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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A13-0276**

In re the Marriage of:  
Brenda Ellen Nygaard, petitioner,  
Appellant,

vs.

Jeffrey Merlin Nygaard,  
Respondent.

**Filed February 3, 2014  
Affirmed  
Peterson, Judge**

McLeod County District Court  
File No. 43-FA-09-1478

Court John Anderson, Henson & Efron, P.A., Minneapolis, Minnesota (for appellant)

Jody Lynn Winters, Gavin Winters Twiss Thiemann & Long LTD, Glencoe, Minnesota  
(for respondent)

Considered and decided by Halbrooks, Presiding Judge; Peterson, Judge; and  
Ross, Judge.

**UNPUBLISHED OPINION**

**PETERSON, Judge**

This appeal is from a judgment that denied appellant-wife's motion seeking damages for breach of fiduciary duty, usurpation of corporate opportunity, and fraud, and requesting that the parties' judgment and decree be reopened. Wife argues that the

district court (1) failed to address her claims for breach of fiduciary duty and usurpation of corporate opportunity and (2) erred in ruling that husband's conduct that formed the basis for those claims was not fraudulent. We affirm.

## **FACTS**

Appellant-wife Brenda Ellen Nygaard and respondent-husband Jeffrey Merlin Nygaard were married in 1986 and divorced by a stipulated judgment and decree filed in July 2011. In April 2012, wife brought her motion seeking damages and requesting that the judgment and decree be reopened. Beginning in 1992, the parties owned and operated Nygaard Enterprises, Inc. (NEI), a business that stripped paint from equipment and vehicles, mainly for corporate clients. Husband and wife each owned 50% of NEI's stock. As NEI's chief financial officer, wife handled the accounts payable, invoicing, and payroll and assisted the accounting firm that prepared NEI's tax returns. Husband was the company's chief executive officer and worked in day-to-day operations.

Wife contends that, in September 2010, husband locked her out of the business to prevent her from monitoring NEI's financial records. In a November 2010 affidavit supporting husband's request that the district court appoint an independent entity to handle NEI's bookwork and order wife not to enter the business, husband stated that wife withdrew large amounts of money from NEI for her personal use and prevented husband from finding out about the withdrawals by changing NEI's accounting firm. Husband also stated that, between 2008 and 2010, wife made payments totaling \$140,275.28 from NEI to credit-card accounts, but he failed to show whether the payments were for business or personal expenses. Husband stated that other conduct by wife caused

problems for him in his relationships with both employees and vendors. In a December 2010 affidavit, husband stated that wife removed the keys from vehicles to prevent NEI employees from performing jobs and that NEI lost a large job because wife had removed the keys from a sandblasting/snowplow truck.

Beginning in January 2011, the district court appointed a receiver to manage NEI's operations and oversee its finances. Wife asserts that, following the receiver's appointment, husband converted money payable to NEI by its client Palomino Manufacturing Corporation. In April 2012, a Palomino employee wrote a check to NEI for \$12,700, but, at husband's request, added husband's name to the check. Husband gave the check to the receiver for deposit in NEI's account. Palomino also wrote a check for \$12,375 payable to NEI or husband for work done by NEI. Husband turned over \$3,535 to the receiver and testified that he withheld the balance of \$8,740 for warranty work. The receiver testified that he did not fully understand Palomino's policy for withholding funds for warranty reasons and that he was not able to determine how much of the \$12,375 payment was owed to NEI. At trial, husband gave the receiver a check for \$4,370 for wife's half of the \$8,740 balance.

After NEI was shut down in September 2011, husband began operating a new business, Nygaard Industrial Painting, Inc. (NIPI). Wife alleges that an NEI employee was paid to perform work for NIPI before NEI was shut down. The employee testified on direct examination that he worked on equipment during the summer of 2011 and was uncertain whether he was performing work for NEI or NIPI. On cross-examination, the employee testified that he was uncertain when he began working for husband.

Wife asserts that husband failed to inform the receiver about a contract between NEI and 3M. Husband testified that NEI did some work for 3M in August 2011. Husband also testified that NIPI used NEI's contract- and vendor-identification numbers to submit invoices to 3M for work done by NIPI.

Wife asserts that husband answered interrogatories deceptively by failing to disclose the converted Palomino funds, the 3M contract, and checks written against NEI's account. In a May 2012 affidavit, husband explained that he misunderstood an interrogatory and thought that it asked about only his personal expenses. The affidavit contains a list of checks written on NEI's account, the expenses paid with those checks, and a detailed accounting of deposits into and withdrawals from the NEI account.

Wife asserts that husband threatened potential bidders when NEI's land was auctioned in August 2011. That matter was the subject of a previous district court order. The court found that husband intimidated a potential bidder and awarded wife damages that placed her in the position that she would have been in if the potential bidder had purchased the land at the price he was willing to pay.

Wife alleges that husband rigged the bid prices at the auction of NEI's equipment so that he could obtain the equipment at less than fair market value. A witness testified that he overheard a conversation between husband and husband's friend, in which the friend agreed to be the second bidder and the friend and husband agreed on the friend's maximum bid. But that testimony referred to one of the auctions for NEI's real estate, not to the equipment auction. Wife also claims that she was prevented from bidding at the NEI auctions because husband "had deprived her of an NEI paycheck for months, he

had converted NEI's cash and its business, and he had starved [wife] of the capital she would need to qualify for a loan." Husband stated in the December 2010 affidavit that wife received the following income at the end of 2010:

25. [Wife] is not suffering for money due to the fact that she has written herself checks out of NEI for the amounts of \$3,000.00, \$3,000.00 and \$1,137.25 from 11-16-2010 to 12-7-2010. (attachment -M) The amounts written to herself are in addition to her regular pay checks [(])\$511.31 per week) and the cash she has taken out of the business (\$700.00 on December 6, \$200.00 on October 9 and \$300.00 on September 23).

Wife does not cite to evidence of her income or financial situation in 2011.

A trial was conducted on wife's claims that husband usurped corporate opportunities, breached his fiduciary duty, and committed fraud. The district court concluded that wife failed to prove her claims. This appeal followed.

## **DECISION**

The district court's findings of fact will not be set aside unless they are clearly erroneous. Minn. R. Civ. P. 52.01. Clearly erroneous means "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 726 (Minn. 1985).

1. Wife argues that the district court failed to address her claims that husband breached the fiduciary duty owed to her as NEI's co-owner and usurped corporate opportunities when he formed and operated NIPI on NEI's property, using NEI's building, telephone number, and other assets. Shareholders of a closely-held corporation owe each other a fiduciary duty that requires them to be open, honest, and fair and to

adhere to “the highest standard of integrity and good faith in their dealings with each other.” *Berreman v. W. Publ’g Co.*, 615 N.W.2d 362, 370-71 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. Sept. 26, 2000). Whether a fiduciary duty has been breached is generally a fact question. *Id.* at 367.

A two-prong test is applied to determine whether to impose liability for usurpation of a corporate opportunity. *Miller v. Miller*, 301 Minn. 207, 224, 222 N.W.2d 71, 81 (1974). The first prong requires a showing that a business opportunity is a corporate opportunity, meaning that “the business opportunity is of sufficient importance and is so closely related to the existing or prospective activity of the corporation as to warrant judicial sanctions against its personal acquisition by a managing officer or director of the corporation.” *Id.* at 224, 222 N.W.2d at 81. This is a fact question, and the burden of proof is on the party claiming usurpation. *Id.* at 225, 222 N.W.2d at 81. If a corporate opportunity is shown, the burden shifts to the acquiring officer to show that the acquisition did not violate the fiduciary duties of loyalty, good faith, and fair dealing toward the corporation. *Id.* at 227, 222 N.W.2d at 82.

In findings of fact 21 and 22, the district court found that the receiver accounted for all work performed by NEI and that wife failed to present evidence substantiating her allegations that NIPI profited from work performed by NEI. Although these findings do not use the terms “fiduciary duty” or “usurpation of corporate opportunity,” they do address wife’s claims that husband used NEI’s assets to benefit NIPI. Wife presented evidence that she claimed showed that husband used NEI’s assets to perform work for which NEI was not paid, and husband presented contrary evidence that he claimed

identified the work that was done and the payments received. The district court found the evidence presented by husband more persuasive, and its findings addressing wife's claims that husband used NEI's assets to benefit NIPI are not clearly erroneous. As the district court explained in its memorandum,

[wife] flooded the Court with information, but this information contained no compelling evidence but rather speculation and conjecture that [husband] committed actionable deeds that harmed [wife]. The claims of [wife] are simply unfounded or of the kind for which no recovery can be had.

2. Wife argues that "the [district] court concluded in its findings of fact that [husband] hired and paid [an employee] through his business, NIPI, for several months before NEI's business ceased, in competition with NEI, and at a point in time when NIPI had no assets of its own." This argument misstates the district court's finding. The district court found:

[The employee] testified that he worked for [husband] from approximately July until November of 2011. However, he was unsure if those dates were correct and also unsure whether he worked for NEI or NIPI. [The employee's] W-2 tax form was submitted as Exhibit 1, Section 44. The W-2 indicates that he worked for NIPI. [The employee] testified to working on multiple items, but did not say when he worked on them or for what company. The receiver testified that [the employee] was an employee of NIPI. This evidence indicates that [the employee] was briefly an employee of NIPI and never an employee of NEI. Any work he did was for the benefit of NIPI alone.

The district court further stated that the employee's testimony "established only that [the employee] was confused as to whether he worked for NIPI or NEI and that he did work on some items for [husband]. Nothing in this testimony established that NIPI

was doing work that should have been done by NEI.” The district court also found that wife failed to provide the receiver with invoices from alleged work performed by NEI for NIPI’s profit or evidence that any work performed by NEI was not accounted for by the receiver and the accountant. The district court’s findings are not clearly erroneous, and the findings support the court’s rejection, based on a failure of proof, of wife’s claim that NIPI profited from work that was done or should have been done by NEI.

3. Wife argues:

Utilizing the funds he diverted to his NIPI business, and the loan he secretly obtained from MidCountry Bank utilizing NEI’s and [wife’s] assets as security, combined with the lower bid prices resulting from his verbal and physical intimidation of bidders and unlawful bid rigging, [husband] successfully purchased almost every asset owned by the parties through NEI at dramatically below-market rates, and he recreated NEI’s business on the cheap.

But, as already discussed, the district court found that wife failed to prove that funds were diverted to NIPI. The district court also rejected wife’s claim that husband and the bank “engaged in suspect transactions” and found that the bank approved the loan to husband based on the financial information he provided. Husband did not breach a fiduciary duty owed to wife by obtaining approval for a loan before the auctions were held and then, after buying NEI’s assets at the auctions, using the assets as collateral when the loan closed. The evidence supports the district court’s finding that “[b]oth parties had an equal opportunity to bid on any or all of the real estate and equipment at the auctions” and that wife chose not to participate in the auctions.

Wife's allegations about irregularities in the real estate auctions were addressed in an earlier district court order that required husband to pay wife an additional amount for the agricultural land because husband had intimidated another bidder. In the order currently on appeal, the district court found:

The Court determined [in the earlier order] that the homestead and Erie Street property auctions were valid and [wife] presented no evidence that [husband] intimidated other bidders away from those two auctions or that another bidder was ready, willing, and able to bid in an amount higher than what was bid by [husband]. Regarding the agricultural auction the Court placed [wife] in the same position she would have been if [the other bidder] was the successful bidder.

Even if wife's challenge to the real estate auctions is within the scope of review in this appeal, she is not entitled to relief because she has not shown that the district court's findings are erroneous.

Regarding the equipment auction, the district court found that "[t]he machinery and equipment [husband] purchased from the auction was at fair market value." Wife argues that the district court confused NEI's land and equipment auctions and did not address the witness's testimony that husband rigged bids at the equipment auction. But the witness's testimony first addressed the three land auctions, and the witness testified about a conversation at one of those auctions between husband and a third party who allegedly agreed to be a second bidder in order for the auction to proceed. Husband's attorney then asked the witness, "Were you involved at all in the auctioning of the [NEI] business inventory as well?" The witness's response to that question indicated that his involvement was limited to helping successful bidders pick up items that they had

purchased and did not include any statement about bid rigging. The witness's testimony does not support wife's allegation of bid rigging at the equipment auction, and the receiver's October 5, 2011 report supports the district court's finding that husband purchased NEI's machinery and equipment at fair market value.

4. Wife argues that the district court erred in determining that she failed to prove that husband committed fraud. "[A] motion to reopen a dissolution judgment for fraud requires the moving party to meet a lesser threshold than that required to reopen a judgment for fraud on the court." *Doering v. Doering*, 629 N.W.2d 124, 129 (Minn. App. 2001), *review denied* (Minn. Sept. 11, 2001). "[T]he failure of a party to a dissolution to make a full and complete disclosure constitutes sufficient reason to reopen the dissolution judgment for fraud, without any showing of fraud on the court." *Id.*

The district court made detailed findings that describe how the receiver and the accountant made all financial information available to wife before the property settlement was finalized. Wife specifically argues that husband converted NEI's assets and business, intimidated bidders, and rigged bids. As we have already addressed, wife failed to prove that husband converted NEI's assets and business or rigged bids, and she has already been compensated for husband's intimidation of a bidder.

Wife also argues that husband committed fraud by stealing Palomino and 3M funds that belonged to NEI. The district court found:

The Receiver acknowledged that two checks intended for the NEI account were given to [husband] directly. One in April, 2012 which was given to the Receiver on May 7, 2012 and which was accounted for in the parties' distributions and the second check was received by [husband] late April/ early

May, 2012. The second check was issued in the amount of \$12,375.00 of which [husband] gave the Receiver a check in the amount of \$3,535.00 and withheld the balance of \$8,740.00 for warranty work. [Husband] gave the Receiver a check in the amount of \$4,370.00 at the hearing on July 26th which was [wife's] half of the \$8,740.00 balance. The Receiver paid that amount to [wife] and the Receiver is satisfied that the \$12,375 check has been resolved.

....

NEI's contract with 3M was for labor rates for services provided (it delineated the amount which could be charged by NEI). The contract was not a guaranty that NEI would provide a certain amount of labor for 3M. [Husband] testified credibly and provided numerous invoices as evidence showing that he accounted for his work with NEI done for 3M.

The evidence supports the district court's findings on the Palomino and 3M funds, and those findings support the determination that husband did not commit fraud.

**Affirmed.**