IN THE COURT OF APPEALS OF IOWA

No. 8-308 / 07-0477
Filed October 1, 2008

LARRY D. McMILLAN,
Plaintiff-Appellee/Cross-Appellant,

vs.

HARKER'S DISTRIBUTION, INC.,
Defendant-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Plymouth County, Edward A. Jacobson, Judge.

Harker's Distribution, Inc., appeals and Larry D. McMillan cross-appeals from the district court's judgment in favor of McMillan. **AFFIRMED.**

Stanley J. Thompson of Davis Brown Law Firm, Des Moines, for appellant/cross-appellee.

Sharese Manker and Timothy A. Clausen of Klass Law Firm, L.L.P., Sioux City, for appellee/cross-appellant.

Heard by Mahan, P.J., and Vaitheswaran and Doyle, JJ.

MAHAN, P.J.

Harker's Distribution, Inc., appeals and Larry D. McMillan cross-appeals from the district court's order finding Harker's Distribution breached its shareholders' agreement. We affirm.

I. Background Facts and Prior Proceedings

McMillan began working for Harker's Leasing Corporation in 1975. The company changed hands several times, and McMillan eventually progressed to the position of vice president of operations. In 1990 McMillan and other members of the management team purchased the company, renamed it Harker's Distribution, Inc. (HDI), and operated it as a privately held corporation. In doing so, McMillan purchased 3600 shares of common stock. McMillan was eventually "awarded" another 1600 shares of common stock by the board of directors. At some point, he purchased an additional ninety-seven shares of stock from a shareholder who was redeeming some of his shares in the company. This brought McMillan's total number of shares of common stock to 5297. In 1997 McMillan was elected to sit on the board of directors.

HDI utilized outside companies for equity and debt financing. Some of these companies required that HDI amend its original articles of incorporation and shareholders' agreement prior to financing. In 1999 McMillan signed a new shareholders' agreement pursuant to one of these financing transactions.

In September 2000 HDI repurchased common stock from one employee for $150 per share. In October 2000 HDI repurchased common stock from another employee for $160 per share—its best estimate of the fair market value of the shares. Approximately six months later, in April 2001, HDI terminated

McMillan's employment. As part of the severance agreement, McMillan agreed to resign from the board of directors. At the time of his termination, McMillan claims he told Ron Geiger, the president of HDI, that he wanted to redeem his shares of common stock in the company. Geiger allegedly told McMillan that he would talk to the board of directors and get back to McMillan. Geiger did not present the request to the board of directors and did not get back to McMillan.

In 2003 Geiger sent a letter to McMillan and twelve other former employees inquiring whether they were interested in selling their shares back to HDI for fifty dollars per share.[1] McMillan did not express any interest in selling his shares back to HDI for only fifty dollars per share.

On August 22, 2005, McMillan filed a petition alleging HDI had breached its articles of incorporation when it did not redeem his shares. McMillan claimed he should have received $842,223 for his common stock, plus "pre-judgment and post-judgment interest." HDI responded by claiming it was not required to repurchase the shares of a terminated employee pursuant to the 1999 shareholder agreement. HDI also claimed that, because McMillan had waited more than four years to request a repurchase, he was now estopped from raising this claim.

At trial McMillan claimed he, unlike all other involuntarily terminated employees, was not given the opportunity to redeem his shares upon termination. He also argued HDI had failed to follow the procedure set forth in the 1999 shareholder agreement, which set forth a process whereby if HDI

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[1] This letter expressly stated that it was "not an offer to redeem any shares" and there was "no guarantee that any shares will be redeemed." Instead, the letter stated it was "only intended to gather interest in possibly redeeming some shares."

refused to repurchase the shares of a terminated employee, it was required to offer the sale of those shares to the company's remaining stockholders.

HDI countered by claiming the 1999 shareholder agreement gave it unfettered discretion to choose whether or not to repurchase McMillan's shares. HDI also argued it was in such a poor financial position at the time of McMillan's termination that his 5297 shares of common stock were worth nothing. McMillan countered by pointing out that HDI had redeemed another shareholders' stock six months prior to McMillan's termination for $160 a share.

On January 31, 2007, the district court entered an order finding that HDI had breached the 1999 shareholder agreement because Geiger never presented McMillan's request for repurchase to the board of directors or inquired about the possibility of outside financing to purchase his shares and HDI did not notify all other shareholders of the opportunity to purchase McMillan's shares.[2] The court determined McMillan's shares had a market value of $120 at the time of his termination and ordered HDI to repurchase McMillan's remaining 5297 shares at $120 per share within thirty days of its ruling. If HDI did not redeem these shares, the court indicated it would enter judgment against HDI for $635,640.

HDI now appeals, claiming the district court erred when it (1) did not dismiss the claim under the doctrine of estoppel by acquiescence, (2) disregarded and rewrote the plain language of the 1999 shareholder agreement, and (3) determined the stock was worth $120 per share on the date of McMillan's termination.

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[2] In doing so, the court rejected McMillan's claims relating to whether he was treated differently than other stockholders in violation of the third amended articles of incorporation.

McMillan cross-appeals, claiming the court should have assigned the shares a value of $160. McMillan also claims the district court erred when it failed to grant him pre-judgment interest on the value of the judgment.

II. Standard of Review.

The construction and interpretation of a contract is generally reviewed as a matter of law. *Longfellow v. Sayler*, 737 N.W.2d 148, 153 (Iowa 2007). We are not bound by the construction or interpretation made by the district court. *Id.* However, if the district court's interpretation was predicated upon extrinsic evidence, the findings of the court are binding on appeal if supported by substantial evidence. *Id.* Thus, the district court's findings of fact have the effect of a jury verdict and are binding on us if supported by substantial evidence. *Grinnell Mut. Reins. Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988). We construe these findings broadly and liberally. *Id.* In case of doubt or ambiguity, we construe them to uphold, rather than defeat, the judgment. *Id.* A corollary rule prohibits us from weighing the evidence or the credibility of the witnesses. *Id.*

III. Merits.

A. Estoppel by Acquiescence.

HDI argues the court should have found McMillan waived his claim under the doctrine of estoppel by acquiescence because he did not request to redeem his shares until he filed the present lawsuit in August 2005. Estoppel by acquiescence focuses on whether the actions or inaction of the right-holder indicate an intention to waive a known, enforceable right. *Davidson v. Van Lengen*, 266 N.W.2d. 436, 438 (Iowa 1978). This branch of estoppel law applies

"where a person knows or ought to know that he is entitled to enforce his right . . . and neglects to do so for such a length of time as would imply that he intended to waive or abandon his right." *Humboldt Livestock Auction, Inc. v. B & H Cattle Co.*, 261 Iowa 419, 432, 155 N.W.2d 478, 487 (1967).

HDI claims the doctrine of acquiescence applies to this case because McMillan "waited more than four years after his termination to request that HDI purchase his stock." The record contains conflicting evidence as to when McMillan first requested that HDI repurchase his stock. McMillan testified that he told Geiger he wanted HDI to repurchase his shares on the day of his termination and then repeated his request the following day when he turned in his keys. Geiger testified that he did not remember having any conversations with McMillan about redeeming his shares.

In its ruling, the district court resolved this factual dispute by finding "the more credible evidence supports [McMillan's] contention that he asked to have his shares redeemed at the time of his termination." We have no reason to doubt the court's credibility finding. In light of the court's role in weighing evidence and assessing the credibility of witness, *Grinnell*, 431 N.W.2d at 785, we conclude the record contains substantial evidence to support the court's determination that McMillan first informed HDI he wanted to redeem his shares on the day of his termination, not four years later when he filed the present lawsuit. Because we find McMillan did not wait four years to try and redeem his shares, the doctrine of estoppel by acquiescence is not applicable to this case.

B. Breach.

HDI contends the district court rewrote the 1999 shareholder agreement and took express contractual language that said HDI may purchase stock and "simply turned it on its head" to say HDI must buy McMillan's stock.

We find this argument meritless. The district court did not "rewrite" the 1999 shareholder agreement or interpret it to mean that HDI must buy McMillan's stock. Instead, the court found HDI breached its contractual duty when Geiger did not present the request for repurchase to the board of directors and when it did not notify all other shareholders that they had the opportunity to purchase McMillan's shares of stock. The court determined McMillan was "damaged by that failure to fulfill contractual duties" and concluded the only way to compensate him for that damage was to require the corporation to redeem his shares at their market value as of the date of the termination.

HDI also claims the district court erred when it determined Geiger breached its "contractual duty" to present McMillan's repurchase request to the board of directors and/or investigate whether HDI could obtain financing to pay for McMillan's shares. HDI contends that, pursuant to its bylaws, the board provided Geiger with the authority to decide whether the company would redeem a manager's stock under the 1999 shareholders' agreement and if so, at what price.

Even if we assume, arguendo, Geiger did not have a "contractual duty" to present the repurchase request to the board of directors or investigate whether HDI could obtain additional financing to pay for the shares, there is still no question that HDI breached the 1999 shareholders' agreement when it did not

offer McMillan's shares to HDI other security holders. Section 2.1 of the 1999 shareholders' agreement states that the company "may, but shall not be obligated to" repurchase the shares from a terminated manager "at a purchase price equal to the Market Value Per Share determined as of the applicable Termination Date." Section 2.2(a) states the company has ninety days to decide whether it will repurchase the shares at this market value price. Section 2.2(a) goes on to state that, in the event the company does not elect to repurchase the terminated employee's stock, "the Company shall deliver written notice . . . to each Securityholder" and within fifteen days, the remaining shareholders "may elect . . . to repurchase all or any portion" of the terminated employee's stock "at the same prices as the Company would have paid" for that stock.

McMillan requested that HDI repurchase his shares on April 21, 2001. HDI did not establish a "Market Value Per Share" price for McMillan's shares and did not, within ninety days, elect to repurchase these shares. HDI did not deliver written notice to the remaining shareholders of their option to purchase McMillan's shares. This is a clear breach of the terms of the 1999 shareholder agreement.

Because HDI is a privately held corporation and the 1999 shareholder agreement places restrictions on the timing and sale of his shares of common stock, McMillan's shares are not easily marketable or readily transferable. If McMillan were able to find an acceptable buyer today, the market value for these shares would likely be far different than their market value on the date of his termination—April 21, 2001. Therefore, even if we found the district court was incorrect when it determined Geiger, in his role as president of HDI, had a

"contractual duty" to present the repurchase request to the board of directors and investigate whether HDI could obtain additional financing to pay for the shares, this finding would not change the disposition of this case because McMillan was still damaged when HDI breached its own shareholders' agreement by not offering the shares to current shareholders at the "Market Value" price. We find no reversible error here.

C. Stock Value.

Both parties argue the district court erred when it determined the market value of the stock at the date of McMillan's termination was $120 per share. HDI claims the stock was worthless at the time of his termination because the company was in an extremely poor financial condition. HDI also claims that this award was excessive in light of the relatively small amount of money McMIllan had initially invested when he purchased the stock eleven years earlier. McMillan claims the court should have determined the stock was worth $160 per share because that was the amount HDI gave to another employee just six months prior to McMillan's termination.

After a thorough review of the record and all arguments set forth on appeal, we find the market value assigned by the district court was well within the permissible range of the evidence. Therefore, we will not disturb it on appeal. *See Hum v. Ulrich*, 458 N.W.2d 615, 618 (Iowa Ct. App. 1990) (affirming trial court's valuation of property within a partnership as it "was well within the permissible range of evidence").

D. Pre-judgment Interest.

On cross-appeal, McMillan claims the district court erred when it failed to grant him pre-judgment interest on the value of the judgment from the date of his termination. To support this claim, McMillan cites to the following language from *Midwest Management Corp. v. Stephens*, 353 N.W.2d 76, 83 (Iowa 1984):

> Generally, interest runs from the time money becomes due and payable, and in the case of unliquidated claims this is the date they become liquidated, ordinarily the date of judgment. . . . One exception to this rule is recognized in cases in which the entire damage for which recovery is demanded was complete at a definite time before the action was begun. In cases where investments were made in reliance upon false representations, this court has given a broad definition to the word "complete" and has allowed pre-commencement interest from the date the money was invested.

(Internal citations and quotations omitted.) McMillan claims he should be entitled to pre-judgment interest from the date of his termination because, pursuant to the amended articles of incorporation, he should have been treated the same as the other employees whose shares were redeemed after they were terminated.

The district court denied McMillan's request for pre-judgment interest because it found there was a genuine dispute as to whether HDI was required to redeem McMillan's stock under the amended articles of incorporation and a genuine dispute as to the value of that stock at the time of his termination. Indeed, the district court rejected McMillan's articles of incorporation argument and rejected his claim that the shares were worth $160 at the time of the termination. Instead, the court determined McMillan was entitled to damages because HDI failed to offer the shares to existing share holders and determined the shares were only worth $120 at the time of his termination. Based on the genuine dispute regarding liability and the market value of the shares as of the

date of McMillan's termination, we agree with the district court's conclusion that this case does not fall within the aforementioned exception and therefore find no error in the court's decision to deny McMillan's requested pre-judgment interest. *See Flom v. Stahly*, 569 N.W.2d 135, 143 (Iowa 1997) (affirming the district court's decision to deny pre-filing interest because there was a genuine dispute as to the plaintiffs' right to recover and as to the amount of damages).

IV. Conclusion.

Having considered all issues raised on appeal, whether or not specifically addressed in this opinion, we affirm the district court's order in this case.

AFFIRMED.