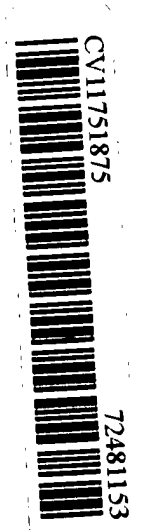
In the Court of Common Pleas
Cuyahoga County, Ohio

DENNIS DISO	)	CASE NO. CV 11 751875
	)	
Plaintiff	)	JUDGE PAMELA BARKER
	)	
v.	)	
	)	**Journal Entry**:
G.D.S., INC., et al.	)	Decision and Order on Defendants'
	)	Motion for Summary Judgment
Defendants	)	
	)	
	)	
	)	



This matter is before the Court on the Motion for Summary Judgment of Defendants G.D.S., Inc., Mark Stenta and Leo Laughrey, II, filed on December 15, 2011 (hereinafter "the Defendants"). On January 17, 2012 Plaintiff Dennis Diso (hereinafter "the Plaintiff") filed Plaintiff's Memorandum In Opposition To Summary Judgment. On January 25, 2012 Defendants filed a Reply In Support Of Defendants' Motion For Summary Judgment.

"The appositeness of rendering a summary judgment hinges upon the tripartite demonstration: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978); *see also Temple v. Wean United, Inc.*,

50 Ohio St.2d 317, 327 (1977). The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment. *Harless*, 54 Ohio St.2d at 66. Once this burden is satisfied, the non-moving party cannot rest upon the unsubstantiated allegations in the pleadings. Instead, the non-moving party bears "a reciprocal burden outlined in Civ. R. 56(E) to set forth specific facts showing that there is a genuine issue for trial." *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in the opposing party's favor. *Doe v. First United Methodist Church* (1994), 68 Ohio St.3d 531, 1994 Ohio 531.

In his Complaint, the Plaintiff set forth three counts or causes of action against the Defendants: 1.) breach of fiduciary duty; 2.) conversion; and 3.) promissory estoppel. Defendants have moved for summary judgment in their favor on all three counts or causes of action.

Count I – Breach of Fiduciary Duty

In Ohio, the majority or controlling shareholders in a close corporation owe a fiduciary duty to the minority shareholders. *Crosby v. Beam*, 47 Ohio St.3d 105, 548 N.E.2d 217 (1989). Majority shareholders "cannot use their control of the corporation to their advantage without providing the same opportunity to the minority shareholders unless the majority has a "legitimate business purpose" for doing so. *Priebe v. O'Malley*, 89 Ohio App.3d 8, 623 N.E.2d 573 (9th Dist. 1993), citing *Crosby v. Beam*, 47 Ohio St.3d 105, 548 N.E.2d 217 (1989). *See, also Gigax v. Repka*, 83 Ohio App.3d 615, 623, 615 N.E.2d 644, 650 (2nd Dist. 1992); *B.& W. Custom*

Cabinets, Inc. v. Worthington 1992 WL 83821 (Ohio App. 8 Dist.), unreported, at *8; and *Wrightsel v. Ross-Co Redi-Mix, Inc.*, 1993 WL 97780 (Ohio App. 4 Dist.), unreported, at *6.

The Defendants assert that they had a "legitimate business purpose" for terminating the Plaintiff's employment with G.D.S., specifically, the Plaintiff's violation of G.D.S.'s sexual harassment policy. The Defendants submitted evidence that demonstrates the following.

In 2005 a G.D.S. employee who reported directly to the Defendant filed an internal complaint with G.D.S. and filed a complaint with the Ohio Civil Rights Commission, alleging sexual harassment by the Defendant. (Affidavit of Roland Stenta, at paragraph 3, attached as Exhibit 3 to Defendants' Motion and Exhibit 49 attached to Defendants' Motion). The allegations associated with the sexual harassment claim included the following: the Defendant's work computer contained pornographic images or pictures and the Defendant showed these pictures to the employee and made rude comments to her; and the Defendant made her uncomfortable by leaning over her at her desk, putting his arm around her when she was trying to show him something pertaining to work, and always had to touch her. (Exhibit 49 attached to Defendants' Motion).

G.D.S. conducted an investigation which revealed that the Defendant had pornography on his G.D.S. computer. (Roland Stenta Affidavit, Exhibit 7, at paragraph 4). Following the investigation and according to Mr. Stenta, he advised the Defendant that he was never to use his G.D.S. computer again for the storage or transmission of sexually suggestive or pornographic pictures. (*Id.* at paragraph 6).

As a result of this 2005 incident or sexual harassment claim, G.D.S. implemented a sexual harassment policy which includes a prohibition against displaying suggestive objects or pictures (Stenta Affidavit, Exhibit 7, at paragraph 8 and Plaintiff's deposition, at page 82). The Defendant acknowledged reading the Policy Prohibiting Discrimination and Harassment and agreed to comply with it on June 27, 2005. (Exhibit 7 attached to Defendants' Motion and Plaintiff's deposition, at pages 82-84). However, the Plaintiff disputes Mr. Stenta's testimony that when he met with Mr. Stenta in connection with the 2005 sexual harassment claim he was specifically told by Mr. Stenta that more pornography on his work computer was not going to be tolerated. (Plaintiff's deposition, at page 83).

On March 7, 2010, the Defendant sent an e-mail with an attachment containing pornographic pictures to Leo Laughrey. (Exhibit 39 attached to Defendants' Motion and Plaintiff's deposition, at pages 89-90). With the permission and at the direction of Mr. Laughrey, his wife and assistant, Deborah Laughrey opened and viewed the e-mail and attachment. (Deposition of Deborah Laughrey, at pages 27-29). On January 21, 2011 or over ten (10) months later, Mrs. Laughrey filed a formal complaint with G.D.S. associated with the March 7, 2010 e-mail sent from the Plaintiff to Mr. Laughrey. (Exhibit 41 attached to Defendants' Motion).

The Defendants, specifically Messrs. Stenta and Laughrey have testified via their respective affidavits that the 2011 investigation into the Plaintiff's use of his G.D.S. computer to transmit pornography, prompted by the January 21, 2011 Deborah Laughrey internal complaint, revealed that the Plaintiff was still using his G.D.S. computer to store and transmit pornography and that his "continued

disregard for G.D.S.' sexual harassment policy" could not be tolerated, prompting the termination. (Exhibits 42 and 43 attached to Defendants' Motion).

The Plaintiff argues and submitted evidence to demonstrate that he did not violate G.D.S.'s sexual harassment policy and that the Defendants' proffered reason for terminating his employment is pretextual. Specifically, the Plaintiff submitted his Affidavit and a copy of his deposition transcript to demonstrate that in late December of 2010 or in very early January of 2011 he had a meeting with Mr. Stenta and Mr. Laughrey during which he requested permission to withdraw money from his 401(K) Plan. (Affidavit of Plaintiff, Exhibit 8 attached to Plaintiff's Memorandum, at paragraph 9). According to the Plaintiff, Mr. Mark Stenta, as Trustee of the 401(K) Plan, promised he would consider his request and Mr. Laughrey told him that G.D.S. might make his portion of a company loan "go away" if the Plaintiff would agree to retire early. (*Id.* and paragraph 10). Per the Plaintiff, "shortly thereafter" Mr. Mark Stenta told him that he was not willing to change the 401(K) Plan and suggested that the Plaintiff consider retiring from G.D.S. (*Id.*). On January 26, 2011, the Plaintiff was given the option of resigning, retiring or being terminated. *(Id.*, paragraph 11.) When the Plaintiff refused to resign or retire, his employment with G.D.S. was terminated by Mr. Stenta. (*Id.*) The Defendants filed a Reply In Support Of Defendants' Motion For Summary Judgment but did not attach to it or direct this Court to any evidence already submitted to the Court to dispute this affidavit testimony of the Plaintiff.

The assertion of these undisputed facts, coupled with the undisputed fact that Deborah Laughrey did not lodge a complaint with G.D.S. about the March 7,

2010 e-mail until January 21, 2011 or just shortly after the meeting and discussions the Plaintiff had with Messrs. Stenta and/or Laughrey in late December, 2010 or early January, 2011 preclude summary judgment in Defendants' favor on Count I of the Complaint. Whether or not the basis for the Plaintiff's termination was a legitimate business reason, i.e., a violation of G.D.S.' sexual harassment policy as testified to and argued by the Defendants, or was a pretext to allow the Defendants to steal monies from the Plaintiff and destroy the value of his minority interest in G.D.S. is a question of fact precluding summary judgment in favor of the Defendants on Count I of the Complaint. Accordingly, the Defendants' motion for summary judgment on Count I of the Complaint is **DENIED**.

COUNT II – CONVERSION

In Count II of his Complaint, the Plaintiff alleged that "Defendants conspired to convert and successfully converted Plaintiff's stock and Plaintiffs' interest in GDS to themselves, all to the Plaintiff's detriment."

"[C]onversion is the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights." *Joyce v. General Motors Corp.* (1990), 49 Ohio St.3d 93, 96, 551 N.E.2d 172. *See Ohio Tel. Equip. & Sales, Inc. v. Hadler Realty Co.* (1985), 24 Ohio App.3d 91, 93, 24 OBR 160, 162, 493 N.E.2d 289, 292; and *Werthmann v. Donet, Inc.*, 2005 WL 1490372 at *14 (Ohio App.2d Dist.), 2005-Ohio-3185.

The Defendants argue that because it is undisputed that the Plaintiff still owns his shares in G.D.S., and because per the Defendants the Plaintiff did not

oppose Defendants' Motion for Summary Judgment on this claim, summary judgment must be granted in their favor on the Plaintiff's claim of conversion. The Court finds that neither of these bases or arguments warrants the granting of summary judgment in favor of the Defendants on the conversion claim.

As to the first basis or argument set forth by the Defendants, this Court acknowledges that in *Cruz v. South Dayton Urological Associates, Inc.*, 121 Ohio App.3d, 655, 666, 700 N.E.2d 675, 682 (2nd Dist. 1997), the court of appeals affirmed the trial court's decision granting summary judgment in favor of the defendants on the plaintiff's conversion claim, concluding that "[e]ven if the defendants acted wrongfully when they terminated him, their actions did not deprive him of personal property or his interests in it." In that case, the plaintiff claimed that his "interest" in the corporation was the property he claimed had been converted by the defendants. However, the court based its decision on its findings that because the plaintiff's shares in the corporation remained in his name, and his right to compensation upon termination was unchallenged, the reallocation of overhead expenses was within the power of the defendants to order, and if it was unreasonable or overbearing, he could obtain relief for that alleged wrong pursuant to his breach of fiduciary duty claim. *Id.* 121 Ohio App.3d at 665-66.

Moreover, in the more recent case of *Werthmann v. Donet, supra*, 2005 WL 1490372 at *15, the Second District Court of Appeals found that the trial court had erred in granting summary judgment on the plaintiff's conversion claim, explaining in relevant part:

> "[W]e find that summary judgment on the conversion claim was improper, at least as to one aspect of the claim. As

> should be apparent from our discussion of breach of contract, Mezer and Sandy could not have converted Werthmann's stock because they had no obligation to purchase the stock, nor did they finalize a purchase. This leaves conversion based on the alleged unlawful retention of Werthmann's salary and bonuses.
> *** Werthmann claims that profits and salary belonging to him have been unlawfully retained by DONet and the majority shareholders. ***
>
> There may be some overlap in the present case between alleged damages for breach of fiduciary duty and the conversion claim. However, that is a matter to be resolved at trial. Accordingly, the trial court erred in granting summary judgment against Werthmann on his claim for conversion.

(Emphasis added.) *Werthmann, supra* at *15.

The Defendants are correct that the evidence demonstrates and it is undisputed that the Plaintiff still owns or retains his shares in G.D.S. and he is still an officer and director of G.D.S, despite his termination as an employee of the corporation. (Plaintiff's deposition, pages 31-32, 44-45, 52). However, as in *Werthmann*, one aspect of the Plaintiff's conversion claim is that the Defendants have retained salaries or bonuses belonging to him. (Plaintiff's Memorandum In Opposition To Summary Judgment, at page 5; the Plaintiff's Affidavit, at paragraph 14 and G.D.S.'s trial balance filed under seal). And, as the court recognized as true in *Werthmann*, while there may be some overlap in the present case between the alleged damages for breach of fiduciary duty and the conversion claim, that is a matter to be resolved at trial.

Moreover, the Defendants' argument that the Plaintiff did not oppose their motion for summary judgment on the conversion claim and therefore, summary judgment must be rendered in their favor on that claim, is belied by the Plaintiff's argument or assertion at page 5 of Plaintiff's Memorandum In Opposition To Summary Judgment, and the

evidence submitted in support thereof, to wit: that the compensation the Plaintiff would have received but for his termination has been equally divided between the two other shareholders whose salaries have increased from $120,000 per year to salaries in excess of $180,000 per year, leaving no monies to pay dividends or bonuses to minority shareholders, specifically the Plaintiff. (G.D.S. trial balance filed under seal and Affidavit of the Plaintiff, at paragraph 14).

Therefore, the Defendants' motion for summary judgment as to Count II of the Complaint is **DENIED**.

COUNT III – PROMISSORY ESTOPPEL

In Count III of his Complaint, and specifically as to the "promises" made to him by the Defendants, the Plaintiff alleges that he: "received and had promises made to him of profit sharing – through salary and other benefits – if he would bring his book of business to GDS and if he continued to promote the business of GDS" (paragraph 28 of Complaint); and would be "a continuing member of the executive team operating GDS." (Paragraph 31 of Complaint).

Defendants assert that under Ohio law there are four elements of a cause of action for promissory estoppel and that the Plaintiff cannot establish the first element of such a claim, i.e., a clear and unambiguous promise. (Defendants' Motion For Summary Judgment, at page 13, citing *Pappas v. Ippolito*, 177 Ohio App.3d 625, 2008-Ohio-3976, 895 N.E.2d 619 (8th Dist.)). Indeed, the Defendants quote from the Plaintiff's deposition to support, and indeed the deposition testimony so quoted does support the assertion that the Plaintiff was never guaranteed continued employment at G.D.S. either through any written agreement or verbal communication, and he knew that he could be subject to

termination for his violation of the sexual harassment policy. In short, then, the Court agrees with the Defendants' assertion that the evidence establishes that the Plaintiff was never promised permanent employment at G.D.S. (Defendants' Motion For Summary Judgment, at page 13.) However, that does not end the inquiry with regard to the promissory estoppel claim.

The Plaintiff argues at page 22 of his Memorandum that he asked for and was promised or received job protection when section 3(f) was added to the revised Shareholder Agreement. In his deposition, the Plaintiff testified that pursuant to a conversation he had with Ron Stenta in 2005, this provision was inserted into the Agreement so that he could not be forced out against his will. (Plaintiff's deposition, at pages 215-217).

Like their second argument with regard to the Plaintiff's conversion claim, the Defendants' second argument with respect to the Plaintiff's promissory estoppel claim is that the Plaintiff did not oppose the Defendants' motion for summary judgment on the promissory claim and therefore, the Defendants' motion must be granted. (Reply In Support Of Defendants' Motion For Summary Judgment, at page 11.) As with the conversion claim, this argument is belied by the Plaintiff's argument summarized and the deposition testimony cited immediately above.

Accordingly, there are genuine issues of material fact precluding the granting of summary judgment in favor of the Defendants on the Plaintiff's promissory estoppel claim and therefore, it is **DENIED.**

DATED THIS 14th day of February, 2011.

Pamela A. Barker
JUDGE PAMELA A. BARKER