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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1076**

Abdiaziz H. Hirsi,
Appellant,

vs.

ARCH Language Network, Inc. d/b/a ARCH Language, et al.,
Respondents.

**Filed April 15, 2019
Affirmed
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CV-16-9944

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Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Respondent ARCH Language Network Inc. provides interpreters, primarily for persons receiving health care, and receives payment for these interpretive services through contracts with health insurers. Appellant Abdiaziz Hirsi entered into a contract with ARCH

to provide interpreter and billing services to ARCH. Nine years later, Hirsi sued ARCH and its owner and chief executive officer, respondent Russell Hastings, claiming under a variety of theories that the contract entitled him to half of ARCH's profits from 2007 to 2015. In a series of decisions, the district court dismissed some of Hirsi's claims on the pleadings, declined to permit Hirsi to amend his complaint a second time, limited discovery through a special master, awarded summary judgment in favor of ARCH and Hastings (collectively, respondents), and denied Hirsi's posttrial motions. In this appeal, Hirsi's primary contention is that respondents committed a fraud on the court. Hirsi also argues that each of the district court's orders was erroneous or an abuse of discretion. We affirm.

FACTS

On August 22, 2007, Hirsi and ARCH¹ entered into a contract. Hastings signed the contract on behalf of ARCH. Under the contract, Hirsi became a subvendor of ARCH, providing interpreters and billing services. The contract provided that Hirsi's payment rates would be "based on rates set forth in Schedule A" of the contract. Schedule A was entitled "Blue Plus Payment Rates," and it defined rates and stated that the parties "agree to split remaining revenue at 50% for each party after payment to billing service and interpreter." The core of the issues on appeal is whether ARCH's contract with Hirsi, or an unspecified subsequent oral contract, gave Hirsi the right to 50% of all of ARCH's profits since 2007,

¹ At the time the contract was signed, ARCH was known as East African Bilingual Services. For clarity, and despite the anachronism, the company will be referred to at all times as ARCH.

regardless of whether Blue Plus was the source of the revenue, and whether, in failing to pay Hirsi those funds, respondents committed one of several possible torts.

Early Litigation

In May 2016, Hirsi served a complaint on respondents. Hirsi filed an amended complaint in September 2016, asserting 12 counts.² Respondents answered and counterclaimed for breach of contract, tortious interference with contractual relationships, misappropriation of trade secrets, and abuse of process.

Throughout extensive pretrial litigation, respondents argued that the only serious dispute was a breach-of-contract claim by Hirsi and that all other claims were frivolous. On this basis, respondents opposed broad discovery. Hirsi, on the other hand, demanded broad discovery and contended that respondents' opposition to certain lines of discovery was fraudulent and constituted unprofessional conduct by respondents' counsel.

Orders of January 27, 2017

In the fall of 2016, both parties filed numerous discovery motions with the district court. Respondents also moved for partial judgment on the pleadings, seeking dismissal of counts 4 through 12 of the amended complaint and limitation of counts 1 through 3 to alleged breaches occurring after May 24, 2010. Hirsi moved for declaratory judgment as to the meaning of the contract and for dismissal of respondents' counterclaims. On

² 1 – declaratory judgment, 2 – breach of contract, 3 – breach of the implied covenant of good faith and fair dealing, 4 – breach of fiduciary duty, 5 – constructive and continuing fraud, 6 – civil conspiracy, 7 – civil conversion, 8 – quantum meruit/unjust enrichment, 9 – equitable accounting, 10 – violation of Minn. Stat. § 181.145, 11 – tortious interference with prospective economic benefit, 12 – piercing the corporate veil.

January 27, 2017, the district court filed two orders—one resolving the dispositive motions, and the other resolving the discovery-related motions.

In the order on the dispositive motions, the district court granted Hirsi’s motion for a declaration that the August 2007 contract was valid and that Schedule A of that agreement provided for sharing of 50% of “remaining revenue.”³ It denied Hirsi’s motion for a declaration to the extent that it sought to define the scope of the revenue to be shared, and denied Hirsi’s motion seeking a declaration that any oral modification of the contract was precluded by the contract. The district court also dismissed respondents’ counterclaims without prejudice. With respect to Hirsi’s amended complaint, the district court dismissed with prejudice counts 5, 6, 7, 10, and 11—the claims sounding in tort. It also dismissed with prejudice count 4—breach of fiduciary duty—but allowed Hirsi to move to again amend his complaint to add a count of breach of fiduciary duty arising from an unspecified joint-venture agreement entered after the August 2007 contract. However, the district court conditioned permission to amend on certain requirements, among them that any new language in the proposed amendments be highlighted and be limited to a short and plain statement of the facts supporting the new claim. The district court denied respondents’ motion to dismiss counts 8 and 9—the claims for equitable relief. It also denied the motion to dismiss count 12—seeking to pierce the corporate veil—but bifurcated the claim from

³ The order was later amended to clarify that its judgment—that the parties had entered into a contract in 2007 and that Schedule A of that contract provided for 50/50 sharing of remaining revenue—was not intended to declare the meaning of the term “remaining revenue.”

the rest of the trial and stayed all further proceedings pending a determination of ARCH's liability.

In the order concerning discovery, the district court directed the parties to meet and confer about the appointment of a special master, required production of certain discovery within 14 days (allowing respondents to propose new terms for a protective order if it was concerned about confidentiality), denied Hirsi's request for attorney fees and costs, and granted Hirsi's motion to amend the scheduling order.

The "Sole Owner" Dispute

The same day the district court filed the two orders, the court held a telephone conference with the parties. Hirsi revealed that he had learned of an inaccurate answer provided by respondents in response to a request for admission. The request and answer were as follows:

REQUEST NO. 28: Admit that the President and sole owner of ARCH, the individual defendant in this Complaint, is Mr. Russell Hastings.

RESPONSE: Admitted.

Hirsi said that he had just learned that, from 2007 to 2009, ARCH was not solely owned by Hastings but had been jointly owned by Hastings and a partner. He asserted that respondents' answer to the admissions request was inaccurate because the instructions accompanying the requests had stated that, "[u]nless otherwise specified, these interrogatories and documents and admissions requests seek information from August 1, 2007 to the present." In that conference call and thereafter, Hirsi's counsel relied on this

“deceit” as a basis to argue for reversing the district court’s order of partial judgment on the pleadings as well as subsequent orders.

Respondents’ counsel countered that (1) the use of the present tense in request 28 meant that the request had “otherwise specified” a different time period, i.e., the present, and (2) the information of a former co-owner was irrelevant to the surviving claims. As further discussed below, the district court concluded, as it did consistently throughout the remainder of the litigation, that the former partner’s existence and any payments made to him by Hastings were immaterial to the case—that those facts did not permit Hirsi’s tort claims to survive dismissal and that respondents’ failure to reveal them immediately was not a “fraud upon the court.”

Special Master Dispute

In the January 27 telephone conference, the district court declined to quash subpoenas served by Hirsi on third parties that sought ARCH’s bank records and documents recording the sale of ARCH to Hastings. But the court also said that ARCH should first produce its records and, if those records were incomplete or insufficient, Hirsi could address getting a subpoena with the special master. Hirsi thereafter received records from the subpoenaed third parties. In February 2017, respondents moved the special master to compel discovery, quash subpoenas, and for discovery sanctions. Hirsi opposed respondents’ motion and filed his own motion to compel.

In March 2017, the special master suspended Hirsi’s outstanding subpoenas pending a hearing set for April 2017, forbade the use of additional subpoenas, and barred Hirsi from

using ARCH's bank account records in any way. In the meantime, respondents moved for sanctions against Hirsi's attorney, and Hirsi moved to disqualify respondents' attorney.

Following the April hearing, in May 2017, the special master issued an order addressing three main issues. First, the special master stated that the district court had intended that Hirsi's subpoenas wait until after the special master had the opportunity to rule on them. Second, the special master stated that, while respondents' response to request for admission number 28 had been inaccurate, answering "deny" would also have been inaccurate, and concluded that the inaccuracy was irrelevant either way because it was about a matter outside the scope of the case. Finally, the special master quashed all outstanding subpoenas, ordered Hirsi to return ARCH's banking records, and ordered production of other documents by respondents. Both parties appealed to the district court, which affirmed the special master's order in September 2017.

Denial of Permission to File a Second Amended Complaint

In March 2017, Hirsi moved the district court for permission to file a second amended complaint, as had been suggested by the district court's January 2017 order. However, the proposed second amended complaint did not comply with the district court's instructions. Specifically, it did not highlight new material, it re-asserted counts that had been dismissed with prejudice, it contained edits to other sections, and it added other counts that were not permitted by the January 27 order. The district court held that the motion to amend was little more than a re-argument of the January 27 order dismissing a number of Hirsi's claims. In April 2017, the district court denied permission to file the second amended complaint.

In July 2017, Hirsi again moved for permission to file an amended complaint, this time seeking to add a claim for punitive damages. The district court denied this motion on September 27.

June 26, 2017 Partial Summary Judgment

In February 2017, respondents moved the district court for partial summary judgment. In June, the district court granted in part and denied in part respondents' motion. It ruled that the plain language of the August 2007 contract limited the contract's applicability to revenue for interpretive services provided under ARCH's contract with Blue Plus (as opposed to services related to other health insurers, as claimed by Hirsi), but denied summary judgment as to the existence of any other contracts with Hirsi arising after the August 2007 contract, and denied summary judgment as to whether the August 2007 contract's exculpatory clause served to limit Hirsi's damages.

December 20, 2017 Summary Judgment

On August 28, 2017, respondents filed a motion for summary judgment on all of Hirsi's remaining claims. The same day, Hirsi filed a motion to strike respondents' answer to the complaint and for default judgment. Respondents filed a memorandum opposing Hirsi's motion to strike and for default judgment on September 15, and, on September 20, Hirsi filed a reply in support of his motion to strike. Accompanying Hirsi's reply brief was the Fourth Declaration of Abdiaziz H. Hirsi. The hearing on these motions was held on September 25, 2017, but no transcript of the hearing appears in the record. Two days later,

the district court denied Hirsi's motion to strike respondents' answer and for default judgment.⁴

While respondents' second summary-judgment motion was pending before the district court, Hirsi petitioned this court for writs of mandamus and prohibition, seeking reversal of the district court's prior orders in the case and removal of the district court judge. The petition was denied on December 19, 2017. The following day, the district court ordered summary judgment in favor of respondents on Hirsi's remaining claims. On December 22, judgment was entered on the district court's orders of January 27, June 26, and December 20, 2017.

In January 2018, Hirsi filed a motion seeking amended findings of fact and conclusions of law under Minn. R. Civ. P. 52.02 and vacation of the court's prior orders and judgments under Minn. R. Civ. P. 60.02. The district court denied these postjudgment motions in May 2018.

Hirsi appeals from the judgment and challenges the 2017 orders of January, granting partial judgment on the pleadings; April, denying him permission to amend; May, by the special master regarding discovery; June, granting partial summary judgment; September, denying his motion to strike and for default judgment; September, affirming the special master's discovery order; and December, granting summary judgment on the remaining claims; as well as the May 2018 order denying his postjudgment motions.

⁴ This September order is the same order that denied the parties' appeals from the special master's May 16 order and Hirsi's request for reconsideration of previous dispositive orders, but separate from the order issued the same day denying Hirsi permission to add a claim for punitive damages to the complaint.

DECISION

I. The district court did not err by granting partial judgment on the pleadings.

Hirsi argues that the district court erred by granting partial judgment on the pleadings in its January 27, 2017 order because (1) respondents' answer denied allegations in the complaint and (2) the district court failed to consider his affidavit under former rule 56.06 of the Minnesota Rules of Civil Procedure. Appellate courts review de novo whether the district court erred in granting judgment on the pleadings. *Burt v. Rackner, Inc.*, 902 N.W.2d 448, 451 (Minn. 2017).

In its motion under Minn. R. Civ. P. 12.03, respondents argued that Hirsi's claims sounding in tort, fiduciary duty, and equity, his claims against Hastings personally, and his claims dating to before 2010 failed to state a claim on which relief could be granted. The defense of failure to state a claim upon which relief may be granted may be made by a motion for judgment on the pleadings. Minn. R. Civ. P. 12.08. When considering the defense of failure to state a claim, courts consider "only [the] facts alleged in the complaint, accepting those facts as true and construing all reasonable inferences in favor of the non-moving party." *In re Individual 35W Bridge Litig.*, 806 N.W.2d 820, 826-27 (Minn. 2011).

Hirsi relies on *Chilson v. Travelers' Ins. Co.*, 230 N.W. 118 (Minn. 1930), and *Ryan v. Lodermeier*, 387 N.W.2d 652, 653 (Minn. App. 1986), to argue that judgment on the pleadings "is never proper when factual allegations of the complaint are denied by an answer." But *Chilson* states that judgment on the pleadings is not appropriate when the answer denies a *material* fact of the complaint. 230 N.W. at 118 (syllabus by the court). And *Ryan* says, "Only if the pleadings create no fact issues should a motion for judgment

on the pleadings be granted.” 387 N.W.2d at 653. Denial of an allegation does not create a fact issue if the complaint fails to state a claim, because allegations supporting a claim that fails as a matter of law are immaterial. Respondents’ denial of allegations in Hirsi’s complaint does not make the court’s grant of judgment on the pleadings erroneous.

Hirsi’s only other argument against the January 27 order granting partial judgment on the pleadings is that the district court erred by failing to consider his rule 56.06 affidavit. At the time of the motion, Minn. R. Civ. P. 56.06 permitted the court to refuse summary judgment or grant a continuance prior to deciding whether summary judgment was warranted if a party opposing the motion showed, by affidavit, that it was unable to present facts essential to its opposition to the motion.⁵ But summary judgment is different from dismissal for failure to state a claim. Because a court considering a motion to dismiss for failure to state a claim looks only at the allegations in the complaint and assumes their truth, *35W Bridge Litig.*, 806 N.W.2d at 826-27, the existence of evidence supporting those allegations is irrelevant to the analysis of a motion for judgment on the pleadings for failure to state a claim. The district court did not err by declining to consider Hirsi’s affidavit.

II. The district court did not err by denying Hirsi’s request for permission to serve and file a second amended complaint.

Hirsi next argues that the district court abused its discretion by denying him leave to amend his complaint for a second time. See Minn. R. Civ. P. 15.01 (providing that a party may amend a complaint for a second time only with the consent of the adverse party

⁵ In the 2018 amendments to the rules of civil procedure, the substance of rule 56.06, though not its exact language, was moved to rule 56.04. *Order Promulgating Amendments to the Rules of Civil Procedure*, No. ADM04-8001 (Minn. Mar. 13, 2018).

or leave of court). Whether to permit amendment is generally a matter for district court's discretion; we review for abuse of that discretion. *McCullough & Sons, Inc. v. City of Vadnais Heights*, 905 N.W.2d 878, 883 (Minn. App. 2017). However, if the district court denies permission to amend because the proposed amendment would be futile, we review the underlying legal ruling de novo. See *U.S. Bank Nat'l Ass'n v. RBP Realty, LLC*, 888 N.W.2d 699, 705 (Minn. App. 2016) ("If a district court denies a motion to amend on the ground of futility, our review of the district court's ruling may turn on whether it was correct in an underlying legal ruling." (quotation omitted)), *review denied* (Minn. Apr. 18, 2017).

The district court's order denying leave to amend was based primarily on Hirsi's failure to comply with the court's express conditions for allowing amendment. In one of its January 27, 2017 orders, the district court dismissed Hirsi's claim alleging breach of fiduciary duty because the plain language of the August 2007 contract did not create a fiduciary relationship. But the court also granted Hirsi permission to move for amendment in order to add a new claim for breach of fiduciary duty based on the theory that the parties created a joint venture at some point after the August 2007 contract. However, because of pleading problems with the then-existing amended complaint, the court required that the proposed second amended complaint (1) identify amendments through highlighting, (2) not amend existing language but only add a new claim for breach of fiduciary duty, and (3) support the new claim with a short and plain statement of facts and not include "extraneous legal analysis, argument, commentary, anticipated discovery issues and disputes, or case citations." The district court explicitly warned that failure to comply could

result in the district court denying permission to amend. When Hirsi's amended complaint violated all three of the district court's requirements, the district court denied permission to amend the complaint. The court indicated that the decision was, in part, a sanction for Hirsi's failure to comply with any of the court's instructions but also stated that Hirsi's failure to comply with the instructions increased the burden on respondents by making it more difficult for respondents to determine what the allegations were.

Hirsi contends that the denial was an abuse of discretion because prejudice to the opposing party is the most important factor deciding whether to allow a party to amend a complaint. He argues that there was no prejudice because the district court, on the same day it denied the motion to amend, also set trial a year out.

Hirsi is correct that prejudice is a critical factor in deciding whether to permit amendment. *See, e.g., Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (“[A]mendments should be freely granted, except where to do so would result in prejudice to the other party.”). But it is not the only factor. A district court “has wide discretion to grant or deny an amendment, and its action will not be reversed absent a clear abuse of discretion.” *Id.* This court has affirmed a district court's refusal to permit amendment based on a party's failure to appear at a hearing regarding its motion to amend even though the district court did not consider whether the opposing party would be prejudiced. *R.B. Thompson, Jr. Lumber Co. v. Windsor Dev. Corp.*, 383 N.W.2d 357, 362 (Minn. App. 1986), *review denied* (Minn. May 22, 1986).

Here, the district court considered prejudice, noting that Hirsi's failure to identify the changes to the complaint and his re-assertion of counts that had already been dismissed

would make it harder for respondents to determine what, exactly, Hirsi was contending. But even if the district court had not considered prejudice, we would affirm. Denial of leave to amend is a matter for the district court's discretion, and it was within the district court's discretion to deny leave to amend as a sanction for Hirsi's procedural failings. *See id.*

III. The special master did not err by limiting Hirsi's use of rule 45 subpoenas.

Hirsi next objects to the special master's order that required Hirsi to seek approval before serving further subpoenas under Minn. R. Civ. P. 45. He does not say whether this was an error or an abuse of discretion but instead describes himself as "acutely aggrieved" by that portion of the order. In fact, Hirsi's entire argument against the special master's order lacks legal citation. Hirsi instead uses the special master's order as a springboard to contend that he should have been permitted to continue arguing his tort claims, which had already been dismissed by the time the special master issued his order. Hirsi has waived his challenge to the special master's order by failing to support it. *See Poeschel v. Comm'r of Pub. Safety*, 871 N.W.2d 39, 47 (Minn. App. 2015) ("An assignment of error in a brief based on 'mere assertion' and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection.").

Even if the argument was not waived, we would affirm. An order of a special master, when affirmed by a district court, is reviewed under the same standard as if the court itself had issued the order. *See State by Humphrey v. Philip Morris Inc.*, 606 N.W.2d 676, 685, 691 (Minn. App. 2000) (applying the abuse-of-discretion standard to the district court's adoption of the special master's privilege determination), *review denied* (Minn. Apr. 25, 2000). Parties or attorneys serving subpoenas are required to "take reasonable steps to

avoid imposing undue burden or expense on a person subject to that subpoena.” Minn. R. Civ. P. 45.03(a). Courts have authority to enforce that duty and impose appropriate sanctions if it is violated. *Id.*

Here, the special master’s order stated that Hirsi’s attorney had proceeded with subpoenas to third parties despite the district court’s instruction that he wait until after the special master had the opportunity to make a ruling. It also stated that the subpoenas seeking information to prove up Hirsi’s tort claims were beyond the scope of discovery. While caselaw does not define the phrase “undue burden” in the context of subpoenas, any burden imposed by a subpoena seeking evidence to bolster an already-dismissed claim is “undue.” Thus, the special master’s discovery order was justified under Minn. R. Civ. P. 45.03(a) and was not an abuse of discretion.

IV. The district court did not err by granting summary judgment as to the scope of the August 2007 contract.

Hirsi argues that the district court erred by ruling that the August 2007 contract unambiguously applied only to revenue from services provided by Hirsi under ARCH’s contract with Blue Plus.⁶

On appeal from a grant of summary judgment, this court asks “whether there are any genuine issues of material fact” and “whether the district court erred in its application of the law.” *Guercio v. Prod. Automation Corp.*, 664 N.W.2d 379, 383 (Minn. App. 2003). Those questions are reviewed de novo. *Stringer v. Minn. Vikings Football Club, LLC*, 705

⁶ This ruling did not dispose of Hirsi’s remaining claims because the court denied summary judgment as to the existence or scope of any subsequent contracts between ARCH and Hirsi.

N.W.2d 746, 754 (Minn. 2005). “A contract is ambiguous if, based upon its language alone, it is reasonably susceptible of more than one interpretation.” *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). Whether a contract is ambiguous is a question of law to be determined by the court. *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003).

Hirsi makes three arguments for why the district court erred. His first argument is that, based on the language of the contract, the contract is either ambiguous or unambiguously means the opposite of what the court ruled it to mean. In support of this argument, Hirsi makes three subarguments. He first points to the term stating, “Payment rates will be made based on rates set forth in Schedule A attached herein.” He argues that the use of “based on” means that the “Blue Plus” revenue, as shown in Schedule A, is merely an example, and that it does not mean that the contract only applied to payments from Blue Plus. He next points to a paragraph relating to data accuracy stating that “[ARCH] is retrieving and processing data from other sources, such as, but not limited to, Health Partners, United Health Group, Medica, Preferred One, UCARE, BCBS, and any other hosted computer systems, on the behalf of [Hirsi] and makes no warranties as to the accuracy of the data.” He argues that this list of other data providers shows that the contract is intended to cover interpretive services under ARCH’s contracts with other insurers, and not only under contracts with Blue Plus. Finally, Hirsi asserts that the contract is not limited to Blue Plus revenue because the main part of the contract—that is, excluding the attached schedules—does not mention any such limitation.

The district court did not err in interpreting the plain language of the contract. As Hirsi notes, the contract does say that “[p]ayment rates will be based on rates set forth in Schedule A attached herein.” The phrase “based on,” read in isolation, could have the meaning Hirsi ascribes to it. But we read contracts as a whole, with an eye toward harmonizing all their clauses. *Nat’l City Bank v. Engler*, 777 N.W.2d 762, 765 (Minn. App. 2010), *review denied* (Minn. Apr. 20, 2010). Schedule A lists only “Blue Plus Payment Rates.” If Schedule A were merely an example of rates, it would be unnecessary for it to say “Blue Plus.” Hirsi’s interpretation would read that language out of the contract, a result that is not favored. *See Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 526 (Minn. 1990) (“[Appellate courts] attempt to avoid an interpretation of the contract that would render a provision meaningless.”). Given the specificity of Schedule A, it does not make sense to interpret “based on” to mean that the specificity is purposeless, and it does make sense for “based on” to simply be a way of referring the reader to Schedule A.

The data-accuracy clause, which refers to other insurers, does not compel a different result. That clause says that ARCH “is retrieving and processing” data from other sources “such as” those insurers. The inclusion of the phrase “such as” indicates that they are merely examples of insurers that could provide data. The clause is thus phrased hypothetically and does not say anything about whether those insurers are actually providing data. And it does not mean that the contract’s compensation provisions, which are specific to Blue Plus, apply to those insurers.

Hirsi's final language-based contention, that this court should not rely on Schedule A but should look only to the body of the contract, also fails. The contract defines the entirety of the agreement to include its addenda; Schedule A is part of the contract.

Hirsi's second argument is that the district court ignored extrinsic evidence that he asserts shows its interpretation of the contract was incorrect. If the language of a contract is unambiguous, extrinsic evidence is inadmissible to guide interpretation of that document. *See Am. Bank of St. Paul v. Coating Specialties, Inc.*, 787 N.W.2d 202, 205 (Minn. App. 2010) (forbidding the use of extrinsic evidence to alter unambiguous contract language), *review denied* (Minn. Oct. 27, 2010). Thus, Hirsi's asserted evidence cannot be used to show that the contract was ambiguous.

Finally, Hirsi argues that, because respondents stated that the meaning of the contract was "hotly contested," the meaning must be a jury issue. But Hirsi's contention that the district court violated "Minnesota Supreme Court precedent"—which he does not identify—is contrary to actual precedent. "A contract's terms are not ambiguous simply because the parties' interpretations differ." *Staffing Specifix, Inc. v. TempWorks Management Svcs., Inc.*, 913 N.W.2d 687, 692 (Minn. 2018) (citing *Denelsbeck*, 666 N.W.2d at 347). The mere fact of a dispute over the meaning of this contract does not make its terms ambiguous.

The district court did not err in granting summary judgment determining that the contract applied only to Blue Plus revenue.

V. The district court did not err by refusing to strike respondents' pleadings or by refusing to allow Hirsi to amend his complaint to add a claim for punitive damages.

Hirsi next contends that the district court erred in its September 2017 order both by refusing to strike respondents' answer and grant default judgment in his favor and by refusing to allow him to amend his complaint to add a claim for punitive damages.

A. Striking Pleadings

An order striking pleadings or rendering default judgment is a permissible discovery sanction against a party who "fails to obey an order to provide or permit discovery." Minn. R. Civ. P. 37.02(b)(3). District courts have broad discretion over motions to dismiss on procedural grounds, and their decisions will not be reversed absent abuse of that discretion. *Jadwin v. City of Dayton*, 379 N.W.2d 194, 196 (Minn. App. 1985). However, dismissal on procedural grounds is a serious sanction and is generally disfavored. *See Enright v. Lehmann*, 724 N.W.2d 546, 551 (Minn. App. 2006) ("[S]triking pleadings is substantial and should not be levied lightly"), *rev'd on other grounds*, 735 N.W.2d 326 (Minn. 2007). To show that it is warranted, a movant must show some prejudice resulting from the opposing party's conduct. *Jadwin*, 379 N.W.2d at 197.

Hirsi argues that the district court abused its discretion in refusing to strike respondents' pleadings. Specifically, he contends that he was prejudiced at the judgment-on-the-pleadings stage by respondents' false answer to the request for admission, and that the dismissal of his tort claims based on that false answer entitles him to default judgment on the other claims. But the tort claims were dismissed for failure to state a claim, not on summary judgment, so evidence related to them is irrelevant. *See Martens v. Minn. Mining*

& Mfg. Co., 616 N.W.2d 732, 739 (Minn. 2000) (holding that, with respect to a motion based on failure to state a claim, “it is immaterial whether or not the plaintiff can prove the facts alleged”). The dismissal was based solely on the sufficiency of the allegations in Hirsi’s complaint and not on whether he could introduce evidence to substantiate those allegations. Thus, even if respondents’ answer was false, Hirsi cannot show that the answer was relevant to the litigation, much less demonstrate any prejudice from the answer. The district court did not abuse its discretion in refusing to strike respondents’ pleadings and grant default judgment.

B. Amendment of the Complaint for Punitive Damages

Appellate courts review a district court’s decision about whether to allow a party to amend its pleadings for an abuse of discretion. *McCullough & Sons*, 905 N.W.2d at 883. It is proper to deny a motion to amend a complaint when the new claim would not survive summary judgment. *Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). However, if the district court denies permission to amend because the proposed amendment would be futile, we review the underlying legal ruling *de novo*. See *U.S. Bank*, 888 N.W.2d at 705. Punitive damages are ordinarily prohibited in breach-of-contract claims; they may be recovered only where the breach also constitutes an independent tort or is accompanied by an independent tort. *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 561 (Minn. 1996); *Olson v. Rugloski*, 277 N.W.2d 385, 388 (Minn. 1979).

The district court denied Hirsi’s motion to amend because the amendment would be futile: the proposed second amended complaint failed to establish an independent tort that

would allow punitive damages. Hirsi does not argue that his proposed second amended complaint's new claim for punitive damages actually alleged an independent tort. Instead, he argues that the independent tort entitling Hirsi to punitive damages is "[respondents'] fraud upon Hirsi and the court during this litigation." But the caselaw that he cites does not indicate that fraud on the court during litigation entitles a party to punitive damages for the conduct underlying the litigation. Those cases merely repeat the principle that defeated his punitive-damages claim in the first place: punitive damages are not allowed without an independent tort. *See Minn.-Iowa Television Co. v. Watonwan TV Improvement Ass'n*, 294 N.W.2d 297, 309 (Minn. 1980) (holding that "conscious and deliberate breach" is not an independent tort); *Olson*, 277 N.W.2d at 388 (holding that refusal to pay an amount owed under an insurance contract was not fraud justifying an award of punitive damages). Further, fraud on the court is not an independent cause of action; it is a justification for vacating a judgment even after ordinary deadlines for vacating the judgment have passed. *See Maranda v. Maranda*, 449 N.W.2d 158, 164-65 (Minn. 1989) (discussing fraud on the court). Thus, because Hirsi failed to allege an independent tort, his proposed amendment to add a claim for punitive damages was futile, and the district court did not err in refusing to permit the amendment.

VI. The district court did not err by granting summary judgment in favor of respondents on Hirsi's remaining claims.

On appeal from a grant of summary judgment, this court asks "whether there are any genuine issues of material fact" and "whether the district court erred in its application of the law." *Guercio*, 664 N.W.2d at 383. Those questions are reviewed de novo. *Stringer*,

705 N.W.2d at 754. In its December 2017 order, the district court granted summary judgment in favor of respondents on Hirsi's remaining claims. Specifically, the district court held that there was no genuine issue of material fact that (1) ARCH did not breach the August 2007 contract, (2) no new contract was formed promising Hirsi a sharing of ARCH's revenue from sources other than Blue Plus, (3) Hirsi was not entitled to equitable relief, (4) Hirsi was not entitled to an equitable accounting, (5) ARCH did not breach the covenant of good faith and fair dealing, and (6) there was no need to pierce the corporate veil because there was no judgment against ARCH.

Hirsi makes two main arguments for reversal. First, he again attacks the district court's June 2017 order for partial summary judgment, contending that his written contract with ARCH extends to more than just Blue Plus revenue. We rejected this contention above. Second, he argues that the district court erred by declining to consider Hirsi's Fourth Declaration as untimely and self-serving. He argues that the affidavit was timely and that a self-serving affidavit may be used to oppose a motion for summary judgment. However, Hirsi focuses solely on those procedural matters; he does not identify any material fact that is genuinely in dispute. We nevertheless address Hirsi's argument.

A. Timeliness

On August 28, respondents filed a motion for summary judgment. The same day, Hirsi filed a motion to strike respondents' answer and to grant default judgment. On September 15, respondents filed a memorandum opposing Hirsi's motion to strike and for default judgment. On September 20—three business days before the hearing—Hirsi filed a 62-page reply to respondents' opposition to Hirsi's motion to strike. That reply

memorandum was accompanied by the Fourth Declaration of Abdiaziz H. Hirsi, which the district court declined to consider as untimely.

Under Minn. R. Gen. Prac. 115.03(b), a response to a dispositive motion, including supplementary affidavits and exhibits, must be served and filed at least nine days prior to the hearing. Hirsi contended at the hearing that his August 28 motion to strike and for default judgment was also a response to respondents' motion for summary judgment. But Hirsi's Fourth Declaration did not accompany Hirsi's August 28 filing, it accompanied his September 20 filing. Since the hearing was scheduled for September 25, Hirsi's Fourth Declaration was filed less than nine days prior to the hearing. It was also not filed and served together with the purported response. Further, the filing that it did accompany was labeled a reply brief, replying to respondents' response to Hirsi's motion to strike. Introduction of new factual allegations opposing some other motion is not permitted in a reply. See Minn. R. Gen. Prac. 115.03(c) (stating that a reply must be limited to new legal or factual matters raised by a response).

Before this court, Hirsi contends that he was permitted to combine into a single memorandum (1) a second response to respondents' motion for summary judgment, (2) his reply supporting his motion to strike, and (3) a response to respondents' motion for sanctions. His argument appears to be that, when he did so, the Fourth Declaration was made timely because it accompanied a timely reply brief. This argument could succeed only if combining timely and untimely filings made all of the combined filings and their supporting affidavits timely. Hirsi does not cite law to support any part of this argument,

and it is contradicted by Minn. R. Gen. Prac. 115.03. Hirsi's Fourth Declaration was not timely filed in response to respondents' motion for summary judgment.

B. Self-serving

Hirsi also argues that Minnesota law does not recognize the rejection of an affidavit as self-serving. In support of this argument, he cites only to *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 541 n.4 (Minn. 2001). He summarizes *Hoover's* footnote as stating that "affidavits filed after deposition testimony are never rejected unless it is completely contradictory; affidavits that explain deposition testimony or clarify the evidence are always accepted." This is a mischaracterization. *Hoover* actually states: "Although affidavits that contradict earlier deposition testimony *generally may not be used* to create a genuine issue of fact, there are exceptions to this rule." *Hoover*, 632 N.W.2d at 541 n.4 (emphasis added). The exception discussed by *Hoover* is for affidavits that clarify deposition testimony when the deposition "reveals confusion or mistake." *Id.*

The district court here held that Hirsi's Fourth Affidavit was not only self-serving—as testimony and affidavits from a party might be—but that it was contradictory to his deposition testimony, in which he had repeatedly stated that he did not recall any specific conversations modifying the August 2007 contract. The district court found that Hirsi expressed neither confusion nor mistake in his deposition and that he had specifically testified that he did not recall any incidents such as those he described in his Fourth Declaration.

The district court did not err in refusing to consider Hirsi's Fourth Affidavit. Because Hirsi did not and does not identify any genuine dispute of material fact, the district court did not err by granting summary judgment in favor of respondents.

VII. The district court did not abuse its discretion by refusing to amend its findings of fact and conclusions of law under Minn. R. Civ. P. 52.02 or by refusing to vacate the judgment under Minn. R. Civ. P. 60.02.

Finally, Hirsi argues that the district court's May 10 order, denying his motion to amend its findings of fact and conclusions of law under Minn. R. Civ. P. 52.02 or to vacate its judgment under Minn. R. Civ. P. 60.02, was an "abuse of discretion and manifest error." We review a district court's denial of a motion for new or amended findings and its refusal to vacate judgment for abuse of discretion. *In re Guardianship of Guaman*, 879 N.W.2d 668, 672 (Minn. App. 2016); *Zaffke v. Wallestad*, 642 N.W.2d 757, 759 (Minn. App. 2002). Hirsi does not describe the standards for evaluating a district court's exercise of discretion over posttrial motions, or even cite the rules on which his argument relies. Instead, he simply asserts that the court ignored fraud, ignored the plain language of the contract, and affirmed its prior decisions. Hirsi's argument for why vacation was required is the same argument that he has been raising since January of 2017—that respondents' answer to the request for admission constituted a fraud on the court and required a total reset of the proceedings. Because the district court did not err in its previous decisions, it did not abuse its discretion by refusing to amend its findings or vacate its judgment.

Affirmed.