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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1119-12T3

THE HOLDER GROUP, INC.
and ANDREW HOLDER,

Plaintiffs-Appellants/
Cross-Respondents,

v.

JOHN BIERMAN, FERNANDO
GALLEGO, CITRUS PARK
PARTNERS and BEECH REALTY,

Defendants-Respondents/
Cross-Appellants.

Submitted December 3, 2013 - Decided May 23, 2014

Before Judges Fisher, Espinosa and Koblitz.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-2043-10.

Gregory M. Gennaro, attorney for appellants/cross-respondents (Mr. Gennaro, on the brief).

Cutolo Mandel LLC, attorneys for respondents/cross-appellants (Jeffrey S. Mandel, of counsel and on the brief).

PER CURIUM

The central issue in this case is whether a $200,000 check tendered by plaintiffs Andrew Holder and The Holder Group, Inc.

(collectively, Holder or plaintiff) to defendants' company, Beech Realty, was a loan or a capital investment in a partnership. Following a bench trial, the judge concluded that the check was a loan made by Holder, as a partner, to the partnership and entered judgment in favor of plaintiff. However, citing "principles of equity, fairness [and] fundamental justice," the judge reduced the amount due to plaintiff. In his appeal, plaintiff argues that the judge erred in calculating the amount of the judgment. Defendants cross-appeal, arguing that the trial court erred in finding the $200,000 was a loan. For the reasons that follow, we affirm the trial court's finding that the check constituted a loan from a partner to the partnership and reverse and remand for further proceedings to determine what amount, if any, is due to plaintiff.

I

Plaintiff brought this action against Beech Realty, Citrus Park Partners, and John Bierman and Fernando Gallego, individually. The complaint alleges breach of contract, negligence, breach of fiduciary and loyalty duties, wrongful conversion, unjust enrichment, fraud, and contractual indemnification and asks for an accounting and dissolution.

Plaintiff Andrew Holder, principal of The Holder Group, Inc., had discussions with defendants John Bierman and Fernando Gallego about business ventures of theirs, including a planned residential development called Citrus Park in Tampa, Florida, that defendants had been working on prior to 2006. Gallego told Holder they were interested in getting some investors and Holder replied that he would be interested in talking to them about it. Holder testified that, in the following weeks, he told defendants he was "interested only in terms of a loan, not as a capital contribution" because he "thought the project was too far along and it wasn't something that [he] would want to risk $200,000 outright in."

Four to eight weeks after their initial conversation, Holder gave a check to Gallego and Bierman which, he stated, was "to loan $200,000 for the benefit of Citrus Park, the development of Citrus Park." The check bore the following notation: "Loan to Beech Realty for Citrus Park, Tampa, FL." Beech Realty was a company owned by defendants Bierman and Gallego. Holder testified that Gallego did not object to Holder's characterization of the check as a loan. The check was deposited into the Beech Realty account.

There was no separate written agreement to document the terms of the loan, not even the terms of repayment. Holder

testified that his understanding was he would be paid "when sufficient funds would be available." Holder did not secure the loan with a mortgage, personal guarantee, or other security.

On the date the check was tendered, Holder and Beth Latour, the Director of Project Administration for the Holder Group, prepared a document that Holder described as "a one page memorandum or agreement . . . attempting to identify the various ownership amounts of Citrus Park" (the Citrus Park agreement). The memorandum, on Citrus Park Partners letterhead, reads as follows:

> I. SCENARIO ONE: PROPERTY IS SOLD WITHOUT PHYSICAL IMPROVEMENT
>
> A. All external financial obligations of the partnership are satisfied, i.e. architects, engineers, consultants, loans, etc.
>
> B. All internal (partner) financial obligations of the partnership are satisfied, i.e. loans, expense reimbursement, etc. plus 8% annual interest rate.
>
> C. Fernando Gallego and John Bierman receive the next disbursement from the partnership up to a cap of $8,800,000.00.
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> D. Any remaining monies beyond the amounts included in Items A, B and C are to be divided equally among the partners as follows:
>
> 1) 33 1/3% to Fernando Gallego
> 2) 33 1/3% to John Bierman

3) 33 1/3% to Drew Holder

II. SCENARIO TWO: PROPERTY IS SOLD WITH ANY PHYSICAL IMPROVEMENT

A. All external financial obligations of the partnership are to be satisfied, i.e. architects, engineers, consultants, loans, etc.

B. All internal (partner) financial obligations of the partnership are to be satisfied, i.e. loans, expense reimbursement, etc. plus 8% annual interest rate.

C. Any remaining disbursements beyond the amounts included in items A and B are to be divided among the partners as follows:

1) 20% of the remaining amount is to be divided equally between Fernando Gallego and John Bierman with a cap* of $8,800,000.00.
2) 26.7% to Fernando Gallego
3) 26.7% to John Bierman
4) 26.6% to Drew Holder

* After the cap of $8,800,000.00 is reached, each of the partners shall share equally in any remaining money (33 1/3%).

Holder, Gallego, and Bierman each signed the agreement, stating they agreed to and accepted the terms.

Bierman testified it was his and Gallego's understanding that Holder "was putting money into this deal just like [they] were putting money into this deal." He explained that the memorandum was structured as it was because, prior to that date, Gallego and he had contributed "money and sweat equity to get it

to this point." Bierman testified it was his understanding that a formal partnership agreement would be drawn when they "finally got [the project] to the finish line" when the necessary approvals were obtained. From defendants' perspective, the $200,000 check was a capital investment and Holder became a partner in the Citrus Park venture with that payment.

Holder stated that his involvement in the project was solicited because of his expertise. He also expected that, if the project came to fruition, his company would have been involved in the construction. The Holder Group prepared a pro forma offering statement, a "compilation of information and financial analysis" for potential investors. The pro forma offering statement classified investors on the basis of the amount of their investments, which were made in $200,000 increments. Defendants were identified as "First Tier members." As Beth Latour acknowledged, a Second Tier Investor listed in this document prepared by plaintiff's company referred to Andrew Holder. Additional documents prepared by plaintiff's office for Domain Real Estate Development, LLC, a company formed by Holder and Latour, identify a $200,000 payment in April 2006 as a buy-in to the Citrus Park partnership.

Holder described meetings he had with Bierman and Gallego:

> I had made repeated requests for them to form Citrus Park Partners with the correct

> paperwork, partnership papers and, also, to open up a bank account and make sure the money that was, then, placed in the Beech account would be segregated, almost, we thought within a week into its own account for Citrus Park. But that never was the case.

Defendants never created a separate Citrus Park bank account. Instead, they used their Beech Realty account as an "operating account" for all their projects. Bierman admitted that the defendants did not maintain accounting records as well as they should have and had "checks coming in [and] checks going out" of the Beech Realty account for different ventures.

On April 16, 2010, four years after tendering the check, Holder sent defendants a letter in which he stated he had tried "on several occasions, albeit unsuccessfully, to discuss . . . the repayment of my loan," and that Holder considered this letter to be "formal notification that [he was] calling in the loan extended," due to the stalling of the Citrus Park project. Bierman testified he was "surprised" that Holder asked for the money back because defendants did not "think that there was a loan" and that he had not received any prior correspondence requesting the repayment of a loan.

The trial judge reviewed the Citrus Park agreement with Bierman, who referred to it as the partners' interim agreement until approvals were obtained and a formal partnership agreement

was drawn. Bierman acknowledged that the agreement addressed the division of profits but did not discuss the allocation of losses. According to Paragraph B of the Citrus Park agreement, the internal financial obligations included loans by partners and reimbursement for expenses incurred by the partners. Such internal financial obligations would include expenses incurred, such as flying to Florida for the project, which would then be repaid with 8% interest. Bierman testified further that the individual partners were entitled to be paid for the loans they made to the partnership and the expenses they incurred, stating, "The money we put in the deal we would at the end we would have thought we would have gotten reimbursed. I mean all expenses would have been reimbursed . . . . Everybody would get [their loans] back before you would share in any of the profits." Bierman stated that each of them loaned money "to the deal" and that he never asked Holder for more money after the April 2006 check. He said he and Gallego each contributed approximately $150,000 to $160,000 to the project. On cross-examination, Bierman acknowledged that he had earlier stated he did not believe his contributions to Citrus Park were loans, explaining that he was "not sophisticated enough" and that, the "way [he] looked at it," they "were all putting money in the deal."

In summation, defendants' counsel stated they considered Holder an equal partner and were willing to do a final accounting and divide what was left, although they did not contend there was $600,000 remaining to permit each partner to receive $200,000. Plaintiff's counsel maintained that the proofs supported the conclusion that the $200,000 payment was a loan.

The trial judge set forth his findings in an oral opinion. The trial judge found that the notation on the check was prima facie evidence that plaintiff intended the check to be a loan. Stating his belief that the testimony of both Holder and Latour was credible, the judge found the evidence sufficient to allow him to make the factual finding that the payment of $200,000 was a loan and he saw nothing in the record that rebutted the evidence that it was a loan.

As for the Citrus Park agreement, the judge stated, "Certainly the document does not constitute a full and complete partnership agreement or joint venture agreement." However, the judge noted that the law allows oral partnership agreements.

The trial judge found the Citrus Park agreement to be "extremely important . . . as reflecting what the parties intended at that time." In that agreement, the parties anticipated that the partners could make loans to the Citrus

Park project and be repaid according to the two scenarios set forth in the agreement. The judge noted that the Citrus Park agreement established priorities for the repayment of obligations and disbursement of profits that were agreed upon by the parties. Under the scenario that more closely resembled the facts here, the parties gave first priority to repayment of "[a]ll external financial obligations of the partnership," described as debts owed to "architects, engineers, consultants, loans, etc." Second in priority were "[a]ll internal (partner) financial obligations," described as "loans, expense reimbursement, etc. plus 8% annual interest rate." Noting that under N.J.S.A. 42:1A-24(e), a partner may lend money to his own partnership or joint venture, the judge concluded that the loan transaction here was a loan advance by a partner to the partnership as anticipated by the partners in the Citrus Park agreement.

The judge observed that the recordkeeping was "sloppy and [maintained in] less than a businesslike manner" and that defendants were commingling Citrus Park funds with funds from other ventures. The judge also noted that "for at least four years Mr. Holder just simply went along with it."

Based on his finding that there was a partnership here, the court stated that under N.J.S.A. 42:1A-24(b)(1), the managing

partners have an obligation "to account to the partnership and hold as trustee for the partnership and its members any property profits or benefits derived by the partner in the conduct . . . of the partnership," which was not done here.

In determining damages, the trial judge awarded simple interest at a rate of 8% per annum to plaintiff's original $200,000 loan, arriving at a total of $301,007.36. Stating that, under partnership law, he was allowed to apply equitable principles, the judge than assessed a one-third discount. The judge said he did not believe Holder should be entitled to the full amount of his loss because he was "clearly involved in this process beyond a pure creditor." The judge noted that after the loan, Holder worked as a partner to advance the interests of the partnership, employing the services of his firm, engaging in discussions, and having Latour do a lot of work for the project. The judge also discounted the judgment by $11,000 based on unpaid amounts due to defendants' company, Sky-Hi Building Services Corp. (Sky-Hi), from The Holder Group. The total amount of damages awarded was $187,664.85.

Plaintiff filed a motion for reconsideration, submitting that the court should amend the final judgment to vacate the equitable reduction, award interest, and eliminate the setoff for monies due to Sky-Hi. The trial judge denied the motion,

setting forth his reasons in a written opinion. The judge noted that he had found plaintiff's "claims of being an innocent and uninformed partner lacked credibility" and also stated he had found plaintiff's actions "contributed to the actual losses sustained by the Plaintiff and the partnership."

In this appeal, Holder argues that the trial judge committed the following errors: failing to find a breach of fiduciary duty or conversion (Point II); applying equitable principles to provide defendants with a one-third discount on the amount owed (Point III); setting off a debt owed to a nonparty entity (Point IV); denying plaintiff's motion for reconsideration (Point V); making a mathematical error (Point VIII); and failing to require defendants to account for returned deposits (Point IX). Holder argues that this matter should be remanded to entertain a claim for punitive damages (Point VI) and to determine Holder's application for costs and fees under the offer of judgment rule (Point VII).

In their cross-appeal, defendants argue that the trial judge erred in his interpretation of the contract and in creating a rebuttable presumption that writing the word "loan" on a check renders it a loan. Defendants also argue that, even if the $200,000 represented a loan, the appropriate remedy was

not to return the full amount of the loan under the circumstances here.

II

We accord deference to a "trial court's determinations, premised on the testimony of witnesses and written evidence at a bench trial." D'Agostino v. Maldonado, 216 N.J. 168, 182 (2013). When "supported by adequate, substantial and credible evidence," a trial court's findings "are considered binding on appeal" and "should not be disturbed unless they are so wholly insupportable as to result in a denial of justice." Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 483-84 (1974) (internal quotation marks and citation omitted). "[I]n reviewing the factual findings and conclusions of a trial judge, [appellate courts] are obliged to accord deference to the trial court's credibility determination[s] and the judge's 'feel of the case' based upon his or her opportunity to see and hear the witnesses." N.J. Div. of Youth & Family Servs. v. R.L., 388 N.J. Super. 81, 88 (App. Div. 2006) (citing Cesare v. Cesare, 154 N.J. 394, 411-13 (1998)), certif. denied, 190 N.J. 257 (2007). We will engage in independent fact finding "sparingly and in none but a clear case where there is no doubt about the matter." Rova Farms, supra, 65 N.J. at 484. Our task has been succinctly described as follows:

> [W]e do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice, and the appellate court therefore ponders whether, on the contrary, there is substantial evidence in support of the trial judge's findings and conclusions.
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> [In re Trust Created by Agreement Dated December 20, 1961, ex rel. Johnson, 194 N.J. 276, 284 (2008) (quoting Rova Farms, supra, 65 N.J. at 484).]

As the trial court observed, the documentation of both the transaction and the parties' relationship was sloppy and incomplete. In the midst of conflicting testimony, the court had to piece together evidence in light of the testimony found credible to resolve the factual issues here.

There were two documents created on the date Holder gave the $200,000 check to defendants. First, the check itself bore the notation that it was a loan for a specific venture. Second, the Citrus Park agreement set forth the priority of repayment of identified debts, including "internal (partner) financial obligations of the partnership . . . i.e. loans, expense reimbursement, etc." (emphasis added). In finding that the $200,000 was a loan, the trial court explicitly noted he found the testimony of Holder and Latour to be credible and that there was no evidence to rebut this finding.

The judge also found that the loan here was made by Holder as a partner in the Citrus Park project. This finding was supported by documents prepared by plaintiff, i.e., the Citrus Park agreement, which referred to Holder as a partner; the pro forma offering statement prepared for potential investors; and the Domain Real Estate Development, LLC record that referred to the $200,000 payment as an investment.

These findings were based in part upon the judge's credibility determinations and are entitled to substantial deference. State v. Nuñez-Valdéz, 200 N.J. 129, 141 (2009); State v. Barone, 147 N.J. 599, 615 (1997); Rova Farms, supra, 65 N.J. at 484. Even if we might have arrived at a different result, there was "adequate, substantial and credible evidence," Rova Farms, supra, 65 N.J. at 484, to support the trial court's finding that the $200,000 check was for a loan by a partner, and that conclusion will not be disturbed.

In light of the trial judge's finding that the loan here was an advance by a partner to the partnership, the terms of repayment would be subject to the priorities established in the Citrus Park agreement. As a result, Holder would not be entitled to repayment of the loan unless and until all external obligations of the partnership were satisfied. Holder's testimony on this point is not to the contrary. He acknowledged

that there was no definite term for repayment, stating only that he expected to be paid "when sufficient funds would be available."

In his testimony, Bierman stated that "all the professionals" were paid. We infer from this statement and the fact that no counterclaim was filed to seek plaintiff's contribution to outstanding professional bills that the "external financial obligations" were satisfied and the partnership was free to address the "internal" obligations, which included plaintiff's loan and other obligations covered by that description, such as unreimbursed expenses.

The trial judge viewed plaintiff as a willing participant who acquiesced in defendants' sloppy business practices. This view was not undeserved. Plaintiff acknowledged that the development efforts had been ongoing for a substantial period of time in stating that "the project was too far along" for him to invest rather than make a loan. Yet, there was no business entity in place for the Citrus Park project, and plaintiff, who is an attorney, handed over a $200,000 check, purportedly a loan for the development of a specific project, Citrus Park, to a company that was not dedicated to that development. The sole documentation of the check's status as a loan was a notation on the check itself. No documentation was prepared to identify who

was responsible for payment of the "loan," when payment of some or all of it was due, or any limitations on how the loan proceeds were to be used. Plaintiff's contention that the funds he turned over to Beech Realty were wrongfully diverted because they were used by Beech Realty for purposes other than Citrus Park is unpersuasive under the circumstances. Therefore, the arguments that the trial court erred in dismissing a claim for punitive damages and in failing to find defendants liable for conversion and breach of fiduciary duty lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

It is evident that the trial judge was discomfited by the prospect that plaintiff would fully recover his $200,000 loan to a failed investment when he had been "clearly involved in" the project and contributed to its failure. The judge stated he was required "to exercise equitable principles" and was allowed to look at the circumstances "in principles of equity, fairness, fundamental justice and to apply [his] discretion in regard to amount." In an effort to arrive at a fair result, the trial judge discounted plaintiff's claim by one-third, reflecting his loss as a partner, and further reduced the amount by deducting the amount Holder owed to Sky-Hi.

Ordinarily, we leave decisions concerning the application of an equitable doctrine to the sound discretion of the trial

court. Feigenbaum v. Guaracini, 402 N.J. Super. 7, 17 (App. Div. 2008). Although we will not substitute our judgment for that of the trial judge unless there is a clear abuse of discretion, such an abuse occurs "when a decision is made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis." Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (internal quotation marks and citation omitted).

Here, the trial judge failed to identify any equitable principle, other than an inchoate sense of fairness, that provided a basis for reducing the amount of the loan to be repaid. As the trial judge acknowledged, these deductions were made without the benefit of an accounting to determine the amount, if any, available to satisfy the "internal (partner) financial obligations" and what other internal obligations remained outstanding. Finally, there was no counterclaim here and no legal basis for reducing plaintiff's recovery by an amount due to a nonparty. For these reasons, we conclude that the trial judge abused his discretion in determining the amount due to plaintiff.

We find the record insufficient for us to make an independent determination of the amount, if any, to be repaid to plaintiff. Therefore, we reverse the amount of the judgment and

remand to the trial court so that an accounting can be rendered and a determination made as to the amount of any judgment in plaintiff's favor. That determination should be consistent with the trial judge's finding that the loan here was made by a partner and the observation that the provision in the Citrus Park agreement regarding "internal (partner) financial obligations" most closely describes the transaction here. In light of our disposition, we need not address the arguments raised in Points V, VII, VIII, and IX of plaintiff's appeal or the arguments raised in the cross-appeal that have not been addressed in this opinion.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION