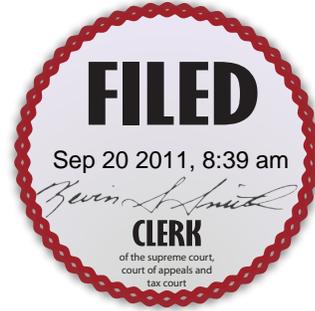


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DANIEL ZUNICA,)

Appellant-Defendant,)

vs.)

No. 45A04-1009-PL-700)

ZUNCOR, INC., STEVEN A. COPPOLILLO,)
JARED TOMICH, and DEBRA TREMBECZYNSKI,)

Appellees-Plaintiffs.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable William E. Davis, Judge
Cause No. 45D05-0802-PL-21

September 20, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Daniel Zunica (“Zunica”) appeals the denial of a motion to correct error, which challenged a jury verdict finding him liable for breach of fiduciary duty in an action brought by Zuncor, Inc. (“Zuncor”) and shareholders Steven A. Coppolillo (“Coppolillo”), Jared Tomich (“Tomich”), and Debra Trembeczynski (“Trembeczynski”). We affirm.

Issues

Zunica presents two issues for review:

- I. Whether he was entitled to judgment upon the evidence in his favor; and
- II. Whether he should be granted a new trial on motion to correct error because he was denied a fair trial by the admission of irrelevant and prejudicial evidence.

Facts and Procedural History

The facts most favorable to the jury’s verdict follow. In 2001, Zunica and Steven Cort (“Cort”) decided to operate a restaurant to be called Danny Z’s Supper Club and they formed Zuncor for that purpose. They procured a \$623,415 loan from Sand Ridge Bank,¹ secured by a mortgage on real property located at 2907 45th Street in Highland, Indiana (“the 45th Street Property”). The property was owned by RDK Corporation (now RZK) (“RZK”), a corporation in which Cort’s mother, Norma Cort, Zunica’s mother, Marilyn Zunica, and Rosemary Cortopassi were each one-third shareholders.

Danny Z’s Supper Club closed after a few months, as did a nightclub called Curves that Zunica and Cort briefly operated at the same site. The 45th Street Property was

¹ Sand Ridge Bank was later acquired by First Financial Bank.

advertised for sale, and Trembeczynski and Coppolillo responded to the advertisement. They met with Zunica, who showed the premises and explained that “he decided he was going to put the building up for sale.” (Tr. 435.) Zunica told Coppolillo that he owned the building. No offer of purchase was made at that time.

Zunica and Cort decided to open another restaurant at the 45th Street Property. Zuni’s, Inc., a corporation then existing and operating a Zuni’s in Schererville, procured a \$200,000 line of credit for leasehold improvements, furniture, and fixtures. Zunica and his wife executed personal guarantees of the indebtedness. Although the line of credit was for improvements, during the period of time that no income was being generated at the 45th Street Property, Zunica used proceeds from the line of credit to pay five payments on the first mortgage and to repay a \$65,000 loan to himself.²

Late in 2004, Zunica and Cort met with Trembeczynski and advised her that they “could not sell the building,” and had therefore decided to open another restaurant at the 45th Street Property. (Tr. 436.) Zunica and Cort proposed that Trembeczynski become an investor and “run the whole show in Highland.” (Tr. 436.) Trembeczynski agreed, and invested \$50,000 in Zuncor. Tomich, a friend of Trembeczynski, began to assist in the

² Zuncor’s financial statement for December 2004 listed leasehold improvements of \$247,549 and debts of \$944,161 (notes to Zunica in the amount of \$275,000, to Cort in the amount of \$112,000 and to Sand Ridge Bank in the amount of \$557,000). John Sannito, CPA testified that a previous accountant had “booked” the Sand Ridge note as a liability of Zuncor although it was actually a liability of RZK guaranteed by Zuncor. (Tr. 918.) He further testified that, although “leasehold improvements” were included as a Zuncor asset, they would “go with the owner of the building” upon sale. (Tr. 921.) He also indicated that the Zuncor loan payable to Zunica included the amounts he had borrowed from the bank on the second mortgage. In essence, at the end of 2004, Zuncor’s “booked” liabilities greatly exceeded its assets and there was no positive cash flow.

cleanup of the former nightclub premises, and he too decided to invest \$50,000 in Zuncor.³

Thereafter, Zunica, Cort, Tomich and Trembeczynski were each 25% shareholders of Zuncor. In March of 2005, Zuni's Restaurant was opened. The restaurant employed approximately forty people who prepared and served pizza and Italian food.

In September of 2005, Coppolillo began working at Zuni's Restaurant as a chef and negotiated to purchase Cort's one-fourth ownership share of Zuncor. He invested \$50,000 and agreed to pay Cort \$2,000 per month for each month between October 2005 and January 2007. The shareholders developed a plan to open additional restaurants and offer a frozen pizza line. They planned to use the 45th Street Property for dual purposes, the operation of Zuni's Restaurant and the operation of a commissary for cooking and distributing food to the other locations. Consistent with the business plan, they opened a restaurant called Zuni's House of Pizza in Dyer and began development of a site in Cedar Lake; they also began selling frozen pizzas.

In 2006, Tomich's attorney prepared a sixty-month commercial lease with an option to purchase the 45th Street Property, which Tomich tendered to Zunica. The lease identified RZK as the lessee and Zuncor as the lessor, and recited a rent amount of \$5,600 per month. This was consistent with the monthly lease payments that were already being drafted from the Zuncor account in the amount of \$5,602.⁴ The purchase option price was \$900,000. Despite

³ Each \$50,000 investment was reflected in the corporate financial records as a \$500 cash investment and a \$49,500 loan to Zuncor. After the new shareholders were added, Zuncor's financial statements also listed a loan of \$315,306 payable to Zunica.

⁴ Unbeknownst to the shareholders other than Zunica, this represented the exact amount of principal and interest due monthly on one of the mortgages encumbering the 45th Street Property. Eventually, Zunica had personally guaranteed \$800,000 of indebtedness on the property, offering as collateral a liquor license issued to

Tomich's repeated inquiries, the lease was never presented to RZK shareholders or executed.

At some point, Zunica told his banker, Michael Schneider, that he was frustrated with "the way things were going." (Tr. 408.) Zunica also stated to his fellow shareholders that Zunica's friend, Michael Macuga ("Macuga") had offered the opinion, "I don't need you guys. I should be doing this on my own." (Tr. 457-58.) Macuga expressed interest in purchasing the 45th Street Property, having acquired a vacant lot next door, and Zunica put Macuga in touch with RZK's attorney. He did not advise his fellow shareholders of the potential offer.

Macuga offered \$900,000 to purchase the 45th Street Property and the shareholders of RZK agreed to the sale. Marilyn Zunica, as President of RZK Corporation, executed a power of attorney allowing Zunica to execute documents regarding the sale. In January of 2007, Zunica approached Coppolillo and told him that "the business is done," and he had sold the building but Coppolillo could "come back and work for him." (Tr. 572.)

Zunica met with Tomich and told Tomich that he was selling the building to a friend and would be implementing the business plan that the Zuncor shareholders had developed. Zunica boasted to Tomich that Macuga was able to "take him to the next level." (Tr. 127.) Zunica advised Tomich that he had been planning and was financially prepared for litigation should the other shareholders file a lawsuit. Later, Macuga also met with Tomich and Zunica, confirming that the sale of the 45th Street Property was taking place and the other shareholders had no recourse. Tomich expressed concern that the other restaurants might not

his Crown Point restaurant and his personal Vanguard investment account.

be sustainable without the “flagship restaurant of Highland” and Macuga and Zunica joked “if they didn’t work out they would buy them.” (Tr. 128.)

Zunica attended the closing on Marilyn Zunica’s behalf. The sale resulted in payoff of the first mortgage of \$489,347 and the second mortgage of \$182,329. This also resulted in the release of Zunica’s personal guarantees and liens against his Schererville liquor license and a Vanguard investment account.

On February 12, 2007, Tomich was served with a Notice to Quit terminating the month to month tenancy of Zuncor and ordering that Zuncor vacate the 45th Street Property no later than March 31, 2007. Tomich and Macuga negotiated a three-month extension for \$12,000 monthly rent, more than double the prior rate. At some point, Macuga offered \$75,000 for the equipment, furniture, and fixtures at the 45th Street Property, an offer that the Zuncor shareholders declined.

Thereafter, Zuni’s Restaurant closed and the employees were terminated. Construction at the Cedar Lake location was terminated due to the withdrawal of bank financing. According to Tomich, Zunica had “called the bank, told them he was no longer involved” and “promptly the bank called us and pulled the loan literally days before it was supposed to be signed and underway.” (Tr. 144-45.) Trembeczynski and Tomich paid the final closing and employee costs for Zuni’s Restaurant.

Macuga demolished the building that Zuni’s Restaurant had previously occupied and constructed a building to house a restaurant called Hi-Fi. Zunica took steps to try to obtain a federal trademark of the name “Zuni’s” despite the Zuncor shareholders’ prior use of the

name and efforts to protect it via a state trademark.

On August 31, 2007, Coppolillo filed a complaint against Zunica and Cort, claiming that Cort was unjustly enriched and that Zunica had breached the fiduciary duties he owed his fellow shareholders in a closely held corporation. On December 7, 2007, Tomich and Trembeczynski moved to intervene personally and on behalf of Zuncor. They were joined as plaintiffs.

A jury trial on the breach of fiduciary claim was held on June 28 through July 2, 2010.⁵ At the close of the case-in-chief, Zunica moved for judgment on the evidence; the motion was denied. At the close of all the evidence, Zunica again moved for judgment upon the evidence. The motion was denied. The jury returned a verdict against Zunica and in favor of Zuncor and the shareholders as follows:

\$50,000 for Coppolillo
\$25,000 for Tomich
\$25,000 for Trembeczynski
\$50,000 for Zuncor

On July 19, 2010, Zunica filed his motion to correct error. The trial court heard argument, denied the motion to correct error, and entered judgment upon the jury verdict. The trial court's order included language specifying that a final judgment had been entered. This appeal ensued.

⁵ The severed unjust enrichment claim was pending. Summary judgment had been granted on the unjust enrichment claim and this Court reversed on appeal. Coppolillo v. Cort, 947 N.E.2d 994 (Ind. Ct. App. 2011).

Discussion and Decision

Standard of Review – Motion to Correct Error

“The court, if it determines that prejudicial or harmful error has been committed, shall take such action as will cure the error[.]” Indiana Trial Rule 59(J). We review for an abuse of discretion a trial court’s decision on a motion to correct error. Knowledge A-Z, Inc. v. Sentry Ins., 891 N.E.2d 581, 584 (Ind. Ct. App. 2008), trans. denied. An abuse of discretion occurs when the decision is against the logic and effect of the facts and circumstances before the court, and inferences that may be drawn therefrom. Id.

Motion for Judgment on the Evidence

Indiana Trial Rule 50(A) provides in relevant part:

Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict.

In reviewing the denial of a Trial Rule 50(A) motion for judgment on the evidence, the reviewing court assesses whether granting the motion would have been proper. Chi Yun Ho v. Frye, 880 N.E.2d 1192, 1201 (Ind. 2008). “This requires that, considering only the evidence and reasonable inferences drawn most favorable to the non-moving party, there is no substantial evidence supporting an essential issue in the case.” Id. “If there is any probative evidence or reasonable inference to be drawn from the evidence in favor of the plaintiff or if there is evidence allowing reasonable people to differ as to the result, judgment on the evidence is improper.” Ross v. Lowe, 619 N.E.2d 911, 914 (Ind. 1993). When, as

here, the defendant has unsuccessfully moved for judgment on the evidence at the close of the plaintiff's case-in-chief, then presented evidence but renewed the motion for judgment on the evidence at the close of all the evidence, we review the denial of the motion in light of the evidence presented in the plaintiff's case-in-chief. Farmers Elevator Co. of Oakville, Inc. v. Hamilton, 926 N.E.2d 68, 76 (Ind. Ct. App. 2010), trans. denied.

A claim for breach of fiduciary duty requires proof of three elements: (1) the existence of a fiduciary relationship, (2) a breach of the duty owed by the fiduciary to the beneficiary, and (3) harm to the beneficiary. Id. at 79. Here, the plaintiffs alleged that Zunica, as a shareholder in a closely-held corporation, breached his fiduciary duty to his fellow shareholders. In general terms, a close corporation is one which does not have publicly traded shares and has relatively few shareholders. McLinden v. Coco, 765 N.E.2d 606, 615 (Ind. Ct. App. 2002). It is agreed that Zuncor has no publicly traded shares and had at most four shareholders (with three remaining after Zunica tendered his shares).

Shareholders in a close corporation stand in a fiduciary relationship to each other. Barth v. Barth, 659 N.E.2d 559, 561 (Ind. 1995). That is, the shareholders have an obligation to deal fairly, honestly and openly with the corporation and with their fellow shareholders. Abdalla v. Qadorh-Zidan, 913 N.E.2d 280, 285 (Ind. Ct. App. 2009), trans. denied. "He must not be distracted from the performance of his official duties by personal interests." G & N Aircraft, Inc. v. Boehm, 743 N.E.2d 227, 240 (Ind. 2001).

A shareholder breaches his fiduciary duty when he brings self-interest into conflict with corporate interest by appropriating a business opportunity to himself. See McLinden,

765 N.E.2d at 616. For example, in Hartung v. Architects Hartung/Odle/Burke, Inc., 157 Ind. App. 546, 301 N.E.2d 240 (1973), a shareholder left the corporation and convinced a client of the corporation to turn an architectural project over to him after informing the client of his withdrawal from the corporation; he also personally leased the office in which the corporation possessed a month-to-month tenancy interest. We held that the shareholder's conduct was a breach of fiduciary duty. Id. at 556, 301 N.E.2d at 245. Similarly, in Epperly v. E. & P. Brake Bonding, Inc., 169 Ind. App. 224, 235, 348 N.E.2d 75, 81 (1976), it was "substantially undisputed that Epperly breached his fiduciary duty as an officer and director of E. & P. He committed wrongs against the corporation ... by setting up a competing business – taking E. & P.'s employees and a large customer."

During the plaintiffs' case-in-chief, the jury heard evidence that Zunica was deeply in debt and dissatisfied with his working relationship with his fellow shareholders. His statements indicated that he wanted to continue in the restaurant business while divesting himself of his current partners in that enterprise. He boasted that he could "go to the next level" with a different associate. (Tr. 126) Indeed, he presented his new plan to Tomich as one in which the other shareholders would "hand over the keys" and he and Macuga would "take over" in exchange for \$75,000. (Tr. 306-7.) Thereafter, he took steps to block his fellow shareholders' protection of the name Zuni's.

Zunica's fellow shareholders were led to believe that Zunica had an ownership interest in the location which was vital to the restaurant business in which each had invested. Zunica knew that he did not. Nonetheless, he did not protect Zuncor's interests by presenting the

lease with a purchase option to RZK or making efforts toward its execution. Instead, he actively and secretly (vis-à-vis the other shareholders) participated in the sale to a social friend. This effectively undercut his fellow shareholders and brought about the demise of the flagship restaurant of the corporation. Zunica had one option for sale that would have continued the restaurant and another option for sale that was its death knell but freed him from his personal guarantees for repayment of mortgages on real property that he did not own. He selected the latter option and never told the RZK owners that there was an alternative offer. There is ample evidence to withstand the motion for a directed verdict.

Zunica also argues there were no damages because Zuncor benefitted by having debt wiped out and the shareholders benefitted from receiving extra shares when he tendered his. Had Zuni's Restaurant continued as a profitable business, this argument might have some plausibility. Under the circumstances, however, Zunica ensured the eviction of his fellow shareholders and the demise of Zuni's Restaurant (which had been generating 78% of Zuncor's gross revenue). Additional shares in a crippled closely-held business enterprise would be of highly questionable value. Nonetheless, Zunica's argument that he actually benefitted his fellow shareholders presents an invitation to reweigh evidence, an invitation we decline. Zunica was not entitled to judgment upon the evidence.

Admissibility of Evidence

Alternatively, Zunica argues that he should have been granted a new trial upon motion to correct error because of undue prejudice from the trial court's evidentiary rulings. More specifically, he claims "it was error to allow evidence of loans Zunica and Zuncor obtained

prior to the plaintiffs becoming shareholders” and “to allow argument Zunica benefitted from the sale of the property by having loans paid off only compounded the error.” Appellant’s Brief at 19.

The decision to admit or exclude evidence is within the sound discretion of the trial court and will be reversed only upon a manifest abuse of discretion. Gary Community School Corp. v. Boyd, 890 N.E.2d 794, 798 (Ind. Ct. App. 2008), trans. denied. An abuse of discretion occurs when the trial court’s decision is contrary to the logic and effect of the facts and circumstances before it. Id. We will not reverse the trial court’s admission of evidence absent a showing of prejudice. Id.

The admission of evidence is “first and foremost a question of relevancy.” Smith v. Johnston, 854 N.E.2d 388, 390 (Ind. Ct. App. 2006). Relevant evidence should be admitted regardless of its weight. Id. Pursuant to Indiana Evidence Rule 401, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Nonetheless, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, considerations of undue delay, or needless presentation of cumulative evidence. Ind. Evidence Rule 403.

Zunica claims that anything he did prior to the plaintiffs becoming shareholders could not constitute a breach of his fiduciary duty to them. In his opinion, the \$600,000 loan (with RZK as borrower and Zunica, Cort, and Zuncor as guarantors) and the \$200,000 line of credit

(with Zuni's, Inc. as borrower and Zunica and his wife as guarantors) were thus wholly irrelevant. We disagree.⁶

Here, the jury was asked to decide whether Zunica engaged in self dealing to the detriment of his fellow shareholders. They heard evidence that Zunica had personally guaranteed loans of approximately \$800,000 although he did not have an ownership interest in the real property encumbered by the corresponding mortgages, and that these guarantees were released when the real property was sold to a third party. This evidence aided the jury in determining whether Zunica directly benefitted from the sale to Macuga. The challenged evidence is therefore relevant.

Moreover, Zunica has not shown that the probative value of the loan evidence is substantially outweighed by the danger of unfair prejudice. Indeed, he offered substantially the same evidence through his witness, John Sannito, CPA, who testified extensively regarding the financial statements of Zuncor, including all assets and "booked" liabilities. (Tr. 918.) We find no abuse of discretion in the trial court's decision to allow evidence of mortgage loans against the 45th Street Property.

Conclusion

Zunica has not shown his entitlement to judgment on the evidence. Nor has he

⁶ Zunica claims that the trial court, with reference to the prior loans, acknowledged "I may have made a mistake by letting that in." (App. 30.) Zunica misconstrues the record. The trial court specified that the financial transactions he considered to be outside the period of fiduciary duty and thus not a proper basis for damages were "these note payments in September, October, November, December" and "repayment of the money that he fronted during that period of time." (App. 299.) The trial court was referring to evidence of Zunica's use of funds from the \$200,000 line of credit to make \$5,602 mortgage payments for several months before the plaintiff shareholders invested and also to Zunica's repayment to himself of a \$65,000 loan to the corporation.

demonstrated that he was denied a fair trial by the trial court's evidentiary rulings. The trial court did not abuse its discretion by denying Zunica's motion to correct error.

Affirmed.

MATHIAS, J., and CRONE, J., concur.