

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM JUNGE,

Plaintiff-Appellant/Cross-Appellee,

v

JAMES W. BARTLES and OSCAR E.
BURRELL,

Defendants-Appellees/Cross-
Appellants.

UNPUBLISHED

October 20, 2009

No. 285035

Wayne Circuit Court

LC No. 06-607269-CZ

Before: Donofrio, P.J., and Wilder and Owens, JJ.

PER CURIAM.

Plaintiff, William Junge, appeals as of right the trial court's order entering judgment in favor of plaintiff. Defendants, James Bartles and Oscar Burrell, cross-appeal the trial court's order entering judgment in favor of plaintiff. This appeal arises from the parties' decision to form and operate BBJ Rigging and Installation, L.L.C. (BBJ). We conclude that the trial court erred when it determined that defendants converted plaintiff's ownership interest in BBJ in contravention of MCL 600.2919a, and for that reason, we need not consider whether the trial court erred when it declined to award plaintiff treble damages, costs, and attorney fees under MCL 600.2919a. However, we conclude that the trial court did not err when it declined to award plaintiff statutory interest pursuant to MCL 600.6013. For these reasons, we affirm in part and reverse in part.

This appeal arises from the parties' decision to form BBJ. According to plaintiff, defendant Bartles formulated the idea of forming BBJ, to install, remove, and transport industrial equipment. Bartles would actually run BBJ, while plaintiff and defendant Burrell would finance BBJ. Plaintiff and defendants filed the articles of organization with the state of Michigan on March 8, 2004. However, there was no written operating agreement for the limited liability company. Instead, the parties operated BBJ under an oral operating agreement. Plaintiff, Bartles, and Burrell each owned one-third of BBJ. Although the parties formed BBJ to undertake smaller contracts for installing, removing, or transporting equipment, consisting of contracts of \$5,000 or \$10,000, according to plaintiff, BBJ "did over a million dollars worth of work in the first year, which was way beyond our original forecast."

According to plaintiff, the “administrative portion” of BBJ would be handled at the facility of plaintiff’s pre-existing entity, H & J Manufacturing, a metal fabricating business located in Romulus, Michigan. Plaintiff supplied BBJ with “an office with restrooms and fax machines and telephones and everything [it] needed.” According to plaintiff, BBJ paid Bartles a salary, but Burrell did not receive a salary. At first plaintiff did not receive any type of compensation. However, plaintiff later reached an agreement with Burrell that BBJ would pay him \$30 per hour as wages and also pay H & J \$5,400 per month for rent and administrative costs.

According to Bartles, problems started at BBJ in May 2005 when Bartles arranged for H & J, as a subcontractor for BBJ, to fabricate a metal floor for a client named Rudolph Libbe. According to Bartles, H & J fabricated the floor poorly, and plaintiff, on behalf of H & J, charged Libbe an “astronomical” amount for the subcontract work. Eventually, a Rudolph Libbe representative advised Bartles that Rudolph Libbe would not retain BBJ to perform its work any longer. In addition, according to Burrell, plaintiff was using his BBJ credit card for his own use contrary to the parties’ agreement that only Bartles would use his BBJ credit card to buy gasoline, whereas Burrell and plaintiff agreed that they would use their credit cards only for emergencies.

Plaintiff identified November 1, 2005, as the date when problems began to arise between the members of BBJ. According to plaintiff, he and Burrell “had a disagreement of a personal nature that had nothing to do with BBJ.” Plaintiff left for his vacation in early December 2005, and returned on December 13, 2005. When plaintiff returned, he was surprised to discover that defendants accused him of stealing money, and he was further surprised that Bartles had removed all of BBJ’s equipment from the H & J facility including welding equipment, gang boxes, come alongs, tools, welding units, jacks, and other equipment. According to plaintiff, he had withdrawn funds from the BBJ account for an emergency tax payment, but he returned the money promptly. And, although plaintiff did make other withdrawals from the BBJ bank account, these withdrawals represented payments to plaintiff for “stockholder loans.” According to Bartles, plaintiff withdrew \$17,000 from BBJ’s bank account in order to take his vacation, and did so at a time when Bartles anticipated that BBJ would be unable to pay its bills.

At a subsequent meeting attended by plaintiff, Bartles, and Burrell, Burrell again accused plaintiff of stealing money. Burrell and Bartles told plaintiff that they did not want to continue BBJ. According to plaintiff, Bartles and Burrell withdrew \$50,000 from the BBJ bank account, removed plaintiff’s authorization to access the account, and removed plaintiff’s name from the BBJ credit card account. Burrell told plaintiff that he “wanted out.” Bartles informed plaintiff that he planned to leave Michigan. Neither Burrell nor Bartles told plaintiff that they planned to form, or had already formed, a new company.

While plaintiff was on vacation, on December 9, 2005, Burrell and Bartles formed North American Machinery and Installation, L.L.C. (“NAMI”). One or two months after formation, NAMI started to perform the work previously performed by BBJ. On January 18, 2006, a business known as “Contractor Steel” received a fax stating:

Due to mitigating circumstances one of the owners of BBJ has decided to withdraw from the company. The other two owners decided to stay in business. They thought it was appropriate for a name change, therefore our new name and

address is as follows, North American Machinery Installation, P.O. Box 329, Trenton, Michigan. Thank you, Amy Brown, North American Machinery.

NAMI performed work for Rudolph Libbe, a former customer of BBJ, which, according to Bartles, had been dissatisfied with BBJ.

At a subsequent meeting, plaintiff and Bartles discussed the termination of BBJ. Plaintiff had not decided to withdraw from BBJ. But, according to Bartles, plaintiff claimed that he was owed \$40,000 to wind up the business. Bartles gave plaintiff a check in the amount of \$40,000. Bartles agreed to pay plaintiff an additional \$17,000, which represented one-third of the accounts receivable of BBJ after the bills had been paid. It was Bartles' understanding that the \$17,000 payment would amicably wind up BBJ. When Bartles actually paid plaintiff the \$40,000, plaintiff accepted the check, but became upset, and accused Bartles and Burrell of stealing. Although Bartles intended to pay plaintiff the additional \$17,000, because plaintiff filed a lawsuit, which Bartles considered a breach of their agreement to wind up BBJ, he had not paid the \$17,000 at the time of trial.

Plaintiff filed his complaint on March 10, 2006 alleging that defendants were liable for "illegal and oppressive acts" pursuant to MCL 450.4515, and conversion. On June 2, 2006, plaintiff filed his first amended complaint, which clarified that plaintiff was seeking treble damages for statutory conversion pursuant to MCL 600.2919a. Defendants timely answered both complaints. Plaintiff then filed a motion for partial summary disposition and defendants filed a counter-motion for partial summary disposition. After holding a hearing on the motions, the trial court denied both motions and the matters proceeded to bench trial.

At the conclusion of the bench trial, the trial court entered its opinion and order wherein it observed: "The parties elected to waive their rights to a jury trial and these equitable issues were brought before the Court as a bench trial." As such, the trial court made both findings of fact and conclusions of law with regard to the litigated issues. The trial court made the factual finding that in December 2005, Bartles gave plaintiff a check in the amount of \$40,000 together with a promise to give him a share of any other funds that would be collected in the future. The trial court found that "this was as [sic] agreement to disband BBJ and distribute the assets to the shareholders." Plaintiff accepted the check but believed he was entitled to an additional \$11,000 for administrative services and \$155,000 as "his fair share of the business." The trial court also found that defendants created a second entity, NAMI, and that NAMI was identical to BBJ in all respects save for plaintiff's ownership interest. Supporting its finding, the trial court observed that NAMI performed the same work as BBJ, employed the same persons, and contracted with the same clients.

Based on these factual findings, the trial court concluded that plaintiff had established his claims of conversion and oppressive acts and that "equitable relief [was] appropriate under the circumstances of this case." With respect to defendants' argument that plaintiff lacked standing to bring his action against defendants, and should have brought a derivative action, the trial court concluded that plaintiff "has proper standing to bring suit against the individual defendants." The trial court reasoned that our Supreme Court, in *Christner v Anderson Nietzke & Co, PC*, 433 Mich 1, 444 NW2d 779 (1989), concluded that "a stockholder may individually sue corporate directors, officers, or other persons when he has sustained a loss separate and distinct from that of other stockholders generally." The trial court awarded plaintiff, as equitable relief, one-third

of the “net book value” of BBJ, amounting to \$57,727.51. The trial court further indicated that the judgment was “joint and several” against defendants.

On March 17, 2008, plaintiff filed a motion seeking treble damages, attorney fees, and statutory interest. Plaintiff argued that because the trial court concluded that defendants converted plaintiff’s ownership interest in BBJ, plaintiff was statutorily entitled to treble damages and attorney fees by operation of MCL 600.2919a. Plaintiff further argued that he was entitled to statutory interest on the money judgment entered by the trial court pursuant to MCL 600.6013. Defendants countered that the plain statutory language demonstrated that the award of treble damages and attorney fees was discretionary. Defendants further argued that the trial court characterized both plaintiff’s oppressive acts and conversion claims as equitable issues, and entered an equitable decree in favor of plaintiff as relief, and did not enter a money judgment on plaintiff’s conversion claim. The trial court held a hearing on plaintiff’s motion for treble damages, attorney fees, and statutory interest, holding as follows:

All right, let me just say these are pretty good arguments. I disagree, I wrote the Opinion indicating in that Opinion that the relied was in a, we were doing an equitable relief in that case because of the special circumstances. I do not believe that the language of MCL 600.2919(a) [sic] mandatorially [sic] requires that the Court treble damages in a case such as this. The motion is denied.

The trial court also denied plaintiff’s motion to the extent that plaintiff sought statutory interest because the trial court granted equitable relief. Plaintiff appealed and defendants cross-appealed.

Defendants argue, on cross-appeal, that the evidence presented at trial did not support the trial court’s conclusion that defendants converted plaintiff’s ownership interest in BBJ. “We review the trial court’s findings of fact in a bench trial for clear error and conduct a review de novo of the court’s conclusions of law.” *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). A trial court’s factual finding is clearly erroneous if “although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.” *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). “When reviewing a grant of equitable relief, an appellate court will set aside a trial court’s factual findings only if they are clearly erroneous, but whether equitable relief is proper under those facts is a question of law that an appellate court reviews de novo.” *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). Statutory interpretation presents a question of law that this Court reviews de novo. *Pohutski v City of Allen Park*, 465 Mich 675, 681; 641 NW2d 219 (2002).

MCL 450.4504 provides:

(1) A membership interest is personal property and may be held in any manner in which personal property may be held. A husband and wife may hold a membership interest in joint tenancy in the same manner and subject to the same restrictions, consequences, and conditions that apply to the ownership of real estate held jointly by a husband and wife under the laws of this state, with full right of ownership by survivorship in case of the death of either.

(2) A member has no interest in specific limited liability company property.

Statutory conversion is defined as: “Another person’s stealing or embezzling property or converting property to the other person’s own use.” MCL 600.2919a. Conversion occurs when a “distinct act of domain [is] wrongfully exerted over another’s personal property in denial of or inconsistent with the rights therein.” *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

Here, the trial court based its conclusion that defendants converted plaintiff’s ownership interest in BBJ on its finding that defendants created a second entity, NAMI, that was identical to BBJ in all respects to BBJ except for plaintiff’s ownership interest. Specifically, the trial court found that NAMI “basically stepped into the shoes of BBJ” because it “did the same kind of work, used the same pool of employees, and relied on the same customers.” But in its conversion analysis, the trial court ignored its earlier factual finding that Bartles gave plaintiff a check in the amount of \$40,000 with a promise to give plaintiff a share of any other funds that would be collected in the future and that this represented an “agreement to disband BBJ and distribute the assets to the shareholders.” This being the case, plaintiff received compensation for his ownership interest in BBJ from defendants. Plaintiff initially agreed to the \$40,000 payout together with another \$17,000, that represented one-third of the accounts receivable of BBJ after all outstanding bills were paid. Bartles testified that it was his understanding that the payments to plaintiff were an agreement to amicably wind up BBJ. When Bartles actually paid plaintiff the \$40,000, plaintiff accepted the check. Though, plaintiff later became distressed and accused Bartles and Burrell of stealing.

After reviewing the record, we find no error in trial court’s factual findings, and thus we cannot conclude that the trial court’s findings were clearly erroneous. *Chapdelaine, supra* at 169. However, after de novo review, we do find error in the trial court’s legal conclusions. *Id.* MCL 450.4504 defines the membership interest in a limited liability company as personal property. Thus, plaintiff asserts that defendants converted his personal property in contravention of MCL 600.2919a. But under MCL 600.2919a, liability for conversion may be imposed where “[a]nother person steal[s] property.” Here, where the trial court found that defendants compensated plaintiff in the amount of \$40,000 plus a promise to give him a share of any other funds that would be collected in the future, and that this was specifically an agreement to “disband BBJ,” the trial court improperly concluded that defendants permanently deprived, or stole, plaintiff’s ownership interest in BBJ. The record reflects that the parties believed that the \$40,000 payment to plaintiff plus the promise to pay plaintiff his share of future collections was, in effect, compensation to plaintiff to completely “disband” BBJ. That being the case, plaintiff was receiving compensation for his membership interest as well as “adequate[] compensat[ion] . . . for administrative costs and rent,” as stated by the trial court. Hence, we conclude that plaintiff indeed received compensation for his ownership interest as well as compensation for costs and rent owed at the time of the wind up of BBJ. Though plaintiff received the compensation after defendants formed NAMI in his absence and without his approval, this does not change the fact that he did receive compensation for being deprived of his personal property.

Simply put, plaintiff cannot show that defendants “stole” from him within the meaning of MCL 600.2919a. For these reasons, the trial court erred when it concluded, on the basis of its findings of fact, that defendants were liable for conversion.¹

After reviewing the record, we do not, however, disturb the trial court’s conclusion that plaintiff established his claim for oppressive acts conduct pursuant to MCL 450.4515 and was entitled to equitable relief. MCL 450.4515 provides, in pertinent part:

(1) A member of a limited liability company may bring an action in the circuit court of the county in which the limited liability company is located to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member. If the member establishes grounds for relief, the circuit court may issue an order or grant relief as it considers appropriate, including, but not limited to, an order providing for any of the following:

(a) The dissolution and liquidation of the assets and business of the limited liability company.

* * *

(d) The purchase at fair value of the member’s interest in the limited liability company, either by the company or by the managers or other members responsible for the wrongful acts.

(e) An award of damages to the limited liability company or the member.

* * *

(2) As used in this section, “willfully unfair and oppressive conduct” means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member. The term does not include conduct or actions that are permitted by the articles of organization, an operating agreement, another agreement to which the member is a party, or a consistently applied written company policy or procedure.

¹ To the extent that defendants argue that the trial court erroneously imposed liability on the basis of plaintiff’s allegation that defendants converted the physical assets of BBJ, we observe that the trial court’s order specifically awarded “all remaining assets, including any equipment of BBJ Rigging and Installation” to defendants. In addition, we observe that the trial court specifically premised its conclusion that defendants were liable for conversion, on the basis of plaintiff’s claim that defendants converted plaintiff’s ownership interest in BBJ, and not that defendants converted other tangible assets of BBJ.

In its opinion and order, the trial court found:

The principle [sic] claim of the [d]efense is that Plaintiff did not conduct himself responsibly with respect to BBJ as evidenced by his improper use of company funds and inflation of billings. In spite of these charges, it is clear from the evidence presented that the [d]efendants converted the personal property interest of [p]laintiff and created a new business, North American Machinery & Installation. This new business basically stepped into the shoes of BBJ. They did the same kind of work, used the same pool of employees, and relied on the same customers. The [p]laintiff has established his claims of conversion and oppressive acts.

The trial court subsequently concluded that equitable relief was appropriate on the basis that defendants had committed conversion, and had engaged in oppressive conduct. The trial court, pursuant to its equitable powers under MCL 450.4515(1), fashioned a remedy for defendants' oppressive conduct, pursuant to MCL 450.4515(1), and awarded plaintiff one-third of the "book value" of BBJ, in the amount of \$57,727.51.

Although the trial court articulated its conclusion that plaintiff "established his claim[] of conversion," after reviewing the record, we conclude that the trial court awarded plaintiff no damages for his conversion claim. Instead, the trial court did "grant relief it consider[ed] appropriate," pursuant to MCL 450.4515(1), using its conclusion that defendants created NAMI to step into the shoes of BBJ by doing the exact same work, with the same employees, for the same customers as a basis for its finding that defendants "committed willfully unfair and oppressive conduct." A plaintiff's remedy for conversion is an action at law, and not a suit in equity. *Piester v Ideal Creamery Co*, 289 Mich 489, 493; 286 NW 801 (1939). "A judge is presumed to know and understand the law." *Powell Production, Inc v Jackhill Oil Co*, 250 Mich App 89, 101; 645 NW2d 697 (2002).

In this case, the determination of the amount of the actual damages sustained by plaintiff, if any, was a question of fact squarely within the purview of the trier of fact, which, in this case, was the trial court. *Brownell v Brown*, 407 Mich 128, 131-132; 283 NW2d 502 (1979). Thus, we do not disturb the trial court's determination of damages when it found on the basis of the proofs that plaintiff was entitled to the equitable remedy of one-third of the "book value" of BBJ for oppressive conduct pursuant to MCL 450.4515(1), and no more.

In regard to plaintiff's argument on direct appeal that the trial court erred when it failed to award plaintiff statutory interest on plaintiff's money judgment under MCL 600.6013, we find no error. The trial court clearly stated in its opinion and order that the relief it granted was equitable in nature. That the trial court provided plaintiff with an equitable remedy is supported by this Court's conclusion that a trial court's order directing two directors of a corporation to purchase the plaintiff's interest in the corporation constituted equitable relief, precluding the application of MCL 600.6013. See *Moore v Carney*, 84 Mich App 399, 403-406; 269 NW2d 614 (1978). Thus, because the trial court awarded plaintiff equitable relief for oppressive conduct pursuant to MCL 450.4515(1), even though the trial court awarded plaintiff the monetary value of his one-third interest in BBJ, the relief, under *Moore, supra*, did not constitute a "money judgment." *Id.* Because interest is awardable under MCL 600.6013 for "money judgments," and equitable relief does not constitute a "money judgment," plaintiff, "[h]aving

sought and received equitable relief,” is not entitled to interest under MCL 600.6013. *McPeak v McPeak*, 233 Mich App 483, 497; 593 NW2d 180 (1999), citing *Giannetti v Cornillie*, 209 Mich App 96; 530 NW2d 121 (1995).

Finally, because we concluded that the trial court erred as a matter of law when it held that plaintiff established his claim for conversion, we need not address plaintiff’s argument on appeal that the trial court erred when it failed to award plaintiff treble damages for conversion pursuant to MCL 600.2919a.

Affirmed in part and reversed in part. No costs to either party.

/s/ Pat M. Donofrio
/s/ Kurtis T. Wilder
/s/ Donald S. Owens