IN THE COURT OF APPEALS OF IOWA

No. 1-304 / 10-1377
Filed July 27, 2011

CARROLL A. DEPENNING,
Plaintiff-Appellant,

vs.

RESOURCE ELECTRIC, INC.,

Defendant-Appellee.

RESOURCE ELECTRIC, INC.,
Plaintiff-Appellee,

vs.

DEPENNING & ASSOCIATES, INC.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson, Judge.

Electrician and electrical company appeal damages awarded for breach of fiduciary duty. **AFFIRMED.**

Kathryn S. Barnhill of Barnhill & Assoc., Iowa P.L.L.C., West Des Moines, for appellant.

Lawrence P. McLellan, Benjamin M. Clark, and Elizabeth N. Overton of Sullivan & Ward, P.C., West Des Moines, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

EISENHAUER, P.J.

This case involves litigation between the owners of an electrical contracting company. Carroll DePenning and DePenning and Associates, Inc. (DPAI) appeal the court's adverse damage award in favor of Resource Electric, Inc. We affirm.

I. Background Facts & Proceedings.

Since 1994, Dennis Sult has owned and operated Resource Services, Inc., a mechanical contracting company. Dennis wanted to create a new, complementary company to provide electrical services. Carroll DePenning, a master electrician with Meisner Electric, approached Dennis seeking to collaborate in the creation of the new electrical company. In the fall of 2004, Dennis, his wife Paula, Carroll, and his wife Nancy, met to discuss the creation of the new electrical company. It was anticipated Carroll would utilize his electrical experience to manage employees, bid jobs, and manage the work performed on the jobs.

In February 2005, the Sults incorporated Resource Electric. The Sults subsequently opened a checking account and obtained financing for the new company. At the time Carroll was still employed by Meisner Electric. The Sults also operated DS & PS, LLC, the owner of the land and building containing the offices of both Resource Services and Resource Electric.

In June 2005, Resource Electric held its first organizational meeting, and Carroll was named president and a director. Carroll was paid a salary of $80,000 per year. Resource Electric's stock ownership was divided as follows: Carroll

forty percent, Dennis fifty-five percent, and Paula five percent. From August 2005 to March 2006, Nancy DePenning was employed by Resource Electric and performed numerous accounting functions. In the spring of 2006, Carroll requested to be and was made a signatory on the Resource Electric checking account.

In the fall of 2006, the DePennings began discussing the formation of their own corporation to act as an electrical contractor. In November 2006, Nancy incorporated DPAI, and in January 2007, Nancy opened DPAI's bank account. On February 16, 2007, Carroll told Dennis he wanted to leave Resource Electric. On February 23, 2007, Carroll presented Dennis with a letter requesting Resource Electric be dissolved. Dennis did not agree to dissolution of the company. Three days later, on February 26, Carroll bid a job in Ankeny for DPAI. At this time Carroll was still president of Resource Electric. On March 5, 2007, over Dennis's protest, Carroll moved Resource Electric's "Community State Bank project" to DPAI. Subsequently, the other Resource Electric electricians went to work for DPAI. Carroll and the other electricians completed the work on four ongoing Resource Electric projects and were paid by Resource Electric for this work.

Carroll was the only Resource Electric employee with a master electrician's license. Dennis's efforts to hire a replacement for Carroll were unsuccessful. Litigation commenced between the parties and their companies. After an April 2010 trial, the court ruled:

> Carroll and Nancy DePenning wanted to start their own electrical contracting business, but didn't want to do so alone, at

> least not at first. They viewed the Sults' successful HVAC company and desire to form a separate electrical contracting entity as a stepping stone to the DePennings' eventual own company. The Sults put all of their personal and corporate assets on the line to support Resource Electric, including a majority of the operating capital; however, they included Carroll in the operation of the company, including officer and directorship. Indeed, Carroll provided an integral part of the company as a master electrician. Carroll and Nancy assented to the operation of [Resource Electric] along the way, understanding how things worked, but not asking too many questions. When the DePennings eventually determined that they were prepared to run the company, Carroll demanded that he be given 85% control of the company. When Dennis Sult denied this demand, Carroll and Nancy formed their own company, using equipment, trucks, tools, employees, and the corporate goodwill of Resource Electric to operate their new company. On his way out, Carroll asked that Resource Electric be dissolved, and that he be entitled to the things he had already taken.

The court concluded "DePenning's claims against Resource Electric, Resource Services, DS & PS, LLC, Dennis Sult, and Paula Sult all fail." The court next addressed the claim Carroll breached his fiduciary duty:

> When viewed as a whole, [Carroll] did not act in a manner that was in good faith or in the best interests of Resource Electric. His decisions and actions were motivated by his desire to have control of an electrical company and the profits generated by that company without sharing those profits with the Sults. He did not want to see Resource Electric continue as a viable competing entity. His actions were not to simply establish a competing company, but to decimate the competition Resource Electric could exert. His actions were a breach of the fiduciary duties he owed Resource Electric and by his actions he effectively usurped the corporate opportunities of Resource Electric.

The court ruled Carroll and DPAI "are jointly and severally liable to Resource Electric in the amount of $448,000 for lost profits . . . ."[1] Carroll and DPAI now appeal.

[1] The court's order requiring Carroll and DPAI to return tools and equipment to Resource Electric is not appealed.

II. Scope of Review.

The parties disagree on the scope of review. Carroll and DPAI seek de novo review while Resource Electric asserts our review is for correction of errors of law. On September 3, 2008, Carroll filed suit in equity seeking a corporate dissolution. On September 25, 2008, Resource Electric filed a petition at law seeking money damages. In November 2008, the court consolidated the two cases. Additional claims were asserted in amended petitions. At trial, the court was presented with both equitable and legal issues.

"Our review of the court's decision after trial is governed by how the case was tried in the district court." *Howard v. Schildberg Const. Co.*, 528 N.W.2d 550, 552 (Iowa 1995); *see also Stanley v. Fitzgerald*, 580 N.W.2d 742, 744 (Iowa 1998) (stating "we review a case in the same manner it was tried"). "Where there is uncertainty about the nature of a case, a litmus test we use in making this determination is whether the trial court ruled on evidentiary objections." *Ernst v. Johnson Cnty.*, 522 N.W.2d 599, 602 (Iowa 1994). We determine this case was tried at law. Accordingly, we review for correction of errors at law. *See id*.

III. Judicial Dissolution.

Carroll argues the trial court "erred in ruling that there was no shareholder oppression entitling [him] to judicial dissolution of Resource Electric." He asserts that twelve actions "singularly and in the aggregate" amount to shareholder oppression. We find no merit to this argument.

First, Carroll's brief fails to refer us to relevant portions of the evidence supporting ten of the twelve alleged "actions." We decline to address those

claims because it "would require us to assume a partisan role and undertake [his] research and advocacy. This role is one we refuse to assume." *See Inghram v. Dairyland Mut. Ins. Co.*, 215 N.W.2d 239, 240 (Iowa 1974).

Second, Carroll's citation to the record regarding Resource Electric's checking account does not support his claim of oppression. Rather, the record shows Carroll did not initially utilize the checking account and he was made a signatory to the checking account when he so requested. Accordingly, we do not address this "action" further.

Carroll's final claimed "action" is:

> Moving money in and out of the company's bank accounts from their own personal accounts and calling it different things and even going so far as to call it 'paid in capital' then paying it back but to a different account—the LLC account—all the while jiggling and back dating transactions and the account records to legitimize the transactions without notice to or the knowledge or consent or ratification to or by the proposed minority shareholder.

Carroll's citation to the record does not support this sweeping claim. The record cited is Nancy DePenning's testimony regarding her discovery the Sults had not paid $10,000 of their $60,000 capital contribution in 2005. The Sults paid the $10,000 in January 2006. Additionally, Resource Electric refutes this claim by pointing to the testimony of accountant Michael Lydon:

> Q. During the course of your work for these individuals, has Resource Electric always kept separate books and records? A. Yes.
> Q. Has Resource Services kept separate books and records? A. Yes.
> Q. Has DS & PS LLC kept separate books and records? A. Yes.
> Q. And have [Dennis] and [Paula] Sult kept separate books and records? A. Yes.
> . . . .

> Q. During the course of your working with those companies and individuals on the [tax] returns, have you seen anything that suggests that there's been a mixing of funds and assets between those companies, or have they been kept separate? A. They've been kept separate.
>
> . . . .
>
> Q. Now, you're aware that there was a line of credit in the name of DS & PS LLC that was taken and used both by Resource Electric and Resource Services? A. Yes.
>
> Q. And did you see anything where Resource Electric was paying Resource Services' debt or Resource Services paying Resource Electric's debt? A. No, I didn't see that.

Accordingly, we find no error.

IV. Breach of Fiduciary Duty.

Carroll and DPAI argue the trial court erred in concluding Carroll breached a fiduciary duty to Resource Electric. First, they claim Carroll is exempted from any fiduciary duty by section twelve of the Resource Electric bylaws. We agree with and adopt the district court's resolution of this issue:

> Section 12 of Article III of Resource Electric's by-laws does not give [DePenning] a defense to these actions by merely giving notice . . . on February 23, 2007, of his intent to leave the company and take the Community State Bank project, along with the tools, equipment and trucks and employees of Resource Electric. This provision is typically known as a conflict of interest clause found in many corporate by-laws. . . . By its language the clause protects contracts between Resource Electric and some other corporation even if there is a director that sits on the board of Resource Electric and the other corporation. That factual situation does not exist here. There was no contract between Resource Electric and DePenning & Associates, [therefore,] this provision is inapplicable and provides no defense to [DePenning] for his actions. This provision simply implements the protection against a conflict of interest . . . .

Second, Carroll and DPAI argue he is excused from any fiduciary duty or duty of loyalty "by the express terms of the February 16, 2007 agreement." This alleged agreement was the subject of the February 23 letter. We find no merit to

this claim because the record clearly shows there was no agreement. Carroll testified: "We asked to dissolve the company but I had nothing—no other response back." Resource Electric did not accept the terms proposed by Carroll in February.

Finally, Carroll and DPAI argue the doctrines of estoppel and waiver preclude recovery by Resource Electric "even if [Carroll] breached a fiduciary duty." Once again, appellants fail to refer us to relevant portions of the evidence supporting this argument. We decline to address this issue because it "would require us to assume a partisan role and undertake [their] research and advocacy. This role is one we refuse to assume." *See Inghram*, 215 N.W.2d at 240.

V. Damages.

The trial court found:

> [Resource Electric's expert's] calculations are reasonable in light of the sales and expenses generated by both companies, particularly the almost $2,000,000 in sales generated by [DPAI] in 2009, and the $932,000 of revenue diverted from Resource Electric over the relevant time periods.

The trial court awarded Resource Electric $488,000 in lost profits. On appeal, Carroll and DPAI argue Resource Electric's damages are "speculative and exorbitant" under the new business rule.[2]

The new business rule provides: "[P]otential profits from a new commercial enterprise are generally too remote and speculative to be recoverable because there is no available data of past business from which

[2] Appellants' citation to the record does not support the argument that "the damages amount the expert calculated was based upon the return an arms-length investor would expect to get if he invested in Resource Electric as a start up company."

anticipated profits can be established." *Connolly v. Bain*, 484 N.W.2d 207, 211 (Iowa Ct. App. 1992) (holding "record reveals no factual basis from which to calculate lost profits with reasonable certainty" where expert relied upon unmet projections). However,

> [t]he new business rule is not absolute. If factual data are presented which furnish a basis for compilation of probable loss of profits, evidence of future profits should be admitted and its weight, if any, should be left to the [trier of fact].

Harsha v. State Sav. Bank, 346 N.W.2d 791, 798 (Iowa 1984) (relying upon expert testimony to award lost profits damages for a new business). The basic question is "whether a prospective loss of net profits has been shown with reasonable certainty." *Id*.

We note the factual data supporting Resource Electric's expert's lost profit calculation were actual business results, not projected business results. Further, the expert explained:

> [I used] a conservative estimate of the amount of revenue that Resource Electric should have achieved, as it does not take into account any contacts for contracts that the other shareholders could have contributed as well as any value associated with the continuity of maintaining a stable trade name and corporate identity during this time [2007-2009].

The expert detailed his subsequent calculations, including application of a "conservative discount rate," and concluded total lost profits for Resource Electric equaled $488,000 as of December 31, 2009. We conclude Resource Electric proved its lost profits damages with reasonable certainty and find no error.

AFFIRMED.