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2017 IL App (3d) 160577-U

Order filed November 17, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

ROLLIE SPRINGER as Executor of the)	Appeal from the Circuit Court
ESTATE OF CYNTHIA L. SPRINGER,)	of the 10th Judicial Circuit,
)	Tazewell County, Illinois.
Plaintiff-Appellant,)	
)	
v.)	Appeal No. 3-16-0577
)	Circuit No. 10-L-59
THE LIBRARY STORE, an Illinois)	
Corporation, DON GUNTER, STEPHEN L.)	
GUNTER, GREGORY L. GUNTER, and)	
MARILYN GUNTER,)	The Honorable
)	James A. Mack,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Holdridge and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's decision in favor of defendants on plaintiff's shareholder oppression claims was not against manifest weight of evidence where plaintiff did not prove defendants engaged in heavy-handed conduct or misused corporate funds. Trial court did not abuse its discretion in precluding accountant from testifying about appraisal prepared by another expert.

¶ 2 Cynthia L. Springer was a shareholder of The Library Store (TLS), along with her parents, defendants Don Gunter and Marilyn Gunter, and her siblings, defendants Stephen L.

Gunter and Gregory L. Gunter. After Cynthia's death, Cynthia's husband, plaintiff Rollie Springer, as executor of her estate, filed a complaint against defendants alleging shareholder oppression and conspiracy. Following a bench trial, the court ruled in favor of defendants. Plaintiff appeals, arguing that the trial court erred in (1) ruling that defendants did not commit shareholder oppression, and (2) precluding his accounting expert from testifying about an appraisal prepared by someone else. We affirm.

¶ 3

FACTS

¶ 4

In 1983, Don Gunter and Marilyn Gunter purchased TLS, which sells library and school supplies. They gifted shares of TLS to each of their children: Stephen Gunter, Gregory Gunter and Cynthia Springer. In 1998, Cynthia began working as vice president of operations for TLS. At that time, all five family members served on TLS's board of directors and owned all of the stock of TLS.

¶ 5

In October 2007, Cynthia was terminated from her employment at TLS. In December 2007, the TLS board of directors voted to remove a position from its board. Cynthia was not elected to one of the four remaining board positions. She was present at that board meeting, along with her attorney.

¶ 6

In July 2008, Cynthia filed a five-count complaint in federal court against defendants, alleging violation of the Americans with Disabilities Act (ADA), retaliation, and wrongful termination. In October 2008, Cynthia died, and plaintiff was named executor of her estate. In 2010, Cynthia's federal lawsuit against defendants was settled and dismissed.

¶ 7

In February 2011, plaintiff, as executor of Cynthia's estate, filed a 10-count amended complaint against defendants TLS, Don Gunter, Stephen Gunter, Gregory Gunter and Marilyn Gunter. Counts I-IV alleged shareholder oppression against each individual defendant in

violation of section 12.56(a)(3)-(4) of the Business Corporation Act (Act) (805 ILCS 5/12.56 (West 2010)); counts V-VIII alleged intentional infliction of emotional distress, and count IX alleged civil conspiracy. Defendants filed a motion to strike and dismiss the complaint. The trial court denied the motion with respect to the shareholder oppression and civil conspiracy counts and granted it with respect to the emotional distress counts.

¶ 8 The case proceeded to a bench trial in July 2016. The evidence at trial revealed that Cynthia was diagnosed with colon cancer in December 2006. In February 2007, she went to work at TLS for a few days and did not return to work after that. By August 2007, Cynthia was receiving disability payments from Social Security and a private insurance company. In October 2007, Cynthia filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) against TLS. That same month, Cynthia's employment with TLS was terminated.

¶ 9 In 2010, TLS sold its building to Gunter Properties, which is owned by Don, Marilyn, Stephen and Gregory Gunter for \$835,000. Gunter Properties then leased the building back to TLS.

¶ 10 Neil Gerber, a certified public accountant, testified for plaintiff. He compared the salaries of TLS's officers before and after Cynthia's death. He determined that after Cynthia's death, there was a significant increase in the wages paid to defendants. At the same time, distributions to shareholders significantly decreased. Gerber determined that after Cynthia died, the officers received "excessive compensation" of \$174,463 based on several different analyses: historical percentage, historical average, and independent investors test.

¶ 11 Gerber explained that in performing his calculations, he had to make certain assumptions, including a 15% rate of return and reasonable salaries for officers, which he set at 3% of sales.

He came up with those values based on his experience. He validated his model and assumptions by comparing them to what TLS did prior to 2008.

¶ 12 Gerber testified that from 2008 to 2012, TLS was “severely impacted by financial – a downturn, an economic downturn” and questioned why salaries were raised then. He admitted that Stephen and Gregory did “some good things” to “turn things around” and make TLS profitable after that. In 2014 and 2015, TLS “did phenomenally well” and actually underpaid its officers. He agreed that Marilyn and Don were receiving very little in salary from 2003 to 2008. It was his opinion that “in the bad years” the officers “took too much money.”

¶ 13 Gerber attempted to introduce evidence that TLS was paying “excessive rent” to Gunter Properties, and defendants objected because Gerber’s conclusion was based on an appraisal that was prepared by another expert. Plaintiff argued that Gerber should be allowed to rely on the opinion and report of another expert. The trial court sustained the objection, explaining “Sometimes experts rely on other opinions in making their conclusions, but you have to – you have to ask those questions. You have to get to it. You’re talking about it, but you’re not asking the questions.” Plaintiff never called the author of the appraisal to testify.

¶ 14 Bethany Hearn, a certified public accountant, testified on behalf of defendants. She explained that TLS had to change its business model after 2008 “to adjust to the changing economy and industry” following “the Great Recession.” She used two tests to analyze if officers of TLS received excess compensation after 2008: the market compensation test and the independent investor test. For the independent investor test, Hearn used a rate of return of 8-12%, which she found was reasonable based on her experience and information from several publications. Her results from that test showed that TLS paid its officers deficient compensation of \$143,693 from 2009 to 2015.

¶ 15 Don Gunter testified that he was president of TLS until 2009. He testified that Cynthia was not at work from mid-December 2006 to early February 2007, because she was receiving medical treatments. When she returned to work in February 2007, Cynthia asked him if she could work from home due to her illness. He told her she could not continue in her position as vice president but could work in the bid department. Cynthia never responded to that offer. The following week, Cynthia came into work for three days. After that, she stopped coming to work entirely. Don paid Cynthia's salary and insurance from March to May 2007. He stopped paying Cynthia when he received a letter from Cynthia's attorney, "indicating that probably a suit was going to be taking place."

¶ 16 In the fall of 2007, Don sent Cynthia a letter terminating her employment. At that time, Cynthia was receiving disability benefits. Don testified that he received a raise as president of TLS in 2008 after he complained to Stephen and Gregory about the meager salary he had previously earned.

¶ 17 Stephen Gunter testified that he and his family members decided to reduce the number of board members from five to four in December 2007 because they "couldn't get anything done." Beginning in June 2007, Cynthia was bringing an attorney to board meetings, and the rest of the board members thought Cynthia and her attorney "were looking for litigation." Stephen testified that with Cynthia's attorney at the meetings, the board members "could not be open with one another to actually run the company."

¶ 18 Stephen testified that locks to TLS were changed in mid-2007 "because a lot of them didn't work anymore." He admitted that he did not give Cynthia a key, explaining that he "did not see her" and "[s]he did not ask."

¶ 19 Plaintiff testified that prior to Cynthia’s death, he saw paperwork showing that TLS owed no debt on its building. After Gunter Properties bought TLS’s real property, plaintiff claimed that TLS paid Gunter Properties \$15,000 per month in rent. Plaintiff admitted that Cynthia’s estate received \$64,996 from TLS in 2014, and \$46,187 in 2015.

¶ 20 The trial court issued an order, finding that plaintiff failed to present evidence of actions “demonstrating an ‘arbitrary, heavy-handed course of conduct’ sufficient to show oppression (illegality or fraud) by a preponderance of the evidence.” With respect to the officer compensation issue, the court found that “the compensation spike in 2009 looks rather questionable, but was adequately explained by the defendants’ testimony when considering the conclusions of the parties’ experts.” The court noted that both experts used the independent investor test and found that both “determined most of the variables competently” but that Hearn’s analysis was more credible because the rate of return she used was supported by published literature. Nevertheless, the court concluded that neither expert’s analysis held “much weight” because during the period in question Don retired, a recession hit, and Stephen and Greg had to reinvent TLS, justifying a change in the distribution of TLS’s compensation and profits.

¶ 21 ANALYSIS

¶ 22 I. Shareholder oppression

¶ 23 A violation of section 12.56(a)(3) of the Act occurs when the directors or those in control of a corporation have acted “in a manner that is illegal, oppressive or fraudulent with respect to the petitioning shareholder.” 805 ILCS 5/12.56(a)(3) (West 2010). Shareholder oppression is not limited to actions defined “as ‘illegal’ or ‘fraudulent’ or necessarily including misapplication of corporate assets or mismanagement of funds.” *Hager-Freeman v. Spircoff*, 229 Ill. App. 3d 262, 276 (1992). Shareholder oppression can consist of a “continuing course of heavy-handed

conduct.” *Id.* A violation of section 12.56(a)(3) may be committed where corporate directors or officers mismanage or misuse corporate assets by paying excessive compensation. See *Kovac v. Barron*, 2014 IL App (2d) 121100, ¶¶ 71-75.

¶ 24 “It is *** fundamental in the law of corporations that the majority of its stockholders shall control the policy of the corporation, and regulate and govern the lawful exercise of its franchise and business.” *Wheeler v. Pullman Iron & Steel Co.*, 143 Ill. 197, 207 (1902). Business decision-making is the responsibility of the board of directors and officers of the corporation. *Polikoff v. Dole & Clark Building Corp.*, 37 Ill. App. 2d 29, 37 (1962). Acts that “are merely the exercise of business judgment *** cannot be made subject to the attack of disgruntled minority shareholders without destroying the practicality of the corporate form.” *Id.*

¶ 25 A majority of shareholders voting to effectively oust another shareholder from participating in the business of the corporation does not constitute shareholder oppression. *Jaffe Commercial Finance Co. v. Harris*, 119 Ill. App. 3d 136, 146 (1983); see also *Schirmer v. Bear*, 271 Ill. App. 3d 778, 784-86 (1995) (removing plaintiff from board of directors was not “oppressive” even though it violated corporate bylaws). This is especially true in a closely held corporation, where the stock is held in a few hands and never, or only rarely, bought or sold. See *Harris*, 119 Ill. App. 3d at 145-46.

¶ 26 It is the plaintiff’s burden to prove that the defendants’ actions were oppressive and constituted misapplication or waste of corporate assets. *Polikoff*, 37 Ill. App. 2d at 35. Oppressive conduct exists where: the corporate president solely controls and directs the corporation’s operations and policies, fails to call board meetings, fails to disclose corporate documents and violates the shareholder agreement (*Compton v. Paul K. Harding Realty Co.*, 6 Ill. App. 3d 488 (1972)); the corporate president violates the corporate bylaws, holds no

shareholder meetings, borrows money from himself on behalf of the corporation, takes actions without proper authorization, and uses corporate money to organize a separate corporation (*Gidwitz v. Lanzit Corrugated Box Co.*, 20 Ill. 2d 208 (1960)); one shareholder takes control of a corporation through a deceptive transaction with another shareholder, borrows money from the corporation and never pays it back, and makes false entries in corporate books (*Hager-Freeman*, 229 Ill. App. 3d 262).

¶ 27 The standard of review in a bench trial is whether the judgment is against the manifest weight of the evidence. *Green v. Papa*, 2014 IL (5th) 130029, ¶ 32. A judgment is against the manifest weight of the evidence only when the opposite conclusion is clearly apparent or when findings appear to be unreasonable, arbitrary, or not based on the evidence. *Id.*

¶ 28 A. Heavy-handed conduct

¶ 29 Here, plaintiff alleged that defendants engaged in “heavy-handed conduct” toward Cynthia that amounted to shareholder oppression under the Act by firing her, removing her from the board of directors and not giving her a key to TLS. We disagree.

¶ 30 It is permissible for a board of directors to reduce the number of directors and replace a corporate officer. See *Harris*, 119 Ill. App. 3d at 146. In this case, there were reasonable explanations for both of these board actions. When Cynthia was terminated from her employment, she had not been to work for over six months and was receiving disability benefits because she was unable to work. Under these circumstances, it was not “unfair” for Cynthia’s employment to be terminated. Moreover, Cynthia’s employment claims were brought and settled in federal court and, as such, should not be relitigated in plaintiff’s shareholder oppression suit.

¶ 31 Additionally, Stephen testified that the board of directors voted to remove a position from the board because the board members could not get anything done with Cynthia and her attorney present at board meetings. It is not oppressive for the majority of shareholders to vote out another shareholder from the board. See *id.* at 145-46. TLS is a closely held corporation with only five shareholders. It was not unreasonable for the majority to vote out a director who they thought was preventing them from running their corporation effectively.

¶ 32 Finally, Stephen testified that it was necessary to change the locks to TLS because many were not operational. He also testified that Cynthia was never given a key to the new locks because she did not ask for one. Plaintiff failed to present any testimony or evidence to refute Stephen's testimony.

¶ 33 Unlike the situations where shareholder oppression has been found, plaintiff did not present evidence that defendants failed to call board meetings, violated corporate bylaws, improperly borrowed money from the corporation or falsified corporate records. See *Compton*, 6 Ill. App. 3d 488; *Gidwitz*, 20 Ill. 2d 208; *Hager-Freeman*, 229 Ill. App. 3d 262. Instead, plaintiff only proved that defendants terminated Cynthia's employment well after she stopped working for TLS and removed her from the board when her presence interfered with the board's ability to effectively run the corporation. The trial court's determination that plaintiff failed to prove "a continuing course of heavy-handed conduct" was not against the manifest weight of the evidence.

¶ 34 B. Mismanagement of assets

¶ 35 Plaintiff also argues that he proved that defendants wasted and mismanaged corporate assets by paying excessive compensation to officers based on the testimony of Gerber, his accounting expert.

¶ 36 The trier of fact is not bound to accept the opinion of an expert. *Rybak v. Provenzale*, 181 Ill. App. 3d 884, 896 (1989). Instead, the trier of fact “is free to disregard the testimony of any expert.” *People v. McGee*, 88 Ill. App. 3d 447, 453 (1980). The weight to be accorded expert testimony is for the trier of fact to decide. *Rybak*, 181 Ill. App. 3d at 896. The testimony of an expert is judged by the same rules of weight and credibility that are applied to other witnesses. *Id.*

¶ 37 In a bench trial, the trial judge weighs the evidence and may draw from it proper inferences and conclusions. *Wilson v. Illinois Benedictine College*, 112 Ill. App. 3d 932, 939 (1983). The trial court’s conclusions will not be disturbed on review unless they are contrary to the manifest weight of the evidence. *Id.*

¶ 38 Here, the trial court considered and weighed the testimony of both experts, Gerber and Hearn, regarding the amount of compensation paid to TLS officers. The trial court acknowledged that the analyses of both experts had flaws but found Hearn’s analysis slightly more reliable. The court ultimately concluded that plaintiff failed to prove that defendants paid excessive compensation because the increase in compensation to officers following Cynthia’s death was “adequately explained” by the witnesses. Since an opposite conclusion is not clearly evident from our review of the record in this case, the trial court’s findings and judgment are not against the manifest weight of the evidence.

¶ 39 II. Exclusion of expert testimony

¶ 40 Plaintiff argues that the trial court erred in refusing to allow Gerber to testify about the appraisal performed by another expert in his attempt to prove that defendants were paying “excessive rent” to Gunter Properties.

¶ 41 Federal Rule 703, which the Illinois Supreme Court has adopted, allows an expert to give an opinion based on information reasonably relied upon by experts in the particular field, even if the information is not otherwise admissible in evidence. *Wilson v. Clark*, 84 Ill. 2d 186, 196 (1981). “Rule 703 does not create an exception to the rule against hearsay because the underlying facts or data are admitted not for their truth, but for the limited purpose of explaining the basis of the expert’s opinion.” *Wingo by Wingo v. Rockford Memorial Hospital*, 292 Ill. App. 3d 896, 908 (1997). Rule 703 allows an expert to base his opinion on the opinions of others that are not in evidence as long as experts in the field ordinarily rely on such opinions in forming their own opinions. *Id.*

¶ 42 The proponent of evidence must convince the trial court that the information is of the type customarily relied upon by experts in the field and that such information is sufficiently trustworthy to make such reliance reasonable. *Rios v. City of Chicago*, 331 Ill. App. 3d 763, 771 (2002). It is error for the trial court to allow an expert to rely on the report of another where the proponent does not lay a foundation as to whether such hearsay is customarily relied upon in rendering opinions in the expert’s field and that such reliance was reasonable. *Id.* A reviewing court will not disturb a trial court’s ruling on the admissibility of evidence absent an abuse of discretion. *In re Marriage of Almquist*, 299 Ill. App. 3d 732, 735 (1998).

¶ 43 Here, plaintiff sought to introduce an appraisal into evidence through the testimony of an accountant who did not prepare the report. That testimony would have been admissible if Gerber had testified that appraisals are customarily relied on by accountants in rendering opinions and that it was reasonable for him to rely on the appraisal. See *Rios*, 331 Ill. App. 3d at 771. However, Gerber never testified that the appraisal was the type of information customarily relied upon by experts in his field and that the appraisal was sufficiently trustworthy to make his

reliance reasonable. Absent this foundation, the trial court properly prohibited Gerber from testifying about the contents of the appraisal. See *id.*

¶ 44

CONCLUSION

¶ 45

The judgment of the circuit court of Tazewell County is affirmed.

¶ 46

Affirmed.