THIRD DIVISION
JOHNSON, P. J.,
RUFFIN and ELLINGTON, JJ.

September 25, 2001

In the Court of Appeals of Georgia

A01A1154. BRIDGEWATER GROUP, INC. et al. v. GATES et al.

ELLINGTON, Judge.

Bridgewater Group, Inc. ("Bridgewater"), Barry Kriegel, and Cindy Custard (collectively "appellants") appeal from the trial court's order granting in part and denying in part cross motions for summary judgment in this action arising out of a dispute between Bridgewater's corporate officers. For the following reasons, we affirm the judgment below.

Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. OCGA § 9-11-56 (c); *Lau's Corp. v. Haskins*, 261 Ga. 491 (405 SE2d 474) (1991). "We review the grant or denial of a motion for summary judgment de novo, construing the evidence and all reasonable inferences therefrom in the light most favorable to the nonmovant." (Citation omitted.)

Bell v. Sasser, 238 Ga. App. 843, 844 (520 SE2d 287) (1999). Viewed in this light, the record reveals that in late May 1994, Carl Gates and Ron Foltz formed Bridgewater, an independent insurance adjusting firm. Gates was a shareholder, director, officer and employee of Bridgewater from its inception. In November of 1994, Cindy Custard and Barry Kriegel also joined Bridgewater and became shareholders, directors, officers and employees of the corporation. Bridgewater was successful and grew in size and profitability. In April of 1995, Bridgewater purchased Foltz's stock and redistributed it equally to the remaining shareholders, Gates, Kriegel, and Custard, giving each a third interest in the corporation. On January 1, 1996, Custard became president of Bridgewater and Gates became a vice president.

In January of 1997, Gates began suffering job-related stress. His work relationships were strained, and Bridgewater employees considered Gates difficult to work with. On or about May 1, 1997, after receiving a memo about his job performance, Gates abruptly left the offices of Bridgewater, telling his fellow employees he needed to take some time off. Kriegel and Custard stated they did not know how much time Gates was taking off or whether he was even returning. Kriegel and Custard said that Gates' absence from his work presented a risk to Bridgewater's business operations. Gates, however, called the office to retrieve his messages and to

monitor his files. Kriegel instructed Bridgewater's receptionist to stop delivering Gates' messages. Further, on or about May 5, 1997, Kriegel changed the office's security code, effectively barring Gates from the premises. Kriegel also told Foltz, the former secretary and an employee of Bridgewater, that Gates would not be returning to Bridgewater and that the alarm code and company door keys were being changed.

On May 7, 1997, less than a week after Gates left the office, Kriegel wrote a letter and sent it by certified mail to Gates. In this letter, Kriegel told Gates he had abandoned his position as an employee and officer of Bridgewater. The letter stated, in relevant part:

> Your actions are therefor construed and accepted as your unilateral decision to terminate your employment with Bridgewater Group, Inc. You are not to present yourself or represent yourself to others in any way as an employee or corporate officer of Bridgewater. . . . If you wish to seek re-employment, that question can be discussed concurrent with the return of company property. . . .You have no right to enter Bridgewater offices without permission of the President.

Kriegel wrote this letter with Custard's input and approval. In a follow-up letter, Custard told Gates he had no right to employment with Bridgewater and demanded that he return all company property immediately. Both Kriegel and Custard said they did not intend to terminate Gates' employment, but, rather, to accept his resignation.

There is no evidence that Bridgewater maintained written employment contracts with its officers. However, the corporate bylaws state that an officer elected by the shareholders may only be removed by a vote of the shareholders at a properly called meeting. Further, although the directors may suspend an officer from acting on behalf of the corporation, they may do so only for cause. Further, the president cannot terminate any employee without first getting approval from the board of directors.

On May 28, 1997, following a meeting during which the parties attempted to resolve their dispute, Gates made a written request pursuant to O.C.G.A. §14-2-1602 to inspect certain corporate financial records so that he could determine the value of his ownership interest in Bridgewater. The record indicates that Gates was denied access to some corporate records until October 9, 2000, when the trial court found the appellants in contempt for failing to comply with previous court orders compelling discovery.

On June 4, 1997, Gates formed a new company, Property Loss Services, Inc. ("PLSI"), which specializes in adjusting property insurance losses. Thereafter, Gates contacted several insurance companies, some of which had done business with Bridgewater, and informed them he had started a new adjusting company. There is no evidence that Gates or PLSI solicited any Bridgewater clients prior to that date.

Further, there is no record evidence that Gates executed a covenant not to compete with Bridgewater. Bridgewater's Articles of Incorporation and Bylaws do not restrict competition by a former officer, director, or employee. There is no evidence showing that Bridgewater maintained written business contracts or exclusive business relationships with any of the clients at issue in this litigation. Further, Gates submitted affidavits from business clients Bridgewater claims he improperly contacted, and each states there was no exclusive relationship with Bridgewater.

At the Bridgewater stockholder's meeting held on August 23, 1997, Custard and Kriegel decided that Gates abandoned his position with Bridgewater and voted to terminate him as a director. Custard and Kriegel voted to increase their annual compensation to $150,000 and to take an offset against any future distributions of Bridgewater profits for the amount of any claims which had been made against any former officer who was also a shareholder. Gates was the only former officer of Bridgewater who was also a shareholder at that time, and, thus, this vote had the effect of giving Custard and Kriegel corporate authority to withhold distributions to Gates based upon their claims against him.

Custard and Kriegel also voted to give themselves, in their capacities as chairman and vice-chairman of Bridgewater's board of directors, respectively, annual

stipends of $12,500 and $10,000. They voted, further, to make Kriegel's wife a director and to pay her an annual stipend of $2,500. Kriegel testified that his wife was a high school teacher and had never worked in the insurance adjusting industry. There is no evidence that Bridgewater ever issued such stipends in the past or that directors had any corporate responsibilities or duties apart from attending an annual meeting.

All of Gate's income from Bridgewater ceased on May 7, 1997. He received no distributions from the corporation from that point forward, nor has he received any other compensation, including unused vacation time, sick leave, or reimbursement of business expenses. However, in 1997, Bridgewater issued K-1 forms to Gates, indicating that Bridgewater had retained over $40,000 in earnings and profits for which Gates, as a shareholder, incurred tax liability based upon Bridgewater's Subchapter S status. Appellants offered to buy out Gates' interest in the corporation for $25,000. If the offer was not accepted by July 30, 1997, it would be reduced by $2,000 per day thereafter.

Gates filed suit against the appellants on August 22, 1997, alleging wrongful termination, intentional interference with business relations, defamation, fraud, breach of fiduciary duty, and corporate dissolution. Appellants answered and counterclaimed, alleging usurpation of corporate opportunities, breach of fiduciary duty, and tortious

interference with business relations, and seeking attorney fees. On November 12, 1997, Bridgewater filed a separate action against Gates' new company, PLSI, alleging unjust enrichment. Bridgewater also sought an accounting of PLSI corporate records and attorney's fees. PLSI answered and counterclaimed with essentially the same claims as those raised in Gates' original complaint against appellants. The two cases were consolidated by the trial court. Gates/PLSI and appellants filed cross motions for summary judgment in the consolidated actions.

1. The trial court properly granted Gates/PLSI summary judgment on appellants'/Bridgewater's claims and counterclaims. Appellants argue that Gates breached his fiduciary duty to the corporation by being abusive and disruptive during his employment, by walking off the job on May 1, 1997, and by competing with the company after his departure. Appellants also contend Gates tortiously interfered with appellants business relationships and contracts and usurped its corporate opportunities. In its suit against PLSI, Bridgewater claimed unjust enrichment and sought an accounting and attorney fees. The trial court granted Gates'/PLSI's motion for summary judgment as to each of these claims.

(a) Breach of fiduciary duty and usurpation of corporate opportunities. Appellants' counterclaims against Gates for breach of fiduciary duty and usurpation of

corporate opportunities are based upon the contention that Gates, while he was serving as an officer and director of Bridgewater, did not have the right to form and operate a competing insurance adjusting business and to solicit business from clients who had previously done business with Bridgewater.[1] As we have held, a "corporate officer or director owes to the corporation and its stockholders a fiduciary or quasi-fiduciary duty, which requires that they act in utmost good faith." *Enchanted Valley RV Park Resort, Ltd. v. Weese*, 241 Ga. App. 415, 423 (5) (526 SE2d 124) (1999). The evidence reveals, however, that Gates' duties as an employee, officer, and director of Bridgewater ceased as of May 7, 1997. Although appellants contend they did not intend to fire Gates, but, rather, to accept his resignation, the result is the same: Appellants, by their own admission, no longer considered Gates an employee or an officer of the corporation as of that date. Although Gates was not *formally* removed as a director until the August 23, 1997 shareholders meeting, he was forbidden by Kriegel and Custard (the *only* other shareholders and directors in this close corporation) from acting

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[1]Appellants also contend that Gates breached his fiduciary relationship to the corporation by abandoning his job and by being difficult to work with. Appellants have cited no case law, nor have we found any, which suggests this conduct constitutes a breach of fiduciary duty to the corporation under these circumstances. Bridgewater's remedy for such conduct is to take the proper steps to terminate Gates' employment.

in that capacity as of May 7, 1997. Gates was not authorized to represent the corporation, he was denied entry to the premises, denied compensation, and denied access to corporate financial records. Additionally, the record shows that Gates was never employed pursuant to an agreement or a covenant not to compete with Bridgewater. Given this evidence, Gates owed no fiduciary or contractual duty to Bridgewater after May 7, 1997. Consequently, he could not breach such a duty to the corporation by starting a competing business and by contacting and doing business with Bridgewater customers after he had left Bridgewater's employ. See, e.g., *Instrument Repair Svc., Inc. v. Gunby*, 238 Ga. App. 138, 140-141 (1), (2) (518 SE2d 161) (1999); *Nilan's Alley, Inc. v. Ginsberg*, 208 Ga. App. 145 (1) (430 SE2d 368) (1993).

(b) Tortious interference with business relations. In order to support a claim of tortious interference with business relations there must be evidence of some wrongful act which *interfered* with the business relationship. The elements of tortious interference with contractual relations, business relations, or potential business relations are: (1) improper action or wrongful conduct by the defendant without privilege; (2) the defendant acted purposely and with malice with the intent to injure; (3) the defendant induced a breach of contractual obligations or caused a party or third parties to discontinue or fail to enter into an anticipated business relationship with the plaintiff;

and (4) the defendant's tortious conduct proximately caused damage to the plaintiff. *Disaster Svcs., Inc. v. ERC Partnership*, 228 Ga. App. 739, 740-741 (492 SE2d 526) (1997); *Renden, Inc. v. Liberty Real Estate &c.*, 213 Ga. App. 333, 334-335 (2) (444 SE2d 814) (1994). The wrongful act must be the cause of the customer's decision to cease the business relationship. See *Hayes v. Irwin*, 541 FSupp. 397, 431 (3) (A) (N. D. Ga. 1982). To remove such a requirement would essentially make parties liable for their lawful competitive acts. Attracting customers from another party in the fair course of trade is not actionable, even if such competition results in great damage to the party having previous business relations with the customers. See *Tom's Amusement Park Co. v. Total Vending Svcs.*, 243 Ga. App. 294, 298 (3) (c) (533 SE2d 413) (2000); *E.D. Lacey Mills, Inc. v. Keith*, 183 Ga. App. 357, 358-359 (1) (359 SE2d 148) (1987).

In this case, appellants have failed to set forth any evidence from a former customer that indicates that the customer refused to do business with it based upon some wrongful act by Gates or PLSI. Cf. *Hayes v. Irwin*, 541 F. Supp. at 431; see also *Rose v. Zurowski*, 236 Ga. App. 157, 159 (1) (511 SE2d 265) (1999). The evidence reveals that Bridgewater did not have or maintain written business contracts or exclusive business relationships with any of the customers at issue in this litigation. The affidavits indicate that Bridgewater customers were free to choose between prospective

adjusting companies. Gates' alleged statements to Bridgewater customers that Bridgewater could not handle large insurance claims is simply a statement of opinion and is not actionable. See *Rose v. Zurowski*, 236 Ga. App. at 159 (1). See also, *Singleton v. Itson*, 192 Ga. App. 78, 80 (383 SE2d 598) (1989) (truthful statements and critical personal opinions made by one employee about another are not wrongful or unlawful and so trial court correctly directed verdict on claim for tortious interference with contractual relations). We find no error.

(c) Unjust enrichment. In its separate suit against PLSI, Bridgewater claimed unjust enrichment against PLSI, alleging essentially that PLSI's business with former Bridgewater customers was wrongful and tortious in nature, and therefore, all revenues derived therefrom constitute unjust enrichment. In order to recover for unjust enrichment, Bridgewater must show that a good or service was taken from it without compensation and conferred upon PLSI. *Zampatti v. Tradebank Int'l Franchising Corp.*, 235 Ga. App. 333, 340 (5) (508 SE2d 750) (1998). Georgia courts have allowed claims for unjust enrichment for competitors only where a party has done some wrongful act to become enriched at the other party's expense. *Cochran v. Ogletree*, 244 Ga. App. 537, 539 (1) (536 SE2d 194) (2000). As stated in subsection (b) above, Bridgewater has not shown that Gates' competition was wrongful.

(d) Accounting/attorney fees. Bridgewater asked for an accounting of PLSI's books and records to determine the amount of revenue PLSI gained from doing business with former Bridgewater customers. Since Bridgewater owns no stock and holds no position with PLSI, it is not entitled to such an accounting absent a showing of wrongful conduct. See OCGA § 14-2-1602. As discussed above, there has been no showing that Gates' competition was wrongful. Further, since Bridgewater's claim for attorneys fees derives from its unjust enrichment claim, it must fail. See *Johnson v. MARTA*, 230 Ga. App. 105, 107 (2) (495 SE2d 583) (1998).

2. The trial court properly denied in part appellants's motion for summary judgment on Gates' claims.

(a) Wrongful termination. If Gates' position with Bridgewater was simply that of an at-will employee who had been hired for an indefinite period, he would have no claim for wrongful termination. *See, e.g., Ford Clinic, Inc. v. Potter,* 246 Ga. App. 320, 322-323 (540 SE2d 275) (2000); O.C.G.A. §34-7-1. Gates, however, was more than an at-will employee, he was an officer of Bridgewater. The record shows that as vice-president, Gates' employment was controlled by the bylaws, which set the procedure for removing corporate officer employees. See *Martin v. J. M. Clayton Co.*, 184 Ga. App. 273 (361 SE2d 385) (1987). The bylaws state that an officer elected by

the shareholders may only be removed by a vote of the shareholders at a properly noticed meeting of the board. Further, although the directors may suspend an officer from acting on behalf of the corporation, they may do so only for cause. And, the president cannot terminate an officer's employment without approval by the board of directors.

In this case, a jury could infer that Gates was fired effective May 7, 1997, when he received Kriegel's letter. Appellants' conduct of barring him from the premises, demanding the return of company property, and withholding his business calls and messages further support that inference. Further, the jury could conclude that appellants fired Gates well before the shareholders' meeting occurred in August, in violation of the corporate bylaws. A genuine issue of material fact remains as to whether appellants terminated Gates in violation of the bylaws or merely accepted Gates' resignation, as the appellants contend. See *Martin v. J. M. Clayton Co.*, 184 Ga. App. at 274. Therefore, the trial court properly found that appellants were not entitled to summary judgment on Gates' wrongful termination claim because material issues of fact remain for jury resolution. See id.

(b) Breach of fiduciary duty/fraud. Gates alleged that appellants breached fiduciary duties owed him and are liable for fraud.[2] Both claims are based upon appellants actions of improperly firing Gates, withholding dividends, denying him access to corporate information, diluting the value of his shares by issuing new shares of stock, appointing new and unqualified directors, and attempting to force a share buyout at a price fixed by the remaining shareholders.

Gates presented some evidence from which a jury could infer that each of these tactics were used against him with the intention of depriving him of the fair market value of his shares in the corporation. For example, after Gates was fired, Kriegel and Custard voted to pay stipends to all directors even though such stipends had not been paid in the past. Kriegel and Custard also voted to increase their salaries from approximately $30,000 up to $150,000. Kriegel and Custard replaced Gates as a director with Kriegel's wife, a high school teacher who had no experience in the insurance adjusting business. There also exists some evidence that appellants withheld corporate financial records and attempted to dilute the value of its stock by issuing 1,000,000 shares to Bridgewater employees.

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[2]Gates was not required to bring a derivative action under these circumstances. See *Thomas v. Dickson*, 250 Ga. 772, 774 (301 SE2d 49) (1983).

The record also indicates there had been a practice of making regular and increasingly larger cash distributions to the three shareholders, Gates, Kriegel, and Custard. But, Gates received no distribution after May of 1997. Gates, however, incurred tax liability for corporate profits because Bridgewater was a Subchapter S corporation. This practice has been recognized as a "squeeze-out" technique where a controlling shareholder in a Subchapter S corporation attempted to force a minority shareholder out of the company by withholding dividends without a legitimate corporate purpose. See *Corbin v. Corbin*, 429 F Supp. 276, 280 (M.D. Ga. 1977). The *Corbin* court recognized that such a scheme was both a breach of fiduciary duty and fraudulent. Id. In that case, the controlling shareholder froze all corporate income while continuing to pay himself a salary and other benefits. Noting the significant adverse tax consequences to the minority shareholder, the court enjoined the further withholding of dividends, explaining that "a majority shareholder cannot use his position to manipulate corporate affairs so as to deprive a minority shareholder of the value of his property for the purpose of freezing him out." Id. at 281. Further, the court noted that the "obvious intent and desired result of the manipulation of corporate funds . . . [was] to make [the minority shareholder's] stock valueless . . . thereby forcing him to sell it [to the majority shareholder]." Id. at 280. See also, *Thompson v. Central Ohio*

Cellular, Inc., 639 NE2d 462, 470-471 (1) (1994) (Ohio App. 1994); *Pooley v. Mankato Iron & Metal, Inc.*, 513 NW2d 834, 836 (Minn. App. 1994).

Further, evidence exists that appellants attempted to purchase Gates' shares of stock for a reduced value. After Gates refused the June 6, 1997 buyout offer of $25,000 for his stock shares, Kriegel extended an ultimatum to Gates on July 28, 1997 regarding the sale of his stock, whereby the offer of $25,000 would be reduced by $2,000 per day if not accepted by July 30, two days after the date of his letter. Good faith in dealing with a minority stockholder requires that the majority protect the minority's investments. "In close corporations, minority stockholders may easily be reduced to relative insignificance and their investment rendered captive, because ordinarily there is no market for minority stock in a close corporation and a minority stockholder cannot easily liquidate his investment for its true value." *Comolli v. Comolli*, 241 Ga. 471, 474 (1) (246 SE2d 278) (1978). A jury may reasonably infer that the purpose of the ultimatum and the decreasing offer was an attempt to manipulate the purchase of Gates' ownership interest for a reduced amount.

Based on this evidence, the trial court properly found a jury issue with respect to Gate's claims for fraud and breach of fiduciary duty.

(c) Tortious interference with business relations. Kriegel and Custard argue the court erred in finding a jury issue remained as to whether they could be held personally liable for tortious interference with business relations based upon their allegedly wrongful termination of Gates' employment with Bridgewater.

Georgia law provides that even at-will employment is a valuable right "which may not be unlawfully interfered with by a third person without such authority." *Moore v. Barge*, 210 Ga. App. 552, 553 (1) (436 SE2d 746) (1993); *Troy v. Interfinancial*, 171 Ga. App. 763, 766-767 (320 S.E.2d 872) (1984). Gates claims that, despite their ownership interests in Bridgewater, Custard and Kriegel lacked the authority to fire him as they did and are properly considered as third persons who unlawfully interfered with his employment with Bridgewater. See *Moore v. Barge*, 210 Ga. App. 553 (1). There is evidence in the record from which a jury could infer that Kriegel and Custard, individually, lacked the authority to discharge Gates in the manner they chose. Further, Custard testified that she approved Kriegel's decision to send the May 7, 1999 letter and either ratified or condoned Kriegel's other actions, including barring Gates from the office and withholding his compensation. Because there is some evidence that Custard and Kriegel wrongfully interfered with Gates employment, the trial court properly denied Kriegel and Custard summary judgment on this claim.

Judgment affirmed. Johnson, P. J., and Ruffin, J., concur.

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