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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

FILED

DIVISION FOUR

MAY 24 1993

Court of Appeal - First App. Dist
RON D. BARROW

MALINDA CHAN,

Plaintiff and Respondent,

v.

WILLIAM J. SHORT,

Defendant and Appellant.

By _____
A057344 ^{DEPUTY}

(Alameda Super. Ct.
No. H-147308-5)

The judgment before this court reflects the bitter breakup of Nic-Ware Inc., a domestic corporation engaged in computer manufacture. Nic-Ware had only two directors, two officers, and two shareholders. Defendant William J. Short was a director and chief executive officer as well as secretary; plaintiff Malinda Chan was a director and the chief financial officer. Each owned 50 percent of the corporation's outstanding stock. Nic-Ware's implosion began when defendant purported to terminate plaintiff's employment and oust her from her corporate positions.

A jury having returned a verdict against him, defendant appeals from the amended judgment ordering him to pay plaintiff the sum of \$170,744.97. He has chosen to do so, however, with no reporter's transcript of what occurred at the trial. With only a clerk's transcript for a record, this is in effect a judgment roll

appeal (Kopf v. Milam (1963) 60 Cal.2d 600, 601), which requires us to indulge every conceivable presumption and inference in support of the judgment's validity. (Wheelright v. County of Marin (1970) 2 Cal.3d 448, 454; California School Employees Assn. v. King City Union Elementary School Dist. (1981) 116 Cal.App.3d 695, 702.) This places defendant at a well-nigh insurmountable disadvantage in pressing any claim of error which involves any consideration of evidence. For example, defendant challenges the trial court's ruling granting plaintiff leave to amend her complaint to conform to the proof presented at the trial. That ruling "is a matter placed within the sound discretion of the trial judge and his exercise thereof will not be disturbed on appeal absent a showing that there has been an abuse of discretion." (Godfrey v. Steinpress (1982) 128 Cal.App.3d 154, 174.) It should be as clear as day that as we do not know what was the proof adduced at trial, we cannot know whether allowing amendment in conformity therewith amounts to an abuse of discretion.

With the limitations of our review established, we proceed to the merits of defendant's contentions. We start with his claim that the amended judgment should never have been entered.

Shortly after the jury returned its verdicts, and pursuant to stipulation by the parties, the court made an "Order Re Dissolution and Injunctive Relief" authorizing the process of winding up the affairs of Nic-Ware. Defendant now claims this was a final judgment, which he takes to mean that the court lacked

jurisdiction to enter the amended judgment for damages thereafter. By invoking the so-called "one final judgment" rule, defendant fails to appreciate that it involves a principle of appellate procedure (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 43, pp. 66-67), and not an ironclad limitation of trial court powers. Thus, while it is true that a decree for a corporation's dissolution has been treated as appealable (Reynolds v. Special Projects, Inc. (1968) 260 Cal.App.2d 496, 499-501), the order in this case does not meet the statutory definition of a judgment as "the final determination of the rights of the parties" (Code Civ. Proc., § 577) because the demise of Nic-Ware would have no effect on the liability defendant had already been found to have to plaintiff. Moreover, the order itself belies defendant's construction of it: it includes a provision enjoining defendant and others from committing certain acts "pending the final winding up of the corporation's affairs and the entry of a final judgment." (Emphasis added.) It is thus apparent that the order was intended to be interlocutory, and not the final judgment adjusting all rights and liabilities between plaintiff and defendant.

With it now established that the provisions of the amended judgment are properly before us for review, we move to the merits of plaintiff's challenge to the judgment entered on the jury's verdicts.

The jury awarded plaintiff \$47,066 on her cause of action for defendant's wrongful termination of her employment. Defendant

contends that because any implied contract of continued employment plaintiff may have had was with Nic-Ware, not him, he cannot be assessed damages for terminating plaintiff's employment. There is an undeniable allure to this reasoning, but it does not withstand scrutiny.

As an officer of Nic-Ware, plaintiff could not be discharged except by a vote of the board of directors. (Corp. Code, § 312, subd. (b).) The jury was so instructed by the trial court. In accordance with the rules governing this judgment roll appeal, we must assume that there was evidence that no such vote occurred. This conclusion suffices to establish liability for wrongful termination, but there remains to be demonstrated why defendant should be liable.

On the first day of trial Nic-Ware appeared with counsel, but the corporation was dismissed immediately after the jury was selected. There are hints that Nic-Ware's departure was accompanied by a stipulation from defendant that he would in effect substitute for Nic-Ware. In the absence of a reporter's transcript detailing the precise nature of the stipulation, we can and do assume that it was to this general effect, merging and subsuming Nic-Ware in defendant for purposes of the case as it went to the jury. This could account for the near-total lack of mention of Nic-Ware in the court's instructions, an omission that would otherwise be troubling and inexplicable. Further explanations are conceivable. It is the rule that "Corporate officers and directors cannot ordinarily be held personally liable

for the . . . obligations of their corporation. However, they may become liable if they directly authorize or actively participate in wrongful or tortious conduct." (Taylor-Rush v. Multitech Corp. (1990) 217 Cal.App.3d 103, 113.) It is not unimaginable that, with respect to a corporation that seems to have involved only two persons not particularly fastidious about corporate formalities, evidence may have been produced that defendant played a dominant if not domineering role in halting plaintiff's employment with Nic-Ware. In light of all of these possibilities--none of which can be disproven on this record as a matter of law--we can have no confidence in striking this award by the jury.

The most intriguing argument is the one defendant makes against the jury's award of \$113,678.97 for his "breach of fiduciary duty." As set forth in plaintiff's second amended complaint, the general basis for this cause of action was defendant using corporate funds for personal purposes. Defendant argues that plaintiff is essentially alleging misappropriation of corporate assets, which must be subject of a shareholder derivative suit (see Corp. Code, § 800) on behalf of the corporation. This is defendant's way of asserting that he owed no fiduciary duty to plaintiff, who "lacks standing to sue in her individual shareholder capacity" and has thus failed to state a cause of action. In short, defendant is contending that plaintiff could not recover damages for what amounted to injury done to Nic-Ware.

The gravamen of defendant's position was sustained by the

trial court in connection with defendant's motion for a new trial. In its order granting the motion only as to this cause of action, the court stated: "[W]hen Short wrongfully used Nic-Ware's corporate earnings to pay his personal expenses, he was breaching his [fiduciary] duty to the corporation. See 9 Witkin, Calif. Law (3d ed. 1985) Corporations, § 181. The resulting injury is to the corporation and only the corporation may recover for this breach. Id. The evidence presented by Chan indicated the amount paid from the corporate treasury to cover Short's personal expenses was \$113,678.97. The jury instructions read, 'Directors owe a duty of highest good faith to the corporation and its stockholders. A director cannot, at the expense of the Corporation, make an unfair profit from his position'. This could be interpreted to indicate that Plaintiff Chan, as a stockholder, should be allowed to recover directly for Short's misappropriation of corporate funds. As noted above, this is not a correct statement of the law. The jury awarded Chan compensatory damages of \$113,678.97, the exact amount which Chan claimed Short had misappropriated. This indicates the jury award was erroneous. [¶] The court determines that the jury found Defendant Short misappropriated Corporate funds in the amount of \$113,678.97 for his personal use. Of this amount, Plaintiff Chan is entitled to half, or \$56,839.49, as a 50% shareholder of Nic-Ware. [¶] . . . For the foregoing reasons, the compensatory damages to be recovered by Plaintiff Chan for breach of fiduciary duty are reduced from \$113,678.97 to \$56,839.49, and the motion is

otherwise denied."

It appears, however, that this halving of plaintiff's recovery is not reflected in the amended judgment, probably because the purported grant of a new trial was ineffective because the trial court had lost jurisdiction to rule on the motion. (The notice of motion was filed on November 20, 1991. The trial court had only 60 days thereafter to rule on the motion (Code Civ. Proc., § 660), but its order purporting to grant the motion was not filed until February 28, 1992.) The trial court's reasoning is sound, and we agree with it. The reduction will be implemented by modifying the judgment.

The third part of the judgment is the jury's award of \$10,000 exemplary damages on plaintiff's seventh cause of action for false arrest. Because defendant makes no argument in his briefs concerning this award, this portion of his appeal from the entire judgment will be deemed abandoned. (Trailer Train Co. v. State Bd. of Equalization (1986) 180 Cal.App.3d 565, 576, fn. 6.)

In addition to the judgment, defendant also appeals from the order denying his motion to tax plaintiff's costs. The order is appealable (Catello v. I.T.T. General Controls (1984) 152 Cal.App.3d 1009, 1012, fn. 2), but defendant presents no argument as to it in his briefs. This portion of defendant's appeal will therefore be deemed abandoned (Trailer Train Co. v. State Bd. of Equalization, supra, 180 Cal.App.3d 565 at p. 576, fn. 6) and the order summarily affirmed. (Remillard Brick Co. v. Remillard-Dandini (1952) 109 Cal.App.2d 405, 424.)

The amended judgment entered on June 19, 1992, is modified to show that plaintiff shall recover \$56,839.49 on the fifth cause of action. As so modified, the judgment is affirmed. The order denying the motion to tax costs is affirmed. The parties shall bear their respective costs of appeal.

Poché, J.

WE CONCUR:

Anderson, P.J.

Reardon, J.

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