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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

BRADLEY MURCHIE, Individually and)	
Derivatively on behalf of SYMED, INC., an)	
Illinois Corporation,)	
)	
Plaintiff-Appellee,)	Appeal from the Circuit Court
)	of Cook County.
v.)	
)	
MARK SORENSEN,)	No. 06 CH 19280
)	
Defendant-Appellant)	
)	The Honorable
(SyMed, Inc., an Illinois Corporation, and)	Thomas R. Allen,
MioMed Orthopaedics, Inc., an Illinois)	Judge, presiding.
Corporation,)	
)	
Defendants).)	

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Pucinski and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's findings of minority shareholder oppression, corporate waste, and violation of corporate disclosure statute were not against the manifest weight of the evidence. The trial court's valuation of company was reasonable.

¶ 2 Illinois law provides minority shareholders with an array of remedies to escape mistreatment by the majority shareholders. Plaintiff Bradley Murchie, a 10% owner of defendant SyMed, Inc., sued the 90% owner, defendant Mark Sorensen, under the Illinois Business Corporation Act (Act) (805 ILCS 5/12.56 (West 2006), alleging, among other claims, that Sorensen failed to disclose SyMed's corporate records, oppressed Murchie, and wasted corporate funds by transferring all of SyMed's assets to defendant MioMed Orthopaedics, Inc, which Sorensen owns. After a bench trial, the trial court awarded Murchie \$319,288.93 in damages. Sorensen appeals. Because sufficient evidence and the manifest weight of the evidence support the trial court's judgment, we affirm.

¶ 3 BACKGROUND

¶ 4 In 1998 or 1999, Murchie and Sorensen, who worked for a company that sold orthopedic products, discussed forming their own orthopedic service business. Their business would contract with health insurance companies to provide products and services to orthopedic patients, with Sorensen handling sales, marketing, and management, and Murchie meeting with patients to instruct them on how to use the equipment. Sorensen formed SyMed in November 2000. He gave Murchie a 10% ownership interest in the company, and retained the remaining 90%. Murchie worked 20 to 25 hours per week servicing patients for SyMed while working fulltime for another orthopedics company. Murchie was not SyMed's sole servicer, and Sorensen referred SyMed's work to other service representatives as well.

¶ 5 The minutes from SyMed's annual meetings from 2001 to 2006 list Murchie as a shareholder and officer of SyMed, though Murchie was never informed of these meetings. Murchie never requested SyMed hold a shareholders' or board of directors' meeting. From November 2001 to early 2003, Murchie and Sorensen made three joint purchases of

rehabilitation equipment for use in SyMed's business. Sorensen operated SyMed out of his home office with the help of his mother.

¶ 6 In late 2001, Sorensen learned of an opportunity to become a distributor for DJO, a provider of orthopedic products. In 2002, Sorensen formed MioMed as its sole owner for the purpose of distributing for DJO. MioMed acquired office space, which it shared with SyMed. In addition, MioMed and SyMed shared office equipment and staff. In April 2002, MioMed entered into a distribution agreement with DJO.

¶ 7 Sorensen offered to hire Murchie as a sales representative for MioMed. Murchie accepted and began working exclusively for SyMed and MioMed in September 2002, although he did not execute a written sales agreement until 2005. Murchie received his assignments for both SyMed and MioMed from MioMed employees.

¶ 8 Beginning in August 2002, Sorensen transferred virtually all of the assets of SyMed to MioMed monthly. Sorensen described these transfers as "administrative and consulting fees" to reimburse MioMed for work done on behalf of SyMed and for overhead expenses. Sorensen did not keep any records regarding what work MioMed performed for SyMed or the manner of the division of overhead expenses.

¶ 9 In June 2005, Murchie wrote Sorensen complaining about lack of payments and commissions. Sometime that month, Murchie obtained documents from MioMed's medical billing servicer, and met with a regional manager from DJO to whom Sorensen and MioMed reported. Murchie showed the documents to DJO and claimed that there were billing discrepancies. Murchie later met with the vice president of sales for DJO. Sorensen testified that, after this point, he noticed that DJO began to exhibit a lack of confidence in MioMed, though he did not learn of Murchie's meetings with DJO until Murchie's deposition in 2010 or 2011.

- ¶ 10 In January 2006, Sorensen executed an agreement between SyMed and MioMed to transfer 60% of SyMed's gross revenue to MioMed. In April 2006, Murchie wrote SyMed and Sorensen, requesting the company's balance sheets, income statements, bylaws, and tax returns for the purpose of valuing his ownership interest in SyMed. After receiving no response, Murchie sent a similar letter via his attorney the following month. Neither SyMed nor Sorensen responded.
- ¶ 11 In July 2006, Sorensen terminated Murchie from MioMed, which Murchie understood to effectively terminate his employment with SyMed as well. Sorensen cited Murchie's lack of sales and failure to market and obtain referrals for the use of their jointly owned machines. Soon after, Sorensen began placing Murchie's commissions for the ongoing rental of their jointly owned machines in escrow.
- ¶ 12 After 2006, SyMed's revenues increased significantly to over \$2 million per year. Sorensen expanded SyMed's business into many other healthcare related services. DJO renewed its distribution agreement with MioMed in August 2007, but in May 2008, DJO terminated its relationship with MioMed.
- ¶ 13 In September 2006, Murchie filed suit, alleging the following claims against Sorensen, SyMed, and MioMed: (i) failure to disclose corporate records (805 ILCS 5/775(e) (West 2006)); (ii) oppressive conduct (805 ILCS 5/12.56(a)(3) (West 2006)); (iii) breach of fiduciary duty; (iv) fraud; and (v) three claims for breach of various contracts. In addition to damages, Murchie sought to have Sorensen purchase Murchie's SyMed shares. 805 ILCS 5/12.56(b)(11) (West 2006).
- ¶ 14 At a bench trial in 2013, Murchie called two experts. Gerard Schrementi and Albert Choi. Schrementi, a certified public accountant, testified as an expert in accounting and financial

statements. He reviewed income tax statements, financial statements, and the general ledger of SyMed and MioMed from 2002 to 2011. He noted that SyMed paid MioMed large administrative and consulting fees that "effectively wiped out [SyMed's] profits." He testified that the fees were inconsistent in amount and had no supporting documentation. Summarizing his findings, Schrementi said that from 2002 to 2011, SyMed's income showed a net loss of \$2,380 while paying MioMed about \$2.85 million in fees.

¶ 15 Murchie's second witness, Albert Choi, testified as an expert in business valuation. Choi reviewed SyMed's financial statements, tax returns, and general ledgers. He described SyMed's fees to MioMed as "red flags" and noted that the fees were round numbers and fluctuated as a percentage of SyMed's revenue. Choi attempted to determine the basis of the fees, but could not do so without documentation. He requested a management interview with Sorensen, which Sorensen denied. Finding no basis for the fees, Choi treated the fees as distributions and did not consider them expenses.

¶ 16 Applying the fair value standard from section 12.56 of the Illinois Business Corporation Act (805 ILCS 5/12.56 (West 2006)), using a capitalization of earnings method, and adding a \$400,000 premium for being a "pass through" entity, Choi valued SyMed at \$1.598 million. Accordingly, he valued Murchie's share at \$159,806. On cross-examination, Choi testified he believed that Murchie ran SyMed, though he stated that Sorensen ran SyMed in his written report. Choi admitted that his analysis did not take into account Sorensen's compensation. He also admitted that his valuation did not reflect the "fair market value" of Murchie's shares.

¶ 17 The trial court found that Sorensen oppressed Murchie by failing to share SyMed's profits, and agreed with Choi's valuation. The trial court ordered Sorensen to purchase Murchie's SyMed shares for \$159,806. The court also found that half of the "administrative and consulting

fees" SyMed paid to MioMed constituted a waste of corporate assets, and calculated Murchie's damages at \$142,502.93. As a penalty for failing to disclose SyMed's documents to Murchie, the trial court assessed a penalty of 10% of the value of his shares. The court ruled in defendants' favor on the breach of contract and breach of fiduciary duty counts. Sorensen appeals.

¶ 18

ANALYSIS

¶ 19

Sorensen raises four errors by the trial court: (i) the finding that he oppressed Murchie; (ii) the finding that he wasted SyMed's assets; (iii) the acceptance of Choi's valuation of SyMed; and (iv) the assessment of a 10% penalty for failure to disclose SyMed's documents to Murchie on request.

¶ 20

Oppression

¶ 21

Sorensen argues that the trial court erred in holding that he oppressed Murchie. We review the trial court's findings against the manifest weight of the evidence. *Kovac v. Barron*, 2014 IL App (2d) 121100, ¶ 71. "A finding is against the manifest weight of the evidence only if, upon hearing such evidence, no reasonable person would reach the conclusion arrived at by the trial court." *Coduti v. Hellwig*, 127 Ill. App. 3d 279, 288 (1984).

¶ 22

The Act sets forth a cause of action where 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 with respect to the petitioning shareholder whether in his or her capacity as a shareholder, director, or officer." (Emphasis added.) 805 ILCS 5/12.56(a)(3) (West 2006). "Shareholder oppression has not been limited to actions defined as 'illegal' or 'fraudulent' or necessarily including misapplication of corporate assets or mismanagement of funds. *** [R]ather, it can contemplate a continuing course of heavy-handed conduct." *Hager-Freeman v. Spircoff*, 229 Ill. App. 3d 262, 276 (1992). Heavy-handed conduct can include the failure to call meetings of the

board of directors or to consult with minority shareholders regarding management of corporate affairs, and failing to disclose corporate documents on request. See *Compton v. Paul K. Harding Realty Co.*, 6 Ill. App. 3d 488, 499 (1972).

¶ 23 The trial court's finding that Sorensen oppressed Murchie was not against the manifest weight of the evidence. The record is replete with evidence of oppression. Sorensen failed to invite Murchie to shareholder and board of director meetings. He twice ignored Murchie's requests for SyMed's financial documents. He transferred all of SyMed's funds to MioMed, half of which were SyMed's profits, and failed to document the two companies' shared expenses. And, Sorensen failed to share SyMed's profits with Murchie. These actions suffice to support the trial court's finding of oppression under the Act.

¶ 24 Sorensen argues that Murchie had no right to participate in SyMed's business aside from servicing clients. But Sorensen admits that Murchie was a shareholder and officer of SyMed, and thus had some right to govern SyMed under the Act. See 805 ILCS 5/8.50 (West 2006). Sorensen further asserts that Murchie had no right to participate in the governance of SyMed because Sorensen gifted Murchie his shares. We know of no principle of law, nor does Sorensen cite any, supporting the proposition that gifted shares are treated differently than purchased shares.

¶ 25 We affirm the trial court's ruling on the claim of minority shareholder oppression.

Waste

¶ 26 Sorensen next asserts that the trial court erred in finding that he wasted SyMed's assets. Again, the standard of review is against the manifest weight of the evidence. *Kovac v. Barron*, 2014 IL App (2d) 121100, ¶ 71.

¶ 27 The Act allows shareholders of non-public corporations to seek redress where "[t]he corporation assets are being misapplied or wasted." 805 ILCS 5/12.56(a)(4) (West 2006). "[W]aste is defined as an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade." (Internal quotation marks omitted.) *Sherman v. Ryan*, 392 Ill. App. 3d 712, 733 (2009). To prevail on a claim of waste, the stockholder must show that the board irrationally squandered corporate assets to the point that the challenged transaction served no corporate purpose or where the corporation received no consideration. *Id.*

¶ 28 To succeed on a claim of waste, the shareholder plaintiff must rebut the presumption of good faith created under the business judgment rule. *In re Huron Consulting Group, Inc. Shareholder Derivative Litigation*, 2012 IL App (1st) 103519, ¶ 62. That rule "cloaks directors with the presumption that in making business decisions on behalf of the corporation, they do so on an informed basis, in good faith, and in the honest belief that their actions are in the corporation's best interest." *Id.*

¶ 29 The trial court's finding of waste is not against the manifest weight of the evidence. There is minimal evidence to support the legitimacy of the transfers of funds from SyMed to MioMed. Sorensen testified that SyMed used MioMed's office space, employees, and office equipment, but did not present any evidence of how much MioMed paid for these items let alone how much SyMed should have paid. Moreover, these transfers—billed as administrative and consulting fees—eliminated virtually all of SyMed's profits. Choi testified that the fees did not appear to be legitimate expenses because they were always round numbers, and were not supported by any documentation. Thus, the evidence reasonably supports the trial court's finding that half of the

transfers between SyMed and MioMed constituted waste and were not shielded by the business judgment rule.

¶ 30 Sorensen argues that the trial court improperly shifted the burden to him to prove the validity of the transfers to MioMed. He asserts that Murchie bore the burden of proving that he profited from the transaction, citing *Coduti v. Hellwig*, 127 Ill. App. 3d 279 (1984). But, in *Coduti*, while the court acknowledged that the initial burden to show improper self-dealing is on the plaintiff shareholder, the burden then shifts to the corporation's fiduciary to show that the transaction was valid. *Id.* at 292-93; see 805 ILCS 5/8.60(a) (West 2006); *Shlensky v. South Parkway Building Corp.*, 19 Ill. 2d 268, 280-81 (1960) ("the directors who would sustain the challenged transaction have the burden of overcoming the presumption against the validity of the transaction by showing its fairness.").

¶ 31 Accordingly, while the initial burden to show waste and self-dealing fell on Murchie, that burden shifted to Sorensen after Murchie introduced the evidence discussed above. *Supra* ¶ 29. The trial court reasonably held that Sorensen did not sustain his burden of showing the validity of the transfers to MioMed after he offered only the flimsiest of explanations. Thus, we affirm the trial court's finding that half of the transfers from SyMed to MioMed constituted waste.

¶ 32 Fair Value

¶ 33 Sorensen argues that the trial court erred in accepting Choi's valuation of Murchie's shares. We review the trial court's determination of "fair value" against the manifest weight of the evidence. *Kalabogias v. Georgou*, 254 Ill. App. 3d 740, 749 (1993) ("if the record 'reflects careful consideration of all the evidence presented,' the court's [valuation] finding will be affirmed on appeal unless it is contrary to the manifest weight of the evidence."). A valuation is against the manifest weight of the evidence only when the opposite conclusion is clearly

apparent or the court's findings are unreasonable, arbitrary, or not based on the evidence. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 44.

¶ 34 Where a shareholder has proved oppression or waste (805 ILCS 5/12.56(a)(3)-(4) (West 2006)), the court may, among other relief, order the corporation or the other shareholders to purchase the shares of the petitioning shareholder for their "fair value." 805 ILCS 5/12.56(b)(11) (West 2006). The court shall "[d]etermine the fair value of the shares, with or without the assistance of appraisers, taking into account any impact on the value of the shares resulting from the actions giving rise to a petition under" section 12.56. 805 ILCS 5/12.56(e)(i) (West 2006). The statute defines "fair value" as "the proportionate interest of the shareholder in the corporation, *without any discount* for minority status or, absent extraordinary circumstances, lack of marketability." (Emphasis added.) 805 ILCS 5/12.56(e) (West 2006).

¶ 35 The trial court use of Choi's appraisal is not against the manifest weight of the evidence. The fact finder may determine whether to accept and give weight to a valuation expert's opinion. *Gold v. Ziff Communications Co.*, 322 Ill. App. 3d 32, 58 (2001). Sorensen argues that the weaknesses in Choi's opinion invalidated his testimony. Sorensen points to Choi's treatment of all of SyMed's fees paid to MioMed as income, and his adding a \$400,000 "pass through" premium. Sorensen also notes that Choi assumed that Murchie ran SyMed, and admitted that he did not know of any Illinois court that accepted the valuation method he used.

¶ 36 These arguments, however, go to the weight of Choi's testimony, and not its admissibility. As we said in *Gold v. Ziff Communications Co.*, 322 Ill. App. 3d at 58 (quoting *Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490, 496 (2d Cir. 1995)), " '[t]o the extent [a valuation expert] depart[s] from general valuation practices or adopted procedures subject to criticism, defendant had ample opportunity to elicit these facts and argue them to the [fact

finder]. The expert's training and background and the procedures he followed in arriving at a valuation presented the [fact finder] with the question of whether or not to accept the expert's opinion and what weight to give it.' "

¶ 37 Sorensen next argues that the trial court's ruling contradicts itself. He notes that the trial court accepted Choi's valuation, which assumed that all of the fees SyMed paid to MioMed were illegitimate. But, when calculating "waste," the trial court found that half of those fees were legitimate. Because Sorensen did not once raise this contradiction in his post-trial motion, he forfeited review. See *Jackson v. Seib*, 372 Ill. App. 3d 1061, 1076 (2007) (where party fails to raise issue in post-trial motion, the issue forfeit on appeal). The trial court did not "have an opportunity to consider and correct the alleged error," and thus, we will not address the issue. *People v. Caballero*, 102 Ill. 2d 23, 41 (1984).

¶ 38 Sorensen further argues that Choi did not use the correct definition of "fair value." Our review of an issue of statutory construction is *de novo*. *Pielet v. Pielet*, 2012 IL 112064, ¶ 30. Sorensen asserts that the "fair value," as opposed to "fair market value," should only apply to Murchie's 10% interest in SyMed, and not the entire company. 805 ILCS 5/12.56(e) (West 2006). The statute defines "fair value" as "the proportionate interest of the shareholder in the corporation, without any discount for minority status or, absent extraordinary circumstances, lack of marketability." *Id.* Sorensen's appears to argue that the Act requires a determination of the "fair market value" of SyMed (with any discounts for minority status or marketability) followed by a determination of the "fair value" of Murchie's 10% share (without those discounts). The statute does not require the "fair value" of a shareholder's interest be calculated based on the "fair market value" of the corporation. Doing so would include the discounts that the statute specifically excludes in the calculation of "fair value." Compare 805 ILCS 5/12.56(e) (West

2006) (defining "fair value" without discount for minority status or lack of marketability) & *Institutional Equipment & Interiors, Inc. v. Hughes*, 204 Ill. App. 3d 922, 930 (1990) ("*Fair-market value* is based on the price that would be agreed upon in an arm's-length transaction between a willing buyer and a willing seller on the open market, neither under a compulsion to act, and both parties possessed of all relevant facts." (Emphasis added.)).

¶ 39 Accordingly, we affirm the trial court's valuation of Murchie's interest in SyMed.

¶ 40 Penalty

¶ 41 Sorensen argues that Murchie is not entitled to a 10% penalty under section 7.75 of the Act. 805 ILCS 5/7.75 (West 2006). The standard of review is whether the trial court's findings are against the manifest weight of the evidence. *McCormick v. Statler Hotels Delaware Corp.*, 55 Ill. App. 2d 21, 31 (1964).

¶ 42 Section 7.75 of the Act gives a shareholder "the right to examine, in person or by agent, at any reasonable time or times, the corporation's books and records of account, minutes, voting trust agreements filed with the corporation and record of shareholders, and to make extracts therefrom, but only for a proper purpose." 805 ILCS 5/7.75(b) (West 2006). A shareholder's demand for records must be in writing and must state "with particularity the records sought *** and the purpose therefor." 805 ILCS 5/7.75(d) (West 2006). Failure to comply with a legitimate request for examination under this section makes the corporation or corporate officer liable for up to 10% of the value of the plaintiff's shares. *Id.* It is a defense to this penalty if the plaintiff shareholder "has improperly used any information secured through any prior examination of the books and records of account, or minutes, or records of shareholders of such corporation or any other corporation." *Id.* The corporation or officer must raise any defense to a demand within at

the time of the demand otherwise the defense is forfeit. *Hagen v. Distributed Solutions, Inc.*, 328 Ill. App. 3d 132, 142 (2002).

¶ 43 Sorensen argues that Murchie's demands did not comply with section 7.75 because they requested records be delivered to Murchie. He further argues that Murchie's disclosure of MioMed's records to DJO in 2005 is a defense against the penalty. But nothing in the record indicates that Sorensen raised either of these issues within the time of the demand. Both defenses are forfeit. *Hagen*, 328 Ill. App. 3d at 142.

¶ 44 Affirmed.