

APPELLATE COURT CASE NO. A04-2338

STATE OF MINNESOTA

IN COURT OF APPEALS

JOHN S. DREWITZ,

Appellant,

vs.

MOTORWERKS, INC., A MINNESOTA CORPORATION,
R. JACK WALSER, PAUL M. WALSER AND ANDREW D. WALSER

Respondents.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

There are three major issues before this Court.

- 1. There is no contractual provision in the agreements between the parties ending Drewitz' shareholder status at the end of his employment. Is Drewitz still a shareholder?**
- 2. Drewitz bases this litigation on issues that could only have been raised based on Respondents' actions since May 2001. Can res judicata apply to actions after the prior litigation ended?**
- 3. Did Respondents have a continuing obligation to tender book value and interest in the correct amount to Drewitz, or did that obligation somehow terminate before the end of Drewitz' employment contract?**

Respondents make reference to litigation between the parties as "meritless" six times. In the prior litigation, Respondents moved for summary judgment on four counts but were denied summary judgment for Count III, the breach of employment contract. The parties reached a settlement on this issue. The litigation was not "meritless." The issues before this Court are meritorious. For nearly six years, Respondents have held hostage a third of a million dollars belonging to Drewitz, allowing Respondents to utilize his money for the benefit of Motorwerks in total disregard of the majority's duty to deal fairly with a minority shareholder.

RESPONDENTS' STATEMENT OF FACTS

Respondents apparently are attempting to ride on the coattails of issues that have been decided and are not a part of this appeal. There are

numerous misstatements of facts and references to facts not on the record.

The portion of the facts in Respondents' brief that refer to the issues in the current litigation begin on page 9, entitled "F. Renewed negotiations."

Respondents state that "the parties renewed their efforts to finally resolve this matter." While it is true the accountants for the parties met and agreed upon the book value, they could not earlier agree due to improper calculations by Respondents in determining book value. (A81) The accountants also reached a resolution of the interest to be paid, including the rate of interest and the time period for which interest should be paid. (A 90) Respondents later repudiated the agreement: "After consideration, I have come to realize" . . . that neither the interest rate nor the period for which interest would be paid is acceptable. (A84) It was not a failure of the parties' accountants to reach a final settlement. Instead, Respondents refused to abide by terms of their negotiated agreement. (A84)

On January 29, 2003, Drewitz' counsel sent a three-page letter to Respondents' attorney seeking resolution. (A94) No response was ever received. It is hardly fair to say that "Drewitz's counsel re-entered the negotiations in January 2003." Respondents had ceased negotiating when

they disclaimed their prior agreement on June 7, 2002 (A84) and were not heard from again for over one year.

By the time Respondents actually tendered the appropriate book value to Drewitz in August 2003 without any conditions or concessions required by Drewitz, by *any* definition Respondents' obligation to tender payment within 90 days had long elapsed. Under any argument, Respondents knew the Court of Appeals had affirmed their right to buy a minority shareholder out at book value under the Stock Redemption Agreement on May 1, 2001 (RA1). Yet no unconditional tender of this amount was offered until over two more years had elapsed.

The statement that Motorwerks' counsel continued to attempt negotiations for interest citing to A84-89 is a complete mischaracterization. The documents sent in a supposed attempt to "continue negotiations" instead offered less than the agreed upon interest rate, cut off 2 ¼ years of interest, and conditioned payment on a Settlement Agreement Respondents had no right to require. This can hardly be characterized as "negotiations." It even appeared Walsers thought they had already paid the principal when they had paid nothing.¹

Respondents then state that all negotiations "with respect to the applicable period of interest assume that it began to accrue on March 31,

¹ "We will make a payment of \$22,161.29 when Mr. Drewitz provides the signed release" (A84). The next page of accountant's notes refers to "\$359,567.31 . . . previously paid" (A85).

1999 . . .” Yet a letter from Respondents’ CFO states that he has “come to realize that interest is not appropriate for the period prior to July 2001.” (A84).

The footnote on page 10 has no basis in fact, nor do Respondents cite to anything on the record to substantiate their statement.

ARGUMENT

I . Respondents claim they had no responsibility to tender book value after Christmas Eve 1998, despite a Stock Redemption Agreement that requires them to do so. Was Drewitz’ refusal to accept the incorrect value tendered before litigation was commenced a termination of Respondents’ obligations to Drewitz?

Respondents make the specious argument that they were never again obligated to tender book value after Christmas Eve 1998, but that Drewitz’ status as a shareholder terminated at the expiration of his employment contract because of the contractual provisions (although no contractual provisions support this claim). According to this argument, Respondents are under no obligation to make a tender, yet Drewitz’ standing as a shareholder has somehow evaporated.

Respondents claim Drewitz rejected a tender offered in December, 1998. However, there was no “tender.”

Tender is an offer to perform a condition or obligation coupled with the present ability of immediate performance, so that were it not for the refusal of cooperation by the party to whom tender is made, the condition or obligation would be immediately satisfied...

Stated in alternate terms, "tender" is an unconditional offer of payment consisting of the actual production of a sum not less than the amount due on a particular obligation; tender must be without conditions to which the creditor can have a valid objection or which will be prejudicial to his or her rights. Tender is the unconditional offer of a debtor to the creditor of the amount of its debt.

28 Williston on Contracts § 72:27 (4th ed).

And

Generally, a tender must include everything to which the creditor is entitled, and a tender of any less sum is nugatory and ineffective as a tender. It must include interest due, costs then due or accrued, . . . to which the creditor has become entitled by force of the agreement of the parties, as by commencement of suit or otherwise.

The amount offered by the debtor to his creditor must be at least equal to the whole amount then due or accrued on the debt or obligation to constitute an effectual tender, and an offer of a part of the amount due does not avail as tender.

74 Am. Jr. 2d Tender §20

It would have been foolish for Drewitz to have accepted "tender" from Respondents if it was in an amount other than the full amount due to him.

Defendant submitted a check with the full explanation to plaintiff that it was intended as a settlement of the whole account. With full knowledge of the facts, plaintiff accepted this check and should now be precluded from seeking recovery of more. *Winter Wolff & Co. v. Co-op Lead & Chemical Co.*, 261 Minn. 199, 111 N.W.2d 461 (1961)

Until August 2003, Drewitz would have lost his right to claim the correct amount due from Respondents.

Drewitz *never* waived Respondents' obligation to tender book value within 90 days or even 900 days of the expiration of his employment contract. Drewitz waited over two years after this Court affirmed that he was entitled to only book value for his shares before claiming that such refusal to make a valid tender constituted unfairly prejudicial conduct against a shareholder.

Respondents next state that Motorwerks unconditionally tendered book value once Drewitz finally indicated that he would accept an agreed-upon book value (p. 18). There is nothing in the record to support this argument. The repeated statement by Respondents (p. 19) that they unconditionally tendered payment "once Drewitz finally indicated he would accept an agreed upon book value" is completely false. This Court's decision in May 2001 ended Drewitz' right to claim anything except book value. Yet Respondents did not unconditionally tender such an offer for two more years and even then would not tender the statutory interest.

II. Respondents argue their breach of contract does not eradicate "the contractual provisions ending Drewitz's status as a shareholder when his employment contract expired..." (p. 20) Yet *there are no such contractual provisions.*

There are no contractual provisions ending Drewitz' status as a shareholder when his employment contract expired. If that was the intent of Respondents, they should have negotiated such a provision. They did not. Instead, the contract provisions state Respondents have an obligation

to purchase and Drewitz has an obligation to sell his 30% share in Motorwerks. There has *never* been an argument that Drewitz wanted to continue his shareholder status. In fact, a letter written by Drewitz' attorney states:

Since there has been no payment or redemption of the stock, Mr. Drewitz continues to be a stockholder . . . I hasten to add, however, that the above legal issues do not represent Mr. Drewitz's intent or preference, and under no circumstances should your client conclude that this is Mr. Drewitz's intention. On the contrary, it is his desire to resolve the entire matter with a payment using the value of \$355,862 for the stock as of March 31, 1999 plus 7% interest per annum compounded annually to the date of payment. (A94)

Now we see Respondents asking that the contracts between the parties be strictly interpreted against Drewitz but implicitly exempt themselves from strict interpretation. Respondents' own actions in failing to make unconditional tender is the sole cause of Drewitz' continuing shareholder status.

Respondents state that Drewitz' shareholder status "terminated of its own accord after his employment terminated." (Res. Brief p. 22). But they cite no authority for such a position. Shareholder status does not evaporate. It exists until it is terminated according to contractual provisions between the parties. Title to property in any transaction transfers at closing, not when an agreement to purchase is executed.

Respondents' failure to pay Drewitz to purchase his shares is not a simple breach of contract claim for money owed.² The Redemption Agreement (A11) mandates that Respondents tender at closing, "in full all obligations, whether by notes, advances, or other form of debt, owing from one to the other, . . . The payment shall be in the amount of the balance of indebtedness plus interest at the specified rate to date of payment." *Id.*, 5.05. This is an obligation with a time frame which has long expired. Neither party argues Respondents did not have the right to purchase Drewitz' shares at book value according to the terms of the agreements between the parties. Drewitz only argues that they failed to timely meet that obligation.

Respondents missed the point of *Thompson v. Northern Realty, Inc.*, unpublished, 1997 WL 161854 (Minn. App. April 8, 1997) (A247). *Thompson* held that shareholder relationships terminate through payment and not through the obligation to pay. Drewitz ceases to be a shareholder when Respondent buys his shares, not when they have the right to do so. The burden to tender a proper amount was always on Respondents.

A minority shareholder is not required to pursue this purported "breach of contract." Instead, under Minn. Stat. § 352.751 a minority shareholder is entitled to bring the very type of action Drewitz brought in

² If a car dealer enters into a contract with a customer committing to sell a BMW for a specific price, title to that BMW will not be transferred to the customer until the price is paid to the dealership. The customer cannot take the car, then offer new terms, recant the obligation to pay and yet continue to drive the car for several years calling it his own.

this case, asking for a determination that majority shareholders have acted in an unfairly prejudicial manner.

Respondents bargained for the right to purchase Drewitz' shares for book value and interest if they did so within ninety (90) days of an event triggering this right (A11 at §§ 4.04 and 5.05). Respondents' actions, however, subverted the intent of the parties' shareholder agreement and attempted to force a minority shareholder to accept less than book value and less than statutory interest.

Respondents even argue that once Drewitz refused a tender based on the amount of the tender, Respondents are then released from any further contractual obligations regarding payment obligations. Respondents seem to argue they are virtually immune from complying with the contracts even after this Court affirmed that the written agreements between the parties must be strictly construed.

Respondents' actions did not, however, terminate Drewitz' shareholder status after the expiration of his employment contract because they bargained only for the right to terminate the shareholder interest when they fulfilled their obligation to tender the correct book value and the correct interest. Were it otherwise, majority shareholders like the Walsers could unilaterally retain a minority shareholder's investment indefinitely – in direct contravention of the parties' contract and their intent – by

commencing serial tenders of incorrect amounts, incorrect interest, and demands for additional concessions not called for in the contract.

III. Respondents argue res judicata applies. Yet Drewitz raises issues that could only have been raised since the decision by this Court in May 2001.

This Court's decision affirming the Ramsey County District Court's decision in 2001 gave the Respondents an opportunity to buy back 30% of the shares at book value in a company admittedly worth millions. Intuitively, it seems that Respondents should have been eager to terminate Drewitz' shareholder rights in a way favorable to their own interests. Drewitz was not seeking to retain shareholder status, and as late as January 2003 (A93) continued to request that he simply be paid book value plus interest under the Stock Redemption Agreement (A11) as affirmed by this Court. (RA1) No precipitating incident had terminated Drewitz' shareholder status. No contractual provision terminated Drewitz' shareholder status, and no court order transferred the shares. Drewitz reminded Respondents he was still a shareholder in January 2003 (A93), yet he could not even get a response from Defendants. From May 2001 on, Respondents had a continuing obligation to treat their minority shareholder like a partner, according to Minn. Stat. § 302A.751, Subd. 3a.

Respondents had an obligation to tender full payment of book value and interest to Drewitz at some date ninety (90) days from the end of his employment contract. Because the parties were in litigation at that time,

Respondents argue it was impossible to complete this requirement. But at some point the ninety (90) days ended.

- Respondents knew on May 1, 2001 that their right to purchase Drewitz' shares at book value had been affirmed. If that was the date, the right to tender book value plus interest in return for the shares expired ninety (90) days later. (RA1).
- Respondents knew after the accountants' meeting referred to in A84 and A90 fixed an agreed amount for book value and an agreed amount for interest on Drewitz' money. If that was the date, the right to tender book value plus interest in return for the shares expired ninety (90) days later.
- Respondents knew Drewitz was attempting to resolve tender issues on January 29, 2003 (A93). If that was the date, the right to tender book value plus interest in return for the shares expired ninety (90) days later.

Even the last "unconditional" tender in August 2003 failed to include statutory interest from the date of the end of the employment contract on March 31, 1999, a simple calculation. Respondents were still attempting to punish a minority shareholder with their theory that they only need pay interest for the "appropriate" period. Respondents did not even concoct this theory until 2002, and to claim it should have been litigated in the prior action is absurd.

Conclusion

In determining whether to order equitable relief, dissolution, or a buy-out, the court shall take into consideration the duty which all shareholders in a closely held corporation owe one another to act in an honest, fair, and reasonable manner in the operation of the corporation and the reasonable expectations of all shareholders as they exist at the inception and develop during the course of the shareholders' relationship with the corporation and with each other. For purposes of this section, any written agreements, including employment agreements and buy-sell agreements, between or among shareholders or between or among one or more shareholder and the corporation are presumed to reflect the parties' reasonable expectations concerning matters dealt with in the agreements. Minn. Stat. § 302A.751, Subd. 3a.

Drewitz did not bargain for the oppressive conduct on the part of Respondents in holding his one-third of a million dollars for their own use up to and including 2005. Respondents failed to take any action that would terminate Drewitz shareholder interest after their right to do so was affirmed on May 1, 2001. Respondents' non-compliance with the terms of the Redemption Agreement between the parties demonstrates a failure to act in a manner reflecting the parties' reasonable expectations.

To this day Respondents defy Drewitz' attempts to get a return of his investment and show their contempt by stating first that after Drewitz refused Motorwerks' defective tender in 1998, Defendants had no further obligation to tender a check to Drewitz (p. 16) and next that if Drewitz

wants to get paid he has to sue Motorwerks (p. 26). Even now

Respondents show no intent to pay.

Drewitz remains a shareholder. None of the issues raised in this litigation could have been raised in a prior litigation. Drewitz' Motion for buy-out at fair value should be granted within the statutory time frames of Minn. Stat. § 302A.751 and according to the venue requirements of that statute.

Dated: April 18, 2005

Respectfully Submitted,

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