IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

GREGORY HYMES,	)	**CASE NO. CV 11 745933**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
AMERICAN INDUSTRIAL BOLTING, INC., *et al.*	)	**JUDGMENT ENTRY WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW**
	)	
Defendants/third-party plaintiffs	)	
	)	
vs.	)	
	)	
GMH TECHNOLOGIES, INC.	)	
	)	
Third-party defendant	)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

This is a lawsuit by Gregory Hymes against his two former business partners, Richard D. Wanchisn and Gerald E. Taafe, to recover his share of the money from the sale of their company, American Industrial Bolting, Inc. For their part, the defendants filed a counterclaim alleging various business torts by Hymes. A bench trial of all of the claims in the lawsuit was held from June 4 through June 6, 2012. The parties submitted closing arguments in writing on July 13, 2012, and this entry follows.

Hymes's causes of action

Hymes, Wanchisn and Taafe were equal shareholders in defendant American Industrial Bolting, Inc. AIB was sued by a competitor, Superbolt. The Superbolt lawsuit was eventually settled by Superbolt's purchase of AIB's assets in exchange for covenants not to compete from

Hymes, Wanchisn, Taafe and Extreme Engineered Solutions, Inc. and Extreme Machine and Fabricating, Inc., two companies owned by Wanchisn and Taafe.[1] The settlement proceeds were paid into an escrow account at the McDonald Hopkins law firm. Hymes alleges that each owner was supposed to receive one-third of the settlement (after certain designated payments were deducted) and that he has received nothing to date.

Hymes's complaint also alleges that he worked for defendant Engineered Solutions until November 19, 2009, and, when he left, the corporate defendant did not pay him for unused vacation time and did not reimburse him for business travel expense.

The first cause of action is for breach of contract, i.e., the settlement agreement. The defendants on that claim are Wanchisn, Taafe and AIB. The second and third causes of action are for breach of contract and quantum meruit against Engineered Solutions.

At trial, the complaint was amended pursuant to *Crosby v. Beam*, 47 Ohio St. 3d 105 (1989), to include a claim that the majority shareholders Wanchisn and Taafe breached the duty of utmost good faith owed to Hymes as a minority shareholder by declaring almost $175,000 of the settlement to be debts of AIB owed to their other companies.[2]

The counterclaims and third-party complaint

Wanchisn, Taafe, AIB and Engineered Solutions responded to the complaint with a counterclaim asserting fifteen causes of action: breach of fiduciary duty, conversion, usurpation of corporate opportunity, breach of employee's duty of loyalty, unfair competition, and tortious interference with business relationships, all on behalf of Engineered Solutions; two claims of fraud, one by AIB and Engineered Solutions and the other by Wanchisn and Taafe; two claims of

[1] To avoid confusion that might arise through repeated references to separate companies called "Extreme," Extreme Engineered Solutions, Inc. will be referred to here as Engineered Solutions and Extreme Machine and Fabricating, Inc. as Machine and Fabricating.

[2] The complaint did include McDonald Hopkins as a defendant on the first breach of contract claim, but the complaint against McDonald Hopkins, and McDonald Hopkins's counterclaim, were later voluntarily dismissed.

misrepresentation, one by AIB and the other by Wanchisn and Taafe; conversion and breach of fiduciary duty by AIB; two claims for indemnification under separate warranty agreements, one by AIB and the other by Engineered Solutions; and a claim by Wanchisn, Taafe, AIB and Engineered Solutions for a declaratory judgment requiring Hymes to indemnify them for any claims made by Superbolt alleging breach of the confidentiality provision of the settlement agreement.

All four defendants are also parties to a third-party complaint against GMH Technologies, Inc. GMH is a corporation formed by Hymes. The third-party complaint alleges that Hymes, through GMH, used Engineered Solutions's customer list to unfairly compete. The causes of action include improper competition, tortious interference with business relationships, conversion of intellectual property, and usurpation of corporate opportunity.

STATEMENT OF THE FACTS

The Superbolt lawsuit and settlement

Gregory Hymes is a mechanical engineer. He went to work for Extreme Machine and Fabricating, Inc. in 2003. Machine and Fabricating is owned by Richard Wanchisn and Gerald Taafe. Taafe described Machine and Fabricating as a "job shop" that manufactures chocks. Machine and Fabricating has about 78 employees.

In early 2004, Wanchisn and Taafe incorporated Engineered Solutions. The company was formed to provide engineering and design services for the products manufactured by Machine and Fabricating. Hymes became an employee of Engineered Solutions and remained there until he was fired on November 17, 2009; he was never an employee of AIB.

AIB was formed in 2007. The purpose of the company was to sell products designed by Engineered Solutions and made by Machine and Fabricating, but both of those companies

continued to conduct other business not involving AIB. Hymes, Wanchisn and Taafe each own one-third of AIB's shares. AIB employed only a salesman who would solicit orders from customers. The design of those orders – whether standard or custom – was subcontracted to Engineered Solutions and the manufacture of the items was subcontracted to Machine and Fabricating. Upon rendering their services, the two subcontractors would bill AIB and ultimately get paid once the customer paid AIB's invoice.

On August 15, 2008, AIB and Machine and Fabricating were sued in the United States District Court for the Western District of Pennsylvania by Superbolt, Inc. Engineered Solutions was made a defendant by an amended complaint in January, 2009. The gist of the Superbolt lawsuit was that AIB misappropriated its trade secrets and infringed its copyright by passing off substantial parts of the Superbolt catalog as AIB's own. Machine and Fabricating and Engineered Solutions were alleged to have aided and abetted AIB's unlawful conduct. AIB filed a counterclaim alleging that the patents that Superbolt based its trade secret claims on had expired and were in the public domain. Attorney David Movius of the McDonald Hopkins law firm represented AIB, Machine and Fabricating and Engineered Solutions in the federal lawsuit.

The federal case was settled in late 2009. The exact terms of the settlement remain confidential. Suffice to say that the net result was Superbolt agreed to purchase AIB's assets and Hymes, Wanchisn, Taafe and the three corporations executed covenants not to compete in favor of Superbolt. Settlement payments made by Superbolt went to the client trust account at McDonald Hopkins. From there, the distribution of the settlement proceeds was to be made under an escrow agreement between AIB and McDonald Hopkins. That contract calls first for

the payment of legal fees and then payment of AIB's "remaining debts and obligations."[3] Any money remaining after that is to be distributed in equal shares to the three owners.

Although it was never explicitly framed this way by the parties, the core issue in this case is the question of what are AIB's "remaining debts and obligations."

Movius testified at trial that his law firm has unpaid invoices to AIB totaling $30,207. However, the work done to justify those invoices was undertaken to represent AIB and Engineered Solutions in the defense of this lawsuit as well as to assist Wanchisn and Taafe personally in the defense of this lawsuit. None of those invoices are for work on the Superbolt litigation or settlement.

All of the Superbolt litigation legal expense has been paid from the settlement proceeds. Additionally, AIB received a distribution from the settlement proceeds to cover its remaining debts and obligations with the exception of the warranty claims described in the following paragraphs.

The warranty claims

Wanchisn and Taafe claim that the primary "remaining debts and obligations" of AIB that must be paid before the settlement is split among the owners are two warranty claims. The first claim arises from the allegedly faulty design of a thrust collar incorporated into a chock assembly sold to Sterling Steel. The assembly is used in a conveyer belt at a steel mill. It failed shortly after installation at the mill, possibly because of inadequate lubrication. According to the defendants, the defective design was done by Hymes as an AIB employee – this despite the lack

[3] Plaintiff's trial exhibit 6, September 10, 2009, escrow agreement, page 1. The escrow agreement does not address the priority of payment of the consideration for the covenants not to compete from the three individuals (Wanchisn, Taafe and Hymes) and the three companies (AIB, Machine and Fabricating, and Engineered Solutions). Presumably these are to be paid before the one-third split among the owners.

of evidence that Hymes was never an AIB employee – and then AIB sold the design to Engineered Solutions, which sold it to Sterling.

When the assembly failed around April 2009, Sterling made a claim for its damages under a warranty given by Engineered Solutions. That warranty was not offered into evidence at the trial. The defendants testified that the thrust collars comprised about $17,000 of a total original order of approximately $100,000 to $120,000, and that after the failure Engineered Solutions paid about $32,000 to Machine and Fabricating to make a replacement assembly. But eventually, on May 2, 2011, Engineered Solutions sent an invoice to AIB for $87,338.06 to cover the damages allegedly incurred because of the thrust collars.

The second warranty claim comes from a locking nut that was a component of a rotating cylinder and mandrel assembly sold to the Danieli Corporation. The nut failed and the machine was damaged. Danieli claimed that the nut was not properly designed and sought damages under a warranty from its seller, Machine and Fabricating. That warranty is not in evidence. Testimony at trial revealed that the damage was repaired at a cost of $7,925.80 plus $779.58 for redesign. Yet, also on May 2, 2011, Machine and Fabricating invoiced AIB $87,593.96 for damages paid on this warranty claim.

Not only were the warranties given by Engineered Solutions and Machine and Fabricating to Sterling and Danieli, respectively, not in evidence, but the defendants did not produce the original purchase orders from the buyers nor did they introduce purchase orders from Engineered Solutions and Machine and Fabricating to AIB. Additionally, no warranties from AIB to Engineered Solutions and Machine and Fabricating are in evidence. On both claims, there is less than persuasive evidence that the designs were defective at all. For example,

on Sterling's claim, Hymes, the only mechanical engineer to testify, opined that the user's failure to lubricate the assembly led directly to its breakdown.

Despite the defendants' testimony that at least the Sterling Mill warranty claim was known and estimated at the time the Superbolt lawsuit was settled, neither it nor the Danieli warranty claim appear as accounts payable on AIB's balance sheet until over 18 months later, on June 30, 2011. Moreover, they are not shown as liabilities on AIB's 2009 and 2010 year-end balance sheets.

AIB's December 10, 2011, shareholders' and directors' meetings

Almost 11 months after this lawsuit was filed, Wanchisn and Taafe called special meetings of the shareholders and directors for December 10, 2011. At the shareholders' meeting Wanchisn, Taafe and Hymes were elected as directors. That meeting was then adjourned and a meeting of the directors convened. John C. Grundy, Esq., Wanchisn and Taafe's personal counsel in the lawsuit, served as AIB's corporate counsel at the meetings.

The primary purpose of the directors' meeting was to discuss the distribution of the Superbolt settlement proceeds. The distribution, however, was a foregone conclusion. The meeting minutes include a list of disbursements to be made from the settlement created by Wanchisn and Taafe on December 2, 2011, that shows a total allocation of $174,932.02[4] to Machine and Fabricating and Engineered Solutions for the warranty claims. The minutes summarize the deliberations as follows:

> Specifically discussed were the warranty claims of Extreme Machine and Fabricating, Inc. ["EMF"] and Extreme Engineered Solutions, Inc. ["EES"], which passed the warranty claims of their respective customers (Danieli Corp. and Sterling Steel) to AIB because of the failure of AIB tensioner bolts used in assemblies manufactured by EMF and EES for their respective customers. Mr. Wanchisn and Mr. Taafe stated that AIB has accepted responsibility for the failure of its tensioner bolts. Mr. Hymes disagreed.

[4] The total of the two May 2, 2011, invoices to AIB from Machine and Fabricating and Engineered Solutions.

Wanchisn and Taafe also voted at that meeting to pay from the settlement legal fees and court reporting expenses incurred to defend them in this lawsuit.

Calculation of the settlement amount left before taking into account the disputed warranty claims

By October 28, 2009, the Superbolt lawsuit legal fees had been paid in full and a balance from the first settlement payment of $176,773.23 was distributed to AIB.[5] Although the trial evidence did not reveal where all of that money went, it appears Hymes does not contest that it was used to satisfy legitimate debts and obligations of AIB.

AIB's balance sheet for the end of 2009, the last year it conducted any business, shows an account receivable of the $250,000 final payment by Superbolt[6] as the primary asset contributing to total assets of $283,033.22. The other amounts making up the assets included $28,048.26 in a checking account; a reasonable inference from the evidence is that this money is what was left over from the initial settlement distribution. That means that of AIB's liquid assets at the end of 2009, $278,048.26 was from the settlement.

For liabilities, the December 31, 2009, balance sheet shows $21,245.50 in accounts payable, plus other current liabilities (for payroll, accrued interest and taxes) of $1,288.94, for a total of $22,534.44. From the evidence at trial, that amount of liabilities was legitimately owed by AIB and was not incurred by the company through any misconduct of Wanchisn and Taafe. The same applies to the then outstanding $20,000 account payable "from sale to Superbolt,"[7] which presumably refers to the total of the non-compete payments owed to Wanchisn, Taafe, Engineered Solutions and Machine and Fabricating. After the legal fees, but before the disputed

[5] Trial exhibit 9, Movius's letter of late November 2009 to Hymes's counsel.
[6] The $250,000 was received on January 11, 2010. See trial exhibit 10, Movius's email of that date to Wanchisn and Taafe only.
[7] Plaintiff's trial exhibit 13, AIB's 12/31/2009 balance sheet, line #2050.

warranty liabilities, therefore, AIB's remaining debts and obligations totaled $42,534.44. Taking that amount from the $278,048.26 in available settlement proceeds leaves $235,513.82 from the settlement to be distributed to the shareholders.

Hymes's claims against Engineered Solutions for unpaid vacation time and expense reimbursement

After he was fired, Hymes received a final paycheck from Engineered Solutions dated January 8, 2010. The pay stub shows that the check includes gross salary of $2,147.83 for the pay period of November 1 through November 18, 2009. Taxes in the amount of $437.75 were deducted from the gross, leaving net pay of $1,710.08. However, Engineered Solutions then deducted $1,095.00 for an Auto Cad Seat[8] that belonged to the company but was never returned by Hymes after he was terminated. As a result, the final paycheck was for the net amount of $614.88.

According to Hymes, he was owed a net salary of $2,988.48 for the last two weeks, a difference of $840.65. On top of that, he also seeks unpaid vacation time totaling $249.04 and unpaid expense reimbursement of $1,063.31, making the total shortfall to that point $2,153. But he does agree that Engineered Solutions was entitled to deduct $935.12 in charges he incurred to a company credit card for personal use, leaving, exclusive of taxes on the $840.65, a net amount owed of $1,217.88.

LAW AND ANALYSIS

Hymes's four causes of action can be divided into two categories of claimed damages: a claim against Wanchisn, Taafe and AIB for his share of the settlement proceeds (the complaint's first count for breach of contract and the claim of majority shareholder oppression) and a claim against Engineered Solutions for pay and expenses owed (the complaint's second cause of action

[8] No witness or attorney ever made exactly clear what an Auto Cad Seat is. It appears to refer to licensed computer-aided design software.

for breach of contract and the quantum meruit claim). These categories of damages will be addressed in that order.

Majority shareholder oppression

AIB is a close corporation, which is defined as an entity with few shareholders and whose corporate shares are not generally traded on a securities market. *Hickerson v. Hickerson*, Third Dist. No. 5-10-08, 2010-Ohio-4070, ¶25. Ownership of close corporations is limited to a small number of people who are dependent on each other for the enterprise to succeed. *Tinter v. Lucik*, 172 Ohio App. 3d 692, 2007 Ohio 4437, ¶23 (8th Dist.). Because of the nature of close corporations, it has been well recognized that majority shareholders owe minority shareholders a heightened fiduciary duty. *Thomas v. Fletcher*, Third Dist. No. 17-05-31, 2006-Ohio-6685, ¶14. This duty is similar to the duty that partners owe one another in a partnership because of the fundamental resemblance between the close corporation and a partnership. *Crosby*, supra, at 108. Essentially, shareholders in a close corporation owe each other a fiduciary duty to deal in utmost good faith. *Herbert v. Porter*, 165 Ohio App.3d 217, 2006-Ohio-355, ¶12 (Third Dist.). This duty obligates majority shareholders not to use their power to promote their personal interests at the expense of corporate interests or the minority shareholders. *Tinter*, supra, ¶23.

Hymes proved that Wanchisn and Taafe used their control of the corporation to enrich themselves at his expense. The evidence shows that Wanchisn and Taafe, on the one side, and Hymes, on the other, were becoming estranged no later than the spring of May 2009. Nevertheless, they cooperated as necessary to defend and settle the Superbolt lawsuit.

By the terms of the settlement – and in conjunction with the separate agreement among the three shareholders – Wanchisn, Taafe and Hymes agreed to equally share the amount of the

settlement left after legal fees "for [the Superbolt] matter"[9] and AIB's "remaining debts and obligations"[10] had been paid. The evidence at trial is that $235,513.82 remained after the legal fees and undisputed debts and obligations.

Around the same time, Hymes was fired by Wanchisn from Engineered Solutions. Although there is no evidence that the firing was illegal, its timing to the settlement and sale of AIB's assets was, in view of subsequent events, not entirely coincidental. Thereafter, all of Hymes's efforts to get information about and collect his share of the settlement were rebuffed, ostensibly by AIB through counsel, but at the direction of Wanchisn and Taafe. Indeed, Hymes spent over a year waiting for AIB, through a decision by its majority shareholders, Wanchisn and Taafe, to distribute the settlement proceeds until he finally had to file this lawsuit in early 2011. During that time the defendants never gave Hymes a reason why the settlement was not being split as agreed.

Wanchisn and Taafe then concocted the warranty claims and labeled them as obligations of AIB to be paid before the rest of the settlement was distributed. Wanchisn and Taafe were aware of the alleged warranty claims, yet AIB's December 31, 2010, balance sheet does not list them as liabilities.[11] (In the meantime, once Hymes filed his lawsuit, Wanchisn and Taafe, for themselves individually and for AIB, retained the same counsel to provide joint representation. That counsel then worked with Movius to try to defeat Hymes's claims while continuing to advise the company about the suitability of accepting the warranty claims.) Then, almost two years after AIB had ceased doing any business, the warranty claims appear as accounts payable to Wanchisn and Taafe's own companies – Engineered Solutions and Machine and Fabricating – on a June 30, 2011, accounts payable aging summary.

[9] Movius's September 10, 2009, escrow letter, ¶2.
[10] *Id*., ¶3.
[11] Trial exhibit 14.

Transacting business in the name of one company with another company owned or controlled by the same person is not strictly prohibited. But such self-dealing transactions by those who owe a fiduciary duty to minority shareholders of the corporation are examined under the intrinsic fairness rule and the person controlling the transaction has the burden of proving that, despite the transaction's personal benefit, it was fair to the other shareholders. (See, e.g., *Gries Sports Enters. v. Cleveland Browns Football Co.*, 26 Ohio St. 3d 15, 20 (1986): If the directors are not entitled to the protection of the [business judgment] rule, then the courts scrutinize the decision as to its intrinsic fairness to the corporation and the corporation's minority shareholders.) No such fairness existed here. Wanchisn and Taafe agreed to pay warranty claims of over $174,000 in the absence of any meaningful evidence that AIB owed a duty, breached a duty, or proximately caused any damages. There was no evidence that AIB was in privity of contract with either Danieli or Sterling Steel. There was no evidence of a warranty given by AIB to Danieli or Sterling Steel, much less to Engineered Solutions and Machine and Fabricating. There was no competent evidence that the parts failed because of faulty design or manufacture, no matter what company was responsible for the design and manufacture. Finally, the amounts calculated by Wanchisn and Taafe as damages – $87,338.06 and $87,593.96 – seem to have been pulled out of thin air. In short, the warranty claims were made by Wanchisn and Taafe – through their corporations – and honored by Wanchisn and Taafe – through their control of AIB – for no reason other than to transfer the majority of the remaining settlement proceeds to themselves, all to Hymes's detriment.

By breaching their fiduciary duty to Hymes, Wanchisn and Taafe, jointly and severally, attempted to deprive him of $58,310.67, or one-third of the total $174,932.02 in bogus warranty claims.

Breach of contract by AIB and the majority directors, Wanchisn and Taafe

Hymes's claim for breach of contract rests on the proposition that AIB, Wanchisn and Taafe breached the terms of the parties' agreement by "failing to pay [Hymes] one-third of the amount held in escrow."[12]

The elements of a breach of contract claim are that (1) a contract existed, (2) the plaintiff fulfilled his obligations, (3) the defendants failed to fulfill their obligations, and (4) damages resulted from this failure. *Kirkwood v. FSD Dev. Corp.*, 8th Dist. No. 97371, 2012-Ohio-2922, ¶13. The parties don't dispute the existence of an agreement to equally split the settlement proceeds left after legal fees and permissible debts and obligations were paid. And, based upon the conduct of Wanchisn and Taafe already summarized in this opinion, the evidence is clear that the individual defendants used their majority control of AIB to substantially reduce the amount of the "pot" that the three men would split by proposing to siphon almost $175,000 of it to themselves. Finally, there is no question that AIB, acting through Wanchisn and Taafe, the directors who control it, has not distributed the remaining settlement proceeds.

But that leaves unaddressed the issue of whether AIB was required to distribute the proceeds within a specified time frame, i.e. has the time for performance expired? Where a contract does not specify a time for performance then it must be completed within a reasonable time. *Bertovich v. St. John*, 8th Dist. No. 96619, 2012-Ohio-475, ¶15. Since AIB's legal fees should have been known no later than the end of September 2009, and, because it was no longer doing business, its other debts and obligations should have been known no later than the end of 2009, AIB and the majority directors breached the contract by not first making a good faith determination about the company's remaining debts and obligations and then distributing to all

[12] Complaint, ¶15.

three shareholders equally the net proceeds of settlement by January 14, 2011, the date Hymes filed this suit.

Breach of contract and quantum meruit against Engineered Solutions

Hymes's testimony on what he was supposed be paid by Engineered Solutions was more credible than the evidence opposed to it, hence he proved his claim for breach of contract by the preponderance of the evidence and his equitable claim for the same damages under a theory of quantum meruit is moot.

The defendants' counterclaims and the third-party complaint

The first, third, fourth, fifth, sixth and seventh counterclaims are all asserted by Engineered Solutions.[13] The essence of these claims is that Hymes violated duties he owed to Engineered Solutions as a "defacto corporate officer"[14] and employee when he formed GMH Technologies, Inc. and began using the company's "customer list"[15] and "information about business opportunities"[16] to "[draw] customers away from"[17] Engineered Solutions. None of these claims were supported by evidence sufficient to prove them. It is true that Hymes did form the new company while working for Engineered Solutions, but that act alone did not violate his duty of loyalty. More importantly, there was scant evidence that he did anything beyond simply forming the company, and no evidence that anything he did proximately caused damage to Engineered Solutions.

At count two of the counterclaim, Engineered Solutions alleges conversion, namely of a laptop computer, CAD software and cash. This claim was not proved. In fact, the CAD

[13] The seventh counterclaim, for fraud, is also asserted on behalf of AIB.
[14] Counterclaim, ¶2.
[15] *Id*., ¶22.
[16] *Id*. ¶13.
[17] *Id*. ¶5.

software appears to be the Auto CAD Seat for which the company has already charged Hymes $1,095.

Engineered Solutions's last claim against Hymes is count fourteen of the counterclaim: indemnity on the warranty claim of Sterling Steel. By this cause of action, Engineered Solutions claims that Hymes "negligently designed certain products which . . . failed catastrophically,"[18] causing Engineered Solutions to have to pay a warranty claim. AIB makes a similar counterclaim at count thirteen. As mentioned earlier in this entry, no competent evidence was offered at trial to show, first, that Hymes breached a professional standard of care and, second, that any such breach proximately caused problems at Sterling Steel and Danieli.

Counts seven, eight, nine and ten of the counterclaim by AIB, Wanchisn and Taafe are for fraud and misrepresentation. The basic allegation of these causes of action is that Hymes illegally used Superbolt's designs, thereby exposing AIB and his fellow shareholders to liability to Superbolt. It is enough to say about these claims that they required much more proof than was presented at trial. The same is true for counterclaim causes of action eleven (by AIB for conversion) and twelve (for a breach of fiduciary duty to other shareholders), both of which are premised on essentially the same alleged misconduct.

The final counterclaim is at count fifteen and alleges that Hymes is required to indemnify Wanchisn, Taafe, AIB and Engineered Solutions for any claims that Superbolt makes against them because of Hymes's breach of the confidentiality provision of the settlement agreement by disclosing its terms in this case. Putting aside the exception in the settlement agreement to non-disclosure when disclosure is "reasonably necessary to enforce the rights and obligations"[19] of a party, there is no evidence that Superbolt has made any such claim. As a result, this portion of

[18] *Id*., ¶87.
[19] Trial exhibit 4, settlement agreement, section 4.

the counterclaim is not justiciable because it does not relate to a real controversy among the parties.

Finally, and for the same reasons – primarily, a lack of evidence – that the defendants are not entitled to recover on their counterclaims, the third-party complaint against GMH Technologies, Inc. is decided in the third-party defendant's favor.

Damages

By contract, AIB agreed to distribute one-third of the net settlement, after payment of its remaining debts and obligations, to Hymes. AIB breached that agreement and the evidence showed that the net amount of the settlement is $235,513.82. Hymes is entitled from AIB to one-third of that amount, or $78,504.61, as damages for breach of contract.

Wanchisn and Taafe, as majority shareholders of a close corporation, breached their heightened fiduciary to Hymes by colluding to divert $174,932.02 from the proceeds that should have been divided equally among the three shareholders. Hymes's share of that comes to $58,310.67, for which Wanchisn and Taafe are jointly and severally liable to him. But that amount is included in the damages caused by AIB's breach of contract, i.e. Hymes will be made whole for his damages on both claims by the payment of $78,504.61.

That money remains under the control of Wanchisn and Taafe by virtue of their majority control over AIB, since, under the escrow agreement, McDonald Hopkins must wait for instructions from AIB before distributing any of the remaining settlement proceeds. As part of his claim for relief, Hymes seeks "an order to the ecrow agent, McDonald Hopkins"[20] to pay Hymes his damages out of the escrowed settlement. This is the functional equivalent of a request for a mandatory injunction ordering Wanchisn and Taafe, for AIB, to instruct McDonald Hopkins, under the first part of the third paragraph of the escrow agreement, to distribute

[20] Plaintiff July 13, 2012, post-trial brief (closing argument), p. 35.

$78,504.61 to Hymes as a debt of AIB – by this judgment entry – to be paid before the shareholders split the rest of the settlement. At the same time, such a distribution will also have the effects of paying Hymes his share, so that no further distribution to him would be required, and satisfying this judgment, except costs.

CONCLUSION

Consistent with the findings of fact and conclusions of law in this journal entry, judgment is hereby entered in favor of plaintiff Gregory Hymes on the complaint against Richard Wanchisn and Gerald Taafe, jointly and severally, in the amount of $58,310.67, with interest at the statutory rate beginning on the date of this entry, and court costs.

Judgment is hereby entered in favor of plaintiff Gregory Hymes on the complaint against American Industrial Bolting, Inc., in the total amount of $78,504.61, with interest at the statutory rate beginning on the date of this entry, and court costs. To carry this judgment into effect, defendants Wanchisn and Taafe are ordered to instruct McDonald Hopkins to pay $78,504.61 to Hymes from the Superbolt settlement proceeds currently in McDonald Hopkins's possession. Once McDonald Hopkins complies with that instruction, and after all court costs are paid, the judgments against AIB, Wanchisn and Taafe will be marked as satisfied and Hymes will have no further right to any of the remaining settlement proceeds.

Judgment is hereby entered in favor of plaintiff Gregory Hymes on the complaint against Extreme Engineered Solutions, Inc. in the total amount of $1,217.88, with interest at the statutory rate beginning on the date of this entry, and court costs.

Judgment is hereby entered in favor of plaintiff/counterclaim defendant Gregory Hymes and against the defendants/counterclaimants Richard Wanchisn, Gerald Taafe, Extreme

Engineered Solutions, Inc. and American Industrial Bolting, Inc. on their counterclaim, at their costs.

Judgment is hereby entered in favor of third-party defendant GMH Technologies, Inc. and against the third-party plaintiffs Richard Wanchisn, Gerald Taafe, Extreme Engineered Solutions, Inc. and American Industrial Bolting, Inc. on their third-party complaint, at their costs.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

SERVICE

A copy of this journal entry was sent by email, this _____ day of October, 2013, to the following:

Stuart A. Strasfeld, Esq.
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Attorney for plaintiff Gregory Hymes and
Third-party defendant GMH Technologies, Inc.

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_____
Judge John P. O'Donnell