STATE OF MICHIGAN

COURT OF APPEALS

PATRICK SCHERER,

Plaintiff-Appellant,

v

DAVID BUHA,

Defendant-Appellee.

UNPUBLISHED
May 24, 2002

No. 230975
Oakland Circuit Court
LC No. 99-017578-CZ

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's judgment of no cause for action in this case involving defendant's alleged violations of the Michigan Business Corporation Act (MBCA), MCL 450.1101 *et seq*. We affirm.

On appeal, plaintiff first argues that the trial court erred in denying his motion for summary disposition pursuant to MCR 2.116(C)(10). We review de novo a trial court's decision regarding a motion for summary disposition to determine if the moving party was entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion brought pursuant to MCR 2.116(C)(10), the court considers the "affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Smith, supra* at 454. Summary disposition is properly granted under MCR 2.116(C)(10) if a review of the record evidence in the light most favorable to the nonmoving party does not yield a genuine issue with respect to any material fact. *Smith, supra* at 454.

In support of his motion for summary disposition, plaintiff maintained that genuine issues of material fact did not exist concerning whether defendant violated the pertinent provisions of the MBCA. Plaintiff further argued that the record evidence showed that defendant, the sole shareholder and director of Premier Sales Associates, Inc., consented to and accepted a distribution in contemplation of dissolution of the corporation in spite of defendant's knowledge that plaintiff 's case against Premier Sales was pending in the 47th District Court. In response to plaintiff 's motion, defendant argued that the voluntary dismissal of defendant in his individual capacity with prejudice from the district court case barred plaintiff's claim in this case on the basis of res judicata. Specifically, defendant argued that had plaintiff used reasonable diligence he could have discovered the MBCA claim and raised it in the prior proceeding before defendant was dismissed as a party. In reply, plaintiff argued that he was unable to discover the potential

claim given that the alleged improper disbursement occurred after defendant was dismissed from the case. Plaintiff also argued that the doctrine of res judicata was not applicable because the issues and facts in the two cases were not identical.

We are satisfied that the trial court's refusal to grant summary disposition in favor of plaintiff was proper where the trial court correctly found that genuine issues of material fact existed with regard to (1) when the alleged illegal distribution occurred and, (2) whether plaintiff could have discovered the distribution before dismissing defendant from the district court case. The record evidence before the court on the summary disposition motion revealed that defendant was voluntarily dismissed from the prior action on October 16, 1998. The evidence also demonstrated that the disbursement from Premier Sales to defendant was made sometime after the corporation ceased operations on September 30, 1998. Because it was unclear from the existing record when the alleged improper distribution occurred, we agree with the trial court that genuine issues of fact sufficient to warrant trial existed.

Plaintiff next argues that the judgment of no cause of action was improperly entered where defendant's actions clearly violated MCL 450.1551 and MCL 450.1855a. This Court reviews for clear error a trial court's findings of fact in a bench trial. MCR 2.613(C); *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed." *Id.* In applying this principle, we defer to the trial court's superior position to observe the credibility of the witnesses who testify during the bench trial. MCR 2.613(C); *Attorney General ex rel Director of Dep't of Natural Resources v ACME Disposal Co*, 189 Mich App 722, 724; 473 NW2d 824 (1991). However, this Court reviews de novo a trial court's conclusions of law in a bench trial. *Id.*

After hearing both plaintiff's and defendant's trial testimony, the trial court issued a written opinion and judgment finding no cause of action. In the written judgment, the trial court noted that after observing each witness testify, defendant was simply a more credible witness. During his trial testimony, defendant indicated that he believed that the voluntary dismissal in October 1998 exonerated him from any liability arising from plaintiff's claim, and ended his complete involvement in the case. A review of the trial court's written ruling reflects its determination that defendant's subjective expectation that he was "out of the case" in his individual capacity rendered him not liable for his actions as director of the corporation. Moreover, the trial court also noted that it accepted defendant's contention that he acted in good faith, believing that once he was voluntarily dismissed with prejudice from the prior case in district court, it was not improper for him to disburse the corporation's funds. During trial defendant further testified that he had intended to dissolve the corporation as early as January 1998, and that his decision to effect the disbursement had absolutely nothing to do with plaintiff's pending claim in district court.

At issue in the present case is whether the trial court correctly determined that defendant's actions did not contravene the pertinent provisions of the MBCA. As relevant to the present appeal, MCL 450.1551 provides in pertinent part:

> (1) Directors who vote for, or concur in, any of the following corporate actions are jointly and severally liable to the corporation for the benefit of its creditors or shareholders, to the extent of any legally recoverable injury suffered by its creditors or shareholders as a result of the action but not to exceed the difference

between the amount paid or distributed and the amount that lawfully could have been paid or distributed:

* * *

(b) Distribution to shareholders during or after dissolution of the corporation without paying or providing for debts, obligations, and liabilities of the corporation as required by [MCL 450.1855a].

(2) A director is not liable under this section if he or she has complied with [MCL 450.1541a.]

* * *

(3) A shareholder who accepts or receives a share dividend or distribution with knowledge of fact indicating it is contrary to this act, or any restriction in the articles of incorporation is liable to the corporation for the amount accepted or received in excess of the shareholder's share of the amount that lawfully could have been distributed.

Further, MCL 450.1855a provides in pertinent part:

> Before making a distribution of assets to shareholders in dissolution, a corporation shall pay or make provision for its debts, obligations, and liabilities. Compliance with this section requires that, to the extent that a reasonable estimate is possible, provision be made for those debts, obligations, and liabilities anticipated to arise after the effective date of dissolution.

As plaintiff notes in his brief on appeal, both this Court and our Supreme Court have acknowledged the validity of a creditor's claim against the director of a corporation where steps were not taken to provide for the anticipated claims of creditors following dissolution. See *Christner v Anderson, Nietzke & Co, PC*, 433 Mich 1, 8-9; 444 NW2d 779 (1989); *Muskegon v Amec, Inc*, 62 Mich App 644, 646-647; 233 NW2d 688 (1975). However, the trial court in the instant case found, on the basis of the evidence offered at trial, that plaintiff had not proven a violation of the MBCA. Although we do not embrace the trial court's specific reasoning in the instant case, we affirm its judgment for reasons other than those specifically articulated. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000).

Chapter 5 of the MBCA deals with the duties and responsibilities of directors and officers of corporations. Specifically, MCL 450.1541a(1) requires the director of a corporation to "discharge his or her duties as a director or officer . . . (a) [i]n good faith, (b) [w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances, and (c) [i]n a manner he or she reasonably believes to be in the best interests of the corporation." See *Estes v Idea Engineering & Fabricating Co*, 245 Mich App 328, 341-342; 631 NW2d 89, vacated 245 Mich App 801 (2001), but reasoning adopted by conflict panel ___ Mich App ___; ___ NW2d ___ (Docket No. 211845, issued 3/5/02); *Baks v Maroun*, 227 Mich App 472, 478-479; 576 NW2d 413 (1998), abrogated on other grounds *Estes v Idea Engineering & Fabricating, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 211845, issued 3/5/02). As

noted above, MCL 450.1551(1)(b) provides that a director is liable to the corporation for the benefit of its creditors where a distribution is made to shareholders before or during the dissolution of the corporation when the director does not make provisions to "pay[ ] or provid[e] for debts, obligations, and liabilities of the corporation . . . ." MCL 450.1855a further specifies that a corporation make provision for "debts, obligations, and liabilities anticipated to arise after the effective date of dissolution."

However, particularly noteworthy in the present case is the language of MCL 450.1551(2), which provides that "[a] director is not liable under this section if he or she has complied with [MCL 450.1541a]." MCL 450.1541a provides in pertinent part:

> (1) A director or officer shall discharge his or her duties as a director or officer . . . in the following manner:
>
> (a) In good faith
>
> (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.[1]
>
> (c) In a manner he or she reasonably believes to be in the best interests of the corporation.
>
> (2) In discharging his or her duties, a director or officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by any of the following:
>
> * * *
>
> (b) *Legal counsel, public accountants, engineers, or other persons as to matters the director or officer reasonably believes are within the person's professional or expert competence*. [Emphasis supplied.]

During the June 26, 2000, trial, defendant testified that although he was aware of plaintiff's pending claim against the corporation in district court, he issued a check to himself as the corporation's sole shareholder on October 7, 1998, in the amount of $96,478.36. A judgment in the amount of $24,762.84 against the corporation was entered in the district court on November 24, 1998. Defendant further testified that he was not present in court when the voluntary order dismissing him as a party with prejudice was entered in the district court, but that he received the information confirming this fact from his attorney. Defendant recounted that his attorney explained the significance of the order to him, and that his resulting subjective understanding was that "[he] was out of the case individually" and was "[t]otally out of the case." Defendant also testified that the corporation closed its doors in May or April of 1996, and from that point he began to run the corporation out of his home. According to defendant, the decision to close the business was reached in January 1998 because "commissions [were not]

[1] "In the absence of fraud, directors are only liable for ordinary negligence." *Dykema v Muskegon Piston Ring Co*, 348 Mich 129, 136; 82 NW2d 467 (1957).

coming in" and therefore had nothing to do with plaintiff's pending lawsuit. In response to his attorney's queries regarding why he decided to withdraw the corporation's assets and make a distribution to himself, defendant testified in the following manner:

> That money had been in the account for ages. My accountant, way, way, back in the first couple of years of our existence, he had a certain amount of you know, retained earnings.
>
> [The accountant] said you can keep a certain amount without it being taxed so we built up a certain cushion and that stayed with the Corporation from then on as a cushion in case [the corporation] had cash flow problems, so it was always there in case you needed it and [the accountant] said – and I said, well, you know, when can I take this out of here, and [the accountant] says well, you want to wait until you close the Corporation because that's when you take it out because then it's a capital gain. If you take it out before that, it's regular income.

Defendant further indicated that his decision to withdraw the funds was the result of his accountant's advice that it would provide him with a tax advantage.

In *Reed v Burton*, 344 Mich 126, 130; 73 NW2d 333 (1955), our Supreme Court recognized that "[i]t is with reluctance, and only upon a clear showing of actual malice, that [the Court] move[s] in on the affairs of a corporate body."

> "It is not the function of the court to manage a corporation nor to substitute its own judgment for that of the officers thereof. It is only when the officers are guilty of wilful abuse of their discretionary powers or of bad faith or of neglect of duty or of perversion of the purpose of the corporation or when fraud or breach of trust are involved that the court will interfere." [*Id.* at 131, quoting *Dodge v Ford Motor Co*, 204 Mich 459 (3 ALR 413).]
>
> See also *Ayres v Hadaway*, 303 Mich 589, 594; 6 NW2d 905 (1942).

Under the circumstances of this case, where the record demonstrates that the trial court impliedly found that defendant acted in good faith in effecting the disbursement in reliance on his attorney and accountant's advice, see *Camden v Kaufman*, 240 Mich App 389, 399-400; 613 NW2d 335 (2000), we are not persuaded that the trial court erred in entering a judgment of no cause of action. MCL 450.1551(2); 450.1541a(1)(a). Under Michigan law, "[i]n fulfilling their duty to inform themselves officers and directors are entitled to rely on the advice of financial and legal advisors provided they do not do so blindly." *Detwiler v Offenbecher*, 728 F Supp 103, 169 (SDNY, 1989) (citation omitted). In the present appeal, a close review of the bench trial transcript, as well as the trial court's written judgment in this matter, reflects the trial court's implied finding that defendant acted in good faith and in reliance on the opinion of his professional staff in making the disbursement. Similarly, the trial court also impliedly found that defendant, the sole shareholder in the corporation, did not "accept the share . . . distribution with

knowledge of facts indicating" such action was contrary to the MBCA. See MCL 450.1551(3). Accordingly, we are satisfied that the judgment of no cause of action was properly entered.[2]

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Patrick M. Meter

[2] Given our resolution of this issue, we need not address plaintiff's additional issue on appeal challenging the trial court's alternate determination that res judicata barred plaintiff's claim.