

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Ruth D. Thomas, Executor of the
Estate of John Ryan Thomas

Appellee

v.

Albert C. Thomas, Inc., et al.

Appellant

Court of Appeals No. L-11-1064

Trial Court No. CI0200802675

DECISION AND JUDGMENT

Decided: August 31, 2012

* * * * *

Thomas A. Yoder, for appellee Ruth D. Thomas, Executor of
the Estate of John Ryan Thomas.

James F. Dettinger, for appellee Wilbur S. Thomas.

V. Robert Candiello, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common
Pleas, in which the trial court dismissed a complaint for dissolution of Albert C. Thomas,

Inc. (“ACT”), a closely held corporation, that was filed by appellee, Ruth Thomas, for failure to comply with statutory requirements. In addition, the trial court awarded appellee, Wilbur S. Thomas, a one-third interest in ACT, and awarded ACT damages for breach of fiduciary duty and conversion on the part of appellant, Albert C. Thomas. Finally, the trial court dismissed the claim of appellant for repayment of an alleged personal loan made to ACT.

{¶ 2} On appeal, appellant sets forth the following four assignments of error:

Assignment of Error No. 1:

The trial court committed reversible error finding that Appellee, Wilbur Thomas had a one-third ownership interest in the Corporate entity known as Albert C. Thomas, Inc. (ACT) and therefore was entitled to one-third of the proceeds realized from the sale of the Corporate assets.

Assignment of Error No. 2:

The Trial Court’s Entry and Order of Judgment finding that the Appellant breached a fiduciary duty in converting assets of the Albert C. Thomas, Inc. Company in constructing and maintaining his personal residence on the real estate owned by another Company, Thomas Brother’s Inc., was erroneous and constituted reversible error without any evidence being introduced at trial to substantiate such a claim.

Assignment of Error No. 3:

The Trial Court committed reversible error in awarding a Judgment for Rent in favor of the Appellees and against the Appellant as such finding and Judgment was arbitrary, unreasonable and capricious and against the manifest weight of the evidence produced at trial, and contrary to law.

Assignment of Error No. 4:

The Trial Court's entry and Order of Judgment finding that Albert C. Thomas, Inc. owed no debt to the Appellant constituted an abuse of discretion and reversible error when such findings were against the manifest weight of the evidence.

{¶ 3} In December 1956, brothers Albert and Ross Thomas formed and incorporated a water and sewer line excavation business, which they named Thomas Excavating Company, Inc. ("TEC"). Later, in 1962, Albert purchased Ross's share of the business and Albert's two remaining brothers, Wilbur and John Thomas, became part owners of TEC, with Albert designated as the president of the company. In 1965, Albert, Wilbur and John incorporated a separate business, Thomas Brothers, Inc., which owned the real estate on which TEC was located, along with certain other parcels of real estate.

{¶ 4} On December 15, 1983, the state of Ohio cancelled TEC's corporate charter for failure to pay corporate franchise tax. Rather than wind up the corporation, the three brothers continued to operate TEC as a partnership until March 29, 1985, when they formed another corporation, Albert C. Thomas, Inc. ("ACT"). ACT operated from the

same business location, and used the same equipment and client list, as TEC. Albert and John were named as corporate officers. All three brothers worked as employees of ACT until 1993, when Albert and John terminated Wilbur's employment.

{¶ 5} On October 9, 2007, Thomas Brothers, Inc. transferred its real property by deed to Albert, John and Wilbur. Shortly thereafter, John Thomas died. Thomas Brothers, Inc. was never dissolved.

{¶ 6} On March 12, 2008, appellee, Ruth Thomas, filed a complaint in which she asked the trial court to dissolve ACT and to sell and distribute its assets equally to Albert and to her late husband John's estates. The complaint also asked for the dissolution of Thomas Brothers, Inc., and the distribution of any of its remaining assets and/or real estate¹ equally between Albert, Wilbur, and John's estates. On May 13, 2008, Albert, ACT and Thomas Brothers, Inc.² filed an answer and a counterclaim. In the counterclaim, Albert asserted that he was paid less than John for his efforts on behalf of ACT and, therefore, he was entitled to \$147,217.50 in unpaid compensation. On May 15, 2008, Ruth filed an answer to the counterclaim, in which she asserted that any reduction in compensation to Albert was voluntary, and that Albert received other benefits from ACT "to make up for any discrepancies in the salaries."

¹ The real estate referenced in the initial complaint was land in Swanton Township, part of which had been transferred from Thomas Brothers, Inc., to the Toledo Metroparks.

² Unless otherwise specified, any references herein to Albert Thomas also refer to ACT and Thomas Brothers, Inc.

{¶ 7} Shortly after the complaint was filed, Albert started a new company, Jake Contracting, LLC (“Jake Contracting”), which performs the same work as ACT, from the same location, using the same equipment and telephone number. On November 3, 2008, with leave of court, Ruth filed an amended complaint which added Wellman Rentals, Inc., an equipment rental company owned by the three brothers, as an additional party. Albert filed an answer to the amended complaint on November 5, 2008; however, on July 24, 2009, Ruther dismissed Wellman Rentals, Inc. as a defendant, with prejudice.

{¶ 8} On July 28, 2009, Wilbur filed a counterclaim and cross-claims. In support of his counterclaim against Ruth, Wilbur stated that John and Albert never informed him that ACT was, in all respects, a successor corporation to TEC, and that Albert and John did not inform him that he was not to be an owner of ACT. Wilbur further stated that he did not know that Albert and John were the only owners of ACT until Ruth filed the complaint in this action. Wilbur’s complaint further alleged that John’s actions with regard to ACT constituted conversion of corporate assets, fraud, and interference with prospective advantage, at Wilbur’s expense.

{¶ 9} In support of his cross-claims, Wilbur stated that Albert and John breached a fiduciary duty to Wilbur through “self-dealing and misappropriation of revenue, net income and assets of Thomas Excavating Company” by not giving him an ownership interest in ACT. Wilbur further alleged that Albert converted corporate assets for his own use by living in part of a building owned by ACT, rent free, and by not paying for utilities, taxes or insurance associated with his use of that residence, since 1985. In

addition, Wilbur alleged that Albert's actions amounted to fraud and interference with Wilbur's prospective advantage. Finally, Wilbur alleged that both John and Albert were responsible for breach of contract/unjust enrichment because they accepted loans from Wilbur totaling \$24,000, \$14,000 of which was still outstanding when the complaint was filed. Ruth filed an answer to the counterclaim on August 4, 2009, and Albert replied to the cross-claims on August 6, 2009.

{¶ 10} On August 31, 2009, Albert filed a motion for summary judgment in which he argued that, as a matter of law, Wilbur is not entitled to either one-third of the value of ACT's assets, or to repayment of the loan he allegedly made to ACT. In support, Albert relies on his own deposition testimony, as well as the depositions of Wilbur and ACT's accountant, Jeffrey Turner, CPA, the affidavits of ACT's secretary, Susan Godwin, and ACT's corporate tax returns.

{¶ 11} In his deposition, Albert testified that he and John formed ACT in 1985; however, the company had no corporate records, and shares were never issued. He stated that ACT never paid rent for its business property, which was originally owned by Thomas Bros., Inc., and was transferred to the three brothers in 2007. ACT does, however, pay the taxes, utilities and other expenses. Albert also stated that he lives in a two-bedroom apartment on the business premises for free in exchange for taking care of the property. Albert further testified that he formed Jake Contracting to do the same work as ACT, and that ACT is still in existence, even though it has no projects pending, because it provides some income and health insurance for John's son. Both ACT and

Jake Contracting have the same business address and telephone number, and use the same excavating equipment.

{¶ 12} Albert stated that he loaned ACT money in the past, which was never repaid. He further stated that he paid off a line of credit for ACT in 2007, and that Jake Contracting has taken over the business line of credit that was formerly accessed by ACT. He testified that, although TEC was dissolved in 1984, the company still owns some “worthless” lots, for which Albert pays the taxes. He further testified that all three brothers owned the business property at 6930 Berkey-Southern Road in Whitehouse, Ohio, which is valued at approximately \$277,000. Albert testified that John’s estate owes him \$319,000 for back pay because, for 12 years, he received only a company car and \$25,000 in compensation, while John was paid more than \$300,000 during the same time period. Albert also testified that he gave up compensation from the company voluntarily, believing that some day he would be paid back.

{¶ 13} On cross-examination, Albert testified that he and John incorporated TEC in 1956, and that he bought Ross out in 1963 when John joined the company as an owner. He further testified that Wilbur became a one-third owner of TEC in 1975, after loaning the company money. Albert stated that company moved to 21.16 acres in Whitehouse in 1970, where it has remained for over 37 years. TEC transferred the land to the three brothers for no charge when the company’s charter was revoked in 1983. Albert further stated that ACT, which was formed in 1985, is owned solely by John and himself, because Wilbur was not a reliable worker. However, Albert testified that Wilbur was

originally allowed to work for ACT because he had loaned the company money, which was paid back. Albert also testified that Jake Contracting has the same client base, location and phone number as ACT and that, on the advice of counsel, he did a “vest pocket dissolution” of ACT instead of formally winding up the company’s business affairs.

{¶ 14} On further cross-examination, Albert testified that he never told Wilbur that he was being excluded from ACT; however, while Wilbur was a company employee, he received a salary, benefits, a pension, and a company car. Albert stated that, over the years, Thomas Bros., Inc. has owned several parcels of real estate in addition to the Berkey-Southern property. He also stated that, at the time of his deposition, ACT had \$16,000 in the bank and Albert personally had certificates of deposit worth \$120,000, which were put in his three daughters’ names.

{¶ 15} Wilbur testified in his deposition that, in his opinion, he is a one-third owner of ACT, even though he was never involved in running the company, because he was an officer and an equal shareholder in TEC. He further testified that, when TEC’s charter was revoked by the state of Ohio, it owned 15 pieces of equipment, including three excavators, most of which are still used by Albert to run ACT and Jake Contracting. Wilbur stated that he loaned TEC \$24,000 in 1983 and that, by the date of his deposition, only \$10,000 has been paid back. Wilbur further stated that, although the loan was made to his brother John, the money was given to ACT.

{¶ 16} Jeffrey Turner testified in his deposition that he was the accountant for Albert and John since 1997 and that he considered Albert and John to be the only owners of ACT. Turner stated that he never filed a tax return on behalf of TEC or Thomas Bros. He further stated that Albert was never paid more than \$9,000 per year by ACT; however, John was paid between \$35,000 and \$45,000 per year. Turner testified that, in 2007, the brothers transferred real estate from Thomas Bros., Inc. to themselves because John was ill and that corporation was defunct at the time. He further stated that, for tax purposes, Albert reported no basis and a \$100,000 sale value in 2007, for which he paid \$13,000 in capital gains taxes, while John reported a stepped up basis of \$100,000 and no taxable gain.

{¶ 17} On cross-examination, Turner testified that he never saw a corporate minute book, shareholder resolutions or documents showing and election of officers for ACT, and there are no records to show that TEC was the predecessor corporation to ACT. Turner further testified that, if Albert lived on a portion of ACT's business premises he should have either paid the corporation for rent and utilities, or reported passive income for those items on his tax return.

{¶ 18} On further cross-examination, Turner testified that Albert never complained about receiving little or no salary from ACT. He recalled at least one year when Albert and John each received an \$8,000 dividend from ACT. He verified that John's salary from 1997 to 2007 totaled approximately \$319,000.

{¶ 19} In her affidavit, Godwin stated that she was the secretary for ACT for over 20 years, during which Wilbur was an employee of the company. Godwin further stated that, to the best of her knowledge, Wilbur was not an owner of ACT.

{¶ 20} On September 10, 2009, Ruth filed a motion for summary judgment and a memorandum in support, in which she asked the trial court to dismiss Albert's counterclaims and Wilbur's cross-claims against John's estate. In support, Ruth argued that the brothers' counterclaims and cross-claims are barred as a matter of law by the doctrines of laches, estoppel, and waiver. Specifically, as to Albert's counterclaims, Ruth asserted that Albert voluntarily reduced his salary. She also argued that Albert's counterclaim for \$319,435 in back wages is barred by R.C. 2305.07, which states that an unwritten agreement is unenforceable after six years, and the doctrine of laches, because Albert took reduced wages for 12 years and then waited until after his brother's death to assert a claim. Similarly, Ruth argued that Albert's counterclaim is barred by the doctrine of estoppel, because Albert and John allegedly made an agreement whereby Albert would reduce his salary in exchange for a free place to live, a car, and free utilities. Finally, Ruth argued that, by making the agreement with John, Albert waived his right to assert a claim to receive a full salary for over 12 years.

{¶ 21} As to Wilbur's cross-claims, Ruth argued that they are barred by laches because, for 23 years, Wilbur did nothing to ascertain whether he was a shareholder of ACT, or to protect his interests as an owner, and had "no contact or input" into the company. Ruth also argued that Wilbur is not entitled to repayment of his \$14,000 loan

to ACT because Wilbur testified in his deposition that he did not intend to sue John's estate for the money.

{¶ 22} On September 28, 2009, Wilbur filed a memorandum in opposition to both Ruth's and Albert's motions for summary judgment. Wilbur relied on the depositions referenced above, along with his own affidavit, to support his position that summary judgment is not appropriate in this case because a genuine issue of material fact exists as to whether or not he is a one-third owner of ACT.

{¶ 23} In an attached memorandum, Wilbur stated that the articles of incorporation for TEC list him as a one-third owner. Wilbur further stated that TEC's corporate charter was cancelled on December 15, 1983; however, the company continued to operate as an equal partnership between John, Albert and Wilbur, until ACT was incorporated in 1985. Wilbur asserted that no documentation has been produced to show that TEC was ever dissolved, or that its assets were formally transferred for consideration to any other corporate entity. Wilbur also asserted that Ruth and Albert presented no evidence, other than hearsay, to establish that John and Albert were the only owners of ACT. In his own attached affidavit, Wilbur stated that he was never advised by Albert or John that he was not an equal owner of ACT, even when the company, along with Albert, Wilbur and John, was sued by Nationwide Insurance Company for failure to pay ACT's insurance premiums. Wilbur asserted that the statements made in Susan Godwin's affidavit relating to whether or not Wilbur was an owner of ACT are inadmissible hearsay. Finally, Wilbur argued that the admissible evidence in this case unequivocally

demonstrates that ACT “absorbed, without legal proceeding, the full value of Thomas Excavating Company with all of its attributes,” thereby making Wilbur an equal owner in ACT and that, thereafter, “no proper legal proceeding ever occurred to disjoin Wilbur from his equal ownership of ACT.”

{¶ 24} On September 29, 2009, Albert filed a memorandum in opposition to Ruth’s summary judgment motion, in which he argued that any in-kind benefits that he received should be considered an offset to the salary he agreed to defer until the company was “in the black.” Albert further argued that he should not be estopped from seeking reimbursement at this time because ACT was not in a position to pay him the deferred salary until it was dissolved.

{¶ 25} On February 10, 2010, the trial court filed an opinion and judgment entry in which it found that the facts presented did not prevent a finding that Wilbur is a one-third owner of ACT because no evidence was presented that ACT purchased the assets of TEC. The trial court further noted that, in 1992, all three brothers purchased an insurance policy for TEC, however, Wilbur was the only named individual in a lawsuit brought by Nationwide Insurance Company against TEC, Thomas Brothers, and ACT, for non-payment of those insurance premiums. Accordingly, the trial court found that genuine issues of material fact exist as to whether or not Wilbur is a one-third owner of ACT, and denied Ruth’s motion for summary judgment on that issue.

{¶ 26} The trial court further found that Albert’s claim for deferred wages, and Wilbur’s claim for repayment of a loan made to John sometime between 1980 and 1983

are both barred by the statute of limitations. Based on these conclusions, the trial court granted Ruth's motion for summary judgment as to Albert's counterclaim for payment of deferred salary and Wilbur's cross-claim for repayment of the loan to John.

{¶ 27} A trial to the court was then held on July 19, 2010, at which attorneys for Ruth, Wilbur and Albert agreed that a settlement had been reached as to Wellman Rental. The parties also agreed that the assets of ACT were appraised at \$127,000. The parties further agreed that the issues to be resolved by the trial court were whether Wilbur had an ownership interest in ACT, and whether Albert and/or Wilbur had any outstanding claims against the assets of the corporation. Thereafter, testimony was presented by Turner, Wilbur, Ruth, and realtor Megan Malczewski.

{¶ 28} Turner testified at trial that, although Thomas Bros. has shown no financial activity since 1985, it still has an "open charter." Turner also testified that he never knew Wilbur to have an interest in ACT. Turner stated that, until 2008, ACT had a \$100,000 line of credit with Farmers and Merchants Bank and that, after John's death, Albert paid off the open line of credit with his share of profits from the sale of land to the Toledo Metroparks. Turner further testified that Albert set up Jake Contracting around the time that the lawsuit was filed by Ruth, with himself as sole owner and shareholder, and opened up a new line of credit. In 2008, Jake Contracting later loaned ACT \$43,000.

{¶ 29} On cross-examination, Turner testified that he never saw any "legal corporate records" for ACT, and he relied on Albert's and John's statements that they were the only owners of the corporation. Turner further testified that ACT paid \$8,000

bonuses to Albert and John in 2004. On redirect, Turner stated that Albert set up Jake Contracting so he would not need another shareholder to guarantee a line of credit.

{¶ 30} Wilbur testified at trial that his employment with ACT ended in July 1993, after which he worked for other excavating companies. Wilbur also testified that he did not guarantee ACT's line of credit. Wilbur stated that, at its peak, TEC had 40 employees. At that time, Albert was president of the company, John was vice president, and Wilbur was secretary/treasurer "in name only." He further stated that, although TEC's charter was revoked in 1983, the company was never dissolved. Wilbur testified that he lent money to TEC in 1983 for payroll, and that he was never repaid. Wilbur further testified that ACT was a tenant of TEC, and that Albert has been living on company property since the late 1970s, but he never paid rent, utilities or real estate taxes to the company.

{¶ 31} Ruth testified at trial that she listed a 50 percent ownership in ACT as an asset of John's estate in spite of the fact that John never had any records showing that he was an owner of the company. She stated that John died on November 15, 2007.

{¶ 32} Megan Malczewski testified that she inspected Albert's apartment and that, in her professional opinion as a realtor, fair market rent for the one bedroom unit from 1980 until 2010 would be \$200 per month.

{¶ 33} On February 17, 2011, the trial court issued its "Findings of Fact and Conclusions of Law & Judgment Entry" in which it found that John, Wilbur and Albert owned equal shares in TEC, and ACT was a continuation of TEC, which "absorbed the

assets and property of [TEC] without purchase, without change in management, and after insolvency of the predecessor corporation.” The trial court also found that ACT did not observe corporate formalities such as issuing shares, electing directors, or paying corporate dividends; however, the company “permitted Wilbur to be named as a defendant (dba Thomas Excavating Company) in a suit [against all the family members] to collect a debt of the family business for past due insurance premiums. * * *” Finally, the trial court found that: (1) Albert breached his fiduciary duty to the company by maintaining a personal residence on the business property without paying rent, taxes or utilities; and (2) the company did not owe a debt to Albert, personally.

{¶ 34} Based on its findings, the trial court concluded that “Ruth failed to present sufficient evidence, * * * to merit judicial dissolution or to approve voluntary dissolution of the named corporations.” However, the trial court also concluded that ACT was merely a continuation of TEC, in which the three brothers each had a one-third ownership interest. Accordingly, the trial court found that Wilbur had a one-third interest in ACT. In making this finding, the trial court relied on evidence that Wilbur was allowed to be a defendant in a lawsuit against ACT long after he ceased to be a company employee. The trial court noted that Albert, who claimed that he and John agreed to divest Wilbur of any ownership interest in ACT, chose not to testify at trial.

{¶ 35} In addition to the above findings, the trial court found that Albert breached a fiduciary duty to the shareholders of ACT by living in quarters supplied by the company and located on the business premises, without paying rent, utilities or real estate

taxes. In support, the trial court noted that Albert had control of all the company's assets, and used that control to benefit himself; however, the trial court found no evidence that Albert's breach of fiduciary duty or conversion of assets was done with malice. The trial court further found that Albert's portion of the sale price for ACT was approximately equal to the amount of damages due to ACT for his breach of fiduciary duty and conversion of property for his own use, and that no evidence was presented to support Albert's claim to repayment of a loan to the ACT.

{¶ 36} Ultimately, the trial court dismissed Ruth's complaint for failure to comply with the statutory requirements for dissolution of the family business. In addition, the trial court awarded Wilbur a one-third interest in any assets of ACT that remain "after dissolution of the various entities comprising the family business." Finally, the trial court ordered Albert to pay damages to ACT out of his portion of such future disbursements, and dismissed Albert's claim for repayment of the loan. A timely notice of appeal was filed on March 21, 2011.

{¶ 37} In his first assignment of error, Albert asserts that the trial court erred by finding that Wilbur has a one-third ownership interest in ACT and is, therefore, entitled to one-third of the proceeds from the eventual dissolution and winding-up of the company. In support, Albert first argues that Wilbur cannot present physical evidence showing that he was an owner of ACT, since ACT and TEC did not issue shares of stock, and neither company kept corporate records such as minutes. Albert next argues that no evidence was presented to show that ACT somehow absorbed the assets of TEC. Third,

Albert argues that Wilbur does not meet the definition of an “owner” of a “close corporation,” because he was merely an employee of ACT who ceased to work for the company in 1993, “and never came back.”

{¶ 38} Albert further argues that ACT’s tax returns list only himself and John as corporate shareholders. Finally, Albert argues that the trial court erroneously concluded that any claim Wilbur may have had to ownership of ACT is barred by the doctrine of laches.

{¶ 39} Essentially, appellant asserts that the trial court’s findings of fact were against the weight of the evidence. The Supreme Court of Ohio has held that “[t]he weight to be given the evidence and the credibility of witnesses are primarily for the trier of the facts.” *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). On review, an appellate court “must presume the findings of the trial court are correct because the trial judge is best able to observe the witnesses and use those observations in weighing the credibility of the testimony.” *Thomas v. Barnhouse*, 2d Dist. No. 2003-CA-22-2004-Ohio-77, ¶ 18, *citing Seasons Coal v. Cleveland*, 10 Ohio St.3d 77, 81, 461 N.E.2d 1273 (1984). “Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.” *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 375 N.E.2d 578 (1978).

{¶ 40} Ohio courts have held that stock ownership is a form of intangible property, and the issuance of a stock certificate is not always necessary to establish corporate

ownership. *Shuman v. Shuman*, 9th Dist. No. 17572, 1996 WL 455975 (Aug. 14, 1996); R.C. 1701.24. Accordingly, Albert's argument that Wilbur is not an owner of ACT because he holds no shares of corporate stock is not well-taken. In addition, although Turner testified that only Albert and John received bonuses from ACT, he also testified that the tax and accounting work he performed for ACT was based wholly on information provided to him by Albert, and that Wilbur was never mentioned as having an ownership interest in the company.

{¶ 41} Albert next argues that Wilbur cannot be an owner of ACT because he stopped working for the company in 1993. In making this argument, Albert relies on *Werthman v. DONet, Inc.*, 2d Dist. No. 20814, 2005-Ohio-3185, in which the Second District Appellate Court quoted the Ohio Supreme Court's statement that a closely held corporation is

a corporation with a few shareholders and whose corporate shares are not generally traded on a securities market. * * * In essence, the Ownership of a close corporation is limited to a small number of people who are dependent on each other for the enterprise to succeed. *Id.* at ¶ 43-44, quoting *Crosby v. Beam*, 47 Ohio St.3d 105, 108, 548 N.E.2d 217 (1989).

{¶ 42} However, in *Werthman*, the issue addressed was whether a minority shareholder could maintain an action for breach of fiduciary duty against majority shareholders who terminated the minority shareholder's employment and offered to purchase his shares in the business at a substantially lower price than the one set forth in

the close corporation agreement. Before ultimately refusing to grant summary judgment on that issue, the appellate court cautioned that, due to the partnership-like structure of a close corporation, majority shareholders have a unique ability to “oppress minority shareholders” by such means as restricting dividends, and giving preferential treatment to themselves. *Id.* at ¶ 44.

{¶ 43} In this case, evidence was presented that Wilbur did not voluntarily terminate his employment at ACT, but rather he was fired by John and Albert. As set forth above, the record contains no corporate documents or any other evidence to show that Wilbur did not have an ownership interest in ACT. Likewise, the record does not contain any evidence, such as close corporation agreement, to show that Wilbur would be divested of any such interest in the event his employment at ACT was terminated. Accordingly, Albert’s reliance on *Werthman, supra*, is misplaced, and his argument is not well-taken.

{¶ 44} Finally, Albert argues that Wilbur’s claim is barred by the doctrine of laches, since Wilbur made no ownership claim to ACT until after the original complaint was filed, nor did he make any effort to finance the line of credit that was necessary for operation of the business. This argument is not well-taken, for the following reasons.

{¶ 45} “The elements of laches are: (1) an unreasonable delay or lapse of time in asserting a right; (2) no excuse for the delay; (3) actual or constructive knowledge of the injury or wrong; and (4) prejudice to the other party.” *Thomas v. Thomas*, 10th Dist. No. 03AP-1106, 2004-Ohio-2136, ¶ 14, citing *State ex rel. Mallory v. Pub. Emp. Retirement*

Bd., 82 Ohio St.3d 235, 244, 694 N.E.2d 1356 (1998). In order to show prejudice due to the passage of time, the one asserting the defense of laches must show that he has been “materially prejudiced by the delay of the person asserting his claim.” *Stevens v. Natl. City Bank*, 45 Ohio St.3d 276, 285, 544 N.E.2d 612 (1989).

{¶ 46} The record contains no evidence that Wilbur had actual knowledge that he was not an owner of ACT. In addition, although Albert argues that Wilbur should have known he was not an owner, Albert has not demonstrated that he was prejudiced by Wilbur’s failure to assert such a right at any particular time before John’s death. Accordingly, Albert has not established the right to assert a defense of laches in this case.

{¶ 47} On consideration, this court finds that the trial court’s determination that ACT was merely a continuation of TEC, and awarding Wilbur a one-third interest in ACT on that basis, was supported by competent, credible evidence. Albert’s first assignment of error is not well-taken.

{¶ 48} In his second assignment of error, Albert asserts that the trial court erred by finding that he breached a fiduciary duty to ACT by maintaining a personal residence in a building used by ACT, which was located on real estate owned by TEC, without paying rent, utilities or taxes. In support, Albert argues that he did not convert ACT’s assets to his own use by living in the apartment because (1) the apartment was constructed in the 1970s when the business was known as TEC, and (2) Wilbur testified at trial that he did not know who paid for the construction of the apartment. Albert’s reasoning is flawed, for the following reasons.

{¶ 49} The elements of breach of fiduciary duty are ““(1) the existence of a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately therefrom.”” *Saxe v. Dlusky*, 10th Dist. No. 09AP-673, 2010-Ohio-5323, ¶ 23, quoting *Wells Fargo Bank, N.A. v. Sessley*, 188 Ohio App.3d 213, 2010-Ohio-2902, 935 N.E.2d 70, ¶ 36 (10th Dist.). (Additional citations omitted.) In a closely held corporation, a majority shareholder ““has a fiduciary duty not to misuse his power by promoting his personal interests at the expense of corporate interests.”” *Franks v. Rankin*, 10th Dist. Nos. 11AP-934, 11AP-962, 2012-Ohio-1920, ¶ 34, quoting *Crosby*, 47 Ohio St.3d at 108-109, 548 N.E.2d 217. (Additional citations omitted.)

{¶ 50} In addition to Wilbur’s trial testimony, the record contains Albert’s deposition testimony, in which he admitted living in an apartment constructed using corporate funds, located in the building used by TEC and later by ACT. Albert also testified in his deposition, which was referenced in all the parties’ motions for summary judgment, that he paid no rent to his brothers and TEC, who owned the land, or to ACT, which utilized the building and paid its expenses, and that he contributed nothing for the taxes or utilities, for 10 to 12 years. As noted by the trial court, Albert did not testify at the trial to clarify his earlier testimony.³

{¶ 51} On consideration, this court finds that Albert’s free use of the apartment years promoted his own personal interests at the expense of his brothers, TEC, and ACT,

³ Although a reference is made in Albert’s appellate brief that he may have been unable to testify at trial due to health reasons, we cannot consider such information since it is not included in the trial court’s record.

particularly since it is undisputed that Albert controlled all of the business aspects of both TEC and ACT. Accordingly, the trial court's decision that Albert breached a fiduciary duty was not arbitrary, unreasonable or capricious, and was not against the manifest weight of the evidence. Albert's second assignment of error is not well-taken.

{¶ 52} In his third assignment of error, Albert asserts that the trial court abused its discretion by awarding a "sum uncertain in lost rent to the Corporation for [Albert's] use of a portion of the building where ACT conducted business." In support, Albert argues that he was not obligated to pay rent or other expenses because he did not have a lease and ACT did not own the building from which it conducted business. Albert further argues that, even if the trial court found there was a contract implied in law only Thomas Brothers, Inc., which is not a party to these proceedings, had the authority to assess rent.

{¶ 53} An abuse of discretion connotes more than a mere error of law or judgment, and instead requires a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). As set forth above, a contract implied in law, which is essentially the same as a claim for unjust enrichment, must be demonstrated by a showing on the part of the claimant that:

(1) the defendant received a benefit; (2) the defendant possessed an appreciation or knowledge of that benefit; and (3) the benefit was received under circumstances that would make it unjust for the defendant to retain the same without paying for it. *Warren Concrete and Supply, Inc. v.*

Strohmeier Contracting, Inc., 11th Dist. No. 2010-T-0004, 2010-Ohio-5395, ¶ 36.

{¶ 54} It is undisputed that Albert received the benefit of living rent-free in a building used by ACT as its business premises. It is further undisputed that Albert controlled the finances of Thomas Brothers, TEC and, later ACT, which included paying taxes and utilities for the apartment with company funds. As set forth in our determination as to Albert's first assignment of error, ACT is merely a continuation of those other business enterprises. In addition, testimony was presented at trial, through realtor Megan Malczewski, that the apartment had a rental value.

{¶ 55} On consideration of the foregoing, this court finds that the trial court did not abuse its discretion by finding that it would be unjust for Albert to not be assessed rent upon the dissolution of ACT. Albert's third assignment of error is not well-taken.

{¶ 56} In his fourth assignment of error, Albert asserts that the trial court abused its discretion by finding that Albert is not entitled to repayment of a \$100,000 loan from ACT. In support, Albert argues that the trial court attempted to "punish" him for not testifying at trial, even though Turner testified that Albert paid off ACT's \$100,000 line of credit with his own funds after John's death.

{¶ 57} Albert correctly states that, at trial, Turner testified that Albert paid approximately \$83,000 of his own money to Farmer's and Merchant's Bank to pay off ACT's line of credit. However, the record also shows that Albert formed Jake Construction, LLC, using the same location, client base and equipment as ACT, making

himself the new company's sole owner and shareholder. He then opened a new line of credit for Jake Contracting at the same bank. In addition, Albert stated in his deposition testimony, which is part of the trial court's record, that ACT did not owe him any money. As set forth above, for reasons not explained in the record, Albert did not testify at trial.

{¶ 58} On consideration of the foregoing, the court finds that the trial court's dismissal of Albert's claim for repayment of a loan to ACT was not arbitrary, unreasonable or unconscionable and, as such, is not against the manifest weight of the evidence presented in this case. Albert's fourth assignment of error is not well-taken.

{¶ 59} The judgment of the Lucas County Court of Common Pleas is hereby affirmed. Pursuant to App.R. 24, appellant, Albert Thomas, is ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
