The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

John Meehan

v.

Jay Gould and Flatbread, Inc.

No. 218-2017-CV-01322

ORDER

The Plaintiff, John Meehan, brought this action against the Defendants, Jay Gould and Flatbread, Inc. seeking permanent injunctive relief as well as monetary damages. As explained in the course of this opinion, Meehan is a minority shareholder in a corporation known as Flatbread, Inc., and a minority shareholder in a number of individual restaurants. Meehan alleges that he has been denied employment, access to books and records and otherwise injured by the actions of the majority shareholder, Gould. He seeks injunctive relief against Gould, the majority shareholder, and Flatbread Inc., and also seeks money damages.

Count I of the complaint alleges Breach of Fiduciary Duty by Gould; Count II alleges Breach of Contract against Gould; Count III alleges Breach of the Implied Covenant of Good Faith and Fair Dealing against Gould; Count IV alleges Intentional Interference with Contractual Relations against Gould; and Count V alleges Violation of the New Hampshire Wage Act, RSA 275:44 against Gould. Defendants have filed a Motion for Summary Judgment on Count I "as to any claim of breach of fiduciary duties… related to Meehan's employment" and on Counts II, III, IV and V of Meehan's

Complaint. Meehan objects to the Motion with respect to Counts I, II, III and IV but not with respect to Count V. For the reasons stated in this Order, Gould's Motion for Summary Judgment is GRANTED with respect to Count V and otherwise DENIED.

I

To prevail on a motion for summary judgment, the moving party must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. In order to defeat summary judgment, the non-moving party "must put forth contradictory evidence under oath, sufficient ... to indicate that a genuine issue of fact exists so that the party should have an opportunity to prove the fact at trial. . . ." Phillips v. Verax, 138 N.H. 240, 243 (1994) (citations and quotations omitted). A fact is material if it affects the outcome of the litigation under the applicable substantive law. Palmer v. Nan King Rest., Inc., 147 N.H. 681, 683 (2002). In considering a party's motion for summary judgment, the evidence must be considered in the light most favorable to the non-moving party, together with all reasonable inferences therefrom. Sintros v. Hamon, 148 N.H. 478, 480 (2002).

Many of the facts are not in dispute, and are taken from the pleadings and the summary papers. Meehan and Gould are business partners who jointly own a chain of pizza restaurants, all referred to as Flatbread Co. restaurants. There are restaurant locations in New Hampshire, Maine, Massachusetts, Rhode Island, Hawaii, and British Columbia. Since the opening of the first restaurant, Meehan and Gould have incorporated another corporate entity, Flatbread, Inc., which serves as a management company for each of the individual Flatbread Co. restaurants. Meehan and Gould own 30% and 70% of Flatbread, Inc. respectively. They own seven of the nine Flatbread Co. restaurants with the same 30%/70% ownership structure. Together, they own 50% of

the two restaurants in Hawaii and British Columbia, meaning that Meehan owns 15% of those two restaurants and Gould owns 35%.

The first Flatbread Co. restaurant opened in Amesbury, Massachusetts in 1998. (Defs.' Statement of Material Facts in Supp. of Defs.' Motion for Partial Summ. J. ¶ 2) [hereafter "Defs.' Statement"]. At the time that the parties opened the first location, both Meehan and Gould were fully employed elsewhere. Gould contributed 100% of the startup capital for the restaurant. (Defs.' Statement ¶ 2.) Meehan asserts that once the restaurant opened, Gould worked in his family business, Gould Insurance, assisting with the Flatbread Co. restaurant as time allowed, while Meehan worked at the restaurant full-time. (Meehan Aff. in Supp. of his Opp'n to Mot. for Partial Summ. J. ¶ 6.) [hereinafter "Meehan Aff."] However, Gould agreed that Meehan "would have a 30% interest in the Flatbread Co. restaurant as a benefit associated with his sweat equity." (Defs.' Statement ¶ 2.) A number of restaurants have opened over the years since the first restaurant opened, and all of the restaurants are separate corporations. (Defs.' Statement ¶ 3.)

The parties agree that Meehan generally performed the day-to-day management of the original Flatbread Co. restaurant at the time the restaurant opened and acted as its *de facto* President. (Defs.' Statement ¶ 10.) Meehan asserts that once the restaurant opened, Gould continued to work full time at his family business, Gould Insurance, assisting with Flatbread Co. restaurant as time allowed while Meehan worked at the restaurant full-time, without pay, for approximately one year. (Meehan Aff. ¶ 6.) Meehan asserts that both parties worked part-time for the next 2 years and as they opened up the third restaurant, his hours began to approach full time. (Meehan Aff. ¶ 7.) Meehan claims he told Gould that he would be unable to continue to work without

income. (Meehan Aff. ¶ 8.) Meehan further states in his affidavit that Gould agreed that Meehan would be paid but insisted that Gould be paid equally. (Meehan Aff. ¶ 9.) Meehan avers in his affidavit that "given the disparity of efforts between us, it was evident that the salary represented not compensation for services rendered but, rather, a mechanism for distribution of profits." (Meehan Aff. ¶ 9.) Gould specifically disputes this claim, asserting that the salaries which were paid to Gould and Meehan were compensation for their work with the company and not a return on equity. (Gould Aff. ¶¶ 5, 11.); (Defs.' Statement ¶ 10.)

The parties do not dispute that in August 2016 a new president was hired, and Meehan was removed from his position as president of Flatbread, Inc. (Gould Aff. ¶ 22.); (Defs.' Statement ¶ 25.) However, the parties dispute the reason for the change. Defendants assert that an analysis was done in 2014 by a firm called New England Restaurant Advisors. The analysis determined that Flatbread, Inc. suffered from a lack of accountability controls and recommended improvements in a number of areas including financial reporting, human resources, real estate, and construction. (Gould Aff. ¶¶ 13–18); (Defs.' Statement ¶¶ 13–25.) Defendants assert that it was necessary to obtain an experienced restaurant manager to run the day-to-day operations of the business, and Meehan could no longer perform that function. Id. Meehan disputes this claim, and asserts that company profits continued to grow at the time New England Restaurant Advisors did its analysis of the business. (Meehan Aff. ¶¶ 25–31.)

II

Meehan's Complaint has 5 Counts. Count I alleges a Breach of Fiduciary Duty. Meehan alleges that Gould's Breach of Fiduciary Duty to him includes the following allegedly wrongful acts:

a. Withholding regular distributions of profits to Meehan and making distributions based on Gould's personal financial interest rather than the best interests of Meehan and business;

b. Threatening to retain profits for purposes of developing new restaurants rather than, consistent with past practice, funding development through bank financing and distributing the profit;

c. Unilaterally, and without any business justification, waiving a franchise fee and royalty payments and thereby denying Meehan of a share of the profits from these payments; and

d. Threatening to not allow increases of lease rents to fair market value so as to keep the real estate from generating their profits and income to Meehan.

(Complaint ¶ 72 (a)–(d).)

Meehan alleges that Gould has engaged in these acts "in a manner to deprive Meehan of salary, benefits and profit distributions and to force Meehan to sell his 30% ownership interest at significantly less than fair market value." (Complaint ¶ 73.)

The other counts are all derivative of the Breach of Fiduciary Duty claim. Count II of the case is captioned Breach of Contract. Meehan alleges:

> 76. Meehan and Gould have a binding and enforceable agreement that each would draw an identical salary from Flatbread, Inc.
>
> 77. Meehan and Gould agreed that in exchange for his investment and efforts on behalf of the business, Meehan would be continually employed by Flatbread, Inc. and earn his livelihood from the business as an important benefit of his minority shareholder status.
>
> 78. In breach of the agreement, Gould unilaterally and without any legitimate business reason terminated Meehan's position and effectively eliminated his salary, while maintaining his own salary at $250,000 annually.

(Complaint ¶¶ 76–78.)

Counts III and IV are based upon the existence of a contract between Meehan and Gould. Count III of the Complaint alleges a Breach of the Implied Covenant of Good Faith and Fair Dealing, which is a part of any contract and simply recites that "under

New Hampshire law and by virtue of his status as a majority shareholder in a closely held corporation, Gould owed Meehan an implied covenant that he would act in good faith and fairly in the performance of their agreement." (Complaint ¶ 81.) Count IV also assumes the existence of a contract. It further alleges that Gould maliciously, in bad faith, and through improper motive, terminated Meehan's employment relationship with Flatbread, Inc. (Complaint ¶ V.) Count V alleges violation of RSA 275:44 (V) in that Gould intentionally withheld wages. Meehan does not object to summary judgment for the Defendants on Count V.

The parties approach the analysis of Meehan's claims in different ways. Defendants assert that all of the Meehan's claims are "predicated, in whole or in part, on Meehan's . . . employment at Flatbread [Co.], specifically, his allegation that he entered into an oral agreement with Gould that he would be 'continually employed' by Flatbread [Co.] at a salary that matched Gould's." (Defs.' Mem. in Supp. of Mot. for Partial Summ. J. at 2) [hereinafter "Defs.' Mem."]. Meehan however, asserts that his employment claim is based upon his claim of Breach of Fiduciary Duty:

> Rather than seeking lifetime employment, Meehan seeks to reap the same benefits of an oral agreement by which each partner would take the same amount characterized as salary, although that sum was unrelated to services rendered. Moreover, Defendants seek to ignore employment as a right of ownership, characterizing Meehan as an at will employee.

(Pl.'s Mem. in Supp. of Obj. to Mot. for Partial Summ. J. at 2) [hereinafter "Pl.'s Mem."].

While not abandoning his claim that he has a contractual right to lifetime employment, Meehan asserts that he "had an oral contract that whatever money one drew in the form of salary, the identical amount would be paid to the other." (Pl.'s Mem. at 9.) Meehan argues that his salary is essentially a return on his investment from the company. (Pl.'s Mem. at 12.) In substance, he alleges that his loss of employment

resulted from a breach of Gould's fiduciary obligations to him as a majority shareholder, a corporate freeze-out. Defendants stress the New Hampshire Supreme Court has never explicitly adopted the tort of corporate freeze-out, and that the Superior Court should not do so now. (Defs.' Mem. at 13.)

A

As Defendants point out, the New Hampshire Supreme Court has never explicitly adopted the tort of corporate freeze-out, although it has assumed its existence *arguendo*. See Thorndike v. Thorndike, 154 N.H. 443, 446 (2006); Kennedy v. Titcomb, 131 N.H. 399, 403 (1989). This case requires the Court to determine whether, if the issue were squarely presented, the New Hampshire Supreme Court would determine that it exists.[1]

Courts in most jurisdictions recognize the tort of corporate freeze-out, holding that majority dominant or controlling shareholders owe a fiduciary duty to the minority shareholders. 18A Am. Jur.2d Corporations § 637 (2019). Generally, a shareholder oppression claim may exist when (1) a majority shareholder's conduct substantially defeats the minority's expectations that objectively viewed, were both reasonable under the circumstances and central to the minority shareholders decision to join the venture; or (2) burdensome, harsh or wrongful conduct, a lack of probity and fair dealing in the company's affairs to the prejudice of some members, or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his or her money to accompany is entitled to rely. 18A Am. Jur.2d Corporations § 641 (2019). Such "freeze-out," tactics may include withholding dividends, "restricting

[1] The fact that the New Hampshire Supreme Court has twice declined to state whether or not the tort exists in New Hampshire, while deciding cases assuming that it does exist, brings to mind Jeremy Bentham's observation that the "power of the lawyer is in the uncertainty of the law."

or precluding employment in the Company, paying excessive salaries to majority shareholders, withholding information relating to the operation of corporation, appropriation of corporate assets, denying dissenting shareholder appraisal rights, they are to hold meetings, and excluding the minority from a meaningful role in corporate decision-making." Id. (citing Grill v. Aversa, 908 F.Supp. 2d 573 (M.D.Pa. 2012).)

In addressing the how the statute of limitations applied to a freeze-out claim in Thorndike, the Court cited a number of Massachusetts cases to determine the appropriate statute of limitations, noting that the law of Massachusetts is well developed. Thorndike, 154 N.H. at 446–447. To determine whether or not the New Hampshire Supreme Court wwould accept the majority rule that majority shareholders of a close corporation owe a fiduciary obligation to minority shareholders, the court believes it is therefore appropriate to consider the seminal Massachusetts case on corporate freeze-out, Donahue v. Rodd Electrotype Co. of New England Inc., 367 Mass. 578 (1975).

The Rodd Court first began by defining a close corporation as one in which the stock is held in a few hands, or in a few families, and where it is not at all, or only rarely, dealt in by buying and selling. Id. at 585. It continued that "as thus defined, the close corporation bears striking resemblance to a partnership. . . The stockholders clothe their partnership with the benefits peculiar to a corporation, limited liability, perpetuity and the like." Id. (citations omitted). The Court continued:

> Many close corporations are really partnerships, between two or three people who contribute their capital, skills, experience and labor. Just as in a partnership, the relationship among the stockholders must be one of trust, confidence and absolute loyalty if the enterprise is to succeed.

Id. at 587 (citation omitted).

The Court recognized that while the corporate form provides advantages for the stockholders, it also provides an opportunity for the majority stockholders to disadvantage stockholders by a variety of oppressive devices, termed freeze-outs, such as refusing to declare dividends, draining the corporation's earnings in the form of exorbitant salaries and bonuses to the majority shareholders or depriving minority shareholders of corporate officers and employment by the company. Id. at 588 (citing Note, Freezing Out Minority Shareholders, 74 Harv. L. Rev. 1630 (1961).) The Court noted:

> Thus, when these types of 'freeze-outs' are attempted by the majority stockholders, the minority stockholders, cut off from all corporation-related revenues, must either suffer their losses or seek a buyer for their shares. Many minority stockholders will be unwilling or unable to wait for an alteration in majority policy. Typically, the minority stockholder in a close corporation has a substantial percentage of his personal assets invested in the corporation. The stockholder may have anticipated that his salary from his position with the corporation would be his livelihood. Thus, he cannot afford to wait passively. He must liquidate his investment in the close corporation in order to reinvest the funds in income-producing enterprises.

Id. at 590-591 (citation omitted).

Unlike a partner, who may seek dissolution of the partnership at any time, the minority stockholder may be immured in a disadvantageous situation. Thus, the Massachusetts Supreme Judicial Court, as well as the majority of other courts, have held majority shareholders, like partners, owe a fiduciary obligation to the minority shareholders. Id.; 18A Am. Jur.2d Corporations § 637.

The Court believes that if the question were squarely presented, the New Hampshire Supreme Court would find that majority shareholders owe an actionable fiduciary obligation to minority shareholders.[2] The affidavits filed by the parties plainly

[2] The New Hampshire Supreme Court referred to a corporate freeze-out as a tort claim. Thorndike, 154

establish that a genuine issue of material fact exists as to whether or not a Breach of Fiduciary Duty owed by Gould to Meehan has occurred.[3] Accordingly, Meehan's allegations plainly set forth a Breach of Fiduciary Duty claim against Gould, the majority shareholder and summary judgment on Count I must be DENIED.

B

With this background, the Court turns to Meehan's claim for Breach of Contract. Meehan has brought a separate count for Breach of Contract, and a count for Breach of the Implied Covenant of Good Faith and Fair Dealing. However, in the circumstances of this case, the cause of action is one and the same.[4]

The law does not favor contracts for lifetime employment. The New Hampshire Supreme Court has never explicitly stated this, but the United States District Court for the District of New Hampshire recently noted the prevailing view it believed was applicable under New Hampshire law. It stated that such contracts are "out of the

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N.H. at 446.

[3] Although the Court finds that Meehan's affidavit establishes genuine issues of material fact, Meehan asserts that "due to extended negotiations discovery was put on hold until fairly recently" and that he is "being required to respond to defendants' motion without the benefit of responses to interrogatories, or request for production or deposition testimony, a tactic that would be precluded for this action pending in federal court. 'Federal Rule of Civil Procedure 56 bars motions for summary judgment until discovery is closed; here discovery has just begun'" Pl.'s Mem. at 1. In fact, under Fed. R. Civ. P. 56 (d), a party seeking to avoid summary judgment on the grounds discovery is incomplete must provide the court with an explanation as to why the information is not available. A similar provision appears in RSA 491-a: 8, II.

[4] "In every agreement, there is an implied covenant that the parties will act in good faith and fairly with one another. " Livingston v. 18 Mile Point Drive, Ltd., 158 N.H. 619, 624 (2009). But, the implied covenant of good faith and fair dealing is not a separate cause of action; rather it is a description of the obligations the common law imposes on parties to a contract. The seminal distillation of the doctrine from traditional common-law contract law appears in Judge Souter's opinion in Centronics Corporation v. Genicom Corporation, 132 N.H. 133 (1989). There is not "one rule of implied good faith duty in New Hampshire's law of contract, but a series of doctrines, each of them speaking in terms of an obligation of good faith but serving markedly different functions." Id. at 139. An implied duty exists in three distinct categories of contract cases: those dealing with standards of contract and contract formation, with termination of at will employment contracts, and with limits on discretion in contractual performance. To the extent the implied covenant doctrine applies, it is merely another way of alleging that the Defendant breached the employment contract the Plaintiff had with Flatbread Inc.

ordinary" and that "an offer of lifetime employment must be expressed in clear and unequivocal terms to be enforceable." Holland v. Chubb America Service Corporation, 944 F. Supp. 103, 107 (D.N.H. 1996); see also Piascik-Lambeth v. Textron Auto. Co., 2000 WL 1875873, at *9 (D.N.H. Dec. 22, 2000). This is so because the concept of lifetime employment is "at variance with general usage and sound policy, because such contracts are, in practical effect, unilateral undertakings by the employer to provide a job for so long as the employee wishes to continue in it" despite the fact that the employee is free to terminate it at will. Morro v. DGMB Casino, LLC, 112 F.Supp.3d 260, 277 (D.N.J. 2015).

However, Meehan does not claim he had a contract for lifetime employment as an employee. Rather, he asserts that he "seeks to reap the same benefits of an oral agreement by which each partner would take the same amount characterized as salary, although that sum was unrelated to services rendered." (Defs.' Mem. at 3, 10.) Defendants assert that such an agreement would be unenforceable as violative of the Statute of Frauds, RSA 506:1. But, Meehan claims that he has already performed under the agreement. New Hampshire has long recognized that the partial performance doctrine is a judicial device intended to prevent the Statute of Frauds from doing grave injustice. See Greene v. McLeod, 156 N.H. 724, 728 (2008). Partial performance effectively withdraws contracts from the operation of the Statute of Frauds when application of the statute would result in fraud or irreparable injury on the part of the person who has performed his part of the agreement. Ross v. Ross, 170 N.H. 331, 340 (2017). The Statute of Frauds is not available to Defendants.

Even if Meehan's claim were characterized as a contract of employment for as long as he chose to remain employed, Defendants are not entitled to summary

judgment. Courts generally recognize that while some shareholders in corporations "receive a return on their investment purely from the increased value of their shares, others recoup their original investment and return on their investment in the form of salaries and benefits." Simms v. Exeter Architectural Products, Inc., 868 F. Supp. 677, 682 (M.D.Pa. 1994). The Simms court cited an earlier edition of O'Neal and Thompson's Close Corporations and LLCs: Law and Practice with approval:

> Unlike the typical shareholder in the publicly held corporation, who may be simply an investor or a speculator and cares nothing for the responsibilities of management, the shareholder in a close corporation is a co-owner of the business and wants the privileges and powers that go with ownership. His participation in that particular corporation is often his principal or sole source of income. As a matter of fact, providing employment for himself may have been the principal reason why he participated in organizing the corporation. He may or may not anticipate an ultimate profit from the sale of his interest, but he normally draws very little from the corporation as dividends. In his capacity as an officer or employee of the corporation, he looks to his salary for the principal return on his capital investment[.]

Simms, 868 F. Supp. at 682 n.1 (citing O'Neal, Close Corporations [2d ed.], § 1.07 at 21–22 [n. omitted].)

More recently, courts have held that the doctrine of the employment-based shareholder oppression is distinct from the wrongful termination doctrine. The analysis under the separate doctrines should attempt to protect close corporation employment and, at the same time, respect the legitimate sphere of the at-will rule. Gunderson v. Alliance of Computer Professionals, Inc., 628 N.W.2d 173, 190 (Minn. Ct. App. 2001**);** see also Kortum v. Johnson, 755 N.W.2d 432, 441 (N.D. 2008). Numerous courts have recognized that the nature of the employment of a shareholder in a closely held corporation may lead a reasonable expectation by the employee owner of any employment is not terminable at will. Pedro v. Pedro, 489 N.W.2d 798, 803 (1992); see generally, Majority's Fiduciary Obligation to Minority Shareholder of Close Corporation-Breach and Remedy, 39

A.L.R.6th 1 (Originally published in 2008). This recognition is based on the fact that "[u]nderstandably, a person may be unwilling to embark personal savings in a new enterprise unless assured of a continuing voice in the management of the business, and may be unwilling to give up present employment with accumulated pension rights if employment by the new company can be easily terminated." O'Neal and Thompson's Close Corporations and LLCs: Law and Practice § 6.2 (Rev. 3rd Ed 2019). Here it is true that Meehan did not invest capital into the business, but Defendants concede that he has invested sufficient time in the company to obtain a 30% ownership interest as a benefit associated with "sweat equity." (Defs.' Statement ¶ 4.) The law protects that expectation.

Of course, the majority shareholder must be given the ability to manage the business in the best interest of the corporation. Courts generally apply the so-called "business judgment rule" in such circumstances. See e.g. MPG Bedford, LLC v. KDG Bedford, LLC, 2018 WL 3968473 *3 (N.H.Sup. Aug. 13, 2018). The rule was codified by the legislature in RSA 304-C:109, which reads:

> Unless the operating agreement provides otherwise, there shall be a rebuttable presumption that a manager has not breached the manager's duty of care if, in the matter in question, the manager has acted:
>
> (a) In accordance with contractual good faith;
> (b) In a manner the manager reasonably believed to be in the best interest of the limited liability company; and
> (c) On the basis of reasonably adequate information.

The assertions of fact by the parties, made under oath, plainly puts in dispute whether or not Meehan's removal was in the best interest of the corporation and therefore proper. As the New Hampshire Supreme Court has recently noted, "the business judgment rule involves issues of fact that should generally be left to a jury." MPG Bedford, LLC v. KDG Bedford, LLC, 2018 WL 3968473 at*3. Therefore, the

Defendants' Motion for Summary Judgment with respect to Counts II and III of the complaint must be DENIED.

C

Finally, in Count IV of the Complaint, Meehan has alleged Interference with Advantageous Contractual Relations. Although Defendants have moved for summary judgment on this claim, they have not briefed that part of the Motion. Similarly, Meehan has not briefed the issue in his Objection.

"To establish liability for intentional interference with contractual relations, a plaintiff must show: (1) the plaintiff had an economic relationship with a third party; (2) the defendant knew of this relationship; (3) the defendant *intentionally* and *improperly* interfered with this relationship; and (4) the plaintiff was damaged by such interference." Hughes v. New Hampshire Division of Aeronautics, 152 N.H. 30, 40–41 (2005); Singer Asset Finance Co., LLC v. Wyner, 156 N. H. 468, 477 (2007). Meehan's allegations, taken as they must be, in the light most favorable to him as the nonmoving party, are clearly sufficient to defeat a claim for summary judgment. Accordingly, Defendants' Motion for Summary Judgment with respect to Count IV is DENIED.

SO ORDERED

7/31/19
_____
DATE

s/Richard B. McNamara
_____
Richard B. McNamara,
Presiding Justice

RBM/