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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1164**

Anthony Novak,
Respondent,

vs.

Lorie Miller, et al.,
Appellants.

**Filed April 10, 2023
Affirmed
Connolly, Judge**

Hennepin County District Court
File No. 27-CV-20-10935

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(for respondent)

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Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Slieter,
Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

This case arises out of a dispute between the two sole members of a limited liability corporation (“LLC”). Appellants challenge the district court’s order granting summary judgment in favor of respondent, arguing that respondent did not have standing and that the district court erred when entering damages against appellants. We affirm.

FACTS

In 2010, respondent Anthony Novak met appellant Lorie Miller, and she represented that if he invested in her real-estate venture, he could expect a return of \$3,000 to \$4,000 a month in about seven years. In December 2010, Miller and Novak formed Camelot Estates, LLC (“Camelot”) to rent residential properties. They each owned 50% of Camelot; Novak initially invested \$170,000, and Miller invested \$100 and promised to invest her time and management in Camelot.

From 2010 to 2013, Novak made more investments in Camelot and by 2013, had invested more than \$500,000. Throughout the same time period, Camelot purchased three properties. At the time of filing the underlying action, Novak had not received any rental income from Camelot.

In May 2017, Camelot obtained a loan of \$260,000 (“Camelot loan”) to purchase further investment properties. The Camelot loan proceeds were deposited into the Camelot bank account. The loan was secured by a mortgage on one of Camelot’s properties, and both parties executed personal guarantees for the full loan amount. The requirements of the personal guarantees were that Camelot, Miller, and Novak provide tax returns and personal financial statements each year. Miller did not provide the required documents, and the lender threatened foreclosure.

From 2010 to 2017, Miller managed the tax returns for Camelot and the corresponding K-1s. But Novak did not receive a K-1 or tax return for Camelot from 2018 to 2020. He averred that Miller maintained all of the business records and refused to provide him with a copy so that he could have the tax returns prepared.

In May 2020, Novak gained access to Camelot's bank statements and learned that Miller had been withdrawing and transferring the Camelot loan proceeds to herself and respondent Tranquil Holdings, LLC ("Tranquil"), an LLC owned and managed by Miller. Miller used the Camelot account to pay for personal expenses including but not limited to: personal travel to places such as Hawaii and California for herself, friends, and family; medical expenses including IVF and plastic surgery; clothing; groceries; liquor; hair appointments; lash extensions; her boyfriend's expenses; utilities and taxes on properties not owned by Camelot; and a criminal defense attorney. Miller continued to withdraw from the Camelot account after Novak started the underlying lawsuit. In addition, Miller failed to issue certificates of rent paid to tenants.

On August 27, 2020, Novak sued Miller and Tranquil, alleging that Miller misappropriated funds that belonged to Camelot. Camelot was not a party to the action. Novak demanded the appointment of a receiver and an accounting and asserted claims of civil theft, breach of contract, conversion, breach of fiduciary duty, and unjust enrichment. He also sought dissolution and winding up of Camelot. Miller and Tranquil denied the allegations and asserted counterclaims.

In February 2021, Novak moved for a temporary injunction and to compel discovery. In March 2021, the district court granted Novak's motion for a temporary injunction and ordered Miller and Tranquil to provide responses to Novak's discovery requests. On April 6, 2021, Tranquil and Miller's counsel withdrew. On April 8, 2021, the district court ordered Miller and Tranquil to pay, within five days of the order, Novak's

attorney fees and costs associated with Novak's successful motion to compel discovery. Miller and Tranquil did not comply with the district court's order.

On April 26, 2021, Novak moved for sanctions and for default judgment on his conversion, civil theft, and unjust enrichment claims. Novak requested that the district court dismiss Tranquil and Miller's counterclaims, enter judgment against them, and order the winding up and dissolution of Camelot. New counsel filed a notice of appearance on behalf of Tranquil and Miller on May 7, 2021. In response to Novak's motion for default judgment, Miller and Tranquil argued that default judgment was not appropriate because it was an extreme sanction.

On July 30, 2021, Miller and Tranquil's new counsel withdrew. On August 27, 2021, the district court dismissed Miller and Tranquil's counterclaims and granted Novak's motion for default judgment as to the conversion, civil-theft, and unjust-enrichment claims because of Miller and Tranquil's noncompliance with district court orders and misappropriation of Camelot assets. The district court reserved its finding on damages pending a hearing and ordered the sale of Camelot's assets and the dissolution and winding up of Camelot.

On August 18, 2021, Novak moved for summary judgment on the remaining claims for breach of contract, breach of LLC documents, and breach of fiduciary duties against Miller. Tranquil and Miller did not respond to this motion. On December 14, 2021, the district court dismissed count 3, breach of contract, for lack of standing and granted Novak's motion for summary judgment as to the remaining claims. The district court determined that Miller and Tranquil's "failure to file any response to the instant motions

for summary judgment, combined with their wholesale failure to abide by the rules and orders of [the district] court, fully justif[ied] an award of summary judgment.” The district court ordered an accounting of Camelot to determine damages.

The parties appeared for a hearing on damages on February 18, 2022. Novak requested \$678,609 total theft damages from Miller. Miller’s counsel argued that Novak’s damage calculation was made up of justifiable business expenses. On June 22, 2022, the district court entered judgment against Miller for \$594,590.94 and against Tranquil for \$19,876.

This appeal follows.

DECISION

This court reviews the district court’s “grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law.” *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotation omitted); *see also* Minn. R. Civ. P. 56.01. “We view the evidence in the light most favorable to the party against whom summary judgment was granted.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002) (citations omitted).

I. Tranquil and Miller waived any objections to the pleadings, and Novak’s complaint, by fair and reasonable inference, states a claim upon which relief could be granted to Novak as an LLC member.

Miller and Tranquil contend that the district court should have dismissed Novak’s claims for breach of the LLC documents, breach of fiduciary duties, conversion, civil theft, and unjust enrichment for lack of standing because Novak alleged a derivative cause of

action without naming Camelot as a party.¹ “[W]hen shareholders are injured only indirectly, the action is derivative; when shareholders show an injury that is not shared with the corporation, the action is direct.” *In re Medtronic, Inc. S’holder Litig.*, 900 N.W.2d 401, 409 (Minn. 2017). Generally, “an individual shareholder may not assert a cause of action that belongs to the corporation.” *Nw. Racquet Swim & Health Clubs, Inc. v. Deloitte & Touche*, 535 N.W.2d 612, 617 (Minn. 1995). A shareholder may “sue in a representative capacity for the benefit of the corporation, and not for damages to him individually.” *Wessin v. Archives Corp.*, 592 N.W.2d 460, 464 (Minn. 1999) (quotation omitted). Similarly, a member of an LLC generally may not maintain derivative claims on behalf of the LLC. *See* Minn. Stat. § 322C.0902 (2022). But a member of an LLC “may maintain a derivative action to enforce a right of [the LLC] if” the member makes a demand on the other members and they do not bring the claim with a reasonable time, or if the demand would be futile. *Id.* Here, Novak made no demand, but he had standing to assert derivative claims on behalf of the LLC if the demand would have been futile.

Novak contends that Miller and Tranquil waived their argument challenging the summary-judgment order by not raising it to the district court. A member asserting derivative claims must “allege with particularity the efforts, if any, made by the plaintiff to obtain the desired action from the [LLC] and the reasons for the plaintiff’s failure to obtain

¹ Miller and Tranquil characterize standing as an issue of subject-matter jurisdiction, but the concepts are distinct. Subject matter jurisdiction “concerns the court’s ability to consider a question”; in contrast, standing “concerns a party’s right to bring a particular action.” *Cochrane v. Tudor Oaks Condo. Project*, 529 N.W.2d 429, 433 (Minn. App. 1995), *rev. denied* (Minn. May 31, 1995).

the action or for not making the effort.” Minn. R. Civ. P. 23.09. Miller and Tranquil did not move to dismiss the complaint on the basis that Novak failed to plead futility with particularity. This court generally will only review issues “presented and considered by the [district] court in deciding the matter before it.” *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). “Objections which go merely to the form of the pleading are waived and cannot be urged for the first time in the appellate court. They must be properly raised in the court below.” *Winter v. Farmers Educ. & Co-op. Union of Am.*, 107 N.W.2d 226, 232 (Minn. 1961). But, when there is a complete failure to state a claim upon which relief is granted, this court regards it “as a fundamental one which may be raised for the first time in the appellate court.” *Id.* at 232. “If by fair and reasonable inference a cause of action can be spelled out of the matters pleaded, a construction which will sustain the pleadings is favored.” *Id.*

In *Winter*, the defendant argued for the first time on appeal that the plaintiff failed to allege that it had made a demand on the defendant. *Id.* at 230-31. The court noted that if an objection had been made to the district court, a motion to dismiss would have likely been granted. *Id.* at 232. The court held that the complaint was sufficient to state a derivative cause of action because, considering the record as a whole, the plaintiff alleged that the matter was brought to the board of director’s attention and the entire record demonstrated that the case had been tried as if the demand pleading requirement had been met. *Id.*

Here, even though the complaint did not name Camelot as a party and Novak did not allege with particularity that demand would have been futile, a derivative “cause of

action can be spelled out of the matters pleaded.” *Id.* at 232. While Camelot is not a named party, the complaint describes Camelot as a party. The complaint also specifically alleges that Miller’s conduct caused Camelot harm and damages: “As a direct and proximate result of Miller’s wrongful conduct, Novak and Camelot are suffering immediate and irreparable injury, harm, and damage” and “[a]s a result of [Miller and Tranquil’s] theft, Novak and Camelot have been damaged in the amount of at least \$50,000.” We conclude that the parties tried the case as if this pleading requirement had been met. For example, in Novak’s motion for summary judgment he stated, “there is no doubt and no factual dispute that Miller has wholly failed in her obligations to Camelot.”

Moreover, while the complaint does not specifically allege the demands made upon Miller, we conclude that there are sufficient allegations to demonstrate that demand would have been futile. *See* Minn. Stat. § 322C.0902. Novak alleged that he requested financial information, tax records, copies of the books, and a special meeting to discuss Camelot’s finances and the deadlock between the two parties. And Novak alleged that Miller did not respond to any of the requests and did not appear at the special meeting. Indeed “demand should be made on the shareholders . . . unless the majority of their number is interested,” and Miller owned 50% of Camelot. *Winter*, 107 N.W.2d at 233; *see also In re UnitedHealth Grp. Inc. S’holder Derivative Litig.*, 754 N.W.2d 544, 550 n.5 (Minn. 2008) (stating “[t]he demand requirement may be excused, however, when the board suffers from a conflict of interest regarding the subject matter of the derivative suit”).

It is quite apparent from the record that the parties litigated this case as if the conditions for a derivative claim had been met, and we therefore conclude that Miller and

Tranquil waived their objection to the form of the pleadings. *See Winter*, 107 N.W.2d at 232.

II. The district court did not err when entering damages against Tranquil and Miller.

This court will not disturb a damage award unless the “failure to do so would be shocking or would result in plain injustice.” *Dunn v. Nat’l Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008) (quotation omitted). “We generally review a damage award for an abuse of discretion.” *Smallwood v. Dep’t of Hum. Servs.*, 966 N.W.2d 257, 267 (Minn. App. 2021), *rev. denied* (Minn. Nov. 16, 2021). And “[w]e review a district court’s application of the law de novo.” *Harlow v. State, Dep’t of Hum. Servs.*, 883 N.W.2d 561, 568 (Minn. 2016).

a. Tranquil’s Damages

Tranquil contends that the district court erred by entering a judgment of damages against it because, at the hearing on damages, Novak’s counsel stated that the claim against Tranquil had been paid in full. Novak contends that the judgment was satisfied.

An appeal should be dismissed as moot “when intervening events render a decision on the merits unnecessary or an award of effective relief impossible.” *Wayzata Nissan, LLC v. Nissan N. Am., Inc.*, 875 N.W.2d 279, 283 (Minn. 2016). An appeal is not moot if a party could be afforded effective relief. *Hous. & Redev. Auth. ex rel. City of Richfield v. Walser Auto Sales, Inc.*, 641 N.W.2d 885, 888 (Minn. 2002).

“Once a satisfaction of judgment is filed with the district court, that judgment ceases to have any existence.” *Herubin v. Finn*, 603 N.W.2d 133, 137 (Minn. App. 1999)

(quotation omitted). The district court lacks the authority to vacate a satisfied judgment. *Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc.*, 482 N.W.2d 771, 773 (Minn. 1992); *see Lyon Fin. Servs., Inc. v. Waddill*, 607 N.W.2d 453, 454 (Minn. App. 2000) (satisfaction of a judgment precludes district court review of the judgment).

Here, Novak filed partial satisfactions of judgment against Tranquil on August 19 and November 10, 2022, and a full satisfaction of judgment on November 28, 2022. This court cannot afford Tranquil effective relief because once Novak satisfied the judgment against it, the judgment ceased to exist, and this appeal is moot. *See Herubin*, 603 N.W.2d at 137.

b. Miller's Damages

Miller argues that the district court erred by not adjusting the damages amount for Miller's 50% share of Camelot. As a threshold matter, Novak contends that Miller waived this argument because she "made no cogent argument against the imposition of any monetary judgment against [her]." A party may not raise a new issue on appeal, "[n]or may a party obtain review by raising the same general issue litigated below but under a different theory." *Thiele*, 425 N.W.2d at 582.

At the hearing on damages, Miller's counsel argued that Novak's damage calculation were justifiable business expenses. Miller offered an expert affidavit which averred that "based upon the amount of capital contributed by . . . Miller to Camelot . . . during the time period examined, and the resulting amounts due to her upon liquidation of Camelot . . ., that . . . Miller did not receive any funds to which she would have not otherwise been entitled." The expert affidavit was based on the following documents "in

conjunction with input and discussions with . . . Miller as to the conduct of the business and the transactions”: lease and eviction documents for Camelot’s properties, Camelot’s bank statements, “Credit Card Billings used for Camelot Estate property renovations,” “Day Labor Payments,” summaries of utility and property tax payments, and partnership contribution repayments in part on his conversations with Miller. It is not clear what the expert relied on in concluding that Miller made capital contributions to Camelot, and Miller did not produce the bank statements, credit card statements, listing of day labor payments, and Novak’s contribution repayment documents. The district court determined that the expert affidavit was “too late to be considered,” and, even if it was not late, that it “wholly lack[ed] evidentiary value.”

Miller raises a different theory on appeal. She no longer argues that her expenditures were legitimate business expenses but instead contends that her total damages should be offset by her share of Camelot. Because Miller never raised the argument that any damages calculation reached by the district court must be adjusted for her share, she did not raise it properly and it is forfeited. *See Thiele*, 425 N.W.2d at 582.

However, even if she did not forfeit this argument, the district court did not err. Miller contends that the district court ignored “the law and its own holding that, because Miller owned half of Camelot, she was entitled to a one-half offset in any damages calculation.” Miller is not disputing the damage amount, instead she contends that the district court’s distribution of the damages in winding up was erroneous. “We review the district court’s application of the law de novo.” *Harlow*, 883 N.W.2d at 568.

When a member applies for and the district court orders dissolution of the company on the grounds that a member has acted in an illegal manner that is harmful to the applicant, the district court “may order a remedy other than dissolution.” Minn. Stat. § 322C.0701, subd. 2 (2022). This may be ordered “in any case where that remedy would be appropriate under all the facts and circumstances of the case.” *Id.*

Here, the district court determined that Miller stole \$494,590.94 and imposed a civil penalty of \$100,000. The district court entered a judgment in favor of Novak against Miller for the entire amount stolen for the civil penalty. Minnesota law permits the district court to order a remedy other than dissolution for the illegal acts of another member. *See id.* Moreover, it is common sense that a party should not be able to offset the amount they converted by claiming an equal share of an LLC when it is dissolved. Thus, the district court did not err by awarding Novak damages for the entirety of the amount Miller converted from Camelot.

Affirmed.