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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000638-MR

BRIAN DEAN LOWDER — APPELLANT

v.

APPEAL FROM GALLATIN CIRCUIT COURT
HONORABLE PAUL W. ROSENBLUM, JUDGE
ACTION NO. 04-CI-00124

JASPER D. LOWDER, III; SHEILA LOWDER;
AND CARLTON-LOWDER FUNERAL HOME — APPELLEES

OPINION
VACATING AND REMANDING IN PART
AND AFFIRMING IN PART

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; CAPERTON AND MOORE, JUDGES.

MOORE, JUDGE: Brian Dean Lowder appeals the Gallatin Circuit Court's order granting the motion for summary judgment filed by Jasper D. Lowder, III, Sheila Lowder, and Carlton-Lowder Funeral Home, Incorporated. After a careful review of the record, we vacate and remand the circuit court's order in part, regarding the claim that the defendants/appellees misappropriated $80,000.00 of the corporation's money for their personal benefit. The remainder of the Gallatin Circuit Court's order is affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1975, Jasper and Sheila Lowder, husband and wife, bought from Eules Carlton the land and building upon which his funeral home business operated, as well as the contents and equipment thereon. Approximately nine years later, Jasper and Sheila incorporated the business, creating Carlton-Lowder Funeral Home, Incorporated.

After forming the corporation, Jasper and Sheila did not convey the land upon which the funeral home was located to the corporation. The real estate upon which the funeral home was situated was owned by Jasper and Sheila, personally and in their individual names, and the funeral home building was never leased to or owned by the corporation. Jasper and Sheila never received any corporate compensation for the use of the land or building.

After their son Brian graduated from mortuary school, he was hired as a director and embalmer for the funeral home. Jasper and Sheila gave Brian two shares of corporate stock per year. After a period of years, Brian ultimately held sixteen shares of stock in the corporation, with Jasper and Sheila owning the remaining shares, totaling hundreds of shares. No one else owned stock in the corporation. Brian also served as vice president of the corporation, with Jasper as president and Sheila as secretary/treasurer.

In 1997, Jasper, Sheila and Brian executed a written Stock Purchase Agreement ("stock agreement"). The stock agreement provided that, if one shareholder wanted to sell or transfer his stock in the corporation, such shares of stock first had to be offered to the corporation. If the corporation did not purchase them, the shares had to be offered to the remaining shareholders. The stock agreement also provided that no shares of stock could be transferred by gift or otherwise without the written permission of the remaining shareholders because it was the shareholders' intention that all shares of stock would remain in the immediate family. Furthermore, the stock agreement provided that, if any of the shareholders divorced or died, their shares had to be surrendered to the corporation so that it could purchase those shares. If the corporation failed to purchase them, then the shares had to be offered to the remaining shareholders.

Years later Jasper and Sheila, as corporate officers, decided to sell corporate assets. They entered into an agreement for the purchase and sale of the corporation's assets ("assets sales agreement") with MNG, Incorporated, Michael McDonald, Brian New and Mark Garnett. Specifically, the corporation sold assets used in the business's operation, as well as the real estate and the "buildings and improvements located thereon," in exchange for $900,000.00 "plus other terms and conditions and payments" as set forth in the assets sales agreement. The assets sold included inventory, as well as equipment used by the business, the business's name, the telephone numbers used by the business, the funeral home's books and records, and the business's motor vehicles. The assets sales agreement further provided that the following assets were *not* being sold: "all accounts receivable owed to the Business; all cash on hand at the business; all bank accounts or other monies used in conjunction with the operation of the business; and [certain] photographs, mementos and personal property of" Jasper and Sheila that had been stored at the property.

In his complaint filed in the circuit court, Brian contended that Jasper and Sheila had misappropriated assets of the corporation by transferring "approximately $80,000.00 in corporate funds in 2001 to make improvements in their personal real estate"; by transferring "approximately $70,000.00 of corporate funds in 2003 to their own name for their personal use and benefit"; and by purchasing "personal vehicles, boats, and other non-business expenditures for the personal use and the benefit of themselves and their daughter." Brian further alleged that Jasper and Sheila's act of selling the corporate assets violated "the purpose, intent, and terms of" the Stock Purchase Agreement. Alternatively, Brian argued that the sale of the corporation's assets violated Jasper and Sheila's duties to the corporation and violated the good faith they owed, as the majority stockholders, to Brian.

After Jasper and Sheila answered Brian's complaint, Brian moved to amend his complaint. His motion was granted. Brian's amended complaint included claims that he raised in his initial complaint, and added a claim that Jasper and Sheila "made oral statements for a period of years (the entire time [Brian] worked for the funeral home) that [Brian] would have the first opportunity to purchase the funeral home if it was ever sold." Brian claimed they knew these statements were false and that Brian would rely on them, which Brian alleges he did to his detriment. Additionally, Brian claimed in his amended complaint that Jasper and Sheila wrongfully terminated his employment with the funeral home in retaliation against him after he threatened to report them to the Internal Revenue Service and the Kentucky Revenue Cabinet for tax evasion. Furthermore, Brian contended that an award of punitive damages was proper.

Jasper, Sheila, and the funeral home moved for summary judgment, and Brian opposed their motion. The circuit court granted the motion for summary judgment.

Brian now appeals, arguing that: (1) a party to a buy-sell agreement regarding stock cannot circumvent the agreement by selling all of the corporation's assets; (2) the circuit court improperly granted summary judgment when genuine issues of material fact existed concerning: (a) the duty of corporate officers claim; (b) the fraud claim; (c) the punitive damages claim; and (d) the wrongful termination claim.

II. STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id*. Further, "the movant must convince the court, by the evidence of record, of the nonexistence of an issue of material fact." *Id*. at 482.

III. ANALYSIS

A. CLAIM THAT SALE OF CORPORATE ASSETS WAS IN VIOLATION OF STOCK PURCHASE AGREEMENT

Brian first claims on appeal that a party to a buy-sell agreement regarding stock cannot circumvent the agreement by selling all of the corporation's assets. Specifically, Brian contends that the sale of all of the corporation's assets violated the stock purchase agreement because the intent of the stock purchase agreement was for "all shares of stock [to] remain in the immediate family." Brian cites no authority for this theory.

Brian acknowledged in his response to Jasper and Sheila's motion for summary judgment that the stock purchase agreement made no mention of the sale of assets. However, he mistakenly equates the sale of the corporation's assets with a sale of stock. The stock purchase agreement does not control the sale of the corporate assets.

By selling its assets, the corporation did not sell its stock; rather, compensation was received by the corporation in exchange for the assets it sold. This money was retained by the corporation and used to pay corporate debt. The remaining balance is in a corporate account. Brian did not dispute this assertion. Thus, the claim that the sale of the assets violated the stock purchase agreement lacks merit.

B. CLAIM THAT THE CIRCUIT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT

(1) THE DUTY OF CORPORATE OFFICERS CLAIM

Brian next asserts that the circuit court improperly granted summary judgment on his claim that Jasper and Sheila violated their duties as officers and directors of the corporation when they, in bad faith: sold the corporation's assets and misappropriated corporate assets for personal use. *See* KRS 271B.8-300; KRS 271B.8-420.

As for his claim that Jasper and Sheila violated their duties by selling the corporation's assets allegedly in bad faith, Brian has proffered no evidence to support this claim. In fact, Brian has not alleged, much less shown, that Jasper and Sheila sold the corporation's assets for less than what they were worth.

Additionally, Brian alleges that Jasper and Sheila violated their duties by misappropriating corporate assets for their personal use. "When the directors themselves, who must necessarily act for the corporation, mortgage or sell the property of the corporation to themselves or one of their members, a different rule obtains from that where the property is sold to a third person in good faith and for a valuable consideration." *People's State Bank v. Jacksonian Hotel Co.*, 261 Ky. 101, 87 S.W.2d 111, 117 (Ky. 1935) (internal quotation marks omitted).

During his deposition, Jasper admitted that, in 2001, he had used $80,000.00 of the corporation's assets to make improvements on the funeral home building; additions were made to the office and garage. Although the corporation operated out of this building, it did not own or lease it. Rather, the building was personally owned by Jasper and Sheila. Jasper and Sheila have not cited evidence showing that the money was paid back to the corporation at a later date. The building, with the improvements, was subsequently sold along with the corporate assets. Of the $900,000 purchase price, $497,500 was allotted for the property, land and buildings, which were personally owned by Jasper and Sheila. Because corporate money was used, but not repaid, to improve personal property, summary judgment was not proper on this claim.[1]

(2) THE FRAUD CLAIM

Brian next asserts that the circuit court erred in granting summary judgment on his fraud claim. In his fraud claim raised on appeal, Brian contends that Jasper and Sheila committed fraud by falsely telling him that he would have the first opportunity to buy the funeral home whenever they decided to sell it. He also alleges that the stock purchase agreement provides that it was the intent of the parties to pass the company on to him.

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[1] We note that in the circuit court, Brian alleged that an additional transfer of $70,000.00 in corporate funds was made by the defendants/appellees in 2003 for their own personal use. However, he has not pointed this Court to any evidence supporting this claim. Therefore, summary judgment was properly granted by the circuit court as to that portion of Brian's misappropriation of corporate funds claim.

To the extent that Brian asserts the stock purchase agreement reflected the parties' intent that the company would be passed on to him, his claim is misplaced. The stock purchase agreement provided that if a shareholder wished to sell his or her shares in the corporation, the corporation would first have the opportunity to purchase those shares. If the corporation did not purchase them, the remaining shareholders could do so. This stock purchase agreement, however, did not concern the sale of the corporation's assets, as occurred in this case. Therefore, Brian's claim that Jasper and Sheila committed fraud by allegedly violating the stock purchase agreement lacks merit because they did not violate that agreement when they sold the corporation's assets.

Brian also asserts that Jasper and Sheila committed fraud by falsely telling him that he would have the first opportunity to buy the funeral home if they decided to sell it. However, this claim concerns an alleged future oral promise by Jasper and Sheila. "It is a general rule that fraud must relate to a present or pre-existing fact and cannot ordinarily be predicated on representations or statements that involve mere matters of futurity or things to be done or performed in the future." *Brooks v. Williams*, 268 S.W.2d 650, 652 (Ky. 1954). Therefore, this claim lacks merit. Consequently, the circuit court did not err by granting summary judgment regarding Brian's fraud claim.

(3) THE PUNITIVE DAMAGES CLAIM

Brian next alleges that he is entitled to punitive damages in this case based on his fraud claims. However, because his fraud claims lack merit, as discussed previously, there is no basis for awarding punitive damages. *See* KRS 411.184(2). Additionally, to the extent that Brian contends that he is entitled to punitive damages due to the alleged breach of contract perpetrated by the defendants/appellees, KRS

411.184(4) prohibits such an award. Therefore, Brian's punitive damages claim lacks merit.

(4) THE WRONGFUL TERMINATION CLAIM

On appeal, Brian contends that he was wrongfully terminated. He acknowledges that typically, the doctrine of at-will employment applies in Kentucky. However, he alleges that the stock purchase agreement in this case created a more firm relationship than one between a company and an at-will employee. Regardless, Brian did not raise this argument in support of his wrongful termination claim in the circuit court. Therefore, we will not consider this argument for the first time on appeal. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) ("The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.").

Additionally, in the circuit court, Brian argued that he was wrongfully terminated in retaliation for his threats to report Jasper and Sheila to the Internal Revenue Service and the Kentucky Revenue Cabinet for tax evasion. However, he has not argued retaliation as a basis for his wrongful termination claim on appeal. Therefore, this part of Brian's wrongful termination claim is deemed waived on appeal. *See Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 815 (Ky. 2004).

Accordingly, the judgment of the Gallatin Circuit Court is vacated and remanded in part, regarding Brian's claim that the defendants/appellees misappropriated $80,000.00 of the corporation's money. Furthermore, the remainder of the Gallatin Circuit Court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Eric C. Deters
Independence, Kentucky

BRIEF FOR APPELLEE:

Ruth H. Baxter
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