2016 IL App (1st) 151285-U

THIRD DIVISION
May 18, 2016

No. 1-15-1285



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| RICHARD T. KLEIN, JR., | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellant, | ) | Cook County, Illinois. |
| | ) | |
| v. | ) | No. 06 L 012669 |
| | ) | |
| MICHAEL K. CAVANAUGH, ROBERT J. | ) | |
| VECHIOLA, and FOLEY & LARDNER LLP, | ) | Honorable |
| | ) | Lorna E. Propes |
| Defendants-Appellees. | ) | Judge Presiding. |

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JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court's judgment in plaintiff CEO's action against the defendant attorneys for breach of fiduciary duty is affirmed where evidence supported the trial court's finding that any breach by defendants did not proximately cause the termination of plaintiff's employment.

¶ 2 Plaintiff Richard Klein filed a multi-count complaint against his lawyers, Michael Cavanaugh and Robert Vechiola, as well as their law firm, Foley & Lardner LLP (Foley), after Richard was terminated from his positions as chairman and chief executive officer (CEO) of Klein Tools, Inc. (Klein Tools), a family-owned tool manufacturer, and of ZAH Group, Inc.

(ZAH), Klein Tools' parent company. Richard alleged, among other things, that defendants improperly represented Richard, Klein Tools and ZAH at the same time, improperly advised him to sign a new, less favorable employment agreement and supported board members who wanted to terminate his employment. The jury heard Richard's legal malpractice claim while the trial court heard his breach of fiduciary duty claim. After the jury entered a verdict in defendants' favor, they similarly prevailed at the bench trial. The court found that no alleged breach of duty proximately caused Richard's termination because a majority of Klein Tools' board members were resolved to terminate his employment. Richard appeals only from the trial court's judgment as to his breach of fiduciary duty claim. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Richard became Klein Tools' CEO after years of working for the company in a number of lesser positions. He succeeded his cousin, Michael Klein, who died after being diagnosed with cancer. In 1992, defendants Cavanaugh and Foley drafted employment agreements for Klein Tools' employees, including Richard, who signed the agreement. The agreement stated, in pertinent part, as follows:

> "The Company may terminate the Employee's employment under this Agreement at any time prior to the Employee's retirement, death or disability, if the services rendered by the Employee are not satisfactory to the Company, upon giving the Employee one month's written notice of its intention to terminate his employment. Upon such termination, the Employee shall have no rights under this Agreement."

¶ 5 In 2003, Cavanaugh assisted in the formation of ZAH. At that point, Richard was the chairman and CEO for both Klein Tools and ZAH. In 2005, after losing a key employee, Richard asked defendants to draft a new employment agreement. The new agreement, drafted by

defendants, included a section titled, "At-Will Employment," which stated that "the Company is free to terminate Employee's Employment at any time, for any or no reason, with or without notice." This signed agreement further stated that it "supersedes any previous oral or written agreement or understanding between the Company and Employee with respect to the subject matter hereof." Thus, while the 1992 agreement conditioned termination on unsatisfactory services rendered, the 2005 agreement contained no such condition. Richard signed this agreement without questioning any of the included language.

¶ 6 During all of this time, Cavanaugh (at times assisted by Vechiola) also served as private counsel for Richard and his family, handling every conceivable type of legal assistance they needed, including estate planning, real estate acquisition and serving as power of attorney for health care. Richard testified that he considered Cavanaugh to be his trusted mentor.

¶ 7 In 2006, there was considerable dissension in the Klein ranks, with Richard's brother Thomas Klein (Tom) and cousin Mathias Klein III (Mat III) complaining about Richard's management style and his allegedly profligate corporate expenditures, some of which seemed to favor his son's private business. Several senior executives indicated that they were considering leaving the company because Richard was "not CEO material." Others complained that Richard "manages by fear" and that the culture of the company needed to change.

¶ 8 Despite these (and other) issues, Richard's appointment as CEO was renewed in May, 2006. A series of meetings with other executives continued, however. At that time, ZAH's board members were Richard, Tom, Mat III, Richard's cousin Robert Klein (Bob), and Cavanaugh. Klein Tools' board members were Richard, Tom, Mat III, Bob, Mark Klein and Vechiola. Following a meeting on August 4, 2006, which was attended by every member of both boards with the exception of Richard, the boards unanimously resolved that it was in the best interests of

the family and the company that Richard resign or be terminated immediately. The next morning, Cavanaugh, Vechiola, Mat III, Tom and Bob informed Richard of the decision.

¶ 9 Richard then commenced this action, ultimately filing a fourth-amended complaint. Count I alleged that defendants committed legal malpractice by failing to disclose their conflict of interest, advise him to obtain his own legal counsel with respect to the 2005 agreement and advise him not to sign the agreement. Additionally, Richard alleged defendants committed legal malpractice by conspiring to terminate his employment. As a result, his employment was terminated. Furthermore, count II alleged that defendants owed Richard fiduciary duties by virtue of their roles in managing his personal affairs and administering his estate. Richard's allegations were otherwise substantially similar to those alleged in count I.

¶ 10 Rather lengthy litigation and related trials followed. The parties were told that the jury would decided the malpractice claim and that the trial court, hearing the evidence simultaneously, would decide the breach of fiduciary duty claim. The parties were also allowed, if desired, to submit any additional evidence to the trial court regarding the breach of fiduciary duty claim. The jury heard extensive testimony from many of the Klein family members, defendants and expert witnesses retained by both sides in this dispute.

¶ 11 In summary, Richard claimed that defendants breached their fiduciary duty to him by failing to properly inform him of the content of the 2005 employment agreement which allowed any Klein Tools employee to be fired without cause. Richard also claimed that in contrast, the 1992 agreement was not for "at-will" employment and arguably entitled him to "untold millions in lost compensation, deferred compensation and other benefits." Richard ignored, however, that the 1992 agreement authorized Klein Tools to terminate Richard's employment if his performance was unsatisfactory, in which case he would have no rights under the agreement.

Evidence also showed that the bylaws of Klein Tools and ZAH specifically provided that officers could be removed at any time by a majority vote of the directors.

¶ 12 As stated, the jury returned a general verdict in defendants' favor. Ultimately, the trial court ruled that while it found defendants owed Richard a fiduciary duty, no possible breach was a proximate cause of any damages to Richard because a majority of the Klein family board members were resolved to terminate Richard's employment, regardless of which employment agreement was in force. Thus, according to the trial court's reasoned ruling, the family members' votes were sufficient to terminate Richard, regardless of any of defendants' actions. As a result, the trial court found that any damages suffered by Richard were not proximately caused by any breach on defendants' part.

¶ 13 II. ANALYSIS

¶ 14 A reviewing court will reverse the trial court's findings following trial only where they are against the manifest weight of the evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002). Additionally, a decision is against the manifest weight of the evidence only where an opposite conclusion is apparent or the findings are arbitrary, unreasonable or not based on the evidence. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 154 (2005). The reviewing court must not substitute the trier of fact's judgment with its own. *Id.*

¶ 15 First, Richard argues that the trial court improperly placed the burden of proving proximate cause on him, rather than placing on defendants the burden of showing there was no proximate cause. Defendants respond, however, that Richard waived this argument by failing to raise it in the trial court. *Forest Preserve District of Du Page County v. First National Bank of Franklin Park*, 2011 IL 110759, ¶ 67 (arguments not made in the trial court are forfeited). In the trial court, Richard explicitly stated that to recover on his breach of fiduciary duty claim, he was

required to prove that the breach of duty proximately caused his damages. With that said, Richard notes he also argued in the trial court that having demonstrated defendants breached their duty of loyalty, "nothing more can reasonably be required to establish the causal connection." Inconsistent arguments such as these are generally disfavored. See *e.g.*, *In re Ch. W.*, 408 Ill. App. 3d 541, 547 (2011). Even assuming this argument is properly before us, we are unpersuaded.

¶ 16 On appeal, Richard cites to *Tully v. McLean*, 409 Ill. App. 3d 659 (2011), which states that "[t]o recover for breach of a fiduciary duty, *a plaintiff* must prove that a fiduciary duty exists, that the fiduciary duty was breached, and that the breach proximately caused the injury of which the plaintiff complains." (Internal quotation marks omitted and emphasis added.) *Id*. at 681 (quoting *Crichton v. Golden Rule Insurance Co.*, 358 Ill. App. 3d 1137, 1149 (2005)). Thus, the plaintiff generally has the burden of proving that the defendant's actions proximately caused his injuries. *Prodromos v. Everen Securities, Inc.*, 389 Ill. App. 3d 157, 171 (2009). Richard argues in a conclusory fashion, however, that this rule should not be applied to a breach of fiduciary duty claim because this cause of action is not a tort.

¶ 17 Notwithstanding Richard's contention, this court has placed the burden of proving proximate cause on the plaintiff even in the context of a breach of fiduciary duty claim. *Prodromos*, 389 Ill. App. 3d at 170-71. Additionally, we have explicitly found that proximate cause is an element of a breach of fiduciary duty claim despite that the cause of action is not a tort. *Wolinsky v. Kadison*, 2013 IL App (1st) 111186, ¶ 73; see also *Enterprise Recovery Systems, Inc. v. Salmeron*, 401 Ill. App. 3d 65, 74 (2010) (stating that a breach of loyalty is established when a person with a fiduciary duty breaches that duty, proximately causing an injury). Thus, the burden rested squarely on Richard.

¶ 18 We are also unpersuaded by Richard's reliance on case law shifting the burden to defendants who have benefited from their breach. Richard has not identified any personal benefit that the defendants here gained from the specific breaches of duty alleged, notwithstanding benefits that defendants generally gained from their relationship with Richard, Klein Tools and ZAH. *Cf. Curtis Fisher*, 406 Ill. 102 (1950) (establishing a breach of fiduciary duty where stepchildren misled their senior stepmother to convey for inadequate consideration 140 acres of land, which were ultimately conveyed to the stepchildren themselves); *NC Illinois Trust Co. v. First Illini Bancorp, Inc.*, 323 Ill. App. 3d 254, 262 (2001); see also *In re Estate of Long*. 311 Ill. App. 3d 959, 960-62, 964, 967 (2000) (where the former co-executor of the illiterate decedent's will had him lease his property to the co-executor's wife and child as lessees before the decedent passed away, the co-executor failed to meet his burden of demonstrating that he exercised good faith). Instead, the crux of Richard's claim was that defendants breached their fiduciary duty to the benefit of another client, the family business. We note that even where a plaintiff does assert that a fiduciary breached his duty of loyalty by profiting in a transaction, the plaintiff must prove that the fiduciary in fact profited from the transaction before the fiduciary will be given the burden of proving the transaction was fair. *Karris v. Watertower Trust & Savings Bank*, 72 Ill. App. 3d 339, 353-54 (1979). We further decline Richard's invitation to address case law from other jurisdictions in support of his contention that the burden rested on defendants. *U.S Residential Management and Development LLP v. Head*, 397 Ill. App. 3d 156, 164 (2009) (observing that case law from other jurisdictions is not binding on this court).

¶ 19 Even assuming that defendants bore the burden of proving a lack of proximate cause, the record indicates that the trial court would have reached the same result. The trial court found as follows:

> "*There is no proof* *** that had the earlier agreement been in force, plaintiff would not have been fired. To the contrary, the determination of Mr. Thomas Klein and Mr. Mathias Klein III to run Rick Klein out of the company was crystal clear in the evidence. ***Accordingly, no action taken or not taken by the defendants in connection with plaintiff's execution of the 2005 Employment Agreement amounts to proximate cause for his dismissal or resultant damages. " (Emphasis added.)

While Richard makes much of the court's choice of words, finding that *he* had not proven the existence of proximate cause, the court in this instance clearly would have found defendants had proven a lack of proximate cause had the burden belonged to them. Ample evidence supports the trial court's finding of no proximate cause: even if the 1992 agreement remained in place and defendants had opposed terminating Richard's employment, his employment would have nonetheless been terminated. *Wolinsky*, 2013 IL App (1st) 111186, ¶ 77 (proximate cause is generally a question of fact to be decided by the trial court).

¶ 20 Under the 1992 agreement, Richard's position could be terminated "if the services rendered by the Employee [were] not satisfactory to the Company." Richard contends that under an objective standard, however, his performance could not have been deemed unsatisfactory. Compare *Muka v. Estate of Muka*, 164 Ill. App. 3d 223, 230 (1987) (stating that courts generally prefer an objective standard over a subjective one when it is unclear whether a contract reserved the right to subjective satisfaction), with *Ray v. Georgetown Life Insurance Co.*, 94 Ill. App. 3d 863, 865 (1981) (observing that in matters of sensibility and judgment, performing to the satisfaction of another depends on subjective satisfaction).

¶ 21 Even under an objective standard, the record shows Richard's performance put vital human resources at risk, notwithstanding his fiscal success. Plentiful testimony was presented

regarding discontent over Richard's management style. The trial court heard testimony that key employees were considering leaving the company because of internal friction. Many advocated for Richard's termination. While Richard contends that Klein and ZAH lacked a genuine basis for finding his performance unsatisfactory because the companies approved of his reviews with respect to "Standards of Performance" and "Key Result Areas," the trial court was entitled to find that these were not the only valid criteria for determining whether his performance was satisfactory.

¶ 22 We also reject Richard's suggestion that the boards would not have voted to terminate his position had Cavanaugh and Vechiola properly abstained from voting due to their conflict of interest. As the trial court observed, Richard's family members did not need Cavanaugh and Vechiola to terminate Richard's employment. With respect to Klein Tools' board, Tom, Mat III, Mark and Bob, four of six members, would still have voted in favor of terminating Richard. With respect to ZAH's board, Tom, Matt III, and Bob, three of five members, would still have voted in favor of terminating Richard. The result would have been the same.

¶ 23 In reaching this determination, we similarly reject Richard's representation that "it is beyond doubt that Bob would have voted differently if he was informed that Mr. Cavanaugh himself had approved of Rick's performance a month earlier in reappointing Rick as CEO and Chairman of the Board based upon Rick's continued success in meeting his [Key Result Areas] and the results achieved for the Company." Richard disregards Bob's testimony that he voted based on his best judgment and did not feel he was improperly or unduly influenced by anyone. Richard also disregard's Bob's testimony indicating that the aforementioned reviews were not dispositive in assessing whether Richard's performance was satisfactory; rather, it was important how company officers treated employees as well. To the extent Richard argues Bob's vote

resulted solely from Cavanaugh's influence, Bob testified that his decision was based on information that Matt III and Tom provided him. Indeed, Matt III and Tom were Richard's loudest critics.

¶ 24 While Richard contends he was not required to provide unequivocal evidence of proximate cause (see *Union Planters Bank, N.A., v. Thompson Coburn LLP*, 402 Ill. App. 3d 317, 343 (2010)), we find the record supports the trial court's finding that the evidence refuted any possible showing of causation. Defendants' action or inaction was not a material factor in bringing about Richard's injury. See *Thacker v. UNR, Inc.*, 151 Ill. 2d 343, 354-55 (1992). Richard would have lost his position and been in the same circumstances with or without any involvement from defendants.

¶ 25 III. CONCLUSION

¶ 26 The trial court's finding of no proximate cause was not against the manifest weight of the evidence. Consequently, Richard failed to prove defendants breached their fiduciary duty and we need not consider the parties' remaining arguments.

¶ 27 For the foregoing reasons, we affirm the circuit court's judgment.

¶ 28 Affirmed.