STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0325

U.S. Consulting, LLC,
Appellant,

vs.

Kevin Lee Roggatz, et al.,
defendants and third party plaintiffs,
Respondents,

vs.

Dennis Larson, third party defendant,
Appellant.

Filed December 17, 2012
Affirmed in part, reversed in part, and remanded
Klaphake, Judge[*]

Chippewa County District Court
File No. 12-CV-10-79

Amy J. Doll, Fluegel, Anderson, Mclaughlin & Brutlag, Chartered, Morris, Minnesota (for appellants)

Jon C. Saunders, Sarah L. Klaassen, Aaron P. Welch, Anderson Larson Hanson & Saunders, P.L.L.P. (for respondents)

Considered and decided by Ross, Presiding Judge; Kirk, Judge; and Klaphake, Judge.

[*] 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

KLAPHAKE, Judge

In this appeal from summary judgment, appellants Dennis Larson and U.S. Consulting, LLC (USC) challenge the district court's adverse ruling on their breach of fiduciary duty and tortious interference with contract claims and the district court's issuance of a protective order. Respondents Kevin Roggatz and Ag Business Consulting, LLC (ABC) filed a related appeal to challenge the district court's adverse ruling on their breach of fiduciary duty counterclaim and the district court's denial of their motion to amend their complaint to include counterclaims of promissory estoppel and piercing the corporate veil. We affirm in part, reverse in part, and remand for trial on appellants' breach of fiduciary duty and tortious interference with contracts claims.

FACTS

Larson, Larson's wife, and Roggatz formed USC, an agricultural implement dealership consulting company in July 2005. Larson provided the funding; he and his wife held the ownership interest in USC. Roggatz, who was USC's president and responsible for the day-to-day operations of the company, signed an employment contract with USC that expired on December 31, 2011. Larson provided USC with a $100,000 discretionary revolving line of credit and took out a $202,600 loan from a bank in USC's name that he personally guaranteed. Larson periodically provided money from the two loans to USC in incremental portions.

Immediately after its formation, USC struggled financially. It generated no profits from 2005 to 2007 and relied entirely on loans from Larson. Several times USC was

unable to pay Roggatz his salary, although Roggatz eventually paid himself from USC's corporate account. In 2008, USC generated more than $800,000 in revenue, which Roggatz used to pay down much of USC's debt to Larson, and Larson used $100,000 to pay down the bank loan he took out in USC's name. USC ran into financial difficulties again at the end of 2008 and in 2009 borrowed money from Larson for expenses. In the summer of 2009, USC was again unable to pay Roggatz's salary, and in August 2009, Larson informed Roggatz that he would give money to USC only to pay corporate expenses, but not Roggatz's salary, and that all future funds for USC had to come from sales. By the end of 2009, Larson and Roggatz were in constant dispute over USC's bills and Roggatz's salary. In December 2009 or January 2010, Roggatz stopped working for USC, and began working for ABC—an agricultural implement dealership consulting company that he formed in December 2009.

Shortly after its formation, ABC received payments from at least one former USC client. USC commenced suit against respondents in February 2010, alleging breach of contract, breach of fiduciary duty, and tortious interference with contracts. Respondents answered and asserted eight counterclaims against appellants, including breach of contract and breach of fiduciary duty, and also moved for a protective order to prevent appellants from contacting respondent's clients; the district court granted this motion. Both parties moved for summary judgment, and respondents moved to amend their complaint to include counterclaims of promissory estoppel and piercing the corporate veil. The district court granted summary judgment, rejecting all of appellants' claims and ruling in favor of respondents on their breach of contract and failure to pay earned wages

counterclaims. The district court denied respondents' motion to amend their complaint. This appeal followed.

D E C I S I O N

The district court properly grants summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . , show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. We review the district court's summary judgment to "determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). We "view the evidence in the light most favorable to the party against whom judgment was granted." *RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1, 6 (Minn. 2012) (quotation omitted).

1. Appellants' breach of fiduciary duty claim against Roggatz

The district court concluded that Roggatz did not owe a fiduciary duty to appellants because Roggatz rescinded his contract with USC after USC materially breached its employment contract with Roggatz in the fall of 2009 by failing to pay his wages. We disagree.

The district court concluded both that Roggatz was entitled to rescind the employment contract because USC committed a material breach of the contract by failing to pay his salary and that Roggatz was entitled to damages for his breach of contract claim. When a party to a contract commits a "material breach," the other party may

rescind. *Liebsch v. Abbott*, 265 Minn. 447, 451, 122 N.W.2d 578, 581 (1963). This "annihilates the contract and [returns] . . . each party . . . to his previously existing rights." *Marso v. Mankato Clinic, Ltd.*, 278 Minn. 104, 116-17, 153 N.W.2d 281, 290 (1967). Therefore, "[b]reach-of-contract damages and rescission are historically viewed as inconsistent remedies because the former assumes and affirms a contract while the latter denies or unmakes the contract." *Nw. State Bank, Osseo v. Foss*, 293 Minn. 171, 177, 197 N.W.2d 662, 665 (1972). The district court made legally contradictory conclusions by granting summary judgment to Roggatz on his breach of contract claim against USC while at the same time concluding that Roggatz rescinded the employment contract. *Id.* at 177, 197 N.W.2d at 665-66.

Because Roggatz elected to affirm the contract by seeking damages for its breach, the district court erred by finding that he had rescinded the contract. And, there are material issues of fact that must be resolved as to whether Roggatz breached his fiduciary duty to USC. Roggatz owed a fiduciary duty to USC both as an officer and an employee. *Swenson v. Bender*, 764 N.W.2d 596, 601 (Minn. App. 2009) (stating that the officer-corporation relationship is a per se fiduciary relationship), *review denied* (Minn. July 22, 2009); *State by McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 858 (Minn. 1985) (stating that "[a]ll employees, to a lesser or greater extent, have a fiduciary relationship to their employers with a duty to act in the interests of the employer and not as an adversary" (citation omitted)). As an officer, Roggatz was statutorily required to "discharge the duties of an office in good faith, in a manner the officer reasonably believes to be in the best interests of the corporation, and with the care an ordinarily

prudent person in a like position would exercise under similar circumstances." Minn. Stat. § 302A.361 (2010).

Roggatz left USC and began work at ABC sometime between late 2009 and early 2010, and shortly thereafter respondents received payments from former clients of USC. The record is unclear as to exactly when Roggatz left employment with USC, when he began working for ABC, which clients he took with him from USC, and the actions Roggatz took to attract USC's former clients to ABC. These are genuine issues of material fact that preclude summary judgment on appellant's breach of fiduciary duty claim. We therefore reverse and remand this issue for trial.

2. Appellants' tortious interference with contracts claim

Appellants argue that the district court erred by dismissing their tortious interference with contracts claim against respondents because there are still material facts in dispute. Appellants' argument is persuasive. "A cause of action for tortious interference with a contractual relationship requires five elements: (1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages." *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 362 (Minn. 1998) (quotation omitted). The district court acknowledged that factual disputes as to this claim existed but concluded that, because Roggatz handled the daily operations, USC was "incapable of fulfilling and profiting from any contracts it had with clients" once Roggatz left; therefore, it would be impossible for appellants to prove damages. We conclude that the district court erred as a matter of law.

"The controlling principle governing actions for damages is that damages which are speculative, remote, or conjectural are not recoverable." *Leoni v. Bemis Co.*, 255 N.W.2d 824, 826 (Minn. 1977) (quotation omitted). "The usual remedy provided by Minnesota law for interference with contract is to compensate the victim for the damages that resulted from the loss of the contract." *Storage Tech. Corp. v. Cisco Sys., Inc.*, 395 F.3d 921, 925 (8th Cir. 2005). Even viewing the evidence in the light most favorable to respondents, at least one of USC's former clients canceled its contract with USC, formed a similar, if not identical, contract with respondents, and paid respondents the same fee it would have paid USC. This provides a basis for damages that is not speculative, remote, or conjectural.

Further, it is possible that appellants would be able to prove damages related to prospective profits that are not too speculative. Without Roggatz, USC is essentially a new business, and "[a]lthough the law recognizes that it is more difficult to prove loss of prospective profits to a new business than to an established one, the law does not hold that it may not be done." *Cardinal Consulting Co. v. Circo Resorts, Inc.*, 297 N.W.2d 260, 267 (Minn. 1980) (quoting *Leoni*, 255 N.W.2d at 826).

There are material disputes of fact over the existence of contracts between USC and the various clients respondents allegedly interfered with, whether respondents interfered with those contracts, and whether respondents were justified in their interference. The district court erred by granting summary judgment on this claim, and we therefore reverse and remand this issue for trial.

3. Respondents' motion to amend complaint

Respondents argue that the district court erred by refusing to permit them to amend the complaint to include promissory-estoppel counterclaims for piercing the corporate veil. Minnesota Rule of Civil Procedure 15.01 provides that a "party may amend a pleading once as a matter of course at any time before a responsive pleading is served . . . [or] a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so required." While "the amendment of pleadings should be liberally allowed unless the adverse party would be prejudiced," the supreme court has "cautioned that the court should deny a motion to amend a complaint where the proposed claim could not withstand summary judgment." *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 332 (Minn. 2004). "Generally, the decision to permit or deny amendments to pleadings is within the discretion of the district court and will not be reversed absent a clear abuse of discretion." *Johns v. Harborage I, Ltd.*, 664 N.W.2d 291, 295 (Minn. 2003).

Promissory Estoppel

The district court concluded that Larson "did not make a clear and definite promise to Roggatz" and so the "doctrine of promissory estoppel is not applicable." We agree.

"To state a claim for promissory estoppel, the plaintiff must show that (1) there was a clear and definite promise, (2) the promisor intended to induce reliance and such reliance occurred, and (3) the promise must be enforced to prevent injustice." *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 834 (Minn. 2011). The purported promise

here is a statement that Larson made to Roggatz prior to forming USC that "[t]he one thing you will never have to worry about with me is cash. We will never run out of cash."

In *Ruud v. Great Plains Supply, Inc.*, the supreme court held that an employer's statements to an employee to convince the employee to take a job elsewhere in the company that "[g]ood employees are taken care of" and that he was "considered a good employee" were too vague and indefinite as a matter of law to give rise to a promissory-estoppel claim. 526 N.W.2d 369, 370, 372 (Minn. 1995). The statement in *Ruud* is similar to the alleged statement here: both are vague assurances that do not contain sufficient details to give rise to a promissory-estoppel claim capable of surviving summary judgment. We affirm the district court's decision to deny respondents' motion to add a promissory estoppel counterclaim.

Piercing the Corporate Veil

The district court denied respondents' motion to amend its pleadings to pierce the corporate veil and to hold Larson individually liable for USC's breach of the employment contract, concluding that this claim would not survive a motion for summary judgment. "A court may pierce the corporate veil to hold a shareholder liable for the debts of the corporation when the shareholder is the alter ego of the corporation." *Hoyt Props, Inc. v. Prod. Res. Grp., L.L.C.*, 736 N.W.2d 313, 318 (Minn. 2007) (citing *Victoria Elevator Co. v. Meriden Grain Co.*, 283 N.W.2d 509, 512 (Minn. 1979)). "Veil piercing is an equitable remedy," *Equity Trust Co. Custodian ex rel. Eisenmenger IRA v. Cole*, 766 N.W.2d 334, 339 (Minn. App. 2009), and courts are to consider "'reality and not form,

with how the corporation operated and the individual defendant's relationship to that operation.'" *Hoyt Props.*, 736 N.W.2d at 318 (quoting *Victoria Elevator*, 283 N.W.2d at 512). In so doing, the court considers whether there is:

> [(1)]insufficient capitalization for purposes of corporate undertaking, [(2)]failure to observe corporate formalities, [(3)] nonpayment of dividends, [(4)]insolvency of debtor corporation at time of transaction in question, [(5)]siphoning of funds by dominant shareholder, [(6)]nonfunctioning of other officers and directors, [(7)]absence of corporate records, and [(8)]existence of corporation as merely facade for individual dealings.

Id. at 318-19 (quoting *Victoria Elevator*, 283 N.W.2d at 512).

If the court determines that a number of the *Victoria Elevator* factors are present, it then determines if there is "an element of injustice or fundamental unfairness." *Victoria Elevator*, 283 N.W.2d at 512. If both of the prongs of this two-part test are met, the "corporate existence cannot be allowed to shield the individual from liability for damages incurred by those dealing with the corporation." *Id.* We agree with the district court's conclusion that respondents did not meet either prong of the *Victoria-Elevator* test.

The parties do not dispute that throughout USC's existence, it did not follow corporate formalities, or have functioning officers or directors besides Larson. In addition, Larson paid USC's corporate taxes personally, instead of having USC file corporate tax returns. But in a closely-held corporation, failure to observe corporate formalities is not sufficient to meet the *Victoria-Elevator* test. *Id.*; *see also Trustees of the Graphic Communications Int'l Union Upper Midwest Local 1M Health & Welfare*

Plan v. Bjorkedal, 516 F.3d 719, 731 (8th Cir. 2008) (holding under the *Victoria-Elevator* test that simply because "corporate formalities may not have been scrupulously followed does not change the fact that [the shareholder] treated [the corporation] as its own business") Further, not having active directors "is not inconsistent with [a closely held] corporation." *Snyder Elec. Co. v. Fleming*, 305 N.W.2d 863, 868 (1981). We agree with the district court's conclusion that these facts are insufficient to establish a basis for piercing the corporate veil.

Further, the district court found that "USC was sufficiently capitalized for the purposes of its corporate undertaking" because "USC was able to function or several years on funds invested by, and loans facilitated by, Larson." We agree. In *Snyder Elec. Co.*, the supreme court stated that shareholder loans count towards equity, not corporate liability. 305 N.W.2d at 868.

And, as to the insolvency of the debtor corporation at the time of the transaction in question, this court previously noted in *Ass'n of Mill & Elevator Mut. Ins. Co. v. Barzen Int'l, Inc*., that the insolvency factor carries less weight because insolvency is frequently present when a party seeks to pierce the corporate veil of a corporation that has ceased operating. 553 N.W.2d 446, 450 (Minn. App. 1996), *review denied* (Minn. Nov. 20, 1996).

As to the siphoning of funds factor, the district court found that while Larson placed a large part of the bank loan in his personal account, he did not siphon funds because he invested much—if not all—of the money into USC. Larson took out $202,600 from the bank in USC's name and commingled it in his personal account, but

by the end of 2009, Larson transferred more than $302,600 into USC's corporate account. While Larson did commingle funds, there are no facts to show that he siphoned any money from USC.

Finally, the district court found that "USC did not exist as a façade for Larson's personal dealings . . . . [Larson] had very little to do with USC's day-to-day operations." We agree. Roggatz authorized almost all of the money paid out of USC's corporate account, and the only money that Roggatz alleges that Larson unilaterally transferred out was $100,000 in 2008 to pay down USC's loan from the bank. There is no evidence that Larson used USC's corporate entity merely to provide protection from liability for his individual dealings.

Although the first prong of the *Victoria Elevator* test does not support respondents' claim, we briefly address the second prong. Respondents argue that Larson agreed to fully fund USC and because he failed to do so, USC failed to pay Roggatz, which was fundamentally unfair. But USC, not Larson, was Roggatz's employer. There is no evidence that Larson personally assumed any obligation to ensure that Roggatz was paid, and there are no facts in the record suggesting that Larson agreed to bankroll USC in perpetuity. Because the district court's findings and conclusions are supported by the record, we affirm its denial of Roggatz's motion to amend his complaint to include a piercing the corporate veil claim.

4. Roggatz's breach of fiduciary duty counterclaim

Roggatz argues that Larson, as the owner of the controlling interest in USC, breached his fiduciary duty toward Roggatz by distributing money from the corporate account to himself and his interests prior to paying Roggatz his wages. The district court concluded that Larson did not owe a fiduciary duty to Roggatz because, at the time of transfer, USC was not insolvent. We agree with the district court.

"A fiduciary is a person who is required to act for the benefit of another person on all matters within the scope of their relationship." *Swenson*, 764 N.W.2d at 601 (quotation omitted). "When a corporation is insolvent, or on the verge of insolvency, its directors and officers become fiduciaries of the corporate assets for the benefit of the creditors." *Snyder*, 305 N.W.2d at 869. A director cannot make a loan to the corporation and then "by reason of their special position treat themselves to a preference over other creditors." *Id.* "[I]t is an impermissible preference for an insolvent corporation's officers or directors to seek exoneration of corporate debts on which they are secondarily liable to the prejudice of other creditors." *Id.*

The only transfer that Roggatz alleges that Larson made directly out of USC's corporate account was a payment of $100,000 in August 2008 to pay down the balance on USC's loan, which Larson had personally guaranteed. The year that Larson made the transfer, USC had revenue of more than $800,000 and was not behind on its payments to Roggatz or to any other creditor. Further, USC earned more than $320,000 in additional revenue before it eventually failed. Thus, the alleged facts support the district court's grant of summary judgment to the appellants on that issue and we affirm.

5. Protective Order

Appellants assert that the district court abused its discretion by granting respondents' motion for a protective order that prohibited appellants from contacting ABC's clients for discovery purposes. Under Minnesota Rule of Civil Procedure 26.02(a), "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party." The rules of discovery have been "consistently construed . . . in favor of broad discovery." *State v. Deal*, 740 N.W.2d 755, 763 (Minn. 2007) (quoting *Larson v. Indep. Sch. Dist. No. 314*, 305 Minn. 358, 363, 233 N.W.2d 744, 747 (1975)). The district court may, "[u]pon motion by a party . . . for good cause shown . . . make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Minn. R. Civ. P. 26.03. The district court "has broad discretion under Minn. R. Civ. P. 26.03 to fashion protective orders and to order discovery only on specified terms and conditions." *In re Paul W. Abbott Co.*, 767 N.W.2d 14, 17-18 (Minn. 2009) (quotation omitted). On appeal, this court reviews "a district court's order for an abuse of discretion by determining whether the district court made findings unsupported by the evidence or by improperly applying the law." *Id.* (quotation omitted).

Here, the district court granted respondents' motion for a protective order and prohibited appellants from "using, giving, showing, making available, or communicating in any way the information contained on [respondents'] confidential client and business contacts list, including, but not limited to, direct or indirect contact with current or prospective clients and business contacts." But appellants produced evidence that

respondents may have profited from three former clients of USC. At least two of these clients, Franken Implements and Tri-State Implements, were included within the meaning of the district court's protective order. To fully pursue their breach of fiduciary duty and tortious interference with contract claims against respondents, appellants must determine these clients' relationships with USC, the circumstances under which they left their contracts with USC, and the nature of their relationships with ABC and Roggatz, among other things. We therefore reverse the district court's order as it pertains to Franken Implements and Tri-State Implements, and affirm the remainder.

Affirmed in part, reversed in part, and remanded.