FOURTH DIVISION
June 29, 2018

Nos. 1-17-0434 & 1-17-1005 (consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHRISTOPHER G. GEHRKE,	)	Appeal from the
	)	Circuit Court of
Plaintiff/Counterdefendant-Appellant,	)	Cook County
	)	
v.	)	No. 12 CH 44267
	)	
FETTES, LOVE & SIEBEN, INC.; M. SCOTT	)	
HOFFMAN; and JOHN WOLF,	)	Honorable
	)	Anna H. Demacopoulos
Defendants/Counterplaintiffs-Appellees.	)	Judge Presiding.
	)	

JUSTICE ELLIS delivered the judgment of the court.
Justices McBride concurred in the judgment.
Justice Gordon dissented.

ORDER

¶ 1 *Held*: Trial court judgment affirmed. Trial court correctly granted summary judgment on all counts of complaint where defendants terminated plaintiff for insubordination and plaintiff failed to come forth with any factual support for claims that defendants breached their fiduciary duty or engaged in a continuing course of oppressive conduct towards plaintiff. Summary judgment on counterclaim for specific performance requiring plaintiff to sell his stock and sign subordination agreement was proper where required by bylaws.

¶ 2 In this consolidated appeal, the issue before us is whether the circuit court correctly granted summary judgment to defendants, Fettes, Love & Sieben, Inc. (FLS), M. Scott Hoffman, and John Wolf, on all four counts of the second amended complaint and on their amended counterclaim.

¶ 3 The second amended complaint alleged: breach of fiduciary duty (count I); tortious interference with employment expectancy (count II); civil conspiracy (Count III); and violation of section 5/7.05 of the Business Corporation Act of 1983 (815 ILCS 5/7.05 (West 2012)). After the trial court granted summary judgment on all four counts of the second amended complaint in favor of defendants, defendants filed an amended counterclaim for specific performance requiring plaintiff, a minority shareholder, to sell his stock in FLS and sign a subordination agreement, as required by the company's lender. The trial court also granted summary judgment on the amended counterclaim. Plaintiff appeals both orders.

¶ 4 For the reasons that follow, we affirm the judgment of the circuit court.

¶ 5 I. BACKGROUND

¶ 6 FLS is a plumbing and heating contractor that had been operated for years by two families, the Gehrkes and the Hoffmans. The grandfathers of plaintiff Christopher Gehrke and defendant Scott Hoffman ran the company until they were succeeded by Albert Gehrke (Christopher's father) and Ralph Hoffman and his wife, Sheryl (Scott's parents).

¶ 7 Plaintiff Christopher Gehrke, a licensed plumber, began working for FLS in 1985. From 1985 to 1989, plaintiff worked as an apprentice plumber. He got his license in 1989 and continued working for FLS as a plumber in the field, as well as a foreman, until 1997.

¶ 8 In 1997, Albert Gehrke, plaintiff's father and the president of FLS, asked plaintiff to work in the office. Between 1997 and 1999, plaintiff worked in the office as a project manager and did telephone work and dispatch-type work. If a property owner contacted FLS to certify and test a backflow, he would send out a certified backflow inspector. He ran a contract that FLS had with the city of Chicago. He provided estimates work for prospective customers, as he had

previously done in his role as a field plumber. He also ran the service truck department, which had one employee.

¶ 9 Overall, plaintiff felt that the office job was not his "cup of tea." Plaintiff decided to leave FLS in 1999 because he was "very frustrated." He could not get plumbers assigned to the jobs he had secured. He also believed he had insufficient administrative support and discussed this with his father several times. But his father did not hire more office support and never addressed the issue to plaintiff's satisfaction. Instead, plaintiff's father told him that plaintiff would "figure it out" and basically told him, "[i]n a roundabout way," that plaintiff had to handle it. Eventually, plaintiff's father suggested that, if plaintiff was so frustrated, he should take a break from what he was doing. When plaintiff decided to leave, his father offered to put him out onto a job as a plumber with FLS. But plaintiff declined, and in a matter of days, he chose to join a competitor, Johns' Plumbing, where he worked for a year and a half as a plumber and did no office work.

¶ 10 When plaintiff left FLS in 1999, he owned shares of its stock. His father told him that the bylaws stated that only an employee could be a stockholder and plaintiff had to give up his shares. Plaintiff returned to work at FLS in July 2000 and kept his shares.

¶ 11 Plaintiff's father was still the president of FLS when plaintiff returned. Plaintiff worked as a plumber and never returned to office work.

¶ 12 In 2008, Albert Gehrke and Ralph Hoffman gifted shares of FLS stock to their children. Albert gifted shares to plaintiff; Ralph gifted shares to defendant Scott Hoffman. Eventually, plaintiff and defendant Hoffman each owned 425 shares. Defendant John Wolf owned 25 shares. Eric Nelson owned 10 shares.[1]

[1] Plaintiff states in his brief that he owned 425 shares in 2008. Defendant John Wolf testified in his deposition that plaintiff had 417 shares and plaintiff's father gave him an

¶ 13 Between 2000 and 2008, plaintiff never indicated to anybody at FLS that he wanted to do office work. In 2008, plaintiff asked his father if he could do office work and get into a management position, but his father told him no, because work had slowed due to the recession.

¶ 14 Plaintiff testified that, in 2010, he had "four or five conversations" with defendants, Hoffman and Wolf, about doing office work and filling in for others when they went on vacation. Plaintiff could not recall if either responded verbally; plaintiff said they either shrugged their shoulders, shook their heads, or walked away. At the time, plaintiff's father was president and had the authority to make that decision, but plaintiff did not talk to his father or discuss it with him. And although plaintiff's father, on his own, had the power to put plaintiff into the office at any time between 2000 and 2010, he did not.

¶ 15 In 2011, Albert Gehrke and Ralph Hoffman retired. Ralph's wife, Sheryl, who worked in the office, also retired at that time. The record shows that, although there was an attempt to make plaintiff's father retire involuntarily, he eventually agreed to retire. Plaintiff's father died in February 2012.

¶ 16 Although plaintiff never returned to office work during his father's tenure as president, plaintiff testified that, in January 2012, his father told him that he had set up the shares equally between plaintiff and defendant Hoffman for the two to run the business. Nothing was reduced to writing.

¶ 17 After his father's death, one or two times, including on June 7, 2012, plaintiff told defendants Hoffman and Wolf, "It's time for me to get into the office." When asked what he was qualified to do, plaintiff responded estimating, plumbing, office work and management. Plaintiff testified that he was told he was not qualified and did not have computer knowledge.

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additional 8 shares in 2011. The difference is immaterial.

¶ 18 On June 7, 2012, an annual shareholders meeting was held. Plaintiff attended the meeting. Defendant John Wolf prepared an agenda before the meeting and discussed it with Hoffman. The agenda included three items under "New Business."

¶ 19 The first item was a proposed revision to the bylaws that " 'all shareholders selling their stock back to the company must sign a Subordination Agreement as required by the bank in order to secure our line of credit' as done in the past." The reason stated was that this had never been included in the corporate documents. (The agenda also contained an "Officers Report" noting a meeting with FLS's bankers the previous day and the signing of a new line of credit for 2 million dollars.)

¶ 20 The second item under new business concerned the number of board members. Although the original corporate bylaws allowed three members, over time the number had increased to five. The proposal sought to reaffirm, and revert back to, three board members.

¶ 21 The last item under new business sought an amendment to the bylaws to allow for a director who was "not an employee or shareholder if said individual was a director of the corporation for a minimum of 10 years."

¶ 22 Plaintiff nominated himself to be a director. Hoffman nominated his father, Ralph Hoffman, to be a director. A vote was held and Ralph Hoffman was elected by a vote of 2 to 1.

¶ 23 Under section 7.40(a) of the Illinois Business Corporation Act, "in all elections for directors, every shareholder shall have the right to vote the number of shares owned by such shareholder for as many persons as there are directors to be elected, or to cumulate such votes and give one candidate as many votes as shall equal the number of directors multiplied by the number of such shares or to distribute such cumulative votes in any proportion among any number of candidates." 805 ILCS 5/7.40(a) (West 2012). It is undisputed that plaintiff had the

right to cumulatively vote his shares. Had he exercised this right, he could have elected himself a director. But it is also undisputed that plaintiff was not aware of his right to cumulatively vote his shares until he later talked with his attorney.[2]

¶ 24 Plaintiff testified in an affidavit that, after the shareholders meeting, both Hoffman and Wolf "berated" him. Plaintiff had previously sat in on an office meeting. Plaintiff stated that Hoffman said: "Who the hell do you think you are sitting in our weekly meeting—you have no business at that meeting." Plaintiff responded that, "as a shareholder, [he] was entitled to attend the meetings." Hoffman replied, "You are just a shareholder and nothing more."

¶ 25 In late October 2012, plaintiff submitted his name for nomination to the board of directors of the Plumbing Contractors Association (PCA). The PCA's primary role is to negotiate the Collective Bargaining Agreement (CBA) with the Chicago Plumbing Local 130 UA. Plaintiff testified that he decided to submit his name after discussions with two PCA board members, who worked for another plumbing contractor, and with the PCA president, Lori Abbott. Plaintiff did not tell anyone at FLS. At the time, defendant Hoffman was president of FLS and defendant Wolf was vice president and secretary-treasurer. Hoffman testified that he learned of plaintiff's self-nomination to the PCA board of directors in late October 2012 from a plumbing contractor with another company.

[2] In his earlier complaints, plaintiff sought a mandatory injunction ordering another meeting of the shareholders to elect directors and a declaration that the election of directors in June 2012 was invalid. According to the record, the trial court decided that an individual is charged with knowledge of the law and defendants had no obligation to inform plaintiff of the law. Plaintiff's claims regarding cumulative voting were dismissed with prejudice. Plaintiff later filed a second amended complaint and dropped these claims.

¶ 26 Hoffman also testified that, in October 2012, FLS decided that it did not like the individual who had been appointed as the head of PCA's negotiating committee by Abbott, and that FLS did not want to be represented by PCA.

¶ 27 On November 2, 2012, FLS sent a letter of resignation from PCA membership. Plaintiff testified that Abbott called him that day and told him that Hoffman had just dropped out of the PCA. Plaintiff asked her if that meant his nomination was null and void and she said, "Yes." Plaintiff testified that others called him regarding FLS leaving the PCA. One of these individuals was Bill Johns. In his affidavit, plaintiff testified that "Johns told me that Scott Hoffman was very upset when he learned of my nomination to the PCA board." After learning that Hoffman was upset, plaintiff made no effort to talk to Hoffman to tell him about it or determine what was going on.

¶ 28 On November 9, 2012, plaintiff was at a job at a school. At 12:30 p.m., John Moses, an FLS employee, called plaintiff and told him that Hoffman wanted plaintiff to come into the office to see him and discuss the PCA issue. Plaintiff understood he was being called to the office to talk about plaintiff's nomination to the PCA board. Plaintiff said, "Have Scott call me." Plaintiff did not leave the site as requested and did not try to contact Hoffman. Plaintiff testified that he thought Hoffman was going to call him.

¶ 29 Fifteen minutes later, plaintiff received a second call from another FLS employee, Stephanie Armagaso. She told plaintiff that Hoffman wanted plaintiff to come in and see him. Plaintiff responded: "I know." Plaintiff told Armagaso to tell Hoffman that he needed to talk to his lawyer. At his deposition, plaintiff testified that he wanted his counsel to talk to any individual from FLS because of plaintiff's "interrogation, beration, [and] bullying" five months earlier at the June 7, 2012 shareholders meeting.

¶ 30 Plaintiff testified that he also told Armagaso to have Hoffman call him. Plaintiff began to pack away his tools because the job was finished. Ten minutes after Armagaso called, plaintiff's phone rang and he saw a call coming in from Hoffman. But plaintiff did not answer the phone because he was loading up his truck and his "hands were full." Plaintiff stated that he tried to call Hoffman back within minutes but his phone had been shut off. Although plaintiff also had a working personal cell phone, he did not use it to call Hoffman; he did not know why.

¶ 31 Plaintiff left the jobsite approximately 15 or 20 minutes after talking to Armagaso. Even though plaintiff had told Armagaso he needed to talk to his lawyer, plaintiff did not call his lawyer during those 15 to 20 minutes. Despite the two requests by Hoffman, FLS's president, to come to the office, plaintiff did not do so.

¶ 32 Plaintiff testified that the typical protocol after finishing a job would be to call Moses to see if there was other work, but he did not do so because there was no more work and because he was waiting to hear from Hoffman. He did not tell anyone from FLS that he was leaving the jobsite.

¶ 33 Plaintiff went to lunch and then went home. He did not use his landline phone to call Hoffman because he "saw no urgency."

¶ 34 Later that day, on November 9, 2012, plaintiff received a termination letter via e-mail from Hoffman. The reasons stated for the termination were "the unauthorized action by [plaintiff] to request nomination to the PCA Board of Directors, without authorization by the Company Officers, and insubordination due to [plaintiff's] refusal to comply with two requests to appear in person in our office on Friday, November 9, 2012." The letter was also sent to plaintiff's attorney.

¶ 35 Plaintiff filed suit on December 14, 2012, later amending it to a four-count second amended complaint. Count I alleged breach of fiduciary duty. Count II alleged tortious interference with employment expectancy. Count III alleged civil conspiracy. Count IV alleged a violation of section 5/7.05 of the Business Corporation Act (815 ILCS 5/7.05 (West 2012)).

¶ 36 The circuit court granted summary judgment in favor of defendants on all four counts of the second amended complaint. Though it initially refused to enter a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016), the court later entered Rule 304(a) language, and plaintiff timely appealed the grant of summary judgment in favor of defendants.

¶ 37 In the interim, defendants had filed an amended counterclaim for specific performance, requiring plaintiff to sell his stock in FLS and sign a subordination agreement, as required by FLS's lender. Defendants moved for summary judgment on that counterclaim, and the trial court granted that motion, too. Plaintiff timely appealed that grant of summary judgment, as well.

¶ 38 We consolidated the appeals.

¶ 39 II. ANALYSIS

¶ 40 We review *de novo* a circuit court's ruling on a motion for summary judgment. *State Bank of Cherry v. CGB Enterprises, Inc*., 2013 IL 113836, ¶ 65. Summary judgment is proper only where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id*. Summary judgment is a drastic means of disposing of litigation and should be allowed only when the right of the moving party is clear and free from doubt. *Adames v. Sheahan*, 233 Ill. 2d 276, 296 (2009).

¶ 41 The purpose of summary judgment is not to try a question of fact but rather to determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co*., 211 Ill. 2d

32, 42-43 (2004). A genuine issue of material fact exists when the material facts are disputed, or when the material facts are undisputed but reasonable persons might draw different inferences from those undisputed facts. *Carney v. Union Pacific Railroad Co.*, 2016 IL 118984, ¶ 25. To survive a motion for summary judgment, a plaintiff need not prove its case but must present some evidence that would arguably entitle it to judgment. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12.

¶ 42 A. Count I: Breach of Fiduciary Duty

¶ 43 Plaintiff first argues that the trial court erred in determining that defendants did not breach their fiduciary duty to plaintiff, a minority shareholder. He contends that the trial court should not have considered Hoffman and Wolf's actions "piecemeal as separate claims" but rather as a "continuing course of *** oppressive conduct." Plaintiff claims that the evidence he submitted raised questions of fact and reasonable inferences favorable to him.

¶ 44 To prevail on a claim of breach of fiduciary duty, a plaintiff must prove: (1) the existence of a fiduciary duty on the part of the defendants; (2) the defendants' breach of that duty; and (3) damages proximately caused by that breach. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 69.

¶ 45 Defendants owed plaintiff a fiduciary duty. It has long been established that corporate officers and directors occupy a fiduciary relationship towards their corporation and shareholders. See *Brown v. Tenney*, 125 Ill. 2d 348, 360 (1988). The issue here involves the second element—whether defendants breached their fiduciary duty through oppressive conduct towards plaintiff.

¶ 46 As our supreme court has explained:

> "We have held that the word 'oppressive' as used in [the predecessor statute] does not carry an essential inference of imminent disaster; it can contemplate a continuing course

> of conduct. The word does not necessarily savor of fraud, and the absence of 'mismanagement, or misapplication of assets,' does not prevent a finding that the conduct of the dominant directors or officers has been oppressive. It is not synonymous with 'illegal' and 'fraudulent.' " *Gidwitz v. Lanzit Corrugated Box Co.*, 20 Ill. 2d 208, 214-15 (1960) (quoting *Central Standard Life Insurance Co. v. Davis*, 10 Ill. 2d 566, 573-74 (1957)).

¶ 47 In *Gidwitz*, 20 Ill. 2d at 214, oppressive conduct was found where the president of the corporation used his position to completely control and manage the corporation; violated the corporate bylaws; failed to hold shareholder meetings; and took actions without proper authority which included making a personal profit by borrowing money from himself on behalf of the corporation and setting up a separate corporation.

¶ 48 Here, plaintiff claims that defendants engaged in a continuing course of heavy-handed conduct which included (1) refusing to allow plaintiff a role in management, (2) not providing him with information about FLS's business, (3) assigning him jobs which resulted in lower wages than other plumbers, and (4) ultimately terminating his employment. We believe the trial court properly considered each of plaintiff's contentions, and we will do the same.

¶ 49 We first address plaintiff's claims that defendants engaged in oppressive conduct by refusing to allow him to participate in the management of FLS. He says there was ample evidence presented that raised factual questions regarding this aspect of defendants' conduct.

¶ 50 A shareholder does, of course, have a right to participate in management to some extent. *Gidwitz*, 20 Ill. 2d at 215. But this limited extent does not include the right to be elevated to a management role in the company. As an example, the trial court noted that a shareholder of a

major bank cannot go into a branch and say: "I want to manage this branch." As our supreme court put it:

> "The essential attribute of a shareholder in a corporation is that he is entitled to participate, according to the amount of his stock, in the selection of the management of the corporation, and he cannot be deprived or deprive himself of that power. [Citations.] Truly the management is controlled by the stockholders acting through their elected directors, and it is contemplated that the corporation is to be controlled by the majority stockholders. [Citations.] Nevertheless the minority of stockholders is not to be deprived of the opportunity of exhibiting their corporate desires and directives by the exercise of their right to participate in the election of directors." *Gidwitz*, 20 Ill. 2d at 215.

¶ 51 Plaintiff had the right to participate in the selection of management and to exhibit his corporate desires and directives. He was not deprived of the opportunity; he was provided the right to participate in the election of directors at the shareholders meeting. He was never barred from a shareholder meeting. Plaintiff has failed to cite to any authority in support of his contention that his right to participate in management (as a minority shareholder) included the right to be elevated to a management position in the corporation (as an employee).

¶ 52 But plaintiff contends that Hoffman's refusal to let him attend the weekly meetings of the office staff also constituted heavy-handed conduct and evidence of the continuing course of oppressive conduct. Hoffman told plaintiff he could not attend the meetings because he was employed as a "field plumber." Plaintiff characterizes these staff meetings as "business" meetings and argues that Hoffman's refusal to let him attend ignores the fact that plaintiff is an "owner" of the company. Although plaintiff characterizes himself as an "owner" of the company based on his shareholder status, "[a]n individual shareholder, by virtue of his ownership of

shares, does not own the corporation's assets." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003).

¶ 53 As the trial court noted, plaintiff is both a shareholder and an employee. The so-called "business meeting" was not a shareholder meeting; it was a weekly meeting of the office staff. Plaintiff was employed as a plumber; he was not working in the office. As an employee, plaintiff reported to FLS's president, defendant Scott Hoffman. Nothing in Hoffman's decision to refuse plaintiff's attendance at the weekly staff meeting of office personnel, which plaintiff was not, can be said to constitute oppressive conduct towards a minority shareholder.

¶ 54 Plaintiff's reliance on *Compton v. Paul K. Harding Realty Co*., 6 Ill. App. 3d 488 (1972*)*, is misplaced. There, the court found ample evidence in the record to justify the trial court's finding of oppression and order of dissolution. But plaintiff Compton was not only a shareholder but an *officer*. *Id*. at 491. There was a written agreement under which defendant Harding was the president and manager, but plaintiff Compton was executive vice president and treasurer. *Id*. at 492-93. In rejecting the defendants' claim that the contract was not binding, the court noted that "Harding was the leader in the formulation and preparation of the agreement by which the plaintiffs were led to participate in the corporation with both their money and their services." *Id*. at 495. The evidence included "an arbitrary, overbearing and heavy-handed course of conduct" on the part of Harding, including his failure to call board meetings; his failure to consult with plaintiff Compton regarding management of corporate affairs; his imperious attitude when questioned about his salary; and, his dilatory action to certain requests made by the plaintiffs. *Id*. at 499. Because the plaintiff in *Compton* was an officer both in fact and as required by a written agreement, that plaintiff stood in very different shoes than plaintiff here.

¶ 55 Plaintiff claims that defendants' oppression involved other actions showing a continuing course of heavy-handed conduct. He claims that, prior to the June 7, 2012 annual shareholders meeting, defendants prepared an agenda that included a plan to exclude plaintiff from management based on the proposed bylaw amendment that would allow for a director who was not an employee or shareholder. Defendants did not provide the agenda to plaintiff prior to the meeting. Plaintiff argues that a reasonable inference exists that, had they provided him with the agenda, he would have become aware of their plan and could have protected his rights.

¶ 56 There are two problems with this argument. First, as defendants note, plaintiff still could have elected himself a director by voting his shares cumulatively. Plaintiff's failure to do so is no one's fault but his own.

¶ 57 Second, as defendants also claim, plaintiff has forfeited this particular argument. An earlier complaint alleged this very act of alleged oppression, that defendants did not advise plaintiff of his right to vote his shares cumulatively. That count was dismissed with prejudice, and plaintiff did not include these allegations in his second amended complaint. A party who files an amended complaint waives any objection to the trial court's dismissal of prior complaints unless the amended complaint realleges or incorporates by reference the dismissed claims. *Boatmen's National Bank of Belleville v. Direct Lines, Inc*., 167 Ill. 2d 88, 99 (1995); *Doe v. Roe*, 289 Ill. App. 3d 116, 119-20 (1997).

¶ 58 In sum, plaintiff had a right to participate in management—to attend shareholder meetings and participate in the election of directors. That right to "participate" in management did not include the right to employment in a corporate management position. Plaintiff presented no facts showing that defendants violated his right to participate in management.

¶ 59 We next address plaintiff's claims that defendants engaged in oppressive conduct with their ongoing refusal to provide plaintiff with information about FLS's business. Plaintiff failed to submit any evidentiary facts whatsoever showing any "refusal." Instead, it is undisputed that plaintiff never made a written demand to examine FLS's records. Plaintiff argues that the circuit court erred in ruling that plaintiff was required to make a written request. We disagree.

¶ 60 Section 5/7.75(b) of the Business Corporation Act of 1983 states:

> "Any person who is a shareholder of record shall have 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. *In order to exercise this right, a shareholder must make written demand upon the corporation, stating with particularity the records sought to be examined and the purpose therefor*." 805 ILCS 5/7.75(b) (West 2012).

As the trial court correctly determined, there is no genuine issue of material fact on this question—it is undisputed that there was never a written demand. Nor is there any factual evidence that defendants improperly "withheld" financial information. Instead, plaintiff testified that he, a few times, asked defendants, Hoffman and Wolf, how the company was doing and that they responded: "Fine." In sum, there was no "refusal" to provide plaintiff with financial records.

¶ 61 Plaintiff's next argument is that the circuit court mischaracterized his claim for disproportionate wages. Plaintiff asserts that defendants breached their fiduciary duty based on the difference between his compensation and that of Hoffman and Wolf's compensation, and the fact that plaintiff was the lowest paid plumber in the service department from 2010 through 2012. Notably, this time period included the years when plaintiff's father was president.

¶ 62 Plaintiff's compensation as a plumber reflected the number of hours he worked; plaintiff was assigned jobs where he worked only 5 or 6 hours instead of 8. Moreover, it was undisputed during plaintiff's deposition that he was actually on pace to work more than 1400 hours in Hoffman's first full year as president (2012), which would have been more hours than he worked during any of the final three years his father was president. As the circuit court correctly noted, plaintiff cannot point to a single piece of evidence that shows defendants reduced plaintiff's hours. Nor is there any evidence of any significant change to plaintiff's earnings caused by the change in leadership when Hoffman became president.

¶ 63 Plaintiff further asserts that the payment of "excess compensation" to Hoffman and Wolf is another aspect of their oppressive conduct toward him and a breach of their fiduciary duty. As for plaintiff's contention that the difference between his compensation and that of Hoffman and Wolf's compensation established disproportionate wages, plaintiff does not dispute that his position as a field plumber is different than defendants' positions.

¶ 64 In determining whether compensation is reasonable, some of the factors to be considered include: "the employee's ability, quantity and quality of services he renders, the time he devotes to the company, the difficulties involved and responsibilities assumed in his work, the success he has achieved, profitability due to his efforts, the company's financial condition, and the compensation paid for comparable work by similar companies." *Romanik v. Lurie Home Supply Center, Inc.*, 105 Ill. App. 3d 1118, 1126 (1982). "Generally, unless the majority shareholders and directors are clearly managing the affairs of the corporation dishonestly or the compensation is so unreasonable as to constitute 'waste' or 'spoliation,' courts have not substituted their judgment for that of the directors." *Id.* at 1127; accord *Jaffe Commercial Finance Co. v. Harris*, 119 Ill. App. 3d 136, 143 (1983). Although a plaintiff need not prove his case at the summary

judgment stage, he must present a factual basis that would arguably entitle him to a judgment at trial. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. Mere speculation, conjecture, or guess is insufficient to survive summary judgment. *O'Gorman v. F.H. Paschen, S.N. Nielsen, Inc*., 2015 IL App (1st) 133472, ¶ 82. Plaintiff has failed to point to any factual basis to support his assertion that defendants' compensation was excessive.

¶ 65 In further support of his contention that defendants breached their fiduciary duty to him, plaintiff claims that his "termination had no legitimate purpose and was done for the sole purpose of forcing him out of FLS, and depriving him of his salary and the right to share in the financial benefits from FLS, so that Hoffman and Wolf would have a larger share of the profits of FLS." He argues that a question of fact existed regarding whether he was insubordinate and whether his termination was justified.

¶ 66 Insubordination is grounds for an employee's termination. *Circle Security Agency, Inc. v. Ross*, 107 Ill. App. 3d 195, 203 (1982). As defendants note, the FLS employee manual lists insubordination as conduct that could end in termination. It specifically defines insubordination to include acts such as "refusal to perform assigned work or follow directions from proper authority." "In an employment relationship, insubordination 'imports a wilful or intentional disregard of the lawful and reasonable instructions of the employer.' " *Board of Education of Round Lake Area Schools v. Community School District No. 116*, 292 Ill. App. 3d 101, 110 (1997) (quoting Black's Law Dictionary 801 (6th ed.1990)).

¶ 67 Plaintiff knew that Hoffman, the FLS president, had requested—twice—that plaintiff come into the office. (And he knew that Hoffman had called a third time). Plaintiff stated in his affidavit that he knew Hoffman was very upset when he learned of plaintiff's nomination to the PCA board. And plaintiff conceded in his deposition that he knew he was being called to the

office to talk about plaintiff's nomination to the PCA board. He said that he tried to call Hoffman on his work phone but it was dead. But he conceded that he had a personal cell phone that was working fine, but he did not use it to call Hoffman. Instead, he went to lunch and then went home, without telling anyone at the office that he was doing so. At home, he did not use his landline, either, to call Hoffman. When asked why he made no attempt to contact Hoffman on his personal phone or home landline, he responded more than once, "I saw no urgency." And of course, rather than call, plaintiff obviously could have driven to the office to see Hoffman—which was exactly what he was told to do.

¶ 68 Hoffman testified at his deposition that he was "surprised that twice [plaintiff] just flat out ignored my request, my order" to come see him in the office. He testified that he made the decision to terminate plaintiff "after the second call" to plaintiff asking him to come in, which plaintiff ignored.

¶ 69 We find no genuine issue of material fact on this question. Plaintiff admitted, without equivocation, that he failed to respond to multiple requests to come into the office to meet with Hoffman—he refused to "follow directions from proper authority" under the company's employment policy or, as the law defines it, he "intentional[ly] disregard[ed] *** the lawful and reasonable instructions of the employer.' " *Board of Education of Round Lake Area Schools*, 292 Ill. App. 3d at 110. We are thus presented with a factual situation where Hoffman swore under oath that he fired plaintiff because he was insubordinate for ignoring his order to come into the office to meet with him; plaintiff readily admitted to those predicate facts; and those facts clearly constituted insubordination.

¶ 70 Thus, we cannot agree with the dissent that a triable question of fact exists that his termination was improper. We are making no credibility determinations; we are simply

following the undisputed facts where they lead. There is simply no question that Hoffman had a legitimate basis to fire plaintiff.

¶ 71 Plaintiff says that questions of fact exist as to "whether [Hoffman] had a legitimate business reason" for firing plaintiff. But plaintiff provides no counter-evidentiary *facts* to contradict the stated, valid basis for termination. He states in his brief, rather generically, that his firing "had nothing to do with his employment, and had everything to do with his attempt to have a role in the management" of the company. He likewise writes—again without citation to any fact in the record—that the firing "was the culmination of Defendants' efforts to freeze him out of the company and end the Gehrke era" at the company.

¶ 72 Plaintiff must do more than assert naked conclusions. Once the movant establishes a basis for summary judgment, it is incumbent on the non-movant to present some factual basis that would support his claim or at least indicate the existence of a disputed question of material fact. *Benson v. Stafford*, 407 Ill. App. 3d 902, 912 (2010); *Reuben H. Donnelley Corp. v. Krasny Supply Co., Inc.*, 227 Ill. App. 3d 414, 418 (1991) (party opposing summary judgment must establish question of material fact precluding summary judgment). " 'Mere speculation, conjecture, or guess is insufficient to withstand summary judgment.' " *Benson*, 407 Ill. App. 3d at 912 (quoting *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill.App.3d 313, 328 (1999)).

¶ 73 Plaintiff admits to the facts that indisputably constitute grounds for insubordination, and Hoffman testified without contradiction that it was the reason for plaintiff's termination. Without anything in the record to contradict this fact, and nothing but generic argument and speculation, plaintiff has not demonstrated any basis that summary judgment was improper on this question.

¶ 74 Thus, plaintiff was validly terminated. His termination does not in any way show oppressive conduct. Plaintiff presented no factual evidence in support of his claim that

defendants engaged in a continuing course of oppressive conduct. The trial court properly granted summary judgment in favor of defendants on plaintiff's claim of breach of fiduciary duty in count I of the second amended complaint.

¶ 75 B. Count II: Tortious Interference with Employment Expectancy

¶ 76 Plaintiff next argues that the trial court erroneously granted summary judgment on count II of the second amended complaint for tortious interference with employment expectancy. He argues that he "had a reasonable expectation of continued employment at FLS, which had been operated in part by his family for decades, where he had worked for over 30 years and was a 49% shareholder." Plaintiff correctly notes that defendants did not present an argument as to count II in their motion for summary judgment, nor did they raise an argument in their reply below after this was pointed out by plaintiff in his response.

¶ 77 Defendants requested summary judgment as to the entire second amended complaint. And as the trial court noted during oral argument on defendants' motion for summary judgment, count II for tortious interference with employment expectancy, and count III for civil conspiracy, "rise and fall as a result of the first count."

¶ 78 "A claim for tortious interference with a contractual relationship consists of the following elements: (1) the existence of a valid and enforceable contract between the plaintiff and another; (2) the defendant's awareness of the contract; (3) the defendant's intentional and unjustified inducement of a breach of the contract; (4) a subsequent breach by the other, caused by the defendant's conduct; and (5) damages." (Internal quotation marks omitted.) *Seip v. Rogers Raw Materials Fund, L.P.*, 408 Ill. App. 3d 434, 444 (2011).

¶ 79 The trial court reasoned that defendants had a valid basis for firing plaintiff—insubordination—and thus plaintiff could not demonstrate an intentional and *unjustified* act on

defendants' part. That ruling was correct. Plaintiff argues that questions of fact remain as to whether he was insubordinate, but we have already rejected that argument. Because defendants were justified in terminating plaintiff based on his insubordination, plaintiff cannot establish the element of intentional and unjustified conduct as a matter of law. The trial court properly granted summary judgment count II of the second amended complaint.

¶ 80 C. Count III: Civil Conspiracy

¶ 81 Plaintiff next argues that the trial court erroneously granted summary judgment on his claim of civil conspiracy in count III of the second amended complaint.

¶ 82 "Civil conspiracy consists of a combination of two or more persons for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means." *Adcock v. Brakegate, Ltd*., 164 Ill. 2d 54, 62 (1994). "[A] conspiracy is not an independent tort." *Indeck North America Power Fund, L.P. v. Norweb PLC*, 316 Ill. App. 3d 416, 432 (2000). If "a plaintiff fails to state an independent cause of action underlying its conspiracy allegations, the claim for a conspiracy also fails." *Id*.

¶ 83 Plaintiff argues that he has submitted sufficient evidence of two independent causes of action—namely, breach of fiduciary duty and tortious interference with employment expectancy. We have already determined that the trial court properly granted summary judgment on both of these causes of action. Thus, the trial court correctly determined that, because plaintiff's termination was proper, there was no independent tort to support the claim for conspiracy. The trial court properly granted summary judgment on plaintiff's claim of civil conspiracy in count III of the second amended complaint.

¶ 84 D. Count IV: Violation of Business Corporation Act

¶ 85 Plaintiff next argues that the trial court erred in granting summary judgment in favor of defendants on count IV of the second amended complaint. In count IV, plaintiff claimed that defendants violated section 7.15 of the Business Corporation Act of 1983 (805 ILCS 5/7.15 (West 2012)), by failing to give plaintiff notice of the January 21, 2013 and the 2014 annual meetings of shareholders. Section 7.15 states, in relevant part, as follows:

> "Notice of shareholders' meetings. Written notice stating the place, day, and hour of the meeting *** shall be delivered not less than 10 nor more than 60 days before the date of the meeting *** either personally or by mail, by or at the direction of the president, or the secretary, or the officer or persons calling the meeting, to each *shareholder of record entitled to vote* at such meeting." (Emphasis added.) 805 ILCS 5/7.15 (West 2012).

¶ 86 The Stock Purchase Agreement states as follows:

> "8. Upon the termination of a shareholder's employment by the Corporation, for any reason whatsoever, *the shareholder shall sell* and the Corporation shall purchase the shares which are owned by the shareholder at the time of such termination for the price and upon the other terms hereinafter provided." (Emphasis added.)

¶ 87 Plaintiff argues that, because he had not yet sold his shares and because he had filed this suit contesting his termination, he was entitled to notice as a shareholder of record.

¶ 88 The language in the Stock Purchase Agreement is plain and unambiguous. Plaintiff was *required* to sell his stock when he was terminated on November 9, 2012. We agree with the determination of the trial court that, as a matter of law, once plaintiff was terminated he was no longer a "shareholder of record entitled to vote." Thus, defendants were not required to provide notice of the shareholders meeting and did not violate section 7.15 of the Business Corporation

Act. The trial court properly granted summary judgment on Count IV of the second amended complaint.

¶ 89 We thus affirm the grant of summary judgment in favor of defendants on the second amended complaint.

¶ 90 E. Defendants' Amended Counterclaim

¶ 91 We next address plaintiff's argument that the trial court erred in granting defendants' motion for summary judgment on its amended counterclaim. Defendants sought: (1) an order requiring plaintiff to sell his stock in FLS pursuant to the Stock Purchase Agreement; and (2) an order requiring plaintiff to execute a subordination agreement to FLS's lender. (The amended counterclaim also sought punitive damages, attorney fees and costs, but defendants represented to the trial court that these claims would not be pursued if summary judgment was granted requiring plaintiff to sell his stock and execute a subordination agreement.)

¶ 92 As we have already discussed, the Stock Purchase Agreement required plaintiff to sell his shares of stock once he was no longer employed by FLS. Plaintiff argues that *if* this court reverses the circuit court's decision that his termination was justified, then the order granting defendants' motion for summary judgment on its amended counterclaim must be reversed. We have instead affirmed the trial court's decision that plaintiff's termination was justified.

¶ 93 But plaintiff raises additional arguments with respect to the court's order requiring him to execute the subordination agreement. He first contends that that the trial court erroneously considered the minutes of the June 7, 2012 shareholders meeting.

¶ 94 Defendants had argued that plaintiff was required to sign the subordination agreement based on the bylaw amendment at the June 7, 2012 shareholders meeting. As noted earlier (*supra*, ¶ 19), the agenda for the shareholders meeting contained, under "New Business," a

proposed revision to the bylaws stating that "all shareholders selling their stock back to the company must sign a Subordination Agreement as required by the bank in order to secure [FLS's] line of credit." Defendants attached a copy of the minutes of the June 7, 2012 shareholders meeting. Under "New Business," the minutes state:

> "Scott made a motion that the Bylaws be modified to state, 'all shareholders selling their stock back to the company must sign a Subordination Agreement as required by First Bank and Trust.' A discussion took place and John explained what the Subordination Agreement was and why the bank required it. A vote was taken and the motion was unanimously accepted and passed by majority vote of the shareholders."

¶ 95 Defendants also attached an affidavit from defendant Wolf in which he testified that FLS held a shareholders' meeting on June 27, 2012, Wolf was present, and, in his role as secretary, he took the minutes. Wolf stated: "At the Shareholder's meeting of June 7, 2012, a motion was duly made and unanimously passed by all Shareholders in attendance including [plaintiff] that a shareholder selling his stock back to [FLS] must sign a Subordination Agreement as required by [FLS]'s lender, First Bank & Trust Company."

¶ 96 In response to defendants' motion, plaintiff attached his affidavit stating that "there was no discussion or vote at the meeting I attended about amending the by-laws to include signing a subordination agreement, nor was there any discussion of the business aspects reflected in the minutes." Plaintiff also stated that "[m]uch of what is reflected in the minutes never took place in [his] presence" and that "[t]he meeting lasted approximately 45 minutes, not two hours and 15 minutes as reflected in the minutes." Thus, according to plaintiff, "a question of fact exists about what transpired at the meeting."

¶ 97 It is undisputed that plaintiff attended the meeting. The minutes state that the meeting started at 2:00 p.m. and adjourned at 4:15 p.m. Plaintiff states the meeting he attended lasted 45 minutes but he does not indicate the time period that he was present. It is unclear why he was present for only a portion of the meeting. But the trial court correctly decided that whether plaintiff voted in favor of the motion to amend the bylaws does not create a genuine issue of material fact. As defendants noted in their reply, FLS's bylaws provide that "Voting upon all questions at all meetings of the stockholders shall be by shares of stock and not per capita." Thus, the motion did not require a unanimous vote; plaintiff was bound by a majority vote.

¶ 98 Plaintiff raises additional challenges to the validity of the minutes of the shareholder meeting. He claims that the trial court erred in considering them because they were inadmissible. He says, in passing, that defendants did not lay a foundation for their admissibility, but he does not elaborate, giving us no basis for reversal. In any event, the Illinois Rules of Evidence contain a business-records exception to the hearsay rule that is substantively identical to its counterpart in the federal rules. *Cf.* Ill. R. Evid. 803(6) (eff. April 26, 2012) *with* Fed. R. Evid. 803(6). Meeting minutes have been consistently deemed admissible under this exception to the hearsay rule. See, *e.g.*, *Ernst v. City of Chicago*, 837 F.3d 788, 805 (7th Cir. 2016) ("Meeting minutes properly fall within the business-records exception" to hearsay rule under federal rules of evidence); *Braggs v. Dunn*, 2:14CV601-MHT, 2017 WL 426875, at *1 (M.D. Ala. Jan. 31, 2017) (corporate meeting minutes admissible under federal business-records exception).

¶ 99 As he did in the trial court, plaintiff also argues that the minutes lack a foundation because Wolf did not post a surety bond as required by FLS's bylaws. The trial court rejected this claim. Paragraph 35 of FLS's bylaws states:

> "The Secretary shall give bond in such amount and with such surety *as may be ordered by the Board of Directors* for the faithful performance of the duties of his office, and the restoration to the Company, in case of his death[,] resignation or removal from office, of all books, papers, vouchers, money or other property of whatever kind in his possession belonging to the corporation." (Emphasis added.)

¶ 100 Plaintiff argues that FLS provided no evidence that Wolf fulfilled these requirements and Wolf was therefore "not competent to testify as corporate secretary about the June 7, 2012 meeting." As the trial court noted, the argument was misleading because the bylaws only required the secretary to post a bond if *ordered* to by the Board of Directors. On appeal, plaintiff merely reiterates the argument he presented in the trial court and fails to address the trial court's decision. The trial court also rejected plaintiff's claim that the minutes were inadmissible because they were not signed and because there was no mention, in the January 21, 2013 annual shareholders meeting, that the June 7, 2012 minutes were approved. Plaintiff presents no argument and no authority as to why these alleged deficiencies negate the minutes' status as a business record, or why these alleged deficiencies render the minutes inadmissible. The minutes were admissible and were properly considered as a business record.

¶ 101 Plaintiff also argues that defendants' subordination agreement claim was barred by the statute of frauds. "In general, the statute of frauds provides that a promise to pay the debt of another, *i.e.*, a suretyship agreement, is unenforceable unless it is in writing." *Rosewood Care Center, Inc. v. Caterpillar, Inc.*, 226 Ill. 2d 559, 567 (2007). Plaintiff asserts that "[t]he subordination agreement by which a creditor agrees to accept a lower priority of its indebtedness is similar to a guaranty, an agreement to answer for the debt of another."

¶ 102 Defendants note that "[p]laintiff is not being asked to guaranty or otherwise be responsible for the indebtedness of FLS to its lender." Instead, as the trial court concluded, the subordination agreement only makes the indebtedness of FLS to plaintiff for his stock subordinate to FLS's indebtedness to First Bank & Trust. As the trial court further noted, under the "PAYMENTS TO CREDITORS" section of the subordination agreement, FLS can make the required payments to plaintiff as long as FLS is not in default on its obligations to the bank. Thus, plaintiff is bound by the amendment to the bylaws that requires execution of a subordination agreement by a selling shareholder.

¶ 103 Plaintiff also argues that the amendment of FLS's bylaws, requiring that a selling shareholder execute a subordination agreement, was an impermissible modification of the Stock Purchase Agreement. As defendants note, plaintiff acquired his stock subject to the bylaws of the corporation. He received consideration in the form of stock, and by accepting the stock, he accepted the bylaw that allows amendment by affirmative vote of a majority of shareholders. See, *e.g.*, *Kern v. Arlington Ridge Pathology, S.C.*, 384 Ill. App. 3d 528, 532 (2008) ("[C]orporate bylaws constitute an enforceable contract between the corporation and its shareholders."). Plaintiff had no reason to expect that the terms of the bylaws would remain frozen in place in perpetuity. We conclude that the trial court properly granted summary judgment in favor of defendants on the amended counterclaim.

¶ 104 III. CONCLUSION

¶ 105 For all of the reasons stated, we affirm the judgment of the circuit court of Cook County in all respects.

¶ 106 Appeal No. 1-17-0434: Affirmed.

¶ 107 Appeal No. 1-17-1005: Affirmed.

¶ 108 JUSTICE GORDON, dissenting:

¶ 109 I must respectfully dissent for the following reasons:

¶ 110 This may be a prime case in a close corporation of three shareholders, where it appears that the majority shareholder took advantage of the minority shareholder.

¶ 111 It is clear from the evidence illustrated in the summary judgment proceedings that there are genuine issues of material fact. *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011) ("The purpose of summary judgment is to determine whether a genuine issue of material fact exists, not to try a question of fact.").

¶ 112 In finding that plaintiff failed to show a breach of fiduciary duty, the majority observes with approval that "the trial court noted that a shareholder of a major bank cannot go into a branch and say " 'I want to manage this branch.' " *Supra* ¶ 50.

¶ 113 Comparing a major bank to this two-family plumbing business is like comparing McDonald's to a mom-and-pop grocery store, where mom locks pop out of the store.

¶ 114 Here we have two equal shareholders—and one person with a few shares. Plaintiff has alleged that one of the two equal shareholders colluded with the person with a few shares in order to lock out plaintiff, who is the other, equal shareholder.

¶ 115 To support its conclusion that there was no breach, the majority finds that plaintiff was "not deprived of the opportunity" to select the management of the company. *Supra* ¶ 51. However, you can only reach that conclusion if you have already rejected plaintiff's version of the facts. Plaintiff testified that his attempts to manage were stonewalled by defendants (*supra* ¶ 17) and, thus, he was deprived of that opportunity, as he "testified" to.

¶ 116 There is no evidence that plaintiff was not a qualified plumber. When plaintiff's father was alive and he did participate in a management position by working in the office as a project

manager, there was no evidence that he did not do a good job, plaintiff's testimony revealed that, in 1997, Albert Gehrke, plaintiff's father and the president of FLS, asked plaintiff to work in the office. Between 1997 and 1999, plaintiff worked in the office as a project manager and did telephone work and dispatch-type work. If a property owner contacted FLS to certify and test a backflow, he would send out a certified backflow inspector. He supervised the services on a contract that FLS had with the city of Chicago. He provided estimate work for prospective customers, as he had previously done in his role as a field plumber. He also ran the service truck department, which had one employee.

¶ 117 When his father was alive, he decided to work in the field and left his management position in the office. Plaintiff's father had "told him" that he had set up the shares equally between plaintiff and defendant Hoffman for the two to run the business. *Supra*, ¶ 16. The majority acknowledges that "there was an attempt to make plaintiff's father retire involuntarily." *Supra*, ¶ 15. After his father's death, plaintiff asked for defendants to allow him to return to management in the office. They refused at a shareholders meeting on June 7, 2012. Defendants admitted that they discussed the agenda among themselves prior to the meeting without plaintiff. They deliberately misled him about how the directors were elected, which prevented him from exercising his right to elect himself as a director. Plaintiff described defendant Hoffman's behavior at the meeting toward him as "interrogation, beration, and bullying." *Supra*, ¶ 29. After the shareholders meeting, after plaintiff submitted his name for nomination to the board of directors of the Plumbing Contractors Association (PCA), defendant Hoffman became angry and unilaterally dropped their firm out of the PCA, thereby nullifying plaintiff's nomination. *Supra* ¶ 27. A few days later, on November 9, 2012, defendant Hoffman demanded to see him. *Supra* ¶¶ 28-30. Plaintiff did not respond because relations had soured so badly by that point and

defendant Hoffman's behavior toward him was so abrasive that plaintiff wanted to contact an attorney and have an attorney call back on his behalf. *Supra* ¶ 29. However, defendant Hoffman did not give him the chance, firing him with lightening speed by the end of the same day. *Supra* ¶ 34. The majority criticizes plaintiff for not contacting an attorney during the 15 to 20 minutes that he had after leaving a job site and heading home. *Supra* ¶ 31. The majority indicates that the average person can contact and reach an attorney in 15 minutes. I do not believe that is the case or is reasonable. The termination email stated that the two reasons for his termination were: (1) plaintiff's self-nomination to the PCA board; and (2) his "insubordination" in not complying "with two requests" to immediately appear in the office on Friday, November 9, 2012. *Supra* ¶ 34. The majority ignores defendants' first and primary stated reason for firing plaintiff, and addresses only the second reason. *Supra* ¶¶ 65-74.[3] The first reason substantiates and supports defendant's claim that his firing "had nothing to do with his employment, and had everything to do with his attempt to have a role in the management" of the firm. *Supra* ¶ 71. As to defendants' secondary reason for the termination, plaintiff testified that he did not come flying in on a Friday afternoon because he did not think there was an emergency, and the record fails to show any evidence of an emergency at all. *Supra* ¶ 33. His PCA nomination was dead in the water, once defendant Hoffman pulled their firm out of the organization, and it was going to stay dead in the water on Friday, through the weekend, until Monday morning and beyond. *Supra* ¶ 27. In addition, plaintiff's assessment that he needed an attorney was borne out by the speed with which defendants rushed to fire him—from a firm that he had devoted most of his life to and his father

[3] By failing to discuss defendants' primary stated reason for termination, the majority, in effect, concedes that there may be a question of fact as to whether plaintiff's self-nomination to the PCA board would be grounds for termination. The majority concludes, in effect, that plaintiff was not fired for defendant's primary stated reason for termination—namely, his self-nomination to the PCA board—but for his alleged insubordination.

before him. Without a doubt, plaintiff's testimony and exhibits demonstrate the heavy-handed conduct that the law requires for relief. *Compton*, 6 Ill. App. 3d at 499 ("an arbitrary, overbearing and heavy-handed course of conduct" entitles a plaintiff to relief). Thus, plaintiff has created a genuine issue of material fact, as he claims, about whether his termination was simply "the culmination of [d]efendants' efforts to freeze him out *** and end the Gehrke era" at the firm. *Supra* ¶ 71. See also *Perry v. Dept. of Financial and Professional Regulation*, 2018 IL 122349, ¶ 30 (summary judgment may be granted only if there is no genuine issue of material fact). In short, there is a credibility dispute about whether his termination was the end result of an orchestrated course of conduct by defendants to freeze him out of the firm, and about whether their claimed, secondary reason for his termination was merely pretextual. *Dyback v. Weber*, 114 Ill. 2d 232, 241 (1986) ("questions of credibility should be decided" by a factfinder at a trial, not by a trial court on a motion). As our supreme court has stated repeatedly, summary judgment is a drastic measure that should only be granted if the movant's right to judgment is free from doubt. *Cohen v. Chicago Park District*, 2017 IL 121800, ¶ 41. "Summary judgment should be denied if a reasonable person could draw divergent inferences from undisputed cases." *Cohen v. Chicago Park District*, 2017 IL 121800, ¶ 41. That is certainly the case here.

¶ 118 Plaintiff supports his position by citing the *Compton* case. The majority finds that plaintiff's reliance on *Compton* to be "misplaced." *Supra* ¶ 54. In *Compton*, the appellate court found that the defendant, in a basically two-family corporation like the one at bar (*Compton*, 6 Ill. App. 3d at 491-92), had engaged in "an arbitrary, overbearing and heavy-handed course of conduct," that entitled plaintiff to relief. *Compton*, 6 Ill. App. 3d at 499. The majority finds that plaintiff's reliance on *Compton* is misplaced because the plaintiff in *Compton* was, not only a shareholder, but also an officer. First, this is a distinction invented by the majority and not relied

on by the court in *Compton*. *Compton*, 6 Ill. App. 3d at 499. Second, the majority's attempt to distinguish *Compton* ignores the facts, as alleged by defendant, that his attempts at becoming an officer were stymied by a shareholder who should have been every bit his equal in ownership and influence. The reasoning here is circular. In other words, we stopped you from becoming an officer and, since you are not an officer, you cannot complain, because—wait for it—you are not an officer.

¶ 119 Similarly, referring to the other, equal shareholder as plaintiff's superior, gives the impression that the majority has already resolved the disputed issues of fact in defendant's favor. *Supra* ¶ 69.

¶ 120 In *Compton*, the appellate court held that "the word 'oppressive' *** does not carry an essential inference of imminent disaster, but can contemplate a continuing course of conduct. The words does not necessarily savor of fraud, and even the absence of mismanagement or misapplication of assets does not prevent a finding that the conduct of the dominant director or officer has been 'oppressive.' " *Compton*, 6 Ill. App. 3d at 499. Thus, whether defendants' misrepresentations or misleading omissions about cumulative voting were, or were not, strictly-speaking illegal was not the relevant question. *Supra* ¶¶ 23 n.2, 55-56.

¶ 121 I must also dissent from the majority's finding that plaintiff is foreclosed from citing defendants' alleged misrepresentations and omissions about cumulative voting, because they were not specifically realleged in a subsequent complaint.

¶ 122 Count I of plaintiff's first amended complaint sought injunctive relief, while court II alleged a breach of fiduciary duty against defendants Hoffman and Wolf. Count I alleged, in relevant part, that "Hoffman and Wolf *misrepresented* the method of voting to be applied for the election of directors," provided for in FLS' bylaws, and thereby deprived plaintiff of his right to

elect himself as director. (Emphasis added.) Count II, the breach count, made no allegations concerning cumulative voting and merely stated that it realleged any allegations stated earlier.

¶ 123 On April 22, 2014, the trial court ordered, among other things, that count I, the injunctive relief count, was dismissed with prejudice, and that count II, the breach count, was dismissed with prejudice as it related to "the cumulative voting issue."

¶ 124 On May 23, 2014, plaintiff filed a second amended complaint that dropped the prior count for injunctive relief, including the specific allegations concerning cumulative voting. However, the breach count continued to allege that Hoffman and Wolf "refus[ed] to provide Plaintiff" with information relating to the business of FLS. In addition, the new breach count specifically alleged that:

> "Despite the succession plan since Albert Gehrke's death in February 2012, Hoffman and Wolf have been openly hostile to the Plaintiff, refused to allow him to participate in the management of FLS, and undertook a course of action to freeze him out of the operations of FLS and terminate his employment."

I would find that Hoffman and Wolf's deliberate and calculated misrepresentations and omissions to plaintiff, if they occurred, concerning the method of voting could be considered part of a "course of action," by Hoffman and Wolf "to freeze [plaintiff] out of the operations of FLS and its operations."

¶ 125 While Illinois is a fact-pleading jurisdiction, a plaintiff is not required to allege every fact in support of his or her claim in the complaint. See *Y-Not Project, Ltd v. Fox Waterway Agency*, 2016 IL App (2d) 150502, ¶ 27. A plaintiff must allege only sufficient facts to support each and every element of his or her cause of action (*Y-Not Project*, 2016 IL App (2d) 150502, ¶ 27) and to place the defendant on notice (*Wilson v. Schaefer*, 403 Ill. App. 3d 688, 696-7 (2009) (where

the actions involved in an informed-consent claim would be entirely different from the actions in a negligent-surgery claim, the complaint failed to place defendants on notice). I have no doubt that Hoffman and Wolff were well on notice about the course of conduct that plaintiff had in mind. Thus, I would find that plaintiff may cite evidence of misrepresentation or misleading omissions by them relating to voting, as well as other topics, in support of his breach claim. His claim is specific, alleging a consistent and carefully orchestrated course of conduct by two specified individuals, during a short period of time,[4] with a very specific objective— "to freeze him out."

¶ 126 The majority's reliance on *Boatmen's National Bank of Belleville*, 167 Ill. 2d 88 (1995) is misplaced. *Supra* ¶ 57. In *Boatmen's*, the supreme court held that claims by certain interested parties in a wrongful death action were barred when their names were dropped by the special administrator of the estate from his complaint prior to a jury trial. *Boatmen's National Bank*, 167 Ill. 2d at 96, 99. *Boatman* does not stand for the proposition that a plaintiff must allege in his or her complaint every fact or act in support of an alleged oppressive course of conduct.

¶ 127 As the majority notes, concerning the shareholders' meeting where the subordination agreement was approved, "plaintiff attached his affidavit stating that 'there was no discussion or vote at the meeting I attended about amending the by-laws to include signing a subordination agreement, nor was there any discussion of the business aspects reflected in the minutes.' Plaintiff also stated that '[m]uch of what is reflected in the minutes never took place in [his] presence' and that '[t]he meeting lasted approximately 45 minutes, not two hours and 15 minutes as reflected in the minutes.' "*Supra* ¶ 96.

[4] Plaintiff alleges that the conduct began shortly after his father's death in February 2012. *Supra* ¶ 15. Plaintiff alleges conduct from June 7, 2012, through his termination on November 9, 2012. *Supra* ¶¶ 17-34.

¶ 128 The majority then writes: "It is unclear why he was present for only a portion of the meeting." *Supra* ¶ 96. This comment misses the point. Plaintiff is not claiming that he was not present for a portion of the meeting. He is claiming that it never happened. In other words, plaintiff is claiming that the meeting that occurred was of short duration and did not discuss the items that defendant claims.

¶ 129 The majority then concludes that, whether or not the meeting minutes were completely fabricated is irrelevant, because the vote would have been by majority vote, and the other two would have outvoted him anyway. *Supra* ¶ 97. I disagree. Allegedly fabricated minutes, events that may never have happened, do create a genuine question of material fact. While only a majority vote was needed, a vote was still required. That's why we have a Corporation Act that governs the conduct of corporations, their officers, directors, and shareholders.

¶ 130 Plaintiff specifically asked the court to consider defendants' actions as a continuing course of conduct, rather than piecemeal (*supra* ¶ 43), but the majority considered the actions piecemeal (*supra* ¶ 48).

¶ 131 Most importantly, when you look at the reasons that the defendant gave for the firing, certainly plaintiff's election to the board of an association that the company was a member could never be a valid reason for the discharge from employment of a long-time employee who owns close to 50% of the corporate stock, nor can a one-time failure to follow instructions to come to the office immediately without a showing by the defendants the urgency in the request. Under the majority decision in this case, any person or persons who want to remove a minority shareholder from his job at a company can make any unreasonable request they want and if the employee fails to comply immediately, he is fired. That cannot be fair, just, or reasonable, and

our courts should not give credence to that conduct. This is not a case to be decided by summary judgment. For all the foregoing reasons, I must dissent.