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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4492-14T2

DEBRA DILWORTH and
GEORGE JAY DILWORTH,

Plaintiffs-Respondents,

v.

MARIE DISALVATORE and MUNICIPAL
CODES INSPECTIONS, INC., a New
Jersey Corporation,

Defendants-Appellants.

Argued December 21, 2016 – Decided March 16, 2017

Before Judges Alvarez and Manahan.¹

On appeal from Superior Court of New Jersey,
Chancery Division, Gloucester County, Docket
No. C-46-12.

¹ Hon. Carol E. Higbee participated in the panel before whom this case was argued. The opinion was not approved for filing prior to Judge Higbee's death on January 3, 2017. Pursuant to R. 2:13-2(b), "Appeals shall be decided by panels of 2 judges designated by the presiding judge of the part except when the presiding judge determines that an appeal should be determined by a panel of 3 judges." The presiding judge has determined that this appeal shall be decided by two judges. Counsel has agreed to the substitution and participation of another judge from the part and to waive reargument.

Jeffrey V. Puff argued the cause for appellants (Puff & Cockerill, LLC, attorneys; Mr. Puff and Richard S. Kaser, on the briefs).

Anne C. Singer argued the cause for respondents.

PER CURIAM

Defendants Marie DiSalvatore (Marie) and Municipal Code Inspections, Inc. (MCI) appeal a judgment entered in favor of plaintiffs Debra Dilworth (Debra) and George Jay Dilworth (Jay) after a bench trial.² We affirm in part, reverse in part, and remand for proceedings consistent with our opinion.

We discern the following facts as essential to our determination. Marie founded MCI in 1999 to provide building code inspection services for various government entities. Marie's primary responsibilities were related to MCI's business operations. Lou DiSalvatore (Lou), Marie's husband, was employed by MCI as an inspector.

In January 2002, Jay began working as an independent contractor providing inspection services for nine separate municipalities. Shortly thereafter, Lou contacted Jay about working for MCI. In exchange for his employment, Jay requested an ownership interest in MCI. The request was denied due to the

² We use the first names of the parties for ease of reference. In doing so, we intend no disrespect.

competitive advantage of MCI remaining as a female-owned entity. Jay and Lou agreed to give an ownership interest to Debra. In furtherance of the agreement, pursuant to a shareholder agreement dated March 24, 2004, Debra received a fifty-percent ownership interest in MCI valued at \$700,000, and Jay became a supervisor to MCI's other inspectors. It was understood between the parties that Marie would serve as MCI's president and remain in charge of business operations.

On November 30, 2009, Lou had his licenses revoked to perform inspections as a result of pleading guilty to conspiracy to defraud the Internal Revenue Service (IRS). Lou was therefore unable to continue working for MCI. In December 2009, a meeting between the DiSalvatores and the Dilworths was held to discuss an arrangement that would permit Marie to collect Lou's salary for the next two years. After this period, Marie would turn over her MCI ownership interest to Debra. However, there was no writing memorializing the agreement.

Lou was sentenced to serve one-year-and-one-day in prison, and was incarcerated from July 2010 to April 2011, at the Federal Correctional Facility in Fairton, New Jersey. During Lou's imprisonment, Jay regularly visited to keep him apprised of MCI's business. Lou did not receive a salary during 2010 and 2011, and

Marie's salary increased from \$10,360 in 2009 to approximately \$180,000 in 2010 and 2011.³

The DiSalvatores and Dilworths, with their respective accountants, met on December 20, 2011, to arrange the transfer of Marie's MCI ownership interest to Debra. During the discussion, Lou requested an additional \$96,000 of reimbursement for money paid to the IRS as restitution for his guilty plea. The Dilworths did not agree, and the meeting terminated. Thereafter, the DiSalvatores refused to transfer Marie's interests unless MCI paid their health insurance premiums.

On February 14, 2012, the Dilworth's attorney sent a letter to Marie demanding compliance with the agreement to transfer her ownership interest in MCI to Debra. Marie denied any knowledge of the agreement and subsequently cancelled the Dilworth's company credit cards, stopped reimbursing Jay for company travel expenses, and eventually stopped paying Jay's salary. Jay resigned his employment with MCI in June 2012.

Debra and Jay filed a civil complaint against Marie and MCI on December 10, 2012. The six-count complaint alleged breach of contract (counts one and six); access to MCI's books and records (count two); oppression of Debra as an MCI shareholder, N.J.S.A.

³ The annual salary Marie received was that which Lou received prior to his incarceration.

14A:12-7 (count three); breach of fiduciary duty (count four); and misappropriation and conversion (count five). A three-day bench trial was conducted from May 6, 2014, to May 8, 2014.

On August 29, 2014, the judge entered an order in favor of the Dilworths, finding that "Lou proposed a sale of Marie's stock to Debra in order to ensure that Marie had Lou's income while he was in prison." The judge further held the parties "agreed that Marie would receive Lou's salary . . . for two years as consideration for her transferring her [fifty-percent] interest in MCI to Debra after the two-year period." This was supported by MCI's financial records showing Marie made the exact salary for 2010 and 2011 that Lou had made prior to those years. Subsequently, the judge found that Marie and Lou were not credible witnesses, specifically because neither party could recall any events that occurred at the December 2011 meeting.

With respect to Debra's claim that she was an oppressed shareholder, the judge found that Debra did not have a reasonable expectation to be involved with MCI's management; however, Debra and Jay did have a reasonable expectation to be treated fairly. The judge found "Marie's conduct in refusing to turn over her MCI shares to Debra after receiving two years of Lou's salary was oppressive and unfair." Additionally, Debra presented sufficient credible evidence to support the claim that Marie refused to

provide MCI's financial information in 2011 and 2012. This conduct was found to be oppressive by the judge.

With respect to Marie's treatment of Jay, the judge concluded that cancelling his company credit card, denying him pay, and refusing to reimburse his travel expenses caused Jay to leave MCI. At the time of trial, MCI's annual revenue had dropped to \$279,449.70, a marked decrease from revenue in 2010 that totaled \$1,211,745. The judge concluded that Jay's departure, which was instigated by Marie's actions, "caused the decline in the value of [Debra's shares in] MCI[,]" and further found that Jay was "owed [a] salary of \$10,648.56 and [a \$1860.20] expense reimbursement" at the time of his resignation from MCI.

Given the decline in MCI's value as a result of Marie's conduct, the judge ordered Marie to "repay the two years of Lou's salary that she received in 2010 and 2011 as compensation for the transfer of shares." Additionally, Marie was ordered to "repay salary paid to herself from 2012 to date" because her conduct during that time caused MCI's business to significantly shrink. The judge held that the DiSalvatore's children inappropriately received excess wages and health insurance premiums during this time, and that \$538,483 was improperly taken out of MCI's revenues.

Furthermore, it was determined that MCI should not have paid for the Dilworth's attorney's fees totaling \$114,463.49 associated

with this litigation. Moreover, Marie's conduct was found to be "arbitrary, vexatious, and not in good faith[,]" thereby necessitating her payment of Debra's attorney's fees and expenses pursuant to N.J.S.A. 14A:12-7(10). The judge found there was "a breach of trust between the parties beyond the contractual breach[,]" resulting from Marie refusing "to provide MCI financial information, her termination of credit cards, her refusal to pay or communicate with Jay despite that he was performing MCI work," and her threats to Debra that the litigation would deplete MCI's value and assets.

Judgment was entered in favor of Debra for \$410,469.25 in compensatory damages plus prejudgment interest and \$350,000 in punitive damages. Judgment was entered in favor of Jay for \$12,508 in compensatory damages plus prejudgment interest. Debra also was awarded \$27,390 in attorney's fees. The judge ordered Marie's compensation from MCI be prospectively limited, and that Debra was entitled to fifty percent of all MCI's future profits as long as she held a fifty percent ownership interest. The counterclaim was dismissed.

Marie and MCI raise the following points on appeal:

POINT I

A DE NOVO STANDARD OF REVIEW IS APPROPRIATE
IN THE CASE AT BAR.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AN ALLEGED ORAL AGREEMENT FOR THE TRANSFER OF MCI STOCK TO DEBRA DILWORTH AND THAT [CONSTITUTED] SHAREHOLDER OPPRESSION.

POINT III

THE TRIAL COURT ERRED IN FINDING THAT DEBRA DILWORTH WAS AN OPPRESSED SHAREHOLDER.

POINT IV

THE PAYMENT OF DEFENDANT MCI'S ATTORNEY'S FEES BY MCI WAS PROPER.

POINT V

THE TRIAL COURT ERRED IN ITS AWARD OF PUNITIVE DAMAGES UNDER N.J.S.A. 2A:15-5.9 ET SEQ.⁴

Our review of a trial court's factual findings following a bench trial is highly deferential, and will remain undisturbed "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[.]" D'Agostino v. Maldonado, 216 N.J. 168, 182 (2013) (alteration in original) (quoting Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011)). Additionally, we defer to the judge's credibility

⁴ Although Marie and MCI challenge the decision that led to an award of attorney's fees to Debra as an oppressed shareholder, they do not challenge the award or its amount on appeal. Finderne Heights Condo. Ass'n v. Rabinowitz, 390 N.J. Super. 154, 166 (App. Div. 2007).

determinations because it "'hears the case, sees and observes the witnesses, and hears them testify,' affording it 'a better perspective than a reviewing court in evaluating the veracity of a witness.'" Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare v. Cesare, 154 N.J. 394, 412 (1998)). However, we review any legal determinations de novo. D'Agostino, supra, 216 N.J. at 182.

"The decision to award punitive damages and the amount of such damages is within the sound discretion of the factfinder." Balsamides v. Perle, 313 N.J. Super. 7, 30 (App. Div. 1998), aff'd in part and rev'd on other grounds, 160 N.J. 352 (1999).

Marie and MCI first argue that the judge erred in finding that Marie entered into an oral agreement to transfer her ownership interest in MCI to Debra. Debra and Jay have the burden of showing that the parties entered into a valid and enforceable contract. Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007). The essentials of a valid contract are mutual assent, consideration, legality, and capacity of the parties. Cohn v. Fisher, 118 N.J. Super. 286, 291 (Law Div. 1972). An agreement will be enforced by our courts even if the terms do not materialize in a written document. See Lahue v. Pio Costa, 263 N.J. Super. 575, 596 (App. Div.) cert. denied, 134 N.J. 477 (1993).

Here, the record contains ample credible evidence to support the judge's conclusion that the parties entered into an enforceable oral agreement in 2009. Based on that agreement, Marie would receive consideration by way of a salary increase for two years equivalent to Lou's former salary. In exchange, Marie agreed to transfer her ownership interest in MCI to Debra. In addition to the testimony of Debra and Jay, we view the course of dealings between the parties as consistent with the terms of the agreement. Marie did receive the benefit of Lou's former salary. Upon Lou's release, the parties met with their accountants to consummate the transfer of stock. Although, it was disputed by Marie that there was an agreement to transfer control of MCI to Debra, the judge held, and we agree, that the record proved otherwise.

Marie and MCI next argue that the judge erred in finding that Debra was an oppressed shareholder pursuant to N.J.S.A. 14A:12-7. When a company has two fifty-percent shareholders, neither has a controlling interest in the corporation. Balsamides v. Protameen Chems., Inc., 160 N.J. 352, 371 n.7 (1999). Oppressing a minority shareholder is defined as "frustrating a shareholder's reasonable expectations." Brenner v. Berkowitz, 134 N.J. 488, 506 (1993). An oppressed shareholder may seek relief under N.J.S.A. 14A:12-7(c), which explains:

In the case of a corporation having [twenty-five] or less shareholders, [where] the directors or those in control have acted fraudulently or illegally, mismanaged the corporation, or abused their authority as officers or directors or have acted oppressively or unfairly toward one or more minority shareholders in their capacities as shareholders, directors, officers, or employees.

We interpret this language "broadly to provide remedies for the distinctive problems of close corporations." Brenner, supra, 134 N.J. at 508 (internal citations and quotations omitted). Additionally, "a plaintiff must . . . demonstrate a nexus between th[e] misconduct and the minority shareholder or her interest in the corporation." Ibid. "Ordinarily, oppression by shareholders is clearly shown when they have awarded themselves excessive compensation, furnished inadequate dividends, or misapplied and wasted corporate funds." Kelley v. Axelsson, 296 N.J. Super. 426, 431 (App. Div. 1997) (emphasis omitted) (quoting Muellenberg v. Bikon Corp., 143 N.J. 168, 180 (1996)).

The judge determined that Debra was not an oppressed shareholder prior to December 2011, as she did not have a reasonable expectation of access to MCI's financial records given her limited role in the business. However, the judge also determined that the modification to the MCI shareholder agreement, which provided for the transfer of Marie's ownership interest to

Debra, produced a reasonable expectation by Debra that she would have access to the financial records. As such, the judge held that Marie's refusal to both turn over her MCI shares and to provide MCI's financial information to Debra in 2011 and 2012 was oppressive and unfair.

Further, the judge held that by Marie cancelling Jay's company credit card, denying him pay, and fabricating policies that he be required to provide timesheets, caused him to be "constructively terminated" by MCI; a termination that resulted in "the decline in value of [Debra's shares in] MCI[.]" To be sure, our Supreme Court has held that Jay's termination alone may have been sufficient grounds to find a violation of the statute. See Brenner, supra, 134 N.J. at 509 ("Even the termination of the employment of the shareholder's children . . . may constitute oppressive conduct sufficient to constitute a violation under the statute.").

Marie diverted MCI's funds and paid herself an inflated salary beyond the agreed upon two-year term she was entitled to receive the equivalent of Lou's salary. By Marie's conduct in not transferring her shares, Debra did not receive income from dividends. Marie also misapplied corporate funds by increasing MCI's contribution to her children's' health care premiums. In sum, we are satisfied that Marie's conduct in awarding herself

excessive income, denying dividends and misapplying corporate funds clearly resulted in oppression. See Kelley, supra 296 N.J. Super. at 431 (citations omitted). Predicated upon our review of the record and consistent with our standard of review, we perceive no error in the judge's holding.

To the contrary, we conclude that the judge erred in summarily determining that MCI's payment of attorney's fees was improper. At the outset, we note that the litigation involved both MCI and Marie, in her corporate capacity, as defendants. Pursuant to N.J.S.A. 14A:3-1(1)(b) and (g), a corporation, duly formed under the New Jersey Business Corporation Act, N.J.S.A. 14A:1-1 to 17-18, shall have the power to "complain and defend" in any judicial proceeding and to make contracts and incur liabilities. Consistent therewith, MCI, as a qualified corporation, was authorized to retain counsel to defend the action instituted by Debra and Jay and to prosecute the counterclaim. Further, Marie may have been entitled to a defense and indemnification as a "corporate agent."

N.J.S.A. 14A:3-5(2)(a) reads in pertinent part:

Any corporation organized for any purpose under any general or special law of this State shall have the power to indemnify a corporate agent against his expenses and liabilities in connection with any proceeding involving the corporate agent by reason of his being or having been such a corporate agent, other than a proceeding by or in the right of the corporation, if

(a) such corporate agent acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation[.]

Here, the judge held that MCI improperly paid Marie's attorney's fees from its profits after she already "received full payment for her shares of the MCI stock." In reaching this determination, there was no analysis by the judge of the allocation of the attorney's fees incurred as between MCI and Marie and, to the extent those fees could be allocated, whether Marie may have been statutorily eligible for their payment. In the absence of the required findings on this score, we remand for further proceedings.

As to the final argument, we conclude the judge awarded punitive damages in error as without consideration of the relevant factors contained in the Punitive Damages Act (PDA), N.J.S.A. 2A:15-5.9 to -5.17. In an evaluation of whether to award punitive damages, the following factors must be considered:

- (1) The likelihood, at the relevant time, that serious harm would arise from the defendant's conduct;
- (2) The defendant's awareness of reckless disregard of the likelihood that the serious harm at issue would arise from the defendant's conduct;

(3) The conduct of the defendant upon learning that its initial conduct would likely cause harm; and

(4) The duration of the conduct or any concealment of it by the defendant.

[N.J.S.A. 2A:15-5.12(b).]

Should punitive damages be warranted, the determination of the amount of the award shall be in consideration of the following factors:

(1) All relevant evidence relating to the factors set forth in subsection b. of this section;

(2) The profitability of the misconduct to the defendant;

(3) When the misconduct was terminated; and

(4) The financial condition of the defendant.

[N.J.S.A. 2A:15-5.12(c).]

There must also be an ascertainment that the award is reasonable.

N.J.S.A. 2A:15-5.14(a).⁵

In reaching the decision to award \$350,000 in punitive damages, the judge primarily focused on Marie's conduct, characterizing her actions as malicious and "fatal" to MCI. The judge held that Marie created a "breach of trust between the

⁵ The determination to award punitive damages must be made in a bifurcated trial if requested by the defendant. N.J.S.A. 2A:15-5.13(a). Marie and MCI did not request a bifurcated trial.

parties beyond the contractual breach." Balsamides, supra, 313 N.J. Super. at 31. Since the decision was not premised upon consideration of either N.J.S.A. 2A:15-5.12(b) (whether punitive damages were warranted) or N.J.S.A. 2A:15-5.12(c) (the amount of the award), we remand on this score as well for further proceedings.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION