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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERRY NEAL, Defendant/Counterclaim Plaintiff/ Third-Party Plaintiff Below, Appellant, v. TRIPLE H FAMILY LIMITED PARTNERSHIP, a Delaware limited partnership, Plaintiff/Counterclaim Defendant Below, Appellee, and JEFFREY A. HOOPS, Third-Party Defendant Below, Appellee,	)	No. 447, 2018 Court Below: Court of Chancery of the State of Delaware C. A. No. 12294-VCMR

APPELLANT'S REPLY BRIEF

January 14, 2019

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I. Hoops violated his fiduciary duties to Neal and to Omni by planning and acting to form Black Diamond to appropriate Omni's business opportunities before any alleged consent by Neal to dissolve Omni.

The trial court's ruling that Hoops did not appropriate Omni's business opportunities[1] was based upon its conclusions that:

(1) The parties agreed to dissolve Omni on October 15, 2014;

(2) They confirmed that agreement in writing on October 25, 2014; and

(3) Black Diamond was not formed until October 30, 2014. (Op. at 44-45).[2]

On appeal:

(1) Neal challenges the conclusion that the parties agreed to dissolve Omni on October 15, 2014; rather, both Hoops and Neal continued to discuss, through October 27, 2014, the possibility that Omni would continue in business.

(2) Neal argues that any alleged consent given by Neal on October 27, 2014 was a nullity, as a result of Hoops' prior breaches of his fiduciary duties in planning to form Black Diamond to appropriate Omni's business and failing to advise Neal (to whom he was a fiduciary) of those plans.

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[1] Hoops spends much of his brief repeating the Court's findings regarding Neal's acts and omissions that the trial court concluded were breaches of his fiduciary duties. The trial court awarded nominal damages for that breach. (Op. at 56). While it is understandable that Hoops wishes to emphasize that narrative, it is irrelevant to the issue on appeal because Neal has not appealed that finding.

[2] The July 31, 2018 Memorandum Opinion (the "Opinion or "Op.") is attached to Appellant's Amended Opening Brief (Trans. ID 62679958) ("OB").

The trial court stated that "*when contemporaneous written evidence is lacking* and Neal's and Hoops's testimony conflicts, I tend to give Hoops's testimony more weight." (Op. at 5). The trial court had the discretion to do so. However, three facts that would be case dispositive under the trial court's *ratio decidendi* are important, and each of the three either is established by contemporaneous written evidence or does not involve a conflict in testimony between Hoops and Neal.

(A) Contemporaneous written evidence contradicts Hoops' testimony, and the trial court's finding (Op. at 34-35) that Hoops and Neal agreed to dissolve Omni on October 15, 2014.

(B) Hoops admitted at trial that he did not disclose to Neal anything about forming Black Diamond, even though he had decided by October 17 to go into business with Hammond and Jacobs.

(C) The Opinion does not mention that Hoops was taking action to form Black Diamond, in order to appropriate Omni's business, no later than October 24, 2014, three days before the October 27, 2014 emails that the Court judged to be the members' written consent to dissolve Omni.

We review each of these three facts:

A. Contemporaneous written evidence contradicts Hoops' testimony, and the trial court's finding, that the members agreed to dissolve Omni on October 15, 2014.

On October 27, 2014, twelve days after the October 15, 2014 date that the Court decided was the date that the members agreed to dissolve Omni, Hoops wrote to Neal:

> *I am really concerned about whether we are going to be able to make this [Omni] work* with Lisa and Heather as I spoke with both of them and it is not good.
>
> *In the event we cannot get this worked out*, *I would propose* we just unwind what we were going to do with Omni and you will get 50% of the commissions and keep everything you earn from Neal Insurance and just let our deal die when it comes up for renewal.

(A323) (emphasis added). That email, sent at 11:11 a.m., preceded the 12:14 p.m. email from Neal that the trial court found constituted agreement to dissolve Omni. (*See* Op. at 38 n.134). If Hoops and Neal had agreed to dissolve Omni on October 15, as the trial court found (Op. at 34), (1) Hoops would not have been concerned, 12 days later, about making "this [Omni] work" with Henson and Hammond, and (2) Hoops would not be *proposing*, also 12 days later, to, "[i]n the event we cannot get this worked out . . . we just unwind what we were going to do with Omni . . . ." (A323). The same email also contradicts the trial court's conclusion that on October 27, 2014 the parties memorialized an agreement reached on October 15, 2014 to

dissolve Omni. (*See* Op. at 34). It indicates that Hoops was not simply working out details as part of a dissolution process. To the contrary, the parties had not yet decided whether or not to continue Omni.

B. Hoops admitted at trial that he did not mention to Neal anything about forming Black Diamond.

Hoops conceded that by October 17, 2014, he "knew he wanted to go into business with Jacobs and Hammond." (AR012).[3] He discussed the prospect with them on that date. (A308-309). Hoops testified at trial that he "was under no obligation to share with [Neal] what [his] plans were" despite the fact that Hoops (through Triple H) and Neal remained 50/50 owners of Omni (A385 at 182:8-183:8 and A224 at 39:2-40:12 (Hoops)), and "[Black Diamond] was going to be in the same business [as Omni]." (A224 at 40:7-12 (Hoops)).

C. Evidence that the Opinion does not mention established that Hoops was acting to form Black Diamond to appropriate Omni's business no later than October 24, 2014, three days before the October 27, 2014 emails that the Court judged to be written consent to dissolve Omni.

The trial court based its finding that Hoops did not usurp Omni's corporate opportunity on the fact that the parties agreed to terms of dissolution on October 15 and Omni was dissolved in writing on October 27, 2017, while Black Diamond was formed "[a]t the earliest . . . on October 30, 2014." (Op. at 44-45).

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[3] "AR___" references are to the Appendix to Appellant's Reply Brief filed contemporaneously with this brief.

However, the Opinion does not mention that Hammond received her West Virginia producer licenses for casualty and property policies on October 24, 2014 (A339). Hammond testified at trial that she obtained those licenses "[b]ecause [she] was going to start working for Black Diamond Insurance Group." (A485 at 482:21-483:18 (Hammond)). Hoops argues that other testimony of Hammond contradicts the quoted testimony. However, nothing in the record supports Hoops' own finding of fact, at page 25, note 103, of his answering brief, that Hammond's testimony was a "misstatement." Hoops argues that even though Hammond was a 25% owner of Black Diamond, the insurance licenses that were issued to Hammond six days before Black Diamond was incorporated, when Hammond was a 25% owner of Black Diamond, were not applied for with the purpose of using those licenses for the business of Black Diamond. The argument is not credible.

It cannot be disputed that before October 27, 2014, the date on which the Court found that Neal consented in writing to dissolve Omni, Hoops had taken concrete steps to start Black Diamond in order to appropriate Omni's corporate opportunities.

The importance of the trial court's error on this question of the sequence of events cannot be overstated. Hoops began the steps to form Black Diamond, in order to appropriate Omni's insurance business, before Neal consented to dissolve Omni. Hoops did so without advising Neal, with respect to whom Hoops was a fiduciary.

In rejecting Neal's argument that Hoops made false statements to Neal to induce Neal to dissolve Omni, the trial court found dispositive the fact that Hoops' false statement to Neal about Hoops' getting out of the insurance business (at 1:27 p.m. on October 27, A320) was one hour and thirteen minutes after Neal's alleged agreement to dissolve Omni at 12:14 p.m. the same day (A322; Op. at 38 n.134). However, the trial court ignored the fact that Hoops' violation of his fiduciary duties to Omni and to Neal *preceded* October 27, 2014, namely, Hoops' taking active steps to begin Black Diamond's business, without any disclosure to Neal, the other 50% owner of Omni.

These facts are closely analogous to those in *Dweck*, in which Dweck, in defending against a claim of usurping corporate opportunities, argued that Nasser gave her permission to compete with Kids International Corporation, the company in which they were both directors and Dweck was CEO. *Dweck v. Nasser*, 2012 WL 161590, at *14 (Del. Ch. Jan. 18, 2012). The court in *Dweck* rejected the consent defense after finding that Dweck never disclosed to Nasser that she intended to compete directly with Kids, but "initially conveyed . . . in consciously vague terms that she was thinking about starting a distinct and separate apparel business." *Id.* at *15. The court in *Dweck* concluded:

> Nasser never consented to Dweck competing directly with Kids, using Kids' employees and resources, and operating out of Kids' premises. In a real sense, that was not competition at all. It was conversion and theft.

> Regardless, Dweck and Taxin cannot rely on Nasser's purported consent to justify their conduct.

Id. In the Opinion in the case *sub judice*, the trial court stated that "*Dweck* is far from on point" because the *Dweck* court "made a credibility determination and held that Dweck had never asked for permission." (Op. at 38 n.134). The trial court concluded that in this case, "Hoops did not need Neal's permission or consent to compete because, as discussed, Omni was dissolved when the alleged competition took place." (*Id.*). However, the trial court's legal analysis flowed from its erroneous conclusion that the determinative date was October 30, 2014, when Black Diamond was incorporated, (Op. at 45), and not an earlier date of October 17, 2014 or October 24, 2914, when the evidence shows that Hoops had made his decision to appropriate Omni's business and hid that fact from Neal. On October 17, 2014, Hoops decided to go into business with Jacobs and Hammond. On October 24, 2017, Hammond received her West Virginia insurance producer licenses for the purpose of working for Black Diamond. *See* p. 5, *supra.* Both of those dates preceded October 27, 2014, the date that the trial court found that the parties agreed in writing to dissolution. Hoops made that decision and took that action without advising Neal, the other 50% owner of Omni. Both were necessary first steps in forming Black Diamond.

Since the trial court's decision was based upon the conclusion that an agreement to dissolve was made one hour and thirteen minutes before an email in

which Hoops misrepresented to Neal that he planned to return his companies' insurance business to Van Meter, as opposed to starting Black Diamond,[4] the trial court's determination of timing of those decisions was case dispositive.

We have shown in this brief and in our opening brief that the trial court's conclusion as to the timing of Hoops' decision to start Black Diamond was clearly erroneous. As stated above, Hoops' misrepresentations and his actions to start a business, Black Diamond, to compete with Omni and Neal, without advising Neal, were violations of his fiduciary duties and vitiated any alleged consent by Neal to dissolve Omni.

[4] *See* OB at 30-31.

II. If this Court reverses the decision of the trial court, the trial court can then consider the question of damages.

Hoops argues, incorrectly, that Neal's position at trial was that Hoops had a perpetual obligation to send Revelation's and his personal policies for renewal. (AB at 39).[5]

The basis for the trial court's decision that there was no usurpation of Omni's corporate opportunities was the same as the basis for its conclusion that Neal's consent to dissolve Omni was not vitiated by Hoops' false representations to Neal that he, Hoops was "getting out of the insurance business": according to the trial court, Neal's consent to dissolve preceded any such misrepresentations and preceded the incorporation of Black Diamond. (*Compare* Op. at 44-45 *with* Op. at 38 n.134).

Neal raised as error the trial court's finding, at Opinion pages 31-32, that the evidence did not show that the parties agreed that Revelation's insurance business was Omni's in perpetuity, because Neal's damages theory did not include that contention, nor was he required to make such a showing to prove his claims. Neal cited the issue on appeal solely in order not to be judged later to have waived the argument if this Court reverses and the trial court determines damages.

Neal's damages theory relies upon the law established in *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1939):

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[5] Answering Brief of Appellees Triple H Family Limited Partnership and Jeffrey A. Hoops (Trans. ID 628006500) ("AB").

> If an officer or director of a corporation, in violation of his duty as such, acquires gain or advantage for himself, the law charges the interest so acquired with a trust for the benefit of the corporation, at its election, while it denies to the betrayer all benefit and profit. The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.

The determination of damages caused by Hoops' breaches of his fiduciary duties, based upon the expert testimony at trial, can await reversal and remand to the trial court, if that occurs.

CONCLUSION

For the reasons stated herein and in the opening brief, this Court should reverse the holding of the Court of Chancery and remand to that court for further proceedings.

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