

2. Floorgraphic's Motion is **GRANTED in part**, and plaintiffs may not assert or attempt to prove at trial that Floorgraphic's litigation against News America could have been resolved for more than \$29.5 million.
3. The remainder of Floorgraphic's Motion is **DENIED**.

BY THE COURT:


ALBERT JOHN SNITE, JR., J.

direct, but much larger, competitor of FGI. FGI filed suit against News America for a variety of anti-competitive activities, and FGI's claims against News America went to trial. During the trial, News America and FGI agreed to resolve their differences as follows:

1. News America paid a total of (approximately) \$29.5 million:
 - a. \$13 million to FGI for its assets; and
 - b. Almost \$16.5 million to the Majority Shareholders for their personal goodwill and non-compete and consulting agreements.
2. FGI's lawsuit against News America was dismissed.

As part of the transaction, FGI provided News America with a Fair Market Valuation Report prepared by an allegedly independent appraiser in which the appraiser assigned a value of approximately \$9.6 million to FGI's assets and approximately \$19.9 million to the Majority Shareholders' goodwill, consulting and non-compete agreements.¹ Rather than follow the appraiser's allocation, the Majority Shareholders suggested, and News America agreed, to allocate more to FGI and less to the Majority Shareholders.

In this action, the Minority Shareholders object to the amount paid by News America, which they claim was really paid in settlement of the lawsuit, and they object to the allocation of the purchase price between FGI and the Majority Shareholders. In the Minority's view, FGI should have received substantially more than the \$13 million paid by News America for the FGI assets.

Both News America and the Majority Shareholders have moved for summary judgment on the Minority Shareholders' claims. In order to survive summary judgment, the Minority

¹ Fair Market Value Allocation, p. 70, (December 2, 2009), Exhibit 42 to the Minority Shareholders' Response to News America's Motion for Summary Judgment (the "Response").

Shareholders must point to evidence of record to satisfy each element of their claims against News America and the Majority Shareholders.

The Majority Shareholders argue the Minority Shareholders may not assert breach of fiduciary duty claims against them; instead, they claim the Minority Shareholders are limited to asserting their dissenters rights under the Pennsylvania Business Corporation Law (the “BCL”). The BCL limits a complaining shareholder’s right of action against the corporation to either: 1) moving to enjoin the disputed transaction; or 2) obtaining a valuation and payment of the fair value of his/her shares.² However, such limitations do not apply where complaining shareholders in a closely held corporation³ bring claims against the corporation’s principals for misfeasance.⁴ Therefore, the Minority Shareholders may proceed with their claims against the Majority Shareholders for damages.

The Majority Shareholders owe a fiduciary duty to the Minority Shareholders.⁵ The Majority Shareholders, as officers and directors of FGI, also owe fiduciary duties to FGI.⁶ The Minority Shareholders claim the Majority Shareholders breached these fiduciary duties by:

² See 15 Pa. C. S. § 1105 (“A shareholder of a business corporation shall not have any right to obtain, in the absence of fraud or fundamental unfairness, an injunction against any proposed plan . . . Absent fraud or fundamental unfairness, the [dissenters’] rights and remedies so provided shall be exclusive). In connection with their fiduciary duty claims, the Minority Shareholders assert the transaction between News America and FGI was fundamentally unfair because it benefitted the Majority Shareholders to the detriment of FGI and the Minority Shareholders.

³ FGI apparently has no more than 30 shareholders, so it fits the definition of a closely-held corporation set forth in the BCL. See 15 Pa. C. S. § 1103.

⁴ See, e.g., Viener v. Jacobs, 834 A.2d 546, 557 (Pa. Super. 2003) (the business judgment rule does not insulate directors and officers from liability to minority shareholders for damages for breach of fiduciary duty).

⁵ See Ford v. Ford, 878 A.2d 894, 905 (Pa. Super. 2005) (“Of course, majority shareholders may act in their own best interest; on the other hand, they may not use their power in such a way to exclude minority shareholders from their proper share of the benefits accruing to the enterprise.”)

⁶ See 15 Pa. C. S. § 1712.

1. Dismissing FGI's lawsuit against News America without any settlement payment from News America.
2. Allocating to themselves \$16.5 million of the amount News America paid.

To prove that the Majority Shareholders acted improperly in connection with the asset purchase/settlement, the Minority Shareholders must proffer evidence showing: 1) how much the settlement of the FGI lawsuit should have been; and/or 2) what the proper allocation of the \$29.5 million paid by News America should have been.

In support of their claim that the amount paid by News America was not properly allocated, the Minority Shareholders offer the expert report of Brett A. Margolin. Mr. Margolin "conclude[d] that the market for the purchased assets [particularly the goodwill, consulting and non-compete agreements] was very much a buyer's market, which would result in a price for the purchased assets potentially approaching zero."⁷ He also states: "Given that I would expect [News America] to pay little, if any, value for the purchased assets, alternative consideration from FGI to [News America] must explain the \$29.5 million payment."⁸ He then notes that News America obtained FGI's dismissal of its lawsuit as part of the transaction, but leaves it to the court to determine if the \$29.5 million "was, in effect, a settlement of the FGI lawsuit."⁹

Mr. Margolin's report creates a disputed issue of material fact as to the reasonableness of allocating \$13 million to FGI's assets, \$16.5 million to the goodwill, etc. of the Majority Shareholders, and nothing to the settlement of FGI's lawsuit. The report does not, however,

⁷ Expert Report of Brett A. Margolin, PhD, p. 16 (Sept. 16, 2011), Exhibit 37 to the Response, (the "Margolin Report").

⁸ *Id.* at p. 19.

⁹ *Id.*

serve as evidence that FGI should have and could have received more in settlement of its lawsuit than the \$29.5 million News America paid.

There is no factual evidence of record to show that News America was willing to pay significantly more than \$29.5 million for FGI's assets, nor that it was willing to allow any of that amount to be paid in settlement of FGI's lawsuit.¹⁰ In order to proceed with their claim that the settlement should have been for more than \$29.5 million, the Minority Shareholders have to proffer evidence showing that it was unreasonable for the Majority Shareholders to accept only \$29.5 million under all the circumstances existing at the time of settlement. Such evidence must be in the form of an expert opinion because the issue of whether the settlement was reasonable is "one involving special skills and training not common to the ordinary lay person."¹¹ The Minority Shareholders offer no such evidence.

Their expert, Mr. Margolin, makes a creative argument that, due to different applicable tax rates, the Majority Shareholders, who received a net total of \$20.7 million under the asset sale, would have received the same net amount under a settlement only if News America had paid a total of \$63.8 million to settle the FGI lawsuit.¹² The implication of this calculation is that the settlement could have been for as much as \$63.8 million, but Mr. Margolin does not explain why such a settlement would have been reasonable under the circumstances. Nor is there any evidence of record that such a settlement could have been reached with News America.

¹⁰ Instead, the evidence is to the contrary. News America's witnesses stated they set a ceiling of \$30 million and refused to pay any amount in settlement of the lawsuit.

¹¹ Storm v. Golden, 538 A.2d 61, 64 (Pa. Super. 1988). The question whether corporate fiduciaries acted improperly in settling a lawsuit for a particular amount is the sort of subject matter that involves the special skills and training of lawyers or other litigation experts. The necessity for such experts is evidenced by the fact that both FGI and News America relied heavily upon their respective counsel in negotiating the settlement/asset transfer.

¹² Margolin Report, pp. 19-20.

Since the Minority Shareholders do not have expert evidence to show that the settlement amount should have been more than \$29.5 million, they are limited to claiming at trial that the entire \$29.5 million should have been paid to FGI. Since FGI already received \$13 million of that amount, the Minority Shareholders are really limited to recovering from the Majority Shareholders as damages the Minority Shareholders' fair share of the additional \$16.5 million paid to the Majority Shareholders for what the Minority Shareholders' expert says were worthless assets.

As set forth above, the breach of fiduciary duty claim against the Majority Shareholders must be tried, albeit with a limitation on the amount of compensable damages recoverable. Since the Minority Shareholders have pointed to evidence to support their claim of breach of fiduciary duty against the majority Shareholders, the next question is whether they can point to evidence to support their claims against News America for assisting that breach.

In order to survive a motion for summary judgment on their claim against News America for aiding and abetting breach of fiduciary duty, the Minority Shareholders must proffer facts to show the following:

(1) a breach of a fiduciary duty owed to another; (2) knowledge of the breach by the aider and abettor; and (3) substantial assistance or encouragement by the aider and abettor in effecting that breach.¹³

News America may be presumed to know that the Majority Shareholders owed fiduciary duties to FGI and the Minority Shareholders. However, the Minority Shareholders have not presented evidence that News America knew there was a breach of such duties,¹⁴ *i.e.*, there is no evidence

¹³ Koken v. Steinberg, 825 A.2d 723, 732 (Pa. Commw. 2003).

¹⁴There is still a disputed issue of material fact as to whether any such duty was breached.

News America knew the allocation of the \$29.5 million was improper.¹⁵ Instead, the evidence shows the Majority Shareholders provided News America with an allegedly independent appraiser's report showing FGI's assets were worth less than the \$13 million News America paid for them.¹⁶ The evidence also shows News America made its own independent business decision not to allocate any of the \$29.5 million to settlement of the FGI lawsuit.

The court will not impose a duty on News America to conduct any further investigation to determine whether the allocation was fair to the Minority Shareholders. Any such duty belonged to the Majority Shareholders and to FGI's other fiduciaries involved in the transaction with News America, not to their adversary, News America. Because the Minority Shareholders cannot show that News America knew the allocation was a breach of the Majority Shareholders' fiduciary duty, the Minority Shareholders cannot prevail on their aiding and abetting claim against News America.

For much the same reasons, the Minority Shareholders cannot prevail on their claim against News America for conspiracy to breach the Majority Shareholders' fiduciary duties.

To prove a civil conspiracy, it must be shown that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means. Proof of malice, *i.e.*, an intent to injure, is essential in proof of a conspiracy. This unlawful intent must be absent justification. . . . Assume that what is done is intentional, and that it is calculated to do harm to others. Then comes the question - was it done with or without 'just cause or excuse'? If it was bona fide done in the use of a man's own property such legal justification would exist not the less because what was done might seem to others to be selfish or unreasonable. But such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights.¹⁷

¹⁵ Mr. Margolin's expert opinion, that the Majority Shareholders' goodwill etc., was worthless, may be evidence that the independent appraiser's report was incorrect, but it is not evidence that News America knew the report was incorrect, nor that News America knew the Majority Shareholders were improperly allocating \$16.5 million to themselves in breach of their fiduciary duties to the Minority Shareholders.

¹⁶ See Fair Market Value Allocation, Exhibit 42 to the Response.

¹⁷ Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 211, 412 A.2d 466, 472-473 (1979).

As set forth above, there is no evidence News America knew the Majority Shareholders were committing an unlawful act, *i.e.*, a breach of fiduciary duty. There is also no evidence News America acted with malice towards, or intent to harm, the Minority Shareholders. Finally, there is no evidence News America acted with unjustified malice towards FGI in connection with the asset purchase/settlement.¹⁸ At most, the evidence shows News America acted to further its own legitimate business interests in eliminating a competitor,¹⁹ acquiring assets, terminating litigation against it, and minimizing its tax obligations.²⁰

CONCLUSION

For all the foregoing reasons, the Majority Shareholders' Motion for Summary Judgment is granted in part and denied in part and News America's Motion for Summary Judgment is granted.

BY THE COURT:



ALBERT JOHN SNITE, JR., J.

¹⁸ Since FGI and News America were business competitors and litigation adversaries, strong dislike and a desire to harm may be inferred. In our capitalist system, such antagonism is generally viewed as laudable, not actionable.

¹⁹ There is no claim here that News America's elimination of a competitor through purchase of its assets violated any anti-trust laws.

²⁰ There is no claim here that News America committed tax fraud.