NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5741-10T4

CHRISTOPHER ACQUAVIVA,

Plaintiff-Appellant,

v.

ESTATE OF FRANK DIMISA,
DORIS DIMISA, JUDY MORRIS,
ELIZABETH THOMAS-EDWARDS,
FOX RUN CORPORATION and
MACK-MORRIS BTE, INC.,

Defendants-Respondents.

Submitted September 25, 2012 – Decided October 18, 2012

Before Judges Yannotti, Harris and Hoffman.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3715-06.

Rosner Nocera & Ragone, attorneys for appellant (Eliot L. Greenberg, on the brief).

Giordano, Halleran & Ciesla, attorneys for respondent Estate of Frank Dimisa (Paul H. Schneider, on the brief).

Bray & Bray, L.L.C., attorneys for respondent Judy Morris (Peter R. Bray, on the brief).

Schwartz & Schwartz, attorneys for respondents Elizabeth Thomas-Edwards and

Mack-Morris BTE, Inc., join in the brief of respondents Estate of Frank DiMisa and Judy Morris.

PER CURIAM

Plaintiff Christopher Acquaviva appeals from orders entered by the trial court on June 16, 2011, denying his motion for summary judgment and granting summary judgment in favor of defendant Estate of Frank DiMisa (Estate). Plaintiff also appeals from an order entered by the trial court on July 7, 2011, which granted summary judgment in favor of defendant Judy Morris (Morris). We affirm.

I.

We briefly summarize the relevant facts. Appellant's father Ronald Acquaviva (Ronald), Frank DiMisa (DiMisa) and Morris were members of a partnership known as 800 River Road. The partnership borrowed monies from Midlantic National Bank (Midlantic), and the loan was secured by a mortgage on the partnership's property. After the loan and mortgage went into default, Midlantic commenced an action to foreclose on the property.

The property was thereafter sold but the sale proceeds did not fully satisfy the debt and in March 1992, the court entered a deficiency judgment in favor of Midlantic and against Ronald, DiMisa and Morris in the amount of $460,373.94, plus interest

and costs. Midlantic assigned the deficiency judgment to Fox Run Corporation (Fox Run), an entity that DiMisa owned and controlled.

Fox Run thereupon took steps to collect on the deficiency judgment. On September 4, 1998, the court entered an order requiring Mack-Morris BTE, Inc. (Mack-Morris) to turn over Ronald's shares in Mack-Morris to the Monmouth County Sheriff. Fox Run Corp., as assignee from Midlantic National Bank, N.A., v. 800 River Road, et al., Chancery Division, Monmouth County (Docket No. F-12028-91) (the Fox Run litigation).

On December 18, 1998, Elizabeth Thomas-Edwards (Edwards), the President of Mack-Morris, sent Ronald's stock certificate to Fox Run's attorney, David B. Katz (Katz), along with a copy of a letter dated October 8, 1991, in which Ronald stated that he was assigning his shares in Mack-Morris to Marsha Acquaviva (Marsha), plaintiff's wife. The stock certificate was not indorsed.

On January 13, 1999, Edwards provided Katz with a copy of a letter from plaintiff to Mack-Morris dated January 4, 1999. In his letter, plaintiff stated that in 1991, Ronald had resigned from the corporation and transferred his stock "to other parties[.]" Plaintiff wrote that "whoever handled the corporate

books at that time" failed to transfer the stock certificates and never recorded the transaction on the corporation's books.

Plaintiff stated that this was an "oversight" that had never been corrected. He added that Edwards should:

> write to Mr. Katz and advise him of this situation before any further action is taken. If this matter is not rectified immediately, I will have no alternative but to pursue a legal action against the corporate officers of Mack-Morris BTE in order to either regain the fair percentage of the stock lost, or for the value of same, along with damages and fees.
>
> At this time, I am not sure why you did what you did without even the courtesy of a phone call regarding the matter, but feel you have now taken the responsibility yourself for this action, and must now either rectify same or bear the burden of the outcome.

On March 19, 2001, the Chancery Division entered an order in the Fox Run litigation which provided, among other things, that Mack-Morris could redeem Ronald's shares by paying the amount remaining due on the judgment. The order additionally provided that, if Mack-Morris elected not to redeem the shares, they would be sold at public auction.

On June 6, 2006, plaintiff filed this action against DiMisa, Doris DiMisa (Doris), Morris, Edwards, Fox Run and Mack-Morris. Plaintiff alleged that before the September 4, 1998 order was entered in the Fox Run litigation, Ronald had assigned

his interest in Mack-Morris to him. Plaintiff asserted claims against DiMisa and Morris for breach of fiduciary duties owed to Ronald as a partner in 800 River Road; against DiMisa and Morris for breach of the 800 River Road partnership agreement; against DiMisa and Morris seeking indemnification for their respective shares of the Midlantic deficiency judgment; against DiMisa, Morris and Fox Run for conversion of Ronald's stock in Mack-Morris; against all defendants for conspiracy to commit fraud; and against Edwards and Mack-Morris for breach of contract.[1]

In May 2011, plaintiff filed a motion for summary judgment. The Estate, Edwards, Mack-Morris and Morris opposed plaintiff's motion. The Estate also filed a cross-motion for summary judgment. The motion judge heard argument on the motions on June 16, 2011. Thereafter, the court entered orders denying plaintiff's motion and granting summary judgment in favor of the Estate.

In a rider appended to the orders, the court stated that plaintiff did not have standing to pursue claims based on his alleged ownership of Ronald's shares in Mack-Morris because there was no evidence showing that Ronald's shares were ever legally transferred to plaintiff. The court also stated that,

[1] We note that DiMisa died on December 12, 2009. The court later entered an order substituting DiMisa's Estate as defendant. We also note that Doris is now known as Doris Cruz.

even if plaintiff had standing, his claims were barred by the applicable statute of limitations. The court additionally stated that, assuming plaintiff had standing and his claims were not time-barred, the claims were barred by the entire controversy doctrine.

Morris subsequently asked the court to enter an order dismissing the claims against her for the reasons stated in the court's rider. The court entered an order dated July 7, 2011, dismissing the claims against Morris. This appeal followed.

II.

As we stated previously, in his complaint, defendant named DiMisa, Doris, Morris, Edwards, Fox Run and Mack-Morris as defendants. The trial court's June 16, 2011 order granted summary judgment to the Estate, and the court's July 7, 2011 order dismissed the claims against Morris. Counsel for Edwards and Mack-Morris appeared at the argument before the trial court on June 16, 2011, and opposed plaintiff's summary judgment motion. It appears, however, that Edwards and Mack-Morris did not file a cross-motion for summary judgment and the court never entered an order dismissing the claims against these parties.

Furthermore, there is no indication in the record before us that the trial court ever formally disposed of the claims against Doris and Fox Run. We note that Doris and Fox Run

maintained that they had never been served with the complaint, but plaintiff insisted that Doris was served and sought the entry of default against her.

The court stated on the record on June 16, 2011 that it would consider the matter. The rider to the court's June 16, 2011 orders suggests that the court intended to dismiss all of plaintiff's claims against all parties, but the orders only addressed the claims against DiMisa and Morris.

It therefore appears that the trial court never entered a final judgment from which an appeal could be taken as of right pursuant to Rule 2:2-3(a)(1). An order is final for purposes of appeal if it resolves all issues as to all parties. House of Fire Christian Church v. Zoning Bd. of Adj. of Clifton, 426 N.J. Super. 157, 159 (App. Div. 2012) (citing Janicky v. Point Bay Fuel, Inc., 396 N.J. Super. 545, 549 (App. Div. 2007)). The record before us indicates that the trial court did not dispose of all claims against all parties.

Nevertheless, because the trial court apparently intended to dismiss all of plaintiff's claims for lack of standing, failure to comply with the applicable statute of limitations and the entire controversy doctrine, and because plaintiff filed a timely notice of appeal from the June 16, 2011 and July 7, 2011

orders, we will grant leave to appeal nunc pro tunc pursuant to Rule 2:4-4(b)(3) and address the merits of the appeal.

III.

Plaintiff first argues that he has standing to pursue claims based upon Ronald's interest as stockholder in Mack-Morris and the trial court erred by concluding otherwise. We do not agree.

"Standing 'refers to the plaintiff's ability or entitlement to maintain an action before the court.'" In re Adoption of Baby T., 160 N.J. 332, 340 (1999) (quoting N.J. Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 409 (App. Div.) certif. granted, 152 N.J. 13, (1997), and appeal dismissed as moot, 152 N.J. 361 (1998)). "Entitlement to sue requires a sufficient stake and real adverseness with respect to the subject matter of the litigation." Ibid. (citing Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107 (1971)).

It is undisputed that Ronald had a twenty-five percent share in Mack-Morris. In September 1991, DiMisa and Ronald pled guilty to paying kickbacks to a bank to induce it to lend more than $100 million in construction loans for real estate development. On September 18, 1991, an investigator for the New Jersey Real Estate Commission (Commission) informed Mack-Morris that a convicted corporate officer must sever his interest and

"participation in the activity" of a corporation subject to regulation by the Commission.

Plaintiff claims that Ronald executed a letter dated October 8, 1991, transferring his shares in Mack-Morris to Marsha. He further alleges that Marsha signed a letter dated November 15, 1997, transferring "her shares" in Mack-Morris to him. The trial court determined, however, that Ronald's shares were not legally transferred to plaintiff.

The court noted that under N.J.S.A. 12A:8-304(c), a stock certificate cannot be transferred unless the certificate is indorsed and delivered to the purchaser. There was no evidence establishing that Ronald had ever indorsed his stock certificate. The trial court pointed out that the stock certificate was never indorsed because it remained on the corporation's books after the purported assignments. There also is no evidence that Ronald's stock certificate was ever delivered to Marsha or plaintiff.

The court additionally pointed out that an individual can not become a stockholder without his or her knowledge and consent. Fortugno v. Hudson Manure Co., 51 N.J. Super. 482, 499 (App. Div. 1958). The court determined that Marsha did not become a stockholder in Mack-Morris in 1991 because, as she

testified at her deposition, she had no knowledge of Ronald's purported assignment of his shares to her on October 8, 1991.

The court further noted that there was evidence that Ronald retained his interest in Mack-Morris after the purported assignment of his stock interest to Marsha in 1991. In June 1994, Mack-Morris distributed $20,000 to Ronald as a shareholder. In addition, on the Schedule K-1 for his 1996 federal tax return, Ronald declared that he had a twenty-five percent interest as stockholder of Mack-Morris. Moreover, in 1998, the Mack-Morris's corporate books identified Ronald as a Mack-Morris shareholder.

The court also determined that, even if Ronald's shares had been indorsed and delivered to the purported assignee, the assignments were invalid because they violated the Mack-Morris stockholders' agreement. The agreement states that when a stockholder wishes to "sell, transfer or encumber" his or her shares, the stockholder must first notify and offer the corporation the right of first refusal.

Edwards stated in a certification dated June 8, 2011, that Mack-Morris first learned of Ronald's purported 1991 assignment of his shares sometime in 1998, and the corporation had never been given the right of first refusal to purchase those shares. She also said that Mack-Morris never received Marsha's November

15, 1997 letter, which purportedly transferred the shares to plaintiff. Edwards stated that Ronald resigned as Secretary of Mack-Morris but he remained a shareholder of the corporation. Thus, the evidence established that Mack-Morris was never given a right of first refusal before the purported assignments of Ronald's stock.

We are therefore satisfied that the trial court correctly determined that plaintiff did not have standing to assert any claims as the owner of the shares.

Plaintiff argues, however, that Ronald's stock certificates were properly assigned to him and that the assignments do not require either an indorsement or actual delivery. The trial court correctly rejected this argument.

N.J.S.A. 12A:8-304(c) provides that "[a]n [i]ndorsement whether special or in blank, does not constitute a transfer until delivery of the certificate on which it appears or, if the [i]ndorsement is a separate document, until delivery of both the document and the certificate." A stock certificate is deemed delivered when:

> (1) the purchaser acquires possession of the security certificate;
>
> (2) another person, other than a securities intermediary, either acquires possession of the security certificate on behalf of the purchaser or, having previously acquired

> possession of the certificate, acknowledges that it holds for the purchaser; or
>
> (3) a securities intermediary acting on behalf of the purchaser acquires possession of the security certificate, only if the certificate is in registered form and is (a) registered in the name of the purchaser, (b) payable to the order of the purchaser, or (c) specially indorsed to the purchaser by an effective [i]ndorsement and has not been indorsed to the securities intermediary or in blank.
>
> [N.J.S.A. 12A:8-301(a).]

Here, there is no evidence that Ronald's stock certificates were ever indorsed or delivered to either Marsha or plaintiff. Accordingly, Ronald's stock interest in Mack-Morris was never transferred to Marsha or plaintiff in the manner required by N.J.S.A. 12A:8-304(c).

Plaintiff notes that N.J.S.A. 12A:8-304 was enacted in 1997. See L. 1997, c. 252, § 1. He argues that the law in effect in 1991 permitted stock to be transferred by a separate written instrument without delivery. In support of this argument, plaintiff relies upon N.J.S.A. 12A:8-308(1), which was in effect before its repeal in 1997. Even if plaintiff were correct in his interpretation of the law in effect in 1991, N.J.S.A. 12A:8-304(c) applied to the purported transfer of Marsha's interest in

the stock to plaintiff. The transfer was ineffective because it did not comply with the statute.[2]

Plaintiff additionally argues that he has standing to pursue the claims based on the shares even if they had never been transferred to him. He says that Ronald would have standing to pursue the claims and he has standing to pursue Ronald's claims because they shared an "identity of interests." Again, we disagree. A litigant cannot pursue the rights of a third party. Jersey Shore Med. Ctr. - Fitkin Hospital v. Estate of Sidney Baum, 84 N.J. 137, 144 (1980).

IV.

Plaintiff further argues that the trial court erred by determining that he failed to bring his claims within the time prescribed by the applicable statute of limitations. In our view, this argument is entirely without merit.

As we noted previously, plaintiff asserted claims against DiMisa and Morris for breach of fiduciary duties, breach of contract, indemnification, conversion and fraud. These claims

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[2] Prior to the enactment of L. 1997, c. 252, § 1, N.J.S.A. 12A:8-309 provided that an indorsement did not "constitute a transfer" of a "certificated security" until the security upon which the indorsement appears is delivered or, if the indorsement is on a separate document, until both the document and the security are delivered. See L. 1989, c. 348, § 27. Thus, Ronald's purported assignment of his shares in Mack-Morris to Marsha did not comply with the statute.

are subject to the statute of limitations in N.J.S.A. 2A:14-1, which requires that such claims be asserted within six years after their accrual. The limitations period begins to run when the claimant possesses "actual or constructive knowledge 'of that state of facts which may equate in law with a cause of action.'" Baird v. Am. Med. Optics, 155 N.J. 54, 68 (1998) (quoting Burd v. N.J. Tele. Co., 76 N.J. 284, 291-92 (1978)).

Plaintiff's claims against DiMisa and Morris are based on the alleged wrongful transfer of Ronald's shares to Katz on December 18, 1998, pursuant to the Chancery's Division's turnover order in the Fox Run litigation. As the trial court determined, plaintiff had sufficient facts indicating that he had claims based on the alleged wrongful transfer of Ronald's shares by at least January 4, 1999, when he wrote to Edwards. In that letter, plaintiff objected to the transfer of Ronald's shares and threatened legal action against Mack-Morris and its corporate officers if the shares were not returned.

Plaintiff contends, however, that his claims accrued on March 19, 2001, when the Chancery Division entered another order which allowed Mack-Morris to redeem Ronald's shares and which provided that, if the shares were not redeemed, they would be sold at public auction. Plaintiff argues that, until the court entered the March 19, 2001 order, any claims based on the

alleged wrongful transfer of Ronald's shares would have been premature because, before that time, the harm was merely speculative. We do not agree.

We note that in a certification filed with the court in the Fox Run litigation on January 6, 2001, Katz stated that, after the Chancery Division issued the September 4, 1998 order in the Fox Run litigation requiring Mack-Morris to turn over Ronald's shares, he had "only received shares that were never signed or properly issued." Katz also stated that Ronald's shares "had not been turned over presumably because they were never properly issued."

Even so, plaintiff was aware by January 4, 1999, that the court had ordered Mack-Morris to transfer Ronald's stock to Fox Run in order to satisfy the deficiency judgment against 800 River Road. At that time, the harm allegedly resulting from the transfer of the stock was not speculative. Therefore, as of January 1999, plaintiff had sufficient facts to assert claims based on the alleged wrongful transfer of the stock. We therefore conclude that the trial court correctly determined that plaintiff's claims against DiMisa and Morris were filed beyond the time prescribed by N.J.S.A. 2A:14-1.

In view of our decision that plaintiff did not have standing to pursue any claims based on his alleged ownership of

Ronald's shares in Mack-Morris, and that the claims asserted against DiMisa and Morris were filed beyond the time prescribed by the applicable statute of limitations, we need not consider whether plaintiff's claims also were barred by the entire controversy doctrine.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION