COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1556 **Cir. Ct. No. 2001CV165**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

JOHN L. SENTY,

PLAINTIFF-APPELLANT,

V.

JAMES A. SENTY AND CONSOLIDATED MIDWEST, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Trempealeau County: ROBERT W. WING, Judge. *Reversed and cause remanded for further proceedings*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. John Senty appeals a summary judgment that dismissed his complaint against his brother, James, and Consolidated Midwest, Inc. (CMI). John argues the trial court erroneously shifted the evidentiary burden

for summary judgment and erroneously considered potential remedies. We conclude genuine issues of material fact exist precluding summary judgment. Accordingly, we reverse the judgment and remand the case for further proceedings.

Background

¶2 John and James are both sophisticated businessmen. John has a business degree, has been a bank director and officer, and at one time was president of Northern Investment Company. He is also licensed to sell registered securities, real estate, and insurance. James grew up working in the family's propane business, Midwest Bottle Gas, becoming its general manager in 1960. James also served as president of the National Propane Gas Association and chaired the State of Wisconsin Investment Board.

¶3 In 1985, James and John had the opportunity to purchase 70.1% of the Midwest Bottle stock from their parents and sister. James and John created CMI as a holding company, and CMI acquired the Midwest Bottle stock. At no time, however, did John invest any of his own money, including during the stock purchase. John holds 42% of CMI's voting stock. James owns approximately 55.5%.

¶4 According to documents filed with the Securities and Exchange Commission, CMI is organized under WIS. STAT. ch. 180 (2001-02). Chapter 180 corporations cannot be partnerships. CMI's articles of incorporation state it will continue in perpetuity. A 1985 organizational plan says there is no plan to liquidate or sell CMI except in the ordinary course of business.

¶5 CMI flourished and expanded. In 2000, James began seeking a purchaser for CMI's retail propane assets and entered into negotiations with Star Gas Propane. Ultimately, the transaction was approved with a $29 million purchase price for the assets, a $750,000 payment to John, a $1.825 million payment to James, and a payment to James' son Paul.

¶6 John's complaint arises from a series of agreements he claims he had with James regarding how to run CMI and its eventual sale. James, of course, challenges John's recollections. John also takes issue with a series of events concurrent to the Star Gas transaction that John claims were designed to freeze him out of or alienate him from CMI.

¶7 According to John, when he and James founded CMI in 1985, they agreed to run it as a partnership and build up the company for a few years before selling it and dividing the proceeds. In the mid-1990s, John deferred to James's determination that it was an inopportune time to sell the company.

¶8 From 1988 to 2001, John and James were the only members of the board of directors and never deadlocked on anything. James had day-to-day control of the corporation and John performed whatever tasks James assigned him. In 1997, when John turned sixty-five, James purportedly suggested he retire and collect social security. John rejected this notion, citing an inability to subsist on social security payments. John subsequently stopped receiving assignments from James.

¶9 When James was seeking a buyer for the propane assets, Star Gas initially offered approximately $25 million. The offer was sent in October 2000. On November 13, 2000, Star Gas sent a letter of intent to purchase the propane assets for $32 million plus a $500,000 consulting agreement payment to James.

According to John, James informed him of the October offer on November 18, but James never mentioned the November 13 offer.

¶10 On November 22, Star Gas sent a new letter of intent to purchase the propane assets for $29 million. The new agreement also included the $500,000 consulting payment as well as a $3 million goodwill and noncompete payment to James. Allegedly without consulting John, James executed the November 22 offer, sometime prior to December 15. When James and John spoke on December 20, there was no mention of either November offer, but James agreed to call a special shareholder meeting on January 2, 2001.

¶11 John claims that sometime in November or December 2000, James told him that the Star Gas transaction would allow John to receive a $3-4 million payment. John asserts James told him on December 28 that the offer was $4-5 million in exchange for John's stock. John thought this figure too low since the propane assets—a small fraction of a company of which John held 42%—would, as far as John knew, be sold for $25 million.

¶12 At the January 2 special shareholder meeting, John, James, and James' son Paul were present. Paul—one of the holders of the 2.5% of stock not owned by John or James—moved to amend the bylaws to authorize up to five directors. James and Paul voted for the amendment while John abstained. Ultimately, a new board of directors was appointed, consisting of John, James, Paul, and two of James's business acquaintances.

¶13 On January 5, 2001, new company officers were elected, but John was not one of them. This left John unable to call board meetings. On January 5, James disclosed the November 22 offer for $29 million, but still did not disclose the $32 million offer.

¶14 James called a January 18 meeting for the sale's approval. The sale as proposed to the board was $29 million for the propane business, a $1 million payment to Paul, and a $2.5 million payment to James. But Star Gas had also expressly required John's approval of the sale. As a result of discussions with the board, it was agreed that John would receive a $750,000 payment out of the $3.5 million that was to go to James and Paul. James also purportedly agreed to engage in good faith negotiations to buy out John's stock. Ultimately, on the advice of counsel, John approved the sale. But in the final agreement executed with Star Gas, James ended up with $375,000 more than the board had approved, although the propane assets were still sold for the negotiated price.

¶15 John attempted to review the financial documents of the sale, but James refused. John asked James to call a special board meeting, and James finally agreed to a meeting on June 29. James, Paul, and one other board member arrived at the meeting, where John and his attorney were waiting. The meeting was called to order and immediately adjourned.

¶16 John filed this lawsuit on August 20, 2001. On October 10, the majority shareholders voted John off of CMI's board and removed him from all of CMI's subsidiaries. James then terminated John's employment.

¶17 John complains that he no longer has a benefit from holding 42% of the stock, that he has no voice and no way out of the company.[1] Further, he alleges James personally used corporate assets and committed waste. John's amended complaint contains essentially two parts: an action for breach of

[1] Allegedly, there was no ready market for the sale of John's shares and James would not offer a fair price for the stock.

fiduciary duty against James as an officer and director of CMI and an action seeking corporate dissolution based on "illegal, oppressive, or fraudulent conduct."

¶18 James moved for summary judgment. The court granted his motion. John contends the trial court granted summary judgment to James because it concluded dissolution was not an appropriate remedy. James asserts the court never reached the issue of remedies because it concluded John's summary judgment evidentiary submissions failed to make a case for oppression.

¶19 The court first noted the business judgment rule—that the judiciary should be reluctant to interfere in board decisions—and then noted that the power to dissolve a corporation should be used sparingly and with great caution. The court determined that John's expectations regarding running the business as a partnership, the sale of the business, and his continued employment were unreasonable because they were contrary to written documents, like the articles of incorporation and bylaws, that John had signed. The court determined there was no oppression because: when CMI added directors, John abstained rather than voting no; John's firing, after he sued CMI, was incident to a business goal; and his claim of waste was unsupported, barred by the unclean hands doctrine, and derivative in any event.

¶20 The court also ruled that the Star Gas transaction events were protected under the business judgment rule, that John waived any complaint when he approved the transaction, and that any complaints about injury resulting from the transaction were to the company, not John himself, and were therefore derivative. The court further stated that everything John complained of was protected by the business judgment rule. John appeals.

I. Standards of Review

A. Summary Judgment

¶21 We review summary judgments de novo, using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). We first determine whether the pleadings set forth a claim for relief. ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶12, 277 Wis. 2d 21, 690 N.W.2d 1. If a claim is properly stated, we examine the moving party's affidavits and other proof to determine whether there is a prima facie case for summary judgment. ***Id.***

¶22 If the moving party establishes a prima facie case, the nonmoving party must establish disputed material facts, or undisputed material facts from which reasonable alternative inferences could be drawn, that would entitle the party to a trial. ***Id.*** We review all the evidence in the light most favorable to the nonmoving party. ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 512, 383 N.W.2d 916 (Ct. App. 1986). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2003-04). Accordingly, we will reverse a summary judgment if material facts are in dispute or if the circuit court incorrectly decided a legal issue. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993).

B. Fiduciary Duty

¶23 Corporate officers owe individual shareholders a fiduciary duty of good faith and fair dealing when conducting corporate business. ***Jorgensen v. Water Works, Inc.***, 2001 WI App 135, ¶10, 246 Wis. 2d 614, 630 N.W.2d 230

(***Jorgensen II***); ***Reget v. Paige***, 2001 WI App 73, ¶12, 242 Wis. 2d 278, 626 N.W.2d 302. This means directors may not "use their position of trust to further their private interests." ***Jorgensen II***, 246 Wis. 2d 614, ¶10 (quoting ***Rose v. Schantz***, 56 Wis. 2d 222, 228, 201 N.W.2d 593 (1972)). In addition, majority shareholders have a fiduciary duty to avoid oppressive conduct directed at minority shareholders. ***Jorgensen v. Water Works, Inc.***, 218 Wis. 2d 761, 783, 582 N.W.2d 98 (Ct. App. 1998) (***Jorgensen I***).

¶24 A shareholder may bring an individual, rather than derivative, claim provided the complaint sufficiently alleges facts showing injury to the complaining shareholder, not the corporation. ***Reget***, 242 Wis. 2d 278, ¶12; ***Jorgensen I***, 218 Wis. 2d at 776-77. Whether a corporate director has breached the fiduciary duty is a mixed question of fact and law. ***Jorgensen II***, 246 Wis. 2d 614, ¶8. Whether certain events occurred are factual matters, but whether the facts constitute a breach is a question of law. ***Id.***

C. Business Judgment Rule

¶25 Also at play in this case is the business judgment rule:

> The business judgment rule is a judicially created doctrine that contributes to judicial economy by limiting court involvement in business decisions where courts have no expertise and contributes to encouraging qualified people to serve as directors by ensuring that honest errors of judgment will not subject them to personal liability. …
>
> ….
>
> Procedurally, the business judgment rule creates an evidentiary presumption that the acts of the board of directors were done in good faith and in the honest belief that its decisions were in the best interest of the company.

Reget, 242 Wis. 2d 278, ¶¶17-18 (citations omitted).

¶26 However, while under this rule a court will not substitute its judgment for the corporate decision makers, the court is not prohibited from intervening if the decision makers abuse their discretion. *See* Balotti & Hanks, Jr., *Rejudging the Business Judgment Rule*, 48 Bus. Law 1337, 1339 (1993). The business judgment rule will not shield an individual corporate actor from personal liability if he or she acted with improper motive. *See* ***Sprecher v. Weston's Bar, Inc.***, 78 Wis. 2d 26, 40, 253 N.W.2d 493 (1977); ***Mendelson v. Blatz Brewing Co.***, 9 Wis. 2d 487, 492, 101 N.W.2d 805 (1960).

¶27 This is where John complains the trial court shifted his burden, allowing the business judgment presumption to overcome the summary judgment standard of review. However, the two standards can be combined. Accordingly, to survive summary judgment in light of the business judgment rule, John must simply come forward with sufficient evidentiary facts to make a prima facie case that James acted to further his private interests, or in bad faith, or in an improperly oppressive manner. *See* ***Reget***, 242 Wis. 2d 278, ¶20.

¶28 For the reasons that follow, we conclude there are sufficient facts in the record for John to overcome the business judgment rule's evidentiary presumption regarding the fiduciary duty claim. Accordingly, summary judgment was inappropriate.

II. Fiduciary Duty Claim

¶29 The trial court ultimately determined that all James's corporate decisions were protected by the business judgment rule. However, the court appears to have failed to consider whether John's allegations make the case that James abused his discretionary decision-making powers or acted with improper

motive. On the record before us, we conclude John has alleged sufficient facts to make a prima facie case that James acted improperly.

A. The Star Gas Sale

¶30 John has two essential complaints of misconduct surrounding the Star Gas sale. First, he alleges that James failed to disclose all of Star Gas's offers. Second, he complains that the final deal as executed by James is not the deal approved by the CMI board.

¶31 According to John, Star Gas's first offer was to purchase the propane assets for $25 million; the second offer was $32 million for the assets and a $500,000 consulting fee to James; and the third offer was $29 million for the assets with $3.5 million in payments to James. Of these, John claims the second offer was never disclosed. The offer as proposed to the board called for Star Gas to pay $29 million for CMI's propane assets, $1 million to Paul, and $2.5 million to James. The offer the board approved was $29 million for the propane, $750,000 to John, and the remaining $2.75 million to James and Paul. But the final agreement that James executed somehow resulted in an extra $375,000 payment to James.

¶32 Logically, the good faith and fair dealing component of a fiduciary duty should encompass disclosure of all material elements of a proposed business transaction, particularly when corporate officers stand to benefit. Yet James neglected to disclose the November 13, $32 million proposal. James asserts it is because the offer really represented the same proposal as the November 22 offer he did disclose—$29 million for the propane assets and $3.5 million in payments to himself. A Star Gas representative testified to that effect.

¶33 Implicitly, therefore, James is suggesting disclosure of the second deal was irrelevant and unnecessary. That is a possibility. But on this summary judgment record, there is a "reasonable alternative inference." *See* ***Baumeister***, 277 Wis. 2d 21, ¶12. When we consider that James never disclosed the $32 million offer, it could be inferred that the second offer failed to sufficiently identify James's compensation package, and he requested revisions. That is, James did not want the board to mistake the $32 million figure as the purchase price of the assets. Without more evidence, this could possibly be construed as a case of a corporate officer using his position to further his own private interest. While Star Gas testified it meant for the offers to be identical, this neither explains why it needed to issue the third offer nor does it inform on James's intent in concealing the second offer.

¶34 A similar concern about self-dealing underlies the matter of the discrepancy between the offer as approved by the board and the offer as executed by James. The final offer approved by the board involved Star Gas purchasing the propane for $29 million, a $750,000 payment to John, and $2.75 million to James and Paul. The offer James executed gave him an additional $375,000.

¶35 James asserts that Star Gas offered this additional payment of its own volition, and that we should not view the transaction suspiciously because the Board authorized him to make any changes to documents necessary to effect the deal. We will assume, for argument's sake, that Star Gas offered the payment willingly and not in response to any sort of complaint by James that he had to give up some of his compensation to John. There is still no explanation why James accepted an offer different than the one the board approved.

¶36 The trial court acknowledged this transaction as a potential problem, but noted James "was authorized to modify [the transaction] as necessary in order to close the deal." However, while the board gave him authorization to change the form of documents needed for the transaction, it did not authorize changes to the substance of the deal. A change in payment is a substantive change, not a mere formality. Without elaboration, this could be perceived as a case of a corporate director using his "position of trust to further [his] private interest;" "an abuse of discretion" by a decision maker; or an "individual corporate actor … with improper motive," all of which are not protected by the business judgment rule. Indeed, we hardly suspect that Star Gas considered paying a larger sum necessary in order to close the deal unless, for some reason it believed James would not complete the transaction without the added funds.

¶37 Rather, it would seem that the most logical thing to do, to uphold the fiduciary duty to the shareholders, would be to execute the agreement as approved by the board and to decline an agreement incorporating an additional $375,000 personal windfall to the negotiator. We are not prepared to say a breach of fiduciary duty exists as a matter of law under these circumstances, but at the very least, a factual question presents itself.

¶38 When brought by an individual, a breach of fiduciary duty claim must allege injury to that individual, not the corporation, so as to avoid being labeled derivative. Part of the fiduciary duty requires avoiding oppressive conduct towards the shareholders, which has been described as:

> burdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of the company to the prejudice of some of its members; or a visual departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely.

Jorgensen I, 218 Wis. 2d at 783 (citation omitted). The trial court held there was no oppressive conduct, and therefore no breach of fiduciary duty, based primarily on its conclusion that John's expectations were unreasonable. However, under ***Jorgensen I***, expectations, reasonable or otherwise, are not the sole basis for an oppression determination.

¶39 In the Star Gas transaction, there is the possible inference of "a lack of probity and fair dealing in the affairs of the company to the prejudice of some of its members" because it is possible to infer that, had John been fully aware of the Star Gas offers, he might have demanded or been able to negotiate higher payment to himself in proportion to his shares. This is an injury personal to John.

B. Other Potentially Oppressive Conduct

¶40 Certain events stand out as creating an inference of oppressive conduct. First, James has offered no explanation for why, when John turned sixty-five and refused to retire, James stopped giving him assignments and work. One possibility, to be sure, is that John was no longer performing up to CMI's standards, or some other legitimate business reason. But without any evidence on the matter, one inference is that James was improperly trying to force John out of the company—also a direct injury to John, not an injury to CMI. Depending on the reasons that James stopped giving work to John, there could be wrongful or improperly oppressive conduct, or bad faith, or improper motive, none of which is protected from scrutiny under the business judgment rule.

¶41 Similarly, increasing the number of directors, given its context relative to the Star Gas transaction, could be viewed suspiciously. James asserted the addition was simply a matter of allowing new eyes a chance to evaluate the transaction. This is possible, but this does not explain why John was then voted

out as an officer in favor of James' son and a business colleague. When we consider that increasing the number of directors and electing new officers left John unable to call meetings on his own, and therefore unable to challenge the Star Gas transaction, we begin to see the possible inference of a lack of fair dealing.

¶42 Compounding all of this is the June 29 board meeting, finally called by James at John's request, that was commenced and immediately adjourned. James asserts this was done on the advice of counsel, which very well may be the case. Absent more, however, this might comprise "a visual departure from the standards of fair dealing and a violation of fair play." We also cannot help but note that the failure to allow John access to the financial documents relative to the Star Gas sale could be considered a "lack of probity."

¶43 Ultimately, John has alleged facts that he has, by James's intentional acts, become stuck in a corporation where he holds 42% of the stock but has no say in the company's operation nor any real way to liquidate the stock at a fair price and leave the business. It is possible that James had legitimate business reasons for every action John complains of.[2] However, the record does not presently support summary judgment in James's favor. Rather, competing factual inferences and the need for additional facts create multiple questions for a jury to answer.

[2] Indeed, several facts may or may not ultimately work against John, including: (1) that he abstained on certain votes, rather than voting no; (2) that he did eventually approve the Star Gas sale and received what he bargained for; (3) that he participated in some of the same wasteful behavior he alleged James did; and (4) he was not fired until after he filed suit against James and CMI.

III. The Claim for Dissolution

¶44 Finally, we are confronted with the question of remedies. John's complaint sought the dissolution of CMI. While John asserts the court considered this possibility too extreme and used it as a factor weighing against him, James contends the court never reached the question.

¶45 WISCONSIN STAT. § 180.1430 (2001-02) states, in relevant part:

> The circuit court for the county where the corporation's principal office or, if none in this state, its registered office is or was last located may dissolve a corporation in a proceeding:
>
> ….
>
> (2) By a shareholder, if any of the following is established:
>
> ….
>
> (b) That the directors or those in control of the corporation have acted, are acting or will act in a manner that is illegal, oppressive or fraudulent.

¶46 In its oral decision, the trial court held there was no oppression because John's expectations were unreasonable. In the written judgment, the court stated that for the same reasons it held there was no oppression, it would hold there was no breach of the fiduciary duty. Accordingly, we presume the references to oppression refer not only to conduct needed to demonstrate the breach of the fiduciary duty, but also to the conduct justifying dissolution. In its written order, the court noted "the power [to dissolve a corporation] is one to be exercised with great caution" and held there were no undisputed facts that would "permit the Court to order dissolution." Thus, it appears the court considered whether John had made his case for dissolution, holding that because he had not shown oppression, dissolution was not an available remedy.

¶47 However, because we hold there are genuine issues of material fact in dispute in the fiduciary duty claim, and the trial court considered the facts interchangeable on both issues, we therefore also hold there are genuine issues of material fact as to whether John made his case for dissolution.

¶48 We stress that even if, on remand, John makes a case for dissolution, the court is not required by the statute to dissolve CMI. Rather, WIS. STAT. § 180.1430 (2001-02) says the court "*may* dissolve a corporation" when the shareholder makes the requisite showing. (Emphasis added.) Use of the word may, instead of shall, generally means the statute is directory, not mandatory. *See* ***Thielman v. Leean***, 2003 WI App 33, ¶10, 260 Wis. 2d 253, 659 N.W.2d 73. Moreover, oppression is not the only basis for dissolution. Illegal or fraudulent behavior can also justify judicial dissolution. Finally, dissolution is an equitable remedy, and we agree with other jurisdictions holding the trial court is free to fashion some other equitable remedy short of dissolution should the facts so dictate. *See*, *e.g.*, ***Landstrom v. Shaver***, 561 N.W.2d 1, 9 (S.D. 1997)[3]; ***Brenner v. Berkowitz***, 634 A.2d 1019, 1032 (N.J. 1993); ***Balvik v. Sylvester***, 411 N.W.2d 383, 388 (N.D. 1987).

By the Court.—Judgment reversed and cause remanded for further proceedings.

[3] South Dakota's statute, S.D. CODIFIED LAWS § 47-7-34, provided, in relevant part, "The circuit court shall have full power to liquidate the assets and business of a corporation in an action by a shareholder when it is established … that the acts of the directors or those in control of the corporation are … oppressive[.]" Their supreme court, in determining that other options could be fashioned by the trial court, noted it "makes little sense to leave the trial courts with two draconian options of helplessly dismissing outright a proven cause of action or ordering the dissolution of a corporation …." ***Landstrom v. Shaver***, 561 N.W.2d 1, 9 (S.D. 1997).

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).