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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4198-11T1

SURGEM, LLC AND
JOHN HAJJAR, M.D.,

Plaintiffs-Respondents,

v.

ACHIEVMED, INC.,

Defendant/Third-Party
Plaintiff,

and

JOHN SEITZ,

Defendant/Third-Party
Plaintiff-Appellant,

v.

SURGICARE OF MANHATTAN,
LLC a/k/a SOM, LLC,

Third-Party Defendant-
Respondent.

Argued March 12, 2013 - Decided October 16, 2013

Before Judges Messano, Lihotz and Mantineo.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-191-09.

Diane L. Medcraft argued the cause for appellant (Law Offices of Bernd Hefele, attorneys; Ms. Medcraft, on the brief).

George J. Kenny argued the cause for respondent (Connell Foley, LLP, attorneys; Mr. Kenny and Philip F. McGovern, Jr., on the brief).

The opinion of the court was delivered by

LIHOTZ, J.A.D.

Defendant John Seitz appeals from a judgment fixing the percentage ownership and value of his interest in plaintiff Surgem, LLC (Surgem). Although we agree the judge erred in computing Seitz's percentage interest in Surgem, we affirm his determinations and conclusions in all other respects. These facts are taken from the trial record of the six-day bench trial and found by the trial judge in his written opinion.

Plaintiff John Hajjar, an accomplished board certified urological surgeon and astute businessman, recognized a need for ambulatory surgical centers (ASC), also known as outpatient or same-day surgery centers. Hajjar established his first ASC in Fair Lawn and, in the ensuing years, opened additional ASCs in Mahwah, Englewood Cliffs, Oradell, Jersey City, Carlstadt, and Wayne.

In 2002, Hajjar initially hired Seitz as a consultant to review the viability of marketing software Hajjar had developed to monitor and measure an ASC's profitability. On Seitz's

recommendation, Hajjar ended the project. Thereafter, Seitz introduced Hajjar to Seitz's company, Achievmed, Inc., which provided a web-based alternative. Hajjar was convinced Seitz was an intelligent and business-savvy entrepreneur with impressive experience in the field of medical management. As the trial judge noted:

> Dr. Hajjar bought into Seitz's Achievmed emotionally and eventually financially and the Seitz-Hajjar relationship warmed. Dr. Hajjar came to trust Seitz to such an extent that over 2003 and 2004[,] Dr. Hajjar sent Seitz $650,000 for what he believed to be a [fifty] percent interest in Achievmed. Predictably, Achievmed "just died out" according to Dr. Hajjar's testimony. Dr. Hajjar never sought nor received any proof of his ownership in Achievmed, nor any accounting [of] his $650,000. Dr. Hajjar lost his entire investment.

Seitz moved to New Jersey in June 2004 to collaborate with Hajjar and explore the possibility of syndicating Hajjar's ASCs. At the time, Hajjar was operating his own practice, as well as three ASCs by himself. Seitz offered his help, representing he had experience in the medical management field. Hajjar trusted Seitz and the veracity of his representations.

In January 2005, Hajjar and Seitz attended a Miami law firm's one-day symposium on "how to syndicate surgery centers and how to merge and acquire surgery centers." The conference introduced a subscription formula for physician investors that

Hajjar and Seitz used successfully in syndicating the New Jersey ASCs. Soon thereafter, Surgem was established to provide development and management services to individual ASCs. Hajjar owned one hundred percent of Surgem and Seitz continued as a consultant. Surgem syndicated its first ASC, Surgicare of Fair Lawn, LLC, in 2005, selling a combined eighty percent interest to various doctors for $8,000,000, retaining the remaining twenty percent interest and contracting for a management fee defined as six percent of facility revenues. Surgem entered into the same arrangement with Surgicare of Englewood Cliffs and Surgicare of Oradell, selling eighty percent interests for $2,900,000 and $3,200,000 respectively, and the management fee.

Hajjar hired Seitz as Surgem's president on September 6, 2005. The two had a verbal agreement providing Seitz would be paid an annual salary of $185,000; a bonus equal to ten percent of the management fees collected from the ASCs, plus a later-determined percentage of all development fees; five percent of any Surgem profit distribution; and a potential ten percent ownership interest in Surgem, or 300,000 shares of stock then held by Hajjar, to vest "over a period of four years with 75,000 [m]embership [s]hares vesting each year."

It is undisputed that the terms of Seitz's employment and compensation as president of Surgem were memorialized in the

Surgem, LLC Confidential Private Placement Memorandum (CPPM). The record contains two versions of this document, both dated November 15, 2005. The parties agree the twenty-seven page version contained in plaintiff's appendix, although unsigned, states their initial oral agreement (original CPPM). Between September 2005 and April 2006, Seitz asked Hajjar to change his compensation, by increasing his annual salary to $250,000, and giving him the 300,000 Surgem membership units at once, not vested over time. Hajjar agreed to the increased salary, and told Seitz he would own ten percent of the company if it were sold. Seitz claims his modified compensation and interest in Surgem is reflected in the seventy-six page version of the CPPM contained in his appendix (revised CPPM).

Also undisputed is Seitz, with Hajjar's permission, sold 10,000 of his shares for $10.00 per share to an individual named Hartzband, and 20,000 shares at the same price to a second investor. Further, Seitz exchanged a portion of his Surgem interest to satisfy two disgruntled financiers in exchange for their Achievmed shares. These transactions left Seitz with 8.74% interest in Surgem.

As the organization's expansion efforts increased, Hajjar had greater interaction with Seitz, now Surgem's president, and realized Seitz's knowledge of ASCs was quite limited,

notwithstanding his claim of medical practice management experience. Seitz's management style was crass, domineering, impatient, condescending, inappropriate, rude, verbally abusive, and sexually harassing. Six different witnesses testified to Seitz's offensive workplace behavior that caused employee discontent, discomfort, resignations and threats of lawsuits. Hajjar's efforts to curb Seitz's inappropriate behavior were unsuccessful. The last straw came when Seitz went on vacation. Hajjar learned Seitz had prepared a business plan that he had distributed to potential clients and had also solicited Surgem's key employees in an attempted takeover.

Seitz's employment was terminated for cause on April 26, 2008. Plaintiffs filed this Law Division complaint to establish the fair value of Surgem's stock for the purposes of determining Seitz's 8.74% interest as a disassociated member and demanding the stock subject to repurchase. Hajjar, claiming he was induced by fraud, also sought to offset his $650,000 investment in Achievmed against any sum determined due to Seitz. Finally, plaintiffs sought damages suffered by Surgem because of Seitz's breach of contract and misconduct. Seitz filed a counterclaim and a third-party complaint seeking to enforce his rights as ten percent shareholder of Surgem, and a three percent shareholder of a related entity, Surgicare of Manhattan, LLC (SOM). He

demanded payment of the value of his interest in each of these companies along with consequential and punitive damages for wrongful termination as president and exclusion as a shareholder. In an amended complaint plaintiffs added a claim regarding a domain name, Surgem.com, which Seitz allegedly wrongfully appropriated. Hajjar and Surgem requested the court enjoin Seitz from use of the domain name, remove his name as its registered owner, and order Seitz to transfer the domain name to Surgem.

The trial judge found Seitz's employment was properly terminated for cause, stating

> Seitz's deplorable conduct towards his fellow employees at Surgem and [to] Dr. Hajjar's staff alone constituted grounds for dismissal from his at-will employment. However, Seitz went a giant step farther by attempting to hijack Dr. Hajjar's company. Seitz's emailing of his business plan to accomplish the takeover of Surgem to Dr. Hajjar's own staff and business associates bespeaks of megalomania consistent with the [c]ourt's determination that Seitz's testimony at trial was facile, dishonest, and incredible. Seitz's acts of betrayal of Dr. Hajjar were reprehensible and fully deserving of the termination of his employment with Surgem.

The judge also determined Seitz became dissociated as a member of Surgem as of the date he was fired and, following the vesting formula of the original CPPM, calculated Seitz's ownership interest as 3.74%. The court entered a judgment against Surgem

for $157,787.91. Further, the judge found Seitz had no ownership interest in SOM and had wrongfully registered Surgem.com and was ordered to transfer registration to plaintiffs. Finally, plaintiffs' claim for damages for the wrongful registration was denied. This appeal ensued.

Seitz argues the judge erred in limiting his ownership interest in Surgem by the vesting schedule in the original CPPM and in concluding he held no interest in SOM. Further, he challenges the value calculated by the court.[1]

The scope of our review of a judgment entered in a non-jury case is limited. Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011). We will not "disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Ibid. (internal quotation marks and citations omitted). See also Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 483-84 (1974) (stating appellant review should focus on whether there is substantial evidential support for the trial judge's findings

[1] Seitz does not challenge the judge's determination he was terminated for cause, became a dissociated member of Surgem as of April 26, 2008, or plaintiffs' ownership of Surgem.com.

and conclusions). Credibility determinations receive "particular deference," because of the position of the trial judge to observe witnesses and hear them testify. RAB Performance Recoveries, L.L.C. v. George, 419 N.J. Super. 81, 86 (App. Div. 2011). On the other hand, our review of a trial judge's legal conclusions is de novo, as "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Seitz first challenges the determined amount and value of his ownership interest in Surgem. He argues the evidence, including Hajjar's testimony "incontrovertibly" confirmed he owned 8.74% of Surgem, not 3.74% as found by the court.

In his written findings, the judge explained:

> Here, the [revised CPPM] lists Seitz as an owner of 300,000 shares of Surgem, LLC, for his cash and capital contributions. Seitz, in fact, did not make a cash contribution for his shares of Surgem. The [CPPM] lists that Seitz's annual salary was $250,000 and that he was "granted 300,000 shares of Founders Stock under a buy/sell agreement that allows the company to repurchase shares in the event of termination by [Surgem] for cause or resignation by Mr. Seitz." Although both are referenced in the [CPPM], neither the buy/sell agreement nor the employment agreement were ever drafted. . . . Dr. Hajjar credibly testified as to the oral agreements, and Seitz did not refute that testimony. The oral agreements included

> provisions that Seitz would receive 300,000 founder's shares at a rate of 75,000 shares per year as long as Seitz stayed at Surgem. . . . The oral employment agreement also included a provision that Seitz's employment could be terminated for just-cause, and that upon such termination, Surgem could buyback Seitz's shares.
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> . . . .
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> Seitz's employment with Surgem was terminated on April 26, 2008. At the time of his termination, Seitz had actually become vested in only two years' worth of Surgem shares — 150,000 shares at 75,000 per year, equivalent to a 5% interest in the company. Seitz had transferred [37,800] of his shares, leaving him with [112,200] shares. [112,200] shares is equivalent to an ownership interest in Surgem of 3.74%, Seitz's interest on his date of dissociation.

The judge rejected Seitz's claim based on the revised CPPM's reference to a buy-sell agreement, finding that these documents were "never drafted." Although the revised CPPM bears Hajjar's signature, the court found it was forged by Seitz, making the agreement invalid. Nevertheless, we find substantial, credible evidence shows Hajjar orally agreed to amend the initial transaction terms. Hajjar's conduct reflects his acceptance of Seitz's request to transfer the 300,000 shares to Seitz immediately, in lieu of the originally proposed vesting schedule.

Although the judge found Seitz forged the revised CPPM and determined Seitz was not credible witness, Hajjar's testimony, which the court found to be very credible, supports the position Seitz held an unrestricted 8.74% interest in Surgem at the time he was terminated.

Throughout the litigation, beginning with the complaint, plaintiffs asserted Seitz was vested with an 8.74% ownership interest in Surgem. Not once during trial did either party allude to the possibility Seitz's interest was limited in conformance with the vesting schedule. During his testimony, Hajjar agreed he assented to the March or April 2006 increase in Seitz's salary to $250,000. At the time, Seitz also requested his 300,000 shares be given immediately, to which Hajjar responded: "Okay, we'll give you $250,000. You're going to own [ten] percent of the company if it gets sold and that was the agreement." In addition to Hajjar's testimony regarding the original CPPM, he also noted the revised CPPM "set forth a memorialization of [his] agreement with Mr. Seitz changing [Seitz's] income from $185,000, with the other benefits . . . , to the $250,000 with [ten] percent of the shares of Surgem." Hajjar stated:

> [Seitz] wanted to go up from 185 to $250,000. So I agreed to it. So go ahead get a raise, and I said with the management fees doesn't make any sense at all. And

> just have ownership in the property, a [ten] percent ownership and that will be the end of it.
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> . . . .
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> The agreement with respect to Mr. Seitz is that he has 300,000 shares, he has 10 percent of the company when it gets sold, okay. . . [H]owever, if he decides to quit or if he's terminated for cause, then he gets 10 percent of whatever the value of the company is at that particular time.
>
> [(Emphasis added).]

Several other trial references included Hajjar's comment that Seitz owned ten percent of Surgem.[2] Additionally, this is consistent with the tax returns and K-1s, admitted into evidence.

Our review requires that we reverse the finding that there was no change in Seitz's compensation as it is unsupported by the record.

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[2] One example was Hajjar's explanation regarding the attempts to register Surgicare of Manhattan. Hajjar commented his lawyers recommended he and Seitz list themselves as owners in their individual capacities because "they felt that maybe we could sneak it through, because we are part of Surgem. You know, John Seitz owned [ten] percent of Surgem . . . at that time[.]" Further, several times during cross-examination, Hajjar acknowledged Seitz's 8.74% ownership interest. Finally, Surgem's accountant, William Kawam, testified Hajjar gave Seitz shares constituting a ten percent ownership interest in Surgem in 2006.

Seitz also contests the determined value of his share-units maintaining the value was "$10.00 per unit" as supported by his expert, Timothy Blackmer. Defendant's argument challenges reliance on plaintiffs' expert, insisting the CPPM requires repurchase at ten dollars per share, and emphasizing prior shares were purchased or sold at ten dollars per share. We reject as unfounded defendants' gross mischaracterization of the testimony of Michael Lehner, plaintiffs' valuation expert.

"In a bench trial, the acceptance or rejection of an expert's opinion as to valuation of a corporation, and the expert's methodology, are matters peculiarly within the province of the trial court." Denike v. Cupo, 394 N.J. Super. 357, 381-82 (App. Div. 2007), rev'd on other grounds, 196 N.J. 502 (2008). Therefore, a trial judge's findings are accorded significant deference and should not be reversed absent an abuse of discretion. Id. at 382 (citing Balsamides v. Protameen Chems., Inc., 160 N.J. 352, 368 (1999)).

A dissociated member is entitled to receive the "fair value of his limited liability company interest" as of the date of dissociation. Id. at 381-83 (citing N.J.S.A. 42:2B-24.1, -39). Fair value, although not synonymous with fair market value, may be established "by any techniques or methods which are generally

acceptable in the financial community and otherwise admissible in court." Steneken v. Steneken, 183 N.J. 290, 297 (2005).

In this matter, the judge properly rejected the proposed buy-sell agreement offered by Seitz, which was prepared at Seitz's direction and was never accepted or executed by Hajjar. Further, he rejected the opinion of Seitz's expert, stating:

> Seitz's appraisal expert[, Blackmer,] did not appraise the fair value of Surgem or of Seitz'[s] interest; rather he testified that he had been engaged to prepare only a "calculation of value," an agreement between appraiser and client as to the manner in which the appraiser's work is to be done; i.e., a calculation of value by the method determined by the client, in this case Seitz. Seitz's expert testified further that Seitz did not supply him with numerous materials which were necessary for a valid opinion, and he acknowledged that "more work should have been done" for him to come to an opinion and prepare a report containing actual fair valuation of Surgem as of April 26, 2008.

Accordingly, he found Lehner's testimony was uncontroverted. The judge accepted Lehner's analysis and calculations, fixing Surgem's fair value as of the date of Seitz's termination at "$4,218,928 and the fair value of an 8.74% interest in Surgem at $368,700."

Notwithstanding defendant's assertion to the contrary, in discussing valuation methodology Blackmer did not maintain the operating documents dictated Seitz entitlement to $10.00 per

share. He merely mentioned the operating agreement would be "part of the consideration" if valuing Seitz's shares alone, but not when assessing Surgem's worth on the date of termination. Further, Blackmer never claimed Seitz's interest should be $10.00 per share.

Indeed, Lehner testified the $10.00 per share price "seems to have been an arbitrary amount," based on unreliable projections. Hajjar confirmed Lehner's suspicions, testifying Seitz arbitrarily set the price per share at $10.00. There is no challenge the Lehner's valuation applying the accepted fair value standard, which calculates "the amount that an individual would be compensated who was involuntarily deprived of the benefit of an asset where there is no willing buyer or willing seller[.]" The judge's conclusion which relied on this evidence will not be disturbed. A new trial is unnecessary because the value of Seitz's 8.74% interest was calculated by Lehner as $368,700.

Finally, we reject defendant's ownership claim to SOM and affirm substantially for the reasons set forth by the judge in his written opinion. R. 2:11-3(e)(1)(A). The substantial credible evidence of record supports the finding Seitz had no interest as he forged Hajjar's signature in the SOM's September 1, 2006 Subscription Agreement.

Affirmed in part and remanded solely for correction of the final judgment for defendant in the amount of $368,700.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION