

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-000715-MR

JAN E. FLOWERS AND
MARY R. FLOWERS

APPELLANTS

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 98-CI-00068

GERALD W. DUSEK

APPELLEE

AND NO. 2002-CA-001199-MR

JAN E. FLOWERS; MARY R.
FLOWERS; JEF INDUSTRIES, INC.;
AND BEAR CREEK BOAT WORKS, INC.

APPELLANTS

v. Appeal FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 98-CI-00068

GERALD W. DUSEK

APPELLEE

OPINION AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND DYCHE, JUDGES.

DYCHE, JUDGE. These appeals are taken from an order of the Marshall Circuit Court resolving the controversy between the parties concerning the dissolution/winding up of corporate affairs of JEF Industries, Inc., which was owned 52% by Jan and Mary Flowers (majority shareholders) and 48% by appellee Gerald W. Dusek. Dusek initiated this action claiming various violations of fiduciary duty by the majority shareholders.

The trial court conducted a bench trial, made findings of fact and conclusions of law, and rendered a money judgment in favor of Dusek on two issues: (1) refusal by the majority shareholders to permit Dusek to inspect corporate records; and (2) the repayment of loans made by the majority shareholders to the corporation in a greater proportion than loans made by Dusek. On the first issue, the court granted Dusek \$4,120.66; on the second, \$34,072.00 plus pre-judgment interest. These appeals followed.

Appellants make a half-hearted argument that "the trial court failed to consider all of the relevant facts in awarding appellee \$4,120.66 for being required to seek a court order to obtain corporate records," but then abandon it, acknowledging that they cannot prove the decision to be clearly erroneous. That part of the judgment is affirmed.

The second argument is that the trial court erred in finding that Dusek was repaid his loans to the corporation in a

different proportion than appellants. The Flowerses claim that their loans were \$197,967.00 of the total of \$232,039.00 loaned to the corporation, as listed on the 1997 tax return, and that Dusek received, according to the trial court's judgment, 100% of the \$34,072.00 he had loaned the corporation, while the Flowerses received only \$27,498.38, or 13.75% of their loans.

The trial court's findings of fact on this issue are:

The claims in both counts 3 and 4 involve self-dealing on the part of Flowers. While it is clear to the Court that the Flowers [sic] did treat the corporation as if it were their own, the Court does not find that the corporation, nor Dusek, were damaged in that the Court also finds that it was basically loans from Flowers to the corporation that kept the corporation afloat. As a result, any actions which might have been a breach of fiduciary duty benefited Dusek as well as Flowers, but the Court also believes that Flowers did receive favorable treatment by virtue of the repayment of loans. The Court finds that as of the date of dissolution, Dusek had loans outstanding to the corporation in the amount of \$34,072.00.

The Conclusions of Law on this issue were:

The Court . . . is of the opinion that Plaintiffs [Dusek] did in fact make loans to the corporation which were not compensated in the same manner in which defendants later repaid loans to themselves. The Court is of the opinion that such shows a violation of fiduciary duty, and that Plaintiffs as a matter of law are entitled to recover on their loans in the same manner as defendants recovered monies on their loans prior to dissolution of business. As such, defendants are liable to plaintiffs for those loans, which totaled \$34,072.00, plus

interest at the agreed upon rate of 10% from the date of dissolution of the corporation to the present.

There is no finding concerning how the majority shareholders loans were repaid, in what amount, under what terms, or in what percentage they were repaid. In short, the trial court's judgment does not contain sufficient information from which we can decide the issue raised by the majority shareholders. The judgment of the Marshall Circuit Court is therefore affirmed in part, vacated in part, and this matter is remanded for further findings to support the judgment.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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