 2014). However, Jacobson's position and conduct as CEO remains relevant when considering whether he submitted sufficient evidence to show that AOM failed to inform him about the company's financial state or that he justifiably relied on such omissions.

issue is expressly covered by the contract, or where the contract is intentionally silent as to that subject, the implied duty to perform in good faith does not come into play." *Dave Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 23 (Del. Ch. 1992).

Jacobson argues that "AOM . . . intentionally mismanaged its cash flow to ensure that it would be out of compliance with its debt covenants so that it never had to pay Jacobson (or Enrico or Ploen) cash dividends." He does not identify specifically how AOM manipulated its finances except to suggest that AOM applied the $9 million investment toward its debt obligations in a manner that precluded compliance with AOM's debt covenants. But it was Jacobson himself, as CEO of AOM, who signed the amendments to lender agreements that determined how the funds would be allocated to address the company's senior and mezzanine debt. Jacobson fails to demonstrate how his own action in signing agreements allocating the $9 million investment among AOM's lenders could have been a breach of the implied covenant that AOM owed to him as an investor.

Jacobson's response to this flaw in his claim, which he elaborated on at oral argument, is that there is a distinction between the allocation of funding at a high level and the day-to-day operations of the company. To support his contention that AOM manipulated the day-to-day operations of the company to avoid having to make dividend payments to him and the other investors, Jacobson points to AOM's failure to budget for dividend payments following the $9 million cash infusion. But Jacobson acknowledges that AOM did not meet its debt covenants, which would explain the absence of cash dividends from its post-agreement budgets. And simply citing the absence of a budgeted item for cash dividends does not identify any alleged day-to-day operational actions that

AOM took to result in the company’s failure to meet its debt covenants. In sum, Jacobson has not presented evidence sufficient to create a genuine dispute of material fact regarding whether AOM intentionally manipulated its finances to avoid paying him cash dividends.

Affirmed.