

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-001547-MR

JOHN MARTIN, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LAURANCE B. VANMETER, JUDGE  
ACTION NOS. 92-CI-00447 & 99-CI-03314

MAN O WAR RESTAURANTS, INC.;  
ROBERT LANGLEY, JR.; DON POOLE;  
AND W. KENT TAYLOR

APPELLEES

AND

NO. 2000-CA-001695-MR

MAN O WAR RESTAURANTS, INC.

CROSS-APPELLANT

v. CROSS-APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LAURANCE B. VANMETER, JUDGE  
ACTION NO. 92-CI-00447

JOHN MARTIN, JR.

CROSS-APPELLEE

OPINION  
AFFIRMING IN PART AND REVERSING IN PART  
APPEAL NO. 2000-CA-001547-MR AND  
AFFIRMING CROSS-APPEAL NO. 2000-CA-001695-MR

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BEFORE: DYCHE, EMBERTON, AND HUDDLESTON, JUDGES.

DYCHE, JUDGE: Appellant, John Martin, Jr. (Martin), and cross-appellant Man O War Restaurants, Inc. (MOWR), seek review of

various orders of the Fayette Circuit Court in this matter on remand from the Kentucky Supreme Court. We affirm in part and reverse in part as to Appeal No. 2000-CA-001547-MR and affirm in cross-appeal No. 2000-CA-001695-MR.

This case originated in February of 1992 when MOWR filed suit to enforce a stock surrender provision in Martin's employment contract. Martin had been allowed to purchase stock when he was hired by MOWR. The terms of the contract required Martin to surrender his stock in the company upon termination. When MOWR terminated his employment, Martin fought the surrender provision. The trial court ruled the provision was enforceable. However, this Court reversed the trial court holding the stock surrender provision unenforceable as against public policy. The Kentucky Supreme Court affirmed this Court. Man O War Restaurants, Inc. v. Martin, Ky., 932 S.W.2d 366 (1996). The matter was remanded to the Fayette Circuit Court for further proceedings. A jury trial was held to determine the value of the stock. The jury determined that the value of Martin's MOWR stock at the time of surrender was zero.

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\_\_\_\_\_Martin's initial argument on appeal is that he was entitled to restitution of his stock pursuant to the Supreme Court's holding. This argument is without merit for several reasons. First, the Supreme Court's opinion in Man O War Restaurants v. Martin did not specifically state restitution was required. The Supreme Court held that Martin was entitled to "appropriate compensation," not specific restitution. Id. at

369. Second, the trial court properly relied on section 74 of the Restatement of the Law of Restitution and Sebastian v. Floyd, Ky., 585 S.W.2d 381 (1979), in ruling that specific restitution is not always required and certainly not when it is inequitable. Finally, Martin's argument for restitution is a complete change from his argument all through the first part of this case, where he simply sought compensation for the value of his stock and not the right to retain that stock. Therefore, the Court did not err in failing to amend its November 7, 1997, order that denied Martin's request for specific restitution.

We now address the agreed order of March 2, 1993, which Martin relies on in part of his specific restitution argument. An agreed order was entered at the very beginning of this case which required neither party to post a supersedeas bond if an appeal occurred. However, for some reason, Martin filed a motion for a nominal supersedeas bond after the trial court ordered enforcement of the stock surrender provision. This motion was a waiver of Martin's rights under the agreed order. Barker v. Stearns Coal & Lumber Co., 291 Ky. 184, 163 S.W.2d 466 (1942). Martin fails to offer any explanation or defense regarding the motion for nominal bond and the waiver of the agreed order. Thus, his reliance on the March 2, 1993, agreed order is misplaced.

Martin next argues that the trial court erred in denying his motion for summary judgment regarding the value of his stock based on the deposition testimony of MOWR'S president. Martin's motion fell far short of the standard of Steelvest, Inc.

v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

The deposition testimony of MOWR's president does not clearly show the value to be \$125,000; therefore there is a genuine issue of material fact, and the trial court did not err in denying his motion for summary judgement.

Martin also argues the trial court erred in dismissing his conversion claim against MOWR. This argument is without merit. The trial court correctly held that privilege protected MOWR pursuant to American States Insurance Co. v. Citizens Fidelity Bank & Trust Co., Ky. App., 662 S.W.2d 851 (1983). Having held privilege a valid reason to dismiss Martin's conversion claim, we need not address the statute of limitations issue.

Finally, Martin argues the trial court erred in failing to grant his motion for new trial pursuant to CR 59.01<sup>1</sup>. We have carefully reviewed the record of the trial and agree with Martin that a new trial is necessary and thus reverse the trial court.

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<sup>1</sup>CR 59.01 – A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

- (a) Irregularity in the proceedings of the court, jury or prevailing party, or an order of the court, or abuse of discretion, by which the party was prevented from having a fair trial.
- . . . .
- (d) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court.
- (e) Error in the assessment of the amount of recovery whether too large or too small.
- (f) That the verdict is not sustained by sufficient evidence, or is contrary to law.

Martin is entitled to a new trial under either CR 59.01 (e) or (f). The jury verdict of zero is both inadequate and contrary to the proof in the case. In its response to Martin's motion for a nominal bond made after the trial court held the stock surrender provision enforceable, MOWR stated the stock had substantial value and that the parties had stipulated the stock was worth more than \$1000.00. That admission or argument is important, not based on whether it was a judicial admission, but because it was a part of the record which informed the decision of this Court and the Supreme Court in the first review of this matter.

The Supreme Court stated in Man O War Restaurants, Inc. v. Martin that Martin's stock could not be taken without "appropriate compensation." 932 S.W.2d at 369. The Supreme Court also pointed out that MOWR had numerous other options to avoid vesting Martin with part ownership of the company but failed to do so. Id. Just as the Supreme Court's use of the term "appropriate compensation" prevents the return of Martin's stock, it also prevents the use of fair market value or book value if those figures fail to produce "appropriate compensation." "[B]ook value or fair market value may not be the exclusive point of reference for ascertainment of equitable compensation in 'buy-back' circumstances, if the contract so provides." Id. at 368. As Martin was vested with ownership rights in MOWR, MOWR must give "appropriate compensation" for removing him as an owner. Regaining complete control of the company allowed MOWR to sell control to those who could help make MOWR profitable, therefore

that control had value. A verdict of zero does not conform with the Supreme Court's holding in Man O War Restaurants, Inc. v. Martin. Accordingly, the trial court is reversed and this case is remanded for a new trial to determine "appropriate compensation," which must not be less than \$1000.00.

CROSS-APPEAL NO. 2000-CA-001695-MR

\_\_\_\_\_MOWR argues on cross-appeal that the trial court erred in failing to reform the contract. We agree with the trial court that reformation is not appropriate in this case as there was not the type of mutual mistake that allows for reformation. 66 Am. Jur. 2d Reformation of Instruments § 1 (1973). Additionally we agree with the trial court that Hodges v. Todd, Ky. App., 698 S.W.2d 317 (1985), is distinguished from this case since the contract in Hodges was incomplete as opposed to unenforceable. Thus, we affirm the trial court on the issue of reformation.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-  
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BRIEF FOR APPELLEES/CROSS-  
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