STATE OF MICHIGAN

COURT OF APPEALS

H. JOHN SCHIMKE,

Plaintiff/Counter-Defendant-Appellee,

v

LIQUID DUSTLAYER, INC., WENDY STEEL, Trustee of the RICHARD C. RADEMAKER TRUST, and TINA L. RADEMAKER,

Defendants/Counter-Plaintiffs-Appellants.

UNPUBLISHED
September 24, 2009

No. 282421
Manistee Circuit Court
LC No. 01-010606-CK

Before: Meter, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Defendants Liquid Dustlayer, Inc., Wendy Steel, as Trustee of the Richard Rademaker Trust,[1] and Tina L. Rademaker (Tina) appeal as of right from a judgment, following a bench trial, awarding plaintiff $769,600 for the value of his minority interest in Liquid Dustlayer. We affirm.

Plaintiff, a minority shareholder of Liquid Dustlayer, a closely held corporation, brought this action for willfully unfair and oppressive conduct, contrary to § 489 of the Michigan Business Corporation Act, MCL 450.1489, in connection with a proposed plan by Richard Rademaker (Rademaker), the sole director of Liquid Dustlayer, to have Liquid Dustlayer redeem his stock on terms not made available to plaintiff.

I. Pretrial Motion for Summary Disposition and Injunction

Defendants first argue that the trial court erred in denying their motion for summary disposition and in enjoining the proposed redemption of Rademaker's shares. We disagree.

[1] Richard Rademaker was originally named as a defendant, but died during the pendency of this action. The trust was thereafter substituted in his place.

A. Summary Disposition

A trial court's decision on a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion brought under MCR 2.116(C)(10), a court must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). A question of fact exists when reasonable minds could differ with regard to the conclusions to be drawn from the evidence. See *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992); see also *Quinto*, *supra* at 367, 371-372. Questions of statutory interpretation are also reviewed de novo. *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996).

At all relevant times, § 489 provided:

> (1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:
>
> (a) The dissolution and liquidation of the assets and business of the corporation.
>
> (b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.
>
> (c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.
>
> (d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.
>
> (e) The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.
>
> (f) An award of damages to the corporation or a shareholder. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.

> (2) No action under this section shall be brought by a shareholder whose shares are listed on a national securities exchange or regularly traded in a market maintained by 1 or more members of a national or affiliated securities association.
>
> (3) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

Although there are four published decisions addressing this statute, *Franchino v Franchino*, 263 Mich App 172; 687 NW2d 620 (2004), *Estes v Idea Engineering & Fabricating, Inc*, 250 Mich App 270; 649 NW2d 84 (2002) (*Estes II*), *Estes v Idea Engineering & Fabricating, Inc*, 245 Mich App 328, 338-346; 631 NW2d 89 (2001) (*Estes I*), vacated in part 245 Mich App 801 (2001), and *Baks v Moroun*, 227 Mich App 472; 576 NW2d 413 (1998), overruled in part by *Estes II*, only *Franchino* and *Estes II* remain good law with regard to § 489.

In *Estes II*, *supra* at 271-272, a special panel of this Court was convened under MCR 7.215(J)[2] to resolve a conflict between *Estes I* and *Baks* with respect to whether § 489 creates a cause of action. This Court resolved the conflict in favor of *Estes I* and against *Baks* by holding that § 489 creates a cause of action, rather than simply being a venue provision. *Estes II*, *supra* at 278-279. In *Franchino*, *supra* at 173-174, this Court held that § 489 only protects a shareholder's interest *as a shareholder*, not as a member of a board of directors or as an employee of a corporation.[3]

Defendants argue that plaintiff failed to demonstrate that there were questions of material fact for trial and, therefore, the trial court should have granted defendants' motion for summary disposition. We note, however, that in his response to defendants' motion, plaintiff did not claim that there existed issues of material fact for trial, but rather argued that he, not defendants, was entitled to judgment as a matter of law. Defendants now argue that they were entitled to judgment as a matter of law for various reasons. We disagree.

Defendants argue that plaintiff failed to establish a violation of § 489 because he failed to show a *pattern* of "willfully unfair and oppressive conduct." However, § 489(3) defines "willfully unfair and oppressive conduct" as "a continuing course of conduct *or* a significant action *or* series of actions that substantially interferes with the interests of the shareholder as a shareholder" (emphasis added). Thus, "willfully unfair and oppressive conduct" may be

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[2] The rule applicable in *Estes II* was at that time found in MCR 7.215(I).

[3] Section 489(3) was amended by 2006 PA 68, effective March 20, 2006, to add that "[w]illfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder." Thus, it appears that this portion of *Franchino* has been legislatively overruled.

established by proof of *either* (1) a continuing course of conduct, (2) *a significant action*, or (3) a series of actions. Accordingly, a single significant action that substantially interferes with a shareholder's interests as a shareholder is sufficient to support a cause of action under § 489.

Defendants also argue that they were entitled to summary disposition because the proposed redemption never took place. However, § 489 does not require that an act be completed before a court may intervene. Indeed, § 489(1)(c) allows a court to issue an "injunction against a resolution or other act of the corporation." Similarly, § 489(1)(d) allows a court to "prohibit[] . . . an act of the corporation or of shareholders, directors, officers, or other persons party to the action." Therefore, the fact that the contemplated redemption had not yet occurred did not entitle defendants to judgment as a matter of law.

Defendants also argue that plaintiff failed to show that the proposed redemption would diminish the value of his stock. However, § 489 does not require a showing that oppressive conduct diminished the value of the shareholder's stock. Rather, § 489(3) requires a showing that the misconduct "substantially interferes with the interests of the shareholder as a shareholder." In this case, the plan to redeem Rademaker's stock did not include plaintiff. To the extent that defendants were willing to consider redeeming plaintiff's stock, it was at a much lower price. This discrepancy affected the value of plaintiff's shareholder interest in Liquid Dustlayer and was sufficiently indicative of a substantial interference with plaintiff's rights as a shareholder.

For these reasons, the trial court did not err in denying defendants' motion for summary disposition.

B. Temporary Restraining Order (TRO)

Defendants argue that the trial court erred in sua sponte enjoining the proposed stock redemption, without a showing of imminent or irreparable harm.

MCR 3.310(B)(1)(a) requires a showing of immediate and irreparable harm before a TRO may be issued without advance notice to the other party. In this case, the trial court sua sponte issued a TRO, without prior notice to defendants and without discussing the requirements of MCR 3.310(B)(1)(a). However,

> an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice. [MCR 2.613(A).]

At trial, Rademaker testified that he had voluntarily refrained from implementing the redemption pending the outcome of this lawsuit. He also took the position that the redemption was merely a hope or a dream that had not been finalized, not a real plan. Once the trial court decided the matter on the merits and ascertained the value of plaintiff's stock, it lifted the injunction and allowed Liquid Dustlayer to redeem Rademaker's shares on the same terms as plaintiff's. Under the circumstances, any error in issuing the TRO was harmless. Failure to grant appellate relief would not be inconsistent with substantial justice.

II. Finding of Willful and Oppressive Conduct

Defendants argue that the trial court erred in concluding that the proposed redemption plan was sufficient to establish willful and oppressive conduct under § 489. We disagree.

A trial court's findings of fact at a bench trial are reviewed for clear error. *Sands Appliance Service, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). Regard is given to the trial court's special opportunity to evaluate the credibility of witnesses who appeared before it. See *Morris v Clawson Tank Co*, 459 Mich 256, 271; 587 NW2d 253 (1998). A finding is clearly erroneous when, although there is evidence to support it, the appellate court is left with a definite and firm conviction that a mistake has been made. *Arco Inds Corp v American Motorists' Ins Co*, 448 Mich 395, 410; 531 NW2d 168 (1995), overruled in part on other grounds *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 116-117 n 8; 595 NW2d 832 (1999). Questions of law are reviewed de novo. See *Sands*, *supra* at 238.

Defendants argue that the proposed redemption plan was merely an inchoate dream and, therefore, was not actionable under § 489. We disagree. The evidence presented at trial showed that Rademaker repeatedly indicated that he wanted Liquid Dustlayer to redeem his stock and that he was not willing to redeem plaintiff's shares immediately, or at the same price. Even after transferring some of his stock to his daughter Tina, Rademaker controlled a majority of the shares. Rademaker had his attorney draft closing documents for the company-financed redemption of his remaining stock, at $15,000 a share. Rademaker also proposed scheduling a shareholders' meeting on the issue, but stated that the meeting could be held on the same day as the closing, thus suggesting that whatever happened at the meeting was unlikely to affect Rademaker's plans. In light of the evidence on the entire record, the trial court did not clearly err in finding that Rademaker had a well-formed imminent plan to cause Liquid Dustlayer to redeem his remaining shares of stock, but not plaintiff's shares, for $15,000 a share. As discussed previously, §§ 489(1)(c) and (d) contemplate that oppressive conduct that has not yet been completed is actionable under the statute.

Defendants argue that the redemption plan was mere speculation and could not support an award of damages or the trial court's decision to interfere with the officers' discretion. However, § 489 contemplates that in a closely held corporation, directors may sometimes exercise their discretion in a willful and oppressive manner, to the disadvantage of minority shareholders. As indicated, § 489 allows a court to intervene before an action is finalized. Further, § 489(1)(e) specifically authorizes a court to order a corporation to purchase a plaintiff's shares of stock.

Defendants next observe that MCL 450.1261(i) and (m) authorize a corporation to buy and sell shares, but we note that plaintiff here never claimed that the proposed redemption plan was ultra vires.

Defendants also argue that plaintiff failed to prove a continuing pattern of oppressive conduct, but, as explained previously, a single "significant action" is sufficient to show willful and oppressive conduct under § 489(3).

Defendants argue that a violation of § 489 was not established because the evidence showed that plaintiff's retirement interests were being considered. They contend that Rademaker

did not intend to divert so much money that he would hurt Liquid Dustlayer, and thereby his daughter or plaintiff, and that the proposed price of $15,000 a share was simply a "talking point." They also assert that Rademaker intended to obtain an appraisal of Liquid Dustlayer and that no witness analyzed the proposed terms or the effect of the inchoate redemption plan. Thus, defendants argue, plaintiff failed to prove that he had a "right" to unlock the value of his stock or that he would have been hurt if Liquid Dustlayer redeemed Rademaker's stock.

As previously explained, the evidence at trial showed that the proposed redemption was imminent. While defendants claim that plaintiff's retirement interests would be protected, the evidence showed that Rademaker offered plaintiff approximately one third of what Rademaker was demanding for his shares, and Rademaker had voting control of Liquid Dustlayer. In the meantime, Rademaker and Tina remained steadfast in refusing to pay dividends, despite Liquid Dustlayer's substantial cash reserves, essentially preventing plaintiff from receiving any benefit whatsoever from his nearly one-third ownership of Liquid Dustlayer. The trial court did not clearly err in finding that defendants engaged in "willfully unfair and oppressive conduct," entitling plaintiff to relief under § 489.

III. Remedy of Redemption

Defendants next argue that the trial court erred in ordering Liquid Dustlayer to redeem plaintiff's stock. We again disagree.

"An inquiry into the nature, scope, and elements of a remedy is a question of law that is reviewed de novo." *Auto-Owners Ins Co v Amoco Production Co*, 468 Mich 53, 57; 658 NW2d 460 (2003). However, a trial court's choice among available remedies is reviewed for an abuse of discretion. See, generally, *Rasheed v Chrysler Corp*, 445 Mich 109, 122; 517 NW2d 19 (1994).

Section 489(1) provides that "[i]f the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following . . . ." Thus, § 489 grants a court broad discretion to fashion a remedy it "considers appropriate."

In *Estes II*, *supra* at 280, this Court recognized that in a closely held corporation, such as this one, "a shareholder . . . is unable to escape an oppressive situation by dispensing of his shares of ownership in the public arena" (internal citation, quotation marks, and emphasis omitted). The Court also recognized that "the relationship among those in control of a closely held corporation requires a higher standard of fiduciary responsibility, a standard more akin to partnership law." *Id*. at 281 (internal citation and quotation marks omitted). Accordingly, § 489(1)(e) specifically authorizes a court to order the purchase of a plaintiff's shares. Section 489(1)(a) also allows a court to order "[t]he dissolution and liquidation of the assets and business of the corporation."

In the present case, the continuing injunction prevented Liquid Dustlayer from redeeming Rademaker's shares. However, the evidence showed that Rademaker continued drawing a salary from Liquid Dustlayer, as well as substantial bonuses. Tina was similarly paid a generous salary and bonuses. Liquid Dustlayer had never paid dividends to its shareholders, and Rademaker and Tina opposed the idea of doing so. Plaintiff held nearly a one-third interest in Liquid Dustlayer,

but received no dividends (and no salary), and he had no voting influence. Thus, Rademaker and Tina continued receiving a benefit from their stock ownership, while plaintiff received nothing. Extending the injunction, without ordering the purchase of plaintiff's stock, would merely have perpetuated this inequitable status quo. Under the circumstances, the trial court did not abuse its discretion in ordering Liquid Dustlayer to redeem plaintiff's stock.

IV. Valuation of Plaintiff's Stock

Defendants next argue that the trial court erred by failing to discount the value of plaintiff's minority shares. We disagree.

An award of damages following an evidentiary hearing is reviewed for clear error. *Woodman v Miesel Sysco Food Service Co*, 254 Mich App 159, 190; 657 NW2d 122 (2002); *Jansen v Jansen*, 205 Mich App 169, 170-171; 517 NW2d 275 (1994). "A trial court has great latitude in determining the value of stock in closely held corporations," and no clear error will be found where the court's valuation is "within the range established by the proofs." *Id*. at 171.

Section 489(1)(e) authorizes a court to order "[t]he purchase at *fair value* of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts" (emphasis added). The trial court's order for the parties to obtain a normalized valuation of plaintiff's stock must be viewed in the context of the statute. Defendants received the report of David Richards, a certified business evaluator, in January 2007, and failed to produce any contrary evidence at the valuation hearing.

As defendants observe, MCL 450.1761(d) states that

> "[f]air value," with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.

Michigan has not adopted the requirement that fair value be ascertained without a discount for lack of marketability or minority status. Conversely, the definition contained in § 761 does not *require* a court to discount the value of minority shares. The trial court correctly recognized this principle.

In the present case, Rademaker owned 37.78 percent of Liquid Dustlayer, Tina owned 33.33 percent of Liquid Dustlayer, and plaintiff owned 28.89 percent. Thus, the parties held similar ownership interests.[4] Richards testified that "the ownership percentages were so close together that I just – a huge discount . . . would not be appropriate." Richards later testified that it was appropriate to take into account *no* discount in this case. Under the circumstances, the

[4] As noted by the trial court, during his employment, plaintiff contributed greatly to the success and profitability of Liquid Dustlayer.

trial court did not err in declining to discount the value of plaintiff's shares; its decision was supported by the proofs.

V. Interest

Defendants lastly argue that the trial court erred in awarding plaintiff prejudgment interest on the purchase price of his stock.

Generally, a decision whether to award prejudgment interest is reviewed de novo. *Griswold Properties, LLC v Lexington Ins Co*, 275 Mich App 543, 569; 740 NW2d 659 (2007), superceded in part on other grounds 276 Mich App 551 (2007). However, "[t]his Court reviews an award of interest in equity for an abuse of discretion." *Olson v Olson*, 273 Mich App 347, 349; 729 NW2d 908 (2006).

Under MCL 600.6013(8), a plaintiff is entitled to prejudgment interest accruing from the date a complaint is filed through the date the judgment is satisfied. In this case, however, the trial court did not award interest from the filing of the complaint, nor did it cite § 6013 as authority for its award of interest. Further, an order directing the purchase of minority stock is an equitable remedy, not a money judgment. See, generally, *Olson*, *supra* at 354, n 6; see also *Moore v Carney*, 84 Mich App 399, 404-406; 269 NW2d 614 (1978). Therefore, § 6013 does not apply.

However, an award of interest on an equitable remedy "may be appropriate pursuant to the trial court's discretion under its equitable powers." *Olson*, *supra* at 354. "An equitable award of interest . . . is not intended to serve the purpose of compensating a party for the lost use of funds." *Id*. at 354-355 (internal citation and quotation marks omitted). Rather, it "prevents the delinquent party from realizing a windfall and assures prompt compliance with court orders." *Id*. at 355 (internal citation and quotation marks omitted); see also *In re Forfeiture of $176,598*, 465 Mich 382, 388 n 12; 633 NW2d 367 (2001).

In the present case, the evidentiary hearing to determine damages was held in July 2007, 18 months after the case was initially decided, and the judgment was not entered until November 20, 2007. In the meantime, defendants continued to operate Liquid Dustlayer and had full use of its assets, while plaintiff received no dividends or other benefit from his ownership interest. If equitable interest had not been ordered, defendants would have received a windfall from the delay. Therefore, the trial court did not abuse its discretion in ordering defendants to pay equitable interest on the judgment.

Affirmed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Jane M. Beckering