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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1902**

Rick Donato DeMartini, d/b/a Entirely Seamless, Inc.,
Appellant,

vs.

Rachel Fonss, et al.,
Respondents.

**Filed June 1, 2010
Affirmed
Randall, Judge***

Redwood County District Court
File No. 64-CV-08-457

Rick Donato DeMartini, Lamberton, Minnesota (pro se appellant)

Robert L. Gjorvad, Runchey, Louwagie & Wellman, P.L.L.P., Marshall, Minnesota (for
respondents)

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

UNPUBLISHED OPINION

RANDALL, Judge

Appellant Rick Donato DeMartini challenges the dismissal of his suit against the
co-owner of his closely-held corporation and two additional respondents. The district

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

court did not err in determining that his claims are without merit. His conduct during the course of the litigation was sufficiently extreme to grant the award of attorney fees in favor of the respondents. Affirmed.

FACTS

Rick Donato DeMartini¹ appeals from the district court's dismissal of his claims against respondents Rachel Fonss, Norman Fonss, and Donald Hill. Appellant started Entirely Seamless in late 2003 with respondent Rachel Fonss, then his wife. They later incorporated the business in early 2006. Under the new corporate structure, appellant was the president of the corporation, Rachel Fonss was the vice-president, and each had equal shares of stock.

Appellant was indicted in federal court in early 2006 on charges arising from the theft of an aircraft in New Jersey. Later that year, appellant was also indicted for federal fraud charges related to a false letter of credit presented to one of Entirely Seamless's suppliers. In late March 2006, appellant was incarcerated in a federal prison camp. Rachel Fonss was left to run Entirely Seamless on her own.

After appellant was incarcerated, Rachel Fonss discovered that Entirely Seamless was deeply in debt to multiple creditors. She estimated that the corporation had \$1.3

¹ The case is captioned with appellant "d/b/a Entirely Seamless, Inc." Because appellant is not an attorney licensed to practice law in Minnesota, he cannot pursue an appeal on behalf of Entirely Seamless, Inc. Although persons who are not licensed attorneys may represent themselves in court, they may not represent others. *In re Conservatorship of Riebel*, 625 N.W.2d 480, 481 (Minn. 2001). "It is well settled under Minnesota common law that a corporation must be represented by an attorney in legal proceedings." *Save Our Creeks v. City of Brooklyn Park*, 699 N.W.2d 307, 309 (Minn. 2005). We therefore consider only appellant's personal claims.

million in outstanding debts, but only \$600,000 in assets. By negotiating with some of the corporation's creditors, Rachel Fonss was able to reduce the corporation's debt load by approximately \$300,000. But that left nearly \$1 million in debt and insufficient assets to pay off creditors.

While Rachel Fonss had to run the corporation alone, she had Norman Fonss (her father) and Donald Hill advise her on some of the issues facing the corporation. Norman Fonss paid for an ad to help the company liquidate equipment and lent money to the corporation. Both Norman Fonss and Donald Hill admit that they helped advise Rachel Fonss on how to run the business. But neither of them took any money from Entirely Seamless or had any control over any of the corporation's property. Neither of them were officers or employees of the corporation. Rachel Fonss was solely responsible for managing all of Entirely Seamless's operations.

On June 3, 2008, appellant sued Rachel Fonss, Norman Fonss, and Donald Hill, alleging that they breached their fiduciary duties to the company and misappropriated corporate assets. Appellant repeatedly sent requests for interrogatories, and when he considered the answers insufficient, he moved for sanctions. The district court denied his requests for sanctions. Appellant also requested that hearings be held by telephone to allow him to participate from prison. The district court did not grant the request, stating that it was court policy not to allow appearances by telephone in contested civil matters.

Norman Fonss and Donald Hill moved for summary judgment on the basis that they owed no fiduciary duties to Entirely Seamless. The district court agreed and dismissed the claims against them, finding that appellant presented no genuine issue of

material fact tending to establish that they owed any fiduciary duties to Entirely Seamless. The claims against Rachel Fonss went to trial.

On approximately September 15, 2008, two former Entirely Seamless employees entered the corporate offices at appellant's direction. Once inside, they took files from the computer system. At trial, Rachel Fonss testified that after taking the files, one of the former employees sabotaged the computer system, removing firewalls and rendering the corporation's network inoperable.

The district court held a trial on July 1, 2009. Rachel Fonss appeared, represented by counsel. Appellant did not appear, and appellant did not secure counsel to appear on his behalf. The district court took testimony from Rachel Fonss, focusing on her actions in managing the corporation while appellant was in prison.

On September 1, 2009, the district court issued an order dismissing the claims against Rachel Fonss, on the basis that appellant did not present evidence to rebut her testimony. The district court also awarded \$5,137.38 in attorney fees plus costs and disbursements to Rachel Fonss as a sanction for appellant's bad-faith conduct during the case, which was "intended only to add to the cost and complexity of this litigation." This appeal follows.

DECISION

Appellant did not file a motion for a new trial. In an ordinary civil case where there is no motion for a new trial, the scope of review on appeal includes substantive legal issues properly raised at trial, whether the evidence supports the findings of fact, and whether the findings support the conclusions of law. *See Alpha Real Estate Co. of*

Rochester v. Delta Dental Plan of Minn., 664 N.W.2d 303, 310 (Minn. 2003) (substantive legal issues properly raised at trial); *Gruenhagen v. Larson*, 310 Minn. 454, 458, 246 N.W.2d 565, 569 (1976) (whether the evidence supports the findings and whether the findings support the conclusions of law and the judgment).

I.

After appellant failed to appear at trial, the district court dismissed appellant's charges against Rachel Fonss with prejudice. The district court conceded that under Minn. Stat. § 302A.467 (2008) appellant may have a valid individual claim:

If a corporation or officer or director of the corporation violates a provision of this chapter, a court in this state may, in an action brought by a shareholder of the corporation, grant any equitable relief it deems just and reasonable in the circumstances and award expenses, including attorneys' fees and disbursements, to the shareholder.

Even assuming that appellant has a valid individual claim against Rachel Fonss, the district court found that the claim failed on the merits.²

The district court specifically found that appellant did not meet his burden of proof in demonstrating his claims for breach of fiduciary duty. *See, e.g., Carpenter v. Nelson*, 257 Minn. 424, 427, 101 N.W.2d 918, 921 (1960) (noting that in a civil action "the plaintiff has the burden of proving every essential element of his case, including damages, by a fair preponderance of the evidence"). Here, appellant failed to appear at

² Even assuming that appellant has a valid individual claim, his remedy under the statute is limited to equitable relief. *See Westgor v. Grimm*, 381 N.W.2d 877, 881 (Minn. App. 1986) (holding that \$5,000 damage reward could not be sustained because it was not authorized by the statute).

trial, and failed to present sufficient evidence to prove that there was a breach of fiduciary duty by Rachel Fonss.

Appellant's challenge to the district court's order will be interpreted as a challenge to the district court's findings of fact. "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. In applying rule 52.01, "we view the record in the light most favorable to the judgment of the district court." *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). "The decision of a district court should not be reversed merely because the appellate court views the evidence differently." *Id.* "Rather, the findings must be manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Id.* (quotation omitted). "Findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation omitted). And "[i]f there is reasonable evidence to support the district court's findings, we will not disturb them." *Rogers*, 603 N.W.2d at 656.

The district court found that Rachel Fonss believed that appellant left Entirely Seamless with approximately \$1.3 million in debt at the time he was sent to the federal prison camp. Between appellant's incarceration and the time of this suit, Rachel Fonss managed to reduce that debt by \$300,000. The record supports the district court's finding that Rachel Fonss did not breach any fiduciary duty to appellant. Appellant presented no

evidence by which the district court could find otherwise. The district court's findings of fact are not clearly erroneous and support the conclusions of law.

II.

Appellant also challenges the dismissal of his claims against Norman Fonss and Donald Hill by summary judgment. “On appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law.” *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Appellant argues that both Norman Fonss and Donald Hill owed fiduciary duties to Entirely Seamless by virtue of the fact that Rachel Fonss asked for their occasional help in signing for checks, drafting documents, and advising her on how to manage the business. We disagree.

The district court found that neither Norman Fonss nor Donald Hill was an officer or employee of Entirely Seamless. The district court also found that neither Norman Fonss nor Donald Hill appear to have been paid by Entirely Seamless. “[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party’s case, the nonmoving party must make a showing sufficient to establish that essential element.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997); *see also Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006) (describing *substantial evidence* as an “incorrect legal standard” and clarifying that “summary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions”). In opposing summary judgment, “general assertions” are not enough to create a genuine

issue of material fact. *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). “In order to successfully oppose summary judgment, appellant must extract *specific*, admissible facts from the voluminous record and particularize them for the trial judge.” *Kletschka v. Abbott-Northwestern Hosp., Inc.*, 417 N.W.2d 752, 754 (Minn. App. 1988), *review denied* (Minn. Mar. 30, 1988).

Here, the record does not contain sufficient evidence for a reasonable jury to find that either Norman Fonss or Donald Hill owed any fiduciary duties to Entirely Seamless. They were neither officers nor employees of the corporation. That they assisted Rachel Fonss in running the company does not by itself cause them to owe fiduciary duties to a corporate shareholder, officer, or director. *See Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 914 (Minn. App. 2008) (describing requirements for the existence of a fiduciary relationship), *review denied* (Minn. Jan. 20, 2009). Appellant presented no genuine issues of material fact that support his claims against Norman Fonss and Donald Hill.

III.

The district court did not abuse its discretion in denying appellant’s request for discovery sanctions against respondents. Appellant alleges that respondents did not provide adequate or timely discovery, justifying imposing sanctions under Minn. R. Civ. P. 37.02(b). We disagree. “The choice of sanctions under Minn. R. Civ. P. 37.02(b) for failure to comply with discovery is within the [district] court’s discretion.” *Przymus v. Comm’r of Pub. Safety*, 488 N.W.2d 829, 832 (Minn. App. 1992), *review denied* (Minn. Sept. 15, 1992). In its October 23, 2008 order, the district court noted that under Minn.

R. Civ. P. 37.01(b), a party is required to certify that they have “in good faith conferred or attempted to confer with the person or party failing to make the discovery” prior to engaging in court action. The district court found that this requirement was not followed.

The record does not indicate any behavior on the part of respondents that would reasonably lead to sanctions. *See Breza v. Schmitz*, 311 Minn. 236, 237, 248 N.W.2d 921, 922 (1976) (explaining factors used in determining whether discovery sanctions are appropriate). The district court’s decision to deny sanctions was proper.

IV.

The district court did not err by refusing to allow appellant to appear via interactive television or telephone. Courts have a duty to allow reasonable accommodation to pro se litigants so long as no prejudice results. *Kasson State Bank v. Haugen*, 410 N.W.2d 392, 395 (Minn. App. 1987); *see Liptak v. State ex rel. City of New Hope*, 340 N.W.2d 366, 367 (Minn. App. 1983) (stating that “[w]hile some latitude and consideration is provided by all courts to persons appearing pro se, we cannot permit bending of all rules and requirements or cause disruptions of courts’ trial schedules”). While there is some latitude given, pro se parties are still generally required to abide by court rules. *See Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001) (“Although some accommodations may be made for pro se litigants, this court has repeatedly emphasized that pro se litigants are generally held to the same standards as attorneys and must comply with court rules.”).

Here, appellant claims that he was prejudiced by the district court's refusal to allow him to appear by telephone. We disagree. The district court specifically denied appellant the right to appear by telephone *after he failed to appear for a previously scheduled telephone conference*. Allowing appellant to appear via telephone in a contested civil case would impede the opportunities for the district court to observe appellant's demeanor, would make conduct of a trial difficult, and would violate the district court's policy limiting electronic appearances to certain uncontested matters and cases in which electronic appearances are allowed by statute. The district court's stated rationale for disallowing electronic appearances was valid and the district court did not abuse its discretion in denying appellant's request.

V.

The district court awarded attorney fees to Rachel Fonss under Minn. Stat. § 549.211 (2008). "We review the district court's award of attorney fees or costs for abuse of discretion." *Brickner v. One Land Dev. Co.*, 742 N.W.2d 706, 711 (Minn. App. 2007), *review denied* (Minn. Mar. 18, 2008). Courts are "normally reluctant" to grant attorney's fees against a pro se party, but will do so in a case of "extreme" conduct. *Liedtke v. Fillenworth*, 372 N.W.2d 50, 52 (Minn. App. 1985) (observing that district court did not abuse its discretion in awarding attorney fees against pro se litigant who filed numerous harassing suits), *review denied* (Minn. Sept. 13, 1985). Here, the district court notes that appellant failed to appear at trial, failed to employ counsel to represent himself or the corporation at trial, instructed former employees to gain unauthorized access to the corporation's network, and made discovery demands for the stolen

information. While it is rare to award fees against pro se parties, appellant's actions were "extreme." The district court did not abuse its discretion in awarding fees to respondents.

Affirmed.