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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-924

No. COA22-384

Filed 29 December 2022

Cumberland County, No. 19 CVS 3319

DR. SURIYA JAYAWARDENA, Plaintiff,

v.

DR. MATTHEW A. DAKA, DR. SELVARATNAM SINNA, DR. MANESH THOMAS, FERNCREEK CARDIOLOGY, P.A., MSSM REAL ESTATE, LLC, MSMS REAL ESTATE, LLC, NORTHSIDE PRIMARY AND URGENT CARE, PLLC, and CAROLINA PREMIER PRIMARY AND URGENT CARE, PLLC, Defendants.

Appeal by plaintiff from order entered 18 January 2022 by Judge Vince M. Rozier, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 16 November 2022.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III, and Daniel K. Keeney, for plaintiff-appellant.

Lincoln Derr, PLLC, by Sara R. Lincoln and R. Jeremy Sugg, for defendants-appellees.

DIETZ, Judge.

¶ 1 Plaintiff Suriya Jayawardena appeals the entry of partial summary judgment in favor of Defendants, his former business associates and fellow shareholders in a professional association.

¶ 2

As explained below, we affirm the trial court’s order. Undisputed record evidence demonstrates that the corporation’s regular accountants valued the business in good faith according to the parties’ agreement; that Plaintiff breached the operating agreements of two related LLCs by failing to identify an appraiser within the required time frame; and that Defendants, who are each minority shareholders like Plaintiff, did not act as a unified control group sufficient to warrant treating them collectively as a controlling majority shareholder for purposes of fiduciary duties. Accordingly, the trial court properly entered partial summary judgment in favor of Defendants with respect to these claims. We affirm the trial court’s order.

Facts and Procedural History

¶ 3

This case arises from a shareholder dispute involving a group of four physicians—Plaintiff Suriya Jayawardena and Defendants Matthew A. Daka, Selvaratnam Sinna, and Manesh Thomas. The four physicians created a North Carolina professional association named Ferncreek Cardiology, P.A. through a shareholder agreement, with each of the four holding equal shares in the business.

¶ 4

Section 10 of the shareholder agreement governs a buy-out of a shareholder by the remaining shareholders. It states that the price for any buy-out occurring five years or more after the date of the shareholders agreement “shall be equal to the amount by which the book value of the Shares owned by such Shareholder has increased above 0 since the date of this Agreement.” The term “book value” is defined

in the shareholder agreement as the value from the previous quarterly period “shown on the balance sheet of the Corporation prepared by its regular accountants, in accordance with generally accepted accounting principles, consistently applied” The agreement also states that the “adjusted book value shown on any such existing or newly prepared balance sheet or financial statement prepared in good faith shall be binding and conclusive on all persons.”

¶ 5 Section 11 of the shareholders agreement provides for the manner of payment applicable to any purchase of a shareholder’s shares. Section 11 also provides that, “the selection of the manner of payment shall be made known to the Seller by written notice given at the time the purchase option is exercised.”

¶ 6 In addition to creating Ferncreek, the corporate entity, Plaintiff and Defendants also created two limited liability companies, MSSM Real Estate, LLC and MSMS Real Estate, LLC. As with the corporation, Plaintiff and Defendants each took an equal stake in these LLCs. Both LLCs are governed by operating agreements.

¶ 7 The operating agreements for each LLC provide for a “Buy-Sell” event in which LLC members may purchase the interest of withdrawing members. Section 9.3 of the operating agreements requires any purchasing members to give notice of intent to exercise this purchase option within thirty days of notice of the “Buy-Sell” event from the withdrawing member. Section 9.5 provides the method of valuing the withdrawing member’s interest in a Buy-Sell event. It states that if the parties are

unable to agree on a single appraiser to determine the value, “the purchase price shall be determined by three appraisers, one selected by the purchaser(s), one selected by the seller, and the third selected by the two appraisers.” The “value determined as of the date of the Buy-Sell Event by a majority of the appraisers will be final.” The operating agreements provide that closing on a “Buy-Sell” event shall occur “not later than ninety (90) days after the delivery of the Buy-Sell Notice.”

¶ 8 At some point, Plaintiff and Defendants began to disagree on certain financial and business-related matters. Ultimately, Plaintiff elected to exit the businesses, and he initiated the withdrawal and buyout provisions in the agreements governing Ferncreek and the LLCs.

¶ 9 The parties were unable resolve a number of disputes that arose as they worked through the buyout process. In May 2019, Plaintiff brought the complaint initiating this action. Defendants answered and asserted a number of counterclaims. Plaintiff later amended his complaint.

¶ 10 After discovery, the parties brought cross-motions for summary judgment. The trial court entered partial summary judgment in favor of Defendants on several of Plaintiff’s claims and several of Defendants’ counterclaims. The trial court certified this partial summary judgment order for immediate appeal under Rule 54(b). Plaintiff then timely appealed.

Analysis

¶ 11 The standard of review for a trial court’s entry of summary judgment is *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is appropriate when the record reveals that “there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *Forbis v. Neal*, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007).

I. Defendants’ Counterclaims

¶ 12 Plaintiff first argues that the trial court erred by addressing Defendants’ counterclaims because Defendants failed to re-plead those counterclaims in response to Plaintiff’s amended complaint. As a result, Plaintiff argues, the counterclaims were not properly before the trial court.

¶ 13 No case from our State’s appellate courts has ever supported Plaintiff’s theory, and it is inconsistent with Rules 7, 8, and 15 of the North Carolina Rules of Civil Procedure, which treat counterclaims as independent, affirmative pleadings in a case, and thus separate from the answers or responses to an existing complaint or claim. N.C. R. Civ. P. 7(a), 8(a), 15(a); *see McCarley v. McCarley*, 289 N.C. 109, 113–14, 221 S.E.2d 490, 493–94 (1976). When an affirmative pleading is amended, there must be a new response or answer to that pleading as well. N.C. R. Civ. P. 7(a), 15(a). But counterclaims are not part of that answer or response to the initial complaint and need not be refiled simply because the initial complaint is amended.

II. Valuation of Ferncreek Shares

¶ 14 Plaintiff next argues that the trial court erred by granting summary judgment to Defendants concerning the valuation of the parties' corporation, Ferncreek Cardiology, P.A.

¶ 15 Much of Plaintiff's argument is based on an assertion that the "only competent evidence" before the trial court was his expert's valuation, because Defendants' failed to designate their own valuation expert.

¶ 16 "Business valuation always is a fraught undertaking, and particularly so for a small professional business." *Logue v. Logue*, 2022-NCCOA-625, ¶ 1. As a result, valuing a professional business often will involve a battle of competing experts, using competing methodologies, with many questions of fact and credibility that must be resolved by a fact-finder.

¶ 17 But it does not have to be this way, thanks to the freedom of contract. Because "consensual arrangements among shareholders are agreements—the products of negotiation—they should be construed and enforced like any other contract so as to give effect to the intent of the parties as expressed in their agreements." *Blount v. Taft*, 295 N.C. 472, 484, 246 S.E.2d 763, 771 (1978). With respect to valuing shares, this Court has recognized that parties often contract away their right to fight over the value of a business with competing experts because valuation is so costly and time-consuming. *Crowder Construction Co. v. Kiser*, 134 N.C. App. 190, 193, 517

S.E.2d 178, 182 (1999). A “buy-out agreement may be seen as a way to avoid disagreement about value that could consume a significant portion of the value of the shares.” *Id.* at 197, 517 S.E.2d at 184. “For that reason, the buy-out agreement will usually set out a simple formula for determining the price to be paid for the employee’s shares in order to ensure a prompt, inexpensive resolution of the question of price.” *Id.* These types of agreements “often set out a formula tied to the book value of the corporation because that figure is easily ascertained from the corporation’s balance sheet.” *Id.*

¶ 18 That is precisely what occurred here. As Plaintiff acknowledges, the shareholder agreement provides a method of valuing a departing member’s shares without having that amount judicially determined. This contractual calculation is “the amount by which the book value of the Shares owned by such Shareholder has increased above 0 since the date of this Agreement” with the book value being calculated as the value from the previous quarterly period “shown on the balance sheet of the Corporation prepared by its regular accountants, in accordance with generally accepted accounting principles.” The agreement also states that the “adjusted book value shown on any such existing or newly prepared balance sheet or financial statement prepared in good faith shall be binding and conclusive on all persons.”

¶ 19 After discovery, Defendants moved for summary judgment and presented a

“Calculation Report” prepared by Cherry Bekaert LLP. Cherry Bekaert is a CPA firm that provided accounting services to Ferncreek. The record indicates that Cherry Bekaert prepared Ferncreek’s tax and financial reports and offered other accounting services. There is no evidence in the record that Ferncreek used any other firm for regular accounting services.

¶ 20 The Cherry Bekaert report followed the criteria in the shareholder agreement and calculated the amount by which the book value of Plaintiff’s share in the corporation had increased precisely as the agreement requires. Thus, at summary judgment, the threshold question for the trial court was this: was there any factual dispute that the report was prepared by Ferncreek’s regular accountants in good faith? If not, then the valuation in that report is conclusive, even if it is wildly different from the valuation of Plaintiff’s own expert or anyone else.

¶ 21 Here, the undisputed evidence establishes that Cherry Bekaert is the firm that provides regular accounting services to Ferncreek. Thus, Cherry Bekaert is Ferncreek’s “regular accountants” under the plain meaning of that phrase in the shareholder agreement.

¶ 22 We thus turn to whether the report from Cherry Bekeart was “prepared in good faith” under the shareholder agreement. The phrase “good faith” is widely understood to mean “honesty or lawfulness of purpose.” *Merriam-Webster’s Collegiate Dictionary* (11th ed. 2003); *see also Good Faith, Black’s Law Dictionary* (11th ed. 2019). Courts

repeatedly have interpreted this phrase to mean that “honest disagreements” are not indications of lack of good faith. *See Hope v. Integon Nat’l Ins. Co.*, 275 N.C. App. 979, 852 S.E.2d 447, 2020 WL 7974003, at *2 (2020) (unpublished), *aff’d*, 380 N.C. 482, 2022-NCSC-20.

¶ 23 Here, Plaintiff had the opportunity for full discovery to make a case that the report was not prepared in good faith. Nevertheless, Plaintiff’s only ground to assert the lack of good faith is a series of judgment calls by this independent accounting firm, such as the firm’s estimates of the percent of accounts receivable that likely are collectible in the future. The trial court did not err by determining that these judgment calls, at most, showed honest disagreements about valuation and were insufficient to create a fact question concerning whether Cherry Bekaert acted in good faith when preparing the report for Ferncreek.

¶ 24 Finally, Plaintiff argues that, with respect to the method of payment of Plaintiff’s shares, Defendants “waived their right to select a manner of payment” by not identifying that manner of payment in their initial communications and instead inquiring about which method Plaintiff preferred.

¶ 25 “In contract law, waiver is an intentional relinquishment or abandonment of a known right or privilege.” *Mount Airy-Surry Cty. Airport Auth. v. Angel*, 267 N.C. App. 548, 549, 833 S.E.2d 409, 410 (2019). “Waiver can be express or implied.” *Id.* “A waiver is implied when a person dispenses with a right by conduct which naturally

and justly leads the other party to believe that he has so dispensed with the right.”

Id.

¶ 26 Here, Plaintiff has not forecast any evidence that Defendants expressly or impliedly waived their right to select a payment method when they chose to inquire about Plaintiff’s preference rather than immediately selecting a payment method. Indeed, the agreement contains what is often called a “no-waiver” provision, requiring waiver to be express and in writing to be effective. Because waiver is the only argument Plaintiff raises with respect to the payment method issue, we find no error in this portion of the trial court’s ruling. N.C. R. App. P. 28(b). Accordingly, we affirm the portion of the trial court’s summary judgment order addressing the valuation and payment for Plaintiff’s share of Ferncreek Cardiology, P.A.

III. Valuation of the Real Estate LLCs

¶ 27 Plaintiff next argues that the trial court erred by entering summary judgment with respect to the valuation of MSSM Real Estate, LLC, and MSMS Real Estate, LLC. Essentially, the trial court determined that Plaintiff materially breached the three-step appraisal process in the operating agreements, and therefore ruled that Plaintiff was bound by the initial, single appraisal done by Defendants’ appraiser, Cherry Bekaert.

¶ 28 As noted above, the operating agreements for these LLCs provide for a procedure for buying out a withdrawing members’ shares. If the parties are unable to

agree on a single appraiser to determine the value of the departing member's shares, "the purchase price shall be determined by three appraisers, one selected by the purchaser(s), one selected by the seller, and the third selected by the two appraisers." The "value determined as of the date of the Buy-Sell Event by a majority of the appraisers shall be final." The operating agreements also create a timeline ensuring that this buy-out process will conclude "not later than ninety (90) days after the delivery of the Buy-Sell Notice."

¶ 29 Plaintiff does not dispute that this contractual buyout process was triggered, that the parties could not agree on a single appraiser, and that Defendants selected an appraiser. The dispute concerns what happened next.

¶ 30 Plaintiff contends that he informed Defendants that "he intended to select his own appraiser to value his membership interests in the LLCs and reiterated that he needed access to the LLCs financial records to do so." Plaintiff then brought suit to, among other things, access the financial records needed for Plaintiff's appraiser to conduct the appraisal. Ultimately, more than a year later, Plaintiff identified his appraiser. Then, nearly two years later, Plaintiff informed Defendants that he was ready to "begin the process of choosing a third appraiser."

¶ 31 Importantly, nothing in the record indicates that Plaintiff actually selected his appraiser, or informed Defendants who that appraiser was, within the 90-day time period after Defendants first identified their appraiser. This, in turn, meant the

parties' two appraisers could not communicate and jointly select the third appraiser under the agreement. And this, Defendants argue, is the material breach of the contract because, had Plaintiff timely identified his appraiser, the third appraiser promptly could have been selected, any issues in the appraisers accessing the necessary financial information could have been resolved, and the parties could have completed the buyout of these LLCs within the 90 days anticipated in the agreements.

¶ 32 On appeal, Plaintiff does not contend that he fully complied with the appraisal process in the contract. But he argues that any breach was immaterial. "It is well established that in order for a breach of contract to be actionable it must be a material breach, one that substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform." *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 220–21, 768 S.E.2d 582, 593 (2015).

¶ 33 The undisputed facts demonstrate that Plaintiff materially breached the operating agreement. The core purpose of the agreement's appraisal process is to create a simple, streamlined valuation process that ensures the valuation is completed and the buy-out takes place within 90 days. That did not happen here because Plaintiff did not timely identify his appraiser.

¶ 34 Now, to be sure, if Plaintiff timely identified an appraiser but that appraiser was unable to conduct a meaningful appraisal—for example, because Defendants

refused to provide necessary financial records—then Plaintiff’s failure to complete the process within 90 days would not be a material breach. But that is not an argument Plaintiff asserts in this appeal. Likewise, Plaintiff does not argue that the trial court’s chosen remedy—an order that “the single appraisal and valuation obtained by Defendants for MSSM and MSMS stands”—is erroneous. We therefore decline to address these issues, *see* N.C. R. App. P. 28(b), and hold only that, on the grounds identified in this appeal, the trial court’s entry of summary judgment is appropriate.

IV. Breach of Fiduciary Duty

¶ 35 Lastly, Plaintiff challenges the entry of summary judgment on his breach of fiduciary duty claim. Plaintiff’s claim turns on the theory that Defendants—each of whom individually are minority shareholders—should be treated collectively as a majority shareholder for purposes of assessing their fiduciary duties.

¶ 36 “As a general rule, shareholders do not owe a fiduciary duty to each other or to the corporation.” *Raymond James Capital Partners, L.P. v. Hayes*, 248 N.C. App. 574, 580, 789 S.E.2d 695, 701 (2016). But “the majority stockholder of a corporation owes fiduciary duties to the minority stockholders.” *Corwin v. Brit. Am. Tobacco PLC*, 371 N.C. 605, 616, 821 S.E.2d 729, 737 (2018).

¶ 37 This Court has held that individual minority shareholders, collectively, can be considered a majority shareholder, but in those cases, there was evidence that the

minority shareholders had united together through an agreement to work toward a shared goal. *See Farndale Co., LLC v. Gibellini*, 176 N.C. App. 60, 68, 628 S.E.2d 15, 20 (2006) (minority shareholders conceded that they acted collectively as a majority); *Loy v. Lorm Corp.*, 52 N.C. App. 428, 435, 278 S.E.2d 897, 903 (1981) (minority shareholders transferred assets to another corporation collectively owned by those same minority shareholders).

¶ 38 This is consistent with the definition of controlling shareholder used by the American Law Institute’s treatise on corporate governance, which recognizes that minority shareholders who collectively have a majority can be treated as a “controlling shareholder” when they achieve control “pursuant to an arrangement or understanding.” American Law Institute, *Principles of Corporate Governance* § 1.10 (1994).

¶ 39 Likewise, this approach also is consistent with Delaware law, on which our courts often have relied on corporate governance questions. Under Delaware law, there is no distinction between closely held corporations and publicly held corporations. Any group of minority shareholders collectively can be treated as a majority shareholder if they “form a control group where those shareholders are connected in some legally significant way—e.g., by contract, common ownership, agreement, or other arrangement—to work together toward a shared goal.” *Dubroff v. Wren Holdings, LLC*, No. CIV.A. 3940-VCN, 2009 WL 1478697, at *3 (Del. Ch. May

22, 2009).

¶ 40 Here, Plaintiff does not point to any evidence in the record that Defendants had an agreement or understanding to act as a unified control group. Plaintiff points to a series of corporate decisions that benefitted Defendants more than Plaintiff, and to various examples of Defendants failing to comply with corporate formalities. But none of these actions indicate that Defendants formed a unified control group, as opposed to simply acting in their individual interests as shareholders. Accordingly, the trial court properly entered summary judgment on Plaintiff's breach of fiduciary duty claim.

Conclusion

¶ 41 We affirm the trial court's order.

AFFIRMED.

Judges MURPHY and COLLINS concur.

Report per Rule 30(e).