

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 02CP4002647R

Donnie Elgin

Grace Kelly

Elgins Paint And Body Shop

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court.

RECEIVED

FEB 13 2015

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

SC Court of Appeals

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 10 day of Jan, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Charles Cantzon Foster II W. Thomas Vernon S. Jahue Moore

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. Yoder

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
)
Donnie Elgin and Elgin's Paint and)
Body Shop, Inc.,)
)
Plaintiffs,)
)
vs.)
)
Grace Kelly,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Docket No.: 02-CP-40-2647R

ORDER

2013 JAN 15 AM 9:40
CLERK OF COURT
JENNIFER L. BROWN
C. CR. CLERK

This matter came before me for an accounting. A hearing was conducted on January 31, 2013. Present at the hearing were Donnie Elgin, President of Elgin's Paint and Body Shop, Inc. represented by Cantzon Foster, Esq. and Defendant Grace Kelly represented by Jahue Moore, Esq.

PROCEDURAL BACKGROUND

Plaintiffs Donnie Elgin ("Elgin") and Elgin's Paint and Body Shop, Inc. ("Corporation") brought this action to permanently enjoin Defendant Grace Kelly ("Kelly") from acting in the name of the Corporation, from coming onto the Corporation's real property, and from using the Corporation's property for her own personal use. Kelly counterclaimed for an involuntary dissolution of the Corporation, an immediate appointment of a receiver, an accounting of the Corporation's affairs, a declaratory judgment stating the parties' rights with respect to each other, and for damages resulting from Elgin's alleged illegal wiretap, negligence, assault, invasion of privacy, and breach of fiduciary duty to the Corporation.

The legal claims were tried before a jury in August 2003. At the conclusion of the parties' cases, Defendant's causes of action for the illegal wiretap, negligence, and invasion of privacy were dismissed pursuant to a motion made by Plaintiffs. The remaining legal issues of assault and breach of fiduciary duty were submitted to the jury. The jury returned verdicts for Plaintiffs on both counts. The jury also found through a special interrogatory that Defendant had an ownership interest in the Corporation. Plaintiffs' request for a permanent injunction and Defendant's claims for dissolution, appointment of a receiver, accounting, and declaratory judgment were retained to be determined by the Court. By Order issued on August 4, 2004 this

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Court dissolved the corporation, distributed the remaining assets and declared there was no basis for an accounting. Defendant filed a Motion for Reconsideration and Motion to Vacate which were denied on October 26, 2004.

Defendant subsequently appealed. On appeal, the Court of Appeals upheld the denial of the request for appointment of a receiver, but remanded the claim for an accounting. After the appeal of this matter, a hearing was scheduled on the accounting during which the parties presented testimony and exhibits.

FINDINGS OF FACT

This Court takes judicial notice of the Orders issued by the U.S. Bankruptcy Court and the court records in determining the facts in this matter.¹ Based on the evidence presented, the burden on the parties to establish their respective cases by a preponderance of the evidence, and taking into account the credibility of the witnesses, I make the following findings of fact:

1. The Corporation is an automotive body shop and towing service that was incorporated in South Carolina on March 21, 1986. At the time of incorporation, Elgin was the president and sole shareholder.

2. In 1989, Elgin sold 50% of the Corporation's stock to Kelly for \$70,000.²

3. From 1990 to 1993, the Corporation's state and federal tax returns were not filed. In October 1994, the Corporation was administratively dissolved by the South Carolina Secretary of State for failure to pay taxes for these three years. There was conflicting testimony at the trial as to whether Kelly or Elgin was responsible for filing the Corporation's tax returns. Both Elgin and Kelly had full access to the corporate books and records and ultimately shared responsibility for the failure to pay corporate taxes. Elgin, as the president of the Corporation and with access to all corporate documents, should have noticed the Corporation was behind in its tax obligations. Kelly, as bookkeeper, should have come to the same realization.

4. Between 1994 and 1998, Elgin lived in Florida and visited the Corporation's shop several times a month. Elgin remained the president of the corporation, but testified that he was an "absentee owner" and that Kelly ran the day-to-day operations at the shop. He testified the purpose of these visits was to talk with Kelly about the business, clean up around the shop, and

¹ Neither the trial transcript nor the record on appeal was reviewed the Court. Any testimony recited from the trial is based upon notes, documents, or orders.

² No stock certificate for this transfer of ownership was ever created, and there was no documentation of Kelly's ownership.

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drive a wrecker as needed. For these services, he received a salary of over \$1,000 per month.

5. On several occasions during her employment, Kelly diverted corporate funds to her own use by unjustifiably paying herself large sums of money from the corporate checking account and falsifying the payment records in the corporate check register. Numerous checks were admitted into evidence during the trial which showed Kelly had a pattern of writing checks to herself from the corporate checkbook and then recording in the check register half the actual amount written on the check.

6. In August 1998, Elgin discovered several bank statements which revealed discrepancies in the corporate records. Elgin testified at the trial that when he confronted Kelly regarding these discrepancies, she offered no explanation and at one point, signed over her 50% interest in the Corporation to him for no consideration. Even after this event, both parties admit they continued to operate as co-owners.

7. Elgin filed this action in October 1998 seeking a restraining order against Kelly from coming onto the property and interfering with the operation of the business. A temporary restraining order was issued against Kelly by the Court on October 16, 1998 effectively ousting her from the business. The jury determined that Kelly was still a shareholder in the business. Kelly seeks an accounting of the corporate assets from the date of her ouster.

8. Elgin filed Chapter 7 bankruptcy on behalf of the Corporation on March 5, 1999. Kelly had notice of the bankruptcy proceedings.

9. All of the Corporation's assets, books and records were given to the appointed bankruptcy trustee ("Trustee") who took possession and subsequently sold at public auction on May 29, 1999 all of the Corporation's equipment, inventory and vehicles (except the 1994 Ford Explorer in Defendant's possession and the 1965 Chevrolet Chevelle). A Report of Sale was filed with the Bankruptcy Court.

10. During the bankruptcy proceedings, Kelly refused to cooperate with the Trustee. She filed an Adversary Complaint with the bankruptcy court in June 1999 challenging the Corporation's right to file for bankruptcy. On January 31, 2000, the bankruptcy petition was dismissed as having been filed ultra vires. In its order of dismissal, the Bankruptcy Court held that Elgin did not have authority to file for bankruptcy without the approval of the Corporation's other directors. The Court ordered the return of the proceeds of the liquidation of the assets after payment of court approved fees and expenses.

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11. By Order dated March 9, 2000, the Bankruptcy Court granted the Trustee's request for compensation, fees and expenses in the amount of \$25,231.54 and ordered that all remaining assets be turned over to Elgin after thirty days. The Court also made numerous findings of fact regarding the conduct of the parties during the course of the proceedings.

12. Pursuant to the Bankruptcy Court order, the Trustee turned over \$71,038 to Elgin in April 2000. The corporate books and records were given to Kelly's attorney and have never been returned to Elgin, the Corporation, or their attorney. None of the corporate books and records was produced to this Court.

13. Elgin deposited the check from the Trustee into his personal bank account at First Union. The other remaining assets were the two vehicles, not sold during the bankruptcy.

14. Kelly has continuously possessed the 1994 Ford Explorer since its purchase. The title to this vehicle shows Elgin's Body Shop as owner. The value of the vehicle during the time of the bankruptcy proceeding was \$12,000.

15. Kelly claimed ownership of the 1965 Chevrolet Chevelle³; when purchased in May 1997, the Assignment of Title states that the buyer was "Elgins Body Shop/by Grace Kelly." Subsequently a dispute about its ownership arose when the vehicle was sold in 2001. Kelly filed a lawsuit in 2003 against Elgin's son, Darryl Elgin, and Elgins of Columbia, Inc. (his company), claiming conversion⁴. A judgment was granted in Kelly's favor which has been satisfied.

16. There were no records of the amount of money in the corporate accounts as of October 16, 2008, the date of ouster. The exhibits presented to the Court reveal there was \$6724.39 in the Bank of America account as of August 31, 1998. No other bank statements for the time period between September 1998 and March 1999 were available to this Court.⁵

17. Bank statements for an account with Anchor Bank were produced for the period May 1999 to December 1999. The account balance in May 1999 was \$411.84. The balance in December was \$366.66 before it was closed by the Trustee. The only transactions during this time period were deductions for service charges. Funds from this account were part of the estate

³ The Bankruptcy Court determined that the Chevelle was an asset of the Corporation.

⁴ This action was filed by Kelly individually, not on behalf of the Corporation.

⁵ The Bankruptcy Court Order dated March 9, 2009 states that the bank records for the year preceding the bankruptcy filing were missing. Due to the passage of time, Elgin was not able to retrieve those records from the appropriate banking institutions. Presumably all moneys in bank accounts were taken by the Trustee in March 1999 and are accounted for during the bankruptcy proceeding. Kelly had access to all information in the bankruptcy proceeding and this Court will not attempt to recreate that information.

handled by the Trustee and are accounted for in his records.

18. As stated earlier, after the bankruptcy was dismissed Elgin deposited \$71,038 in his personal account on April 14, 2000. Elgin's Paint and Body ceased doing business and did not retain the lease on the commercial building.

19. Elgin spent \$2760.93 on rent, furnishings, house mortgage, house loan, cable and telephone. These were his personal expenses associated with returning to South Carolina from Florida.

20. Elgin spent money on three cars totaling \$9369.87 and paid \$226.31 for disability insurance. These appear to be personal expenses.

21. There was a payment of \$206.16 for attorney fees paid to King and Vernon in connection with this lawsuit.

22. The bulk of the money was spent on credit cards totaling \$39,999.42. Elgin testified he reimbursed himself for payments to the Internal Revenue Service, the SC Department of Revenue and for attorney fees connected to the Corporation including the bankruptcy.

23. Elgin produced credit card statements from 1999 showing payments for taxes to the state and federal authorities totaling \$19,625.87. He also produced checks from his personal account paying both federal and state authorities for taxes covering the years 1992-1996. These checks total \$18,402.17. Written on the reference line on each check were the tax year, 1040 form, and Elgin's social security number. It appears that these expenditures were for Elgin's personal tax debt not the Corporation's. At the time of trial in 2003, the accountant testified that, to his knowledge, no corporate tax liability had been incurred.

24. On May 8, 2000, the remaining balance of the money from the Trustee in the amount of \$18,475.39 was transferred to King and Vernon and placed in the law firm's trust account.

25. Once the balance was placed in the law firm trust account it remained out of Elgin's hands until September 2004 when the balance and all accrued interest (a total of \$18,993.89) was paid to Kennedy and Price to settle outstanding legal fees owed as a result of this action.

26. The Corporation declared bankruptcy after Kelly had tendered her shares in August 2008 and after a court order of ouster in October 1998. The bankruptcy court determined Kelly was still a shareholder, a conclusion also adopted by the jury during the trial. No one

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testified as to the reasons bankruptcy was sought.

27. Elgin testified he expected to be reimbursed for the expenditures made on behalf of the business. Elgin personally paid \$17,051.80 during the bankruptcy on the Corporation's behalf which include: \$2475.29 to Young and Siddons, P.C. (tax attorneys); \$2095.36 to Nexsen Pruet Jacobs & Pollard, LLP; \$918.75 to Williams, Gee & Company, PA (accountants); \$11,562.40 to King and Vernon, P.A. on the bankruptcy. Some of these expenditures were reimbursed to Elgin from the corporate assets he used to pay credit cards.

28. In addition to the money paid to Young and Siddons, P.C., Terry Williams was paid \$3200 for services in connection with the corporate taxes.

29. No corporate books were provided to the court to determine the number of shares held by each party or their capital contribution. Testimony revealed that Kelly paid \$70,000 for her interest in the corporation and that Kelly and Elgin were each 50% owners of the corporation.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, I conclude the following as a matter of law:

1. The assets of the now-dissolved Corporation must be distributed. A dissolved corporation may not carry on any business except that appropriate to wind up and liquidate its business and affairs, as expeditiously as possible. S.C. Code Ann. § 33-14-105 (Supp. 2003). Permitted business includes discharging or making provision for discharging its liabilities and distributing any remaining corporate property among its shareholders according to their interests. *Id.* As shareholders in the Corporation, Kelly and Elgin are entitled to a pro rata share of the Corporation's remaining property, after the corporate liabilities are discharged.

2. An accounting is designed to prevent unjust enrichment by disclosing and requiring the relinquishment of profits received as the result of a breach of a confidential or fiduciary duty. *Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 382 S.E.2d 915 (1989). Kelly alleges that Elgin maintained exclusive control over the returned funds and utilized them to the exclusion of Kelly.

3. An action for an accounting is an action in equity. *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 427, 673 S.E.2d 448, 453 (2009); *Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 272, 705 S.E.2d 73, 76-77 (Ct. App. 2010).

4. An accounting implies that one party is responsible to another for money or

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property as the result of a contract or some other fiduciary relationship. 1A C.J.S. *Accounting* § 6 (2010); *Consignment Sales, LLC v. Tucker Oil Co.*, *supra*.

5. An accounting may also be appropriate to prevent unjust enrichment and require the relinquishment of property when there is a breach of a confidential relationship or a fiduciary duty. See *Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 382 S.E.2d 915, 917 (1989); *In re Worldwide Wholesale Lumber, Inc.*, 372 B.R. 796, 814 (Bankr. D.S.C. 2007).

6. The jury determined that Elgin did not breach his fiduciary duty to Kelly. Although that finding is not binding as to the resolution of the equitable issues, it is supported by the evidence. On appeal, the matter was remanded for an accounting on the basis that there was evidence that Elgin may have used corporate money for his personal use.

7. As stated above, Elgin spent \$52,562.61 on what appears to be personal items. The remaining money was placed in the trust account and ultimately paid to the attorneys in compromise of the outstanding legal fees in the action brought by Elgin and the Corporation against Kelly. The Ford Explorer, valued at \$12,000 by the bankruptcy court, is in Kelly's possession.

8. The evidence establishes that Kelly took funds from the corporation on a regular basis that amounted to more than \$74,900. After the bankruptcy, Elgin used \$52,562.61 for his personal use, and to reimburse himself for money spent on taxes and attorney fees on behalf of the corporation. The remaining money (\$18,475.39) was used to pay legal fees arising out of this lawsuit filed in 1998.

9. All of the fees paid in connection with the bankruptcy were reasonable. These expenses were paid by Elgin personally. Kelly asserts that because the bankruptcy filing was an ultra vires act, all money paid during the course of the bankruptcy was improper and must be returned to the corporation. As noted by the Bankruptcy Court, Kelly had the opportunity to dispute the filing of the bankruptcy before the liquidation of assets. Her failure to do so despite repeated contacts by the Bankruptcy Court and its representatives increased all of the expenses associated with that action including the legal and accounting fees paid by Elgin. This Court agrees with the Bankruptcy Court.

10. The doctrine of unclean hands precludes a party from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the other party.

Both parties come into this matter with unclean hands.⁶ The conduct of both parties as discovered during the course of this litigation reveals that both parties diverted corporate assets for their own personal use. Equity does not require this Court to divest one party of corporate assets to give to another party who also has unclean hands.


11. Kelly and Elgin each received over \$70,000 in corporate assets. Kelly paid \$70,000 for fifty percent (50%) interest in the corporation. She received corporate assets in 1998 prior to her ouster that equaled or exceeded \$70,000. Elgin used \$71,038.08 for corporate and non-corporate expenses. There was no breach of fiduciary duty to Kelly.

12. The corporate liabilities have been discharged and there are no remaining assets from which to distribute to Kelly and Elgin. Each has received his or her pro rata share based upon 50% ownership in the corporation. Therefore, neither is entitled to further distribution or repayment of corporate assets.

ORDER

Based on the foregoing, **IT IS ORDERED** that the accounting is complete and there are no corporate assets due or owed to Grace Kelly or Donnie Elgin. Elgin's Paint and Body Shop has been dissolved and the assets have been distributed to the shareholders.

AND IT IS SO ORDERED.



ALISON RENEE LEE
Circuit Court Judge

January 14, 2015
Columbia, South Carolina

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⁶ See previous court orders issued by the circuit court or the appellate court.