EXHIBIT A

95 Mass.App.Ct. 1107
Unpublished Disposition

Appeals Court of Massachusetts.

Joseph R. MULLINS
v.
Joseph E. CORCORAN & another. [1]

[1] Gary A. Jennison.

18-P-1163
|
Entered: April 10, 2019.

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

By the Court (Vuono, Blake & Ditkoff, JJ. [2]),

[2] The panelists are listed in order of seniority.

***1** In this case involving claims and counterclaims of breach of contract and breach of fiduciary duties, a judge of the Superior Court issued final judgments in favor of the defendants, Joseph E. Corcoran and Gary A. Jennison, following a jury-waived trial. The plaintiff, Joseph R. Mullins, appeals from the judgments as subsequently corrected and amended. The defendants also appeal, arguing that the Superior Court judge improperly calculated the damages. We affirm.

1. Background. The parties have been in business together since the 1970s when they formed a company now known as Corcoran, Mullins, Jennison, Inc. (CMJ). The parties' ownership interests in CMJ are not equal. Corcoran has a sixty percent interest, and Mullins and Jennison both have twenty percent interests. Pursuant to CMJ's original bylaws, however, CMJ is managed by a three-member board of directors, consisting of the parties or their designees. The board of directors requires a majority vote to act. Thus, Corcoran does not control the daily business of CMJ despite his majority interest.

CMJ is in the business of developing residential real estate projects, and most of those projects have been multifamily apartment buildings. To finance a project, CMJ historically used its working capital to cover the costs associated with conducting a feasibility study and with obtaining regulatory approvals. CMJ would then take out a construction loan to finance the actual construction and, once the project was built and stabilized, CMJ would obtain long-term financing secured by the property and its revenues. This long-term financing typically came from government-subsidized loan programs.

In 1987, the parties entered into a new agreement after Mullins decided that he wanted to start his own business while still retaining an interest in CMJ. The 1987 agreement provided that CMJ would not guarantee the obligations of any entity and further provided that CMJ would not enter into any new projects without the unanimous consent of all of the parties. A key issue during trial was the timing of this consent provision and whether consent could be revoked once given. The judge concluded that the 1987 agreement was ambiguous on this point, and he thus looked to extrinsic evidence to determine the parties' intent. After reviewing that evidence, including the parties' past practices and the costs associated with obtaining regulatory approvals, the judge found that the 1987 agreement required the parties to determine whether to consent to a new project after the completion of the feasibility study but before CMJ sought regulatory approvals.

The parties worked together amicably until 2001, when Mullins brought his first lawsuit against Corcoran and Jennison. See Mullins v. Corcoran, 65 Mass. App. Ct. 1122 (2006). After that, Corcoran refused to meet or speak directly with Mullins about business matters. Corcoran and Jennison instead arranged for CMJ staff to have quarterly meetings with Mullins to keep him apprised of CMJ's remaining projects.

***2** One of CMJ's remaining projects involved a parcel of land with four apartment buildings on one side and a retail building on the other. This case concerns CMJ's plans to redevelop the retail side, referred to as Cobble Hill Center. In 2009, Corcoran assigned his son the task of conducting a feasibility study. Mullins was aware of this assignment. Several years later, in January 2012, CMJ staff informed Mullins of plans to develop an apartment building at Cobble Hill Center and also provided him with a detailed report on the project. Mullins received an updated report in June 2012. On July 17, 2012, Mullins had a regularly scheduled quarterly meeting with CMJ staff, during which Corcoran's son made a presentation on the project. After the presentation, Mullins consented to the project and was fully supportive of it. CMJ then proceeded to obtain regulatory approvals, which cost in excess of $ 1 million to obtain.

The project progressed until December 2013, when Mullins received a status report from Corcoran's son. The status report included a proposal to give Corcoran's son a ten percent interest in Cobble Hill Center by reducing Mullins's and Jennison's interests to eighteen percent each and Corcoran's interest to fifty-four percent. In response to the status report, Mullins sent a letter to Corcoran's son requesting additional information on, inter alia, the financing strategy. Mullins also asserted that he had not yet consented to the project. Mullins subsequently received additional information on the financing strategy, which involved obtaining a construction loan, replacing the construction loan with a permanent loan upon completion of construction, and ultimately refinancing the permanent loan with a government-subsidized loan.[3] In response, Mullins sent a letter to CMJ again asserting that he had not yet consented to the project. The judge found that Mullins's stated reasons for not wanting to proceed with the project, including the proposal to reduce his interest to eighteen percent and the riskiness of the proposed financing strategy, were not made in good faith.

3 Although not discussed by the Superior Court judge, the financing strategy also included a proposal that CMJ guarantee the initial construction loan.

After subsequent conversations during which the parties could not reach an agreement, Mullins filed the underlying lawsuit against Corcoran and Jennison to prevent the project from proceeding, and he was successful in accomplishing that goal. In his complaint, Mullins alleged that Corcoran and Jennison breached their contractual and fiduciary duties by proceeding with the development of Cobble Hill Center without his consent. Corcoran and Jennison counterclaimed, alleging that Mullins breached his contractual and fiduciary duties by interfering with the development of Cobble Hill Center after consenting to the project.

2. Standard of review. In reviewing a judgment entered after a jury-waived trial, we set aside the trial judge's findings of fact only if clearly erroneous. Goddard v. Goucher, 89 Mass. App. Ct. 41, 44 (2016). The trial judge's legal conclusions, however, are reviewed de novo. Id.

3. The claims and counterclaims. We first address the successful counterclaims brought by Corcoran and Jennison against Mullins, as they are the focus of the parties' appeals.[4] Corcoran and Jennison alleged that Mullins breached his contractual and fiduciary duties by revoking his consent to develop Cobble Hill Center. On appeal, Mullins argues that (1) he had legitimate business reasons for revoking his consent, and (2) he reasonably believed that, under the terms of an ambiguous contract, he could revoke his consent because of changed circumstances.

4 As a preliminary matter, Mullins argues that the judgment against him is based, impermissibly, on his constitutional right to petition the courts. Corcoran and Jennison correctly note that Mullins did not raise this issue below. Mullins contends that the issue was raised below, but he points only to a portion of the judge's directed verdict findings that discuss whether Corcoran's and Jennison's counterclaims based on Mullins's refusal to agree to an ownership share for Corcoran's son were based on protected petitioning activity. Mullins does not cite anywhere in the record where he argued that his own lawsuit constituted protected petitioning activity. The argument, therefore, is waived. See Carey v. New England Organ Bank, 446 Mass. 270, 285 (2006) (issue not raised below deemed waived on appeal).

***3** We begin our analysis by reviewing the fiduciary duty standard that applies to shareholders in a close corporation such as CMJ. Because of the "trust and confidence which are essential to this scale and manner of enterprise ... [shareholders] in [a] close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another" (footnote omitted). Donahue v. Rodd Electrotype Co. of New England, Inc., 367 Mass. 578, 592-593 (1975). This duty is one of "utmost good faith and loyalty." Allison v. Eriksson, 479 Mass. 626, 636 (2018), quoting Donahue, supra at 593. In analyzing whether the duty of utmost good faith has been breached, we look to whether there was a legitimate

business purpose for the action taken and whether there was an alternative, less harmful, way to achieve the intended objective. [5] Koshy v. Sachdev, 477 Mass. 759, 772 (2017).

5 The 1987 agreement required the parties to conduct themselves in "scrupulous good faith." The parties disagree whether "scrupulous good faith" is a higher standard than "utmost good faith." As we affirm even applying the "utmost good faith" standard as urged by Mullins, we need not resolve this quandary.

With this standard in mind, we address Mullins's argument that he had three different legitimate business reasons for revoking his consent and filing his lawsuit against Corcoran and Jennison: (1) the proposal to reduce his interest in the project; (2) the proposal to have CMJ guarantee the construction loan; and (3) the riskiness of the proposed financing strategy. As to Mullins's first and second reasons, we consider whether he had a legitimate business purpose for the action taken. See Koshy, 477 Mass. at 772. We are guided by the fact that Mullins's intent in revoking his consent and filing the underlying action was to prevent the project from proceeding. With that in mind, we acknowledge that Mullins may have had a basis for demanding that Corcoran and Jennison recognize his right to veto a CMJ loan guaranty and a reduction in his interest and, if they refused, to bring a declaratory judgment action or take some other action to clarify the parties' rights under their agreements. That does not mean, however, that Mullins had a legitimate business purpose for halting, unilaterally, a project on which the parties had just spent over $ 1 million to obtain regulatory approvals.

Mullins's third reason is also unavailing. Mullins argues that the proposed financing strategy was a different, riskier, strategy than the one that CMJ had used historically. The June 2012 report that Mullins received before initially consenting to the project, however, indicated that CMJ was exploring a different financing strategy. Mullins did not condition his consent on any particular financing strategy, which is otherwise a business decision that would have been determined by a majority vote of the board of directors. [6]

6 We further note that we are bound by the judge's findings that Mullins's stated reasons for revoking his consent were not asserted in good faith, and we see nothing clearly erroneous about these findings, which are ultimately based on credibility determinations. See Passero v. Fitzsimmons, 92 Mass. App. Ct. 76, 83 (2017) ("assessing the credibility of the witnesses was squarely within the purview of the judge").

Mullins's second argument, that his reasonable interpretation of an ambiguous contract cannot give rise to a finding of bad faith, is premised on the judge's conclusion that there was some ambiguity in the 1987 agreement as to how long the parties had to decide whether to consent to a new project. [7] Mullins contends that a mere breach of a contract, based on a reasonable interpretation of ambiguous contractual terms, cannot be the basis for a finding of bad faith. That is not what occurred here, however. In looking at the extrinsic evidence, the judge found that "it would not have made rational business sense ... to give each of the CMJ principals absolute veto power over a new real estate development project at any time before the terms of long-term financing were finalized." Based on the costs CMJ typically incurred before finalizing long-term financing, we agree that Mullins's interpretation was irrational and thus unreasonable. Moreover, Mullins's actions amount to more than a mere breach of contract. Not only did he revoke his consent, he engaged in bad faith conduct, using false assertions about the information he had received and the riskiness of the project. He then acted in bad faith to prevent the project from proceeding. In these circumstances, we see no merit to Mullins's argument. See, e.g., Federal Deposit Ins. Corp. v. Holbrook & Johnston, 36 Mass. App. Ct. 424, 428-430 (1994) (involving ambiguous contract, defendant was liable for failing to perform his obligations where such failure resulted from his bad faith, gross negligence, actual fraud, or willful misconduct).

7 Mullins also argues that the judge erroneously found that Mullins could not revoke his consent under the 1987 agreement once he learned of material changes to the project. This argument has no merit, as discussed infra.

***4** Having addressed Mullins's arguments regarding Corcoran's and Jennison's counterclaims, we turn to Mullins's arguments regarding his own claims. Mullins argues that the judgment was based on an erroneous finding that, even though there were material changes to the proposed project, he could not revoke his consent after the July 2012 meeting. [8] We discern no clear error in the judge's finding that the 1987 agreement required the parties to determine whether to consent to a new project before CMJ sought regulatory approvals. See Browning-Ferris Indus., Inc. v. Casella Waste Mgt. of Mass., Inc., 79 Mass. App. Ct. 300, 307-308 (2011) (meaning of ambiguous contract is question of fact subject to "clearly erroneous" standard of review). The judge's finding is supported by the fact that it typically cost CMJ a substantial

amount of money to obtain regulatory approvals. In addition, as noted by the judge, material facts regarding a project may change up until the completion of construction, or possibly even later, and it would not have made sense to allow revocation of consent that far into a project. Instead, as the judge found, it made sense for those business decisions to be left to a majority vote of the board of directors. [9]

8 Our conclusion regarding Mullins's ability to revoke his consent rests on his asserted objections to (1) the proposal to reduce his interest in the project; (2) the proposal to have CMJ guarantee the construction loan; and (3) the riskiness of the proposed financing strategy. We need not decide whether Mullins could have revoked his consent based on other hypothetical changes to the proposed project.

9 Mullins argues that the judge erred in looking to the parties' past practices in interpreting the timing of the consent provision. Given the judge's other well-grounded reasons for interpreting the 1987 agreement as he did, we need not address this argument.

4. Damages. Mullins, as well as Corcoran and Jennison, argue that the judge erred in calculating the damages. We disagree. To put Corcoran and Jennison back in the position they would have been had Mullins not breached, the judge calculated lost profits by determining what Cobble Hill Center would have been worth once stabilized and by then subtracting from that amount (1) the likely cost to complete the project and (2) the value of the land still owned by CMJ. See Pasquale v. Casale, 72 Mass. App. Ct. 729, 736 (2008), quoting Situation Mgmt. Sys., Inc. v. Malouf, Inc., 430 Mass. 875, 880 (2000) ("An award of 'expectancy' damages may include lost profits"). See generally John Hetherington & Sons, Ltd. v. William Firth Co., 210 Mass. 8, 21 (1911) (setting forth long-established rule for breach of contract recovery). In determining the likely cost to complete the project, the judge credited the testimony of Corcoran and Jennison's expert witness that costs were increasing between 2013 and 2016. In determining the value of the land, the judge credited an independent financial analysis indicating that the parties could have sold the land in 2015, with regulatory approvals in place, for $ 15 million.

Corcoran and Jennison argue that the judge erred in considering the effect of inflation when determining the cost to complete the project. In making this argument, Corcoran and Jennison rely on evidence indicating that they had plans to enter into a guaranteed maximum price contract that would have fixed the costs. No such contract had been finalized, however, and we will not speculate on what contingencies any such contract may have included. [10] In these circumstances, we see no reason to set aside as clearly erroneous the judge's finding that it would have cost $ 45 million to complete the project.

10 In fact, a CMJ monthly project report dated June 25, 2014, less than one month before Mullins filed his lawsuit, indicated, "We are expecting final pricing ... during the first half of July. The construction contract will still need to be negotiated before issuing notice to proceed ...."

Mullins argues that the judge's lost profits analysis will result in a double recovery for Corcoran and Jennison, who still have an interest in the land and may one day develop it for a profit. As described above, however, the judge included in his calculation a reduction for the value of the land in 2015, with regulatory approvals in place. This reduction takes into consideration the fact that the parties still control the land and that they may eventually sell it for a profit. Mullins's arguments to the contrary challenge the judge's findings regarding the value of the land and the possibility of future profits, none of which are clearly erroneous. [11]

11 For example, we are not persuaded by Mullins's arguments that the parties could have entered into a presale transaction for an amount in excess of $ 60 million. Such a transaction would have required CMJ to contract, before starting construction, to sell the property to a third-party investor at some future date. Where Mullins, himself, testified that he was not aware of any presale transactions in the Boston area, we see no error in the judge's finding that the possibility of any such transaction was completely speculative.

***5** Corrected and amended judgments affirmed.

All Citations

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