STATE OF MICHIGAN

COURT OF APPEALS

GARY GOLDBERG,

Plaintiff-Appellant,

v

FIRST HOLDING MANAGEMENT COMPANY, BAY MANOR, DOUGLAS SILLS, CLAUDIA SILLS, SUSAN J. SILLS, and NINETY SIX BAY MANOR,

Defendants,

and

88 WOODS, LLC, BRIGHTON GLENNS, LLC, FIRST HOLDING MANAGER, LLC, and NINETY SIX MB, LLC,

Defendants-Appellees.

UNPUBLISHED
October 9, 2014

No. 314874
Oakland Circuit Court
LC No. 2011-120459-CB

Before: RIORDAN, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Plaintiff, Gary Goldberg, appeals as of right the bench trial verdict in favor of defendants-appellees, 88 Woods, LLC, Brighton Glenns, LLC, First Holding Manager, LLC, and 96 MB, LLC, in this action involving minority shareholder oppression. We vacate and remand.

I. FACTUAL BACKGROUND

The three companies at issue in this case—88 Woods, LLC (88 Woods), 96 MB, LLC (96 MB), and Brighton Glenns, LLC (Brighton)—all own apartment complexes. Plaintiff had an ownership interest in the companies, the percentage of which varied throughout the years. The named manager of the properties was First Holding Manager, LLC (FH Manager). FH Manager, in turn, delegated its management responsibilities to First Holding Management Company, LLC (FH Management Co). The Sills—defendants Susan, Douglas, and Claudia—owned FH Manager and FH Management Co.

FH Management Co was entitled to receive five or six percent, depending on the property, of the revenue for its management services. However, neither FH Manager nor FH

Management Co had direct day-to-day control over the employees or management issues, because FH Management Co delegated the day-to-day operations to sub-managers. According to John Breza, an employee of FH Management Co, FH Management Co retained "asset management" responsibilities. Breza detailed that the sub-managers were paid three and a half percent, taken from a portion of the rent paid to FH Management. At trial, seemingly among other things, plaintiff alleged wrongdoing regarding the delegation of the management duties.

Initially, plaintiff's investment in these properties seemed promising, as he received the following distributions: (1) from his initial investment of $32,100 in 88 Woods,[1] plaintiff received $160,280 in distributions; (2) from his initial investment of $65,000 in Brighton, plaintiff received $300,635 in distributions; and (3) from his initial investment of $150,000 in 96 MB, plaintiff received $219,000 in distributions. However, the distributions ended in 2005, 2004, and 2001, respectively, leaving plaintiff dissatisfied.

Plaintiff further complained about the management of the three companies after his friend, Archie Sills, died in 2003. Plaintiff repeatedly requested information about the companies, but felt that he was rebuffed. There was significant testimony pertaining to loans, with accruing interest, the Sills were making to the properties without member approval. Plaintiff characterized this as wrongful, as he believed it exceeded the authority in the operating agreements as it was for expenses such as shortfalls, repairs, and maintenance.

In regard to 88 Woods, which was sold in 2011, plaintiff identified several instances of alleged wrongdoing. Testimony at trial established that a Sills' entity purchased the 88 Woods' mortgage at a discount, without member approval, and then sold it at a profit. Plaintiff was later extended the opportunity to participate in the purchase, but he declined, explaining that he felt he lacked the necessary information to participate in the offer. Plaintiff also objected to the sale price obtained for 88 Woods (the property), and produced an expert witness in appraisals to explain how the purchase price should have been higher. Significant testimony was solicited demonstrating that virtually all of defendants' conduct, including selling 88 Woods, was accomplished without member approval.

Plaintiff initiated this instant action and alleged the following five counts: (I) member oppression pertaining to 88 Woods, in violation of the Michigan Limited Liability Company Act, MCL 450.4515; (II) member oppression pertaining to Brighton, in violation of MCL 450.4515; (III) member oppression of 96 MB, in violation of MCL 450.4515; (IV) common-law equitable dissolution of Brighton and 96 MB; and (V) an accounting.

After a three day bench trial, the trial court found in favor of defendants. The court stated that it "was sorry that [Archie Sills] passed away" and that plaintiff's "relationship with the entity changed, [plaintiff] became a member, not a friend." The trial court neither identified nor analyzed the legal issues before it, but simply concluded that plaintiff failed to prove his claims. Plaintiff now appeals.

[1] Plaintiff testified that his initial investment was closer to $40,000.

II. TRIAL COURT'S RULING

A. STANDARD OF REVIEW

"We review a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo." *Chelsea Inv Group LLC v Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010). "Clear error exists only when the appellate court is left with the definite and firm conviction that a mistake has been made." *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 471; 719 NW2d 19 (2006) (quotation marks and citation omitted). We review *de novo* the issue of whether the trial court complied with a court rule. *Cranbrook Prof Bldg, LLC v Pourcho*, 256 Mich App 140, 142; 662 NW2d 94 (2003).

"Decisions concerning the meaning and scope of pleading . . . are within the sound discretion of the trial court and reversal is only appropriate when the trial court abuses that discretion." *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); *Lockridge v Oakwood Hosp*, 285 Mich App 678, 692; 777 NW2d 511 (2009). "A trial court abuses its discretion only when its decision results in an outcome falling outside the range of principled outcomes." *Lockridge*, 285 Mich App at 692.

"[R]eview of an unpreserved great weight issue is reviewable on appeal, subject to the plain error standard of review." *People v Cronin*, 494 Mich 867, 867; 832 NW2d 199 (2013). We review unpreserved claims for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

B. ANALYSIS

Plaintiff correctly argues the trial court provided virtually no findings to support its conclusions of law. Defendants rejoin that the issues plaintiff now raises on appeal were never pled in the trial court thus, on appeal, his claims are meritless. We agree that the trial court's findings are insufficient for us to review, and thus we remand this matter for further clarification.

"The primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Dalley v Dykema Gossett*, 287 Mich App 296, 305; 788 NW2d 679 (2010) (quotation marks, brackets, and citation omitted). In other words, "MCR 2.111(B)(1) requires that a complaint be specific enough to reasonably inform the adverse party of the nature of the claims against him." *Weymers*, 454 Mich at 654. When the case proceeds to trial, MCR 2.118(C) provides:

> (1) When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.
>
> (2) If evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings, amendment to conform to that proof shall not be allowed unless the party seeking to amend satisfies the court that the amendment and the admission of the evidence would not prejudice the objecting party in

maintaining his or her action or defense on the merits. The court may grant an adjournment to enable the objecting party to meet the evidence.

On appeal, plaintiff highlights the purchase of the 88 Woods' mortgage, the sale of 88 Woods, the Sills' family loans to the three companies, and the delegation of manager duties. However, there is no mention in plaintiff's second amended complaint of the Sills' family loans, the hiring of sub-managers or FH Management Co, or the purchase of 88 Woods' mortgage.

Even assuming, *arguendo*, that plaintiff failed to sufficiently plead these claims in his complaint with its allegations of member oppression, a motion pursuant to MCR 2.118(C) could have cured the defect. Nevertheless, plaintiff did not make a motion at trial to amend his complaint consistent with MCR 2.118(C)(1). See *Zdrojewski v Murphy*, 254 Mich App 50, 61; 657 NW2d 721 (2002) ("The only requirement [of MCR 2.118(C)(1)] is that the party seeking amendment move to have the court amend the pleadings[.]"). Furthermore, the trial court made no finding whether defendants expressly or implicitly consented to a constructive amendment of the complaint. See *City of Bronson v American States Ins Co*, 215 Mich App 612, 619; 546 NW2d 702 (1996). In the stipulated final pretrial order, the parties listed as a contested legal question: "Whether plaintiff may assert unpleaded claims with regard to 88 Woods mortgage purchase, the right to pay management fees or whether operating costs could have been lower?" In their opening statement at trial, defendants again alerted the court that plaintiff failed to plead a claim regarding the purchase of 88 Woods' mortgage, the Sills family loans, and the management fees.[2]

The trial court provided no guidance regarding the scope of the issues at trial. When defendants objected to specific evidence pertaining to the sale of 88 Woods, the trial court ruled in plaintiff's favor. Apart from that ruling, it is unclear what the trial court understood were the precise issues plaintiff brought forth in his complaint or through the evidence submitted at trial. As noted *supra*, plaintiff only had to make his complaint "specific enough to reasonably inform the adverse party of the nature of the claims against him." *Weymers*, 454 Mich at 654. While decisions regarding the meaning and scope of a pleading are within the trial court's discretion, *id.* at 654, it does not appear that the trial court actually exercised that discretion in this case to delineate in its ruling the scope of the issues before it. As the trial court's ruling is devoid of any meaningful analysis, we are left to speculate about what theories and evidence the trial court considered in its ultimate decision.

This lack of clarity is exacerbated by the deficiencies in the trial court's subsequent written opinion. Pursuant to MCR 2.517(A)(1): "In actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." Further, "[b]rief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts." MCR 2.517(A)(2). In evaluating the adequacy of the trial

[2] Defendants echoed these arguments in their closing argument. Because of defendant's repeated assertion of this issue before proofs began, this issue is not waived as plaintiff suggests in his reply brief.

court's findings, the question is whether it is apparent from its findings of fact and conclusions of law that the court was aware of the issues and correctly applied the law, "and where appellate review would not be facilitated by requiring further explanation." *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995); *LaFond v Rumler*, 226 Mich App 447, 458; 574 NW2d 40 (1997).

Here, the trial court's factual findings and legal conclusions are insufficient for this Court to review. The trial court's perception of the case was that after plaintiff's friend—Archie Sills—died, plaintiff "began to be treated as a partner in the deals, and not as a friend. Plaintiff didn't like this treatment and sued[.]" However, that is not an evaluation of plaintiff's claims, whatever they may be. The court went on to conclude that plaintiff had little proof of his claims, whatever the court considered those claims to be. The court also stated that while plaintiff requested annual meetings, he did not show damages resulting from the failure to hold meetings. However, the failure to conduct annual meetings was merely one of plaintiff's numerous allegations. The court then found that while plaintiff complained about "the sale of 88 Woods" and claimed that "he didn't have sufficient information about the sale which would have led him to participate as offered, . . . he failed to identify what additional information he would have needed." However, that conflates two of plaintiff's allegations: the purchase of the mortgage (which plaintiff was offered a chance to participate in), and the sale of the property (about which plaintiff was not consulted). Thus, it appears the trial court either misunderstood plaintiff's claims, or did not consider them sufficiently pled.

Nor did the court mention or analyze the Sills' loans or the hiring of sub-managers. The court vaguely referenced the operating agreements in context of the annual meetings. It displayed no awareness of the significance of the operating agreements and whether they authorized defendants' various actions.[3] The court likewise failed to analyze the propriety of the Sills' purchase of 88 Woods' mortgage.[4] It is not clear from the trial court's rulings whether these omissions were a reflection of a misunderstanding of the facts and law, whether the trial court found that such allegations were not properly pled, or whether shareholder oppression occurred.

While the trial court referenced the sale of 88 Woods (the property), and placed it in the context of the real estate market at that time, it failed to analyze the precise issue of whether the operating agreement permitted defendants' actions. Instead, the trial court conclusively found that three witnesses at trial were "credible and helpful" while plaintiff's expert in appraisals was "largely incredible." The court concluded that the "testimony of [the three] witnesses established that the managers of the LLCs were more than justified in their actions." However, that does not illuminate what precise evidence the court relied on, an analysis of the shareholder agreement,

[3] The relevance is that actions permitted by "an operating agreement" cannot be "willfully unfair and oppressive conduct." MCL 450.4515(2).

[4] Nor did the trial court reference the issues defendant raises on appeal of time-barred claims pursuant to MCL 450.4515(1)(e).

nor what willfully unfair and oppressive conduct the trial court understood plaintiff to have alleged.

Because the trial court made insufficient findings for this Court to review, remand for further clarification is warranted.[5]

III. EXPERT WITNESS

A. STANDARD OF REVIEW

Plaintiff also challenges the trial court's refusal to qualify his appraisal expert as an expert in property management. We review "a trial court's rulings concerning the qualifications of proposed expert witnesses to testify for an abuse of discretion. An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006) (citation omitted).

B. ANALYSIS

Because the trial court failed to provide the reasoning for its ruling, remand for further clarification regarding the expert witness' qualifications also is warranted.

The proponent of evidence bears the burden of establishing admissibility, and the trial "court may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781, 782; 685 NW2d 391 (2004). The trial court functions as a "gatekeeper" and "[t]his gatekeeper role applies to *all stages* of expert analysis." *Id.* (emphasis in original). "While the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither abandon this obligation nor perform the function inadequately." *Id.* at 780 (quotation marks and citation omitted).

"MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data." *Id.* at 782. However, the proper inquiry is not "whether an expert's opinion is necessarily correct or universally accepted" but "whether the opinion is rationally derived from a sound foundation." *Lenawee Co v Wagley*, 301 Mich App 134, 162; 836 NW2d 193 (2013) (quotation marks and citation omitted). Trial courts "may not, for example, apply an overly narrow test of qualifications in order to preclude a witness from testifying as an expert." *Gay v Select Specialty Hosp*, 295 Mich App 284, 291; 813 NW2d 354 (2012) (quotation marks and citation omitted).

In the instant case, the trial court provided virtually no explanation for declining to qualify plaintiff's witness as an expert in property management. After direct examination, the trial court qualified the witness only as an expert in real estate appraisal, not property

[5] Moreover, because plaintiff's great weight challenge depends on the court's ultimate ruling, it is premature to analyze this claim.

management. When plaintiff questioned why not property management,[6] the trial court responded: "Yeah, because I don't think he's an expert based on his testimony." No further analysis was provided. The trial court did not address or analyze MRE 702, nor explain why the witness proved unworthy of expert qualification. This hardly was a "searching inquiry," and we are once again left speculating about the trial court's reasoning. *Gilbert*, 470 Mich at 782; see also *Gay*, 295 Mich App at 291.

While defendants claim that the witness ultimately provided testimony regarding property management, the trial court ruled that it was not considering him as providing expert property management testimony. Although defendants contend that plaintiff cannot show that a substantial right was affected, in its subsequent ruling, the trial court specifically relied on the fact that "[p]laintiff presented no expert testimony as to any course of conduct or series of actions the [sic] substantially interfered with his interests." Defendants, however, posit that because the trial court found this witness to be "largely incredible," it does not matter whether the witness testified as an expert because the trial court would have disregarded it. However, this Court cannot speculate about the weight the trial court would have given to hypothetical expert testimony. See also *Taylor v Mobley*, 279 Mich App 309, 313-314; 760 NW2d 234 (2008) *(*a factfinder may choose to believe or disbelieve a portion of a witness' testimony). Moreover, considering that the trial court's ultimate ruling was less than clear, it cannot be said with certainty that any error was harmless.

On remand the trial court should state its reasons for declining to qualify plaintiff's witness as an expert in property management.

IV. CONCLUSION

Because the trial court's findings of fact and conclusions of law are insufficient for us to review, a remand is necessary for the trial court to delineate the issues properly raised at trial, to provide its analysis of those issues, and rule on them. The trial court also must detail its reasoning for declining to admit plaintiff's witness as an expert in property management. We vacate the order appealed and remand for entry of a judgment that better articulates findings of fact and conclusions of law. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra

[6] Plaintiff's witness testified that he owned apartment buildings for the last seven years in the City of Westland, and retained property managers.