STATE OF SOUTH CAROLINA	)	BEFORE THE ARBITRATOR
	)	
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-3328
The Construction Services Group, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
Victor Apat,	)	
	)	
Defendant/Third Party Plaintiff,	)	
	)	
v.	)	
	)	
James Ronald McCollum,	)	
	)	
Third-Party Defendant.	)	
	)	

The Parties and their attorneys participated in a hearing on the merits beginning on April 18, 2023. Thereafter, on June 11, 2024, I filed Findings of Fact and Conclusions of Law addressing the claims, counterclaims and third-party claims alleged. Thereafter, Plaintiff ("CSG") and Third-Party Defendant ("McCollum") filed a Motion to Alter or Amend the Order of the Special Referee Dated June 11, 2024. Defendant ("Apat") likewise filed a Motion to Alter or Amend Findings of Fact and Conclusions of Law Dated June 11, 2024. Memoranda in support of those motions were filed as well. Counsel for McCollum requested a hearing on these motions but I do not find that a hearing would aid in the understanding or resolution of these motions and so I decline that request.

MOTION FILED BY PLAINTIFF AND THIRD-PARTY DEFENDANT

First, CSG and McCollum argue that I erred in ruling that McCollum's actions constituted oppressive or unfairly prejudicial conduct toward Apat. In support of this argument, they refer to S.C. Code Ann. Sec. 33-14-300 and 33-14-310 as well as the following decisions: *Steinke v. SC Dep't of Labor*, 336 S.C. 373, 520 S.E.2d 142 (1999); *Kiriakides v. Atlas Food Systems and Services, Inc.* 343 S.C. 587, 541 S.E.2d 257 (S.C. 2001); *Ballard v Roberson*, 399 SC 588, 733

S.E. 2d 107 (2012) and *Mason v. Mason*, 412 S.C. 28, 770 S.E.2d 405 (Ct. App. 2015). More specifically, the CSG and McCollum argue that the termination of Apat's employment, the decision by McCollum to book deferred income and the exclusion of Apat from the CSG's valuation of his interest in CSG were not oppressive or unfairly prejudicial.

I decline to amend the findings of fact and conclusions of law on this issue. As noted in the *Kiriakides* case cited by CSG and McCollum, the terms "oppressive" and "unfairly prejudicial" are not specifically defined in section 33-14-300. In attempting to give meaning to those terms that opinion referenced the comment to S.C. Code Ann. § 33-18-400 (1990) which provides: "[n]o attempt has been made to define oppression, fraud, or unfairly prejudicial conduct. These are elastic terms whose meaning varies with the circumstances presented in a particular case, and it is felt that existing case law provides sufficient guidelines for courts and litigants." *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587, 598, 541 S.E.2d 257, 264 (S.C. 2001). While any one of the factors cited in my prior order, particularly those in paragraph 41, may not have been sufficient standing alone to amount to oppressive or unfairly prejudicial conduct, I remain convinced that the combination of those actions, taken at the time and in the order that were proved at trial, amount to sufficient proof of oppressive or unfairly prejudicial conduct to warrant the relief of ordering a purchase of Apat's shares by CSG.

In support of their argument that I erred in fixing the value of Apat's interest in the corporation, CSG and McCollum rely upon grounds two and five listed in their post-trial motion. Specifically, they contend that I applied the wrong standard and that CSG should be required to purchase Mr. Apat's shares at "fair market value" and not "fair value". CSG also contends that I erred in declining to apply a 25% discount to the value of Apat's shares due to his lack of voting control.

While reviewing the Findings of Fact and Conclusions of Law I noticed a typographical mistake in paragraph 49 that needs to be corrected. The last sentence of that paragraph says in pertinent part that "Sec. 33-44-310(d)(4) establishes 'fair value' as the valuation standard." The correct statutory reference should have been Sec. 33-14-310(d)(4). Therefore, I amend the Findings of Fact and Conclusions of Law to correct that reference.

With that correction, I conclude that the statutory standard for valuation in Sec. 33-14-310(d)(4) is "fair value". Plaintiff and McCollum cite *Ballard* and rely on *Clark v. Clark*, 430 S.C. 167, 843 S.E.2d 498 (2020) as controlling. In *Clark* the Supreme Court discussed valuation

for a closely held family business in the context of the apportionment of marital assets. The trial court received evidence of value from experts for each party, one of whom applied a discount to the business value due to lack of marketability and lack of control and one of whom who did not. The trial court found that the expert who applied the discounts to be more credible and accepted that value. On appeal, the Court of Appeals affirmed the application of the lack of control discount but found that the marketability discount was not appropriate. I conclude that the main teaching point of the *Clark* case is that South Carolina does not have a bright line rule on whether and when it is appropriate to apply those discounts in valuing a closely held business in Family Court. Instead, Family Court judges in South Carolina have discretion to apply these discounts on a case-by-case basis. *Clark v. Clark*, 430 S.C. 167, 168, 843 S.E. 2d 504. I further conclude that neither the reasoning nor the result in *Clark* require a change in my prior order regarding the valuation standard applied or my decision not to apply a discount for lack of voting control under the facts and circumstances of this case.

Next, Plaintiff and McCollum argue that I erred in ruling that the date of ouster, which I determined to be March 1, 2016, should determine the date of valuation, rather than the date of the corporate resolution mandating the stock purchase. In their view, Apat was not ousted as a shareholder on March 1, 2016, he was just terminated as an officer (Vice President) on that date. I do not find that argument persuasive because as Plaintiff and McCollum have pointed out in other arguments, Apat did not have voting control. The evidence in my view showed that Apat was excluded from company operations as of the March 1st date. That is perhaps most evident in the decision to exclude Apat from the valuation process for his own stock. Thus, I confirm the finding that March 1, 2016, was the proper date to value Apat's stock in the company under the reasoning in *Wilson v Gandis*.

Likewise, I am not persuaded by the argument that I erred in removing the deferred compensation amount of $1,325,764 as a liability owed to Mr. McCollum and converting it to general stockholders equity for purposes of valuing Apat's interest. Plaintiff and McCollum contend that the decision to book that amount as deferred salary owed to McCollum was merely to correct an improper accounting practice dating back to the founding of CSG in 2005. However, I cannot ignore that while the governance and organization of CSG was changed in 2012 to give Mr. McCollum 2 votes for each share of stock he owned and to make him the sole director of CSG, no effort was made to address the issue of deferred compensation until after he made the decision

to terminate Apat and purchase his shares of CSG. Also, since I determined that the appropriate date to value Apat's shares predated the Written Consent to Action without a Meeting in which the deferred compensation was booked, I decline to alter or amend my prior order on this point.

Plaintiff and McCollum also take issue with the finding in my prior order that the breach of fiduciary duty and conversion claims applied to Complete Building Corporation (who was not a party) rather than finding Apat liable in his personal capacity for breaches of fiduciary duty to CSG and conversions from CSG. In support of this argument, the supporting memorandum refers to McCollum's post-trial summation for a detailed explanation of this ground. The summation points to six projects on which the set-off claim is based. I will take each in turn.

- VA Chiller job: McCollum claims that CBC received an overpayment of $71,784 on this job and a loan for $101,400 for a total of $173,274. He claims that this amount should reduce the payment to which Apat is entitled for the repurchase of his shares. McCollum Ex 13 includes a pay application with a certificate signed by Apat for CBC on December 25, 2012, and a check from CSG to CBC dated December 12, 2012.
- Sandpiper: On this job, McCollum argues that CBC received an overpayment of $44,859.03 and an undeserved profit of $70,532 because CBC took this job for itself for total of $133,037.10. As proof, he cites McCollum Exhibit 15 which consists of several pay applications and checks written in late 2011 and 2012. All of the checks were written to CBC.
- VA Food & Nutrition: McCollum contents that CBC made $32,179 in profit that CSG should have received plus $56,598 in allegedly hidden charges and change orders plus $42,469 that CBC failed to pay a subcontractor which had to be paid by CSG. Defendant cites McCollum 11 & 17 and Apat Ex 2 (which shows bid day projected profits). Ex. 11 shows that this job appeared on the financial reports of CBC and CSG for 2013.
- VA Mechanical and VA Automation: McCollum claims that CBC hid or failed to disclose profits on these jobs which should have been shared with CSG and were not. He points to Apat #2 which forecasts profits of $5,557 for Automation and $13,773 for Mechanical and McCollum Ex 11 which shows actual profits of $113,109 and $178,053 respectively for total claimed set off of $278,263. In Ex 11 these jobs appear on 2012 financials for CBC and CSG.

- VA Patient Lifts: McCollum claims that profits of $105,146 should be disgorged on this job as CBC started it but did not finish. This job is on the CSG and CBC financials for 2012.

Even after a second detailed review of the set-off claims, the evidence presented was that the payments which form the basis of the set-off claim were made to CBC, not Apat, and would not constitute a set-off for amounts owned to him personally for his stock in CSG.

The next exception from Plaintiff and McCollum is that I erred in finding that various set-off claims and breach of fiduciary claims were too remote in time because I failed to properly consider the discovery rule and equitable tolling resulting from Apat's actions to conceal evidence and destroy records. On this point, I find that a clarification is appropriate. In my prior order I concluded that the set-off claims related to payments to CBC and not Apat. The alternative finding regarding timing was intended as a finding that any attempt to make those claims against CBC at that time were likely time barred since they related to jobs in 2012 and 2013. I am aware that a claim for set-off was raised against Apat in the original complaint and that claim was amended to allege an even larger claim for set-off against him. For that reason, I find it unnecessary to consider the claims of error raised by Plaintiff and McCollum relating to the relation back doctrine under rule 15, the discovery rule for tolling the statute of limitations and the fraudulent concealment tolling doctrine.

Plaintiff and McCollum cite S.C. Code Section 33-8-300 in further support of their argument that any purchase of Mr. McCollum's shares should be set-off by amounts received by CBC. That statute addresses the duties of corporate directors which I understand to be an argument that Apat should be personally liable to CSG (and thus have the purchase price of his CSG stock reduced) because he served as a director of CSG while CBC was a subcontractor of CSG. However, I find that statute does not justify the relief requested for two reasons. First, the mere fact that Mr. Apat was a director of CSG at the same time that CSG subcontracted work to CBC does not automatically translate into personal responsibility for Mr. Apat. Further, I cannot ignore that McCollum has had control over CSG since its formation which contradicts the narrative that Apat used his position to steer CSG into unfavorable, unfair or deceitful contracts with CBC. The undisputed evidence showed that Apat was removed as a director on September 4, 2012, and that McCollum was the sole director from that date until April 14, 2016, when Andy Moody, Mr. McCollum's stepson, was appointed to the Board of Directors as a non-voting member. Before

that, McCollum was the majority shareholder of CSG and the President and Treasurer of the company. Despite the argument that Apat was taking advantage of CSG to the sole benefit of CBC, the evidence presented showed that CSG operated with relative harmony between McCollum and Apat until 2015 when the issue of buying Apat's shares began to take shape.

Finally, Plaintiff and McCollum argue that I erred in failing to hold Apat personally liable for the debts / claims against CBC pursuant to South Carolina law, because CBC was dissolved and so Apat is liable for the debts of CBC as the sole shareholder and sole director of the company. In support, CSG and McCollum cite *American Cotton Oil Co. v Saluda Oil Mill Co*, 107 S.C. 422, 93 S.E. 14 (1917) and S.*C. DSS v. Winyah Nursing Homes*, 282 S.C. 556, 320 S.E.2d 464 (Ct. App. 1984). Based on the evidence presented, I find that neither case justifies alteration of the prior order. To hold Apat liable for obligations of CBC, I would first have to find that CBC owed money to CSG. For reasons described above, I do not find the evidence presented to be sufficient to make that finding. Therefore, I decline to amend my prior order to offset the amount owed to purchase Apat's interest in CSG due to amounts allegedly owed by CBC.

MOTION FILED BY APAT

Apat contends that I should amend my prior order in which I found that he was not entitled to prejudgment interest under S.C. Code Section 34-31-20 because I failed to consider the award of interest as part of the equitable power granted under Section 33-14-310 to fashion an order or grant other relief that I deem appropriate. Having previously found that that Mr. Apat is not entitled to pre-judgment interest on the amount that I have determined to be the fair value of his shares under the prejudgment interest, I will not revisit that issue.

Apat cited to a law review article, 47 S.C. Law Rev 195, and the case of *Wilson v. Gandis*, 430 S.C. 282 844 SE 2d 631(2020) in support of his argument that Section 33-14-310 allows for a basis to award of prejudgment interest independent of the statute. However, I find that neither of the authorities cited stands for that proposition. Instead, I find the case of *Keane v. Lowcountry Pediatrics* to be more instructive. *Keane v. Lowcountry Pediatrics,* 372 S.C. 136, 641 S.E. 2d 53 (Ct. App. 2006). In *Keane* minority shareholders sued alleging causes of action for breach of fiduciary duty and to value the minority interest in the association. There the Court of Appeals stated when describing the appropriate standard of review that "[t]he determination of the appropriateness of an award of pre-judgment interest, on the other hand, is a question of law because the right to relief is entirely statutory." *Id.* For that reason, I find that the equitable powers

under Section 33-14-310 do not include the authority to include prejudgment interest that does not satisfy the requirements of the prejudgment interest statute. Accordingly, I deny Apat's Motion to Alter or Amend Findings of Fact and Conclusions of Law Dated June 11, 2024.

Accordingly, based on the foregoing, it is

ORDERED, that my prior order is amended to correct a typographical error in paragraph 49. The last sentence of that paragraph says in pertinent part that "Sec. 33-44-310(d)(4) establishes 'fair value' as the valuation standard." The correct statutory reference should have been Sec. 33-14-310(d)(4). Therefore, I amend the Findings of Fact and Conclusions of Law to correct that reference. It is

FURTHER ORDERED, that for the reasons stated herein the Motion to Alter or Amend the Order of the Special Referee Dated June 11, 2024, filed by Plaintiff ("CSG") and Third-Party Defendant ("McCollum") is denied. It is

FURTHER ORDERED, that the Motion to Alter or Amend Findings of Fact and Conclusions of Law Dated June 11, 2024, filed by Defendant Apat is denied. It is

FURTHER ORDERED, that within ten (10) days of the date of this order the parties are directed to file with the Charleston Count Clerk of Court copies of the exhibits admitted into evidence during the trial of this matter.

AND IT IS SO ORDERED.

s/John A. Massalon
John A. Massalon
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CHARLESTON, SC

February 17, 2025

STATE OF SOUTH CAROLINA	)	BEFORE THE ARBITRATOR
	)	
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-3328
The Construction Services Group, Inc.,	)	
Plaintiff,	)	
v.	)	**CERTIFICATE OF SERVICE**
Victor Apat,	)	
Defendant/Third Party Plaintiff,	)	
v.	)	
James Ronald McCollum,	)	
Third-Party Defendant.	)	

The undersigned hereby certifies that on February 17, 2025, a copy of the attached has been served upon the following via Electronic Mail:

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February 19, 2025

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VIA HAND DELIVERY
The Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad Street, Suite 106
Charleston, South Carolina 29401

RE: The Construction Services Group, Inc. v. Victor Apat, et al.
Case No.: 2016-CP-10-3328
Our File No.: 619-325

Dear Mrs. Armstrong:

Enclosed please find the original and one (1) copy of an Order of Special Referee, John A. Massalon, in regard to the above-referenced matter. Please file the original, file-stamp the copy, and return the file-stamped copy to me via the bearer of this correspondence. If you have any questions, please do not hesitate to contact me.

With kind regards, I am

Respectfully,

WILLS MASSALON & ALLEN LLC

Charline Barrasso

Charline Le Barrasso, Paralegal to
John A. Massalon
cbarrasso@wmalawfirm.net

Enclosures

cc (via Email)
Eric B. Laquiere, Esquire
Robert T. Lyles, Esquire
Paul B. Ferrara, III, Esquire