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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);  
Ariz.R.Crim.P. 31.24



DIVISION ONE  
FILED: 07/26/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

ROSA GARCIA LAVIN ARROYO, ) 1 CA-CV 11-0601  
)  
Plaintiff/Appellee, ) DEPARTMENT B  
v. )  
) **MEMORANDUM DECISION**  
BENITO PRIETO TONI, ) (Not for Publication -  
) Rule 28, Arizona Rules  
Defendant/Counterclaimant, ) of Civil Appellate  
Appellant, ) Procedure)  
)  
and )  
)  
TOMAS PRIETO BAUMANN, )  
)  
Defendant/Appellant. )  
)  
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-003596

The Honorable John Christian Rea, Judge

**AFFIRMED**

Paul M. Crane  
Attorney for Plaintiff/Appellee

Phoenix

Benito Prieto Toni  
Defendant/Counterclaimant/Appellant Pro Se

Calexico, CA

Tomas Prieto Baumann  
Defendant/Appellant Pro Se

Calexico, CA

**T H O M P S O N**, Judge

¶1 Defendants/counterclaimants/appellants Benito Prieto Toni (Benito) and his son, Tomas Prieto Baumann (Tomas), appeal from the trial court's ruling after a bench trial. The court found that plaintiff/counterdefendant/appellee Rosa Garcia Lavin Arroyo, aka Rosa Serna (Rosa), owned eighty percent of World Common Market, Inc. (WCM), an entity in which Benito claimed a fifty percent interest. For the following reasons, we affirm.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 This case involves a dispute between Rosa and Benito as to the percentage of ownership each has in WCM. WCM was formed in 1992 and is a holding company which owns the majority of stock in two companies, Grupo Nafta and Desarrollo del Futuro. Each company owns fifty percent of an Industrial Park in San Luis Rio Colorado, Sonora, Mexico. Rosa's husband, Agustin Serna, has been the president of Grupo Nafta since 1996 and was responsible for management of the Industrial Park project.

¶3 In February 2010, Rosa filed a complaint and application for a temporary restraining order and preliminary injunction against Benito and Tomas. She claimed she owned eighty percent of the capital stock of WCM and Benito owned twenty percent. Rosa alleged in the complaint that on June 7, 2009, Benito and Tomas, as Benito's agent, had conducted an unauthorized meeting of WCM shareholders or directors and

purported to recapitalize WCM's outstanding shares to reduce her ownership percentage from eighty percent to fifty percent and to increase Benito's shares from twenty percent to fifty percent. Rosa also alleged Benito and Tomas purported to remove Rosa as a Director, and her husband Agustin Serna as President of WCM. The complaint asserted that an authorized meeting of shareholders and the board of directors was subsequently held to disavow the actions taken by Benito and Tomas. Rosa contended that Benito and Tomas continued to claim controlling ownership and to take actions to dilute her ownership interest.

¶14 Rosa based her claim to ownership on a document titled Minutes of First Meeting of Board of Directors of World Common Market, Inc. This document declared that Rosa and Benito, as members of the Board of Directors, were present, identified Rosa as President/Treasurer and Benito as Vice President/Secretary, and directed the corporation issue 80,000 shares of common stock to Rosa and 20,000 shares to Benito in consideration of their services as incorporators of the corporation. The document was signed only by Rosa, as President.

¶15 Rosa sought a judgment declaring she owned eighty percent of the outstanding capital stock of WCM and that the actions of Benito and Tomas were void, and an order directing a special meeting of shareholders pursuant to Arizona Revised Statutes (A.R.S.) section 10-703 (2004).

¶16 In answering the complaint, Benito and Tomas alleged Benito was the sole director and President of WCM, owned fifty percent of the outstanding stock and had authority to control and manage the affairs of WCM. They claimed Rosa owned stock, but had never been a director or majority shareholder. In his counterclaim, Benito claimed that WCM was formed as one in a series of business ventures between himself and Agustin, in which Benito provided the capital for the venture and Agustin served as the manager of the underlying business. Benito noted that WCM's Articles of Incorporation showed that WCM was authorized to issue 10,000 shares of common stock, that Benito was named the initial and sole director of WCM as well as its President/Vice President, and that Rosa was named Secretary/Treasurer. Benito further alleged that he and Rosa each made contributions of capital or services to WCM entitling them to fifty percent of the capital stock, although WCM never issued stock certificates. The counterclaim also alleged that in 2006, Agustin executed a document verifying that he and Benito each owned fifty percent of WCM. Benito asserted that in 2009 he learned from shareholders of Grupo Nafta that the Sernas had sold \$13 million worth of real property in Mexico belonging to Grupo Nafta. Thereafter, Benito and Tomas visited William James Fisher, the corporate counsel and statutory agent for WCM, to review the corporate records and discovered the document

titled Minutes of First Meeting of Board of Directors of WCM, learning for the first time that Rosa claimed an eighty percent ownership in WCM. Benito disputed the accuracy of the document and asserted he did not attend the meeting if the meeting actually occurred. He also claimed Rosa was never a director of the company and was not issued 80,000 shares of stock. Benito asserted that he then took action in June 2009 as the sole director of WCM to confirm his status as sole director, adopt bylaws, appoint officers (including Tomas as Vice President/Treasurer), approve issuance of stock to the Sernas and himself at fifty percent each, and replace Fisher as statutory agent and attorney.

¶17 Benito's counterclaim asserted claims for breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing. He also sought a declaratory judgment that he and Rosa each own fifty percent of WCM, that he is sole director and president, and that his appointments and actions were valid. Benito further sought an injunction restraining Rosa from engaging in any conduct on behalf of WCM or contrary to the actions of Benito as sole director.

¶18 The court held a five-day evidentiary hearing. A number of WCM documents were admitted into evidence, including the Articles of Incorporation dated December 15, 1992, which authorized the issuance of 10,000 shares of common stock, named

William James Fisher as statutory agent, named Benito as "Director until the shareholders elect his successor," declared the Board of Directors would "always consist of not fewer than three persons nor more than nine persons," and named Benito President/Vice President, and Rosa Secretary/Treasurer. It was signed by both Rosa and Benito. Also admitted were the disputed Minutes of the First Meeting of the Board of Directors, which declared that Rosa and Benito, as members of the Board of Directors, were present, that Rosa, as President, presented the agenda, that the corporation was to issue 80,000 shares of common stock to Rosa and 20,000 shares to Benito, and that Rosa was appointed President/Treasurer, and Benito was appointed Vice President/Secretary.

¶19 A number of documents titled Minutes of the Meeting of the Board of Directors from 1996 to 2004 indicated the presence of Rosa as President/Treasurer and Benito as Vice President/Secretary. However, the documents also indicated that Rosa and Benito were both elected Vice President. The minutes included a waiver signed by Benito indicating he was not present, although the minutes said otherwise. The minutes of the meeting held May 2009 showed that Agustin, acting by proxy for Rosa, passed a resolution to pay Fisher \$20,000 for past services, noting that Benito as twenty percent owner was responsible for \$4,000. Agustin was also elected President of

WCM; Tomas objected to the proceedings. In a document titled Action by Written Consent of the Sole Director, dated June 1, 2009, Benito declared: that he was a fifty percent shareholder and the sole director of WCM; that meetings between December 1992 and February 2008 were unauthorized and so any actions taken were invalid; and that Agustin had no valid involvement in the company. The document also authorized capital stock to be 10,000, issued 1000 shares to Rosa and himself, adopted bylaws, and elected Benito as President, Tomas as Vice President, Rosa as Secretary, and replaced Fisher as statutory agent. In a document titled Minutes of Annual Shareholder Meeting dated January 16, 2010, Agustin, acting on behalf of Rosa, elected himself as the sole director, President, and Secretary of WCM; removed Benito as a director and officer; and nullified any action taken at the unauthorized shareholder and director meeting on or about June 9, 2009. A corresponding Minutes of Annual Board Meeting was also admitted. Also admitted into evidence were two documents dated June 14, 2006, signed by Agustin and witnessed by two others, which indicated that Benito owned fifty percent of WCM.

¶10 At trial, Fisher testified that he was involved in the initial incorporation of WCM, including the preparation of the Articles of Incorporation and the minutes of the first meeting. Fisher stated that Benito had told him that he did not want to

be an equal partner in the business, that he was tired of losing money and wanted to be more conservative, and that he did not want to be actively involved. Fisher testified that he used boilerplate documents for the articles of incorporation and the minutes of the first meeting, that 10,000 shares was probably in the form he had used, and that he could not recall any discussion as to who should be director. He speculated that Benito was probably selected to serve as the director by default. Fisher further testified that both Rosa and Benito told him that the split in ownership was to be eighty percent to Rosa and twenty percent to Benito, and that in 2008, Benito told Fisher to sell his interest in WCM. Benito said the project was not worth more than \$10 million, and told Fisher he only wanted \$2 million from the sale and Fisher could keep any from the sale over that amount. Fisher also testified that he did not know if the February 23, 1993 date on the Minutes of the First Meeting was accurate, but he did know that the meeting occurred. He acknowledged discrepancies and mistakes in the minutes of subsequent meetings regarding listing both Rosa and Benito as being elected vice president and in noting Benito was present when waivers indicated he was not. Fisher explained that mistakes were repeated because the document was boilerplate and was stored. Fisher also explained that although he did not know for a fact whether Benito was present at the annual meetings, he



knew that Benito knew about the meetings because he would talk to Benito about them and Benito would say he did not want to attend.

¶11 Rosa testified that she, Benito, and Agustin decided on an eighty percent, twenty percent split in ownership, and the February 23, 1993 Minutes of the First Meeting might not have been signed on February 23, 1993, but that the document was signed in February 1993. She did not remember any corporate actions between December 15, 1992, when WCM was incorporated and February 23, 1993, to explain how she became President, but stated that it had been discussed prior to the meeting and it was decided she would be President because Benito wanted it that way.

¶12 Regarding the origin of WCM, Agustin testified that he explained to Benito that he was putting together a long-term business that would require a lot of time and Benito was not very interested. He further testified that, prior to the company's formation, he, Benito, Rosa, and Fisher discussed the percentage of stock to be issued to each party and they agreed Benito was to have twenty percent and Rosa was to have eighty percent. He testified that from 1996 to 2006, he had complete management of the Industrial Park project and Benito would visit the project but did not participate in the activities of the business. Agustin also testified that on June 14, 2006, Benito

visited the Industrial Park and asked for documents stating that he had fifty percent ownership of WCM that he could use to show potential buyers interested in purchasing their interest in the project of \$24.5 million. He asserted that he could not negotiate the sale appearing as a minority owner. Agustin told Benito he did not own fifty percent, but reluctantly provided the documents after Benito said he would not misuse the documents. Regarding the February 23, 1993 Minutes of the First Meeting of the Board of Directors, which set out the eighty/twenty percent split, Agustin could not remember if the meeting was actually held on February 23, 1993, but stated that he knew it took place.

¶13 Benito testified that he and Agustin had entered into a contract to participate in a group of companies that Agustin had in an equal partnership and that the Industrial Park was one of those ventures. The document, dated July 15, 1988, declared that the parties agreed to go into a partnership at fifty percent each on several businesses and declared an intent to develop other businesses in the near future also on a fifty percent basis. It included a "list of activities in which the intervening parties . . . are participating," which identified storage of various items "especially furniture," running a furniture business in San Luis Rio Colorado, and operating a factory to "revise and finish" and then sell furniture. Benito

testified he was very interested in the Industrial Park project and in August 1991 personally guaranteed a loan for \$240,000 for Grupo Nafta, in anticipation of setting up WCM. He denied he ever did business with Rosa. He claimed that Rosa's signature was not on the Articles of Incorporation when he signed it, and he denied she was an owner of WCM. He admitted signing the waivers of his presence at the annual meetings, but stated that he did not read the waivers, relying on Fisher's representation that they had no effect because there was nothing to be done. He testified that based on the Articles of Incorporation, he was the President of WCM, he was the only member of the Board. He also stated he had an agreement with Agustin for an equal split of the business, and he had never been removed as the President and only director. He explained that his day-to-day role for WCM was to look for potential investors, Agustin was to manage the project locally, and Fisher was responsible for keeping the corporate records and filing the legal documents. Benito testified that he had loaned \$1.5 million into the total operation of the Industrial Park, that he expected to be paid back, and that the loans increased the percentage that WCM owned in Grupa Nafta. Benito disputed Agustin's account of why he asked for the documents declaring his fifty percent ownership of WCM, saying that he asked for the documents because he was getting older and wanted to give his children peace of mind

about the Mexico project. Using an immigration stamp on his passport, Benito demonstrated that he could not have been at a meeting of WCM Board of Directors on February 23, 1993 because he was in Canada.

¶14 Gustavo Enriquez Camacho and German Miranda Ochoa, the attorney and administrative assistant, respectively, for the Industrial Park, corroborated Agustin's version of events regarding the documents provided to Benito saying he held fifty percent of WCM. Both testified that Benito said he needed the documents for purposes of negotiating the sale, that Agustin informed Benito that he had only a twenty percent share, and that Benito acknowledged this and said he only needed the documents for negotiations. They served as witnesses to the documents.

¶15 The court found against Benito and in favor of Rosa. The court relied on verbal testimony, noting that the corporate documents contained discrepancies. The court found Fisher's testimony to be credible and accepted his testimony that Benito had been reluctant to participate in the venture and told Fisher all along that Rosa would own eighty percent and he would own twenty percent; that Fisher had communicated each year with Benito about WCM's annual meeting and each year Benito declined to attend because he had only a minor interest; and that in March 2008, Benito wanted Fisher to find a buyer for WCM for \$10

million, saying he only wanted \$2 million for his share. The court determined that the 1988 document by which Benito and Agustin agreed to participate in a series of businesses as equal partners applied to furniture-related businesses and so did not apply to WCM. The court also found that the 2006 documents stating that Benito owned fifty percent of WCM were documents prepared at Benito's request for purposes of negotiating with a potential buyer, based on the testimony of Agustin, Gustavo Enriquez Camacho, and German Miranda Ochoa. The court noted that Benito had conclusively shown that he had been in Canada on February 23, 1993, which was in conflict with the testimony of Rosa, Agustin, and Fisher, that Benito had attended a meeting on that day resulting in the Minutes of the First Meeting establishing the eighty/twenty percent ownership split. The court found this discrepancy was not fatal to the credibility of Rosa, Agustin, or Fisher, noting that they were being asked to recall dates seventeen years earlier. Despite the discrepancy, the court found persuasive the testimony that a meeting had occurred and that the parties had agreed the division of ownership was to be eighty percent for Rosa and twenty percent for Benito.

¶16 The court entered an order and preliminary injunction declaring that Rosa owned eighty percent of WCM's stock and enjoining Benito and Tomas from attempting to act or

representing they had authority to act on behalf of WCM. Benito and Tomas moved to alter or amend the judgment on the grounds that the ruling was not justified by the evidence; the court denied the motion. The court entered a final judgment awarding fees and costs to Rosa in the amount of \$37,140 and \$1,256.45, respectively. Benito and Tomas timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. § 12-2101(A)(1) (Supp. 2011).

#### DISCUSSION

¶17 On appeal, we are bound by the trial court's findings of fact unless they are demonstrated to be clearly erroneous. *Sabino Town & Country Estates Ass'n v. Carr*, 186 Ariz. 146, 149, 920 P.2d 26, 29 (App. 1996). We view the evidence and reasonable inferences therefrom in the light most favorable to upholding the court's decision and must affirm if any evidence supports the trial court's judgment. *Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1992). Because the trial court is in the best position to judge the credibility of the witnesses and the weight of the evidence, *Goats v. A.J. Bayless Markets, Inc.*, 14 Ariz. App. 166, 171, 481 P.2d 536, 541 (1971), we "defer to the trial court's determination of witnesses' credibility and the weight to give conflicting evidence." *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998). "[W]e do not reweigh conflicting

evidence or redetermine the preponderance of the evidence, but examine the record only to determine whether substantial evidence exists to support the trial court's action." *In re Estate of Pouser*, 193 Ariz. 574, 579, ¶ 13, 975 P.2d 704, 709 (1999).

¶18 Benito argues the trial court erred in finding the Articles of Incorporation established that Rosa was a shareholder. The court did not make such a finding. The court found that the Articles supported Rosa's position, not that it established her shareholder status. Benito also contends that the Articles show that he, as the designated President, Vice President, and Director, is the "strong" partner and the court should have found that the document supported his position. To the extent Benito contends the court's finding that the Articles support Rosa's position is clear error, we reject that contention. The Articles were evidence that Rosa was involved in WCM as an incorporator and as an officer of the company, in contrast to Benito's assertion that he never did business with her. We defer to the court regarding the weight the court might have placed on this evidence.

¶19 Benito argues the meeting that resulted in the Minutes of the First Meeting of Board of Directors did not comply with statutory requirements governing the meetings of shareholders and board of directors. See A.R.S. §§ 10-803 (2004), -820

(2004), -821 (2004), and -822 (2004). He therefore contends the meeting was invalid so any action taken was of no effect; he could not have been removed as president; and Rosa could not have been elected as president. Benito argues the court did not take into account these statutory requirements.

¶20 Although in closing argument Benito argued that the actions taken at the First Meeting were invalid because he, as sole director, was not present, he presented no argument to the trial court below based on noncompliance with the statutory requirements. He has therefore waived such arguments on appeal. *See CDT Inc. v. Addison, Roberts & Ludwig, CPA, P.C.*, 198 Ariz. 173, 178, ¶ 19, 7 P.3d 979, 984 (App. 2000) (only arguments, theories, and facts properly presented below are considered on appeal).

¶21 Benito also contends: that Rosa had no authority to hold the First Meeting because she was not a board member; that under the Articles of Incorporation Benito remained the sole Board member; and that because Benito never called a Board meeting no shares were ever issued. Whether shares were actually issued does not affect the trial court's decision.

¶22 The issue before the trial court was to determine the percentage composition of ownership of WCM, not whether shares were actually issued. Even if the first board meeting was not properly held, the court had before it evidence from which it



could reasonably conclude that, in forming WCM, the parties agreed that Rosa would hold eighty percent ownership and Benito would hold twenty percent.

¶23 The court heard testimony from Rosa, Agustin and Fisher that a meeting took place with Benito, even if not on the date stated in the Minutes of First Meeting, and that it had been previously discussed and was understood that the percentage of ownership was to be eighty percent for Rosa and twenty percent for Benito. Gustavo Enriquez Camacho and German Miranda Ochoa, employees of the Industrial Park, testified that they were present at the June 14, 2006, meeting when Benito asked for documents stating that he was a fifty percent owner in WCM. They both testified that Agustin told Benito that he only had twenty percent ownership and that Benito acknowledged that percentage ownership and said he needed the documents only to negotiate a sale of the project. The evidence presented was sufficient to support the court's finding that the ownership split was intended to be eighty percent to Rosa and twenty percent to Benito regardless of the propriety in the issuance of the shares.

¶24 Benito argues that the court failed to understand that Agustin, rather than Rosa, was Benito's partner and so did not properly consider that prior business obligations existed between Benito and Agustin. The trial court clearly did not

ignore the prior business relationship between Benito and Agustin. The court expressly addressed the 1988 document by which Benito and Agustin agreed to enter into future business ventures as equal partners and on which Benito based his claim that he was a fifty percent partner in WCM. Because the businesses described in the document related to furniture businesses, the court concluded that the document did not apply to a business like WCM. The document is reasonably susceptible to such an interpretation.

¶25 Benito also contends that the court ignored contradictions in Rosa and Agustin's testimony, misjudged the credibility of witnesses, and ignored, misinterpreted, or misunderstood evidence. Benito is essentially asking this court to reweigh the evidence to reach a different conclusion. The trial court here was presented with poorly kept records, contradictory testimony, and widely different versions of the same events. It is for the trial court, and not this court, to determine the credibility of the witnesses and the weight to be given the evidence in reaching its ruling. See *Goats*, 14 Ariz. App. at 171, 481 P.2d at 541 (trial court is in best position to assess witness credibility and to weigh conflicting evidence). We defer to the trial court on these points.

¶26 In a separate appellate brief, Tomas, like Benito, contends that Agustin was Benito's partner in WCM. Tomas

presents a lengthy narrative outlining the relationship of Benito and Agustin from Tomas's perspective, and asserting that Agustin and Rosa had an improper motive in naming Rosa as a partner in WCM. These contentions present no discernible argument pertinent to the issue decided by the trial court.

¶27 Tomas also appears to argue that Agustin has created a new business venture that has benefitted from investments from Benito and that Agustin is diverting assets from the Industrial Park businesses to the new venture. Tomas contends that WCM is entitled to receive benefits from the venture. This claim is entirely unrelated to the issue before the trial court--a determination of the percentage ownership of WCM. We therefore do not address it.

¶28 For the same reason, we do not address Tomas's next argument. He presents another lengthy narrative objecting to conduct and business practices of Agustin, and describing events that began in 2009, well after the time period relevant to the issue of WCM ownership. He accuses Agustin and Rosa of using the legal system as a weapon. Tomas argues that the court made errors of judgment and analysis, contending that the court did not understand what type of people he was dealing with or how complex the case could become. Again, this presents no issue related to the ruling on review. The trial court considers the

issues and evidence properly presented by the parties. The court is not responsible for ferreting out potential issues.

¶129 Finally, Tomas challenges the trial court's findings. Tomas points to the evidence that supports Benito and contends that the court either did not understand the evidence or ignored it. He argues that Rosa's witnesses were not credible--that they were impeached or had reason to lie. These arguments relate to the credibility of the witnesses and the weight to be given the evidence.

¶130 As already noted, this case presented conflicting testimony and documentary evidence. That the court did not weigh the evidence or interpret it in a manner favorable to appellants does not indicate that the court either ignored it or did not understand it. The court noted the significant documentary evidence and recognized the discrepancies in those documents. The credibility of the witnesses, the weight to be afforded the testimony and other evidence, and the resolution of conflicting or contradictory evidence are within the purview of the trial court, which can hear and observe the witnesses first hand. This court will not second guess the trial court's determination of witness credibility or reweigh conflicting evidence; we consider only whether evidence exists in the record to support the trial court's judgment. *Pouser*, 193 Ariz. at 579, 975 P.2d at 709.

