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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1327**

Patrick Takuanyi,
Appellant,

vs.

Sandra E. Martinez,
Respondent,

Julio C. Solis,
Respondent,

Mahmoud Alsharif,
Respondent,

and

Mahmoud Alsharif,
Respondent,

vs.

Patrick Takuanyi,
Appellant,

Pet Enterprises, et al.,
Defendants.

**Filed April 30, 2012
Affirmed
Bjorkman, Judge**

Dakota County District Court
File Nos. 19HA-CV-09-6129, 19HA-CV-10-6068

Patrick E. Takuanyi, St. Paul, Minnesota (pro se appellant)

Sandra Martinez, St. Paul, Minnesota (pro se respondent)

Julio C. Solis, St. Paul, Minnesota (pro se respondent)

Mahmoud Alsharif, Rosemount, Minnesota (pro se respondent)

Considered and decided by Johnson, Chief Judge; Bjorkman, Judge; and Huspeni, Judge.*

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges the judgment denying all of his claims, arguing that the district court (1) made clearly erroneous factual findings, (2) applied the incorrect standard of proof to his breach-of-fiduciary-duty and conversion claims, and (3) erred by denying his breach-of-contract claim. We affirm.

FACTS

Respondents Mahmoud Alsharif and Sandra Martinez incorporated J&M Auto Sales, Inc. in February 2007 to engage in the business of auto repair and sales. Alsharif and Martinez purchased the J&M property and buildings on a contract for deed from Terrance Luther, making a joint \$54,000 down payment and agreeing to share equal responsibility for the \$1,874.52 monthly payments. The contract also required a balloon payment on April 14, 2010.

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

Sometime in 2007, Alsharif decided to sell his share in J&M. Alsharif offered to sell his share to Martinez and her common-law husband, respondent Julio Solis, who worked at J&M. They did not have the means to buy him out. Alsharif then approached appellant Patrick Takuanyi about purchasing his share in J&M. Takuanyi visited the shop with Alsharif, and Alsharif gave Takuanyi a tour of the shop, indicating that he owned half of everything. Takuanyi had his attorney draft a purchase agreement, which provided that Takuanyi would pay \$30,000 for Alsharif's share of J&M, with half due at the time of closing and half due on April 14, 2010. Alsharif represented that he "[had] paid or will pay when due or finally settled all federal, state, local and other income and franchise taxes relating to the Business." Takuanyi "assume[d] no liabilities of [Alsharif], except for half of the payments on the Contract for Deed." Alsharif agreed to "continue to pay half his current contract for Deed payments every month until [Takuanyi] pays the [second \$15,000 payment]," and to remain liable to Luther for making the payments on the contract for deed until that time. Takuanyi and Alsharif signed the agreement on December 27, 2007, and Takuanyi began working at J&M around that time.

Takuanyi also separately agreed to purchase a frame rack from Alsharif for \$10,000. Takuanyi paid \$3,000 toward that purchase on January 13, 2008, and Alsharif gave him a receipt for that payment indicating that the remaining \$7,000 was to be paid by March 1, 2010. Alsharif subsequently sold the same frame rack to Martinez for \$11,500. Takuanyi never paid the remaining \$7,000 to Alsharif.

Relations among Takuanyi and Martinez and Solis deteriorated rapidly, due in large part to language barriers¹ and Takuanyi's refusal to give Martinez a copy of the purchase agreement, despite her requests. Alsharif continued to work at J&M through June 2008. As a result, Martinez was suspicious of Takuanyi's role within the company and questioned how Takuanyi could be an owner of J&M when Alsharif continued to work there. The concerns went both ways. Martinez and Solis felt that Takuanyi was disrespectful because he treated them as employees rather than equals; Takuanyi did not trust the people Martinez and Solis had working at J&M and felt that they were not keeping proper business records.

On April 29, 2008, Martinez and Solis wrote to Takuanyi, through counsel, indicating that they had "now obtained a copy" of the purchase agreement and stating their desire to either buy him out or sell Martinez's interest in J&M to him. But the parties could not agree on terms, so they all continued working at J&M.

As the discord between Takuanyi and Martinez and Solis continued to escalate, the Minnesota Department of Revenue commenced a tax audit of J&M. In an August 15, 2008 letter, the department advised Martinez and Alsharif that J&M "was substantially out of compliance with Minnesota tax laws" because there was no record of employee withholding or sales taxes. Martinez and Solis hired an accountant to help with the audit.

On October 14, 2008, an altercation occurred that led Martinez and Solis to obtain a harassment restraining order (HRO) against Takuanyi. The HRO excluded Takuanyi

¹ All parties to this appeal speak English as a second language, but they conducted all business with each other in English. It is undisputed that this led to communication difficulties.

from J&M for two years. Takuanyi subsequently returned to J&M, but the police officer who accompanied him did not have time to wait for Takuanyi to gather all of his personal belongings. Takuanyi retained a lawyer, to whom he e-mailed a list of items that he claims were at J&M before the HRO was issued, but not there when he went to retrieve the property with the police officer.

After being excluded from the property, Takuanyi stopped paying half of the monthly contract-for-deed payments. Alsharif also made no payments, and Martinez and Solis did not have the funds to make the payments in full. As a result, Luther foreclosed on the property. Luther and Martinez then entered into a rental agreement for the property, and Martinez continued to operate J&M.

In October 2009, Takuanyi commenced this action, alleging that Martinez breached fiduciary duties and converted his property; that Solis assaulted him on October 14, 2008; that Martinez committed abuse of process; and that Alsharif fraudulently induced him to sign the purchase agreement and breached the frame-rack contract. Because Takuanyi did not make the final \$15,000 payment due in April 2010 under the purchase agreement, Alsharif asserted a breach-of-contract claim against Takuanyi in a separate action, which the district court consolidated with this action as a counterclaim. After a bench trial, the district court denied all of Takuanyi's claims and Alsharif's counterclaim. This appeal follows.

DECISION

“In the absence of a motion for a new trial, our scope of review includes substantive legal issues properly raised to and considered by the district court, whether

the evidence supports the findings of fact, and whether those findings support the conclusions of law and the judgment.” *City of Minneapolis v. Minneapolis Police Relief Ass’n*, 800 N.W.2d 165, 172 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). A finding of fact will not be disturbed unless it is clearly erroneous “either because it is without substantial evidentiary support or because it was induced by an erroneous view of the law.” *Brink v. Brink*, 396 N.W.2d 95, 97 (Minn. App. 1986).

I. The record supports the district court’s findings of fact.

Takuanyi challenges several of the district court’s factual findings. We address each challenge in turn.

A. The district court did not clearly err by finding that Martinez was not sophisticated or calculating.

Takuanyi first challenges the district court’s findings that “Martinez and Solis do not appear . . . to be sophisticated business people” or “have much record or bookkeeping experience,” and “do not strike the Court as calculating individuals.” Takuanyi argues that Martinez deliberately ran a cash-only business to evade tax collection and that she and Solis “were far more calculating than the district court gave them credit for.” We are not persuaded.

Martinez testified that J&M was her first business venture, that she did not know very much about business, and that any misstatements in the record from the HRO proceeding were the result of language barriers. Solis testified similarly. This testimony, which the district court accepted, amply supports the challenged findings. Moreover, Martinez’s lack of business acumen and uncalculating demeanor do not bear directly on

any elements of Takuanyi's claims. Rather, the findings reflect the district court's assessment of Martinez as a witness. The district court determines "the relative credibility of the parties and the witnesses" based on its opportunity to observe and evaluate their "testimonial demeanor." *Nelson v. Nelson*, 291 Minn. 496, 497, 189 N.W.2d 413, 415 (1971). And we defer to those credibility determinations. *Patterson v. Stover*, 400 N.W.2d 398, 400 (Minn. App. 1987). We will not second-guess the district court's decision to credit Martinez's testimony.

B. The district court did not clearly err by finding that Martinez did not know of Takuanyi's interest in J&M until April 2008.

Takuanyi also challenges the district court's finding that Martinez did not know of Takuanyi's interest in J&M until April 2008, which was the basis for its conclusion that Martinez did not owe Takuanyi a fiduciary duty. Takuanyi argues that the finding is clearly erroneous because he told Martinez in December 2007 that he had purchased Alsharif's share in the business. We disagree.

Martinez acknowledged that Takuanyi came to the shop in December 2007 and said "that he was our partner." But she also testified that she was "kind of confused" about the state of ownership because he refused to give her a copy of the purchase agreement. Martinez was aware that Takuanyi intended to purchase Alsharif's half of the business, but Takuanyi had been involved with J&M in other capacities since June 2007, Takuanyi and Alsharif failed to seek Martinez's consent to or otherwise consult her about the transaction, and Alsharif continued to work at J&M until June 2008. And the record reflects that Martinez did not have an opportunity to review the purchase agreement until

April 2008. On this record, the district court did not clearly err by finding that Martinez did not know that Takuanyi had purchased Alsharif's share of the business until April 2008.

c. The district court did not clearly err by finding that Alsharif made no misrepresentations to Takuanyi.

Takuanyi argues that the district court clearly erred by finding that Takuanyi “did not prove that Alsharif knowingly falsified information . . . which caused him to enter into the December 2007 Agreement,” and that, given his business experience and legal assistance, “[t]o the extent [Takuanyi] did not have all of the information he wanted or needed, it is a result of his failure to conduct due diligence.” The record amply supports these findings.

The purchase agreement provides that Alsharif will give Takuanyi “full access during normal business hours to all properties, books, accounts, records, contracts relating to the Business, and customer lists and documents that may be reasonably requested and that relate to the Business,” and permits Takuanyi to terminate the purchase agreement prior to closing if Alsharif “failed in any material respect to satisfy all of the conditions to Closing.” Takuanyi testified that he did not review J&M's financial records before closing on the purchase. But he did not claim—and there is no evidence—that Alsharif prevented him from reviewing the records. Rather, Takuanyi testified that Alsharif told him that the books were with an accountant for tax preparation, that J&M was current on its financial obligation, and that Takuanyi would “get all the financial record books for the business” from Martinez, who kept J&M's financial

records, sometime after the purchase. Takuanyi could have refused to close or insisted on reviewing the records; instead, he went forward with the purchase. There is no evidence that Alsharif knowingly misrepresented J&M's financial status at that time or the location of the company's limited records, and the only evidence that J&M has defaulted on financial obligations is evidence of subsequent tax delinquency, for which Alsharif is responsible under the purchase agreement.

On this record, we conclude that the district court did not err by finding that Alsharif did not knowingly provide false information to Takuanyi regarding J&M's financial status and records.

II. The district court's application of a clear-and-convincing proof standard to Takuanyi's claims against Martinez is harmless error.

Takuanyi argues that the district court erroneously applied a clear-and-convincing standard of proof to his claims of breach of fiduciary duty and conversion. We agree. "In an ordinary civil action the plaintiff has the burden of proving every essential element of his case, including damages by a fair preponderance of the evidence." *Wick v. Widdell*, 276 Minn. 51, 53-54, 149 N.W.2d 20, 22 (1967). The district court's application of the clear-and-convincing standard does not require remand, however, if its decision is based on grounds that are unaffected by this error. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored). Accordingly, we consider the grounds on which the district court rejected these two claims.

First, the district court rejected Takuanyi's breach-of-fiduciary-duty claim as a matter of law because Martinez did not owe Takuanyi a fiduciary duty. Because

Takuanyi's only challenge to this legal conclusion is premised on his assertion that Martinez was not aware of his ownership interest in J&M until April 2008,² which we previously rejected, the lack of a duty independently supports the district court's denial of this claim. Moreover, the district court repeatedly stated that there was no evidence, not just insufficient evidence, to support a finding that Martinez breached any fiduciary duty. The record demonstrates that Martinez failed to produce business records because she did not have them; did not account profits to Takuanyi because there were none; and operated independently from Takuanyi rather than sharing profits. And while it is unclear whether Martinez (and J&M) failed to pay taxes, any such failure was not a breach of any duty to Takuanyi because Alsharif remains obligated for J&M's taxes under the purchase agreement.

Second, the district court rejected Takuanyi's conversion claim because he produced no evidence that the items he claimed Martinez converted were actually missing, that Martinez was responsible for the absence of the items, or that the items are worth the amounts he assigned to them. Our examination of the record confirms the dearth of evidence supporting Takuanyi's conversion claim.

² Takuanyi does not challenge the legal conclusion that a one-half partner in a closely held corporation does not owe a fiduciary duty to the purchaser of the other one-half share of the business unless and until she has reason to believe that the purchase has been completed. See *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 n.1 (Minn. 1989) (observing that the existence of a legal duty depends on the factual circumstances of each case but presents a question of law for the court); *Harris v. Mardan Bus. Sys., Inc.*, 421 N.W.2d 350, 353 (Minn. App. 1988) (stating that shareholders in a closely held business organization owe a fiduciary duty to one another, but not to employees), *review denied* (Minn. May 18, 1988).

On this record, we conclude that the district court's erroneous application of a clear-and-convincing standard of proof was harmless and the court did not err by denying Takuanyi's breach-of-fiduciary-duty and conversion claims.

III. Takuanyi waived his breach-of-contract claim regarding the frame rack.

Takuanyi also argues that the district court erred in concluding that Alsharif did not breach the frame-rack contract. We disagree. The district court did not decide the merits of this claim because it determined that Takuanyi withdrew the claim during trial. The record supports this conclusion. At the close of trial, the district court asked Takuanyi's attorney to explain how Takuanyi could prevail on this claim since he had not paid the \$7,000 due on March 1, 2010. After clarifying the terms of the frame-rack agreement, Takuanyi and his attorney discussed the matter off the record. Following the discussion, counsel stated, "We concede the point, Your Honor." We conclude that the district court did not err by determining that Takuanyi waived his claim regarding the frame-rack contract.

Affirmed.