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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2107

Cirrus, Inc., et al.,
Appellants,

vs.

Joseph Whitney, et al.,
Respondents.

Filed September 7, 2010
Affirmed
Shumaker, Judge

Hennepin County District Court
File No. 27-CV-07-5307

Kevin R. Coan, Laura N. Maupin, Barnes & Thornburg, LLP, Minneapolis, Minnesota (for appellants)

Rolin L. Cargill, III, William R. Skolnick, Skolnick & Shiff, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Klaphake, Presiding Judge; Shumaker, Judge; and Harten, Judge.*

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

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

SHUMAKER, Judge

In this appeal involving claims arising out of a business relationship, corporate and individual appellants contend that the district court erred in (1) determining that respondents reasonably relied on appellants' alleged misrepresentations; (2) awarding damages that put respondents in an allegedly better position than they would have been absent the misrepresentations; and (3) piercing the corporate veil of the corporate appellant to hold the individual appellant liable. Respondents challenge our jurisdiction to hear this appeal. We affirm.

FACTS

Respondent Loring Corners, Inc. is a corporation that owns a group of commercial buildings in Minneapolis. From March 2001 through January 2007, Loring Corners was owned by three shareholders: appellant Tim Oskey, respondent Joseph Whitney, and John T. Olson. Oskey is the sole shareholder of appellant Cirrus, Inc., a corporation that provided property-management services for Loring Corners from 1995-2006.

Sometime in 1999, Oskey approached Whitney to discuss how to best upgrade the telephone and internet technology at Loring Corners. Oskey proposed his new technology plan which would provide services through a separate corporation, Advanced T-1 Services, LLC ("AT-1"), another appellant in this matter. Whitney expressed concern that he did not want to negatively impact the cash flow of Loring Corners, and Oskey assured Whitney that the AT-1 plan would not do so. After Whitney and Oskey agreed that installing high-speed T-1 lines would be the most effective technology Loring

Corners could provide at the time, Oskey formed AT-1 in November of 1999. Whitney reassured Olson that Oskey had represented to him that the projections showed that they would not lose money.

At trial, Oskey testified that he and Whitney agreed in 1999, from their first discussions concerning AT-1, that Loring Corners would pay AT-1 an "infrastructure charge." The purpose of the infrastructure charge was to compensate AT-1 for the capital expenditures and equipment lease payments incurred, and was in recognition of the fact that AT-1's services were expected to result in higher rental income for Loring Corners. According to Oskey, Whitney agreed that Loring Corners would pay AT-1 a fixed amount of as much as $20,000 each month based on the number of ports installed in each space in the building; a port being a potential telephone or internet connection.

The infrastructure charge applied to every space in the building, regardless of whether the space was occupied by a tenant or whether any tenant actually utilized AT-1's communications services. The infrastructure charge was supposedly added to each tenant's monthly rental invoice, although no invoices specifically reflected the term "infrastructure charge." Tenants of Loring Corners that used AT-1 services paid for those services, which were listed on the tenants' monthly invoices from Loring Corners as an "AT-1 charge." Loring Corners then collected the money for those services, and paid AT-1 those charges and the infrastructure charge, after AT-1 invoiced Loring Corners. However, none of the invoices from AT-1 to Loring Corners reference an "infrastructure charge" either. In fact, the term "infrastructure charge" does not appear on any documents bearing a date earlier than March 2006. Additionally, the flat fee

charged per port was not uniform throughout each of the spaces in Loring Corners. Whitney and Olson assumed that the costs listed next to vacant spaces on invoices were projections of generated income possibilities, not actual costs charged to Loring Corners. Oskey admitted at trial that his system resulted in a substantial loss for Loring Corners each month.

Whitney testified that he never agreed that AT-1 would be compensated through an infrastructure charge; in fact, he testified that had never heard of the infrastructure charge until this litigation began. Oskey never explained to him that Oskey expected Loring Corners to pay $20,000 a month of the base rent so he could go into business. Whitney agreed to the whole set-up because Oskey presented him with a plan that indicated AT-1 would eventually be profitable. Whitney was under the impression that there would be no expense from Loring Corners unless and until AT-1 was profitable. In 2000, Whitney received a memo from Oskey assuring him that Oskey was "aggressively solving the cash flow problems of AT-1." Whitney was thereby led to believe that AT-1 was earning net revenue of about $4,000 a month. Whitney and Olson both testified that they relied on Oskey to be honest in his handling of Loring Corners' funds.

Oskey set up Loring Corners' bank account, kept the checkbook in his office, and signed all checks, which were made out by him or Cirrus's bookkeeper. Whitney's signature was neither required nor sought. Oskey would routinely create invoices as the owner of Cirrus and AT-1, submit them to himself as Loring Corners' property manager, and write checks to his companies from Loring Corners' bank account in payment of these invoices. Whitney and Olson were not informed of and did not monitor these

transactions except to the extent that expenses for "Advanced T-1 phone service" were reflected on income statements periodically produced by Oskey. Oskey also paid himself a monthly "management fee," which he did not disclose to Whitney or Olson. Oskey agreed that Cirrus received $102,000 in "consulting and management fees" in 2005 from AT-1.

Whitney and Olson questioned Oskey several times over the years as to exactly how AT-1 worked and where the profits were. Each time they questioned him, Oskey would point to the numbers and say, "Look, look how much we're making on this," and Olson testified that "it looked like [they were] making good money." Whenever Whitney had questions about AT-1 operations, Oskey would reassure Whitney that everything was in the tenants' leases, but then Oskey was slow to produce the leases when Whitney asked to see them.

After Loring Corners terminated Oskey and Cirrus as its property manager and AT-1 as its communications provider in May 2006, appellants commenced this action. Respondents asserted counterclaims that included breach of fiduciary duty and misrepresentation. Following a bench trial, the district court found in favor of respondents. Appellants then moved to amend findings or grant a new trial. The district court supplemented the original findings but did not change the substance of its decision. This appeal followed.

D E C I S I O N

Jurisdictional issue

Respondents contend that appellants' motion to amend findings or grant a new trial was "bare bones" and did not state the grounds for the motion with requisite particularity. Thus, when appellants filed a memorandum of law in support of their motion almost two months after the 60-day post-judgment deadline to appeal had passed, respondents argued that the time for appeal had expired and that the district court lacked jurisdiction to decide the motion. The district court decided the motion on the merits.

Relying on *Madson v. Minn. Mining & Mfg. Co.*, 612 N.W.2d 168, 171-72 (Minn. 2000), respondents now argue that this court does not have jurisdiction to consider this appeal because the deadline to appeal has passed. We agree that under *Madson*, the period for appeal is tolled by a posttrial motion only if the motion is both *timely* and *proper*. *Id.* Respondents concede that appellants' motion was timely but claim that it was not proper because it failed to list particular errors. We disagree with respondents' contention that appellants' motion was not proper under the applicable rules.

Minn. R. Civ. App. P. 104.01, subd. 2(b), governs the timeliness of an appeal when a party moves for amended findings after a court trial based on Minn. R. Civ. P. 52.02. After the district court has made its findings of fact, a party may move the court for additional or amended findings. Minn. R. Civ. P. 52.02. The rule further provides that the question of the sufficiency of the evidence to support the findings may be raised on appeal even if there was no objection or posttrial motion to amend in the trial court. *Id.*

In *Madson*, a posttrial motion was made based on Minn. R. Civ. P. 60.02, which allows a party to seek relief from judgment where there is "[m]istake, inadvertence, surprise, or excusable neglect" or for "[a]ny other reason justifying relief from the operation of the judgment." 612 N.W.2d at 169 (quoting Minn. R. Civ. P. 60.02(a) and (f)). The supreme court stated that in order for a motion to be "proper" within the meaning of Minn. R. Civ. App. P. 104.01, it must comply with the rules of civil procedure, such as stating the grounds for appeal with particularity. *Id.* at 172. Respondents argue that appellants' motion was not proper because it did not state the grounds for appeal with particularity.

But appellants brought a posttrial motion to amend the findings under Minn. R. Civ. P. 52.02. Stating the grounds of the motion with particularity is not a requirement under rule 52.02 where a party challenges only the sufficiency of the evidence; therefore, appellants' motion was proper and was sufficient to toll the running of the appeal time.

Because appellants challenge only the sufficiency of the evidence, this appeal is properly before this court, and we will consider all issues raised.

Reasonable reliance

Appellants assert that respondents' claims of fraudulent misrepresentation and breach of fiduciary duties should fail because respondents' reliance on any alleged misrepresentation by Oskey was not reasonable. Appellants maintain that Oskey disclosed all material information to respondents regarding the phone and data system.

To succeed on a claim of fraudulent misrepresentation, a claimant must prove that he or she actually and reasonably relied on an intentionally false representation and

suffered pecuniary damages as a result. *Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C.,* 736 N.W.2d 313, 318 (Minn. 2007). Whether a party's reliance is reasonable is generally a fact question. *Id.* at 321. There is no requirement that the party conduct an investigation; thus, a party may rely on the representation so long as he or she does not know that it is false, and it is not obviously false. *Id.* But, "courts cannot, under ordinary circumstances, extend relief to parties who fail to exercise reasonable diligence or discretion." *Morrill v. Madden*, 35 Minn. 493, 495, 29 N.W. 193, 194 (1886). Additionally, in assessing the reasonableness of the reliance, it is proper to consider the "capacity and experience" of the party who received the misrepresentation. *Berg v. Xerxes-Southdale Office Bldg. Co.*, 290 N.W.2d 612, 616 (Minn. 1980).

Appellants argue that Whitney and Olson are "extremely sophisticated business people," and, as such, they should have been able to ascertain that "a portion of the total rent was not included in the budgeted revenue amount for rent each month." However, there is substantial evidence in the record to support the following facts: there was no mention of an "infrastructure charge" in any of the financial documents relating to AT-1, and neither Olson nor Whitney had heard of the "infrastructure charge" prior to 2006. The only evidence that Oskey and Whitney discussed such a charge prior to establishing AT-1 was Oskey's testimony. Conclusions from such witness testimony are largely credibility determinations, which are squarely within the purview of the fact-finder. *State v. Fisler*, 374 N.W.2d 566, 569 (Minn. App. 1985), *review denied* (Minn. Nov. 18, 1985). Furthermore, Whitney and Olson both testified that Oskey repeatedly reassured that either AT-1 would turn or was turning a profit when they inquired into the financial

workings of AT-1. Short of an investigation, which a defrauded party need not make, respondents' inquiries demonstrated that they exercised reasonable diligence in determining whether Oskey was making financial misrepresentations. The material fact that Oskey was siphoning money to himself through a mysterious "infrastructure charge" and a "management fee" was not obvious. Oskey's reassurance that AT-1 was making a profit was not obviously false. Oskey himself was a sophisticated businessman, and Whitney and Olson acted reasonably in relying on Oskey's representations regarding the communications system that Oskey developed and managed largely single-handedly.

Reasonable reliance implied by a fiduciary relationship

In general, "one party to a transaction has no duty to disclose material facts to the other"; however, a party who "stands in a confidential or fiduciary relation to the other party to a transaction must disclose material facts." *Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 421, 196 N.W.2d 619, 622 (1972). Therefore, fraudulent misrepresentation in a fiduciary relationship occurs when one party conceals a material fact "peculiarly within his own knowledge," and the other party relies on the presumption that the fact does not exist. *Flynn v. Am. Home Prods. Corp.*, 627 N.W.2d 342, 350 (Minn. App. 2001). The material fact must be one which "one party is under a legal or equitable obligation to communicate to the other, and which the other party is entitled to have communicated to him." *Id.* The district court concluded that a fiduciary relationship existed between the parties here as "both co-shareholders and agent/principal" such that Oskey was compelled to disclose material facts in order to avoid a claim of fraudulent

misrepresentation. Relying on *Flynn*, the district court then stated that "reasonable reliance can be implied by a fiduciary relationship."

Appellants argue that the district court misstated the law and presumed reliance because of the fiduciary relationship among the parties. They assert that reasonable reliance on the nonexistence of a material fact is still required in order to sustain a claim for fraudulent misrepresentation. We agree that the district court misstated the law when it indicated in its memorandum that "reasonable reliance can be implied by a fiduciary relationship." However, this error is harmless. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored). In a claim for fraudulent misrepresentation, the fiduciary relationship merely allows for the misrepresentation to be a failure to disclose material facts rather than an affirmative representation. *Id*. There are independent facts, as stated above, to support the conclusion that respondents' reliance was reasonable. Additionally, the fiduciary relationship, though not conclusive, does provide strong support for the conclusion that respondents' reliance was reasonable.

The respondents' reliance on Oskey's failure to disclose the material fact that AT-1 was not making a profit and that he himself was siphoning proceeds from the business was reasonable. The district court did not err in so concluding.

Damages

A damages award may be set aside only if the award is manifestly contrary to the evidence when viewed in the light most favorable to the district court's conclusion. *Imperial Developers, Inc. v. Seaboard Sur. Co.*, 518 N.W.2d 623, 626 (Minn. App. 1994), *review denied* (Minn. Aug. 24, 1994). The amount of damages awarded in a

misrepresentation action is determined by the fact-finder. *Strouth v. Wilkison*, 302 Minn. 297, 300, 224 N.W.2d 511, 514 (1974).

As a general rule, misrepresentation damages should be measured by the plaintiff's out-of-pocket loss. *Lewis v. Citizens Agency of Madelia, Inc.*, 306 Minn. 194, 199-200, 235 N.W.2d 831, 835 (1975). The out-of-pocket loss is determined by measuring the difference between the property received and the price paid, along with special damages proximately caused by the fraud. *B.F. Goodrich Co. v. Mesabi Tire Co., Inc.*, 430 N.W.2d 180, 182 (Minn. 1988). Under the out-of-pocket rule, loss is not a question of what the plaintiff might have gained through the transaction but what was lost by reason of defendant's deception. *Lewis*, 306 Minn. at 200, 235 N.W.2d at 835.

The district court determined that respondents were damaged in the amount of $631,000 by appellants' misrepresentation regarding the management of AT-1, reasoning that "the only reasonable calculation of resulting damages is to subtract the amount of money received for phone services used by tenants that was paid through their rent statements from amounts billed and paid by Loring Corners to Mr. Oskey for AT-1." Although the district court did not explicitly state what damage rule it was applying, its calculation, coupled with its explanation of damages, seems to fit the out-of-pocket-loss rule.

Appellants argue that respondents did not suffer damages; and if respondents suffered damages, the district court should have applied a restitutionary or rescissionary measure of damages. To support their argument, appellants rely on *Estate of Jones by Blume v. Kvamme*, 449 N.W.2d 428, 431-32 (Minn. 1989) (awarding the defrauded party

the price of stock at the time it was sold by defendant, rather than the price of the stock at the time defendant fraudulently acquired the stock, so as to prevent the defendant from retaining the fruits of his misrepresentation and benefiting from the dramatic appreciation of the stock); and *Jensen v. Peterson*, 264 N.W.2d 193, 142-43 (Minn. 1978) (awarding the defrauded party the entirety of the misrepresented sale price, rather than merely the actual price of the property, so as to prevent the defendant from benefiting an extra $10,000 from his misrepresentation). However, neither of these cases contains facts similar to the instant case, nor do they stand for calculating damages in such a way so as to ensure the defrauder is no worse off than he was before the alleged fraud. Rather, these cases apply an exception to the strict out-of-pocket-damages rule in order to make sure the *defrauded* party was fully compensated and restored to its previous position.

The evidence shows that $631,000 is a reasonable amount of compensation for respondents. Measuring damages by anything other than the out-of-pocket-loss rule is unwarranted. Both parties' experts agreed that $631,000 represents the amount of rental income lost by Loring Corners as a direct result of appellants' misrepresentations. No Loring Corners tenant paid any additional rent that could be attributed to the AT-1 system instead of normal market increases. The district court appropriately applied the out-of-pocket-damages rule, and the amount calculated seems reasonable given the evidence presented at trial.

Piercing the corporate veil of both AT-1 and Cirrus was warranted

Appellants argue that piercing the corporate veil here to hold Oskey responsible for the liabilities of both Cirrus and AT-1 was inappropriate. Under limited

circumstances, Minnesota courts may "pierce the corporate veil" and hold shareholders of a company personally liable for the obligations of the company. *Groves v. Dakota Printing Servs., Inc.*, 371 N.W.2d 59, 62 (Minn. App. 1985). For instance, "[w]hen a corporation is used to accomplish fraud, courts may disregard the corporate entity and permit plaintiffs to 'pierce the corporate veil.'" *Stone v. Jetmar Props., LLC*, 733 N.W.2d 480, 488 (Minn. App. 2007); *see also Victoria Elevator Co. v. Meriden Grain Co.,* 283 N.W.2d 509, 512 (Minn. 1979) (stating that, although not the only ground for such a finding, fraud may be, and often is, a ground for disregarding the corporate entity).

Oskey used both AT-1 and Cirrus to carry out his fraudulent scheme: Oskey was in charge of Loring Corners' books and its bank account so that he could write checks to himself via AT-1 for a share of Loring Corners' rental income. Oskey used the shield of both Cirrus and AT-1 to conceal what he was doing from his co-shareholders through the creation of financial statements and invoices. Piercing of the corporate veil of both Cirrus and AT-1 to make Oskey responsible for the liabilities of both companies was appropriate.

Affirmed.