STATE OF MICHIGAN

COURT OF APPEALS

JAMES DITTRICH and JOHN BRADY,

Plaintiff-Appellants,

v

CABANA MANUFACTURING CORPORATION, CHARLES ONGENA, MAHESH KANOJIA, MARGARET KNOEPFLEY, JOANN BRAXTON, EARL BRAXTON and KAN-DU COMPANY[1],

Defendants-Appellees.

UNPUBLISHED
May 12, 1998

No. 185155
Macomb Circuit Court
LC No. 91-002569-CZ

Before: Cavanagh, P.J., and White and Young, Jr., JJ.

PER CURIAM.

Plaintiffs James Dittrich and John Brady, two shareholders of Cabana Manufacturing Corporation (Cabana), appeal as of right the judgment favoring defendants in part, entered following a bench trial, in this action involving allegations of various misdeeds with respect to Cabana's operation. Plaintiffs also appeal the trial court's order denying their request for attorney fees pursuant to MCL 450.1497(b); MSA 21.200(497)(b). We affirm in part, reverse in part, and remand for further proceedings.

Plaintiffs are shareholders of Cabana, a closely held corporation formed in May 1989 to manufacture and sell portable toilets and sanitation chemicals. Defendant Earl Braxton is the president and manager of Cabana, as well as an employee. Defendant Joann Braxton is on Cabana's board of directors, and is also an employee, overseeing production and purchasing. Defendants Charles Ongena and Margaret Knoepfley are shareholders in Cabana.[2] Upon its incorporation, Cabana purchased equipment and machinery used to manufacture portable toilets from Mellon Financial Services (Mellon), which apparently was foreclosing on a loan secured by the assets of Bluewater Equipment Company (Bluewater), another manufacturer of portable toilets.

Under a manufacturing agreement with Enzymes of America Holding Company (EOAHC),[3] which owns the patents and trademarks on certain types of portable toilets, Cabana was given the

exclusive license to manufacture all of the portable toilets that EOAHC required. Cabana also sold portable toilets to Porta-John of America, America West Service Company, and Rent-A-Can, which companies, in turn, are involved in the business of leasing and servicing portable toilets.[4] Those companies, along with Cabana and EOAHC, all operate out of office space in a three-building complex in Shelby Township. Cabana uses part of one of the buildings in the complex as a production facility, which it leases along with office space from Inveterate Investment Company. The Braxtons were partners in Inveterate Investment Company until June 1990 when they sold it to Charles Ongena and Mahesh Kanojia.

Plaintiffs, individually and on behalf of Cabana, sued defendants in June 1991 alleging conspiracy to dilute plaintiffs' ownership interest, fraudulent inducement to invest, misappropriation of corporate assets, violation of the Michigan Uniform Securities Act, breach of fiduciary duty, oppression of minority shareholders, and unjust enrichment. Following a bench trial, the court found that Cabana was entitled to recover $67,781 from Charles Ongena and the Braxtons on plaintiffs' derivative claims of misappropriation of corporate funds and breach of fiduciary duty. However, the trial court found no cause of action on plaintiffs' remaining claims. The court also denied plaintiffs' request for attorney fees. Finally, the trial court denied plaintiffs' motion for a new trial.

Plaintiffs now appeal, disputing several of the trial court's findings with respect to the fairness of certain transactions involving Cabana. A trial court's findings of fact in a bench trial will not be set aside unless clearly erroneous. MCR 2.613(C); *Phardel v Michigan*, 120 Mich App 806, 812; 328 NW2d 108 (1982). Findings are clearly erroneous when, although there is evidence to support them, the reviewing court is left with a firm conviction that a mistake has been made. *Phardel*, *supra*.

Directors and officers of corporations are fiduciaries who owe a strict duty of good faith to the corporation that they serve. *Salvador v Connor*, 87 Mich App 664, 675; 276 NW2d 458 (1978). Where a corporation enters into a transaction in which a director or officer is determined to have an interest, the transaction should be set aside unless the director or officer establishes that "the transaction was fair to the corporation at the time entered into." MCL 450.1545a(1)(a); MSA 21.200(545a)(1)(a). The burden is on the interested director or officer to prove that the transaction was fair. *Fill Buildings, Inc v Alexander Hamilton Life Ins Co*, 396 Mich 453, 460-461; 241 NW2d 466 (1976). The same standard is applied when assessing the fairness of transactions between corporations with interlocking directorates. As the court in *Epstein v United States*, 174 F2d 754 (CA 6, 1949), explained:

> The relation of directors to the corporation is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged the burden is upon those who would maintain them to show their fairness and where a sale is involved the full adequacy of the consideration. [*Id*. at 764.]

First, plaintiffs take issue with the trial court's finding that defendants met their burden of proving the fairness of the Cabana board's acceptance of approximately 68,000 shares of Sycon Industries,

Inc. (Sycon), stock to settle a $29,350 debt that Protein Production, Inc., another corporation in which the Braxtons were involved, owed to Cabana.[5] In their appellate brief, plaintiffs argue only that the Sycon stock had no value because Sycon had gone out of business. However, Earl Braxton testified that Sycon was an active corporation at the time and that it owned the rights to manufacture various products. The trial court had the opportunity to judge the credibility of the witnesses, and we cannot say that the court's reliance on Earl Braxton's testimony was improper. We therefore conclude that the trial court's finding on this issue was not clearly erroneous. This finding is affirmed.

Plaintiffs next argue that the trial court erred in finding that Cabana's payment of $9,606.58 to Inveterate Investment Company for roof repairs was proper. Again, we disagree. The payment was expressly called for in the lease agreement between Cabana and Inveterate Investment Company, and plaintiffs do not otherwise challenge the validity of that lease. The trial court's finding is not clearly erroneous and is therefore affirmed.

Plaintiffs next dispute the trial court's finding that it was not improper for Cabana to issue a $150,000 promissory note payable to Joann Braxton in exchange for "approximately 55,000 pounds of various grades of plastic, and various aluminum and nylon assembly parts sufficient to construct more than two hundred portable cabanas." The trial court found that, "[a]lthough the acceptance of assets without an independent evaluation of the assets was improper, the Court is not persuaded that the transaction resulted in any benefit to the Defendants." However, the trial court made no finding with respect to whether defendants made the requisite showing that this transaction was *fair* to Cabana, as required by MCL 450.1545a(1)(a); MSA 21.200(545a)(1)(a). Therefore, we remand this matter to the trial court for reconsideration of this transaction under the appropriate standard.

Next, plaintiffs briefly assert that Cabana made improper payments of (1) approximately $9,500 to the Father Kramer Credit Union for vehicles that were used "very little for Cabana business," (2) credit card bills "for purchases from, among other places, Brookstone and The Sharper Image," and (3) $104,000 on the Joanna Braxton promissory note "after this lawsuit was commenced and at a time when Earl Braxton conceded that sales were down." However, plaintiffs have not cited sufficient record evidence to support these claims and we therefore decline to address them. See *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997). This Court will not sift through approximately ten days and 1,500 pages of trial testimony in search of evidence to support plaintiffs' claims.

Plaintiffs next argue that the trial court erred in finding that plaintiffs' failed to establish that the Cabana board's authorization of the issuance of nine hundred new shares of Cabana stock to Charles Ongena, Mahesh Kanojia, and the Kan-Du Company at a price of one cent per share constituted a conspiracy to dilute plaintiffs' interest in Cabana. We disagree. Stock issued for the purpose of establishing control of the corporation, and not having some corporate goal as its principle purpose, is fraudulent as against the other shareholders and cannot be permitted to stand. *Campau v McMath*, 185 Mich App 724, 729; 463 NW2d 186 (1990). However, in order to establish an actionable conspiracy, plaintiffs were required to prove that they were damaged by defendants' acts. *Magid v Oak Park Racquet Club Associates, Ltd*, 84 Mich App 522, 529; 269 NW2d 661 (1978). Although Cabana's board authorized the issuance of the new shares, the new shares were never actually issued

and, therefore, the trial court properly determined that plaintiffs were not damaged. The trial court's decision on this issue is affirmed.

Finally, plaintiffs argue that the trial court erred in failing to award them attorney fees pursuant to MCL 450.1497(b); MSA 21.200(497)(b). We review the court's decision for an abuse of discretion. *Moore v Carney*, 84 Mich App 399, 407; 269 NW2d 614 (1978). MCL 450.1497(b); MSA 21.200(497)(b) provides that, upon termination of a derivative proceeding, the court *may* order the corporation "to pay the plaintiff's reasonable expenses, including reasonable attorney fees, incurred in the proceedings if it finds that the proceeding has resulted in a substantial benefit to the corporation." The trial court ordered $67,781 to be returned to Cabana. Although we may have awarded attorney fees under the circumstances, we cannot say that the court abused its discretion in refusing to do so. However, the trial court is directed to reconsider plaintiffs' request for attorney fees if the court determines on remand that the transaction involving the issuance of the $150,000 promissory note to Joann Braxton was not fair to Cabana.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Helene M. White
/s/ Robert P. Young, Jr.

[1] Defendant Kan-Du Company was never served with process and was dismissed from the case upon stipulation of the parties.

[2] Charles Ongena was also a Cabana director and officer until 1992. Earl and Joann Braxton and defendant Mahesh Kanojia were never shareholders in Cabana.

[3] Earl Braxton is the president and chief executive officer of EOAHC, as well as a shareholder, while Joann Braxton is an officer and director. Charles Ongena and Mahesh Kanojia are also EOAHC shareholders.

[4] The record indicates that the Braxtons were involved at least in some capacity with each of those companies.

[5] Sycon, in turn, was a wholly-owned subsidiary of EOAHC.