18-P-1559 Appeals Court

MARK BUTTS & another[1] vs. ARNOLD E. FREEDMAN & others.[2]

No. 18-P-1559.

Suffolk. October 3, 2019. - January 16, 2020.

Present: Massing, Sacks, & Hand, JJ.

Contract, Damages. Damages, Breach of fiduciary duty. Fiduciary. Consumer Protection Act, Businessman's claim, Damages, Attorney's fees, Availability of remedy. Corporation, Close corporation, Corporate opportunity.

Civil action commenced in the Superior Court Department on July 24, 2015.

The case was heard by Kenneth W. Salinger, J.

Andrew C. Oatway (Benjamin D. Stevenson also present) for the plaintiffs.

Charles M. Sims, of Virginia (Michael Paris also present) for the defendants.

MASSING, J. This appeal arises from the deterioration of the business relationship between the two members of a closely

[1] Boston Equity Advisors, LLC.

[2] Oded Ben-Joseph and Outcome Capital, LLC.

held investment banking firm, the plaintiff Boston Equity Advisors, LLC (BEA). BEA and one of its members, plaintiff Mark Butts, brought an action against three defendants: BEA's other member, Arnold E. Freedman; an independent contractor working with the firm, Oded Ben-Joseph; and an investment banking firm, Outcome Capital, LLC (Outcome). After a bench trial, a judge of the business litigation session of the Superior Court entered judgment in favor of the defendants. We affirm.

Background.[3] Butts and Freedman cofounded BEA as equal members in 1999. Ben-Joseph began working with the firm as an independent contractor in 2010.[4] After various disagreements with Butts, mostly concerning Ben-Joseph's compensation, Freedman and Ben-Joseph decided to leave BEA. To this end, they began conversations with Outcome.[5] When Freedman and Ben-Joseph initially met with Outcome, Freedman raised the possibility of BEA and Outcome merging, as well as the possibility of Freedman

[3] The judge issued findings of fact and rulings of law from the bench. We accept a judge's findings of fact unless they are clearly erroneous. See Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 509-510 (1997); Aggregate Indus. -- Northeast Region, Inc. v. Hugo Key & Sons, Inc., 90 Mass. App. Ct. 146, 149 (2016).

[4] Ben-Joseph was never a member or employee of BEA, nor did he have a noncompete agreement with BEA.

[5] Outcome was called WWC Securities, LLC, when these conversations began. Its name was changed when Freedman and Ben-Joseph joined the firm in 2012. For convenience, we refer to it here exclusively as Outcome.

and Ben-Joseph joining Outcome on some other basis. Neither informed Butts of this initial meeting or other ensuing discussions, and they never invited Butts to join them.

After Freedman and Ben-Joseph joined Outcome, Butts and BEA filed this suit alleging an assortment of contract and business tort claims. The trial judge found in favor of the defendants on all counts. On appeal, Butts and BEA challenge the judge's rulings only on their breach of fiduciary duty claim against Freedman and on their G. L. c. 93A claim against all three defendants, including the denial of attorney's fees.

Discussion. 1. Breach of fiduciary duty claim against Freedman. Butts and BEA argue that Freedman breached his fiduciary duty owed to them by failing to disclose the negotiations with Outcome and by failing to share the opportunity for BEA to merge with, or for Butts to join, Outcome.[6] We review the judge's conclusions of law de novo. See Martin v. Simmons Props., LLC, 467 Mass. 1, 8 (2014); Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 510 (1997).

[6] At trial, Butts and BEA additionally argued that Freedman breached his fiduciary duty by usurping several other corporate opportunities, all involving potential clients or transactions. The judge, however, determined that Freedman (and Ben-Joseph) "did not bring any existing client relationships or pending or potential transactions with them to Outcome." On appeal, the plaintiffs focus only on the Outcome opportunity.

As a preliminary matter, we agree with the judge that Freedman, as a member of a closely held corporation, owed Butts and BEA a fiduciary duty. See Pointer v. Castellani, 455 Mass. 537, 549 (2009). It is also well settled that "fiduciaries may plan to compete with the entity to which they owe allegiance, provided that in the course of such arrangements they [do] not otherwise act in violation of their fiduciary duties" (quotation and citation omitted). Meehan v. Shaughnessy, 404 Mass. 419, 435 (1989). The determination whether Freedman otherwise acted in violation of his fiduciary duties rests on the interpretation of the "Other Activities" provision in § 4.09 of BEA's operating agreement, a provision that the plaintiffs characterize as "boilerplate."[7]

The "Other Activities" provision of the operating agreement is extremely broad. It allows members to pursue other business ventures and investment opportunities of any kind, including those that are the same as BEA's. The provision in its entirety states:

> "Other Activities. The Members, Managers and any of their Affiliates may engage in and possess interests in other business ventures and investment opportunities of every kind and description, independently or with others, including serving as directors, officers, stockholders, managers, members and general or limited partners of

[7] Butts and Freedman entered into the operating agreement upon forming BEA. The agreement did not include a noncompete provision, nor did the parties sign a separate noncompete agreement.

> corporations, partnerships or other LLCs with purposes similar to or the same as those of [BEA]. Neither [BEA], nor any other Member or Manager, shall have any rights in or to such ventures or opportunities, or the income or profits therefrom."

"[W]here the parties have defined in a contract the scope of their rights and duties in a particular area, good faith action in compliance with that agreement will not implicate a fiduciary duty." Merriam v. Demoulas Super Mkts., Inc., 464 Mass. 721, 727 (2013). See Fronk v. Fowler, 456 Mass. 317, 331-332 (2010), citing Donahue v. Rodd Electrotype Co. of New England, 367 Mass. 578, 598 n.24 (1975) ("stockholder duties to one another can be altered by provisions in a close corporation's articles of organization, the corporate bylaws, or a stockholder agreement"). The judge determined that the provision limited the scope of Freedman's fiduciary duty such that he could not be held liable for engaging in conduct permitted by the provision. Accordingly, the judge concluded that Freedman had no duty to disclose or share the opportunity of joining or merging with Outcome, a corporate opportunity that might belong to BEA absent the provision. We agree.

Butts and BEA assert that interpreting the provision so broadly permits members like Freedman to appropriate any opportunity that may arise, essentially nullifying the principles underlying the corporate opportunity doctrine. See Demoulas, 424 Mass. at 529-531. More specifically, they claim

that the judge committed a fundamental error in his understanding of the word "other" appearing in the phrase "other business ventures and investment opportunities." The plaintiffs contend that, as used in the provision, the word "limits the type of business ventures or opportunities which may be individually pursued to those which are different from or outside the business of BEA"; therefore, they reason, the provision did not permit Freedman to pursue the Outcome opportunity.

The plaintiffs' interpretation, however, ignores the plain language of the provision, which, read as a whole, specifies that members may pursue ventures and investment opportunities involving business entities "with purposes similar to or the same as" BEA's. See Starr v. Fordham, 420 Mass. 178, 190 (1995) ("the scope of a party's obligations cannot be delineated by isolating words and interpreting them as though they stood alone" [quotation and citation omitted]); Kingstown Corp. v. Black Cat Cranberry Corp., 65 Mass. App. Ct. 154, 158 (2005) (contract must be construed as whole "and not by special emphasis upon any one part" [citation omitted]). This expansive language absolved Freedman of any obligation to disclose and share a potential association with another investment banking firm whose business purpose was similar to or the same as BEA's. The judge did not err in his interpretation of the provision, or

in his determination that the BEA operating agreement allowed Freedman to pursue the Outcome opportunity. While we acknowledge the plaintiffs' concern that overly broad interpretations of such provisions may be inconsistent with the corporate opportunity doctrine, here the judge merely gave effect to the broad language of the parties' agreement.

2. Chapter 93A claim. The plaintiffs claimed that the defendants violated G. L. c. 93A, § 11, when Ben-Joseph, with Freedman's knowledge, brought a prospective client to Outcome before he and Freedman left BEA (but after Ben-Joseph had informed Butts of his intention to leave). The potential client opportunity involved Sirius Implantable Systems Limited (Sirius), a medical device developer. Sirius had sought to engage Ben-Joseph to help raise capital to support its development of a new implantable pacemaker. Neither Ben-Joseph nor Freedman told Butts about the Sirius opportunity. Because Outcome contractually engaged Sirius as a client without first informing Butts, the judge found that Ben-Joseph, Freedman, and Outcome violated Financial Industry Regulatory Authority (FINRA) rules governing the procedure for transitioning work from one broker to another. Ben-Joseph, Freedman, and Outcome obtained stock in Sirius as compensation for their work. The stock, however, ultimately proved to be worthless when Sirius later failed and declared bankruptcy.

The judge determined that although Freedman, Ben-Joseph, and Outcome had engaged in conduct constituting a violation of c. 93A by unlawfully failing to disclose the Sirius engagement, Butts and BEA failed to prove that they had suffered any adverse consequences or loss as a result of the defendants' misconduct. See Hershenow v. Enterprise Rent-A-Car Co. of Boston, 445 Mass. 790, 791 (2006) (proof of injury, whether economic or noneconomic, "is an essential predicate for recovery under our consumer protection statute"); Frullo v. Landenberger, 61 Mass. App. Ct. 814, 823 (2004) (absence of essential element of loss of money or property "fatal" to G. L. c. 93A, § 11, claim, even in light of evidence of unfair or deceptive act). Accordingly, the judge concluded that the plaintiffs were not entitled to relief under c. 93A; he also denied the plaintiffs' claim for attorney's fees.

Butts and BEA challenge the judge's conclusion that, because the Sirius stock ended up being worthless, they suffered no loss. The plaintiffs argue that the judge improperly focused on the value of the stock at a specific point in time rather than recognizing that, had they also received stock, they could have suffered a financial loss either by not being in a position to sell the stock when it had value, or by not being able to use the loss as an advantageous tax deduction.

The plaintiffs' argument presumes a key fact that the judge did not find and the record on appeal does not support. The record before us is devoid of evidence that the Sirius stock received by Freedman, Ben-Joseph, and Outcome ever had any value, either when issued or at any other time prior to the company's bankruptcy. Nor does the record demonstrate how any associated capital loss could be used for tax purposes.[8] The plaintiffs have not shown that the judge's findings were clearly erroneous.[9]

The judge also properly denied the plaintiffs' request for attorney's fees pursuant to c. 93A. The plaintiffs are not entitled to attorney's fees solely on the ground that the defendants engaged in an unfair or deceptive act. In the absence of evidence of harm or loss, a plaintiff suing under § 11 cannot recover attorney's fees "for merely identifying an

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[8] The record appendix does not include any of the trial transcript except for the judge's findings, which were dictated from the bench, and the section of the plaintiffs' brief arguing that they suffered a loss does not include any citations to the record where evidence of loss might be found. See Cameron v. Carelli, 39 Mass. App. Ct. 81, 83-85 (1995) (appellant has obligation to include in appendix parts of transcript necessary for review of issues raised on appeal, and argument section of appellant's brief must contain citations to part of record relied upon).

[9] Given our disposition of this claim, we need not address the defendants' argument that this case involves only an internal business dispute, to which c. 93A does not apply. See Beninati v. Borghi, 90 Mass. App. Ct. 556, 566-567 (2016).

unfair or deceptive act or practice." Jet Line Servs., Inc. v. American Employers Ins. Co., 404 Mass. 706, 718 (1989).

Judgment affirmed.