2013 IL App (2d) 120875-U
No. 2-12-0875
Order filed March 20, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re ESTATE OF STEVEN L. GOOD, Deceased	)	Appeal from the Circuit Court of Lake County.
	)	No. 09-P-70
(Sheldon Good and Company Auctions, Plaintiff-Appellant, v. Estate of Steven L. Good, Defendant-Appellee).	)	Honorable Diane E. Winter, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

Held: Trial court's order granting defendant summary judgment affirmed.

¶ 1 Plaintiff, Sheldon Good & Company Auctions, appeals the trial court's July 6, 2012, order granting summary judgment to defendant, the Estate of Steven L. Good, on plaintiff's claim that decedent Good, plaintiff's founder, misappropriated $1,576,359 in company funds, thereby breaching his fiduciary duty to the company. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 Plaintiff's business conducted real estate auctions and related services. Decedent founded the company in 2001, and, until his death in January 2009, he served as the chief executive officer,

chairman of the board of directors, managing member, and the majority owner of Steven Good Partners International, LLC, a Delaware company (of which plaintiff was a wholly-owned subsidiary). It is undisputed that the LLC was governed by the operating agreement and a 2007 amended version of that agreement (the agreements), which were signed by all members.[1] It is also apparently undisputed that the agreements generally governed decedent's responsibilities to plaintiff (a company, not a LLC). Those agreements provide that "except as otherwise specifically limited in this Agreement, the Manager [*i.e.*, decedent] has the exclusive right to manage the company's business." The agreements did not limit decedent's ability to compensate himself; however, the 2007 version provided that decedent's (and other senior members') compensation after 2006 could not, without approval, exceed that received in 2006. Further, the other specified limitations on decedent's authority pertained to his ability to employ relatives and sell company assets without member approval.

¶ 4 It is undisputed that decedent did not violate any provision of the agreements. However, on July 30, 2009, plaintiff filed a claim against defendant, alleging that, prior to his death, decedent

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[1]We note that the parties utilize imprecise terminology. For example, although plaintiff is actually a "company," the parties refer to the "company" and the "LLC" interchangeably. As such, the record and briefs also interchangeably reference terms generally specific to LLCs (*e.g.*, "members") and corporations (*e.g.*, "board of directors"). Perhaps this is because the operating agreements also use those terms interchangeably; for example, they define "company" as referring to the LLC and create for the LLC a "board of directors." Accordingly, for simplicity, this court simply incorporates the terms used by the parties, without unilaterally attempting to distinguish the two business organizations.

misappropriated company (*i.e.*, plaintiff's) funds. Specifically, in amended claims, plaintiff acknowledged that, from 2003 to 2008, decedent was entitled to commissions, management fees, and medical and automotive expenses that totaled $5,583,127. However, plaintiff alleged that, in that same period, decedent misappropriated for his own benefit funds to which he was *not* entitled, including: (1) $154,000 in personnel fees; (2) $75,944 in life insurance premiums; (3) $3,991 in trust fees; (4) $286,000 in advances; (5) $981,316 in bonuses; and (6) $73,287 in 401(k) plan payments. Plaintiff alleged that, as to those funds, decedent did not obtain "the requisite approval from the company's shareholders or directors; thus, he breached his fiduciary duties to the detriment of the company and its shareholders, and engaged in a misappropriation of assets."

¶ 5 The trial court denied defendant's motions to dismiss plaintiff's amended claims. Thereafter, defendant's request for interrogatories requested plaintiff to identify, for each category of funds decedent allegedly misappropriated, the names of persons with knowledge of those claims and documents which supported the claims. In its second amended answers to interrogatories, plaintiff responded as follows.

¶ 6 As to the personnel fees, plaintiff responded that decedent misappropriated $154,500 and it listed as persons with knowledge: (1) Michael Fine (former executive vice-president and director of project management); (2) Jeffrey Craven (former chief financial officer); (3) Matt Dolbeare (Craven's former assistant and directory of accounting and finance); (4) John Houren (former chief financial officer); (5) Alan Kravets (former president); and (6) Bruce Sayre (former executive vice-president and director of sales). Plaintiff answered that the personnel fees were distributed in 2004, and it identified a one-page, summary document (hereinafter, "the spreadsheet"), as its support therefor.

¶ 7 As to the life insurance premiums, plaintiff responded that decedent misappropriated $78,944 and it identified the same six people as having knowledge of that claim. Plaintiff listed four pages as its documentation for the claim, including the spreadsheet. Plaintiff explained that the life insurance premiums were disbursed as follows: $15,000 in 2004; $26,000 in 2005; $15,035 in 2006; $15,735 in 2007; and $14,469 in 2008. The spreadsheet reflects life insurance premiums totaling $86,239.[2]

¶ 8 As to the trust fees, plaintiff responded that decedent misappropriated $3,991 in funds, listed the same six people as having knowledge of the claim, and it identified 17 pages, including the spreadsheet, as documentation for the claim. Plaintiff explained that the trust fees were disbursed in 2005.

¶ 9 As to the advances, plaintiff responded that decedent misappropriated $286,000 in funds, listed the same six people as having knowledge of the claim, and identified approximately 41 pages, including the spreadsheet, as documentation for the claim. Plaintiff explained that $50,000 of the advances was distributed in 2007, and the remainder was distributed in 2006.[3]

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[2]We note that this total, $86,239, is inconsistent with the total asserted in the same interrogatory answer, $78,944 (which also differs from the $75,944 originally claimed in the amended claim).

[3]We note that although the interrogatory answer asserts that $286,000 in advances were misappropriated in 2006 and 2007, the spreadsheet lists *only* $260,000 in advances in 2005. Further, despite $260,000 being the only entry related to advances, the spreadsheet reflects a *total* of $286,000 in advances.

¶ 10 As to the bonuses, plaintiff responded that decedent misappropriated $981,316 in funds, listed the same six people as having knowledge of the claim, and identified seven pages, including the spreadsheet, as documentation for the claim. Plaintiff explained that the bonuses were disbursed as: $50,000 in 2005; $662,478 in 2006; $260,838 in 2007; and $8,000 in 2008.

¶ 11 Finally, as to the 401(k) plan payments, plaintiff responded that decedent misappropriated unspecified "amounts," listed the same six people as having knowledge of the claim, and identified one page, the summary spreadsheet, as its documentation. Plaintiff explained that the 401(k) funds were disbursed as: $7,803 in 2004; $9,703 in 2006; $17,427 in 2007; and $16,250 in 2008.[4]

¶ 12 Defendant moved to compel and, on March 25, 2011, the trial court held a hearing on the motion. Defendant argued that the foregoing responses were untimely and non-responsive. Further, defendant argued that plaintiff did not produce documents to support its claims, noting that, for some claims, plaintiff listed only the spreadsheet as its support, a document that defendant asserted was inadmissible hearsay. Further, defendant argued, plaintiff did not produce the underlying documents used to create the spreadsheet. As to timeliness, the trial court noted to plaintiff, "quite frankly, when I am done with this, you are going to be barred for anything else unless it is newly discovered, or some very, very good reason why it was not part of your eight-box production." The court agreed that, if the documents identified were all plaintiff had in support of its claims, and if there were no witnesses to testify to the information, what was produced would probably be insufficient to meet plaintiff's burden of proof. Finally, the court stated that it was "barring anything not produced by this date. *** the fact that they have only given you one document is not going to bar them *** if

[4] These amounts total $51,193, as opposed to the $73,287 originally claimed and the $64,313 listed as the total for 401(k) payments on the summary spreadsheet.

they come up with a new document that wasn't part of this, you will probably follow up at the hearing, and I will bar any new document."

¶ 13 Thereafter , the parties conducted discovery depositions. We summarize those depositions as they appear in the record (*i.e.*, excerpts that were attached to defendant's summary judgment motion and plaintiff's response thereto).

¶ 14 A. Matt Dolbeare

¶ 15 Matt Dolbeare testified that, from January 2005 to October 2010, he worked for plaintiff as its director of accounting and finance. In that role, Dolbeare had access to company accounting records, and he oversaw payment of the company's bills, commissions to contract employees and members via their contracts or agreements, and payroll to salaried employees. Dolbeare prepared financial statements for annual audits and monthly financial statements. This included issuing checks to members of the company and tracking members' compensation on approximately a quarterly basis.

¶ 16 Dolbeare prepared the spreadsheet that plaintiff produced in support of its claims. Dolbeare testified that, in 2009, after decedent died, Michael Fine requested that he prepare a summary of compensation or other payments made to decedent for the years 2004 through 2008. According to Dolbeare, Fine created the format and essentially asked Dolbeare to fill in the blanks. (More specifically, Dolbeare's supervisor, Craven, verbally told Dolbeare that Fine wanted him to complete the document). Dolbeare surmised, from the request, that plaintiff was investigating decedent after his death; he knew plaintiff was also considering filing for bankruptcy.

¶ 17 Dolbere prepared the summary "using the company's payment records to [decedent] consisting of check copies, invoice copies, [and] check requests[.]" He then "reconciled that with

our accounting records within our computer system to prepare a summary for these years of all payments made to him." Dolbeare agreed that the documents he used to create the spreadsheet, including check requests, were available, at the time, to other members. Dolbeare agreed that the compensation records he used to create the spreadsheet were records prepared and maintained in the regular course of business. He clarified, however, that the summary *spreadsheet* was *not* maintained in the regular course of business, explaining that "this was a one time document."

¶ 18 During the deposition, defense counsel objected that those underlying records or the source documents purportedly used to create the spreadsheet were not produced to defendant. Dolbeare agreed that there should exist documents to verify the amounts on the spreadsheet, that those documents were available to him in 2009, and, further, that those documents were not present at the deposition. Further, Dolbeare explained that, for all of the alleged categories of misappropriation, the source document would have been something like a check request form, which would have first been signed by Dolbeare's supervisor before he prepared the check. Dolbeare confirmed that his supervisor, whether it was Craven or Houren, needed to approve each check request. He also agreed that, for each category of payments, there should exist at least a check request form, or, at the end point, a check or wire transfer confirmation. Dolbeare testified that approval from two members was required for any wire request; so, to the extent that any of the alleged payments to decedent occurred by wire transfer, it would have been approved by at least one member besides decedent. Further, he agreed that, while the alleged payments to decedent would have occurred throughout the year, one would not be able to determine, without the original source documents, when, exactly, those payments were distributed.

¶ 19 The spreadsheet classifies payments made to decedent by category (*i.e.*, commissions, auction day fees, etc). Dolbeare explained that all commissions, auction day fees, and distributions were paid in accordance with the relevant auction day contracts and the operating agreement. Further, the company paid decedent's medical and automotive bills. It was noted that the spreadsheet was divided into two sections; one entitled "total regular earnings," and the other entitled "total additional fees." When asked why the spreadsheet was separated in such a manner, Dolbeare replied, "I don't recall that I did create two different sections, because the entire document is distributions to him and that's how it was treated on his income tax return." Dolbeare was asked what the category "total regular earnings" meant to reflect, and he replied, "I don't agree with the category label. I don't recall putting the category label there. *** Because all earnings paid to a contractor are regular earnings. These all would have been reported on his income tax return. Additional fees versus regular earnings isn't — there doesn't need to be a distinction made."

¶ 20 As for the 401(k) category, Dolbeare testified that the company distributed money to decedent's 401(k) plan. He acknowledged that the spreadsheet listed a total ($64,313) in 401(k) payments that did not correspond to the spreadsheet's breakdown of those payments by year: "do you understand why there's a discrepancy on this document?" He replied, "No."

¶ 21 Dolbeare was asked to explain the meaning of the spreadsheet category entitled "personnel fee for marketing." He replied, "That, I do not recognize."

¶ 22 As for life insurance premiums, Dolbeare testified that decedent had a personal life insurance policy and the company paid the annual premium thereon. He explained that, upon receiving from his supervisor (first, Houren, then, Craven) the requests for life insurance payments, he would issue

to decedent's insurance company a check for the premium. Dolbeare could not answer with certainty when in 2004 life insurance premiums were paid, because he did not have the source documents.

¶ 23 As to the spreadsheet's documentation of an advance in 2005, Dolbeare agreed that there was another discrepancy between the total listed and that category's breakdown by year; he believed it to be a summation error and testified that he thought the individual, annual columns, rather than the totals, were correct. For the purported $260,000 advance, Dolbeare could not say, without the source documents, if that advance was distributed in one or multiple payments.

¶ 24 As for the trust fee, Dolbeare was not certain what it was. He surmised that it was likely an annual fee for a trust established for decedent.

¶ 25 As to bonuses, Dolbeare explained that the company's outside accounting firm had advised him to change a line item on the financial statements that referred to advances or receivables from decedent and to re-classify it instead as bonus payments. "So, at the end of the year for 2005, [200]6, [200]7, and [200]8, that receivable was [re-classified] as the bonus paid to him and written off on our financial statements."

¶ 26 When asked if he thought the spreadsheet was accurate, Dolbeare testified that he believed the annual columns were correct. When asked if he thought the spreadsheet was "misleading" in any manner, Dolbeare stated that "the personnel fee for marketing I have a question about. Other than that, I believe the document not to be misleading*** It's true and correct other than the totals column, and I have, again, question about the personnel fee for marketing."

¶ 27 B. Alan Kravets

¶ 28 Alan Kravets testified that he served on plaintiff's board of directors and held the titles of president and general counsel. Kravets confirmed that the law firm of Much Shelist (which currently

represents plaintiff in this matter) was employed to assist with the LLC's formation and that it created the operating agreements. Kravets, an attorney, agreed that operating agreements govern LLCs and, specifically, that the operating agreements at issue here governed the conduct of the LLC "in theory *** because I don't think anybody ever looked at it after it was created." Kravets agreed that the operating agreements designated decedent as managing member of the LLC, and that decedent: (1) played a significant role in business development; (2) brought in significant income and revenue; (3) was the company's and LLC's spokesperson to the outside world; and (4) ran the company and LLC.

¶ 29 Kravets was asked whether decedent violated any specific provisions of the amended operating agreement. He replied:

> "I would—I would say that— with respect to the agreement, I would have to relate the fact that I believe that [decedent] was paid monies that were outside the scope of his authority to get these monies. I'm not sure whether or not this particular agreement would be the basis for justifying that or not, but certainly, and I — and, again, I'm not a lawyer with respect to these agreements. I don't — I don't know, but I do believe that [decedent] was paid sums of money that I believe were inappropriate, and the basis for it being inappropriate should be in these documents [the operating agreement and amended operating agreement]."

Kravets was asked if decedent violated any provision in the initial operating agreement, and he answered: "I believe that he—you know, even in regard to the prior question, [decedent] violated, in my opinion, my opinion, his fiduciary obligation, whatever that means, and — in taking money from the company, and I'm assuming that the — if he did it incorrectly, which I believe he did, on a personal level, that it would be in violation of one of these documents." Ultimately, Kravets agreed

that the operating agreements' provision entitled "Management of the Company," provided that "Except as otherwise specifically limited in this Agreement, the Manager has the exclusive right to manage the Company's business." Further, Kravets agreed that he had no factual basis to dispute plaintiff's counsel's stipulation that decedent did not violate any specific provisions in the operating agreements.

¶ 30 Kravets did not play any role in preparing the spreadsheet. Kravets testified that he had no personal knowledge about the personnel fees. Kravets did not know why there was a discrepancy between the interrogatory answers and spreadsheet regarding the amount plaintiff claimed decedent misappropriated in life insurance premiums. Kravets could not identify who created a three-page "Payment Summary-[Decedent]," a document that allegedly supported plaintiff's claim regarding decedent's misappropriation of life insurance premiums. Kravets could not provide any factual information about the life insurance claim. Kravets did recall that the trust claim related, in part, to an irrevocable trust decedent established and that, at one point, Kravets was one of the trustees for that trust. Kravets stated that he did not know of "bonuses" being paid to decedent. Finally, other than the spreadsheet, he was not aware of any other information or documentation related to plaintiff's claims that decedent took monies related to a 401(k) plan, although he agreed that the company had a 401(k) plan for its employees.

¶ 31 C. Michael Fine

¶ 32 Michael Fine testified that he served as plaintiff's executive vice-president and director of project management. He reported to decedent, who was chairman and manager. Decedent traveled a considerable amount, yet, even when away, he made every major decision for the company. Fine

agreed that plaintiff had successful years from 2004 to 2006, and that his salary increased from $270,000 to $505,000 in those same years.

¶ 33 When asked his role in investigating plaintiff's claims, Fine related that he was one of the members that asked the accounting department to identify the total payments in each of the six categories of alleged misappropriations. Fine agreed that he created a grid for the accounting department to complete. When presented with the spreadsheet, Fine testified that he had created an earlier version of the spreadsheet that had looked a bit different. Thereafter, Fine played no other role in the investigation.

¶ 34 When asked whether he had any personal information regarding the categories that formed plaintiff's claim, Fine answered that he was told by Craven and Kravets that there were payments made in those categories. As to the underlying documentation used to create the spreadsheet, Fine was shown a "couple of check stubs," but could not recall which ones, nor could he recall the dollar amounts of those check stubs. Fine agreed that he was listed in plaintiff's interrogatory answers as a person having knowledge relating to plaintiff's claims that decedent misappropriated: personnel fees, life insurance premiums, advances, bonuses, and 401(k) payments. However, when asked about each category, Fine answered that his only knowledge of those claims was that Craven told him such payments were made.

¶ 35 Fine agreed that he once took an advance from the company. Further, he agreed that other members in the company also received bonuses. As to 401(k) participation, Fine stated that, when he became a member of the company, he was told that members were not eligible "any longer" for the 401(k) program, so he was taken out of the program at that time. He could not recall who told

him that information, or if that information or decision was documented. Other than the operating agreements, Fine could not identify any documents that governed the company's membership.

¶ 36 D. Bruce Sayre

¶ 37 Sayre testified that he served as plaintiff's executive vice-president and director of sales. He agreed that decedent was the sole manager of the company and that decedent provided value to the company as a "rainmaker." Sayre agreed that the amended operating agreement embodied the entire understanding between the members concerning the company and their relationship as members and, moreover, that he was not aware of any provision in the agreement that limited decedent's ability to compensate himself.

¶ 38 Though listed in plaintiff's interrogatory answers as a person with knowledge, Sayre had no personal knowledge about plaintiff's claim that decedent appropriated personnel fees, life insurance premiums, advances, bonuses or 401(k) amounts, but he had heard, from someone he could not recall, that to be the case. He played no role in creating the spreadsheet. Further, Sayre testified that, although his signature appeared as the verifying signature for plaintiff's amended claim: he saw plaintiff's amended claim for the first time on the day of his deposition; he played no role in plaintiff's inquiry or investigation related to the amended claim; and he was not consulted by anyone at the company or its counsel prior to filing the amended claim. Other than discussing with other board members what they felt "were some of the improprieties that were occurring," Sayer knew nothing about plaintiff's inquiry relating to the filing of the amended claim.

¶ 39 E. Jeffrey Craven

¶ 40 Jeffrey Craven, plaintiff's former chief financial officer, testified that he was not aware of any document, policy, or procedure that obliged decedent to obtain, as alleged in the complaint,

"requisite approval from the company's shareholders or directors." Further, he agreed that, according to the amended operating agreement, decedent needed approval or consent only to exceed the compensation he had received in 2006. According to Craven, prior to decedent's death in January 2009, and almost entirely due to the global financial crisis, plaintiff's business had disintegrated from a record-setting year in 2006 to almost nothing (and ultimately to bankruptcy). At some point, senior members of the company began to question how much the company paid decedent. Craven testified that Dolbeare prepared the spreadsheet, but that Craven reviewed it with him. Other than reviewing it, Craven did not review any of the backup information used to create it.

¶ 41 Craven did not have any personal knowledge relating to the claims that decedent took personnel fees or advances.

¶ 42 As to life insurance premiums, Craven could recall only that, in 2008, one payment was made, "but to be honest with you, I don't even remember if that was his personal life insurance policy or if it was one of the key man policies. So shortly after I got there, [the company] put some key man policies into place" for decedent and other board members. As for the check that was issued for the 2008 payment, Craven recalled decedent's assistant, Cynthia Crnovich, making the request, although it could have been decedent. He could not recall specifically.

¶ 43 For the claim regarding bonuses, Craven stated that any payments that were made to or on decedent's behalf "I would have had some knowledge of." The alleged bonuses in 2005 and 2006, however, were prior to Craven's tenure with the company, so he had no knowledge of those. As for the alleged 2007 bonus, he also had no recollection of it. Finally, Craven had no recollection of the alleged $8,000 bonus in 2008, but he "probably" saw documentation relating to it, although he did

not know what form it would have taken. "Bonuses could have been taken in any number of forms, though. A bonus for [decedent] didn't just have to be cash, okay, or a check made payable to him. Part of our job was to make sure that his total compensation was reflected accurately [at] the end of the year. So any payments to him, for him or on his behalf, anything that would be deemed to be compensation from an IRS standpoint, would be ***put together for 1099 reporting purposes. So a bonus may not have been a payment to him. It might have been a payment at his direction, in essence for him." Craven testified that he did not recall any communications between him and decedent relating to any of the bonuses he was paid, and he testified that his conversations with decedent were limited to "if he asked me to prepare a check for him, to him or whatever, then that's what I was to do."

¶ 44 As to 401(k) payments, Craven could not recall and had no knowledge regarding any payments in 2004, 2006, or 2007. Craven recalled that, in 2008, the company would issue checks or transfer money via wire transfer to decedent's 401(k) provider: "not to [decedent,] but on his behalf." He agreed that, one way or another, there would be a record of it, either a check request or wire transfer form. If there was an oral request, Dolbeare would generate one of those documents, approve it himself, and put a copy in the file. Craven agreed that the company had a 401(k) plan. He did not participate in it, and he did not recall if he was ever offered the opportunity to participate. Craven was not sure if he would have been eligible to participate. Craven testified that he had questions as to whether or not decedent was eligible to participate in the 401(k) plan and, in a conversation, decedent "kind of indicated that he had an opinion or advice that he was. *** And I said that's fine. It's outside—it's above my scope or, you know, my level of information." Decedent

did not identify the basis of his opinion, whether it was from an attorney or otherwise. Craven did not have any other discussions with anyone else at the company about the 401(k) plan.

¶ 45 Craven was asked if he recalled decedent making, in 2008, a personal loan to plaintiff in the amount of around $200,000. Craven recalled that the members loaned around $400,000 to the company, and that decedent loaned about half that amount. Decedent "made by far the largest loan back to the company."

¶ 46 F. John Houren Declaration

¶ 47 A declaration from John Houren attests that he worked for plaintiff from mid-2003 to Spring 2007 as vice-president in charge of operations with oversight of the accounting department. In or around 2006, the company was audited by Miller Cooper & Co., Ltd., its outside accountant. At that time, there was discussion about a bonus plaintiff paid to decedent. A conference call occurred between a partner at Miller Cooper (Cecil Levy) and Jeff Rubenstein, a partner at Much Shelist (plaintiff's current counsel). Decedent and Houren were both present for the call, and Kravets was involved in and aware of the call. During the call, Rubenstein confirmed that he and a colleague had reviewed the company's agreement and that decedent had the authority to pay bonuses and other compensation to himself.

¶ 48 G. Cecil Levy

¶ 49 Cecil Levy, from Miller Cooper & Co., Ltd., testified that he had no personal knowledge regarding plaintiff's claims of misappropriation. When asked if he knew whether decedent was required to obtain approval from plaintiff's other members relating to amounts paid to him, Levy replied, "I don't know how to answer this. We spoke to somebody at a law firm that said he didn't." Specifically, "years" before decedent passed away, Levy reviewed the operating agreement and could

not identify anything in it that prohibited decedent from taking compensation. Levy then confirmed that understanding with Rubenstein at Much Shelist. "I called him, I said, 'Do you agree with this?' He said, 'Yes. He is entitled to take whatever compensation he wants. There's nothing in the operating agreement to prevent it. He's a 60 percent owner,' and that's it." Levy agreed that Rubenstein told him that, "based on the operating agreement," it was okay for decedent to pay himself the money he was taking, whether as compensation or otherwise.

¶ 50 H. Summary Judgment

¶ 51 On February 9, 2012, defendant moved for summary judgment, arguing that it was entitled to judgment as a matter of law because: (1) plaintiff did not identify admissible documentation for the amounts that decedent allegedly misappropriated; and (2) decedent's ability to pay and receive compensation was governed by contract (the operating agreements), with which he complied.

¶ 52 In its summary judgment response, plaintiff reiterated that, aside from his permitted compensation, decedent directed certain other compensation to be paid to him or for his benefit. In support, plaintiff referenced the depositions of Kravets, Fine, and Craven. Plaintiff asserted that, per the fiduciary duties decedent owed plaintiff, he was not entitled to those forms of compensation and, therefore, it is "inconsequential" that the operating agreements did not specifically delineate or restrict decedent's compensation. "In fact, [plaintiff] acknowledges that [decedent] did not breach the operating agreements."

¶ 53 Plaintiff further argued that summary judgment was improper because it produced "ample evidence" of misappropriation, referencing primarily: (1) the spreadsheet; and (2) Dolbeare's deposition testimony. Plaintiff asserted that other depositions and documents also support its claims. "For example, [plaintiff] has disclosed numerous members and executives of the company who it

expects to testify," including Kravets, Fine, Sayre, Craven, Dolbeare, and Jeffrey Hubbard (executive managing director of the New York office). Specifically, plaintiff asserted that those witnesses would testify to decedent's "systematic and relentless misappropriation of company assets for his own benefit." In a footnote, plaintiff asserted that, although defendant noted in its motion numerous examples of the aforementioned witnesses lacking personal knowledge:

> "the truth of the matter is that [defendant] failed to conduct adequate depositions that would reveal each witness' knowledge. Rather than asking targeted questions, counsel for [defendant] asked vague, open-ended questions. To ask imprecise questions and expect to receive precise answers is foolhardy. If counsel for [defendant] wanted precise answers he needed to ask directed questions. His failure to conduct effective depositions is not the fault of [plaintiff] and certainly does not lead to the conclusion that [plaintiff] lacks evidence."

Nevertheless, plaintiff did not attach any affidavits from any of the aforementioned witnesses to its summary judgment response. The only deposition it attached, Dolbeare's, did not speak to any document other than the spreadsheet.

¶ 54 Finally, plaintiff also noted that it had produced financial documentation, other than the spreadsheet, to support $1,442,465.32 of its claims related to 2005, 2006, and 2007, and attached those documents to its response (plaintiff asserts that the spreadsheet then establishes an additional $216,022 in appropriations for 2004 and 2008). There were no affidavits attached to lay foundation for or to authenticate those documents. Some of those documents (for example the document purportedly establishing a $20,000 advance made on August 24, 2005, (exhibit H to the response to summary judgment) which, incidentally, conflicts with plaintiff's interrogatory answer that no improper advances were taken in 2005)), reflect "approved" thereon. Plaintiff asserted that, if the

evidentiary support does not precisely add up to the amount of its claim, that does not mean summary judgment is appropriate; rather, at trial, plaintiff may amend its claim to obtain judgment in the amount proved.

¶ 55 On July 6, 2012, the court granted defendant's summary judgment motion. The court found there were no disputed material facts and that the operating agreements directed the duties and obligations of decedent. Those agreements provided decedent with broad powers and authority to exclusively manage the company with few restrictions, such as limiting his authority to hire relatives and limiting his compensation to that of 2006. The court noted that plaintiff agreed that decedent did not violate those agreements, but instead alleged that decedent breached his fiduciary duties of loyalty and care to the company and its members by directing property and profits to be paid as part of his compensation. The court found, however, that:

> "The evidence, including the depositions of Mr. Cravens, Mr. Fine and Mr. Kravets, all former Company officers with knowledge of the company's affairs, fails to set forth facts that [decedent] engaged in a course of conduct that breached his duties of loyalty and care to the company and its members. At best, the testimony offered by [plaintiff] in support of [its] claim, reflects the witnesses' subjective opinions, that [decedent] should have exercised his exclusive authority to manage the company differently and should not have paid himself the levels of compensation he received."

¶ 56 Plaintiff appeals.

¶ 57 II. ANALYSIS

¶ 58 We review *de novo* a trial court's grant of summary judgment. *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196, 201 (2009). Summary judgment is appropriate only where the

pleadings, depositions, and admissions on file show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *Ioerger*, 232 Ill. 2d at 201. "Genuine" is construed to mean that there is evidence to support the position of the nonmoving party. *Ralston v. Casanova*, 129 Ill. App. 3d 1050, 1058 (1984). Although plaintiff need not prove its entire case at summary judgment, it must present admissible evidence that would support a finding in its favor. *Nordness v. Mitek Corp. Surgical Products*, 286 Ill. App. 3d 761, 762 (1997). The aim of summary judgment is not to try issues but, rather, to determine whether any triable issues of fact exist. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007). In reviewing a summary judgment disposition, we strictly construe the record against the movant and liberally in favor of the nonmoving party. *Id.*

¶ 59 Plaintiff argues that both the trial court and defendant fail to grasp that, under Delaware law, which governs the operating agreements, decedent owed fiduciary duties of loyalty and care to the company and its members and he breached those duties when, between 2004 and 2008, he misappropriated $1,576,359 of the company's profits and property. Plaintiff asserts that these duties exist beyond those responsibilities and limitations expressed in the agreements, and, so, the trial court's finding that decedent did not breach those agreements is misplaced. Further, plaintiff asserts that it provided ample evidence of the misappropriations, asserting that the spreadsheet is an admissible business record under Illinois Rule of Evidence 803(6) (Ill. R. Evid. 803(6) (eff. Jan. 1, 2011)) and further referencing Dolbeare's testimony and the financial exhibits it attached to its summary judgment response. Plaintiff asserts that, because the trial court did not address the spreadsheet's admissibility at summary judgment (which, plaintiff asserts, suggests that the court found it admissible), this court should also consider the spreadsheet. Finally, plaintiff claims, as it

did at summary judgment, that, notwithstanding the spreadsheet, it disclosed numerous persons it expects to testify regarding decedent's misappropriation and that defendant's failure to ask targeted questions at the depositions does not mean plaintiff lacks evidence.

¶ 60 We disagree and, as explained below, conclude that plaintiff's evidence is largely inadmissible and, in any event, it fails to raise a genuine issue of material fact that decedent breached fiduciary duties.

¶ 61 A. Plaintiff's Evidence is Inadmissible

¶ 62 "Evidence such as hearsay, which is inadmissible at trial, is not admissible in support of or in opposition to a summary judgment motion." *People ex rel. Madigan v. Kole*, 2012 IL App (2d) 110245, ¶ 47; see also *Babich v. River Oaks Toyota*, 377 Ill. App. 3d 425, 429 (2007) ("On a motion for summary judgment, a trial court cannot consider evidence that would be inadmissible at trial"). As explained below (and setting aside all disputes regarding the timeliness of production, plaintiff's failure to provide defendant with complete access to the underlying records, etc.), the purported business records upon which plaintiff relies to support its claims are inadmissible. The spreadsheet does not satisfy the business-records exception to the hearsay rule, and the other financial documents have not been authenticated.

¶ 63 1. The Spreadsheet

¶ 64 First, plaintiff alleges that each of its claims is supported by the spreadsheet. Plaintiff claims that the spreadsheet is admissible under Rule 803(6) because Dolbeare testified that he compiled it by using records kept in the ordinary course of business.[5] We disagree.

[5]In its reply brief, plaintiff explicitly disavows any attempt to claim the spreadsheet is admissible under Rule 1006 (summaries) (Ill. R. Evid. 1006 (eff. Jan. 1, 2011)).

¶ 65 Rule 803(6) provides that "records of regularly conducted activity" are not considered inadmissible hearsay where they constitute:

> "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, *and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation*, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), *unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness****[.]" (Emphases added.) Ill. R. Evid. 803(6).

Because this rule is almost identical to its federal counterpart (Fed. R. Evid. 803(6)), plaintiff relies on federal caselaw to support its position that the spreadsheet is an admissible business document.[6] Specifically, plaintiff asserts that it matters not whether the *summary* was maintained in the regular course of business, so long as the underlying documentation used to create the summary was regularly maintained. However, while the cases upon which plaintiff relies support a similar position, plaintiff's reliance upon them here is misplaced.

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[6]In 2011, Illinois Rule of Evidence 803(6) essentially merged, in a manner consistent with the Federal Rules of Evidence, this state's already existing rules regarding business records (application of which depended on whether the case was civil (Ill. Sup. Ct. R. 236) or criminal (725 ILCS 5/115-5)). As such, Rule 803(6) now provides that, regardless of whether it is a criminal or civil case, business records may be admissible if they meet Rule 803(6)'s requirements. See Michael H. Graham, Graham's Handbook of Illinois Evidence § 803.6, p. 884 (10th ed. 2010).

¶ 66 Specifically, in *United States v. Fujii*, 301 F. 3d 535 (7th Cir. 2002), the court held that computer printouts of an airline's check-in and reservation records were properly admitted under the business-records exception to the hearsay rule because "computer data compiled and presented in computer printouts prepared specifically for trial is admissible under [Federal] Rule 803(6), even though the *printouts* themselves are not kept in the ordinary course of business." (Emphasis in original.) *Fujii*, 301 F. 3d at 539. The court explained that the airline's check-in and reservation records were maintained in the airline's ordinary course of business, there was no indication that the source of information or the method or circumstances of preparation suggested a lack of trustworthiness, and, therefore, the fact that the "information was *printed out* at the request of the INS does not deprive the *printouts* of its business-record character." (Emphases added.) *Id.*

¶ 67 Similarly, in *U-Haul International, Inc. v. Lumbermens Mutual Casualty Co*., 576 F.3d 1040 (9th Cir. 2009), at issue were computer-generated summaries of payments made on claims by an insurance company. There, the court concluded (in accordance with multiple other cases cited therein) that the question was whether the information in the database, not the *printout* from the database, was compiled in the ordinary course of business. *U-Haul*, 576 F.3d at 1043-44. Specifically, the record in *U-Haul* reflected that, at the time the payment was made, employees input a record of the payment into a database; the employees would then query the database to compile the payment information, generating a summary of the costs. *Id.* at 1044. Further, the database summaries were "routinely run" as part of the business practice. The court distinguished the records before it from those in *United States v. Arias-Izquierdo*, 449 F.3d 1168, 1184 (11th Cir. 2006) (which we summarize below), on the basis that, unlike that case, "the company in this case kept the

computerized database in the regular course of business and regularly compiled summaries of payment histories in the regular course of business." *Id.*

¶ 68 In contrast, in *Arias-Izquierdo*, the Eleventh Circuit Court of Appeals distinguished the *Fujii* decision on the basis that, in *Fujii*, the records were "electronically stored information and the summary was simply a printout of that information." In contrast, the court noted, "rather than a simple printout of regularly kept, computerized records, the Government sought to have admitted a typed summary of handwritten business records. This printed summary was prepared solely for trial. Rule 803(6) does not allow for the admission of such a summary." *Arias-Izquierdo*, 449 F.3d at 1184.

¶ 69 Thus, while there is no real dispute that printouts of regularly maintained information may meet Rule 803(6)'s requirements (see also *United States v. Briscoe*, 896 F.2d 1476, 1494 n.13 (1990) ("computer printout" may be prepared for trial and need not be maintained in the regular course of business as long as the data compiled in the printouts was entered into the computer contemporaneous to the event)); *Alexian Bros. Health Providers Ass'n v. Humana Health Plan, Inc.*, 608 F. Supp. 2d 1018, 1024 n.6 (N.D. Ill. 2009) (test for admissibility of computer-generated records is whether the data compiled and presented in "computer printouts" meet Rule 803(6)'s requirements, even when the "printouts" were specifically prepared for trial)), there is a distinction between computer printouts generated without human intervention and a summary created by a person as a one-time record.[7]

[7]We note that Illinois caselaw on this issue is consistent with the foregoing federal caselaw. For example, compare *In re Marriage of DeLarco*, 313 Ill. App. 3d 107, 114 (2000) (discussing an attorney's billing summaries produced by a computer on a monthly basis and noting that "tangible

¶ 70 Here, the spreadsheet is not a "printout" of regularly maintained information; it is more akin to the typed summary of various business records found inadmissible in *Arias-Izquierdo*. The spreadsheet was not created as part of regular business practices, nor is it simply a printout of regularly maintained records. Instead, Dolbeare testified that he prepared the summary, at Fine's direction and based on a format Fine drafted, "using the company's payment records to [decedent] consisting of check copies, invoice copies, [and] check requests." He then "reconciled" the paper records with accounting records in the computer system and prepared the spreadsheet. Dolbeare testified that the compensation records used to create the spreadsheet were records prepared and maintained in the regular course of business. However, he testified clearly that the spreadsheet was not maintained in the regular course of business, "this was a one time document." Unlike the federal cases upon which plaintiff relies, the summary was not printed from the system but was, instead, essentially created from scratch. Finally, we also note that the circumstances of preparation, at Fine's order and with his draft of the document's layout, for purposes of litigation, with an organization and categories Dolbeare did not recognize or agree with, and with apparent errors on the face of the summary, indicate a lack of trustworthiness.

¶ 71 Accordingly, we agree with defendant that the spreadsheet is inadmissible under the business-records exception to the hearsay rule. Plaintiff asserts that we should accept the spreadsheet because

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printouts" of data stored on computers may be admissible under the business-records exception to the hearsay rule) with *A.J. Davinroy Plumbing and Heating v. Finis P. Ernest, Inc.*, 87 Ill. App. 3d 1047, 1054 (1980) ("cost summary" inadmissible as a business record where it was not made in the regular course of business; "To the contrary, it was shown that the summary was not a record of original entries but that it was compiled from the records of original entries").

the trial court did not explicitly strike it. We disagree, however, that we can imply the court found the document admissible simply because it did not strike it at the hearing on the motion to compel or mention it at summary judgment. At the motion to compel, the court focused on the timeliness of production. The court's summary judgment ruling essentially found that, viewing the record in plaintiff's favor, it presented no evidence of misconduct on decedent's behalf. We, however, review summary judgment rulings *de novo* and remain mindful that evidence which is inadmissible at trial is not admissible at summary judgment. *Kole*, 2012 IL App (2d) 110245, at ¶ 47.

¶ 72 2. Other Financial, Business Records

¶ 73 In its summary judgment response and on appeal, plaintiff identifies additional records that purportedly establish its claims. These documents appear to consist of statements, check request forms, etc. However, plaintiff presented no affidavits or deposition testimony authenticating this information. "Basic rules of evidence require that a party lay a proper foundation for the introduction of a document into evidence." *Id.* To properly authenticate a document, a party must present evidence that demonstrates that the document is what the party claims it to be. *Id.* " 'Without proper authentication and identification of the document, the proponent of the evidence has not provided a proper foundation and the document cannot be admitted into evidence.' " *Complete Conference Coordinators, Inc. v. Kumon North America, Inc.*, 394 Ill. App. 3d 105 (2009) (trial court did not err in deeming inadmissible e-mails submitted at summary judgment because the plaintiff failed to provide anything before the trial court to authenticate the e-mails, other than the fact that they had been produced in discovery) (quoting *Anderson v. Human Rights Comm'n*, 314 Ill. App. 3d 35, 42 (2000)).

¶ 74 We assume, because plaintiff does not directly state, that it would seek to admit all or most of these records pursuant to the business-records exception to the hearsay rule; to do so, however, plaintiff was required to establish as foundation that the records were made: (1) in the regular course of business; and (2) at or near the time of the event or occurrence. *Babich*, 377 Ill. App. 3d at 429 (affirming trial court's grant of summary judgment where no witness authenticated records as business records). A sufficient foundation for admitting records pursuant to the business-records exception to the hearsay rule should be established through testimony of the custodian of records or another person familiar with the business and its mode of operation. *Id.*[8] No such testimony exists here. See *Gulino v. Economy Fire and Casualty Co.*, 2012 IL. App. (1st) 102429, ¶ 27 (trial court did not err in finding Home Depot documents inadmissible at summary judgment where the proponent of the alleged business records did not provide testimony establishing foundation for them). Although Dolbeare might be considered a custodian of records, he testified only generally

[8]See also *Woods v. City of Chicago*, 234 F.3d 979, 988 (7th Cir. 2000) (to be an admissible business record, the document must possess sufficient indicia of trustworthiness to be deemed reliable; "[n]ormally, to demonstrate such trustworthiness and reliability at the summary judgment stage, the party seeking to offer the business record must attach an affidavit sworn to by a person who would be qualified to introduce the record as evidence at trial, for example, a custodian or anyone qualified to speak from personal knowledge that the documents were admissible business records"); *Thanongsinh v. Board of Education, District U-46*, 462 F.3d 762, 778 (7th Cir. 2006) (unless the opposing party also relied on the accuracy of the documents (an exception not present here), a business record offered at summary judgment must be authenticated with an affidavit by a qualified person).

that plaintiff maintained compensation records, including check copies, invoice copies, and check requests, and the spreadsheet was the only specific document he identified. Dolbeare, therefore, did not, in his deposition or in an affidavit, authenticate any of the other specific records plaintiff identifies to support its claims. (In fact, Dolbeare explicitly stated that none of the underlying documentation, such as check copies, invoice copies, and check request forms, were present at his deposition). Nor did any other witnesses authenticate the documents. Accordingly, as they lack foundation and authentication, the additional documents are inadmissible and we do not consider them.

¶ 75 B. Remaining Evidence to Support Breach of Fiduciary Duty Claim

¶ 76 As we have determined that the spreadsheet and other business-related documents are inadmissible, only the deposition and declaration testimonies remain to support plaintiff's claims. (Of course, without the financial documents, plaintiff is left without evidence regarding the amounts allegedly misappropriated, as well as any written documentation that decedent directed or received any payments). Viewed in plaintiff's favor, the remaining testimony fails to create a genuine issue of material fact that decedent breached his fiduciary duties to plaintiff.

¶ 77 We note first that the parties debate whether, in light of the operating agreements, decedent's obligations to plaintiff included "default," common-law fiduciary duties outside of the agreements, or whether the agreements exclusively controlled decedent's obligations to plaintiff. Plaintiff notes that the Delaware Limited Liability Company Act (Act) permits a LLC's member or manager's fiduciary duties to be expanded, restricted, or eliminated (6 Del. C. § 18-1101(c) (West 2010)), but it asserts that caselaw reflects that any such restriction on the common-law fiduciary duties must be made expressly. Here, plaintiff asserts, the operating agreements did not expressly restrict or

eliminate decedent's fiduciary duties and, therefore, decedent's actions remained constrained by common law. Plaintiff further cites numerous Delaware and Illinois cases addressing the general concepts of fiduciary duties of loyalty and care, which preclude, for example, self-dealing.

¶ 78 Defendant, in turn, notes that the Act also provides that its policy is to give maximum effect to the principle of freedom to contract and the enforceability of LLC agreements (6 Del. C. § 18-1101(b) (West 2010)). Further, the Act provides that:

> "Unless otherwise provided in a limited liability company agreement, a member or manager or other person *shall not be liable* to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement *for breach of fiduciary duty* for the member's or *manager's* or other person's *good faith reliance on the provisions of the limited liability company agreement.*" (Emphases added.) 6 Del. C. § 18-1101(d) (West 2010).

Defendant, therefore, argues that the agreements exclusively governed decedent's obligations and duties and that it is uncontested that decedent did not violate the agreements.

¶ 79 We need not decide these issues here. In other words, we agree with plaintiff that the agreements did not *explicitly* eliminate or restrict decedent's fiduciary duties. However, plaintiff does not address section 18-1101(d) of the Act, which suggests that, even where fiduciary duties exist in a LLC context, a member will not be liable for a breach where his or her actions were taken in good faith under the agreement. Here, the agreements provided decedent broad, exclusive authority, with only certain limited exceptions to run the company and LLC; he was clearly permitted to compensate himself, as even plaintiff agrees that he was entitled to much of what he received in compensation (more than $5 million). Moreover, according to Houren and Levy, decedent was

explicitly informed (by plaintiff's counsel) that the actions he had taken to compensate himself were permissible under the agreements. Thus, while it is now impossible to learn from decedent what he in fact understood, section 18-1101(d) of the Act might not be irrelevant.

¶ 80 More importantly, however, setting aside the Act and the agreements, the depositions, read in plaintiff's favor, do not establish a breach of fiduciary duty. First, none of the depositions clearly establish that *decedent* did *anything*. Theoretically, because none of the witnesses had any personal knowledge about the alleged misappropriations, the monies might not have been paid at decedent's direction. For example, Craven testified that, on occasion, decedent's secretary made payment requests; the evidence does not reflect whether these requests were, in fact, made with decedent's authorization or at his direction. Craven also testified that requests for payment were often made orally, such that Dolbeare would fill in a form to document the payment. Again, however, the record does not reflect which payments were actually made orally and, if so, whether those requests were made by decedent or at his direction.

¶ 81 Second, the depositions and declarations do not establish that, even if decedent made the payment requests, any of those requests were, in fact, improper such that they reflected a breach of his fiduciary duties. By and large, the testimony established that the deponents had no personal knowledge regarding the claims. Further, they did not clearly establish that any of the payments were, in fact, improper. We note that Dolbeare established that all checks and wire transfers required *approval* by other members; thus, each payment to decedent or on his behalf would have been approved by the members. Further, as to each category of alleged misappropriation, the depositions established only as follows:

- Personnel fees: no one had any knowledge about them.

- Life Insurance Premiums: Dolbeare testified that, after he received requests for such payments from Craven or Houren, Dolbeare issued payments to decedent's personal life insurance policy. Craven, however, testified that, while he recalled a 2008 payment to decedent's life insurance premium, that payment might have been for a key man policy, as opposed to a personal policy.
- Trust fees: Kravets knew that the claim related to an irrevocable trust for decedent and he was once a trustee for that trust.
- Advances: Fine testified that he, himself, once took an advance from the company.
- Bonuses: Fine testified that other company members also received bonuses.
- 401(k) payments: Fine was told by an unidentified source that he, as a member, could not participate in the 401(k) program. Craven testified that, in 2008, the company transferred money to decedent's 401(k) provider. Craven recalled decedent relating a belief, based on advice he had received, that he remained eligible to participate in the program. Craven was not certain whether he was personally eligible to participate.

¶ 82 Thus, the depositions fail to establish exactly what decedent did and how it was unreasonable or, more critically, a breach of fiduciary duty (particularly when other members apparently also did some of the same things). Although Kravets testified that he "believed" that decedent was paid monies that were outside of the scope of his authority, and that, in his "opinion," by taking money decedent violated his "fiduciary obligation, whatever that means," the operating agreements formed the basis for those beliefs. Plaintiff concedes, however, that decedent did not violate those agreements.

¶ 83 As a result, and as the trial court noted, at best, the deposition testimony suggests that the members felt, after the fact, that decedent took "too much." Yet the evidence does not establish at what point the amounts decedent took became "too much" and why. In essence, the deposition testimony did not establish that decedent did anything improper. Plaintiff asserts that defense counsel simply did not ask the right questions at the depositions, and that its witnesses will testify to decedent's "systematic and relentless misappropriation" for his own benefit. But "a party may not resist a motion for summary judgment simply by identifying potential trial witness and then failing to determine what their opinions are or what their testimony might be[.] *** It was the plaintiff's duty to present the opinions of his witnesses, and he cannot be heard to complain that the defendants failed to do that for him." *Addison v. Whittenberg*, 124 Ill. 2d 287, 299 (1988). Here, it was not defendant's responsibility to put on record the evidence to supports plaintiff's claim. If the material facts necessary to sustain plaintiff's cause of action did not come out in the depositions, then plaintiff could have attached affidavits to do so in its summary judgment response.

¶ 84 In sum, the depositions, affidavits, and other evidence on file do not create a genuine issue of material fact to survive summary judgment. Most of plaintiff's evidence is inadmissible and, in any event, the evidence, viewed in plaintiff's favor, fails to create a genuine issue of material fact that decedent breached his fiduciary duties. We affirm.

¶ 85 III. CONCLUSION

¶ 86 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 87 Affirmed.