COURT OF APPEALS
DECISION
DATED AND FILED

March 21, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2425 **Cir. Ct. No. 2010CV2873**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

ROBIN BERNDT AND CHRIS GRETZINGER,

PLAINTIFFS-APPELLANTS,

V.

RYAN BERNDT, SARAH MATTISON AND HYBRID FITNESS, LLC,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: JUAN B. COLÁS, Judge. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Robin Berndt and Chris Gretzinger appeal a summary judgment in favor of Ryan Berndt, Sarah Mattison, and Hybrid Fitness, LLC, dismissing causes of action alleging violations of fiduciary duty under WIS.

STAT. § 183.0402(1)(a),[1] and the implied duty of good faith and fair dealing. We affirm.

¶2 Hybrid Fitness was formed in 2009, as a fitness facility, with a restaurant named Fit Fresh Cuisine located within the facility. Robin and Chris each owned twenty-four percent of the company, Sarah owned twenty-five percent, and Ryan owned twenty-seven percent.

¶3 All four members of the company performed regular work for the facility. Robin was a personal trainer, group fitness director, and Pilates instructor. Chris handled maintenance, front desk staffing, accounting, cleaning, membership services, and marketing. Ryan provided personal training, rehabilitation services, and program development. Sarah primarily operated the Fit Fresh restaurant.

¶4 The members of the company entered into an operating agreement that established, among other things, a purchase option under which members could purchase the ownership units of another member in the event of a "default," which included "any breach of the agreements or provisions contained in this Agreement."

¶5 In January 2010, Sarah learned of an opportunity to open a new Fit Fresh location to provide food services at an outpatient facility for Dean/St. Mary's. A deterioration of the members' professional relationship

[1] References to the Wisconsin Statutes are to the 2011-12 version unless otherwise indicated.

followed. In March 2010, Ryan and Sarah voted to suspend Robin and Chris as employees of Hybrid Fitness, and soon after they were terminated.

¶6 In April 2010, Robin and Chris received letters notifying them of Ryan and Sarah's intent to exercise the option to purchase their ownership units for violating the operating agreement. In particular, Ryan and Sarah alleged that Robin had: (1) misrepresented her marital status on bank loan documents; (2) failed to disclose liens against equipment that she contributed to the LLC; and (3) taken early owner's draws from Hybrid Fitness. It was also alleged that Chris had: (1) destroyed Hybrid Fitness accounting records and emails; (2) provided Robin with early owner's draws; (3) made payments from Hybrid Fitness's accounts on Robin's behalf to a creditor that financed Robin's Pilates beds; and (4) failed to inform other members that Hybrid Fitness had not paid its sales taxes on a timely basis.

¶7 In May 2010, Fit Fresh, LLC was formed, with Hybrid Fitness as the sole member, to operate the new restaurant at Dean/St. Mary's. Ryan and Sarah proceeded with a purchase of Robin's and Chris's ownership interests, effective May 28, 2010.

¶8 On May 27, 2010, Robin and Chris commenced an action seeking declaratory judgment and injunctive relief preventing Sarah and Ryan from carrying out the purchase of their ownership units. The circuit court denied a request for a temporary injunction. An amended complaint was filed seeking declaratory judgment, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, and unjust enrichment.

¶9 The circuit court held a summary judgment hearing and granted summary judgment, dismissing the claims for declaratory judgment and unjust

enrichment. In a subsequent written decision, the court granted summary judgment dismissing the claims for breach of good faith and fair dealing, and breach of fiduciary duty. This appeal follows.

¶10 The methodology for summary judgment is well known and will not be fully repeated. We review summary judgment independently, applying the same standards as the circuit court. *See* ***Green Springs Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). The moving party is entitled to summary judgment if there is no genuine issue as to any material fact and that party is entitled to judgment as a matter of law. ***Id.*** at 315.

¶11 On appeal, Robin and Chris argue that summary judgment was erroneously granted on the breach of good faith and fair dealing claim because genuine issues of material fact exist as to the motivation for purchasing their shares. Robin and Chris concede the operating agreement "did indeed authorize Members to purchase the ownership units of other Members in the event of 'any breach of the agreements or provisions contained in this Agreement.'" Nevertheless, they insist their breaches were "wholly immaterial and resulted in no actual harm to Hybrid Fitness." Furthermore, they contend the manner in which Ryan and Sarah acted on their breaches "raises further suspicions about their true reasons for first terminating Robin and Chris and then repurchasing their ownership shares."

¶12 Wisconsin law recognizes that "[e]very contract implies good faith and fair dealing between the parties to it, and a duty of cooperation on the part of both parties." ***Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.***, 146 Wis. 2d 568, 577, 431 N.W.2d 721 (Ct. App. 1988) (quoting another source). But Robin and Chris complain of acts specifically authorized in the operating agreement and,

therefore, they may not claim a "bad faith" breach of that agreement. *See* ***id.*** at 577-78.

¶13 Here, it is undisputed that Robin and Chris were removed as members and employees in accordance with the operating agreement. The operating agreement also specifically authorized Ryan and Sarah to purchase Robin's and Chris's ownership interests in Hybrid Fitness at the "Determined Value." The operating agreement defined "Determined Value" as "equal to 100% of the Company's earnings before interest and taxes for a period of one year prior to the date of the purchase option." It is undisputed that at the time of the buyout the determined value was zero dollars.

¶14 Nevertheless, Robin and Chris contend the operating agreement required the unanimous consent of the members to "issue additional Units to a new or existing Member." This argument is a non-starter. The company did not issue "additional Units" to Ryan and Sarah. And as mentioned, Robin and Chris concede the operating agreement specifically provided that if any member "commits any breach of … this Agreement (the occurrence of any such event being referred to as a 'Default'), then the Company and the other Members shall have the option to purchase all or any portion of the Units owned by such Member in Default, as provided in Article X."

¶15 Robin and Chris insist Wisconsin case law "has recognized a cause of action for breach of the covenant of good faith and fair dealing when a party takes an action technically allowed by contract in order to avoid paying another party a benefit called for by that contract." In this regard, Robin and Chris misplace reliance on ***Phillips v. U.S. Bank, N.A.***, 2010 WI App 35, 324 Wis. 2d

151, 781 N.W.2d 540, *aff'd by an equally divided court*, 2010 WI 131, 329 Wis. 2d 639, 791 N.W.2d 190.

¶16 ***Phillips*** held that an employer who fires an at-will-employee to avoid paying the employee accrued benefits must still pay those benefits "if it fired her in order to not pay her." ***Id.***, 324 Wis. 2d 151, ¶8. In ***Phillips***, we extended to employment law a doctrine of agency law adopted in ***Leen v. Butter Co.***, 177 Wis. 2d 150, 153, 501 N.W.2d 847 (Ct. App. 1993), that "a principal cannot avoid paying commissions by merely terminating the agency." *See* ***id.***, ¶7 (quoted source omitted).

¶17 However, as the circuit court correctly observed:

> The present case is not one of an agent suing a principal, or an employee suing an employer for terminating the relationship to avoid paying benefits or compensation previously earned. It is a case of co-owners of a business suing other co-owners for expelling them and depriving them not of an accrued benefit, but of their ownership interest and potential future profits. When the terms of the operating agreement were complied with and sufficient grounds for termination of the ownership under the operating agreement existed, as in this case, the defendants' motives in exercising their prerogatives under the agreement are not material.

¶18 In addition, ***Phillips*** involved a dispute as to whether there was a bona fide reason for the deprivation of contractually accrued benefits. ***Id.***, ¶8. In the present case, there is no dispute that Robin and Chris committed violations that constituted a default under the operating agreement, thus triggering the agreed upon option to purchase. Accordingly, Robin and Chris have not demonstrated a genuine issue of material fact. The circuit court properly granted summary judgment on the cause of action for breach of the duty of good faith and fair dealing.

¶19 Robin and Chris also argue that Ryan and Sarah breached fiduciary duties under WIS. STAT. § 183.0402(1)(a), which provides "[n]o member or manager" of a limited liability company "shall act or fail to act in a manner that constitutes" a "willful failure to deal fairly with the limited liability company or its members in connection with a matter in which the member or manager has a material conflict of interest."

¶20 This argument is undeveloped and we shall not further consider this issue. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Robin and Chris fail to explain why they believe there was a material conflict of interest. They merely argue:

> [R]esolution of this action requires a determination of whether: (1) Ryan and Sarah had a material conflict of interest in the creation of Fit Fresh, LLC and the repurchase of Appellants' ownership rights for zero compensation; and (2) whether Ryan and Sarah willfully failed to 'deal fairly' with Robin and Chris in carrying out these actions.

In any event, the expansion into Dean/St. Mary's was consistent with the business plan for Hybrid Fitness, and the purchase of Robin's and Chris's ownership interests was authorized by the operating agreement.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.