

2018 IL App (1st) 170042-U
Nos. 1-17-0042 & 1-17-0729 (consolidated)
Order filed June 29, 2018

Second Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

KRISTEN L. MASON,)	Appeal from the
)	Circuit Court of
)	Cook County.
Plaintiff-Appellant,)	
)	
v.)	No. 09 CH 12439
)	
SUNSTAR AMERICAS, INC.,)	
)	Honorable
Defendant-Appellee,)	Kathleen G. Kennedy,
<u>SUNSTAR AMERICAS, INC., an Illinois corporation,</u>)	Judge, presiding.
)	
Counter-Plaintiff/Appellee,)	
)	
v.)	
)	
KRISTEN L. MASON, d/b/a C & E Associates, C & E)	
ASSOCIATES, DENNIS EATHERTON, and UNITED)	
EXCHANGE CORPORATION,)	
)	
Counter-Defendants/Appellants.)	

JUSTICE HYMAN delivered the judgment of the court.
Justices Pucinski and Walker concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in summarily determining defendant breached his fiduciary duties to his former employer by working for and obtaining an ownership interest in a competing company and did not abuse its discretion in entering a default judgment as a discovery sanction for defendant's destruction of evidence. The trial court also did not err in summarily determining defendant's daughter aided and abetted defendant's breach of his fiduciary duties and in assessing damages against defendants.

¶ 2 At the same time that Dennis Eatherton was a vice president at Sunstar Americas, Inc., a company that designs, manufactures, and sells oral care products, he worked for and was a shareholder in Consumer Care Products (CCP), a California company that also sells oral care products. Eatherton did not inform Sunstar of his relationship with CCP. He also did not inform Sunstar that a broker he hired to work for Sunstar, Kristen Mason, was his daughter. When Sunstar discovered the father-daughter relationship, it terminated Eatherton and Mason.

¶ 3 Mason sued Sunstar for unpaid commissions. Sunstar filed counterclaims and a third-party complaint alleging (i) Eatherton breached his fiduciary duties, (ii) Mason and CCP aided and abetted Eatherton's breach, and (iii) Eatherton and Mason were unjustly enriched. The trial court made pre-trial summary determinations. As to Eatherton, the court found he breached his fiduciary duties to Sunstar by (i) acquiring an equity interest in CCP without first disclosing the corporate opportunity to Sunstar, (ii) causing Sunstar to make broker commission payments to CCP and indirectly to himself as a CCP shareholder, and (iii) concealing that Mason is his daughter and paying her broker commissions. The court also summarily determined that Mason and CCP aided and abetted Eatherton's breach of his fiduciary duties. As to damages, the court found Eatherton's fiduciary misconduct unjustly enriched him, warranting forfeiture damages in an amount to be determined at trial.

¶ 4 Sunstar moved for discovery sanctions against Eatherton and Mason for disposing of computers they used for work. The trial court granted the motion as to Eatherton, entering a default judgment on liability. Mason entered into a stipulation with Sunstar voluntarily dismissing her complaint with prejudice.

¶ 5 After a bench trial, the trial court entered a judgment against Eatherton for over \$2.1 million. The judgment included all of the compensation he made from Sunstar and CCP while working for both companies. The court entered a judgment against Mason for \$239,673.21, the amount of her Sunstar commissions less expenses. (The court also entered a judgment against CCP, which it has satisfied.)

¶ 6 In this consolidated appeal, Eatherton contends the trial court erred in (i) finding as a matter of law that he breached his fiduciary duties to Sunstar, (ii) granting a default judgment on Sunstar's motion for sanctions for destroying evidence, (iii) finding as a matter of law that Sunstar was entitled to forfeiture damages, and (iv) entering judgment for unjust enrichment.

¶ 7 Mason contends we should reverse because Illinois law does not provide for a cause of action for aiding and abetting a breach of fiduciary duty. Alternatively, she argues (i) the trial court's summary determinations improperly drew inferences against her and disregarded multiple issues of material fact, and (ii) equitable restitution was not an appropriate remedy.

¶ 8 We affirm. The trial court did not err in summarily determining that Eatherton breached his fiduciary duties to Sunstar and his breaches warranted forfeiture damages, which were properly calculated based on his wrongful gains. The trial court also did not abuse its discretion in entering a default judgment as a discovery sanction for destroying evidence. We also find that the trial court did not err in summarily determining that Mason aided and abetted Eatherton's breach of his fiduciary duties and in awarding restitution damages.

¶ 9

Background

¶ 10 Dennis Eatherton began working for Sunstar in 1989. As vice president of new development, he ran the “special markets” division, which sells surplus, damaged, and close-out oral care products to deep discount distributors, like Dollar Tree, Dollar General, and Big Lots. The special markets division sold directly to some stores and contracted with independent brokers to sell to other stores. Eatherton’s primary goal was to obtain as much shelf space as possible for Sunstar’s products. His responsibilities included: (i) making sales calls to and managing Sunstar’s special markets customers, (ii) establishing relationships with brokers to sell Sunstar’s products, managing independent sales brokers, and approving their commission payments, (iii) designing Sunstar oral care products, including tooth brushes, and (iv) establishing relationships with suppliers.

¶ 11 In 2001, Carol Choi established CCP. Soon, Eatherton began working for CCP, after meeting Choi at a trade show. (Choi also owned United Exchange Corporation (UEC). CCP merged into UEC in January 2009, with UEC assuming all of CCP’s liabilities.) Conducting business under the fictitious business name C & E Associates, CCP sourced consumer products from third party manufacturers and sold them to special market retailers. CCP sold ointments, pain patches, and makeup, as well oral care products, including tooth brushes. Unlike Sunstar, which sold branded oral care products, CCP sold private label, namely, generic products to special market stores. On behalf of Sunstar, Eatherton also contracted with CCP to act as a Sunstar broker, and directed Sunstar to pay commissions to CCP (d/b/a C & E Associates). Eatherton claims he informed Sunstar of his interest in CCP by telling a Sunstar package artist in 2001 and a purchasing agent in 2005. He did not inform anyone else at Sunstar.

¶ 12 By 2003, Eatherton owned a 49% interest in CCP and received dividends as a CCP shareholder. Eatherton also was a member of CCP's board of directors. Eatherton primarily managed CCP's oral care products and, as with Sunstar, tried to obtain as much shelf space for CCP's products as possible. Eatherton also contracted with brokers, some of whom were also brokers for Sunstar. Eatherton introduced CCP to one of Sunstar's suppliers, Shummi Enterprise Co., Ltd., and assisted CCP in developing toothbrushes. At times, Eatherton conducted business on CCP's behalf using Sunstar's offices and computers.

¶ 13 At Eatherton's suggestion, in 2007, CCP hired Kristen Mason, Eatherton's daughter. Mason reported to and was supervised by Eatherton. She assisted Eatherton in selling CCP's oral care products to Sunstar's special market customers and attended sales meetings with him on CCP's behalf.

¶ 14 In 2008, while Mason was still working for CCP, Eatherton contracted with Mason in her personal capacity to act as a broker for Sunstar's special markets business. At Eatherton's suggestion, Mason named her brokerage company "C & E Associates," even though she knew CCP used that as a fictitious business name and knew that the two companies were not related. Eatherton claims he suggested that name because he thought it would be simpler.

¶ 15 Mason acted as a broker on several accounts that Eatherton had handled for Sunstar. Eatherton accompanied Mason on visits to Sunstar's special markets customers and wrote many of the emails she sent customers. At her deposition, Mason admitted she knew her father owed Sunstar duties of loyalty and good faith and fair dealing. She also acknowledged that he was not serving Sunstar's interests by working for CCP.

¶ 16 Eatherton never disclosed to Sunstar that Mason was his daughter. He claims he wanted her to succeed on her own and not get special treatment. Eatherton also never told Sunstar that

Mason's C & E Associates was unrelated to Choi's C& E Associates. Instead, Eatherton sent an email, copying Mason, telling Sunstar's accounting staff that C & E Associates in California had a new mailing address in Illinois, which was Mason's home address, and informing them to send all of C & E Associates' commissions to the Illinois address.

¶ 17 After discovering Eatherton had authorized \$240,000 in brokerage commissions to Mason without disclosing their relationship, Sunstar terminated him on January 5, 2009. The next day, Sunstar terminated its relationship with Mason.

¶ 18 On March 19, 2009, Mason filed a complaint against Sunstar seeking an accounting and brokerage commissions. Sunstar filed counterclaims and third party complaint, later amended, alleging multiple claims of breach of fiduciary duties and unjust enrichment against Eatherton and Mason and aiding and abetting breach of fiduciary duty against Mason, her C & E Associates, and CCP. The trial court dismissed several of Sunstar's claims with prejudice, leaving four counts: (i) breach of fiduciary duty against Eatherton, (ii) breach of contract against Mason and C & E Associates, (iii) aiding and abetting against Mason, C & E Associates, and CCP, and (iv) unjust enrichment against Eatherton.

¶ 19 Before trial, Sunstar sought discovery sanctions against Mason and Eatherton under Illinois Supreme Court Rule 219 (eff. July 1, 2002). Sunstar urged sanctions for Mason's having destroyed evidence by selling her laptop on eBay 11 months after Sunstar filed its counterclaims and 4 days after Sunstar served its interrogatories. Sunstar agreed not to seek a default judgment as a sanction in exchange for Mason voluntarily dismissing her complaint with prejudice. In the stipulation, the parties agreed that "[n]otwithstanding anything to the contrary in [the] Stipulation, Sunstar does not waive its right to offer evidence of the alleged destruction of evidence described in Sunstar's Motion for Sanctions for any purpose in the proceeding,

including but not limited to in support of any adverse inference arising from or relating to the alleged destruction of evidence described in Sunstar's Motion for Sanctions."

¶ 20 Sunstar requested a default judgment on liability against Eatherton for donating his CCP laptop to Goodwill three months after Sunstar filed its counterclaims. Sunstar claimed Eatherton's failure to preserve and produce the computer, "preclude[ed] it from fully cross-examining Eatherton as to the accuracy, completeness or context of his version of events, his evasive deposition testimony, or the extent of his complex, clandestine business dealing with and on behalf of Mason, C & E Associates and CCP." Eatherton claimed he donated the computer because the hard drive crashed and he did not think information on it could be recovered. He also claimed "virtually all" relevant communications were on a Sunstar-issued laptop and his communications with Mason were over the phone or in person.

¶ 21 The trial court granted Sunstar's motion for sanctions, and entered a default judgment against Eatherton on liability. The court found "[t]here is no question that Eatherton violated the discovery rules by donating his CCP-issued [laptop] in August or September 2009. Eatherton, a named counter-defendant, had a duty to preserve evidence which arose no later than when he received Sunstar's May 4, 2009 counterclaim against him. Further, it was not up to Eatherton to determine whether the 'crashed' laptop contained recoverable evidence relevant to the pending case." The court rejected Eatherton's contention it should hold an evidentiary hearing to assess his credibility, "because the uncontradicted facts and reasonable inferences from those facts support the conclusion that Eatherton's breach was intentional. The extent and the timing of Eatherton's actions establish his deliberate, contumacious or unwarranted disregard for the court's authority."

¶ 22 The court acknowledged that a default judgment constituted the most extreme sanction but concluded it appropriate under the factors set forth in *Shimanovsky v. General Motors Corporation*, 181 Ill. 2d 112 (1998) and *Locasto v. City of Chicago*, 2014 IL App (1st) 113756, the nature of the missing evidence, and the prejudicial effect of the missing evidence on Sunstar's case. The court stated, "Eatherton must take personal responsibility for destroying evidence, the destruction shows an attitude of noncooperation and noncompliance, less coercive measures would be futile, and a warning, under the circumstances, would come too late. Eatherton's conduct warrants the extreme discovery sanction of a default judgment against him."

¶ 23 After completing discovery, Sunstar moved for summary determinations under section 2-1005(d) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005(d) (West 2014)). The trial court granted the motion, finding Eatherton was a fiduciary of Sunstar and breached his fiduciary duties by: (i) acquiring an equity interest in CCP without first disclosing this corporate opportunity to Sunstar and obtaining Sunstar's consent; (ii) competing against Sunstar through CCP with respect to the sale of oral care products to special markets retailers; (iii) causing Sunstar to make broker commission payments to CCP and indirectly to himself as a 49% shareholder of CCP; and (iv) concealing his father-daughter relationship with Mason and causing Sunstar to pay her broker commissions. In addition, the court found that Eatherton (i) was unjustly enriched by his fiduciary misconduct, in an amount to be determined at trial, (ii) forfeited the compensation he received from Sunstar and CCP during the period of his disloyalty in an amount to be determined at trial, and (iii) should be required to pay prime rate prejudgment interest on the amounts owed.

¶ 24 As to Mason, the trial court first found that aiding and abetting a breach of fiduciary duty exists as a cognizable claim under Illinois law regardless of Illinois precedent that breach of

fiduciary duty is not a tort. The court found Mason aided and abetted Eatherton's breach of fiduciary duties to Sunstar and "is liable for and may not benefit from Eatherton's breach of his fiduciary duties by competing against Sunstar through CCP with respect to the sale of oral products to special market retailers and by causing Sunstar to make broker commission payments to Ms. Mason." The court drew "the requested inference that access to Ms. Mason's computer which she intentionally failed to preserve would have yielded evidence supporting Sunstar's aiding and abetting claim."

¶ 25 Eatherton filed a motion to reconsider its summary determination order and its order entering a default judgment on liability. The trial court denied these motions. After the final pretrial conference, the court entered an order withdrawing a number of facts and conclusions from contention and identifying the remaining issues for trial. Those issues included the amount of (i) damages Sunstar incurred from Eatherton's breach of his fiduciary duties, (ii) Eatherton's unjust enrichment, (iii) Eatherton's entire compensation during his period of disloyalty, and (iv) prime rate prejudgment interest.

¶ 26 After a bench trial, the trial court entered judgment against Eatherton and Mason. The court reiterated that Eatherton's liability was established through summary determinations and noted that "Sunstar elected to seek equitable restitution, *i.e.*, damages measured by Eatherton's gains rather than Sunstar's lost profits." The trial court then awarded Sunstar \$2,165,644, which included \$1,159,988.00 Sunstar paid Eatherton in compensation from 2003 to 2009, \$250,975 CCP paid Eatherton from 2008 to 2009, and \$754,681 Eatherton received as a CCP shareholder from 2003 to 2009. The trial court declined to order prejudgment interest. As to Mason, the court found her equitable restitution was \$239,673.21, after deducting certain expenses and commissions paid to Carol Choi. The court determined it inappropriate to credit Mason as an

equitable benefit based on the work she performed, as she willfully destroyed key evidence—the laptop computer.

¶ 27 Eatherton and Mason filed separate appeals, which we have consolidated. Eatherton contends the trial court erred in (i) finding as a matter of law that he breached his fiduciary duties to Sunstar and (ii) finding as a matter of law that Sunstar was entitled to forfeiture damages equal to his compensation from Sunstar and CCP during his period of disloyalty, (iii) granting a default judgment on Sunstar’s motion for discovery sanctions, and (iv) entering judgment against him for unjust enrichment.

¶ 28 Mason argues the verdict should be reversed because Illinois law does not provide for a cause of action for aiding and abetting a breach of fiduciary duty. Alternatively, she argues (i) the trial court’s summary determinations improperly drew inferences against her and disregarded multiple issues of material fact, and (ii) equitable restitution was an inappropriate remedy.

¶ 29 Before proceeding, it is apparent from our review of the record that the trial judge carefully considered the evidence, arguments, and submissions of the parties throughout this contentious and lengthy case, especially in making its rulings regarding Section 2-1005(d) of the Code and Supreme Court Rule 219(c).

¶ 30 Analysis

¶ 31 Summary Determination on Breach of Fiduciary Duties

¶ 32 Section 2-1005(d) of the Code (735 ILCS 5/2-1005(d) (West 2014)) sets forth the proper procedure for a trial court’s summary determination of one or more but less than all of the issues. We review *de novo* a trial court’s summary determinations under section 2-1005(d). *Peregrine Financial Group v. TradeMaven, LLC*, 391 Ill. App. 3d 309, 312 (2009) (citing *Adams v. Northern Illinois Gas Co.*, 211 Ill. 3d 32, 43 (2004)).

¶ 33 Breach of Fiduciary Duties

¶ 34 Eatherton contends the trial court erred in summarily determining he breached his fiduciary duties to Sunstar by (i) depriving it of a corporate opportunity—an interest in CCP—without first disclosing it to Sunstar, (ii) making broker commission payments to CCP, and (iii) hiring Mason and paying her broker commission without disclosing she was his daughter.

¶ 35 While acting as an agent or employee of another, one owes the duty of fidelity and loyalty. *Corroon & Black, Inc., v. Magner*, 145 Ill. App. 3d 151, 160 (1986). An employee need not be an officer or a director to be accountable, as an agent must act solely for the principal in all matters related to the agency and refrain from competing with the principal. *E.J. McKernan Co. v. Gregory*, 252 Ill. App. 3d 514, 530 (1993). The duty of loyalty imposes on the fiduciary “an affirmative obligation to disclose certain information which falls within the scope of the fiduciary relationship, and to refrain from profiting—without consent—from property or information which is considered as belonging to the beneficiary.” *Graham v. Mimms*, 111 Ill App. 3d 751, 761 (1982). A corporate fiduciary may not use corporate assets for his or her own personal gain or take advantage of business opportunities “belonging” to the corporation. *E.J. McKernan Co.*, 252 Ill. App. 3d at 529.

¶ 36 The corporate opportunity doctrine provides that a fiduciary cannot usurp a business opportunity developed through the use of corporate assets. *Dremco, Inc. v. South Chapel Hill Gardens, Inc.*, 274 Ill. App. 3d 534, 537 (1995). A corporate opportunity involves a “proposed activity [that] is reasonably incident to the corporation's present or prospective business and * * * in which the corporation has the capacity to engage.” *Dremco*, 274 Ill. App. 3d at 538. When a corporate fiduciary wants to take advantage of a business opportunity that is within the company's “line of business,” the fiduciary must disclose and tender the opportunity to the

corporation before taking advantage of it, notwithstanding the fiduciary's belief that the corporation is legally or financially incapable of taking advantage of the opportunity. *Graham*, 111 Ill App. 3d at 765.

¶ 37 Eatherton asserts he did not deprive Sunstar of a corporate opportunity because CCP and Sunstar were not in the same line of business. He contends Sunstar adopted a policy against selling generic products like the ones he sold for CCP, and so, his work for CCP was not “reasonably incident” to Sunstar's present or prospective business. He contends that, at minimum, Sunstar’s decision not to sell generic products creates a question of fact as to whether he had to disclose his CCP activity to Sunstar.

¶ 38 We agree with the trial court’s finding that Sunstar and CCP competed in the same “line of business.” Both companies designed oral care products, used the same product manufacturer, and sold oral products to the same special markets customers. Even if Sunstar opted not to sell generic oral products to its special market customers, Illinois law requires Eatherton disclose and tender the opportunity to Sunstar before taking advantage of it.

¶ 39 Eatherton also contends the trial court erred in finding that because he did work for CCP on a Sunstar-issued computer, he is equitably stopped from denying that the resulting opportunities did not belong to Sunstar. He argues he should have been allowed to offer evidence showing he used Sunstar’s computer for an authorized purpose.

¶ 40 The “core principle” of the corporate opportunity doctrine is that a corporation's fiduciary will not be permitted to usurp a business opportunity that was developed through the use of corporate assets. *Graham*, 111 Ill App. 3d at 763. Thus, “when a corporation's fiduciary uses corporate assets to develop a business opportunity, the fiduciary is estopped from denying that the resulting opportunity belongs to the corporation whose assets were misappropriated, even if it

was not feasible for the corporation to pursue the opportunity or it had no expectancy in the project.” *Id.*

¶ 41 Eatherton used time he should have been devoting to Sunstar to pursue opportunities with CCP. Moreover, he used a Sunstar computer and email account for his work with CCP. Emails in the record show that he sent emails from his Sunstar email account to his daughter about CCP products. He also acknowledges he used the Sunstar computer for most of his CCP business.

¶ 42 We also reject Eatherton’s contention that he did not breach his fiduciary duties, as Sunstar’s branded products did not compete with CCP’s generic products. Although the products Sunstar and CCP sold were not identical, they were oral care products sold to “special market” stores. For instance, Eatherton offered the CCP generic “Pudgie Penguin” children’s toothbrush to Dollar General and Dollar Tree, which were Sunstar special market customers, at the same time he was selling a children’s toothbrushes for Sunstar to the same customers. Moreover, some of the products, such as the toothbrushes, were manufactured by the same supplier. And, as noted, Eatherton’s goal was to obtain as much shelf space for each company’s products as possible. So, the companies’ products, which were plainly in the same line of business—oral care products—competed with each other and Eatherton breached his fiduciary duties by selling CCP’s products to Sunstar customers without informing Sunstar.

¶ 43 Next, Eatherton contends the trial court erred in finding he breached his fiduciary duties to Sunstar by making broker payments to CCP, in which he had a 49% interest. He reiterates that Sunstar did not sell generic products, and thus was not competitive with CCP and asserts that CCP had long been a broker for Sunstar. But neither contention addresses the trial court’s finding that by causing Sunstar to pay broker commissions to CCP, he was indirectly benefitting himself as a CCP shareholder.

¶ 44 When a fiduciary relationship exists, any transactions between the parties in which the agent profits are presumed fraudulent. *Prodromos v. Everen Securities, Inc.*, 341 Ill. App. 3d 718, 724 (2003). “[T]he burden of proof shifts to the fiduciary to show by clear and convincing evidence that a transaction is equitable and just.” *Labovitz v. Dolan*, 189 Ill. App. 3d 403, 413 (1989). It is undisputed that Eatherton owed Sunstar a fiduciary duty, but he nonetheless profited by causing Sunstar to pay commissions to CCP, a company in which he had a substantial financial interest. Nothing in the record suggests and Eatherton has presented nothing to show that this was fair and equitable to Sunstar. Thus, we agree with the trial court that Eatherton breached his fiduciary duties.

¶ 45 Lastly, Eatherton contends a question of material fact exists as to whether he breached his fiduciary duties by concealing he was Mason’s father and directing Sunstar’s accounting staff to make broker payments to her. As a fiduciary, Eatherton had a duty to disclose all material facts relating to his agency (*Graham*, 111 Ill App. 3d at 761), including his relationship to Mason, to whom he directed Sunstar to pay commissions. Eatherton contends he did not disclose that Mason was his daughter because he wanted her to succeed on her own. But, his reason for not disclosing the relationship does not absolve him of this duty, and thus does not create a question of material fact as to whether he breached his duty. He aided Mason in creating a company with the same name as one of Sunstar’s existing brokers, C & E Associates, and directed Sunstar to pay Mason’s company nearly \$240,000 in commissions, without disclosing she was his daughter or that her company was not related to the C & E Associates in California. Even if the trial court accepted Eatherton’s rationale, it still could find he breached his fiduciary duties by keeping this information from Sunstar.

¶ 46

Forfeiture of Compensation

¶ 47 Eatherton contends the trial court erred in summarily determining that Sunstar was entitled to forfeiture damages, *i.e.*, damages equal to the amount of his compensation from Sunstar and CCP from 2003 to 2009, the period during which he breached his fiduciary duties.

¶ 48 “Illinois law permits a complete forfeiture of any salary paid by a corporation to its fiduciary during a time when the fiduciary was breaching his duty to the corporation.” *Levy v. Markal Sales Corp.*, 268 Ill. App. 3d 355, 373 (1994). “The purpose of ordering forfeiture of a fiduciary's compensation earned during the period of a breach is not to compensate the injured party but rather to deprive the wrongdoer of the gains from the breach of duty and to deter disloyalty.” *Tully v. McLean*, 409 Ill. App. 3d 659, 681 (2011) (citing *Levy*, 268 Ill. App. 3d at 373). It lies within the trial court’s equitable discretion to determine the appropriate remedy for breach of a fiduciary duty. *Tully*, 409 Ill. App. 3d at 681; *In re Marriage of Pagano*, 154 Ill. 2d at 190.

¶ 49 Eatherton asserts forfeiture damages are contrary to the holding in *In re Marriage of Pagano*, 154 Ill. 2d 174 (1992). In *Pagano*, the plaintiff contended her divorce attorneys breached their fiduciary duties in obtaining waivers of her right to a fee hearing. Although the supreme court suggested it would not have found compensation forfeiture to be an appropriate remedy, it did not reach the issue because it affirmed the trial court’s finding that the attorneys did not breach their fiduciary duties. *Id.* at 188-89. In *dicta*, the court stated that while a breach may be so egregious as to require the forfeiture of compensation by the fiduciary, as a matter of public policy, that will not always apply. *Id.* at 190. The court noted that forfeiture of compensation is “not automatic” but is permissible “where a duty based on a relationship of trust is violated, the fraud is gross, or malice or willfulness are shown.” *Id.*

¶ 50 Eatherton asserts the circumstances do not warrant forfeiture damages as a matter of law. Eatherton reiterates that he did not usurp Sunstar's corporate opportunity, as Sunstar opted not to sell generic products and thus, CCP and Sunstar products did not compete with each other. He contends the trial court should have allowed him to present evidence at trial showing his conduct was not intentional or deliberate.

¶ 51 The trial court did not automatically award Sunstar forfeiture damages. Based on the deposition testimony and briefs, the court found that "[e]ssentially, Eatherton's work for CCP equates to his commencing business as a rival concern which he operated for about eight years while he was employed by Sunstar." Further, by his own admission, Eatherton used Sunstar assets, namely a laptop computer and office space, as well as time he should have been devoting to Sunstar's business interests to instead advance the interests of a competing company. The court determined working for two companies that sold the same types of products and directly competed was an egregious and gross violation of Eatherton's fiduciary duties warranting forfeiture of his entire compensation during the period of his disloyalty. This finding was not an abuse of discretion.

¶ 52 Moreover, as noted, Eatherton deceived Sunstar into thinking it was paying commissions to its longstanding broker, C & E Associates in California when it was actually paying Eatherton's daughter. And when Sunstar discovered this scheme, fired Mason and Eatherton, and filed counterclaims against them, Eatherton and Mason disposed of computers that may have contained evidence Sunstar could use in its case. Contrary to Eatherton's assertion, this suggests he acted intentionally and deliberately, and lends further support to the trial court's decision to award Sunstar forfeiture damages.

¶ 53

Rule 219 Sanctions

¶ 54 Eatherton argues the trial court erred in awarding Sunstar a default judgment on liability as a sanction under Illinois Supreme Court Rule 219(c) (eff. July 1, 2002) for failing to preserve evidence, namely, the CCP-issued laptop computer.

¶ 55 Rule 219(c) authorizes a trial court to impose a sanction, including the entry of a default judgment, for unreasonable noncompliance with discovery rules. Rule 219 affords a trial judge broad discretion in fashioning a sanction appropriate under the specific circumstances. Generally, a sanction will not be reversed absent an abuse of discretion. *Cirrinzione v. Westminster Gardens Ltd. Partnership*, 352 Ill. App. 3d 755, 761 (2004). *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998), lists six factors the trial court should use to determine what sanction, if any, to impose: (1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party's objection to the testimony or evidence; and (6) the good faith of the party offering the testimony or evidence. *Shimanovsky*, 181 Ill. 2d at 124. No one factor trumps another. *Id.* We will reverse only if the record establishes a clear abuse of discretion. *Id.*

¶ 56 The most onerous of all sanctions involves a judgment by default on “claims or defenses asserted in any pleading to which that issue is material” or dismissal of the offending party's action, with or without prejudice. Ill. S.Ct. R. 219(c)(v) (eff. July 1, 2002). In *Locasto v. City of Chicago*, 2014 IL App (1st) 113576, this court held that before imposing the ultimate sanction of default or dismissal, the trial court should have first decided that the six *Shimanovsky* factors give rise to the use of sanctions and then weigh four additional factors: (1) the degree of the party's personal responsibility for the noncompliance; (2) the level of cooperation and

compliance with previous discovery and sanction orders; (3) whether less coercive measures are available or would be futile; and (4) whether the recalcitrant party has been warned about the possibility of entry of an order of default or dismissal. *Id.* ¶ 35.

¶ 57 Eatherton contends the trial court abused its discretion because Sunstar was not prejudiced, as it was able to prove its case without the CCP laptop. He also contends he used his Sunstar's laptop for 99.5% of his CCP-related communications and the CCP laptop would not have produced any relevant information. Not so. As the trial court found, without the laptop, Sunstar could not uncover the full extent of Eatherton's wrongdoing. The trial court was not obligated to accept his assertion that the computer would have revealed little evidence. Further, as the trial court noted, applying the *Locasto* factors, Eatherton's disposal of the laptop showed "an attitude of noncooperation and noncompliance" and "less coercive measures would be futile, and a warning, under the circumstances, would come too late."

¶ 58 Eatherton contends Sunstar failed to exercise diligence by waiting four and half years after he disposed of the computer to file a motion for sanctions. Even if we agreed that Sunstar did not exercise diligence in moving for sanctions, that does not provide a basis for reversing the trial court's decision. As discussed, in *Shimanovsky*, no one factor is determinative (*Shimanovsky*, 181 Ill. 2d at 124) and, as the trial court noted, Eatherton's destruction of evidence "shows an attitude of noncooperation and noncompliance" that could not be addressed with less coercive measures. Moreover, a discovery sanction can act as a general deterrent that will provide a powerful incentive for all litigants to fully and accurately comply with discovery rules. *Perimeter Exhibits, Ltd. v. Glenbard Molded Binder, Inc.*, 122 Ill. App.3d 504, 514 (1984). Taking into account Eatherton's decision to rid himself of the CCP laptop after Sunstar filed

counterclaims, the trial court did not abuse its discretion by entering a default judgment on liability against Eatherton.

¶ 59 Unjust Enrichment

¶ 60 Eatherton contends the trial court erred in finding, as a matter of law, that he was unjustly enriched by his fiduciary misconduct. He asserts that he had a contractual relationship with Sunstar, precluding the equitable remedy of unjust enrichment. He also argues that unjust enrichment damages were improper as he did not gain “at the expense of” Sunstar.

¶ 61 To state an unjust enrichment claim, “a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff’s detriment, and that defendant’s retention of the benefit violates the fundamental principles of justice, equity, and good conscience.” *Saletech, LLC v. East Balt, Inc.*, 2014 IL App (1st) 132639, ¶ 36 (quoting *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 160 (1989)). Even when a person has received a benefit from another, he or she is liable for payment “only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him [or her] to retain it. The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor.” (Internal quotation marks omitted.) *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 9 (2004).

¶ 62 Where a third party transfers the benefit to the defendant, a claim for unjust enrichment requires that: (i) the benefit should have been given to the plaintiff, but the third party mistakenly gave it to the defendant instead; (ii) the defendant procured the benefit from the third party through some type of wrongful conduct; or (iii) the plaintiff for some other reason had a better claim to the benefit than the defendant. *HPI Health Care Services, Inc.*, 131 Ill. 2d at 161-62. “The essence of the cause of action is that one party is enriched and it would be unjust for that

party to retain the enrichment.’ ” *Fortech, L.L.C. v. R.W. Dunteman Co.*, 366 Ill. App. 3d 804, 818 (2006) (quoting *Stathis v. Geldermann, Inc.*, 295 Ill. App. 3d 844, 864 (1998)).

¶ 63 Eatherton breached his fiduciary duties to Sunstar by obtaining an ownership interest in CCP and depriving Sunstar of that corporate opportunity. As a CCP employee, he earned income by selling oral care products that competed with Sunstar products. He also directed business to CCP, as a broker for Sunstar, without disclosing his interest in the company. Thus, as both a CCP employee and part-owner, he received benefits from CCP in the form of both income and dividends. Those benefits were unjustly earned, as they were directly related to his wrongful conduct in breaching his fiduciary duties to Sunstar. So the trial court did not err in summarily finding that Sunstar was entitled to Eatherton’s wrongful gains.

¶ 64 Eatherton contests the amount of damages on the basis that oral care products accounted for only 1-15% of CCP’s sales, and the trial court awarded Sunstar 100% of his compensation from CCP. He asserts that even if the unjust enrichment award stands, he is entitled to a *pro rata* share of funds he received from CCP that were unrelated to oral care products. He also contends the damages were excessive as they were not at “the expense of” Sunstar.

¶ 65 As noted in *Pagano*, our supreme court recognized that “[w]hile [a] breach may be so egregious as to require the forfeiture of compensation by the fiduciary as a matter of public policy [citation], such will not always be the case.” *Pagano*, 154 Ill. 2d at 190. And, this court has held that “ ‘[a] willful and deliberate breach of a fiduciary duty requires complete forfeiture of all compensation during the period of the breach.’ ” *Tully*, 409 Ill. App. 3d at 681 (quoting *LID Associates v. Dolan*, 324 Ill. App. 3d 1047, 1071 (2001)).

¶ 66 As noted, Eatherton acted willfully in failing to disclose his relationship with CCP or obtain Sunstar’s consent to take advantage of that corporate opportunity. Then, without

informing Sunstar, he continued for the next eight years to work for both Sunstar and CCP. He used Sunstar assets, in the form of equipment and time, to further the business of a competing company at the expense of Sunstar's business. Moreover, he directed Sunstar brokerage business to CCP without informing Sunstar that he had an ownership interest and received income and dividends from CCP. All of this evidence was more than sufficient to support the trial court's finding Eatherton's breach was willful and deliberate, warranting the complete forfeiture of compensation.

¶ 67 Eatherton also contends the trial court erred in concluding, as a matter of law, that the "period of disloyalty" continued from 2003 through 2009, and in refusing to allow him to present evidence to refute this finding. We disagree. The record shows that Eatherton became a 49% shareholder in CCP in 2003 and provided services to both CCP and Sunstar until Sunstar terminated him in January 2009.

¶ 68 Mason's Aiding and Abetting a Breach of Fiduciary Duty

¶ 69 Mason argues the trial court erred in summarily finding that she aided and abetted Eatherton's breach of his fiduciary duties because Illinois does not recognize it as a cause of action. Mason's primary contention is that section 876 of the Restatement (Second) of Torts provides for secondary liability only for tortious conduct, and that Illinois courts have found that a breach of fiduciary duty is governed by agency, contract, and equity rather than tort law. See *Kinzer v. City of Chicago*, 128 Ill. 2d 437, 445 (1989). Mason cites no cases, however, and fails to acknowledge that Illinois courts have repeatedly recognized a cause of action for aiding and abetting a fiduciary's breach. See, e.g., *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15 (2003)); *Time Savers, Inc. v. LaSalle Bank, N.A.*, 371 Ill. App. 3d 759, 772 (2007). See also, *Hefferman v. Bass*, 467 F.3d 596, 601 (7th Cir.2006) (applying Illinois law to find plaintiff

adequately stated claim that defendant attorney aided and abetted plaintiff's business partner's breach of fiduciary duty); *Lansing v. Carroll*, 71 F.Supp.3d 765 (N.D. Ill. 2014) (finding Illinois recognizes cause of action for aiding and abetting fiduciary's breach).

¶ 70 To prevail on an aiding-and-abetting claim, the plaintiff must prove: (i) that the defendant aided a party who performed a wrongful, injury-causing act; (ii) that the defendant was aware of its role at the time it provided the assistance; and (iii) that the defendant knowingly and substantially assisted the violation. *Time Savers, Inc.*, 371 Ill. App. 3d at 772 (2007).

¶ 71 Mason's conduct met all three requirements. Mason knew that her father worked for Sunstar and was a part owner of CCP. She also knew that Eatherton was responsible for oral care product sales at CCP and sold CCP's oral care products to some of Sunstar's special market customers. She acknowledged in her deposition that Eatherton owed a duty of loyalty to Sunstar and was not protecting Sunstar's interests by selling competitive products for CCP. Nonetheless, Mason helped Eatherton sell CCP's products to Sunstar customers, accompanying him on sales calls and sending emails that her father drafted to CCP customers under her own name.

¶ 72 Mason also falsely represented to Sunstar that CCP in California, d/b/a C & E Associates was the same company as the C & E Associates she was operating. And she knew that her father made false statements to Sunstar to conceal that the two C & E Associates were not the same companies, including sending an email to accounting staff, advising that all payments for C & E Associates be sent to her residential address in Illinois. As a result, in 2008, Sunstar sent nearly \$240,000 in broker commissions to Mason's C & E Associates. Thus, Mason knew Eatherton was breaching his fiduciary duties to Sunstar, causing damage to Sunstar, and Mason provided substantial assistance in that breach.

¶ 73 According to Mason, the trial court improperly drew adverse inferences against her for disposing of her computer. Mason asserts that under section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2014)), the trial court should have considered the pleadings, depositions, and affidavits strictly against Sunstar, the moving party, and in her favor. And, thereby, should not have inferred that access to her computer “would have yielded evidence supporting Sunstar’s aiding and abetting claim.”

¶ 74 Generally, in ruling on a motion for summary judgment, the trial court must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party. *Dowd & Dowd v. Gleason*, 181 Ill. 2d 460, 483 (1998). But, when a litigant destroys evidence, all presumptions shall be taken against that party. See *Whittaker v. Stables*, 339 Ill. App. 3d 943, 947 (2003).

¶ 75 First, we note that when Sunstar agreed not to pursue sanctions against Mason in exchange for Mason dismissing her complaint, Mason agreed that Sunstar was not waiving its right to offer evidence of the alleged destruction of evidence “for any purpose in the proceeding, including but not limited to in support of any adverse inference arising from or relating to the alleged destruction of evidence.” Mason’s intentional disposal of her computer warranted the adverse inference. Mason sold her computer on eBay 11 months after Sunstar filed its counterclaims and 4 days after Sunstar served its interrogatories and within months of her father donating his CCP-issued computer to Goodwill. Mason’s contention that the evidence destroyed was merely cumulative lacks merit. Mason and Eatherton both disposed of computers they used in working on CCP’s behalf, eliminating emails exchanged between them on those computers. Moreover, the computer likely contained documents relating to work she did not CCP’s behalf, which she acknowledges she did not preserve. So, the trial court did not err in drawing adverse

inferences based on her disposing of her computer or in summarily determining that Mason aided and abetted Eatherton's breach of his fiduciary duties.

¶ 76 Equitable Restitution

¶ 77 Lastly, Mason contends equitable restitution was not an appropriate remedy for her aiding and abetting a breach of fiduciary duty. Mason acknowledges that the court has discretion in awarding forfeiture damages, but contends they were not appropriate for her "relatively minor" breach, which she characterizes as unknowing and mitigated by her successful efforts as a broker for Sunstar.

¶ 78 Under the law of restitution, a third person who has colluded with a fiduciary in committing a breach of duty, and who obtained a benefit must provide restitution to the beneficiary. We review a trial court's order awarding or denying restitution for an abuse of discretion. *Thede v. Kapsas*, 386 Ill. App. 3d 396, 399 (2008) ("We review the trial court's decision to refuse equitable relief for the abuse of discretion."). The trial court found Mason acted knowingly, as "she was aware of her role when she aided her father" and that she "she substantially assisted" him in breaching his fiduciary duties. We agree. The record makes plain that Mason knew her father had fiduciary duties to Sunstar and was breaching those duties by working for CCP, helping her establish C & E Associates, the same name CCP used as a broker, and directing Sunstar to send payments to C & E Associates to her address. Thus, she actively participated in deceiving Sunstar, and although Mason may have provided some benefits to Sunstar, in the form of sales, we agree with the trial court that those benefits do not "override her liability for aiding and abetting Eatherton's breach of fiduciary duty."

¶ 79 Moreover, we disagree with Mason that her conduct was a "relatively minor" breach. Sunstar paid nearly \$240,000 in commissions to her through her C & E Associates company,

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likely believing it was paying its long-time broker, CCP, not its employee's daughter. This is not a "minor" sum of money or a "minor" act of deception. Mason then disposed of evidence, namely her computer and emails, that could have helped Sunstar fully prove its case. Thus, the trial court did not abuse its discretion in awarding Sunstar restitution damages.

¶ 80 Affirmed.