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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1729**

Mathias Miller,
Respondent,

vs.

Gary Johnson,
Appellant.

**Filed July 23, 2012
Affirmed
Larkin, Judge**

Stearns County District Court
File No. 73-CV-10-11431

John J. Neal, Willenbring, Dahl, Wocken & Zimmermann, PLLC, Cold Spring,
Minnesota (for respondent)

John E. Mack, Mack & Daby, P.A., New London, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Johnson, Chief Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges the district court's award of judgment for respondent,
arguing that the district court erred in construing a document drafted and signed by
appellant as a promissory note. We affirm.

FACTS

This is an appeal from judgment following a bench trial on respondent Mathias Miller's breach-of-contract claim arising out of Miller's loan of \$20,000 to appellant Gary Johnson. Miller was represented by counsel at trial; Johnson appeared pro se. The evidence at trial showed that in October 2005, after Johnson's excavation company completed a project for Miller, Johnson told Miller that Johnson's business was low on funds and that he needed to borrow money. Miller agreed to loan Johnson \$20,000.

Miller testified that he asked Johnson whether they should involve an attorney in the transaction. Johnson said that an attorney was not necessary. Miller testified that he told Johnson, "I'm satisfied if you just want to write out a note to me. . . . So [Johnson] took his tablet out and he wrote it out." Johnson testified that he asked Miller for a \$20,000 loan and that he drafted, signed, and provided Miller with a document dated October 28, 2005. The document states, "Matt Miller agrees to borrow Gary Johnson \$20,000 due [and] payable on March 1st 2006 or before at 8% interest." Miller testified that he provided Johnson the \$20,000 and that Johnson never repaid him. Johnson, however, testified that he never received the \$20,000 from Miller.

The district court found that Miller loaned Johnson \$20,000, at an interest rate of eight percent, on or about October 28, 2005. The district court also found that Johnson failed to repay the loan and the interest accruing thereon. The district court concluded that Miller is entitled to judgment against Johnson in the amount of \$20,000, plus interest at the rate of eight percent per annum from October 28, 2005 to the date of judgment, in addition to recoverable costs and disbursements. The district court observed that the trial

testimony “contrasted greatly,” and that the court’s decision “is based upon the conclusion that [Miller’s] testimony was slightly more credible than that of [Johnson].” The district court reasoned that Johnson’s document is an “untrained attempt to draft a [p]romissory [n]ote” and treated it as such. The district court summarized the transaction as “another case of businessmen engaging in a transaction involving a considerable sum of money based upon a hand shake or a ‘napkin’ agreement,” with “predictable” results. This appeal follows.

D E C I S I O N

“[O]n appeal from a judgment where there has been no motion for a new trial the only questions for review are whether the evidence sustains the findings of fact and whether such findings sustain the conclusions of law and the judgment.” *Gruenhagen v. Larson*, 310 Minn. 454, 458, 246 N.W.2d 565, 569 (1976). “[M]otions for a new trial pursuant to Minn. R. Civ. P. 59.01 are not a prerequisite for appellate review of substantive questions of law when a genuine issue of law is properly raised and considered at the district court level.” *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 311 (Minn. 2003). But an appellate court generally will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). “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” *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001).

“A promissory note is an unconditional promise in writing for the payment of a certain sum of money.” *Smith v. First State Bank of Tyler*, 95 Minn. 496, 497, 104 N.W. 369, 369 (1905). Johnson asserts that the district court erred by treating the October 28 document as a promissory note because the document “is an unambiguous commitment to make a loan, not a commitment to pay back money had and received.” Johnson’s appellate briefs focus on one argument: “The [d]istrict [c]ourt erred in construing the written document signed by Mr. Johnson as a note.” Miller responds that Johnson’s argument is not properly before this court, because it is raised for the first time on appeal. *See Thiele*, 425 N.W.2d at 582. We agree.

Although Johnson stated, in his answer to Miller’s complaint, that the October 28 document “*does not* evidence [Johnson] having ‘promised to pay to [Miller’s] order the amount of \$20,000,’ as alleged,” Johnson did not assert that defense at trial. This court’s review of the entire trial transcript reveals that Johnson never argued that the document is an agreement to lend money and not a note—even though the district court and Miller repeatedly referred to the document as a note. Instead, Johnson argued that Miller changed his mind about the loan and never provided the money. For example, when the district court invited Johnson to tell the court what it should know about the case, Johnson testified, “I’m not disputing signing the contract. I gave it to [Miller] to sign, and he was going to give me the money and sign the contract. He didn’t give me the money and he didn’t sign the contract. He changed his mind, and so that’s the way it was left.” And after granting Johnson’s request for oral closing arguments (Miller had

requested the opportunity to submit a written closing argument) the following exchange occurred:

DISTRICT COURT: [T]o save time or at least give you some direction, I'll paraphrase. My understanding is your position is you spoke with Mr. Miller about a loan. You talked about it. He was agreeable. You put the note together. He was going to give some further thought to it or for whatever reason he never signed the note. He never gave you the money. That's your position.

JOHNSON: That's my position.

DISTRICT COURT: In a nut shell?

JOHNSON: That's in a nut shell.

The district court later asked Johnson if there was anything else he wanted to summarize or highlight about his position regarding Miller's claim, and Johnson said, "No." In summary, Johnson never argued in district court that the October 28 document is not a note. Instead, Johnson argued that despite the parties' agreement, Miller never provided the \$20,000.

Because Johnson's legal argument that the October 28 document is not a note was not argued to and considered by the district court, we do not consider it on appeal. *See id.* Moreover, we defer to the district court's express determination that Miller's testimony was more credible than Johnson's, and we discern no clear error in its findings that Miller loaned Johnson \$20,000, at an interest rate of eight percent, on or about October 28, 2005, and that Johnson failed to repay the loan and the interest accruing thereon. *See* Minn. R. Civ. P. 52.01 ("[D]ue regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses."); *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002) ("In an appeal from a bench

trial, we do not reconcile conflicting evidence. We give the district court's factual findings great deference and do not set them aside unless clearly erroneous." (citation omitted)), *review denied* (Minn. June 26, 2002). We therefore affirm.

Affirmed.