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IN THE
COURT OF APPEALS OF INDIANA

CARL L. PETERS,

Appellant-Plaintiff,

vs.

J. RUSSELL SUTTON,

Appellees-Defendant.

No. 49A05-0610-CV-571

APPEAL FROM THE MARION CIRCUIT COURT
The Honorable Theodore M. Sosin, Judge
Cause No. 49C01-0401-MF-31

December 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Carl Peters appeals the trial court's Trial Rule 41(B) involuntary dismissal of his claim against J. Russell Sutton, contending that the trial court erred in granting Sutton's Trial Rule 41(B) motion. Concluding that the trial court's judgment is not clearly erroneous, we affirm.

Facts and Procedural History

Peters and Sutton each own fifty percent of Ferguson Steel Company, Inc. ("FSC"), an Indiana corporation that fabricated and erected steel. Both Peters and Sutton were directors until October of 2002, when Peters resigned from the board. Sutton was also president. When Michael Berghoff joined FSC in 1999, it was understood that Sutton would begin relinquishing his management duties and Berghoff would become president over a five-year-period.

FSC's finances began to take a downturn in 2000. FSC had a $13 million line of credit with First Indiana Bank that was due to expire in April of 2002. The line of credit was secured by a $3 million guaranty from Geiger & Peters, a business owned by Peters and his family. In the months prior to the expiration, FSC sought to secure an extension of the line of credit. The agreement for renewal of the line of credit called for Geiger & Peters to loan FSC $1.5 million and be released from its $3 million guaranty. In addition, certain loans from FSC to related companies in which Sutton and Peters had an interest were to be paid off. Finally, Peters and Sutton were to contribute an additional $750,000 in capital to FSC. Berghoff testified that the money "was going to be paid by the shareholders to the company as paid in capital. . . . [T]hey ultimately issued a loan to the company and received a note in return." Transcript at 312-13. All of these transactions as well as the extension of the line of

credit were to be completed at a closing scheduled for July 15, 2002. The closing was postponed; however, Sutton, Peters, and Berghoff met on that date and handled some of the financial transactions anyway. Sutton and Peters paid off the related party loans and each wrote a check for $375,000 as a gesture to demonstrate to the bank "that they were serious and that progress was being made and the shareholders really were going to do what they said they were going to do." Id. at 439. However, because $275,000 of Sutton's contribution was contingent upon a personal loan to Sutton that would be paid over to FSC at the time FSC's line of credit closed, Sutton pulled his $375,000 check and wrote two checks, one for $125,000 that could be cashed immediately and one for $250,000 that was to be held until the closing.

Also on July 15, 2002, Sutton and Peters signed an "Agreement Relating to Employment of Shareholders by [FSC]" (the "Agreement"). The Agreement provides, in pertinent part:

> WHEREAS, Sutton and Peters are the sole shareholders of [FSC], and,
> WHEREAS, [FSC], in order to continue to operate its business of steel fabrication, must secure a line of credit from a banking institution, and,
> WHEREAS, [FSC] pursued multiple banks in an effort to secure such line of credit, and has now been able to obtain an adequate line of credit with First Indiana Bank, if Peters and Sutton shall each contribute capital in the amount of $1,072,471.67, and
> WHEREAS, should Peters and Sutton contribute the aforementioned sum to [FSC] in order to allow it to continue to operate, Sutton will receive consideration by virtue of his continued employment with [FSC], and
> WHEREAS, in the near future, by virtue of [FSC] having employed Michael Berghoff as its president, Sutton's employment will no longer be necessary, in consideration of Peters' aforesaid contribution, the parties now agree as follows:
>
> 1. Sutton's employment by [FSC] shall, in no event, continue past March 19, 2003 without Peters' consent, but Sutton may continue to receive [FSC] health insurance benefits until age 65, or he qualify for

> Medicare, whichever first occurs.
> 2. Sutton's employment by [FSC] shall terminate on August 22, 2002, unless Buildings to Go, LLC's promissory note to Peters in the amount of $384,254.00 is satisfactorily guaranteed, and Peters' interest in Qualistar Racing, LLC is purchased or a written agreement for its purchase entered into by August 22, 2002.
> 3. Neither Sutton nor Peters shall be employed by [FSC] after March 19, 2003 without the other's written consent.

Appellant's Appendix at 61. Berghoff also signed the Agreement, but he testified that he thought he was signing it only as a witness, because the document had not been presented to or approved by FSC's board of directors.

The bank's commitment to extend FSC's line of credit was based upon its review of FSC's March 31, 2002, financial statement, which showed that FSC had performed relatively well in the first quarter of 2002. However, upon further review of FSC's finances in August 2002, it was discovered that the financial statement was inaccurate and FSC had actually suffered a substantial loss in the first quarter of 2002. FSC informed the bank of this discovery. The bank canceled the closing and refused to extend the line of credit. Peters told the president of Geiger & Peters that it should not proceed with the $1.5 million loan to FSC. Sutton did not make his $250,000 check good "because the conditions that were supposed to have happen[ed] did not happen." Tr. at 551.

On October 10, 2002, the bank notified FSC that it intended to foreclose on the line of credit. Peters resigned from the board and Sutton again took an active role in FSC. Sutton sent a letter dated October 25, 2002, to Peters that stated, in pertinent part:

> Please accept my sincere apologies for the obvious misunderstanding. I accept responsibility for not making sure you understood what was arranged the day we wrote the checks. The underpayment was one of several important items that we needed to discuss. Believing that you were fully aware, I brought it up

> to get input from you as to what we should do. The good thing is that we both "saved" $125,000 from the toilet.
> It is obvious that you seek immediate repayment which I intend to accommodate. But even cash from the sale of stock takes 3 working days to fund and that can't be our only source. I'll obviously need a little more time, but do acknowledge the debt and I am willing to pay reasonable interest. I would like to discuss how this might change our notes to [FSC]. Yours currently reflects $275,000 and mine $125,000.

Plaintiff's Exhibit 108 (emphasis omitted). Sutton testified that "it wasn't a debt in my mind. It was a moral debt, but it was not a financial debt." Tr. at 554. Sutton stopped being paid by FSC in December 2002, and was re-employed by the bank to wind down FSC's affairs. FSC went out of business in February 2003.

Peters filed the instant lawsuit on June 24, 2003,[1] alleging in part:

> Sutton failed to fully perform [the Agreement] in that he failed to pay the sum of $250,000.00 to FSC pursuant to [the Agreement], but nevertheless, continued and continues to be paid a salary by FSC and receive other benefits and consideration from FSC. . . . Sutton and Berghoff conspired to defraud Peters out of the sum of $250,000.00 by their aforesaid actions.
> * * *
> Sutton [has] been unjustly enriched by [his] aforesaid actions.
> * * *
> On or about July 15, 2002, and contemporaneously with the execution of [the Agreement], Sutton agreed to loan $375,000.00 to FSC for purposes of assisting FSC in obtaining a line of credit from FSC's lender. . . . Sutton breached his agreement to loan FSC $375,000 by only loaning $125,000 to FSC. . . . As a result of Sutton's breach, FSC has been damaged in the amount of $250,000.

Appellant's App. at 57-59. Sutton answered, and asserted as defenses that Peters had failed to state a claim upon which relief could be granted; Peters had suffered no damages; Peters's claim for relief was barred by waiver and estoppel; Sutton was not unjustly enriched and did

[1] Berghoff was also named as a defendant. In addition to alleging that Berghoff conspired with Sutton to defraud him, Peters alleged that Berghoff was unjustly enriched and breached his fiduciary duty to FSC and its shareholders.

not breach any fiduciary duties; Peters assumed the risk of his alleged damages; Peters caused his own alleged damages and failed to mitigate his alleged damages; Peters's claim was barred by the doctrine of unclean hands; Peters's claim was barred by the failure of presupposed conditions and mutual mistake; and Peters's claim was barred because Peters used duress to force Sutton to enter into the Agreement.

On April 18, 2005, Sutton filed a motion for summary judgment "on all counts brought against him," alleging that the Agreement was not a "valid, enforceable agreement because of (a) mutual mistake as to an essential fact, and (b) a failed condition of the agreement. Furthermore, Peters cannot demonstrate any personal damages." Appellee's App. at 448. During the summary judgment hearing, Peters orally requested summary judgment in his favor. On October 19, 2005, the trial court denied Sutton's motion for summary judgment and entered judgment in favor of Peters in the amount of $250,000 on his direct claim for enforcement of the Agreement and his derivative claim for enforcement of the Agreement. Peters filed a motion seeking certification of the summary judgment ruling as a final judgment. Sutton objected to certification as a final judgment and filed a motion for the trial court to reconsider the scope of its summary judgment order. The trial court found Sutton's motion to be meritorious, denied Peters's motion for entry of final judgment, and modified its earlier order "to eliminate any judgment on liability or damages for [Peters] and against [Sutton] and . . . to only grant summary judgment in favor of [Peters] and against [Sutton] on the defenses . . . of mutual mistake, failure of a condition precedent and the defense that Peters' [sic] suffered no personal damages." Appellant's App. at 75.

Trial was held in May and June 2000. At the close of Peters's case in chief, Sutton

moved for involuntary dismissal of Peters's claims pursuant to Indiana Trial Rule 41(B). The trial court entered an order on June 30, 2006, amended by an order of July 3, 2006, granting Sutton's motion for dismissal pursuant to Trial Rule 41(B).[2] Peters's motion to reconsider was denied. On September 7, 2006, Sutton requested disposition of the Trial Rule 41(B) dismissals by entry of final judgment, and the trial court approved the request and entered final judgment for Sutton and against Peters by an order dated September 12, 2006. Peters then initiated this appeal.

Discussion and Decision[3]

I. Standard of Review

Trial Rule 41(B) provides:

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[2] Berghoff also made a motion for dismissal. The trial court granted his motion with respect to certain claims, but denied his motion as to the breach of fiduciary duty claim and ordered that the trial on that claim would go forward as scheduled on that issue. Berghoff informed the court that he would offer no additional evidence and the case was submitted on the record and written closing arguments. On August 31, 2006, the trial court issued its findings and final judgment with respect to the remaining claim against Berghoff, finding that he breached his fiduciary duty and should forfeit his salary for the one month that he was being paid as president of FSC while operating a new company.

[3] Sutton claims that a threshold issue is whether Peters's appeal was timely filed. Peters filed his Notice of Appeal on October 11, 2006. Sutton acknowledges that the July 3, 2006, order on dismissing Peters's claims against him pursuant to Trial Rule 41(B) is not a final appealable order because it disposed of fewer than all claims against all parties. He argues, however, that the August 31, 2006, order disposing of Peters's only remaining claim (a claim against Berghoff) was a final appealable order and Peters should have filed his Notice of Appeal within thirty days of that date. This seems to us to be a somewhat disingenuous argument, given that Sutton himself filed a request for disposition of the dismissals by entry of final judgment on September 7, 2006, indicating that he did not believe the dismissal became a final appealable order by operation of the August 31, 2006, order. Contrary to Sutton's assertion that the August 31, 2006, order "expressly referred to the trial court's prior judgment," appellee's brief at 3, we find no express reference to that order. The substance of the August 31, 2006, order concerns only Peters's claim against Berghoff for breach of fiduciary duty by incorporating a similar business and commencing operations while still acting as president of FSC. Peters's notice of appeal, filed within thirty days of the trial court's entry of final judgment on September 12, 2006, was timely.

> After the plaintiff or party with the burden of proof upon an issue, in an action tried by the court without a jury, has completed the presentation of his evidence thereon, the opposing party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the weight of the evidence and the law there has been shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff or party with the burden of proof, the court, when requested at the time of the motion by either party shall make findings if, and as required by Rule 52(A). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication upon the merits.

Under the rule, the trial court may weigh evidence, determine the credibility of witnesses, and decide "whether the party with the burden of proof has established a right to relief." Barger v. Pate, 831 N.E.2d 758, 761 (Ind. Ct. App. 2005). When we review the grant of a motion under Trial Rule 41(B), we must determine whether the trial court's judgment is clearly erroneous. Id. In this case, no party requested the entry of findings and the trial court did not enter any sua sponte. The trial court's judgment is therefore a general judgment that we may affirm on any theory supported by the evidence. Butrum v. Roman, 803 N.E.2d 1139, 1143 (Ind. Ct. App. 2004), trans. denied. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. Sun Life Assur. Co. of Canada v. Ind. Dep't of Ins., 868 N.E.2d 50, 55 (Ind. Ct. App. 2007), trans. denied.

II. Trial Rule 41(B) Dismissal

Peters argues that the evidence does not support the trial court's dismissal of his claim. Specifically, he argues that the evidence proved the necessary elements of his claims and

failed to prove any of Sutton's defenses.[4]

The elements of a breach of contract action are the existence of a contract, the defendant's breach thereof, and damages. Gatto v. St. Richard Sch., Inc., 774 N.E.2d 914, 920 (Ind. Ct. App. 2002). Peters relies upon the Agreement as the contract that Sutton breached by not contributing the full $375,000 to FSC. We note that there was evidence that this was an agreement between Sutton and Peters, not between Sutton and FSC. Berghoff testified that he signed the Agreement as a witness only because the Agreement was never presented to FSC's board for approval. Peters drafted the Agreement himself and admitted it was never presented to the board. Moreover, the terms of the Agreement concern Sutton's continued employment with FSC, not his alleged obligation to contribute funds to the company. Although the Agreement references Sutton's and Peters's expected contribution, it does so in terms of "if" and "should" the contribution be made. Appellant's App. at 61. The actual agreement is that if Peters and Sutton make their respective contributions and if FSC obtains a line of credit that allows it to continue to operate, then Sutton's employment with FSC will cease no later than March 19, 2003, and neither Sutton nor Peters will thereafter be employed by FSC without the written consent of the other. Therefore, the trial court could have found that there was no contract between Sutton and FSC, or that if there was such a contract, Sutton did not breach it by failing to contribute the full $375,000 because the terms of the contract did not obligate him to do so. Moreover, it is clear from the evidence that

[4] Peters claims that to the extent the trial court's decision is based on any of the three defenses upon which it had previously granted summary judgment to Peters, Peters has been unfairly prejudiced. Because the trial court did not enter findings and conclusions explaining the basis for its decision and because we can affirm the trial court's general judgment on any theory supported by the record, we will assume that the trial court did not base its decision on any of those defenses and will likewise not consider those defenses in

FSC's continued viability was contingent upon obtaining the line of credit from the bank. There was no evidence that Sutton's failure to make his $250,000 check good had any impact on the bank's decision not to extend the line of credit. It is clear that the bank's decision was based upon new information about FSC's financial situation irrespective of Sutton's and Peters's contributions. Peters testified that the bank's discovery of FSC's first quarter 2002 loss caused it to refuse to proceed with the line of credit. There was also no evidence that if Sutton had contributed the $250,000, even after the closing fell through, FSC would have been financially viable in the absence of the line of credit. Therefore, the trial court also could have found that if there was a contract obligating Sutton to contribute a full $375,000 to FSC, FSC, and therefore Peters as a shareholder, suffered no damage because of Sutton's failure to do so.

Peters notes the letter Sutton wrote to him in October 2002 in which Sutton "acknowledge[s] the debt." Ex. 108. Sutton testified that he considered it a moral debt, not a contractual debt. He was willing to pay Peters $125,000 so that they each had personally lost $250,000. The letter does not create a contract where none previously existed. The trial court properly could have declined to consider the letter as evidence of a prior contract legally obligating Sutton to contribute $375,000 to FSC.

As for the breach of fiduciary duty claim, "shareholders in a close corporation stand in a fiduciary relationship to each other, and as such, must deal fairly, honestly, and openly with the corporation and with their fellow shareholders." Barth v. Barth, 659 N.E.2d 559, 561 (Ind. 1995). Peters argues that Sutton's conduct in obligating himself to contribute $375,000

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evaluating this appeal.

to FSC and then only paying $125,000 constitutes a breach of his fiduciary duty. "The obvious benefit to both Sutton and Peters of contributing capital, as the sole shareholders of FSC, was that their business would receive a line of credit that was needed to remain in business." Appellant's Brief at 13. There was evidence that all parties were aware that Sutton would receive the funds to cover the $250,000 check he had already written to FSC when the line of credit closed. As stated above, Sutton's failure to make the $250,000 check good was not the reason the line of credit failed to close. Moreover, had Sutton made the check good even after the bank refused to extend the line of credit, it would have represented nothing more than an additional debt that FSC would ultimately be unable to repay. The trial court properly could have found that Peters failed to show that Sutton's conduct in any way failed to constitute fair, honest, and open dealing with FSC and Peters.

On our review of the record, we are not left with the firm conviction that a mistake has been made and pursuant to our standard of review, by which we can affirm a trial court's general judgment on any theory supported by the evidence, we cannot say that the trial court's judgment granting Sutton's motion for a Trial Rule 41(B) dismissal was clearly erroneous.

Conclusion

The trial court's order granting Sutton's Trial Rule 41(B) motion to dismiss was not clearly erroneous. The judgment of the trial court is affirmed.

Affirmed.

KIRSCH, J., and BARNES, J., concur.