

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-017992

10/20/2017

HONORABLE DAWN M. BERGIN

CLERK OF THE COURT
S. Ortega
Deputy

PETER ANTHONY SHELBO

MICHAEL E GERITY

v.

BONNIE JO BROOKS, et al.

JESSICA POST

UNDER ADVISEMENT RULING

Background

This case involves a dispute between ex-spouses Plaintiff Peter Shelbo and Defendant Bonnie Jo Brooks over the dissolution of a business they owned, Tour West America, LLC (the “Company.”) Each party held a 50% membership interest from the Company’s inception through Defendant’s purchase of the Company in May 2017.

After experiencing marital difficulties, the parties separated in June 2014. Plaintiff filed for divorce on October 21, 2014, and the divorce was finalized on January 13, 2015. The parties continued to operate the business, however, maintaining their respective 50% ownership interests. Personal and business disputes escalated between the parties, and on or about October 6, 2016, Defendant locked Plaintiff out of the business. As a result, he had no access to the accounting system.

Plaintiff filed the Complaint in this case on December 14, 2016, alleging breach of fiduciary duty and seeking an accounting and dissolution of the Company. Both parties recognized that they would need to either sell the Company to a third party or one would need to buy the other out. They reached a stipulation whose primary terms were that each party would submit a buyout bid *ex parte* to the Court, the Court would identify who submitted the higher bid, and that party would buy the other out for the bid amount.¹ The bids were submitted on

¹ There were numerous other requirements and conditions with respect to funding and payment of the bid amount, all of which are not material here.

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April 26, 2017. Defendant was the high bidder. The Court understands that the closing occurred sometime in May 2017.

The stipulation also provided for the submission of requests to the Court for compensation for items related to pre-sale operation of the business. The parties set aside \$100,000 in an escrow account to cover any such items.

In making the findings contained herein, the Court has considered the following:

- The pleadings and orders entered in the case;
- Plaintiff's Brief Regarding Disposition of Company Funds Prior to Sale filed on June 16, 2017, and Defendant's Response filed on July 14, 2017;
- Defendant's Brief Regarding Outstanding Issues filed on June 16, 2017, and Plaintiff's Response filed on July 14, 2017;
- All exhibits included with the briefing; and
- The oral arguments presented at the August 21, 2017 hearing.

Analysis

Plaintiff seeks: (1) reimbursement in the amount of \$75,743.30 for "excess" compensation" paid to Defendant; (2) a ruling that Defendant must indemnify him for any personal tax liability resulting from Defendant's "inexcusable" handling of tax matters; and (3) return of certain personal property. Defendant seeks reimbursement for: (1) an alleged improper bonus of \$14,000 paid to Defendant; (2) an \$80,093 "Advance to GM" credit entry made by Plaintiff; and (3) an allegedly unauthorized \$25,000 dividend paid to Plaintiff.

A key threshold issue is whether the parties or the Company is entitled to reimbursement of any improper expenses charged by either party to the Company. Plaintiff takes the position that he is entitled to 100% of any improper personal expenses charged by Defendant pre-sale. Defendant contends that any reimbursements of personal expenses charged by her to the Company pre-sale (if any) must be paid to the Company based on its current membership composition—*i.e.*, a 100% membership held by her.

Neither position withstands scrutiny. Defendant is correct that any reimbursements would be property of the Company. However, they must be attributed to the Company as it existed pre-sale, when each party held a 50% membership. If the Court adopted Defendant's

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position, she would be repaying a company owned solely by her for improper expenses charged when Plaintiff owned 50% of it. Plaintiff's position is untenable exactly because he owned only 50%. Thus, he would have only a 50% interest in any funds coming into the Company. The Court therefore determines that Plaintiff is personally entitled to 50% of any amounts the Court determines that Defendant owes the Company.

Defendant has also responded to several of Plaintiff's challenges by attesting that she reimbursed the Company for the expenses or that she will do so. But, based on the Court's assessment of the allocation of reimbursements, any payments by Defendant post-sale simply do not count.

A. Personal Compensation

Another threshold issue involves how to address the parties' personal compensation. Defendant contends that throughout their ownership of the Company, they were to receive equal compensation. She provides documentation from 2013 and 2014 demonstrating that Defendant received substantially more than she did. However, as Plaintiff points out, any compensation received prior to the parties' divorce would have been community property and addressed in the family court proceedings. The decree was not provided to the Court, but Defendant presented no evidence that the pre-divorce compensation was not incorporated into the decree, and it makes sense that it would have been. The Court will therefore limit its analysis of personal compensation to 2015 and 2016.

The parties also dispute whether they agreed that each party should receive equal compensation. Plaintiff contends that because he was shouldering the bulk of the work, he and Defendant agreed that he was entitled to \$26,000 more than Defendant in 2016. Defendant disputes that she ever agreed to such an increase, and maintains that the agreement had always been that they would receive equal pay. Because all the Court has are conflicting declarations of the parties and *ad-hominem* attacks on each other's characters, the Court will assume that the parties were entitled to equal pay.

According to the W-2's provided, Plaintiff received \$130,000 in 2015 and \$147,000 in 2016, for a total of \$277,000. Defendant received \$104,000 in 2015 and \$171,000 in 2016, for a total of \$275,000. Defendant was therefore undercompensated by \$2,000.

B. Expenses/Payments

The parties identify the following improper payments/personal expenses for which they claim they are entitled to reimbursement.

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1. Defendant's July 14, 2014 Withdrawal of \$20,000

Defendant withdrew \$20,000 in Company funds in July 2014 after she learned that Plaintiff had charged the Company \$20,000 for adult pornography he purchased. However, Plaintiff presented evidence that he repaid the charges for adult pornography. Defendant presented no evidence that she did the same, nor did she directly address the issue in her response. The Court therefore finds that Plaintiff is entitled to half of the \$20,000 withdrawal, or \$10,000.

2. Tour West Capital Account/ Defendant's \$25,000 Dividend

The parties used the Company's "capital account" to charge personal expenses that were to be repaid later. Plaintiff contends that he used the \$25,000 dividend that Defendant challenges to repay his part of the capital account, bringing the balance to zero. Defendant did not reimburse the Company for all of the items in her part of the capital account charged prior to the sale. Her capital account carries a balance of \$32,287. Plaintiff denies that he was not entitled to the dividend, but argues that even if the Court were to find that he should not have received it, it should be credited against the outstanding balance in Defendant's capital account. The Court agrees with this approach. Thus, the balance after the credit would amount to \$7,287. Plaintiff is entitled to half of that, or \$3,928.

3. Defendant's Surgery and Payment to Personal Attorney

Defendant charged \$1,797 to the Company for the cost of a November 12, 2016 surgery. She also charged \$6,582 to the Company on December 23, 2016 for the services of her personal attorney. Defendant presented a Declaration from the Company's bookkeeper, Gary Guldalian, attesting that she repaid these charges on February 3, 2017. Further, the charges and corresponding payments are reflected in Defendant's capital account ledger. Plaintiff is therefore entitled to no reimbursement for these charges.

4. Paving of Yuma Parking Lot

In December 2016, Defendant charged the Company \$7,480 for the paving of a parking lot in Yuma in which only Defendant had an ownership interest. Plaintiff argues that this was an improper expense and he is entitled to reimbursement for it. Defendant points out that the Company's buses regularly used the lot and therefore contributed to the damage/wear-and-tear that needed to be repaired. The Court will attribute half of the cost, or \$3,740, to the Company. Plaintiff is entitled to 50% of that, or \$1,735.

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5. Gifts Purchased by Defendant in Hawaii

On January 30, 2017, while she was in Hawaii, Defendant charged the Company \$1,628.98 for “gifts for employees.” Plaintiff claims that the Company had no business in Hawaii and Defendant has provided no documentation to support the charge as a legitimate business expense. Defendant responds that if she did purchase gifts for employees, the purchase was properly classified as a business expense, and that if the amount does include personal items, she will reimburse the Company for them. This response is insufficient. Plaintiff is therefore entitled to \$815.

6. Costco Supplies

Plaintiff challenges Defendant’s charges of \$4,754.13 for supplies from Costco over a three-month period, arguing that the charges far exceed what would be needed for Company business. Defendant responds that the purchases included some office furniture, but admits that the amount also includes personal items, which she says she will repay. She fails to identify the amount attributable to personal items, however. The Court will therefore allocate \$1,000 to Company expenses and \$3,754.13 to personal items. Plaintiff is entitled to 50% of that, or \$1,877.

7. Microsoft Purchase

Plaintiff challenges a charge of \$3,310.35 to Microsoft, which he claims Defendant has failed to demonstrate is a legitimate business expense. Defendant avows that the charge was for the purchase of a computer she intends to use to work from home. The Court finds that Plaintiff is not entitled to any reimbursement for this expense/purchase.

8. Blueraven Purchase

The records reflect a charge of \$909.70 for a purchase from Blueraven. Defendant states that she has been unable to determine what the charge is for, but if she discovers after further investigation that it qualifies as a personal expense, she will reimburse the Company. For the reasons set forth above, the Court will not allow future payments to a company owned solely by Defendant to operate as a credit against improper charges incurred pre-sale. Plaintiff is therefore entitled to \$455 for the Blueraven purchase.

9. Bonuses Prohibited by Court Order.

In February 2017, Defendant paid herself \$14,000 in bonuses in violation of a court order. Defendant is entitled to reimbursement for half of that, or \$7,000.

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10. Defendant's Travel Agency Payroll

Defendant owns a separate travel agency. She and Plaintiff agreed that payroll for that agency could be charged to the Company, but would have to be repaid by Defendant. In March 2017, travel agency payroll in the amount of \$2,961.45 was charged to the Company. Defendant responds that she reimbursed the Company for this expense on May 31, 2017, post-sale. Plaintiff is therefore entitled to \$1,481 for this item.

11. Compass Bank Appraisal Fee

On February 17, 2017, Defendant charged the Company \$1,914.47 for an appraisal fee in connection with the funding of a loan that she intended to use to buy Plaintiff out. She responds that this charge will be deducted from her July 21, 2017 paycheck. Again, post-sale repayments don't count for purposes of pre-sale personal expenses. Plaintiff is therefore entitled to \$957 for this appraisal fee.

12. Alliance Bank Appraisal Fee

On March 30, 2017, Defendant charged \$6,000 to the Company for an appraisal performed by Alliance Bank. Plaintiff contends that the appraisal was done for the benefit of Defendant not the Company. Defendant claims that the appraisal was done to prepare the business for sale and is therefore a legitimate business expense. The timing of the payment undermines Defendant's claim, however. On March 9, 2017, the parties filed a Status Report to the Court outlining the agreement they reached on the secret bid process. The Court cannot find that the cost of an appraisal three weeks later without Plaintiff's knowledge qualifies as a Company expense. Plaintiff is therefore entitled to \$3,000 for this item.

13. Plaintiff's \$14,000 bonus

Plaintiff received a unilateral bonus of \$14,000 in December 2014. Defendant claims she did not agree to this bonus and seeks \$14,000 to compensate her for it. However, as noted above, pre-divorce compensation was presumably resolved by the family court.

14. The "Advance to GM"

Defendant seeks reimbursement for an \$80,093 "Advance to GM" credit entry made by Plaintiff on December 31, 2014. A note for the entry, which was added on February 23, 2015, states: "take as 2014 dividend." According to Defendant, this entry was made by Plaintiff to bring his "advance account" balance to zero, without the corresponding payment of any funds. The evidence to support this claim is negligible, however. The most Mr. Guldalian could testify

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to was that there was insufficient information to know how the money was used, and Plaintiff contended that the credit was rolled into the retained earnings account. Defendant has simply not provided sufficient evidence for the Court to award her any reimbursement for this credit.

The findings of the Court on all of the expense/payment items are set forth in the table below.

	Plaintiff	Defendant
Personal Compensation		\$2,000
Defendant's July 2014 Withdrawal of \$20,000	\$10,000	
Plaintiff Dividend/Defendant Capital Account	3,928	
Yuma Parking Lot Paving	1,735	
Hawaii Gifts	815	
Costco Supplies	1,877	
Blue Raven Purchase	455	
Bonuses Prohibited by Court Order	7,000	
Travel Agency Payroll	1,481	
Compass Appraisal Fee	957	
Alliance Appraisal Fee	3,000	
Total	\$31,248	\$2,000
Amount Due to Plaintiff: \$29,248		

C. Tax Responsibility

Plaintiff alleges that he may be subject to personal tax liability in the future as a result of the following actions taken by Plaintiff while she was solely in control of the Company: (1) blocking the purchase of a bus in 2016, which allegedly will result in approximately \$100,000 in tax liability for the Company; (2) failing to timely file tax returns or calculate the tax liability for the Company; and (3) failing to pay outstanding taxes when due. He therefore seeks an order from the Court requiring Defendant to indemnify him for any personal tax liability resulting from these actions. The Court declines to issue such a ruling.

First, Plaintiff claimed that the Company's accountant, Thomas Woods, Jr., also recommended the bus purchase. However, Mr. Woods stated in his declaration:

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I did not recommend that Tour West America purchase another motor coach in order to offset a tax liability for 2016. In my opinion, the decision whether to purchase a motor coach or other asset should be based on a business need, not solely because of a desire to reduce the taxes owed by a company.

Second, Plaintiff admits that it is unlikely that he, as a shareholder of the Company, would be personally responsible for any tax liability arising from the Company's 2016 operations. Further, Mr. Woods stated in his declaration: "[t]ax liability for Tour West America does not pass through to its shareholders. Accordingly, Tour West America – not its shareholders – will be responsible for paying any taxes, interest, or penalties for 2016."

Finally, the Court will not enter an order imposing liability for a future speculative event, particularly in the area of tax law, where it is impossible to predict what kind of action the tax authorities may take and the reasons for those actions. The Court would simply be inviting future litigation, and these parties need closure.

D. Personal Property

Plaintiff seeks return of: (1) a model yellow bus with a placard on the side that says, "Tour West America;" (2) the hard drive from the computer he used while at the Company; and (3) one half of the framed pictures in the office; and (4) an eagle plaque.

Plaintiff claims that Michael Krois delivered the model bus to him at a convention, "with the intent that he have it personally." However, the following factors weigh against a finding that the bus is Plaintiff's personal property: (1) the bus has the company logo on it; (2) the bus has been displayed in the front office of the Company (*i.e.*, used for business purposes); (3) Plaintiff did not produce a declaration from Mr. Krois that he intended it as a personal gift; and (4) that Krois gave the bus to Plaintiff at a convention suggests that it was for company use.

The Court finds that Plaintiff is not entitled to any Company-related material on the hard drive of the computer he used while working for the Company. Plaintiff claims that the drive also contains personal information and documentation, but he fails to identify any particular information or documentation. Consequently, the Court will not order the return of Plaintiff's hard drive.

Plaintiff requests half of the framed Lancer prints from the office, claiming that "Defendant asserts without basis that these prints are owned by the Company." The prints contain depictions of various types of motorized vehicles throughout history –*e.g.*, coaches, buses, cable cars. They reflect the theme of the business of Tour West America and have been

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used for Company purposes. The Court therefore declines to order the return of any of them to Plaintiff.

Defendant agrees that the eagle plaque belongs to Plaintiff, but states that she does not have it and does not know where it is. She agrees that if she locates the plaque, she will return it to Plaintiff. The Court declines to enter an order requiring return of an item that Defendant avows she is not in possession of.

For the reasons set forth above,

IT IS ORDERED that Defendant is entitled to \$29,248 from the escrow account established by the parties.

IT IS FURTHER ORDERED denying Plaintiff's request for a ruling requiring Defendant to indemnify him for any future personal tax liability that may result from Defendant allegedly blocking purchase of the buses, filing late tax returns or failing to pay outstanding taxes.

IT IS FURTHER ORDERED denying Plaintiff's request for return of the personal property itemized in his brief.

The Court understands that Plaintiff will collect the \$29,608 due him through the escrow account, and no judgment is necessary. It therefore appears to the Court that this ruling disposes of all remaining issues in the lawsuit.

IT IS THEREFORE ORDERED that the parties shall file a stipulation to dismiss this action **within 20 days of the date this minute entry is filed.**

If the Court is mistaken and outstanding issues remain, the parties shall file a Notice of Outstanding Issues within 20 days of the date this minute entry is filed.