STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1344

Kenneth Kemnitz,
Respondent,

vs.

Richard Whinnery, et al.,
Appellants.

Filed September 9, 2008
Affirmed
Ross, Judge

Scott County District Court
File No. 70-CV-06-10071

Alex W. Russell, Evening & Weekend Law Offices, 464 Hamline Avenue South, St. Paul, MN 55105 (for respondent)

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Considered and decided by Connolly, Presiding Judge; Kalitowski, Judge; and Ross, Judge.

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

ROSS, Judge

This appeal arises from appellants Richard Whinnery and David Reimer's purchase of the right to redeem a gravel pit, Kemnitz Sand & Gravel, Inc., that respondent Kenneth Kemnitz owned before financial problems led to its foreclosure.

Kemnitz sued Whinnery and Reimer raising various tort and contract claims, alleging that he had a contract with Whinnery and Reimer to broker the sale between them and Skluzacek Oil Company in exchange for payment, which he never received. At trial, the district court dismissed most of Kemnitz's claims. The jury determined that Whinnery and Reimer were liable for the remaining claims, including breach of contract, and assigned $650,400 in damages, which the district court reduced to $633,367 based on the parties' pre-verdict stipulation of maximum potential damages. Whinnery and Reimer appeal, and we affirm.

FACTS

Kenneth Kemnitz owned a gravel pit, Kemnitz Sand & Gravel, Inc., in Scott County, Minnesota, until the pit came into severe financial difficulties and eventually into foreclosure in 2002. Kemnitz's right to redeem the property was set to expire on March 28, 2003. In the meantime, he tried to sell the gravel pit to appellants Richard Whinnery and David Reimer for $2.5 million. Although Whinnery and Reimer were interested in owning the pit, they declined that offer. But on the day that Kemnitz's right of redemption expired, he convinced Randy Skluzacek, president of one of the pit's creditors, Skluzacek Oil Company, along with two other creditors, to execute notices of their intent to redeem. Kemnitz assured these creditors that he would find a prospective owner of the gravel pit to satisfy the pit's obligations to them before obtaining title. Kemnitz made an agreement with Skluzacek Oil that he could select the buyer of Skluzacek Oil's redemption rights. He had eight potential buyers of those rights to choose from, including appellants. Kemnitz decided that he would choose the first

person whom he deemed to be honest and capable of obtaining sufficient financing. The first qualified buyer was Whinnery.

Whinnery called Kemnitz on April 9, 2003. He represented that he and his partners would agree to pay Kemnitz $1.5 million up front and $500,000 over a period of time in exchange for Kemnitz's recommendation to Skluzacek Oil that Whinnery and Reimer become the pit's owners. The other potential buyers with whom Kemnitz had met also remained interested in purchasing the redemption rights to the gravel pit, but Kemnitz decided to pursue a deal with Whinnery. Kemnitz testified that he told Whinnery and his partner David Reimer the names of the other potential buyers, and that Whinnery and Reimer expressed gratitude to him for selecting them instead of any of the others.

On April 25, 2003, Kemnitz met Whinnery and gave him Skluzacek Oil's redemption papers. Whinnery assured Kemnitz at that meeting that there would be a final meeting between Kemnitz, Whinnery, Reimer, and Skluzacek Oil and their attorneys to complete the deal. But despite Whinnery's promise that Kemnitz would be included in the final meeting with Skluzacek Oil, four days after Kemnitz gave Whinnery Skluzacek's redemption papers, Whinnery, Reimer, and their attorney met with Skluzacek Oil without Kemnitz, and they entered into a written agreement for the purchase of Skluzacek's redemption rights.

After learning that Whinnery purchased Skluzacek's redemption rights, Kemnitz continually asked Whinnery when he would be paid for his role in brokering the deal. He testified that he estimated that he would receive between $700,000 and $800,000 from

Whinnery and Reimer and that he asked to be paid 20 times. Whinnery responded that it cost $1,244,290 to redeem the gravel pit and there was no money remaining to pay Kemnitz the amount that Kemnitz claimed to be due under the parties' April 9 agreement. But Whinnery assured Kemnitz often not to worry about being paid, that they would take care of it.

Whinnery and Reimer hired Kemnitz to supervise operations at the gravel pit. Whinnery and Reimer are partial owners of TRI Holdings, which owns the land on which the gravel pit is located. Whinnery, Reimer, and partner Brad Nye also own the company that manages the pit, Belle Plaine Sand and Gravel. Trial testimony indicated that these partnerships were created after Whinnery and Reimer purchased the gravel pit. Kemnitz signed an employment agreement with Belle Plaine Sand and Gravel, providing Kemnitz ten years of free rent on his home, which he sold to Brad Nye because of Kemnitz's personal financial struggles. Whinnery and Reimer discharged Kemnitz from his position as gravel-pit manager in February 2004.

Two years after Whinnery and Reimer terminated Kemnitz's employment, Kemnitz brought this action against them, alleging damages under thirteen different theories sounding in tort and contract. The claims stemmed from Kemnitz's contention that he had a contract with Whinnery and Reimer requiring them to pay him for brokering the sale with Skluzacek Oil. At the close of Kemnitz's case, Whinnery and Reimer moved for a directed verdict. The district court dismissed Kemnitz's claims of negligent misrepresentation, consumer fraud, construction trust, failure to pay accounts stated, retaliation for reporting safety and legal issues, defamatory and false unemployment

benefits claims, negligent and intentional infliction of emotional distress, and conversion and trespass to chattels. Defendants renewed their motion for a directed verdict after they had presented and rested their case. The district court then also dismissed the claims of breach of good faith and fair dealing and negligence. The parties stipulated to a damages cap of $633,367. The jury found Whinnery and Reimer liable for misrepresentation, breach of contract, interference with contract, interference with prospective business relationships, promissory estoppel, and unjust enrichment. It determined Kemnitz's damages to be $650,400, which the district court reduced to the parties' stipulated maximum amount. Whinnery and Reimer moved for a new trial, and the district court denied their motion. They appeal the district court's denial of their motion for judgment as a matter of law, and they seek reversal because of an allegedly errant evidentiary ruling and jury instruction.

D E C I S I O N

I

David Reimer and Richard Whinnery first challenge the district court's denial of their motion for a directed verdict, which they made after the close of Kemnitz's case and again after they had rested. A motion for a directed verdict is now called a motion for judgment as a matter of law, but the motion is substantively unchanged. Minn. R. Civ. P. 50.01(a). This court affirms a denial of judgment as a matter of law if there is any competent evidence in the record that would reasonably sustain the verdict. *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998). When the trial court considers a motion for judgment as a matter of law it must determine whether, viewing the evidence

in the light most favorable to the nonmoving party, the verdict is manifestly against the entire evidence or whether, despite the jury's findings of fact, the moving party is entitled to judgment as a matter of law. *Id.* We will not set the verdict aside on appeal if it can be sustained on any reasonable theory of the evidence. *Id.* We will apply this standard of review to Whinnery's and Reimer's contention that there was insufficient evidence for Kemnitz's contract and tort claims to have reached the jury.

We are not persuaded by Reimer's argument that, due to his passive role, he was entitled to judgment as a matter of law on all counts. In Minnesota, "all partners are liable jointly and severally for all obligations of the partnership," unless otherwise provided by law. Minn. Stat. § 323A.0306(a) (2006). An obligation includes losses or injuries or other actionable conduct of a partner acting in the ordinary course of the business of the partnership. Minn. Stat. § 323A.0305(a) (2006). Because the jury specifically determined that Whinnery's and Reimer's relationship constituted a partnership, a determination that neither of them challenges directly on appeal, Reimer's argument that he was not liable for Whinnery's partnership actions is not compelling.

Whinnery and Reimer's brief on appeal challenges each claim submitted to the jury. Because all claims submitted to the jury arise in substance from the same concerns and damages that regard Kemnitz's breach of contract claim, and because we conclude that our analysis of that claim resolves the appeal, we review only the district court's submission of the contract claim to determine whether it erred when it denied the motion for judgment as a matter of law.

The district court determined that it was proper for the jury to consider Kemnitz's breach of contract claim because the alleged contract was formed orally and the jury had to weigh the credibility of Kemnitz's testimony against Whinnery's and Reimer's contrary testimony. To establish a breach of contract claim, a plaintiff must show that a contract was formed through an offer and acceptance, that it was supported by consideration, and that the plaintiff suffered damages from the breach. *Evelyn I. Rechtzigel Trust ex rel. Rechtzigel v. Fid. Nat. Title Ins. Co. of New York*, 748 N.W.2d 312, 321 (Minn. App. 2008). Kemnitz's breach of contract claim against Whinnery and Reimer was appropriately submitted to the jury; there was sufficient proof that Kemnitz had an agreement with Whinnery and Reimer to recommend them to Skluzacek Oil as buyers in exchange for payment to Kemnitz, but that Whinnery and Reimer failed to perform their end of the bargain.

Kemnitz testified that he had an arrangement with Skluzacek Oil to recommend a buyer of its redemption rights. Randy Skluzacek testified that Kemnitz called him and told him that he had a potential buyer. Kemnitz, his wife, and his niece testified that Whinnery called Kemnitz and told Kemnitz that he and his partners had agreed to pay Kemnitz $2 million. The jury had a substantial basis from this testimony to find that Whinnery offered to pay Kemnitz for his recommendation to Skluzacek Oil.

Kemnitz testified that he had other potential buyers for the right to redeem the gravel pit and that he told Whinnery who those potential buyers were. Randy Skluzacek testified that, ultimately, Whinnery and Reimer bought his company's redemption rights.

The jury reasonably interpreted the parties' conduct and performance to conclude that Kemnitz accepted Whinnery and Reimer's offer.

Construing the evidence in the light most favorable to the verdict, we conclude that the jury determined there was an oral contract between Whinnery and Kemnitz. And that contract consisted of Kemnitz's agreement to exclusively recommend that Skluzacek Oil sell its redemption rights to Whinnery and Reimer in exchange for Whinnery and Reimer agreeing to pay Kemnitz $2 million.

The jury reasonably concluded that Kemnitz suffered damages because Whinnery and Reimer failed to pay him according to the terms of this oral contract. Although Whinnery denied that he agreed to pay Kemnitz $1.5 million up front for his assistance in securing the redemption rights, the jury was not bound to credit this testimony. And Whinnery acknowledged that he told Kemnitz that they would discuss payment further but claimed that they could not decide how much to pay Kemnitz until they determined the cost of redemption. Although Whinnery's testimony suggests that the "payment" at issue was related to Kemnitz's salary and not for his assistance to obtain the redemption rights, weighing the conflicting evidence on these points was an appropriate role for the jury. *See Reinhardt v. Colton*, 337 N.W.2d 88, 96 (Minn. 1983) (noting that conflicting evidence is a jury issue).

Our perception of the jury's understanding is supported by its award to Kemnitz. After the jury returned its verdict that included damages on twelve counts at $54,200 each, the district court asked the jury the total amount it intended to award Kemnitz. The jury responded that it had intended to award Kemnitz $650,400. In a memorandum

attached to its findings of fact, conclusion of law, order and judgment, the district court explained that there was no basis upon which to limit or divide damages between claims or between Whinnery and Reimer. A district court's findings on damages will not be set aside unless they are clearly erroneous. *Holiday Recreational Indus., Inc., v. Manheim Servs. Corp.*, 599 N.W.2d 179, 183 (Minn. App. 1999). The jury's clarification that the cumulative amount that it intended to award Kemnitz was $650,400 supports the finding, and we conclude that the district court did not err when it entered judgment for the damages award as a lump sum of $650,400, reduced to $633,367 based on the parties' pre-verdict stipulation of maximum damages. Because the jury's total damages award as reasonably understood by the district court applies to each claim indivisibly, and because we conclude that the district court properly submitted the breach of contract claim to the jury, it is unnecessary to review the other theories and claims upon which the jury based the award.

II

Whinnery and Reimer claim that the district court abused its discretion when it allowed Kemnitz to introduce his business diary as an exhibit. Evidentiary rulings rest within the sound discretion of the district court and will not be reversed absent an abuse of discretion. *Lundman v. McKown*, 530 N.W.2d 807, 829 (Minn. App. 1995), *review denied* (Minn. May 31, 1995). Whinnery and Reimer objected to the admission of Kemnitz's diary during trial on the basis that the diary was hearsay. The district court sustained the objection, but it noted that it would revisit the propriety of the ruling if Kemnitz's truthfulness was later challenged. Whinnery testified about Kemnitz's

testimony that Whinnery had promised to include him in a final meeting with Skluzacek Oil, asserting that Kemnitz's testimony was false. Kemnitz returned as a rebuttal witness and again sought to introduce his diary. Because the district court determined that Kemnitz's truthfulness had been challenged, it ruled that the diary could be admitted. Whinnery and Reimer argue that this ruling was erroneous.

Subject to multiple exceptions, hearsay is generally inadmissible. Minn. R. Evid. 802. But when a witness testifies at trial concerning a prior statement, the statement is not hearsay if it is consistent with his testimony and helps the factfinder evaluate his credibility as a witness. *Id*. at 801(d)(1)(B).

Trial counsel for Whinnery and Reimer objected to Kemnitz's business diary being admitted into evidence on the grounds that (1) the statements in the diary were not sworn statements; (2) his clients disputed the accuracy of the statements; (3) the statements included hearsay within hearsay which, although redacted from the copy being offered to the jury, it was redacted with a black marker and the jury would speculate about the hidden text; and (4) the statements were not being offered to demonstrate consistency in response to actual trial testimony.

The first three bases require little analysis. Whinnery and Reimer offered no authority for the proposition that a statement must be sworn to be excepted from the definition of hearsay under rule 801(d)(1)(B). The rules define "statement" without any regard to whether it was sworn, *id*. at 801(a), and a requirement that a statement must be sworn to be admitted would be inconsistent with the context of the rule's subparts. Whinnery and Reimer do not renew their challenge based on the statement's alleged

incredibility. And any concern that the statement included internal hearsay seems to have been remedied by the redactions, to which Whinnery and Reimer do not make the challenge they did in the district court contending that the jury might speculate about what text might be hidden under the markings.

This leaves their challenge that Kemnitz's diary included statements that were not being offered to demonstrate consistency with trial testimony, emphasizing that the diary's contents went beyond the testimony actually offered at trial. The challenge is well taken in principle, but it does not form a basis to reverse. Rule 801(d)(1)(B) allows the district court to admit a statement that otherwise constitutes hearsay only if the statement contains assertions about events that have been described by the witness during the witness's trial testimony. Minn. R. Evid. 801(d)(1) Advisory Committee's. Cmt. – 1989. And it is unclear how statements in Kemnitz's redacted diary would bolster his credibility after Whinnery testified that Kemnitz had lied; the portions of the diary admitted into evidence did not relate to the statement that Whinnery criticized as untruthful. The diary was therefore not excluded as hearsay by the rules. It should not have been admitted as a prior consistent statement because it did not support Kemnitz's testimony that Whinnery promised to include Kemnitz in a future meeting. The district court erred by allowing the diary into evidence.

But an evidentiary error must be both an abuse of discretion and prejudicial to warrant reversal. *Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn. 1990). "An evidentiary error is prejudicial if it might reasonably have influenced the jury and changed the result of the trial." *George v. Estate of Baker*, 724 N.W.2d 1, 9 (Minn.

2006). Whinnery and Reimer argue that the prejudice of admitting the diary into evidence was significant because it contained information not elicited through testimony at trial and the jury was allowed to view it during its deliberations. Whinnery does not highlight any allegedly prejudicial language, and our review of the diary demonstrates that most of it included statements that were already offered as trial testimony by Kemnitz. It was therefore not prejudicial for the district court to admit it. *See id.* ("[T]he admission of evidence that is cumulative or is corroborated by other competent evidence will be deemed harmless and will not warrant a new trial").

III

Whinnery and Reimer also challenge the district court's instruction to the jury defining a partnership. We will not reverse a district court's decision unless the instructions constituted an abuse of discretion. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). District courts are allowed considerable latitude in selecting the language in jury instructions. *Id.* We review jury instructions to determine whether, taken as a whole, they are confusing or misleading on a material issue. *Lindstrom v. Yellow Taxi Co.*, 298 Minn. 224, 229, 214 N.W.2d 672, 676 (1974). When instructions fairly and correctly state the applicable law, an appellate court will not require a new trial. *Alevizos v. Metro. Airports Comm'n*, 452 N.W.2d 492, 501 (Minn. App. 1990), *review denied* (Minn. May 11, 1990).

Before giving the jury its instructions, the district court informed the parties that it intended to include the partnership instruction. Whinnery and Reimer's attorney objected on the basis that there was no claim of partnership in the complaint and no partnership

was named as a defendant. We are not persuaded by these arguments, repeated on appeal.

Although Kemnitz originally requested to include an agency theory rather than partnership theory of recovery, the district court did not abuse its discretion by preferring and including the partnership instruction. A partnership need not be formally entered into to exist. *See* Minn. Stat. § 323A.0202 ("[T]he association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership."); *Randall Co. v. Briggs*, 189 Minn. 175, 178, 248 N.W. 752, 754 (1933) ("A partnership may be the legal result of an agreement notwithstanding an expressed intention not to create such a relationship. It is the substance and not the name of the arrangement which determines the legal relation . . . .") (citation omitted). Partners generally are liable for the partnership's obligations. Minn. Stat. § 323A.0306. An injured party may sue any partner without naming the partnership as a defendant. Minn. Stat. § 323A.0307(b) ("An action may be brought against the partnership and . . . any or all of the partners in the same action or in separate actions.").

The evidence supported the partnership instruction. According to Kemnitz, Whinnery referred to Reimer as his partner. He represented that they would purchase the redemption rights and the gravel pit and that they would compensate Kemnitz. Kemnitz was not required to name a partnership as a defendant regardless of whether a partnership existed as a formal legal entity at the time of the events that gave rise to this suit. Whinnery testified that he does not personally own the gravel pit, but that he is part owner of the company that owns the land on which the gravel pit is located and part

owner of the company that operates the pit. And Brad Nye's testimony indicated that there was no formal legal partnership formed until after ownership of the gravel pit became an option. Although there was no formal partnership before Whinnery and Reimer purchased the redemption rights and the gravel pit, to determine joint liability it was appropriate for the district court to ask the jury to decide whether Whinnery and Reimer effectively constituted a partnership for the purchase based on their statements and conduct when they committed to the agreement. *See Cyrus v. Cyrus*, 242 Minn. 180, 183, 64 N.W.2d 538, 541 (1954) (noting that the existence of a partnership is generally a question of fact). The district court did not abuse its discretion when it submitted this question of fact to the jury.

Affirmed.