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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4363-09T1

GEORGE F. TAYLOR, JR., in his individual capacity and as a partner in TAYLOR REAL ESTATE PARTNERSHIP,

Plaintiff-Appellant,

v.

RICKY LEE TAYLOR, THE ESTATE OF JENNIE B. TAYLOR,

Defendant-Respondent.

Argued January 11, 2011 - Decided July 8, 2011

Before Judges Parrillo, Yannotti and Espinosa.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-2592-08.

Michael Confusione argued the cause for appellant (Hegge & Confusione, LLC, attorneys; Mr. Confusione, of counsel and on the brief).

Thomas J. Hagner argued the cause for respondent (Hagner & Zohlman, LLC, attorneys; Mr. Hagner, of counsel and on the brief; Ila Bhatnagar, on the brief).

PER CURIAM

Plaintiff George F. Taylor, Jr. (George) appeals from an order dismissing his complaint against his brother, Ricky Lee Taylor (Ricky), in which he alleged Ricky unduly influenced their mother, Jennie Taylor (Jennie), to transfer a property interest to him, violated his fiduciary duties under their real estate partnership, and diverted partnership income. We affirm.

In 1980 or 1981, the Taylor family created Shapes to Come (STC), a fitness center in Winslow Township, New Jersey. STC was a corporation owned equally by George, his father, George F. Taylor, Sr. (George, Sr.), and Jennie. George and his parents later created Taylor Real Estate Partnership to acquire the real estate where STC was built.

In 1991, George retired from his position with the State Police to work full-time at STC. He described his responsibility as "the normal duties of any health club owner" and said Ricky took care of payroll. George, Sr. passed away in 1999. The ownership interests in both the corporation and the partnership were equally split, one-third each to George, Jennie, and Ricky.

George and Ricky each testified that they enjoyed a good relationship with Jennie. George stated his mother "assured [him] that according to her will . . . things would be divided" equally between himself and Ricky. George also testified that,

in the last few years of her life, he observed his mother "displaying an increasing diminished ability to reason and understand simple things that she was able to grasp in earlier years." In contrast, Ricky characterized his mother as "strong willed and independent[,]" though he could not recall examples of such traits after 1984 and 1985. He also testified that, at her request, he occasionally endorsed her checks and cashed them for her.

On May 18, 2006, Jennie signed a bill of sale transferring all of her interest in the partnership to Ricky. Ricky did not sign the bill of sale. Jennie was represented by Michael Diamond (Diamond), an attorney who had represented the family since the mid-1980s. Diamond testified that Jennie contacted him in 2006 to transfer her interest in a partnership to Ricky. He asked Jennie to provide him with a copy of the partnership agreement, which she allegedly sent via fax, though the parties disputed whether she knew how to use a fax machine. Diamond stated that Ricky accompanied her to one of the meetings and sat in the waiting room. He met with Jennie privately and discussed the tax consequences of the proposed transaction and advised her that it would be better to transfer the shares in her will. She rejected that alternative. Diamond stated Jennie "probably understood it as much as the plain language [he] was giving her.

And the plain language that [he] was giving her is it would be better to put it in a will . . . ." When asked whether there was "any question in [his] mind" that the transfer was a "knowing and voluntary act on the part of Jennie Taylor," Diamond answered, "she wanted to do it." Diamond agreed that Jennie was "well aware that she was about to transfer whatever interest she had to Rick[.]" He never discussed the transfer with Ricky. George had no knowledge of this transfer.

Ricky stated he did not ask or encourage his mother to make the transfer. She told him that it was her wish and she made the necessary arrangements. He asked her if she discussed it with George more than once. His mother replied that she was not going to do so, and that "this is what I want to do and I'm going to do it." Ricky stated she refused to talk to George out of "fear of . . . retaliation."

On July 14, 2006, notwithstanding the fact that Jennie had already signed her shares in the partnership over to Ricky, the parties executed an agreement selling STC. Jennie signed in her alleged capacity as a shareholder. She also signed a consent agreement in January 2007; a loan modification agreement dated March 30, 2007; and numerous checks from January to April 2008.

After Jennie passed away on April 9, 2008, Ricky and George met at her house to look for her will or other paperwork.

According to George, Ricky was inside the house when he arrived. A search of the house revealed no paperwork or money, even in the drawer next to Jennie's bed, the location where George said she kept her money, valuables, and will.

George testified that he went to Ricky's house on the following morning to question him because "something [was] obviously wrong." He said Ricky started to cry and told him that Jennie "gave [him] everything" and "signed over all her personal finances . . . months ago."

Ricky testified to a different version of this meeting. He described George as "[v]ery confrontational" and said that at the end of their meeting, George "jumped off of the couch . . . turned around, pointed his hand like a gun" and threatened Ricky that he would "get [his]" before walking out of the townhouse.

George claimed in this lawsuit that Ricky had misappropriated assets of the partnership, including money for "personal training" sessions from gym members. However, Bruce Mulford, an accountant retained by George, testified that the data supplied to him "did not allow [him] to determine" that there were "misappropriations of funds from Shapes to Come or the partnership" caused by Ricky.

After hearing all the evidence and the summations of counsel, the court dismissed the complaint with prejudice,

finding that George failed to present evidence sufficient to sustain his burden of proof. In this appeal, George argues that the trial court erred in denying him a jury trial, that he was entitled to judgment in his favor on the undue influence claim, and that he was entitled to damages and dissociation of Ricky under the Uniform Partnership Act (UPA), N.J.S.A. 42:1A-1 to -56. After carefully reviewing the record, briefs and arguments of counsel, we are satisfied that none of these arguments have merit.

I

George did not include a jury demand in either his complaint or amended complaint. However, because Ricky made such a demand, a jury trial was required

> unless all parties or their attorneys, by written and filed stipulation or oral stipulation made in open court and entered on the record, consent to trial by the court without a jury, or unless the court on a party's or its own motion finds that a right of trial by jury of some or all of those issues does not exist.
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> [R. 4:35-1(d)(emphasis added.)]

In New Jersey, a party to a civil action is entitled to a jury trial only where such right arises under either a statute or the state constitution. In re Envtl. Ins. Declaratory Judgment Actions, 149 N.J. 278, 292 (1997). The New Jersey Constitution preserves "the right to trial by jury as it existed

at common law at the time of the adoption of the New Jersey Constitution." Id. at 291; see N.J. Const., art. I, para. 9. Traditionally, the right applied to legal, but not equitable, actions. In re Envtl. Ins. Declaratory Judgment Actions, supra, 149 N.J. at 291; Weinisch v. Sawyer, 123 N.J. 333, 343 (1991). It is "hardly unusual" for a civil action to contain both legal and equitable claims. Sun Coast Merch. Corp. v. Myron Corp., 393 N.J. Super. 55, 85 (App. Div. 2007). Therefore, "when . . . the equitable nature of the action predominates, and appended legal claims are merely ancillary to the equitable claim lying at the heart of the dispute[,]" our courts must "determine whether the equitable issues are dominant or whether the issues are so intertwined 'that the legal issues fell within the [chancery] court's power to adjudicate them without a jury.'" Id. at 86 (quoting Boardwalk Properties, Inc. v. BPHC Acquisition, Inc., 253 N.J. Super. 515, 528 (App. Div. 1991)).

It was undisputed that George's undue influence claim was equitable in nature. He urged, however, that the claims relating to the UPA required trial by a jury. The trial court disagreed, concluding that the case was predominated by equitable issues and therefore did not require a jury trial. Because the determination of whether a cause of action invokes

the right to trial by jury is an issue "best left to the sound discretion of the trial judge," Ward v. Merrimack Mut. Fire Ins. Co., 312 N.J. Super. 162, 169 (App. Div. 1998), we review the trial court's determination here under an abuse of discretion standard.

George argues he is entitled to a jury trial because he sought money damages for wrongful conversion of partnership assets, "including the value of the partnership interests that defendant obtained through undue influence[,]" and for "defendant's embezzlement of partnership funds and breach of fiduciary duties." He cites N.J.S.A. 42:1A-25 to support the proposition that a partner may maintain an action under the UPA for legal or equitable relief.

However, the fact that an action may be brought for either form of relief does not render the trial court's determination erroneous. Although George asked for money damages, a review of the allegations and prayers for relief reveals that equitable claims are at the heart of this dispute. Count ten of the third amended complaint seeks an order expelling defendant from the partnership pursuant to N.J.S.A. 42:1A-31, a primary objective of the litigation. The statute explicitly provides for such expulsion by "judicial determination," rather than by a jury trial. Moreover, the relief requested included "setting an

equitable buyout price" for Ricky's interest. We are, therefore, satisfied that the trial court did not abuse its discretion in concluding the equitable issues were dominant and that a jury trial was not required here.

II

We turn next to George's undue influence claim. He argues that, once he showed the existence of a confidential relationship, the burden of proof shifted to Ricky to prove the validity of Jennie's transfer of partnership interests, a burden he contends Ricky failed to meet. As a result, George claims he was entitled to judgment in his favor.

Our scope of review of a judge's findings in a non-jury trial is "exceedingly narrow." State v. Locurto, 157 N.J. 463, 470 (1999). We determine whether the record contains sufficient, credible evidence to support the judgment, giving special deference to a trial judge's factual findings that are substantially influenced by the judge's opportunity to observe the witnesses directly. State v. Ernst & Young, L.L.P., 386 N.J. Super. 600, 616 (App. Div. 2006); Ingraham v. Trowbridge Builders, 297 N.J. Super. 72, 84 (App. Div. 1997). Here, we review the record to determine whether it supports the trial court's determination that George failed to make the threshold showing that a confidential relationship existed.

> "Undue influence" has been defined as that sort of influence that prevents the person over whom it is exerted "from following the dictates of his own mind and will and accepting instead the domination and influence of another." . . . In respect of an inter vivos gift, a presumption of undue influence arises when the contestant proves that the donee dominated the will of the donor . . . or when a confidential relationship exists between donor and donee[.]
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> [Pascale v. Pascale, 113 N.J. 20, 30 (1988)(internal citations omitted).]

Although parent-child relationships are "among the most natural of confidential relationships," the mere existence of such a connection does not create a confidential relationship. Est. of Ostlund v. Ostlund, 391 N.J. Super. 390, 401 (App. Div. 2007). In the first instance, George was required to prove the existence of a confidential relationship by a preponderance of the evidence. Ibid.

A confidential relationship is not susceptible to precise definition but includes both "a reposed confidence and the dominant and controlling position of the beneficiary of the transaction." Id. at 402, (quoting Stroming v. Stroming, 12 N.J. Super. 217, 224 (App. Div.), certif. denied, 8 N.J. 319 (1951)). The relationship does not exist if the parties deal on terms of equality, but where, for example, one side "has superior knowledge of the details and effect of a proposed

transaction based on a fiduciary relationship, . . . [or] has exerted over-mastering influence over the other or [the donor] is weak or dependent." Ibid. The dominance and dependence must be of the mind, rather than the physical. Ibid. Evidence of such an "over-mastering influence" was not presented here.

George contends a confidential relationship was shown by the following evidence. Jennie and Ricky were very close, seeing each other frequently, speaking daily, and eating breakfast together three times per week. He claimed that Ricky cashed checks payable to Jennie in his name. George testified that his mother did not understand the partnership arrangement and had a "diminished ability to reason and understand simple things that she was able to grasp in earlier years." However, his testimony was not corroborated by other evidence that Jennie lacked the requisite mental capacity to exercise an independent will. Indeed, Ricky testified that Jennie was a strong-willed, independent person who lived alone after her husband died in 2000, cooking, taking care of herself, and driving. He stated, "once she decided she wanted to do something . . . you couldn't change her mind. She was . . . kind of a hard headed person that, you know, when she wanted something . . . she did it."

George lacked any personal knowledge regarding Jennie's transfer of her interest to Ricky. As a result, the evidence

regarding the transfer was limited to that provided by Ricky and Diamond. Both testified that the idea for the transfer originated with Jennie; that she made the arrangements with Diamond; that Diamond did not discuss the matter with Ricky at any time; and that Jennie rebuffed suggestions she discuss the matter with George. Diamond testified he was satisfied that Jennie understood his legal advice and that the transfer was her knowing and voluntary act. As we have noted, there was no evidence that Ricky exercised dominion over Jennie's mind on this or any other matter.

Although we recognize that Jennie's execution of documents reflecting a continuing interest in STC was inconsistent with her action in transferring her interest to Ricky, this conflict does not necessarily show a lack of understanding or independent will on her part. Ricky testified as to her desire to conceal the transfer from George, an equally credible explanation for her actions.

We are satisfied there was sufficient, credible evidence to support the trial court's determination that Jennie was not dominated or controlled by Ricky and that George failed to meet his burden of proving the existence of a confidential relationship by a preponderance of the evidence.

III

Finally, George argues he was entitled to damages for Ricky's violations of his fiduciary duties and to dissociation of Ricky under the UPA.

N.J.S.A. 42:1A-31(e) permits the court to expel a partner because (1) the partner engaged in wrongful conduct that adversely and materially affected the partnership business; (2) the partner willfully or persistently committed a material breach of the partnership agreement or of a duty owed to the partnership or the other partners under N.J.S.A. 42:1A-24; or (3) the partner engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with the partner.

George contends that each of these grounds was proven, arguing that Ricky "actively defrauded" him by obtaining and concealing the transfer of their mother's interest, misappropriating income earned through personal training sessions provided to gym members, and failing to report nearly $500,000 in income to the Internal Revenue Service. We disagree.

As we have determined, there was insufficient evidence to show Ricky improperly influenced Jennie to transfer her interest to him. It is clear that Ricky was complicit with Jennie to

conceal the transfer from George, who testified he would not have agreed to the sale of STC if he had known. However, there is no evidence that this concealment by both the mother and son partners "adversely and materially affected the partnership business", N.J.S.A. 42:1A-31(e)(1) (emphasis added), as opposed to George's personal interests. N.J.S.A. 42:1A-24(a) states the "only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections b. and c. of this section, as those duties may be clarified or limited in the partnership agreement . . . ."

George has not identified any provision in the partnership agreement breached by Ricky's conduct or presented evidence of a breach of the fiduciary duties of loyalty and care as defined in N.J.S.A. 42:1A-24. These duties are not violated "merely because the partner's conduct furthers [his] own interest." N.J.S.A. 42:1A-24(d). Here, George's claim of misappropriation and the risk of tax liens caused by the alleged under-reporting of income were unproven. In fact, when the trial court asked George's expert whether there was "any forensic analysis which would suggest that there had been misappropriations of funds from Shapes to Come or the partnership which may have been

caused by" Ricky, Mulford replied that the data available to him did not allow him to determine that.

Therefore, the record supports the trial court's determination that George failed to prove any significant loss suffered by the partnership as a result of any alleged misconduct by Ricky.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION