VERMONT SUPERIOR COURT
RUTLAND UNIT
CIVIL DIVISION

NANCY KOTSULL,
Plaintiff

v.

RAYMOND KNUTSEN,
Defendant

Docket No. 723-10-13 Rdcv

RULING ON THE MERITS

This is a dispute between two former owners of a veterinary practice in Rutland, Vermont. Plaintiff Kotsull seeks damages for breach of contract, breach of the covenant of good faith and fair dealing, and failure to pay rent. She also seeks punitive damages. Defendant Knutsen counterclaims for breach of contract, breach of the covenant of good faith, and unjust enrichment. He also seeks punitive damages. A court trial took place on July 18, 19 and 20, 2017. Theodore Parisi, Jr., Esq. represents Kotsull; Robert McClallen, Esq. represents Knutsen.

Findings of Fact

The court finds the following facts to be established by a preponderance of the evidence. The parties are both veterinarians. They were married for five years and owned a practice together: Center Rutland Veterinary Services. Initially Knutsen did large animal work from a traveling van and Kotsull was on site doing small animal work. Over time the van was retired and they both worked on site. They do not agree over who did what with regard to surgeries and with regard to how much time they each worked. They divorced in 1997 but stayed in business together until December of 2010 when Kotsull left the practice. She is now practicing on her own in Benson, about 20-25 miles away. In the last years, Kotsull worked Mondays, Wednesdays and Fridays and

Knutsen worked Tuesdays, Thursdays and half a day Saturdays. Kotsull managed the finances of the business until she left. Knutsen paid little attention to the finances. Both parties used business credit cards for their gas and other business-related expenses, and the business paid their taxes. The court finds no evidence that Kotsull used the business credit card for personal expenses.

In 2010 Kotsull changed the way the compensation for herself and Knutsen was calculated, so that it was based on what work they did rather than just a 50/50 split. Kotsull says she had Knutsen's consent; he denies that. However, it made little ultimate difference, as their total draws for 2010 were almost identical: about $60,000 each. Ex. 38. The figures Knutsen calculated showing a disparity were not accurate, as they counted figures on Kotsull's side that were unrelated to compensation—such as equaling out Knutsen's higher insurance payments and tax payments.

The business was a partnership until 2005, when the parties formed an LLC called CRVS. Kotsull and Knutsen were the only members and owned equal interests. The Operating Agreement provided that a member "may require that the Company redeem all . . . of the member's Units of membership" upon 180 days written notice. Ex. 1 § 3.2.2. It further stated that the price would be "determined by appraising the Company as of the date of notice" and that "[t]he firm of Wutchiett Tumblin and Associates … of Columbus, Ohio" would be deemed an "approved appraiser." Id. § 3.2.3. It went on: "An appraisal by Wutchiett Tumblin shall be binding on the members, dissociated members, and holders." Id. Wutchiett Tumblin specializes in valuing veterinary practices. The Operating Agreement also allowed a second appraisal by any member objecting to the valuation by Wutchiett, with the average of the two being binding. The payment would be due by cash or promissory note with specified terms. Id. § 3.2.4.

Knutsen testified that the Operating Agreement only allows for a buyout if one of the parties dies, and argued that the redemption provision did not apply here. The operating agreement does have a provision concerning dissociation of a member, which says that it shall occur by

withdrawal or death. Id. § 13.1. It has some language about purchasing the units of a deceased member, but nothing in that section affects the provisions regarding redemption by a living member in Sections 3.2.2-3.2.4. Knutsen cannot have in good faith read the death provision to cancel out the redemption process. In fact, the December 2010 agreement that he signed expressly states that the process they are using is the one set forth in the Operating Agreement for one of them buying the other out, so it is not believable that he never understood that agreement to apply. Ex. 3.

It is undisputed that Kotsull gave her 180-day notice in June of 2010 and left the business as of December 31, 2010. On that date, the parties signed an agreement stating that they were negotiating the sale of the business to Knutsen, but that the terms were not yet set and thus Kotsull would leave as of that day but remain as operating manager; Knutsen would take over day-to-day management; Kotsull could practice veterinary medicine elsewhere with no restrictions; Kotsull would assist the accountant in preparing tax returns and other year-end financials. Ex. 3.

After giving notice of her intent to leave and have Knutsen buy her interest, Kotsull contacted Wutchiett Tumblin in June 2010 and began the process of appraisal, but Knutsen refused to cooperate with the appraisal. Ex. 55 pp. 14, 20. The parties did, however, agreeably divide most of the tangible assets such as veterinary equipment, medications, and so forth. A dispute remains over whether Kotsull owes money for her share of the bills that were outstanding at the time she left. The court finds that she still owes $5,138.05. Knutsen argues that she owes more, such as $8,000 for Frontline that Kotsull allegedly took with her, but the court finds that a contemporaneous letter from her accounting for the Frontline is more credible. Ex. 28A.

The first attempt at an appraisal generated a several thousand dollar payment from the business that was returned by the appraiser when Knutsen would not cooperate. Although Knutsen claims he is still owed money for that payment, the court finds no evidence to support that claim.

Kotsull later retained the appraiser for a second time, as required by the Operating Agreement. In May of 2012 the appraisal report was issued. Ex. 13. It concluded that the business (not including the tangible assets already divided) was worth $177,588 as of December 2010. The bill for the appraisal was $10,432. Kotsull paid the bill. Knutsen has not paid Kotsull anything for her interest in the business, or any portion of the appraisal bill. That bill, contrary to Knutsen's claim, was owed by the business rather than just Kotsull because it was required by the Operating Agreement.

Knutsen claims that he terminated the business in February of 2011 and therefore the business has no value. Ex. 7. However, the parties' December 2010 agreement made clear that the parties each still owned 50% of the business and were each "operating managers." Ex. 3. Thus, Knutsen had no power to terminate the business. In any case, Knutsen has continued the practice since then. The sign was not changed until this year, and as recently as September 2016 invoices were still being issued on the letterhead of Center Rutland Veterinary Services. Exs. 48 and 35. Most importantly, the business has unquestionably continued and the change of name has no significance to the value.

Knutsen presented an expert witness whose opinion was that the fact that Kotsull is not bound by any covenant not to compete eliminates the value of the business, because she could start a practice across the street. However, Denise Tumblin, the Wutchiett Tumblin appraiser, credibly testified that because Kotsull is actually practicing over 20 miles away and the "practice radius" for the business—where it draws most of its clients—is 7 or 8 miles, this would not affect the valuation. Ex. 55 pp. 23-25. Her opinion was the same whether or not Kotsull had access to a customer list. Id. pp. 25-26. The court found Tumblin's report and testimony more convincing than the testimony of Thomas Shortle, who asserted that the business had no good will value, because all of the good will was entirely personal to the two veterinarians. In other words, Shortle said, it is the doctors, not the business, to whom customers are going. His position was that because there

was no covenant not to compete, there was zero value in the practice. The court did not find this persuasive. Tumblin specializes in veterinary practice valuation and her opinion was that because *in fact* Kotsull is not competing in the local area, the lack of a contractual non-compete is not relevant. The court accepts that opinion. In any case, Shortle agreed that the usual non-compete he sees is for five years. More than five years have now passed, so Knutsen has received exactly what a non-compete would have given him and more.

Shortle was also unconvincing when he said that because the business was dissolved, it lost all but liquidation value. As noted before, the business continued in the same location, doing the same work, and merely formally changed its name.

The building in which the practice operates was, and remains, owned by Kotsull and Knutsen personally.[1] The business rented the clinic building for $30,000 a year. Kotsull has not been paid her half of that $30,000 since she left in 2010. The total for her share would amount to $100,000 through August of 2017.[2]

For about 15 years after the parties separated as husband and wife, Knutsen lived in an upstairs apartment above the clinic. The apartment was never legal and never obtained a certificate of occupancy, so it cannot be rented to tenants. The business paid for the heat and utilities and the renovation of the space. Knutsen was charged $300 a month for rent (this was done by deduction from his capital account). Knutsen was more available to handle evening and weekend emergencies when he was living upstairs, although that was not the reason he chose to live there. He did much of the work on the renovations himself, although the materials were paid for by the

[1] Kotsull wants the court to resolve the division of the real estate in this case, but the court has no authority to do so since it is not a business asset. Likewise, the court concludes that the $60,000 Knutsen paid toward the mortgage since Kotsull left is an issue to be addressed in the division of the real estate, not here. The same is true of Kotsull's request for a set of keys to the building.

[2] This issue was the subject of an amended complaint that was never filed but was approved by the court. *See* Motion 9 and ruling thereon. The court noted at the start of the trial that the issue was in the case.

business. The court does not find any debt owed one way or the other related to the apartment. The parties both accepted the status quo of $300 a month rent while they ran the business, and Knutsen cannot legally rent to anyone else.[3] There is no basis for the court to rewrite that understanding in hindsight.

Kotsull seeks punitive damages because of Knutsen's behavior. She describes him as abusive, using nasty language and engaging in "physical abuse." However, she provided no details to explain any of this, other than some rude emails in evidence. Exs. 25-26. They are rude but not outrageous. What Knutsen did do, however, was file a complaint with the Rutland Police Department on the eve of the previously-scheduled trial in this case, alleging that Kotsull had embezzled money from him. Knutsen knew that the same facts were at issue in this case, and were to be the subject of the trial. He told the police officer that he hoped that having a criminal investigation would lead to Kotsull dropping this case.[4] In fact, it led to a significant delay in this case, because the court cancelled the initial trial date to avoid placing Kotsull in the position of having to testify while the investigation was going on.

Knutsen also seeks punitive damages from Kotsull, alleging that, for example, she threatened to put him out of business within a matter of months, was mean and was deceptive. He also asserts that Kotsull refused to sign a non-compete agreement. The court does not find any of these allegations credible.

[3] Kotsull argues that Knutsen could get a certificate of occupancy if he installed an elevator, but the court was not persuaded that doing so would be a reasonable possibility without having the elevator for the tenants go through the clinic.

[4] The court rejects Knutsen's claim that he said something different. The police officer was more credible on this point.

Conclusions of Law

Kotsull's Claims

A. Breach of Contract

The court concludes that Knutsen did breach material terms of the Operating Agreement when he refused to cooperate regarding the proposed buyout. The agreement provides that a member "may require that the Company redeem all. . . of the member's Units of membership" upon 180 days' notice. Ex. 1 § 3.2.2. It goes on to say that the price of the units will be determined by an appraisal company identified in the agreement, Wutchiett Tumblin & Associates, and that such an appraisal "shall be binding on the members, dissociated members, and holders." Id. § 3.2.3. It is undisputed that Kotsull gave 180 days' notice and that the proper appraiser was used. Thus, the appraisal was binding upon Knutsen. By not paying out half the appraised value, and not paying half the cost of the appraisal, Knutsen breached the agreement. He owes Kotsull half of $177,588, or $88,794, plus half the $10,432 fee for the appraisal, $5,216. These total $94,010.

B. Breach of the Duty of Good Faith

The purpose of the implied covenant of good faith and fair dealing is to "ensure that parties to a contract act with faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Monahan v. GMAC Mortg. Corp., 2005 VT 110, ¶36, 179 Vt. 167 (quotations omitted). "An underlying principle implied in every contract is that each party promises not to do anything to undermine or destroy the other's rights to receive the benefits of the agreement." Carmichael v. Adirondack Bottled Gas Corp. of Vermont, 161 Vt. 200, 208 (1993).

It is not bad faith to delay payment under a contract because of a good faith dispute over the amounts due. Monahan, 2005 VT 110, ¶ 41. Here, however, Knutsen had no good faith argument for non-payment of the value established by the appraisal, or for not cooperating with

the appraisal. The terms of the Operating Agreement were clear. Knutsen had an obligation to act with faithfulness to the agreement, and did not do so. Likewise, Knutsen's report to the police on the eve of trial was an intentional act aimed at avoiding his obligations under the contract. Thus, he violated the covenant of good faith and fair dealing. However, Plaintiff has pointed to no damages as a result of this breach that are distinct from those resulting from the breach of contract itself. Thus, the court awards nominal damages of $1.00.

C. Failure to Pay Rent

It is undisputed that the business paid rent to Kotsull and Knutsen personally at the rate of $30,000 per year. Kotsull has not been paid her half of these rents since she left in December of 2010. Thus, the business owes her $100,000 through August of 2017. [5]

D. Punitive Damages

The Vermont Supreme Court has explained punitive damages as follows:

> Because the purpose of punitive damages is to punish conduct that is morally culpable and truly reprehensible, this Court has set a high bar for plaintiffs seeking such damages. Our precedents limit the availability of punitive damages to cases where the evidence shows that defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime.

Monahan, 2005 VT 110, ¶ 55 (quotations omitted). Such damages "are available only to punish and deter defendants who acted with actual malice." Id. Actual malice may be shown by "conduct manifesting personal ill will, evidencing insult or oppression, or showing a reckless or wanton disregard of plaintiff's rights." Id. ¶ 4. The court finds that Knutsen went to the police on the eve of the earlier-scheduled trial solely for the purpose of pressuring Kotsull to drop this case, and did so maliciously and with no legitimate purpose. This justifies punitive damages. The court will award Kotsull $20,000 in such damages. The court is not awarding a higher amount because the

[5] Rent will continue to accrue going forward until the parries resolve their joint ownership of the real estate.

record does not provide sufficient evidence of Knutsen's assets and liabilities and his ability to pay a larger award.

Knutsen's Counterclaims

A. Breach of Contract

Knutsen asserts that Kotsull breached their contract in various ways. The only one the court finds established is her not paying him her full share for some of the bills when she left. The court agrees that she owes him $5,138.05. *See* Ex. 28A.

B. Knutsen's Other Claims

The court finds no breach of the covenant of good faith and fair dealing by Kotsull. The court finds no proof of any unjust enrichment. The court finds no basis for punitive damages against Kotsull.

Order

The court awards Kotsull $94,010 for breach of contract, $1.00 for breach of the covenant of good faith and fair dealing, $100,000 in past due rent, and $20,000 in punitive damages. The court awards Knutsen $5,138.05 for breach of contract. The total award will therefore be $208,872.95 to Kotsull. Plaintiff's counsel is directed to submit a proposed judgment by September 11. Defendant's counsel may have five business days to file any objection to the language of the proposed judgment. *See* V.R.C.P. 58(d).

Electronically signed on August 31, 2017 at 11:55 AM pursuant to V.R.E.F. 7(d).

Helen M. Toor
Superior Court Judge