

STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-CV-07-12

Mortgage Solutions of Maine, Inc., et al.,¹

Plaintiffs

DECISION AND JUDGMENT

v.

Nancy Keniston, et al.,

Defendants

This matter was heard on Plaintiff's Complaint and Defendant Nancy Keniston's Counterclaim on April 5, 6, 7, 8, 9 & 12, 2010. Attorney Lawrence Winger represented the Plaintiff; Attorneys Charles Rimmel and Jennifer Archer represented Defendants Nancy Keniston and Keniston Mortgage Services; and Attorney John Whitman represented Defendants Roderick Rovzar and Norman, Hanson & DeTroy.

Following the close of the evidence, the parties filed written argument. The Court received the final written arguments on May 11, 2010. After consideration of the evidence and the parties' arguments, the Court finds as follows:

Findings of Fact

1. James Cummings (Mr. Cummings) and Mark Floor (Mr. Floor) are real estate developers, and have been business partners for several years.

¹ At the inception of this case, Mark Floor and James Cummings were named Plaintiffs. Upon Defendants' motions, the Court entered summary judgment on the individual Plaintiffs' claims. The remaining claims are those asserted by Plaintiff Mortgage Solutions of Maine, Inc.

2. For more than 20 years prior to the formation of Plaintiff Mortgage Solutions of Maine, Inc. (MSM or Mortgage Solutions), Defendant Nancy Keniston (Defendant Keniston) worked in the mortgage service industry.

3. In December of 2004, Mr. Cummings asked Defendant Keniston, a long-time family friend, whether she was interested in establishing a residential mortgage brokerage business in the Standish, Maine area. Mr. Cummings explained that he was willing to provide some initial capital, and that Mr. Floor had an office location available. Mr. Cummings also proposed that he, Mr. Floor and Defendant Keniston would each own one-third of the business.

4. Defendant Keniston expressed interest in the proposal, and agreed to meet with Mr. Floor and Mr. Cummings to explore the possibility of establishing a mortgage business. Defendant Keniston produced at the meeting a written projection of income and expenses.

5. The parties agreed to establish a business known as "Mortgage Solutions of Maine, Inc.", and further agreed that Defendant Keniston would serve as president of the business. The three partners in the business were to divide the company's profits equally among them. As president, Defendant Keniston would be responsible for the day-to-day operations of the mortgage company, including loan origination and processing. Defendant Keniston's employment agreement was not reduced to writing, and her employment could be terminated at will.

6. Mr. Cummings invested \$50,000 in the company. The company operated from one of Mr. Floor's rental units in Standish. After the location was secured and before the company commenced its operation, the company paid rent to Mr. Floor, and paid for some improvements to the rental unit.

7. In connection with this venture, Mr. Cummings and Mr. Floor also established a title company to operate out of the same location as Mortgage Solutions. Defendant Keniston's sister managed the title company.

8. Defendant Keniston provided some furniture items for the office. The company leased a copier and the desktop computers used in the business. The company also purchased three laptop

computers. Mortgage Solutions and the title company shared use of some of the personal property, including the server.

9. Defendant Keniston was to be paid a salary as an employee of the company, and was to receive additional compensation in the form of profits and/or commissions.

10. After the close of the first calendar year in which the business was operating, Defendant Keniston arranged for a K-1 report to be prepared. She shared the K-1 with Mr. Cummings and Mr. Floor. According to the K-1 report, each of the business partners was to receive \$16,800 representing their share in the company's profit for the year. The company paid Mr. Floor his share of the profit. After the check was issued, a revised K-1 revealed that the company had paid Mr. Floor more than he was entitled given the actual profit of the company. Defendant Keniston requested that Mr. Floor return the difference between the amount that he received and the amount to which he was entitled (\$14,346). Mr. Floor refused to return any monies that the company had paid to him.

11. Because Mr. Floor refused to return the overpayment, Defendant Keniston withheld the next month's rental payment to Mr. Floor. When Mr. Floor did not receive the rental payment, Karen Floor, Mr. Floor's wife and the named landlord on the lease agreement with the company, angrily confronted Defendant Keniston.

12. In part because of the disagreement regarding the payment to Mr. Floor, the relationship between Mr. Floor and Defendant Keniston deteriorated. As the result of the deterioration of the relationship, Defendant Keniston approached Mr. Cummings about a possible buy-out of Mr. Floor's interest in the company. The parties then exchanged buy-out offers. By letter dated June 2, 2006, Defendant Keniston informed Mr. Floor and Mr. Cummings that if they could not reach an agreement, she intended to leave the company.

13. As her concerns about the company increased, Defendant Keniston explored other business opportunities. In connection with the other opportunities, she consulted with Defendant Rovzar, a

partner in the law firm of Defendant Norman, Hanson & DeTroy. Defendant Keniston also consulted with Defendant Rovzar about issues relevant to her separation from the company.

14. With Defendant Rovzar's assistance, Defendant Keniston made a written proposal to sell her interest and/or purchase the interest of Mr. Floor and Mr. Cummings in the company.

15. While the parties were involved in buy-out discussions, Defendant Keniston issued a check from the company made payable to her for \$19,000 as compensation for the commissions to which she maintains she was entitled.

16. In 2006, with Mr. Rovzar's assistance, Defendant Keniston formed two new corporations, Defendant Keniston Mortgage Services and Commercial Alternatives, for possible use in the mortgage and/or lending business. Neither Defendant Keniston, nor Mr. Rovzar informed Mr. Floor or Mr. Cummings of the formation of the corporations.

17. In June 2006, Mr. Floor and Mr. Cummings scheduled a special meeting of the shareholders of the company. Defendant Keniston attended the meeting with Defendant Rovzar. During the meeting, Mr. Floor and Mr. Cummings voted to remove Defendant Keniston as president of the company, and to terminate her check writing authority. As part of the meeting, Defendant Keniston withdrew all buy-out offers.

18. Prior to his representation of Defendant Keniston in connection with the formation of two new corporations and in connection with her separation from the company, Defendant Rovzar provided legal services to the company. One matter involved an issue regarding one of the company's employees, and another matter involved Defendant Keniston's consultation regarding the regulations governing the mortgage lending business.

19. As part of his representation of Defendant Keniston, Defendant Rovzar advised her that nothing prohibited her from resigning as an employee of the company, or from establishing a competing business.

20. On June 23, 2006, Mr. Floor arranged for the company to be served with a notice to quit the premises that the company was leasing. Through the notice, Mr. Floor directed the eviction to occur on or before August 1, 2006.

21. In July 2006, Defendant Keniston removed some of the personal property from the space leased by the company. She removed the desktop computers, which contained customer information, some of the corporate files, a couch, table, some chairs, and a copier. At the same time, Defendant Keniston's sister, who operated the title company in the building, removed the server that both companies used. The title company owned the server.

22. Defendant Keniston made available to Mr. Floor and Mr. Cummings the file materials related to the company's business. She also forwarded to Mr. Floor the company's financial records in QuickBooks form.

23. In July 2006, Defendant Keniston resigned from the company. At the time, she was not under contract to the company. After leaving the company, Defendant Keniston began operating Keniston Mortgage Services, which is no longer in business.

24. Mortgage Solutions ceased operations soon after Defendant Keniston left the company.

25. After Mortgage Solutions ceased its operation, some of the company's personal property was sold. Proceeds of the sale, in the amount of \$3,000, are currently maintained in an escrow account.

Discussion

A. Plaintiff's Claims Against Defendants Keniston and Keniston Mortgage Services.

Plaintiff asserted the following claims against Defendant Keniston: (1) breach of fiduciary duty – Count I; (2) fraud – Count III; (3) negligent misrepresentation – Count V; (4) conversion – Count VI; (5) accounting – Count VII; (6) tortious interference – Count IX; (7) aiding and abetting tortious interference – Count XI; and (8) punitive damages – Count XIII. Plaintiff joined Defendant Keniston Mortgage Services in counts IX, XI, and XIII.

At trial and in its post-trial submissions, Plaintiff focused primarily on its breach of fiduciary duty claim. More specifically, upon conclusion of the case, Plaintiff argued that “Defendant Keniston, while the company’s President, systematically and repeatedly breached her fiduciary duty to the company by and through numerous wrongful acts, and then, at the end in a very well-timed, well-planned, secret maneuver, she destroyed the company by taking all of its crucial assets, information, records, and employees.”²

Under Maine common law, a corporate director of a close corporation owes the following fiduciary duties to the corporation as well as to the shareholders:

- (1) To act with that degree of diligence, care and skill which ordinarily prudent persons would exercise under similar circumstances in like positions;
- (2) To discharge the duties affecting their relationship in good faith with a view to furthering the interests of one another as to the matters within the scope of the relationship;
- (3) To disclose and not withhold from one another relevant information affecting the status and affairs of the relationship;
- (4) To not use their position, influence or knowledge respecting the affairs and organization that are subject to the relationship to gain any special privilege or advantage over the other person or persons involved in the relationship.

Rosenthal v. Rosenthal, 543 A.2d 348, 352 (Me. 1988).³

In order to prevail on its claim, Plaintiff must not only demonstrate that Defendant Keniston breached a fiduciary duty, but also that the alleged breach proximately caused the damages for which Plaintiff seeks to recover. *Steeves v. Bernstein, Shur, Sawyer & Nelson*, 718 A.2d 186, 189, n.8 (Me. 1998) (same rules of causation apply whether the cause of action sounds in contract, negligence, or breach of fiduciary duty). Here, Plaintiff maintains that Defendant Keniston’s alleged breach caused the company to fail.

² Plaintiff’s Post-trial Brief, p. 1.

³ 13-C M.R.S. § 843 also requires a corporate officer to act “A. In good faith; B. With the care that a person in a like position would reasonably exercise under similar circumstances; and C. In a manner the officer reasonably believes to be in the best interests of the corporation.” *Id.*

At trial, Plaintiff proved (a) that less than a year after the start of the business, the three founding members of the company had fundamental disagreements as to the management of the company; (b) that Defendant Keniston, who was also an employee of the company, informed Mr. Floor and Mr. Cummings of her unhappiness, and of her intention to pursue other options if the parties were unable to resolve the differences; (c) that Defendant Keniston left the employ of the company when the parties were unable to resolve their differences or agree as to the terms of a buy-out; (d) that before her formal separation from the company, Defendant Keniston formed another corporation for the purpose of providing similar services to those provided by Plaintiff; and (e) that Plaintiff ceased operation soon after Defendant Keniston's departure.

From these facts, Plaintiff contends that the Court can conclude that Defendant Keniston's breach of her fiduciary duty caused Plaintiff's business to fail. The Court disagrees. Even assuming, *arguendo*, that one or more of Defendant Keniston's actions constitutes a breach of her fiduciary duty, Plaintiff has failed to prove that any such breach proximately caused the claimed damages. Instead, the most persuasive evidence established that many other factors contributed to the end of the business. For instance, because of fundamental disagreements among the principals of the company, which disagreements included compensation, Defendant Keniston decided to leave the *employ* of the company. At the time, Defendant Keniston was the company's principal employee, and was solely responsible for the daily operation of the business. She was not, however, bound to the company by contract, nor was she prohibited from working in the same industry in the event she left the company. In other words, she was free to end her employment with the company, and to work in the residential mortgage business. Defendant Keniston's decision to end her employment with the company, while a contributing factor in the decision to close the business, did not constitute a breach of her fiduciary responsibility as an officer of the company. The company ceased to function after Defendant Keniston's departure because Plaintiff did not or could not replace her.

In addition to the end of Defendant Keniston's employment with the company, Mr. Floor's decision to evict the company from its place of business was, not surprisingly, also a precipitating factor in the company's demise. Regardless of Mr. Floor's motivation in terminating the tenancy, the fact remains that he notified Defendant Keniston, the person responsible for managing the office, that the company had to vacate the premises. For any company, the eviction from the location at which it conducts business presents a serious threat to its viability. Indeed, consistent with the threat to the future of the company, Defendant Keniston resigned from her employment with the company after Mr. Floor issued the eviction notice, which suggests that the eviction was at least a factor in the decision of a critical employee to leave the company.

In short, Plaintiff has not established the necessary causation between Defendant Keniston's alleged conduct and the damages that it seeks.⁴ Accordingly, Plaintiff cannot prevail on any of its claims against Defendant Keniston.⁵ Similarly, the record lacks credible evidence to establish that the alleged conduct of Defendant Keniston Mortgage Services caused the company to fail.

B. Plaintiff's Claims Against Defendants Rovzar and Norman, Hanson & DeTroy.

Plaintiff contends that Defendants Rovzar and Norman, Hanson & DeTroy, the law firm of which Defendant Rovzar is a partner, breached their obligation to Plaintiff as their former client.

⁴ At times during this action, Plaintiff has maintained that it was entitled to damages in addition to the company's lost profits. Plaintiff's attempt to recover additional damages is the subject of Defendants' motion in limine, through which motion Defendants argue that Plaintiff is precluded from recovering for any other claimed damages because it did not identify its additional damages in response to Defendants' discovery requests. The Court deferred ruling on Defendants' motion, and allowed Plaintiff to present evidence of its other damage claims. In essence, Plaintiff also seeks to recover monies that it contends Defendant Keniston improperly paid to herself as compensation. For Plaintiff to prevail on these claims, Plaintiff would have to convince the Court that Defendant Keniston was to be paid a \$52,000 annual salary in addition to her share of the profits, but was not to include commissions. Simply stated, Plaintiff has failed to sustain its burden. In fact, because the parties failed to reduce Defendant Keniston's employment terms to writing, and because the record evidence is at best conflicting as to Defendant Keniston's compensation terms, the Court cannot determine that the parties' reached an agreement as to Defendant Keniston's compensation. Where an agreement does not have a definite term, even if the term is essential, "the law invokes the standard of reasonableness, and courts will supply the needed term." *Fitzgerald v. Hutchins*, 2009 ME 115, ¶ 19, 983 A.2d 382, 389 (Me. 2009) (citations omitted). On this record, the Court cannot conclude that the amount of compensation paid to Defendant Keniston is unreasonable. Accordingly, Plaintiff's claim to recover for the alleged over-payment to Defendant Keniston fails.

⁵ At trial, Plaintiff withdrew its conversion claim. Except as discussed in note 4, therefore, Plaintiff's claims focused on Defendant Keniston's conduct that Plaintiffs maintain caused the demise of the business. These claims (i.e., fraud, negligent misrepresentation, tortious interference, and aiding and abetting tortious interference) also fail for lack of causation. In addition, because the Court will not award compensatory damages, Plaintiff cannot prevail on its claim for punitive damages. *Rand v. Bath Iron Works Corporation*, 2003 ME 122, ¶ 15, 832 A.2d 771, 775.

Preliminarily, given the nature of the work that Defendants performed for Plaintiff before their representation of Defendant Keniston, and given the nature of the work that Defendants performed for Defendant Keniston after their work for Plaintiff was complete, Plaintiff's contention that Defendants' subsequent representation of Defendant Keniston required Plaintiff's written consent is suspect.

However, even if the Court were to conclude that Defendants failed to satisfy their professional obligations to Plaintiff, because Plaintiff has not presented credible, persuasive evidence to establish that the alleged breach caused Plaintiff's claimed damages, Plaintiff cannot recover. As explained above, the lawful departure of Plaintiff's principal employee, Plaintiff's inability or lack of effort to replace her, and the attempt to evict the company from its place of business proximately caused the business to cease its operation. Particularly given the relatively close temporal relationship between Defendant Keniston's retention of Defendant Rovzar and the direct communications among the company's shareholders of Defendant Keniston's intention to leave the company if the differences among the shareholders were not resolved, Plaintiff's contention that Defendant Rovzar's representation of Defendant Keniston and his failure to disclose certain information to Mr. Floor and Mr. Cummings caused or contributed to the company's demise fails.

C. Defendant Keniston's Counterclaim.

Through her counterclaim, Defendant Keniston seeks to recover for compensation and/or profits to which she contends she is entitled. As discussed earlier, on this record, the Court cannot determine that the parties reached an agreement as to Defendant Keniston's compensation. Under such circumstances, the Court can insert a reasonable term. *Fitzgerald v. Hutchins*, 2009 ME 115, ¶ 19, 983 A.2d 382, 389 (Me. 2009) (citations omitted). Thus, to the extent that Defendant Keniston seeks damages for unpaid compensation, the Court determines that the amount of compensation that Defendant Keniston received is reasonable, and that she is not entitled to further compensation.

Defendant Keniston's claim for additional accounting damages is also unpersuasive. Defendant Keniston's argument is in part based upon her assertion that some of the rental payments, and payments

made to improve the company's office location were unauthorized expenditures and, therefore, constitute a distribution to one of the shareholders (Mr. Floor) for which he and the company must account. The subject payments were made with the knowledge of the officers and shareholders of the company, including Defendant Keniston, the company's president, and are not inconsistent with industry lease agreements and practices. Consequently, the Court cannot, on this record, conclude that Mr. Floor received a disproportionate distribution.

Conclusion

Based on the foregoing analysis, the Court orders:

1. On Plaintiff's Complaint, the Court enters judgment in favor of Defendants Keniston, Keniston Mortgage Services, Roderick Rovzar, and Norman, Hanson, & DeTroy on all counts.⁶
2. On Defendant Keniston's Counterclaim, the Court enters judgment in favor of Plaintiff.
3. The evidence at trial revealed that some of the company's personal property was sold, and that the proceeds from the sale (approximately \$3,000) are being held in an escrow account. The funds shall first be used to pay any outstanding debt of the company. The remaining balance shall be divided equally among the company's three shareholders (Mr. Floor, Mr. Cummings, and Defendant Keniston).

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Judgment into the docket by reference.

Date: 7/13/10



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⁶ In Count VII and in its post-trial brief, Plaintiff requested an accounting. Plaintiff contends that an accounting is necessary because there "remain so many unanswered questions about what Ms. Keniston did with corporate funds while she was in charge of the company's operations and paying various sums to herself and others ..." (*Plaintiff's Post-trial Brief*, p. 38). Insofar as Plaintiff's claims are based on Defendant Keniston's actions as a fiduciary, including certain payments made by Defendant Keniston, Plaintiff's substantive claims, and the evidence that it presented in support of those claims establish that an accounting is not warranted. Contrary to Plaintiff's contention that "many unanswered questions" remain regarding Defendant Keniston's use of corporate funds, there is little question about how the funds were used or paid. Instead, the issue was whether Defendant Keniston's known use of the funds, and some of her other actions constitute a breach of her obligations as a fiduciary to the company. The Court does not need an accounting to address that issue. The Court, therefore, denies Plaintiff's request for an accounting.

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