2018 IL App (2d) 180333-U
No. 2-18-0333
Order filed December 5, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THOMAS O'SHEA,	)	Appeal from the Circuit Court
	)	of De Kalb County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 14-L-69
	)	
LUKE VANDER BLEEK,	)	Honorable
	)	William P. Brady,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Hudson and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in: (1) granting plaintiff summary judgment on a complaint seeking to release certain escrow proceeds following the sale of the parties' business; (2) entering judgment in plaintiff's favor on defendant's counterclaim seeking an equitable accounting; and (3) denying defendant's request, in a post-judgment motion, for leave to amend his counterclaim. Affirmed.

¶ 2 This case arose out of the sale, to a retail chain, of a close corporation that operated two independent pharmacies. The parties—the corporation's two shareholders—entered into an agreement—a Memorandum of Understanding (MOU)—addressing the sale and distribution of the sale proceeds and company's assets. After the sale, defendant, Vander Bleek (a 51%

shareholder), came to believe that he agreed to the terms of the sale under fraud or duress. A dispute arose concerning, among other items, certain retention bonuses. Plaintiff, Thomas O'Shea (a 49% shareholder), was to receive all of the second and third retention bonuses. Also, Vander Bleek alleged that O'Shea's bargaining position was not in the company's best interests, where O'Shea held out for more compensation because he was required to sign a non-compete agreement.

¶ 3 In August 2014, O'Shea filed a complaint for declaratory judgment and breach of contract to release certain escrow proceeds under the MOU and O'Shea's employment agreement. Subsequently, O'Shea moved for summary judgment, and the trial court, in September 2016, granted his motion and ordered the disbursement of the escrow proceeds. On November 29, 2017, Vander Bleek moved to reconsider.

¶ 4 The proceedings continued on Vander Bleek's counterclaim for an accounting. After a three-day trial in October 2017 on whether an accounting was warranted (phase one), the trial court, on January 3, 2018, entered judgment in O'Shea's favor, finding that Vander Bleek had provided no reason why an accounting was necessary; instead, he provided only speculation and suspicion. Also in this order, the trial court denied Vander Bleek's November 2017 motion to reconsider the September 2016 summary judgment order.

¶ 5 On January 20, 2018, Vander Bleek filed a post-judgment motion (under section 2-1203(a) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1203(a) (West 2016)), asking the court to vacate its January 3, 2018, order granting judgment in O'Shea's favor on the accounting counterclaim, to order an accounting, and to set the case for status on discovery (phase two). On April 4, 2018, the trial court denied Vander Bleek's post-judgment motion. Vander Bleek appeals from the orders entered on: (1) September 28, 2016, (granting summary judgment in

O'Shea's favor on the complaint); (2) January 3, 2018, (entering judgment in O'Shea's favor on the counterclaim and denying Vander Bleek's motion to reconsider the September 28, 2016, order); and (3) April 4, 2018, (denying Vander Bleek's post-judgment motion). We affirm.

¶ 6 I. BACKGROUND

¶ 7 The parties were shareholders in L. Doyle, Inc. The company operated three businesses: (1) two retail pharmacies in De Kalb County under the name Eggleston Pharmacy, which were located in Genoa and Sycamore (the pharmacy business); (2) a packaging business that provided unit dose packaging; and (3) a compounding business, which created compounding medications. O'Shea joined L. Doyle in 1998 as a pharmacy manager. On March 1, 2001, O'Shea and Vander Bleek entered into a shareholders' agreement, and, on March 21, 2001, O'Shea purchased 10% of L. Doyle.

¶ 8 By 2013, Vander Bleek owned 51% of L. Doyle and O'Shea owned 49% of the company. O'Shea ran the daily activities of the company and issued checks for expenses and distributions of profit to himself and Vander Bleek.

¶ 9 A. MOU

¶ 10 On March 1, 2013, the parties entered into the MOU to: (1) effectuate the sale of the pharmacy business to a third-party buyer; (2) distribute cash from the sale; (3) resolve the business between Vander Bleek and O'Shea; and (4) vest all remaining stock in L. Doyle with O'Shea so that he could continue to operate the packaging and compounding businesses without Vander Bleek.

¶ 11 The MOU stated that the parties were the only shareholders of L. Doyle, that the company was negotiating with another company for the purchase and sale of certain assets, and that O'Shea and Vander Bleek sought to commit to writing their agreement on the division of the

sale proceeds and other matters related to the sale. Further, it provided, in a section entitled "Split of Remaining Assets":

> "when the parties allocate 'remaining assets, net of liabilities,' [O'Shea] shall receive the remaining, non-cash, non-A/R assets, which have a depreciated value of zero, in exchange for [Vander Bleek] receiving credit without any discount or other provision for uncollectible accounts receivable. The parties further agree that the 'usual adjustments' to the balance sheet shall be increased by the anticipated insurance premium refunds to the last Transfer Date as defined in the purchase agreement, and decreased by the actual unrecovered portion of Expired Inventory that has been returned for credit, and the routine bonus payments to [O'Shea] for 2012 and for the partial 2013 year from January 1—the last Transfer Date."

¶ 12 The MOU also incorporated and adopted certain terms contained in a February 20, 2013, letter addendum from Vander Bleek's attorney to O'Shea's attorney.

¶ 13 B. Asset Purchase Agreement

¶ 14 On March 1, 2013, the parties and their spouses entered into an asset purchase agreement with another company to sell the pharmacy business, excluding accounts receivables, the packaging business, and the compounding business.

¶ 15 The agreement included a covenant not to compete, which precluded the parties and their spouses, for a five-year period, from working in the pharmacy business within a seven-mile radius from either the Genoa or Sycamore pharmacies. The covenant excluded the packaging business and the compounding business. Also, the buyer offered O'Shea employment.

¶ 16 The agreement provided for a prescription retention payment (based upon the number of prescriptions retained by the buyer one year after the closing). The prescription retention

payment was divided into three tiers: (1) if the lower requisite number of prescriptions was met, 50% of the payment went to Vander Bleek and 50% went to O'Shea through L. Doyle; and (2) if the higher requisite number of prescriptions was retained, any further payments beyond the first would be made only to O'Shea through L. Doyle.

¶ 17 The closing occurred on April 3, 2013. After payment of attorney fees, wire fees, and the holdback of certain funds related to the Genoa and Sycamore stores, the proceeds were deposited into the L. Doyle bank account. Later, the holdbacks were paid out 51% to Vander Bleek and 49% to L. Doyle (owned by O'Shea).

¶ 18 C. O'Shea's Employment Agreement

¶ 19 In 1998, O'Shea had entered into an employment agreement with L. Doyle, which was later, in November 2003, amended. It provided that O'Shea was to work as a pharmacist and perform general management duties. O'Shea was entitled to receive 10% of L. Doyle's net profits derived from the operation of the branch he managed. He also accrued two weeks' paid vacation time at the beginning of each year if he was employed with the company at the start of any vacation period.

¶ 20 D. O'Shea's Complaint

¶ 21 On August 27, 2014, O'Shea filed a two-count complaint for declaratory relief and breach of contract, seeking distribution of the remaining, undistributed proceeds from the sale of the pharmacy business, pursuant to the MOU and employment agreement. Although the parties distributed the majority of the proceeds pursuant to the MOU, they agreed to escrow $200,000 until they had a final accounting and resolution of all expenses, as memorialized in a June 6, 2013, escrow agreement. Thereafter, because Vander Bleek refused to disburse the funds held in escrow, O'Shea filed his complaint. He sought: (1) payment of his outstanding bonuses; (2)

payment of certain expenses and reimbursements; and (3) that remaining proceeds be distributed 51% to Vander Bleek and 49% to O'Shea (subject to some uncontested adjustments).

¶ 22 O'Shea alleged that, after the closing, Vander Bleek refused to comply with the MOU, specifically: (1) refusing to assign all of his stock to O'Shea and resign as officer and director; (2) refusing to resign; (3) refusing to grant O'Shea either access to QuickBooks on Vander Bleek's server or provide O'Shea with a copy of the QuickBooks file so he could complete the consolidation and finalization of the books; and (4) as a result, the capital accounts were not paid out and the remaining cash was not paid out. The parties agreed, on June 19, 2013, to place $200,000 into escrow to allow O'Shea to complete an accounting, allow the receivables to come in, and allow all account payable invoices to be received.[1]

¶ 23 O'Shea sought judgment in the amount of $84,657.26 (consisting of bonuses owed him, underfunding of his pension plan, and distribution of remaining cash held by the company), attorney fees, and costs.

¶ 24 In his answer to O'Shea's complaint, Vander Bleek generally denied O'Shea's allegations and raised as an affirmative defense that O'Shea's action was essentially in the nature of an accounting and both counts should be dismissed. Vander Bleek also raised a counterclaim for an accounting and other relief, asserting that: he negotiated the sale of most of the company's assets; O'Shea was in charge of the company's banking and bookkeeping and was, therefore, a fiduciary and bound to account upon request; O'Shea was an employee and had refused to provide information to support his hours worked, vacation days, credit card use, relief pharmacist hours, and other items; and the asset purchase agreement should be revised to give Vander Bleek

[1] In an agreed order on February 9, 2015, the court authorized the escrow agent to release about $15,000 of the escrow fund to various entities.

51% of the total sale proceeds and O'Shea 49%, commensurate with their stock holdings because O'Shea refused to sign the non-compete unless he received substantially more than his share. "This apparent willingness to 'shoot the hostage' constitutes oppressive conduct and should not be rewarded." Finally, Vander Bleek asserted that, if O'Shea breached his fiduciary duties, he should disgorge all compensation received during the period of such breach.

¶ 25 On March 2, 2016, O'Shea moved for distribution of certain bonuses from the escrow account, seeking $22,783.31 under his employment agreement for his undistributed bonuses for the years 2011, 2012, and 2013.

¶ 26 On June 2, 2016, O'Shea moved for summary judgment, seeking to retain all of the stock of L. Doyle, the packaging and compounding businesses as the remaining non-cash, non-A/R assets with a depreciated value of zero; that routine bonus payments to O'Shea of 10% of the net profits of L. Doyle for 2012 and the partial year 2013 be paid prior to any distribution of the remaining undistributed cash from the sale of the pharmacy business; and that the remaining cash from the sale be distributed 51% to Vander Bleek and 49% to O'Shea.

¶ 27 In a July 25, 2016, affidavit, Vander Bleek averred that, during negotiations for the sale of L. Doyle, O'Shea refused to sign off on the deal unless he received compensation in excess of his 49% interest in the company. The buyer required a non-compete agreement "for obvious reasons," but O'Shea refused to sign such an agreement unless he received more than 49%. "I believed that the sale was too good to lose, and I agreed to O'Shea's terms only in order to close the deal." O'Shea's conduct, Vander Bleek stated, was not in the company's best interests and caused him to check company records, whereupon he determined that: (1) O'Shea had not been working required hours; (2) there were bonus payment discrepancies; and (3) there were credit card discrepancies.

¶ 28 On September 28, 2016, the trial court granted O'Shea's motion for summary judgment and for certain distributions. It found that the MOU was not ambiguous; Vander Bleek established no factual issue as to fraud or duress in the entry of the MOU (where there was no showing of a misstatement of a material fact or an undue advantage whereby Vander Bleek's free will was overcome); O'Shea was entitled to retain all of the stock of L. Doyle, the packaging business, and the compounding business; he was entitled to payment of the 2012 and partial payment of the 2013 routine bonuses of 10% of net profits from the remaining undistributed cash from the sale of the pharmacy business; the remaining cash from the sale of the pharmacy business would be distributed 51% to Vander Bleek and 49% to O'Shea, subject to certain adjustments as either agreed by the parties or ordered by the court; and the escrow agent shall distribute $22,783.31 to O'Shea from the escrow account. The court further noted that hard bargaining was not the same as duress.

¶ 29 On October 27, 2016, O'Shea moved for distribution of the remaining escrow proceeds, seeking an order distributing $89,896.60 to Vander Bleek and $59,777.53 to himself and that the escrow account be closed. Vander Bleek did not file any response. On November 7, 2016, the trial court ordered distribution of $89,896.60 to Vander Bleek and $59,777.53 to O'Shea, after payment of the escrow fee and ordered that the escrow account be closed. Vander Bleek agreed to the form of the order. This order apparently resolved all matters raised in O'Shea's complaint.

¶ 30 E. Proceedings on Vander Bleek's Counterclaim

¶ 31 The proceedings continued on Vander Bleek's counterclaim for an accounting. O'Shea filed an answer and asserted affirmative defenses, including that: (1) an accounting was not authorized under section 12.56(b)(5) of the Business Corporation Act of 1983 (Act) (805 ILCS 5/12.56(b)(5) (West 2016)), because there was no director or shareholder deadlock or any

allegation or evidence that any director or anyone in control acted illegally, oppressively, and fraudulently, and no corporate assets were misapplied or wasted; (2) the parties' rights were governed by the MOU and the remaining issues were not an accounting, but contractual issues between the shareholders related to a distribution as provided in the MOU and escrow agreement; and (3) no accounting was required because Vander Bleek had complete access to all available information. Later, O'Shea sought leave to add *laches* as an affirmative defense, and the trial court, on August 2, 2016, granted him leave to do so.

¶ 32 Trial on the first phase of the counterclaim for an accounting occurred on October 17, 30, and 31, 2017. The evidence reflected that O'Shea ran the day-to-day operations of the pharmacies and that Vander Bleek oversaw the business. The accounting system was on Vander Bleek's computer, and he selected the company's accountant. Also, Vander Bleek's attorney drafted the MOU.

¶ 33 1. Vander Bleek

¶ 34 Vander Bleek, age 54, testified that he owned a pharmacy in Morrison. Addressing O'Shea, he testified that O'Shea's employment agreement provided that he would work 43 hours per week at the pharmacy. Vander Bleek never monitored O'Shea's actual hours. At one point, O'Shea offered to purchase the pharmacies for $60,000 and return paid-in capital to Vander Bleek, but Vander Bleek rejected the offer. Their relationship deteriorated. Vander Bleek countered with $500,000 of goodwill and taking his receivables, but O'Shea rejected it. The parties then decided to sell the business to a third party. According to Vander Bleek, O'Shea, who had a right of first refusal, stated that he was not going to cooperate, would not work for someone else, and would not sign a non-compete agreement. He persisted for one year in his refusal to sign a non-compete agreement. Ultimately, two offers were made, which Vander

Bleek personally solicited and negotiated. The parties accepted the higher offer, which had to be accepted within 10 days. At the same time, the grocery stores where the pharmacies were located were going into receivership. The parties entered into the MOU, and the sale was consummated, and O'Shea, according to Vander Bleek, received about 55% of the business, even though he was a 49% shareholder.

¶ 35 Addressing his assertion that O'Shea was not devoting full efforts to the business, Vander Bleek testified that his suspicions arose before they sold the business. O'Shea was not engaged in growing the business, and he was not working as much. Beginning in early 2012, Vander Bleek had difficulty reaching O'Shea during the day when he expected him to be at the pharmacy. Also, O'Shea did not respond to Vander Bleek's requests for his work schedule and vacation time. Reviewing the ledgers, Vander Bleek came to believe that bonuses that were due to others ended up going to O'Shea. This information was available to Vander Bleek at the time it was created. For example, 2009 data was available soon afterwards.

¶ 36 Another pharmacist, Sonny Garza, left because he was upset that he was not receiving a bonus that he thought he deserved for 2007. In 2012, he should have received a bonus (10% of net profits) for 2011, but it was not reflected in the books. The monies might have stayed with the company or O'Shea might have taken them. These irregularities gave rise, in Vander Bleek's view, to O'Shea's need to account to the company.

¶ 37 In 2012, Vander Bleek requested O'Shea's schedules, but he declined to provide them. Vander Bleek instead obtained them from the Genoa store himself and discovered that O'Shea was working "a lot" less than 43 hours per week. Ultimately, there was a deficit of 291 hours based on Vander Bleek's analysis of the work schedules.

¶ 38 Turning to credit cards, Vander Bleek testified that O'Shea used a personal credit card to make company purchases in order to earn rewards points for himself. Vander Bleek discouraged it and explained that any benefit O'Shea earned should inure to the company. Vander Bleek agreed that the card could be used, but insisted that the miles should go to business items such as business travel. Eventually, Vander Bleek dropped the subject; this occurred years ago.

¶ 39 Turning to vacation time, Vander Bleek testified that O'Shea was entitled to two weeks' vacation, but Vander Bleek never received verification of his actual time off.

¶ 40 Transactions were entered by O'Shea or someone else at the pharmacies, and Vander Bleek received bank statements, which were reconciled. Vander Bleek agreed that he had uninterrupted access to the QuickBooks entries throughout the 13 years of the business. Monetary transactions at the cash register were transferred into Quickbooks, and pharmacy transactions were in the QS/1 system. For 2012, the majority of the entries were related to O'Shea (16,607 out of 18,282 entries). Vander Bleek believed that someone else was logging in under O'Shea's name for some of the transactions, but he conceded that the QS/1 data did not establish this. O'Shea was the Quickbooks administrator for the Sycamore store. Vander Bleek also conceded that he did not know how many hours O'Shea actually worked. He believed that he had an irregular number of people on payroll.

¶ 41 At all times, the company's accountant was someone who Vander Bleek chose, including a firm in which his brother-in-law had an interest. Addressing the MOU, Vander Bleek testified that he signed it, agreed to it, and had the assistance of counsel when he signed it. He received consideration for the sale of the business and additional consideration of no discount on the collectability of accounts receivable.

¶ 42 2. O'Shea

¶ 43 O'Shea testified that he ran the day-to-day operations for the Sycamore store. When he took over the store, sales were under $500,000 per year. After one year, they were $900,000. By the time the parties sold the company, sales totaled $4 million. Eventually, O'Shea was managing partner of both pharmacy locations.

¶ 44 Addressing the MOU, O'Shea testified that both he and Vander Bleek were represented by counsel when they entered into the agreement. O'Shea kept the remaining assets, including the packaging and compounding businesses and all non-cash, non-AR assets. In consideration for this, Vander Bleek was paid cash for accounts receivables that were not yet collected. O'Shea undertook the risk of collection on those, but received some of the assets that remained in the company.

¶ 45 O'Shea explained that there were more to his duties than simply logging prescriptions into a computer, including verifying a prescription with a doctor's office, verifying that the drug was correct and appropriate, doing the final check, answering customer questions, vaccinations both on-site and off-site, compounding medications, and packaging. The QS/1 system would not show who managed inventory, payments, receipts, or negotiations on prices on medicines. It essentially recorded only prescriptions. O'Shea also managed inventory. Initially, entering prescriptions into the system was a large part of O'Shea's work, but, over time, other pharmacists did that work and he would work on verifying, answering questions, and counseling patients. When the Genoa store opened, O'Shea trained and oversaw the staff there, managed inventory, and vaccinations.

¶ 46 Bank statements went to Vander Bleek, and he or his accountant would perform reconciliations. Vander Bleek watched closely over the books. He had access to Quickbooks and QS/1.

¶ 47 Addressing his work hours, O'Shea testified that he did not keep time cards and no one punched a clock. Vander Bleek never asked O'Shea to submit his time or punch cards. O'Shea created the schedules, with some help from his wife. The schedules were never intended to be a log of his work hours, and they do not indicate the hours he actually worked. The schedule was just an initial guideline to ensure they had coverage at the stores. O'Shea was a salaried, not hourly, employee. He testified that he worked more hours than were scheduled. Typically, O'Shea arrived at work before 8:30 a.m., worked his shift (including going to the Genoa location, nursing homes, making deliveries, meeting physicians, etc.), went home at 6 p.m. for dinner, and returned to work at 7:30 p.m. until the grocery store closed at 10 p.m.

¶ 48 O'Shea testified that Vander Bleek's estimate of his hours worked in 2012 was not correct. O'Shea compared his normal routine to Vander Bleek's calculations and determined that Vander Bleek's totals were incorrect. He also looked at Quickbooks (which had date- and time-stamps as to logins on it) and the QS/1 system. By O'Shea's calculation, he worked an additional 239 hours on top of the 43 per week that he was required to work. There were days when he was not scheduled to be at work, but he did work. There were days where he was off for vacation, but he was not out of the area. There were days when he received a call concerning staffing, and he would go to work. According to O'Shea, routinely, he worked business hours (the pharmacy closed at 6 p.m.) and worked from 7:30 p.m. until 10 p.m. Over the 13 years he worked with Vander Bleek, Vander Bleek never raised the issue of O'Shea's work hours.

¶ 49 Addressing the credit card, O'Shea testified that the parties came to an agreement to continue as they were doing. O'Shea offered to allow Vander Bleek to obtain a credit card with a similar agreement but he did not do so. The subject never came up again. O'Shea used the points on the card for business and personal expenses. He was comfortable doing this because

he signed a personal guarantee to acquire the card. O'Shea carried the risk on the card. The miles were considered non-cash assets and O'Shea, as part of the sale, received all non-cash, non-AR asserts.

¶ 50 O'Shea further testified that he received 49% of the proceeds and Vander Bleek received 51%. In addition, there was a side agreement that required O'Shea and his wife to sign non-competes in markets they had worked in for 20 years.

¶ 51 Vander Bleek and O'Shea agreed that bonuses would be given to O'Shea and that he could distribute portions of them to incentivize staff and/or keep all/some for himself. O'Shea did not keep track of his vacation time.

¶ 52 3. Sonny Garza's Deposition

¶ 53 Sonny Garza's deposition was admitted into evidence. Garza was the pharmacist manager who worked at the Genoa pharmacy between 2007 and 2012. His last day of work was June 5, 2012. He earned $52 per hour for 37½ hours per week. Garza testified that he actually worked about 40 or 42 hours per week. Garza reported to O'Shea, who oversaw the operation. Garza was the only pharmacist assigned to Genoa. O'Shea would assign someone to fill in for Garza on the days he did not work. On occasion, O'Shea would fill in himself. O'Shea was present at the Genoa store about once per month; he came in to drop off merchandise or to check on the store.

¶ 54 When Garza resigned, he gave no advance notice. One of his complaints was that he was not paid a fair wage; he believed that the market rate was $60 per hour. Garza also testified that the Genoa store was more profitable than O'Shea believed it was. He based his opinion on what he saw coming in and going out as far as inventory. However, Garza conceded that he did not have access to all of the expense data for that location. He further noted that there were transfers

from the Genoa to the Sycamore store, but he did not know what they were for. Garza further testified that he was unaware that there was a loss of over $13,000 in inventory in 2011 and over $12,000 in 2012. "I didn't have privy to any of the financials." In his resignation letter, Garza also noted that there was going to be a vaccination requirement, and he had elected not to administer vaccinations at the store. "Not for the same amount of money that [O'Shea] was paying me."

¶ 55 Garza told Vander Bleek that he believed that O'Shea was *scheduled* for only 36 hours per week based on his review of about two or three months of data. He conceded that the schedules did not reflect someone's *actual* hours worked, and he was unaware of O'Shea's actual work hours. O'Shea may have worked some weekends. He saw O'Shea three or four times per month.

¶ 56 Addressing his bonus, Garza stated that he did not receive a bonus in 2012 for 2011 because, as O'Shea explained to him, there was no profit to warrant it. This was the final straw for Garza because he believed that his store was profitable. He conceded that the Sycamore store was larger and had more business volume than the Genoa store. Also, the Sycamore store did more compounding than the Genoa store and more packaging and the Genoa store did not serve any nursing homes.

¶ 57 4. Trial Court's Ruling

¶ 58 On January 3, 2018, the trial court granted judgment on the counterclaim in O'Shea's favor and against Vander Bleek. The court also denied Vander Bleek's motion for reconsideration of O'Shea's motion for summary judgment (which was granted on September 28, 2016). The trial court noted that it could not find that O'Shea did something wrong when he negotiated before he signed the non-compete. Referencing the non-compete, the court stated,

"There was no obligation for [O'Shea] to bar himself from his profession when he became a shareholder in the corporation. Mr. Vander Bleek didn't suffer that same prohibition. He had to sign it, but it didn't take him out of his business practice because he lived in Morrison, Illinois, and so it wasn't an equal footing."[2] The court noted that O'Shea's obligations did "not include giving up all rights that you have to working as a pharmacist."

¶ 59 Further, the trial court determined that there was no statutory basis to warrant an accounting because the Act did not apply. Turning to an equitable accounting, the court found that Vander Bleek's allegations were merely "suspicion or speculation" as to the number of hours O'Shea worked, etc. "That's all there is, suspicion or speculation. There's nothing to require the Court to order an accounting based on that suspicion or speculation." As to the airline miles, the court found that the issue was abandoned years earlier. "There was the required lack of diligence and prejudice to the opposing party by not doing anything." As to bonuses, the court found that, to the extent that O'Shea gave himself a bonus owed to another employee, that was between him and the employee, "not Vander Bleek's issue." As to vacation pay, the contract provided that it was accrued at the beginning of each year and it was and should have been available to O'Shea. The trial court summarized that it found no breach of any fiduciary duty and nothing to warrant an equitable accounting.

¶ 60 As to the motion to reconsider, the trial court found that there was no fraud, no changes in the law, no misapplication of the law, and no other basis to change its September 28, 2016, ruling.

¶ 61 On January 26, 2018, Vander Bleek filed a post-judgment motion (under section 2-1203(a) of the Code), seeking to vacate the January 3, 2018, order, to order an accounting, and to

[2] Vander Bleek actually testified that he owned a pharmacy in Morrison.

set the case status on phase two and to reconsider the denial of his motion to reconsider the September 28, 2016, order (granting summary judgment in O'Shea's favor). Specifically, he argued that: (1) the buyout agreement was signed under duress; (2) an accounting was warranted; and (3) alternatively, seeking the wrong remedy was not fatal and Vander Bleek should be allowed to amend his complaint.

¶ 62 O'Shea filed a response, arguing that Vander Bleek's post-judgment motion merely re-argued the same points he had raised in his motion to reconsider (the denial of summary judgment), which was denied on January 3, 2018. There was no distinction, he argued, between Vander Bleek's request to vacate and one to reconsider; they were one and the same. Further, Vander Bleek failed to meet his burden to establish he was entitled to an accounting. Finally, O'Shea argued that Vander Bleek never timely asked or sought to amend his counterclaim and, separately, a motion seeking leave to amend after a judgment is not a proper motion directed against a judgment under section 2-1203 of the Code.

¶ 63 On April 4, 2018, the trial court denied Vander Bleek's post-judgment motion. Vander Bleek appeals.

¶ 64 II. ANALYSIS

¶ 65 A. September 2016 Grant of Summary Judgment to O'Shea on the Complaint

¶ 66 Vander Bleek argues first that the trial court erred in granting O'Shea summary judgment on his declaratory judgment and breach of contract complaint. For the following reasons, we find Vander Bleek's claim unavailing.

¶ 67 Summary judgment is proper when the pleadings, affidavits, and other evidence on file, viewed in the light most favorable to the nonmovant, demonstrate that there is no issue of material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005

(West 2016)); *Srivastava v. Russell's Barbecue, Inc.*, 168 Ill. App. 3d 726, 730 (1988). Our function on review of summary judgment is limited to determining whether the trial court correctly concluded that no genuine issue of material fact had been raised and, if none was raised, whether judgment as a matter of law was correctly entered. *Diefendorf v. City of Peoria*, 308 Ill. App. 3d 465, 467-68 (1999). The construction of a contract is a question of law for the trial court and, thus, suitable for summary judgment. *Srivastava*, 168 Ill. App. 3d at 730. We review *de novo* the trial court's decision to grant summary judgment. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 68 Vander Bleek contends that there was a factual question concerning whether O'Shea's holdout on signing the buyout agreement until he was to receive a larger share of the sale and retention proceeds rather than the 49% to which he would otherwise have been entitled, because he had to agree to a non-compete clause, was pretextual or genuine. Vander Bleek contends that the non-compete's terms were only within a seven-mile radius of each store and lasted only five years. Further, the buyer offered O'Shea employment and he was able to keep the compounding and nursing home packaging practices. He urges that the trial court's finding that O'Shea's actions were merely hard bargaining was erroneous because it essentially weighed the facts and found that even the limited scope of the non-compete justified O'Shea's conduct. Intent and motive, he argues, are issues that warrant a trial. Further, Vander Bleek notes that he averred in his affidavit that he was compelled to sign the MOU at the risk of losing the deal. Noting that the parties owed each other a fiduciary duty, he asserts that, even if hard bargaining is permissible in fiduciary cases, one can bargain in bad faith and with improper motive. Vander Bleek contends that he is entitled to a trial at which O'Shea must establish that his actions or inactions were fair and reasonable and in the best interests of the company, to the exclusion of

his personal interests. He should be able to show on the merits that he agreed to the buyout terms only under economic duress and that the shares should be modified to reflect the actual *pro rata* ownership in the corporation.

¶ 69 O'Shea responds that the MOU's terms are clear, explicit, and not ambiguous. Vander Bleek, he notes, admitted entering into the agreement, was represented by counsel in the negotiations of the MOU and the asset purchase agreement, and testified that he understood their terms, including that O'Shea would receive a larger portion of the retention bonus. O'Shea further asserts that, even though Vander Bleek averred that he agreed to O'Shea's terms only so the deal would go through, he testified that the deal was the higher of two offers the parties received to sell the pharmacy business. The agreements are binding on the parties, he urges. If Vander Bleek did not like the terms he negotiated, he should not have executed the agreements. They are not ambiguous, and their intent is based solely on their text. There is no factual dispute that Vander Bleek, voluntarily and with assistance of counsel, agreed to the terms.

¶ 70 We conclude that the trial court did not err in granting summary judgment in O'Shea's favor on his complaint. The trial court correctly determined that there were no material factual issues concerning fraud or economic duress in the sale of L. Doyle. "Economic duress [(or business compulsion)] is present where one is induced by a wrongful act of another to make a contract under circumstances which deprive him of the exercise of free will, and a contract executed under duress is voidable. [Citation.] To establish duress, one must demonstrate that the threat has left the individual 'bereft of the quality of mind essential to the making of a contract.' [Citation.]" *Alexander v. Standard Oil Co.*, 97 Ill. App. 3d 809, 814-15 (1981). The acts or threats complained of must be wrongful; however, the term "wrongful" is not limited to acts that are criminal, tortious, or in violation of a contractual duty. *Hurd v. Wildman, Harrold,*

Allen & Dixon, 303 Ill. App. 3d 84, 91 (1999). They must extend to acts that are also wrongful in a moral sense. *Id.* "[D]uress does not exist where consent to an agreement is secured because of hard bargaining positions or the pressure of financial circumstances. Rather, the conduct of the party obtaining the advantage must be shown to be tainted with some degree of fraud or wrongdoing in order to have an agreement invalidated on the basis of duress." *Id.* at 815; see also *Rubin v. Laser*, 301 Ill. App. 3d 60, 68 (1998) (shareholders' disagreement concerning timing of sale to bank did not rise to level of duress; "[m]ere hard bargaining does not rise to the level of duress"). "Moreover, where a plaintiff is aware of the claims he [or she] has waived and has had an opportunity to consult with an attorney, it is easier to rebut claims of economic duress." *Carlile v. Snap-on Tools*, 271 Ill. App. 3d 833, 842 (1995). "Ordinarily, a threat to break a contract does not constitute duress, and to infer duress, there must be some probable consequences of the threat for which the remedy for the breach afforded by the courts is inadequate. If there is no full and adequate remedy from the courts for the breach, the coercive effect of the threatened action may be inferred." *Kaplan v. Keith*, 60 Ill. App. 3d 804, 807 (1978). A claim of duress may be disposed of without an evidentiary hearing. See, *e.g.*, *Alexander*, 97 Ill. App. 3d at 816 (granting summary judgment).

¶ 71 Generally, shareholders in a closely held corporation owe a fiduciary duty to the other shareholders, similar to duties owed by partners in a partnership. *Hagshenas v. Gaylord*, 199 Ill. App. 3d 60, 70 (1990). This includes a duty to exercise the highest degree of honesty and good faith in their dealings and in the handling of business assets, thereby prohibiting enhancement of personal interests at the expense of the interests of the enterprise. *Id.* at 71. In determining whether a shareholder in a close corporation has a fiduciary duty, "courts look at a shareholder's

ability to hinder, influence, or control the corporation." *Dowell v. Bitner*, 273 Ill. App. 3d 681, 690 (1995).

¶ 72 Taking Vander Bleek's allegations as true, we agree with the trial court that there was no factual issue concerning the entry of the MOU. Vander Bleek, who was represented by counsel in the transaction, established no factual issue as to fraud or duress in the entry of the agreement. Although he stated in his affidavit that he agreed to O'Shea's terms only to close the deal, he did not aver that his will was overcome or that O'Shea made any material misstatements. Indeed, Vander Bleek averred that the deal was too good to lose. Further, Vander Bleek's claims that O'Shea was a fiduciary who was not free to deal at arm's length in the transaction, do not raise a factual question concerning fraud or duress. Vander Bleek's position that O'Shea would not consent to the sale without additional compensation for being required to also sign a non-compete does not raise a factual issue that he failed to abide by any duty he owed to L. Doyle or Vander Bleek. O'Shea's position concerning the non-compete was based on a legitimate economic concern—the desire for additional compensation in exchange for the non-compete's restrictions, which precluded him (and his wife), from working in markets he had worked in for 20 years. In contrast, Vander Bleek's remaining pharmacy was in Morrison, which, because it was not part of L. Doyle, was not encompassed by the non-compete agreement. We believe that O'Shea's actions did not raise a factual issue concerning any bad faith or improper motive. The evidence also did not show that he concealed any information. See, *e.g.*, *Bakalis v. Bressler*, 1 Ill. 2d 72, 81 (1953) (holding that one partner violated his fiduciary duty to another partner by failing to disclose his own negotiations for and actual purchase of the building in which the partnership leased property). As Vander Bleek alleged it, he was fully aware of why O'Shea

held out for additional compensation. Vander Bleek also led the negotiations with potential buyers and ultimately picked the higher of two offers.

¶ 73 In summary, whether or not he owed Vander Bleek or L. Doyle a fiduciary duty, there was no factual issue as to fraud or duress precluding summary judgment on the issue of the concession O'Shea obtained for himself.

¶ 74 B. January 2018 Judgment on Counterclaim in O'Shea's Favor

¶ 75 Next, Vander Bleek argues that the trial court erred in entering judgment in O'Shea's favor on Vander Bleek's counterclaim for an equitable accounting. For the following reasons, we reject Vander Bleek's argument.

¶ 76 The decision to order an accounting is within the trial court's discretion. *Newton v. Aitken*, 260 Ill. App. 3d 717, 722 (1994); *cf. Tarin v. Pellonari*, 253 Ill. App. 3d 542, 555-56 (1993) (noting that some case law has applied both the abuse-of-discretion and manifest-weight standards in the same case). An abuse of discretion occurs where no reasonable person would take the view adopted by the trial court. *Keefe-Shea Joint Venture v. City of Evanston*, 364 Ill. App. 3d 48, 62 (2005).

¶ 77 The burden of proof in a suit for an equitable accounting is on the party that seeks the remedy to prove by a preponderance of the evidence that he or she has a right to the remedy. *Ferrell v. Plasti-Drum Corp.*, 159 Ill. App. 3d 936, 940 (1987). To sustain an action for an equitable accounting, the plaintiff must show "the absence of an adequate remedy at law and one of the following: (1) a breach of a fiduciary relationship between the parties; (2) a need for discovery; (3) fraud; or (4) the existence of mutual accounts which are of a complex nature." *People ex rel. Hartigan v. Candy Club*, 149 Ill. App. 3d 498, 500-01 (1986). Further, a trial court will not order an equitable accounting where to do so would be unnecessary. *Nieberding v.*

Phoenix Manufacturing Co., 31 Ill. App. 2d 350, 356 (1961). "One instance, however, in which a legal remedy is inadequate and, therefore, a suit in equity for an accounting is appropriate, is where a fiduciary relationship exists between the parties and a duty rests upon the defendant to render an account." *Kerasotes v. Estate of Kerasotes*, 238 Ill. App. 3d 1020, 1031 (1992).

¶ 78 If the party seeking the accounting prevails in an initial hearing and proves his entitlement to such proceeding (*i.e.*, phase one), a second separate hearing on the actual accounting is conducted (*i.e.*, phase two). *Schane v. Conrad*, 68 Ill. App. 3d 961, 964-65 (1979). At the accounting, the party managing or controlling the venture and possessing the records of the venture has a fiduciary duty to the party seeking the accounting and has the burden to produce the accounting. *Couri v. Couri*, 95 Ill.2 d 91, 98 (1983).

¶ 79 Vander Bleek argues first that O'Shea had a statutory duty to account to him for certain expenses. He cites to the Uniform Partnership Act (1977) (805 ILCS 206/100 *et seq.* (West 2016)), without explaining how this statute applies to a corporation such as L. Doyle. Accordingly, we reject this argument outright. In his reply brief, he modifies this argument to assert that, by implication, the partnership statute is an appropriate source of the duty to account. However, he fails to note that he sought a common-law accounting, not a statutory one.

¶ 80 Essentially, Vander Bleek argues that the parties, as shareholders of a close corporation, were fiduciaries. Thus, he was entitled to an accounting, he argues, by virtue of the relationship between himself and O'Shea. Vander Bleek seeks explanation, in phase two, for the Quickbooks entries, hours worked, bonuses, airline miles, and vacation. Vander Bleek claims that, as a fiduciary, O'Shea must come forward with all necessary information and explanations to account for these items.

¶ 81 We reject Vander Bleek's argument. Vander Bleek, the majority shareholder in L. Doyle, testified that he controlled the books, he selected the accountants, and he received bank records. Indeed, he concedes that the bookkeeping entries accurately reflected funds received and disbursed and that it was what was *not* entered or disclosed that was in dispute. However, the problem with this assertion is that he pleaded no facts and submitted no supporting evidence to show, as the trial court determined, that his assertions were anything beyond mere suspicion or speculation. The evidence showed that the work schedules did not reflect actual hours worked, but were a planning tool to ensure adequate coverage at the pharmacies. Indeed, Vander Bleek further testified that he did not know O'Shea's actual work hours, as he never monitored them. Further, over their 13 years of business together, Vander Bleek did not question O'Shea's hours and did so only after the sale of L. Doyle. He questioned the 2012 data that reflected that most of the Quickbooks entries were for O'Shea (showing prescriptions entered), but he did not support his speculation that this data was incorrect because someone else must have been logging in as O'Shea. Further, O'Shea testified that there was more to his job than merely entering the prescriptions on the computer.

¶ 82 As to the bonuses, Vander Bleek agreed that they were O'Shea's to distribute as he saw fit or to keep them entirely for himself. Vander Bleek's claim concerning the airline miles also fails because the evidence showed that he abandoned the issue years before the parties entered into the MOU. Also, the MOU provided that O'Shea would retain all non-cash, non-AR assets, which encompassed the credit card miles.

¶ 83 Vander Bleek concedes that there is no Illinois case law that holds that he had an automatic right to an accounting, but he urges that that should be the case. Without more than bare speculation to support his claim for an accounting, we cannot agree.

¶ 84 C. April 2018 Denial of Vander Bleek's Post-Judgment Motion

¶ 85 Next, Vander Bleek argues in the alternative that the trial court should have granted his request in his post-judgment motion for leave to amend his complaint pursuant to section 2-617 of the Code. For the following reasons, we find Vander Bleek's argument unavailing.

¶ 86 "The factors to be considered in determining whether or not to permit an amendment to the pleadings are whether: (1) the proposed amendment would cure a defect in the pleadings; (2) the proposed amendment would prejudice or surprise other parties; (3) the proposed amendment is timely; and (4) there were previous opportunities to amend the pleading." *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 355-56 (2002). The decision to grant a motion to amend is within the trial court's discretion, and a reviewing court will not overturn the trial court's decision absent an abuse of discretion. *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 69.

¶ 87 On January 26, 2018, Vander Bleek filed a post-judgment motion (under section 2-1203(a) of the Code), seeking to vacate the January 3, 2018, order, to order an accounting, and to set the case status on phase two and to reconsider the denial of his motion to reconsider the September 28, 2016, order (granting summary judgment in O'Shea's favor). Specifically, he argued that: (1) the buyout agreement was signed under duress; (2) an accounting was warranted; and (3) alternatively, seeking the wrong remedy was not fatal and Vander Bleek should be allowed to amend his complaint under section 2-617 of the Code (735 ILCS 5/2-617 (West 2016) (seeking wrong remedy not fatal)). O'Shea responded to the final argument that Vander Bleek never timely asked or sought to amend his counterclaim and, separately, a motion seeking leave to amend after a judgment is not a proper motion directed against a judgment under section 2-1203 of the Code. On April 4, 2018, the trial court denied Vander Bleek's post-judgment

motion. In announcing its ruling, the trial court noted that there was no motion or request to amend and it was too late to make such a request.

¶ 88 Here, Vander Bleek argues that section 2-617 appears to be mandatory and, thus, the trial court erred in denying his request to amend to plead another cause of action, such as breach of contract. He further maintains that no proposed amended pleading is required for purposes of relief under the provision and that the court erred in denying his request. Further, Vander Bleek urges that, because the case was resolved after only phase one, the court essentially heard a motion to dismiss and it would have been more reasonable to have allowed the action to proceed in a different form.

¶ 89 "Section 2-616(a) of the Code provides, in part, that amendments to pleadings may be allowed on 'just and reasonable terms' at any time *before final judgment* to enable the plaintiff to sustain the claim brought in the suit. 735 ILCS 5/2-616(a) (West 2012)." (Emphasis in original). *Foley v. Godinez*, 2016 IL App (1st) 151814, ¶ 33.

¶ 90 Section 2-617 of the Code provides:

> "Where relief is sought and the court determines, on motion directed to the pleadings, or on motion for summary judgment or upon trial, that the plaintiff has pleaded or established facts which entitled the plaintiff to relief but that the plaintiff has sought the wrong remedy, the court shall permit the pleadings to be amended, on just and reasonable terms, and the court shall grant the relief to which the plaintiff is entitled on the amended pleadings or upon the evidence. In considering whether a proposed amendment is just and reasonable, the court shall consider the right of the defendant to assert additional defenses, to demand a trial by jury, to plead a counterclaim or third party

> complaint, and to order the plaintiff to take additional steps which were not required under the pleadings as previously filed." 735 ILCS 5/2-617 (West 2016).

"Under section 2-617, where a plaintiff has sought the wrong remedy and the pleading contains facts entitling the plaintiff to relief on a different legal theory, the court may permit the pleading to be amended." *Foley*, 2016 IL App (1st) 151814, ¶ 35. However, that avenue is foreclosed when "the request to amend the complaint to add an alternate form of relief comes too late." *Id.* (affirming denial of leave to amend on basis that the motion was filed after the case was dismissed on summary judgment).

¶ 91 The factors courts consider in determining whether to grant leave to amend "apply only to amendments that have been proposed prior to final judgment. After final judgment, a plaintiff has no statutory right to amend a complaint and a court commits no error by denying a motion for leave to amend." *Tomm's Redemption, Inc. v. Hamer*, 2014 IL App (1st) 131005, ¶ 14. The *Hamer* court explained that, even though section 2-616(a) allows amendments at any time before final judgment, on just and reasonable terms, "there is no corresponding provision mandating similar latitude in amendments offered after final judgment has been entered. Following judgment, a complaint may only be amended in order to conform the pleadings to the proofs. See 735 ILCS 5/2-616(c) (West 2010). A complaint cannot be amended after final judgment in order to add new claims and theories or to correct other deficiencies."

¶ 92 Here, Vander Bleek sought leave to amend his counterclaim in his post-judgment motion, which was filed 23 days *after* the trial court entered judgment in O'Shea's favor on the counterclaim. Vander Bleek's request was, therefore, too late. The trial court's denial of Vander Bleek's post-judgment motion did not constitute an abuse of its discretion.[3]

[3] As Vander Bleek notes in his reply brief, he did raise the amendment issue in a post-

¶ 93 Further, the post-judgment motion, which was brought pursuant to section 2-1203(a) of the Code, sought: (1) to vacate the judgment on the counterclaim; and (2) reconsideration of the denial of a motion to reconsider the order granting O'Shea summary judgment on his complaint. Section 2-1203(a) allows, in non-jury cases, for motions for rehearing, retrial, modification of the judgment, to vacate the judgment, or for other relief. 735 ILCS 5/2-1203(a) (West 2016). A motion for leave to amend a complaint is not encompassed within the relief provided for under the provision, which, again, explicitly refers to rehearing, retrial, modification, or vacature, or other relief. *Fultz v. Haugan*, 49 Ill. 2d 131, 135-36 (1971) (a motion for leave to amend a complaint is not the type of relief specified in section 2-1203(a); further noting that the "other relief" referred to in the statute does not encompass a motion for leave to amend). Again, the trial court did not abuse its discretion in denying Vander Bleek's motion.

¶ 94 III. CONCLUSION

¶ 95 For the reasons stated, the judgment of the circuit court of De Kalb County is affirmed.

¶ 96 Affirmed.

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trial brief (filed on November 29, 2017), which, of course, was filed before the trial court entered judgment. However, this was the first time the issue was raised, and he did not address the issue at the hearing or in his closing argument to the court on October 31, 2017. Accordingly, this fact does not alter our holding.