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4 **UNITED STATES BANKRUPTCY COURT**
5 **IN AND FOR THE DISTRICT OF ARIZONA**
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8 **ADR CONTRACTING, INC.,**)
9 **Debtor.**) **In Chapter 7 proceedings**
10) **Case No. 2:08-bk-12173-CGC**
11 **THOMAS FORTIER,**)
12 **Plaintiff,**)
13 **v.**) **Adv. No. 2-08-ap-00620-CGC**
14 **ADR CONTRACTING, INC. et al**)
15 **Defendants.**) **AMENDED**
16) **UNDER ADVISEMENT DECISION**
17)

18 **I. Introduction**

19 Carl Buetzow (“Carl”) and Thomas Fortier (“Tom”) used to be family. For almost 20 years,
20 they ran a business together. Often, they hired and worked with friends and family. This all came
21 to an end in 2004 and 2005 when they decided that they could no longer work together. Sadly, for
22 the past five years they have been fighting over what often drives families apart - money. Yes, they
23 are still brothers-in-law, but their squabble over money has clearly pushed them apart. Carl thinks
24 that he has divided up the assets and liabilities of their former business fairly and equitably. Tom
25 thinks Carl closed down a million dollar business without giving him his fair share. They have come
26 here to ask the Court to decide who is right. The Court concludes that Carl did divide up the assets
27 and liabilities of their company fairly and equitably. Therefore, judgment will be given to Carl.
28

1 II. Facts Background

2 Tom is married to Carl's sister. Together, they owned a ADR Contracting, Inc. ("ADR");
3 each being a 50% shareholder. ADR is a dirt broker - a dirt broker matches a party that is
4 excavating a type of dirt with a party that needs that type of dirt. At times ADR used its own
5 equipment; at time the parties used their own equipment. The value that a dirt broker brings to the
6 process is not the ability to move the dirt, instead the value is matching parties that need dirt with
7 those that need to dispose of it.

8 Carl, the founder of the business, was the "brains" behind the operation. He brokered the
9 deals; ran the office; kept the books; managed the employees; and held the key contacts. Some time
10 after its founding, Tom became a 50/50 partner in ADR. He was supposed to be the "brawn" in the
11 business He was ADR's field representative and was not involved in the management of the
12 company.

13 In 2001, ADR faced financial difficulty. In response Carl and Tom both took out home
14 equity loans. In order to cut costs, ADR relocated its headquarters to the cabana in Tom's backyard.
15 In 2003, still facing financial problems, Carl took out another home equity; however Tom declined
16 to follow suit.

17 Over the years, Carl had simmering frustrations with the Tom's performance - claiming that
18 he failed to show up for work; took 50% of profits without 50% of work, refused to borrow more
19 money when the company needed it, and so on. Carl's frustrations boiled over when Tom kicked
20 ADR out of the back yard cabana in October 2004. At that point, Carl decided it was time to
21 dissolve the company; Tom agreed. Carl intended to sell ADR's assets, pay its creditors, repay each
22 of their home equity loans and split whatever money remained between the owners. However, after
23 Carl and Tom agreed to dissolution it became apparent the Tom did not understand the financial
24 status of ADR. For instance, Tom had no understanding that creditors even existed, much less that
25 they had to be paid. Soon after the dissolution process began Tom asked Carl, "why can't it be just
26 like it used to be?"

27 Carl undertook the task of dissolving ADR. Carl also set up an new dirt brokerage business,
28

1 ADRA Contracting Inc. (“ADRA”), using ADR’s old phone number and logo. It is apparent that
2 Carl was a terrible record keeper. He did not follow GAAP principles and did not keep ADR,
3 ADRA or his personal funds separate.

4 Carl claims that he kept ADR funds in ADRA’s and his personal accounts because soon after
5 beginning the dissolution process Tom withdrew several thousand dollars from ADR’s account
6 without consulting Carl. This was a serious problem because Carl intended to use the ADR funds
7 Tom withdrew to pay ADR’s creditors. If Tom continued the unauthorized withdrawals there would
8 be no money remaining to pay creditors. Accordingly, Carl closed the ADR accounts so Tom would
9 not have access to the funds and used ADRA and his personal checking account to pay ADR’s
10 creditors.

11 Between October 2004 and April 2006 several communications and meeting took place
12 between Carl and Tom.

- 13 • October 8, 2004 - Tom kicks ADR out of its office in his house.
- 14 • October 11, 2004 - First Meeting - Tom and Carl agree to stop working together. They both agree that they will set up separate businesses.
- 15 • October 14, 2004 - Second Meeting - Tom plans on getting out of the dirt business. Tom claims he has bigger fish to fry. Tom agrees to sign anything Carl wants.
- 16 • October 19, 2004 - Third Meeting - Tom and Carl reaffirm agreement to end ADR. Tom takes resignation letter Carl prepared. Tom never signs the resignation letter.
- 17 • November 5, 2004 - Tom’s last day of work at ADR.
- 18 • November 15, 2004 - Tom sends demand letter. (“November 15 Letter”). He does not repudiate dissolution.
- 19 • November 16, 2004 - According to a letter from Tom and Carl’s attorney, Tom tells his lawyer that he doesn’t want to do business with Carl anymore. (“November 16 Letter”).
- 20 • December 1, 2004 - Carl sends payout schedules to Tom. Tom does not complain.
- 21 • December 3, 2004 - Tom withdraws \$50,000 from bank accounts
- 22 • December 14, 2004 - Tom agrees to buy out schedules.
- 23 • August 29, 2005 - Tom receives ADR’s final tax returns and his final K-1.
- 24 • April 4, 2006 - Tom sends Carl demand letter.

25 Tom claims that he did not agree to dissolve the business. Further, even if he did agree to
26 dissolve the business, Tom thinks that Carl did not properly account for the dissolution and owes
27 him hundreds of thousands, if not over a million, dollars. Carl counters that they did agree to
28 dissolve the business and that, having done so, he paid ADR’s creditors and divided the remaining

1 assets between the two of them. If anything, according to Carl, Tom received well more than his
2 fair share of the proceeds from the dissolution.

3 The Court held a trial in August and September 2009 to determine the issues. The Court
4 gave both parties the opportunity to file post-trial briefs. Only Carl filed a post-trial brief.

5 **III. Analysis**

6 The Court must determine three issues: 1) Did Tom agree to dissolve ADR Contracting; 2)
7 If so, did Carl proceed with the dissolution; 3) What damages, if any, did Tom suffer?

8 *A. Dissolution*

9 In Arizona dissolution is governed by A.R.S. § 10-1401 *et seq.* Under A.R.S. § 10-
10 1402(B)(1):

11 The board of directors shall recommend dissolution to the shareholders, unless the
12 board of directors determines that because of conflict of interest or other special
13 circumstances it should make no recommendation and communicates the basis for
its determination to the shareholders.

14 Tom and Carl are the directors and shareholders of ADR. Even though there is no paper trail
15 showing Carl's recommendation that ADR be dissolved, the record is clear that he recommended
16 to Tom, the other shareholder, that they dissolve ADR.

17 After a recommendation to the shareholders, the shareholders must vote to approve
18 dissolution. Under A.R.S. § 10-1402(E):

19 Unless the articles of incorporation or the board of directors acting pursuant to
20 subsection C of this section requires a greater vote or a vote by voting groups, the
21 proposal to dissolve, in order to be adopted, shall be approved by a majority of all of
the votes entitled to be cast on that proposal.

22 Again, there is no formal document evidencing a vote by the shareholders agree to dissolution. The
23 Court notes that the formalities of A.R.S. §10-1402(B) and A.R.S. § 10-1402(D) which requires
24 written notice of a meeting of dissolution pursuant to A.R.S. § 10-705 were ignored. Technically,
25 Carl did not properly begin the dissolution process.¹

26

27 ¹ The failure to follow corporate formalities happened throughout this case. Accordingly, the
28 Court uses the Arizona Statutes as guide posts rather than firm rules in determining the intent of the

1 However, the evidence does show that 100% of the shareholders did agree to dissolution.
2 Tom testified that after he asked ADR to move its offices out of his Cabana in early October 2004
3 that Carl was upset. According to Tom, Carl told Tom that he wanted to cease the business to which
4 Tom replied “all right.” Soon after, there were various discussions to wind up the business and split
5 the proceeds that continued into November.

6 Supporting the Court’s conclusion are the November 15, 2004 Letter and November 16, 2004
7 Letter. In the November 15, 2004 Letter Tom asks Carl for a laundry list of information regarding
8 ADR. He concludes the letter by stating:

9 it is important that we reach an agreement regarding the dissolution of the ADR
10 business ASAP. If I do not receive the information requested, or we cannot come to
11 a financial settlement I have been advised to file a criminal complaint with the
12 Arizona Attorney General’s Office.

13 Read in context, the Court concludes that Tom did not dispute their agreement to dissolve ADR, but
14 instead wanted to resolve the financial issues involved with dissolution. This conclusion is
15 buttressed by the November 16, 2004 Letter from Richard Cobb, Tom and Carl’s attorney, which
16 states, “[y]ou each called today to let me know you were not going to do business together any more.
17 This letter confirms the conversation with each of you.”

18 Moreover, Tom showed his agreement to the dissolution of ADR by his actions. Tom quit
19 the company in late November 2004. Thereafter, he continued to accept property and checks from
20 ADR. Fred Schroeder, an ex-employee of ADR, testified that Tom said, “I am never going to be
21 partners with [Carl] again.” In August 2005, Randy Vinson delivered the final tax return for ADR
22 to Tom. Yet, Tom did not complain regarding the dissolution until April 2006. These actions are
23 all inconsistent with someone who did not approve of the dissolution of ADR.

24 At best, Tom attempted to revoke his approval of the dissolution. Under A.R.S. § 10-
25 1404(B):

26 Revocation of dissolution shall be authorized in the same manner as the dissolution
27 was authorized unless that authorization permitted revocation by action of the board

28 _____ parties.

1 of directors alone, in which event the board of directors may revoke the dissolution
2 without shareholder action.

3 In other words, once Tom and Carl agreed to dissolution, revocation of the dissolution required an
4 agreement by Tom and Carl. Clearly Tom and Carl did not agree to revoke dissolution.

5 "No time limit is specified for the filing, and many corporations may elect to postpone the
6 filing of the articles of dissolution until the winding-up of the corporation's affairs is well under way,
7 if not nearly complete." 6 Ariz. Prac. Corporate Practice §9:8. A dissolved corporation continues
8 to exist, but can wind up its business. A.R.S. §10-1405. Pursuant to A.R.S. 10-1405(A):

9 A dissolved corporation continues its corporate existence but shall not carry on any
10 business except that business appropriate to wind up and liquidate its business and
11 affairs, including:

- 12 1. Collecting its assets.
- 13 2. Disposing of its properties that will not be distributed in kind to its
14 shareholders.
- 15 3. Discharging or making provisions for discharging its liabilities.
- 16 4. Distributing its remaining property among its shareholders according to
17 their interests.
- 18 5. Doing every other act necessary to wind up and liquidate its business and
19 affairs.

20 Despite his best efforts, Carl did not effectively dissolve ADR. Here, Carl completed
21 requirements one through four by collecting ADR's assets, disposing of assets, paying off ADR's
22 liabilities and distributing what remained to the shareholders on an equitable basis. However, he
23 did not do every other act required to wind up the business because he did not file articles of
24 dissolution with the Arizona Corporation Commission. See A.R.S. 10-1403. Instead, the
25 Corporation Commission administratively dissolved ADR. However, the Court concludes that Carl
26 made a good faith effort to dissolve ADR by repaying its creditors and attempting an equitable
27 distribution of the remaining assets to ADR's shareholders. But for the paperwork, Carl fulfilled his
28 duties.

24 *B. Damages*

25 In the end, Tom suffered no damages. In a nutshell, Tom's claimed damages are that he did
26 not get his fair share of the business. The facts of the case belie that conclusion. The
27 preponderance of the evidence shows that ADR's creditors were paid in full.

Tom's claimed damages rest, in large part, on the value of ADR given by Susannah Sabnekar, Tom's expert. The Court gives no weight to her opinion. The expert valued ADR at approximately \$2 million if sold as a going concern. The expert's opinion is flawed on many levels. First, she only used ADR's revenue to reach her conclusion. She then extrapolated expenses from other businesses. Thus, she has no real knowledge of the earnings of ADR. Without earnings, it is impossible to determine the value of the company. Further, assuming that her earning calculations are reliable, she made no accounting for the debts of ADR. The opinion is further flawed in that ADR is valued as a going concern. There is no evidence that there is a market for dirt brokering business - likely because there is no market for a dirt broker business as a going concern. The real value of the business is Carl. He is the one with the contacts; who has knowledge of the market; and has the trust of his customers. A sale of the business as a going concern is highly unlikely without the continued involvement of the key people. For the foregoing reasons, the Court no weight to the expert's report.

Comparatively Carl provides the following accounting for the assets, liabilities and distributions for ADR.

Assets:	
Sale of equipment:	\$242,774.39
A/R from contractors:	\$ 98,368.22
Sale of Tractor or Trailers:	<u>\$ 19,490.00</u>
Total	\$360,632.61

Liabilities:	
Amounts owed to Truckers:	\$131,750
Lenders:	\$ 95,881
Other Creditors:	<u>\$294,675</u>
Total:	\$522,306

Distributions	
Tom	
Cash:	\$58,051
Payments:	\$73,903
Additional Distributions:	<u>\$8,000</u>
Total:	\$131,954

1	Carl		
	Equipment		\$224,580 ²
2	Escalade		\$ 51,943
	Total:		\$276,523

3	Other Factors		
4	Loans made by shareholders		
	Carl		\$210,000
5	Tom		\$41,000
	Unaccounted Items by Carl		
6	Similarity of Name of new company		
7	Phone number		
	Labor involved in dissolution		
8	Amounts paid by Carl or ADRA to pay creditors of ADR		\$162,000

10 Based on this accounting the Court makes the following calculations:

11	Value of ADR		
	Assets:		\$360,000
12	Liabilities:		\$522,000
	Liability of Shareholders to ADR:		<\$162,000>

13	Tom		
14	Gross Distributions:		\$132,000
	Less Loan		<\$41,000>
15	Shareholder Liability		<u>\$81,000</u>
	Net Distribution		\$171,000

16	Carl		
17	Gross Distribution		\$277,000
	Less Loan		<\$210,000>
18	Shareholder Liability		\$81,000
	Additional Creditor Payments		<\$162,000>
19	Net Distribution		<\$14,000>

20
 21 Based on the evidence, Tom received a net distribution of \$171,000. By comparison, Carl
 22 received a net distribution of negative \$14,000. In the end, Tom received almost \$200,000 more in
 23 distributions from the dissolution of ADR than Carl. Even if the value of ADR's good will, phone
 24 number, etc. were worth \$150,000 Tom still received a higher distribution than Carl. Carl owes
 25 nothing to ADR or to Tom.

26 ²Carl testified that the trailers were valued at approximately \$20,000 a piece. Yet, on the
 27 disposition of assets the post-trial memorandum, he lists trailers list price as \$29,818-\$34,000 per
 28 unit. The Court used the higher number in making its calculations.

1 **IV. Conclusion**

2 Carl, in good faith, attempted to dissolve ADR. Though he may not have met all of the
3 formal requirements of the statutes the Arizona statutes, he did pay off ADR's creditors and
4 distribute property equitably to ADR's shareholders. If anything was done inequitably, it was done
5 so in favor of Tom. Here, there are no damages that resulted from Carl's actions. Accordingly, the
6 Court finds in Carl's favor; his attorney is to upload a form of judgment. Any application for
7 attorneys fees and costs must be made within thirty days of this decision and be supported by an
8 affidavit from counsel, an itemization of time spent on the matter and statement of the legal basis
9 for any award.

10 So ordered.

11 **DATED:** March 24, 2010

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14 CHARLES G. CASE II
15 UNITED STATES BANKRUPTCY JUDGE

16 **COPY** of the foregoing mailed by the BNC and/or
17 sent by auto-generated mail to:

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