IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Memorandum Web Opinion)

SCOTT V. MUCHOWICZ

DALE SCOTT, INDIVIDUALLY AND ON BEHALF OF DEMU PROPERTIES, L.L.C.,
A NEBRASKA LIMITED LIABILITY COMPANY, APPELLEE,
V.
NICHOLAS MUCHOWICZ ET AL., APPELLANTS.

Filed April 2, 2024. No. A-23-290.

Appeal from the District Court for Douglas County: TIMOTHY P. BURNS, Judge. Affirmed.

Frederick D. Stehlik and Zachary W. Lutz-Priefert, of Gross, Welch, Marks & Clare, P.C., L.L.O., for appellants.

Rubina S. Khaleel and Ashley Fischer-Foxall, of Hennessy & Roach, P.C., for appellee.

MOORE, BISHOP, and ARTERBURN, Judges.

BISHOP, Judge.

INTRODUCTION

In December 2017, Dale Scott, Nicholas Muchowicz (Nick), and Sara Muchowicz (Sara) were the sole members of DEMU Properties, LLC (DEMU). DEMU was created to purchase a commercial building on Birch Drive in Omaha, Nebraska (Birch building), and to be its holding company. Scott was named the manager of DEMU. Nick and Sara, husband and wife, intended to move Nick's company, Active Spine Physical Therapy, LLC (Active Spine), into the Birch building after an existing tenant moved out of the building's second floor and remodeling could take place. Active Spine moved into the Birch building in May 2019.

Issues arose between Scott and the Muchowiczes, including difficulties in finalizing permanent financing for the building purchase, as well as Active Spine's failure to pay rent to DEMU and to pay the contractors who had remodeled its space. Liens were filed against the

property. Scott, individually and on behalf of DEMU, filed an action against the Muchowiczes in the Douglas County District Court, seeking various relief. The Muchowiczes filed a counterclaim against Scott and DEMU, seeking various relief. Active Spine was subsequently added as a defendant. Following a jury trial, judgments were entered against the Muchowiczes and Active Spine totaling over half a million dollars; they appeal from those judgments. We affirm.

BACKGROUND

Scott has worked in commercial real estate since 1991. He has been involved with 24 companies that owned real estate; he "personally managed about a half-dozen of those." He has negotiated "thousands" of leases in his career. And in 30 years, he had "never had a problem in this industry." He has partners who are also tenants in the buildings he owns and "[t]hey all pay rent." Scott was referred to the Muchowiczes by a business acquaintance. When Scott initially met with Nick and Sara in approximately September 2017, the Muchowiczes were planning to partner with a doctor and his wife in purchasing a building out of which both Nick and the doctor would operate their businesses. Scott located the Birch building for their consideration, which according to Nick, "[t]he location was perfect for us." However, Scott pointed out that the 9,544 square feet on the second floor of the building was occupied by Core Bank, but he would see if they could be bought out of that space.

Kathryn Lenczowski has been a commercial lender since 2006. In 2017, she was a vice president of commercial lending at Core Bank. Lenczowski initially met with the Muchowiczes and the doctor and his wife about purchasing the Birch building. When the Muchowiczes later informed the banker that the doctor and his wife were no longer part of the deal, the Muchowiczes inquired about buying the building on their own. The banker informed them they could not. "[T]heir financials for their business weren't strong enough to support the building as well as their personal financials were not strong enough to purchase a $2 million building." Lenczowski suggested they "get either another partner, an investor, or a strong guarantor."

On October 26, 2017, Sara sent an email to Scott indicating that they would no longer be moving forward on their partnership with the doctor and his wife. She inquired about options, including other business owners or investors. At that point, Scott and the Muchowiczes agreed to buy the $2.1 million Birch building together through DEMU, with an initial capital contribution of $101,455.76 from Scott and approximately $150,000 from the Muchowiczes. Scott was given a 40 percent interest in DEMU; the Muchowiczes each received 30 percent. Scott was fine utilizing a Small Business Administration (SBA) loan for financing so long as it allowed DEMU to remain profitable; this meant that all tenants, including Active Spine, would pay rent.

In seeking initial financing for the purchase through Core Bank, Lenczowski understood that "DEMU would obtain the loan to purchase the building and then the Muchowiczes' company, Active Spine, was going to be a tenant in the building." The initial interest-only bridge loan was made with the idea that at some point in time it could be converted to permanent financing which would involve an "SBA 504 loan." This required a pre-approval process. An SBA 504 loan would require a 20-year lease with Active Spine occupying more than 50 percent of the space. According to Lenczowski, they "would have to submit financials, . . . projections, . . . [and] what the estimated end loan would look like." Active Spine's payment of rent to DEMU was a critical component in the bank's determination of whether or not to make the loan. Lenczowski confirmed that in 2017,

when explaining the SBA loan process to Scott, she never told him that Active Spine would collect all the rents for the building or that Active Spine would not have to pay rent to DEMU. The Active Spine lease was "actually a requirement of the SBA" and the projections of both DEMU and Active Spine had to be provided to the SBA as part of the pre-approval process.

Scott and the Muchowiczes applied for the SBA 504 loan in November 2017 (exhibit 224). That document represented that the purpose of the project was to allow DEMU to purchase the Birch building and that the space would be 52 percent occupied by Active Spine. DEMU was listed as the borrower; Active Spine was named the small business concern/operating company. The project cost was $2,566,400, of which the SBA's 40-percent share would be $1,026,560; the remainder would be financed through a separate bank loan. The SBA 504 loan was approved on December 5 (exhibit 206), but finalization was conditioned on numerous requirements. DEMU closed on the bridge loan with Core Bank on December 29.

Throughout 2018, Core Bank maintained occupancy on the second floor of the Birch building and continued to pay rent. Core Bank also occupied space on the first floor, as did another tenant. According to Sara, "DEMU's bank account was very padded." The monthly tenant rents were bringing in "more than double" their monthly mortgage, "so it was very profitable." She said there was $200,000 in DEMU's bank account that was "supposed to go towards renovations." Sara believed that any amounts the Muchowiczes were paying construction workers should have been credited towards their rent. According to Scott, the Muchowiczes claimed they were paying contractors "in lieu of paying rent," even though there was nothing in the lease or any other agreement providing for such an arrangement. He acknowledged that DEMU did pay approximately $75,000 for lobby renovations, but that DEMU was not responsible for renovations made within each tenant's space. He confirmed that the lease required each tenant to keep the premises and the property in which the premises are situated free from any liens arising out of any work performed, materials furnished, or obligations incurred by the tenant. Core Bank vacated the second floor at the end of February 2019.

More than a year had passed after the initial SBA financing approval in December 2017 before DEMU was ready for permanent financing. As a result, according to banker Lenczowski, all financials would have to be reaffirmed to make sure there were "no material changes or adverse changes either to the business or people involved." At some point in 2019, Lenczowski became aware that Sara found "an obscure provision in the 504 loan that [Sara] interpreted to mean Active Spine would never pay rent to DEMU." Sara insisted that Active Spine had to collect all the rents from the building. According to Lenczowski, this meant DEMU would never make a profit. Lenczowski had never heard of Sara's "stance on this provision" before and was surprised to learn of it in 2019 since it was "completely different" from what Sara had represented to Lenczowski in 2017. Lenczowski confirmed that if Active Spine was going to collect all the rents from other tenants in the building, rather than DEMU, and if Active Spine was not going to pay rent to DEMU, the bank would consider these adverse changes. Lenczowski also confirmed that Core Bank would not have made the bridge loan in 2017 if it was understood that Active Spine was never going to pay rent to DEMU.

In March 2019, Sara testified that she had been asked by Scott, Core Bank, and Nick to increase the SBA loan, "which is essentially going through the whole SBA loan process again; more projections, all of that, proof of it, all the tax documents again, everything." Renovations

were happening, both in the lobby of the building and in Active Spine's space on the second floor. According to Sara, Active Spine was hiring employees at that point. Sara said that Active Spine moved into the second floor in May with "wet paint everywhere," but they had to move in because their temporary location lease was up.

According to Scott, Active Spine did not pay rent in May, June, July, and August 2019. Scott, on behalf of DEMU, had to file an eviction action, at which point Active Spine caught up its rent. However, it then stopped paying rent again from September 2019 through June 2020, except for a partial payment in January 2020, causing Scott to file another eviction action. Also, the construction company that had remodeled the space for Active Spine had filed a lien against the property because it was not getting paid on the remaining $190,000 it was owed on the several hundred-thousand-dollar project. As manager of DEMU, Scott said it was his "sole responsibility" to act in a way that was in the best interest of DEMU. Active Spine's rent was "over half the revenue for the building." And Active Spine's lease agreement required a tenant to keep the premises free from any liens arising out of work performed. In response to DEMU's second eviction action, the Muchowiczes called a meeting and removed Scott as the managing member in December 2019 and dismissed the eviction action. Nick then took over as the managing member of DEMU.

In February 2020, Nick executed exhibit 93, an "Amendment to Office Space Lease." It was signed by Nick as the manager of DEMU, as well as signed by Nick as the manager of Active Spine. As relevant to this appeal, the amendment indicated that its commencement date was June 1, 2019, and that the lease terminated on February 29, 2020. Thereafter, Active Spine's occupancy "shall be a tenancy from month-to-month," which Active Spine could terminate with 30 days' written notice to DEMU. (The original lease was for 20 years, which was required for the SBA 504 loan.) Scott testified that the operating agreement required a unanimous vote of DEMU members to enter into contracts, which did not occur when Nick amended the lease. The Muchowiczes interpreted the operating agreement to only require a majority to amend the lease. Scott stated that the lease amendment benefited "Active solely" because they could cancel their lease at any time, and "when we talk about how you value commercial real estate, a lot of that value comes from how much lease term is there." And "[w]hen you have a lease that could be canceled in 30 days, . . . you have essentially taken away any value of that income, so you cut the building value in -- approximately in half." Scott testified that because of the deterioration in his relationship with the Muchowiczes, he was not comfortable personally guaranteeing another loan for DEMU to permanently finance the building. He was not required to personally guarantee such a loan under the operating agreement.

The bridge loan with Core Bank was "written as 18 months," according to Greg Beach, vice president and special assets manager for the bank. Beach was in charge of "loss mitigation" for the bank's loan portfolio. The bridge loan had already had two extensions of 6 months when the bank was "made aware that the partnership had eroded a little bit" and the parties "no longer got along to even sign loan documents together." The loan was in default. Beach had interactions with Scott and the Muchowiczes. While the bank was still a tenant in the Birch building, Beach did not have any problems with the management of the building. In late October 2019 "[w]hen [he] was first brought in," he acknowledged that interactions with the Muchowiczes were "tense." "[T]he whole situation was tense for everybody, including us." At some point, Beach had to tell

Sara that she was not allowed to physically go into the bank's branch location on the first floor of the Birch building. "It had to do with -- the whole situation was tense." Beach did not want his "retail help" having to deal with that and he could not be present all the time.

The bank moved forward with foreclosure on the property and an auction took place on June 10, 2020. By that time, Scott had formed "132 Ventures" with a new partner and paid "2.5" for the Birch building. Scott said that 132 Ventures "paid the extra 250,000" so that the contractors and subcontractors "would be made whole." According to banker Beach, once the bank paid off what it was owed, the remainder would be applied to the "junior lienholders" in the priority of when the liens were filed. He confirmed that the excess amount from the bid was sufficient to pay off the contractors who had liens. Any excess sale proceeds after payment of the bank and lienholders would be the property of DEMU. It was Beach's understanding that the Muchowiczes were objecting to the excess sale proceeds being paid to the contractors who filed liens. Beach agreed that in June 2020, the excess sale proceeds would have been paid to the construction company that had remodeled the space for Active Spine had the Muchowiczes not objected.

In June 2020, following the sale of the building, DEMU received an "Economic Injury Disaster Loan" (EIDL) from the SBA for $150,000. Nick testified that the process for this loan began with an application through an "online rapid portal." Nick recalled that Sara "was typing" the information but that he was "probably there." Exhibit 94 consists of an "Intake Application Summary" for DEMU completed on April 5, 2020, and a "Loan Authorization and Agreement" dated June 12 loaning $150,000 to DEMU; it is signed by the SBA and Nick as "Owner/Officer" for DEMU. Also contained in exhibit 94 is a "Note (Secured Disaster Loans)" and an SBA "Security Agreement," both dated June 12 and both signed by Nick as "Owner/Officer" for DEMU. All of these documents contained a reference to the same application number ending in 7744.

Although the documentation included Scott's name and social security number, he was not aware of this loan, nor had he given permission to use his name and social security number in the application. Scott "felt violated" and "furious"; he could not "believe anybody would actually do this." Scott observed that the application indicated that DEMU had "'cost of goods sold'" in the amount of $207,594, but that DEMU did not sell any goods. "DEMU's sole purpose was to purchase" the Birch building. Scott said the representation was a "complete lie." Scott also said that the representation of "'lost rents'" in the amount of $397,667 was not accurate because Core Bank and the other tenant paid their rent "[r]eligiously." He confirmed that Active Spine was the only tenant not paying rent and that the amount represented as lost rents would require the entire building to be vacant. And although the loan application indicated that DEMU had employees, there were no employees. The application was a "falsehood," according to Scott.

Scott received "a call from . . . Beach at Core Bank, alerting [him] that a large amount of money had been deposited in [DEMU's] account by the SBA for the EIDL loan and that, immediately, Nick had issued a cashier's check, that we couldn't stop payment on, to his company Active Spine." Scott sent an email to Nick on June 17, 2020, indicating that the SBA had "deposited a significant amount of money in the DEMU account and a majority of it was almost immediately withdrawn via a cashier's check by you." Scott further indicated that he was not aware that DEMU had applied for this SBA loan. Nick responded on June 22, 2020, that the "deposit of $149,900 was made into the DEMU . . . account at CORE Bank . . . from a Small Business

Association Economic Injury Disaster Loan. . . . As DEMU . . . suffered due to COVID-19, the funds from the SBA EDIL [sic] were utilized in making payments to accounts payable." Exhibit 157 shows that $149,900 was deposited into DEMU's account on June 16, 2020, and on June 17, $131,229.29 was debited; Beach confirmed the $131,229.29 was issued as a cashier's check payable to Active Spine. Nick acknowledged that he went to the bank to obtain this cashier's check. When asked to explain the alleged inaccuracies in the application, Nick responded that he "delegated most of this to [his] wife" and that "she was using some records, I assume."

Sara agreed that she and Nick jointly filled out the EIDL loan application; she believed it included grant money. She provided various explanations for the information submitted, noting that it "was chaos at this time in COVID" and "grant funds were limited," so it was "like, a mad dash." She explained that "it was, like, an online application; so you complete one screen, you hit 'next,' another screen, enter here, enter here, enter here." She claimed that "the documents that we were seeing in court, we have never seen that before; that must be something spit out from that stuff you entered." She also suggested that "[w]hat's been popped out is not what was -- how it looked when we entered stuff. It's changed it."

After several days of trial in February 2023, a jury returned the following verdicts (paraphrased):

> 1. Active Spine breached the terms of the lease by not paying rent and other charges due between September 1, 2019, and June 10, 2020. Damages of $180,895.89 were awarded.
>
> 2. Active Spine breached the terms of the lease by failing to pay contractors for work and materials provided to Active Spine, "which resulted in unpaid contractors filing construction liens" against the property. Damages of $184,471.86 were awarded.
>
> 3. The Muchowiczes executed a personal guarantee to DEMU for rent and other charges due under the lease by Active Spine and they breached the guarantee by not paying rent and other charges from September 1, 2019, to June 10, 2020. Damages of $45,223 were awarded.
>
> 4. The Muchowiczes entered into an operating agreement with DEMU which created a fiduciary duty between the parties, and they breached that duty to act in good faith and fair dealing towards Scott and DEMU. Damages of $131,229.29 were awarded.

As to the counterclaims filed by the Muchowiczes and Active Spine against Scott, the jury found the following:

> 1. Active Spine did not meet its burden to prove Scott engaged in fraudulent misrepresentation.
>
> 2. The Muchowiczes did not meet their burden to establish that Scott breached his fiduciary duty to act in good faith and fair dealing towards the Muchowiczes.
>
> 3. The Muchowiczes did not meet their burden to prove Scott engaged in fraudulent misrepresentation.

The district court entered a judgment on the verdicts on February 15, 2023. On March 14, the court entered an order dissolving DEMU and assigning a receiver to wind up the business. The Muchowiczes and Active Spine filed their notice of appeal on April 12.

ASSIGNMENTS OF ERROR

The Muchowiczes and Active Spine assign, restated, that the district court erred in (1) permitting Scott to testify as an expert witness, (2) admitting exhibit 94 (related to EIDL loan), (3) admitting hearsay testimony, and (4) granting Scott's motion for directed verdict as to their counterclaim against him for tortious interference with a business expectancy.

STANDARD OF REVIEW

The trial court is given discretion in determining whether a sufficient basis for a lay witness' opinion testimony has been established and such determination will not ordinarily be disturbed on appeal absent an abuse of that discretion. *Harmon Cable Communications v. Scope Cable Television*, 237 Neb. 871, 468 N.W.2d 350 (1991).

Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error in the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ruling to admit evidence over a hearsay objection or exclude evidence on hearsay grounds. *Noah's Ark Processors v. UniFirst Corp.*, 310 Neb. 896, 970 N.W.2d 72 (2022).

In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Lindsay Internat. Sales & Serv. v. Wegener*, 301 Neb. 1, 917 N.W.2d 133 (2018).

ANALYSIS

EXPERT WITNESS

Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2016), provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." As for nonexpert testimony, Neb. Evid. R. 701, Neb. Rev. Stat. § 27-701 (Reissue 2016), states:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

The Muchowiczes and Active Spine (hereafter at times collectively referred to as "appellants") contend that during the course of trial, "Scott was permitted to testify as an expert witness in spite of the fact that he was never disclosed as such, and that such testimony was not helpful to the finder of fact." Brief for appellants at 12. Scott responds that he was never designated as an expert witness, "nor did he hold himself out as an expert at trial." Brief for appellee at 13. Scott was "not introduced to the jury as an expert witness, nor was the jury advised to consider [Scott's] testimony as that of an expert." *Id*. at 14. Scott "simply testified to his personal knowledge of the commercial real estate industry, which he has acquired over the course of his career." *Id*.

The appellants refer to four examples of Scott's testimony in support of their argument, claiming that Scott "offered either technical or otherwise specialized knowledge" and that "[t]his clearly steps into the realm of expert witness testimony." Brief for appellants at 14. Appellants claim that allowing Scott to testify as an expert witness "at a minimum creates an illusion to the jury that Scott has additional expertise and knowledge which is not readily established" and that this "results in a harm to the Muchowiczes" by "elevat[ing] [Scott's] testimony in a way which no other witness in the case was capable of doing." *Id*. The appellants suggest that the "only proper way to correct the ill effect rendered is to reverse and remand the matter for a new trial." *Id*.

The first example the appellants point to is when Scott was asked about the Muchowiczes' position that they could change Active Spine's lease whenever they wanted to do so. Scott's response was that an investment property, such as an office building, "is valued on how much rent it generates; that's ninety percent of the value." He added, "[N]ot that an empty building doesn't have any value, but, in our world, that's how we value properties, how they appraise." A "702" objection was made and overruled at this point. Scott continued:

> If the Muchowiczes had the ability to cancel Active Spine rent in 30 days at any time, that devalues the building. Under their theory, they could say Active Spine is only going to pay a dollar a month in rent, and now you have a building worth half as much. No logical investor with any business judgment in any way, sense, or form, would agree to invest into a situation like that.

The appellants' next example of alleged improper expert witness testimony was when Scott was asked about tenant improvements done specifically within the tenant's space, not in common areas. He pointed out that "[e]very tenant has specific needs for their personal office," so "[u]nfortunately, it doesn't bring any value to the building because, as I just mentioned, every tenant needs something else." He explained how Core Bank had used the second-floor space for their trust and real estate department, and that the Muchowiczes "needed a completely different build-out for that space . . . so, essentially, they tore down a majority of the walls and rebuilt the space to fit their needs." He confirmed that "[f]or the most part," it was a "complete gut job." When asked if a "build-out" added "value to the landlord," Scott responded that it did not. He clarified it might be different, however, if you "redo a lobby, that's your first impression in your building; . . . that first impression is key." There was no objection through this testimony. But when asked, "Why don't tenant improvements have any value to the landlord," an objection was made that "we are stepping into a 702 realm where he's not been properly designated but is speaking to, clearly, beyond just a mere factual recitation." The objection was overruled. Scott then explained that "[w]hen you go to re-lease that space in the future, even another physical therapist might want a different layout."

The appellants' third example is when Scott was asked, "In your 30 years of experience in commercial real estate, what is your understanding of a personal guarantee?" A "702" objection was made and overruled. Scott responded that "[i]f you sign the lease in an entity name, the landlord, to protect himself in case that entity folds or decides to quit paying rent, . . . the personal guarantee means you as individuals will make those payments."

The appellants' fourth example refers to testimony elicited from Scott again regarding the Muchowiczes' February 2020 amendment to Active Spine's lease with DEMU after Nick took

over as DEMU's manager. When asked about the effect of the lease amendment, Scott responded that "it affects the value of the building, to begin with, because they . . . could cancel their lease at any time, given one month's notice." He added that they attempted to change their rental rate, but that it was "poorly written, and they didn't accomplish that." Scott stated that the lease amendment benefited "Active solely" because they could cancel their lease at any time, and "when we talk about how you value commercial real estate, a lot of that value comes from how much lease term is there." And "[w]hen you have a lease that could be canceled in 30 days, . . . you have essentially taken away any value of that income, so you cut the building value in -- approximately in half." A "702" objection was made at that point, and it was overruled.

The record does not support that Scott was ever held out as an expert witness; rather, his testimony properly fell under rule 701. As Scott asserts, he "simply testified to his personal knowledge of the commercial real estate industry, which he has acquired over the course of his career." Brief for appellee at 14. We agree with Scott that his testimony was rationally based on his own perceptions and experiences acquired over 30 years in the commercial real estate business and that his testimony was helpful to the determination of a fact in issue. See *State v. Rocha*, 295 Neb. 716, 890 N.W.2d 178 (2017) (lay witnesses may testify as to factual matters based upon their personal knowledge; under rules 701 and 702, opinion testimony whether by lay or expert witness, is permissible if helpful to trier of fact in making determination of fact in issue).

Further, sufficient foundation was provided for Scott's testimony; there was no abuse of discretion by the district court in overruling the objections set forth above. See *Harmon Cable Communications v. Scope Cable Television*, 237 Neb. 871, 468 N.W.2d 350 (1991) (trial court given discretion in determining whether sufficient basis for lay witness' opinion testimony has been established and such determination will not ordinarily be disturbed on appeal absent abuse of discretion).

EXHIBIT 94

Exhibit 94 was admitted through Scott's testimony. Appellants' objection based on hearsay and foundation was overruled. The exhibit consisted of several documents related to the Muchowiczes' joint effort to obtain a $150,000 "Economic Injury Disaster Loan" from the SBA. Although Scott's name and social security number was used in the application, along with information for the Muchowiczes, Scott was not aware of this application and did not participate in its making. The documentation reflects that the process to obtain the loan was initiated in April 2020, and it was completed and executed by Nick on June 12, 2020, just a couple days after the bank's foreclosure on the Birch building. Additionally, although the loan was requested by DEMU, as soon as the loan deposit was made into DEMU's account, Nick had the bank issue a $131,229.29 cashier's check payable to Active Spine. Nick did not deny that the application was made; he and Sara both acknowledged jointly participating in the application process. Further, an email sent from Nick to Scott, explained that the deposit of $149,900 was made into the DEMU account because DEMU "suffered due to COVID-19." Nick also acknowledged that from those funds, he had a cashier's check issued to Active Spine for $131,229.29. One of the jury's verdicts was for that exact amount due to the Muchowiczes' breach of fiduciary duty to act in good faith and fair dealing towards Scott and DEMU.

The appellants contend that although Nick testified to participating "in the filling out of the online portal," he "had never seen the paper intake summary prior to discovery." Brief for appellants at 16. They argue that the document contains hearsay evidence, "specifically the document is seeking to prove that the application itself was completed." *Id*. "One of the disputed facts in the case that was set before the jury was whether the application was made and whether permission for the application being made existed," and therefore, the "only purpose for the offering of the exhibit was to prove the truth of what the document asserted it was." *Id*.

Even if exhibit 94 was erroneously admitted through Scott, the error would be harmless and does not require reversal because the exhibit was merely cumulative to other evidence, and other properly admitted relevant evidence supports the findings by the jury. See *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007) (erroneous admission of evidence is harmless error and does not require reversal if evidence is cumulative and other relevant evidence, properly admitted, supports finding by trier of fact). There was substantial other undisputed evidence, as set forth previously, regarding the Muchowiczes jointly applying for this loan on behalf of DEMU without Scott's knowledge or consent, and then immediately withdrawing from those deposited funds for the sole benefit of Active Spine. The other properly admitted testimony from Scott, banker Beach, and the Muchowiczes support the findings of the jury on this issue, even without consideration of exhibit 94 itself.

HEARSAY TESTIMONY

Appellants contend the district court erred when it overruled its foundation and hearsay objections to the following:

> [Scott's counsel]: Did you as manager of DEMU ask for the temporary financing to be extended while the SBA issues were sorted out?
>
> [Scott]: I actually got it extended twice.
>
> [Scott's counsel]: Did you hit a point where Core Bank refused to grant another extension?
>
> [Scott]: We did.
>
> [Scott's counsel]: Do you have any understanding as to why?
>
> [Scott]: Quite frankly, the Muchowiczes were wearing them out and they were frustrated.

At that point, an objection was made on "[f]oundation, hearsay." In their brief to this court, the appellants assigned only "[a]dmitting hearsay testimony"; we therefore limit our analysis accordingly.

Appellants argue that "[b]y allowing the notion of Core Bank being 'frustrated' or 'worn out' with the Muchowiczes creates a harmful and prejudicial effect which is nearly impossible for the Muchowiczes to recover from." Brief for appellants at 15. They further contend that there were witnesses from the bank who may have testified that there were difficulties with the Muchowiczes, but that the "basis that [Scott] gave [was] not what Core Bank" gave as its "rationales in dealing with the Muchowiczes." *Id*.

As we concluded in our previous hearsay analysis, even if Scott should not have been permitted to offer his opinion as to Core Bank's reasons for not extending the loan further, any

such testimony was harmless when considered against other evidence received directly from bank employees regarding why the loan would not be extended after two extensions had already been granted. Additionally, the bankers who testified could certainly have been cross-examined regarding Scott's characterization of why no further loan extensions would be granted by the bank.

Beach testified that he had interactions with Scott and the Muchowiczes, and by October 2019, when he first got involved, he acknowledged that the interactions with the Muchowiczes were "tense." Beach had to tell Sara that she was not allowed to physically go into the bank's branch location on the first floor of the Birch building because "the whole situation was tense."

Lenczowski testified about Sara's changed position regarding Active Spine not paying any rent to DEMU, which meant DEMU would never make a profit. Lenczowski had never heard of Sara's "stance on this provision" before and was surprised to learn of it since it was "completely different" from what Sara had represented to Lenczowski in 2017. Lenczowski confirmed that Sara's changed position constituted an adverse change since the initial loan application and Core Bank would not have made the bridge loan in 2017 if it was understood that Active Spine was never going to pay rent to DEMU.

Although neither of these two bankers used the same words as Scott when describing the bank's relationship with the Muchowiczes, their testimony certainly revealed there were difficulties. Therefore, regardless of Scott's characterization of Core Bank as being worn out and frustrated by the Muchowiczes, the jury could certainly have reached a similar conclusion itself when considering the bankers' testimony. Therefore, even if Scott's testimony was erroneously admitted, it was harmless. See *Worth v. Kolbeck, supra*.

DIRECTED VERDICT ON TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY CLAIM

In their counterclaim against Scott for tortious interference with a business expectancy, the appellants alleged that Scott "had full knowledge of and fully cooperated in the Company's intention to obtain SBA financing" to purchase the building and enter the lease, that appellants had a legitimate business expectancy related to the lease and the relationship between Active and DEMU, that Scott interfered with those relationships, and that Scott's action resulted in harm to appellants.

After the parties rested and respective motions for directed verdicts were made by the parties, the district court granted a directed verdict only on this counterclaim. In support of its decision, the court stated on the record:

> It's an intentional tort. I don't think their evidence rises to the level of showing that [Scott], even if taken in the light most favorable to the defense, is intentional -- that he intentionally interfered with their business relationship. He's not a competitor, he's not a physical therapist, and I just don't see that claim as being valid under the evidence presented.

The appellants claim that "Scott took a very intentional act of thwarting Active's ability to maintain and operate in the space both by disrupting the use of the space and by causing DEMU's financing on the Property to be lost which Scott ultimately knew would cost DEMU the Property." Brief for appellants at 17. The appellants argue that the district court "failed to apply the

appropriate standard for whether a tortious interference claim existed." *Id*. They contend that whether "Scott was a competitor or physical therapist was wholly irrelevant to the ability to tortiously interfere with the business expectancy." *Id*.

Scott responds that the "jury's rulings in favor of [Scott] on all other causes of action would have made it impossible for [appellants] to prevail on their tortious interference claims" and therefore "the outcome at trial would have been the same" and was at most harmless error. Brief for appellee at 18.

To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted. *Thompson v. Johnson*, 299 Neb. 819, 910 N.W.2d 800 (2018).

In order to be actionable, interference with a business relationship must be both intentional and unjustified. *Dick v. Koski Prof. Group*, 307 Neb. 599, 950 N.W.2d 321 (2020), *modified on denial of rehearing* 308 Neb. 257, 953 N.W.2d 257 (2021). Factors to consider in determining whether interference with a business relationship was unjustified include: (1) the nature of the actor's conduct, (2) the actor's motive, (3) the interests of the other with which the actor's conduct interferes, (4) the interests sought to be advanced by the actor, (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (6) the proximity or remoteness of the actor's conduct to the interference, and (7) the relations between the parties. *Id*. The issue is whether, upon a consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another. *Id*.

The district court focused on whether Scott, the alleged interferer, intentionally interfered with any business expectations in this case. In order to be actionable, interference with a business relationship must be both intentional and unjustified. *Dick v. Koski Prof. Group, supra*. The essence of the appellants' claim was that Scott refused to take the steps necessary to finalize the permanent financing, which resulted in the loss of the Birch building and Active Spine's occupancy there.

The evidence demonstrates that Scott was agreeable and cooperative with the Muchowiczes' goal of obtaining permanent financing, which was to include an SBA 504 loan. However, that agreement was based on Active Spine committing to a 20-year lease with DEMU and paying rent to DEMU. When Sara took the position that Active Spine did not need to pay rent and that all tenant rents in the Birch building should be paid to Active Spine and not DEMU, that became a problem for both Scott and Core Bank. Additionally, when Nick amended the lease to allow Active Spine to terminate its lease with DEMU with only 30 days' notice, that became another problem for Scott and Core Bank. Further, when the Muchowiczes failed to pay the construction contractors what they were owed for renovations to Active Spine's second-floor space, liens were placed against the Birch building in violation of the lease's prohibition of the same. And finally, when the Muchowiczes applied for a COVID-19-related SBA loan that included Scott's name and social security number without first seeking his consent, he "felt violated" and was "furious." In addition to that, the application contained information that Scott claimed was a "complete lie" or "falsehood." Given these departures from the parties' initial agreement and the

terms of the operating agreement and lease, Scott had a justified basis to no longer be willing to join the Muchowiczes in obtaining permanent financing for the building. Therefore, the elements for tortious interference with a business expectancy could not be established and a directed verdict on this claim was appropriate.

We also agree with Scott, that even if the district court had allowed the jury to consider this claim, the jury's ultimate verdicts demonstrate that they were persuaded that Scott did not engage in any fraudulent misrepresentation to either the Muchowiczes or Active Spine and that Scott did not breach his fiduciary duty to act in good faith and fair dealing towards the Muchowiczes. When it follows logically from a jury's findings that a theory on which a directed verdict was granted could not have been successful, the directed verdict cannot be said to have affected the outcome and is, at most, harmless error. *Lindsay Internat. Sales & Serv. v. Wegener*, 301 Neb. 1, 917 N.W.2d 133 (2018) (jury's verdict would not have differed if directed verdict had not been granted; directed verdict is thus, at most, harmless rather than reversible error).

Even when considering all competent evidence submitted on behalf of the appellants on this issue as true and giving them the benefit of every inference which can reasonably be deduced from the evidence, we conclude that the district court correctly decided this issue as a matter of law.

CONCLUSION

For the foregoing reasons, we affirm the district court's judgment on the jury verdicts.

AFFIRMED.