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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-636

Filed: 26 March 2019

Wake County, No. 16 CVS 7491

CINNAMON A. CLAUDIO; CLAUDIO CHIROPRACTIC & WELLNESS, PLLC,
d/b/a TRIANGLE SPINE CENTER; TRIANGLE SPINE CENTER, LLC, Plaintiffs,

v.

RITA SELLERS; RONALD G. WILSON; THE JOINT CORP. d/b/a THE JOINT
CHIROPRACTIC; MONEYSMAKER INVESTMENTS, LLC, d/b/a THE JOINT
CHIROPRACTIC; PREMIER WELLNESS PARTNERS, LLC d/b/a THE JOINT
CHIROPRACTIC; RJ WELLNESS BRIER CREEK, LLC, Defendants.

Appeal by defendants from judgment entered 6 November 2017 by Judge G.
Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 29
January 2019.

*Gordon & Rees Scully Mansukhani, LLP, by Robin K. Vinson, for plaintiffs-
appellees*

*Smith Moore Leatherwood LLP, by Kip David Nelson and Elizabeth Brooks
Scherer, for defendants-appellants*

Keith A. Bishop, PLLC, by Keith A. Bishop for defendants-appellants

BRYANT, Judge.

Where the trial court erred in instructing the jury on a claim for breach of
fiduciary duty, we reverse and remand for a new trial.

On 29 June 2016, plaintiff Cinnamon A. Claudio and two of her corporate entities (collectively referred to as “Claudio”) filed a Complaint, where Claudio sought, *inter alia*, a declaratory judgment against defendants Rita Sellers, Ronald G. Wilson, and their corporate entities.¹ In the Complaint, Claudio sought a declaration of the rights and obligations of the parties, and immediate access to corporate records of defendants. Claudio also sought monetary damages for “wrongful acts and omissions of [d]efendants.” On 22 November 2016, defendants filed an answer and asserted counterclaims for breach of contract, violation of the Wage and Hour Act, and tortious interference with contract. Defendants also sought a declaratory judgment as to Claudio’s ownership or contractual interests in the corporate defendants. On 23 January 2017, Claudio replied to the counterclaims.

Thereafter, Claudio and defendant Sellers filed cross-motions for summary judgment. Based on his determinations that disputed issues of material fact existed and that neither party was entitled to judgment as a matter of law, the trial court denied the cross-motions and ordered a jury trial.

On 2 October 2017, the matter was heard by a jury before the Honorable Bryan Collins, Judge presiding. At the close of Claudio’s evidence, defendants moved for a directed verdict. The trial court dismissed Claudio’s breach of contract claim and her request for damages in relation to the breach of contract claim. The trial court denied

¹ Claudio voluntarily dismissed all claims against defendant The Joint Corp. on 15 November 2016.

the motion for directed verdict as to the claim for breach of fiduciary duty against defendants Sellers and Wilson.

After the close of all evidence, the trial court concluded “there [was] insufficient evidence to show either a breach of the share purchase contract or that there [had] been sufficient evidence of any damages to [defendant] Wilson.” The trial court dismissed defendants’ counterclaim and Claudio’s claim for breach of fiduciary duty as to defendant Sellers. Claudio’s claim for breach of fiduciary duty against defendant Wilson was allowed to proceed to the jury.

On 12 October 2017, the jury issued a verdict finding that defendant Wilson breached his fiduciary duty to Claudio and awarded Claudio \$67,666.00 in damages based on her investments in the corporate defendants.

The trial court formally entered judgment in accordance with the jury’s verdict on 6 November 2017, and denied defendants’ motion to dismiss and motion for judgment notwithstanding the verdict. Defendants appeal.

On appeal, defendants argue the trial court erred by: 1) instructing the jury on the breach of fiduciary duty claim against defendant Wilson, 2) dismissing defendant Sellers’ counterclaims before she presented any evidence, and 3) permitting Claudio to pursue an un-pleaded claim.

First, defendants argue that the trial court erred by instructing the jury that there existed a fiduciary duty owed by defendant Wilson to Claudio as a matter of law. We agree.

On appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.] The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Hammel v. USF Dugan, Inc., 178 N.C. App. 344, 347, 631 S.E.2d 174, 177 (2006) (citations omitted).

To establish a claim for breach of fiduciary duty, the claimant must prove that: 1) a fiduciary duty was owed, 2) there was a breach of that duty, and 3) the breach was the proximate cause of the damages. *See Farndale Co., LLC v. Gibellini*, 176 N.C. App. 60, 68, 628 S.E.2d 15, 20 (2006). As a matter of law, “[f]or a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties.” *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). Moreover, “[w]hether a fiduciary relationship exists is determined by the specific facts and circumstances of the case.” *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 665, 391 S.E.2d 831, 832 (1990).

Generally, in North Carolina, “[m]embers of a limited liability company are like shareholders in a corporation in that members do not owe a fiduciary duty to each other or to the company.” *Kaplan v. O.K. Techs., L.L.C.*, 196 N.C. App. 469, 473, 675 S.E.2d 133, 137 (2009). “An exception to this rule is that a controlling shareholder owes a fiduciary duty to minority shareholders.” *Id.* However, section 57D-2-30 of our General Statutes, detailing the governance of operating agreements, states that an “operating agreement governs the internal affairs of an LLC” including “the rights, duties, and obligations” of the shareholders and “the provisions of this Chapter and common law will apply only to the extent contrary or inconsistent provisions are not made in, or are not otherwise supplanted, varied, disclaimed, or nullified by, the operating agreement.” N.C. Gen. Stat. § 57D-2-30(a) (2017).

In the instant case, the parties’ operating agreement for Premier Wellness Partners, LLC, setting forth their rights and responsibilities for the shareholders, contained provisions specifying how the shareholders can achieve a “majority” to carry out business for the company:

SECTION 2. OWNERSHIP INTERESTS

2.1 *Ownership Interests and Definitions:*

. . . .

f. “majority,” “majority vote,” or “majority of shares” means sixty-seven percent (67%) or greater of Shares issued by the Company and entitled to vote at the time the vote occurs.

....

SECTION 5. MANAGEMENT

....

5.3 Actions by Members. Except as otherwise provided in this Agreement, all decisions require at least a majority vote. . . .

According to the operating agreement, defendant Wilson had 56.3% of shares, defendant Sellers had 33.3% of shares, and Claudio had 10.4% of shares of the company. Therefore, per the operating agreement, defendant Wilson did not have a 67% majority as contemplated by the operating agreement.

However, notwithstanding the parties' operating agreement, the trial court instructed the jury that a fiduciary duty existed as a matter of law as follows:

As I have already indicated, your verdict will take the form of answers to certain questions or issues. These questions are as follows: number one, did defendant Wilson owe a fiduciary duty to the plaintiff? Two, did the defendant breach his fiduciary duty to the plaintiff? Three, what amount of damages, if any, is plaintiff entitled to recover from defendant as a proximate result of the breach of fiduciary duty on the part of the defendant?

....

In North Carolina, shareholders of a corporation and members of a limited liability company owning a majority number of shares in a corporation or a majority interest in a limited liability company owe a special duty to shareholders in the same corporation or limited liability company who have less than a majority of shares or membership interests, otherwise known as minority

shareholders or members. In such cases, a minority shareholder or member has the right to maintain an action against a majority shareholder for breach of a fiduciary duty arising from disputed corporate actions authorized by such majority shareholder or member.

. . . .

In this case, ladies and gentlemen of the jury, the evidence has established that at all times relevant to this dispute defendant Wilson held a majority of the membership interest in Premier Wellness Partners, LLC and Money Maker Investments, LLC. *I therefore instruct you that this defendant [Wilson] owed a fiduciary duty to [] [Claudio] as a matter of law.*

(emphasis added).

We believe this instruction was erroneous. The trial court assumed that defendant Wilson—holding a 56.3% interest—was a majority shareholder and instructed the jury that defendant Wilson owed a fiduciary duty to Claudio as *a matter of law*, whereas the operating agreement states a “majority” is 67% shares or greater. See *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 587, 403 S.E.2d 483, 489 (1991) (stating the trial court’s primary role when instructing the jury is “to explain to the jury the given legal standard or conclusion at issue and how it should be determined”). Defendant Wilson—although numerically a majority shareholder—by definition of the operating agreement was not a majority shareholder and did not owe a fiduciary duty based on the operating agreement. Whether defendant Wilson owed a fiduciary duty based on other facts was for the

jury's determination. *See Kaplan*, 196 N.C. App. at 473, 675 S.E.2d at 137; *see also Corwin as Tr. for Beatrice Corwin Living Irrevocable Tr. v. British Am. Tobacco PLC*, No. 56PA17, slip op. at 1 (N.C. Dec. 7, 2018) (holding that, notwithstanding the percentage of equity, it is the exercise of domination and control over the business that creates a fiduciary duty to other shareholders), *reh'g denied*, No. 56PA17 (N.C. Jan. 30, 2019).

Whether a fiduciary relationship and/or duty existed was for the jury to decide based on the facts and circumstances of the case. *See Tin Originals, Inc.*, 98 N.C. App. at 665, 391 S.E.2d at 832 (“[T]he existence or nonexistence of a fiduciary duty is a question of *fact* for the jury [to decide.]” (citation omitted)). Additionally, the resulting verdict and basis for damages should have been premised on the jury's determination as to the status of the parties' contractual relationship and whether the parties' interactions gave rise to a fiduciary relationship. Therefore, the jury should have been properly instructed by the trial court to make such a determination.

Additionally, we conclude that the erroneous instruction was prejudicial. The jury, having heard much conflicting evidence as to whether defendant Wilson was a controlling shareholder, was likely misled by the trial court's erroneous instruction that there was, *in fact* and as a matter of law, a fiduciary duty owed by defendant Wilson to Claudio. The jury should have been allowed to deliberate the issue. Under

the jury instructions as given, the jury, having been told there was a fiduciary duty, only had to determine whether there was a breach of that fiduciary duty.²

Accordingly, as defendants were prejudiced by the trial court's erroneous jury instruction, we reverse and remand this matter for a new trial. Having ordered a new trial, we do not address defendant's remaining issues on appeal.

REVERSED AND REMANDED.

Judges DAVIS and INMAN concur.

Report per Rule 30(e).

Judge Davis concurred in this opinion prior to 25 March 2019.

² We note that the trial court also erred in instructing the jury as to the amount of damages rather than allowing the jury to decide that issue for itself.