NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0653-10T4

JOSEPH R. FOSTER,

Plaintiff-Respondent,

v.

JOSEPH P. STAMPONE, and SUNSET LAKE ASSOCIATES,

Defendants-Appellants.

Argued November 9, 2011 - Decided January 27, 2012

Before Judges Carchman and Fisher.

On appeal from the Superior Court of New Jersey, Chancery Division, Cape May County, Docket No. C-43-09.

Anthony J. Baratta (Baratta, Russell & Baratta) argued the cause for appellants

Jay H. Greenblatt argued the cause for respondent (Greenblatt & Laube, attorneys; Mr. Greenblatt, of counsel and on the brief).

PER CURIAM

In this appeal, we conclude that the findings of the Chancery judge, rendered at the conclusion of a non-jury trial, resulted in an equitable division of partnership assets and a

proper resolution of the claims for credits. Finding no merit in any of the parties' arguments, we affirm.

The evidence adduced at a three-day trial revealed that, in 1987, plaintiff Joseph R. Foster, defendant Joseph P. Stampone, and others, formed Sunset Lake Associates, a partnership, to purchase and hold property in Wildwood Crest. The partnership renovated the single-family home on the property when purchased and utilized it as the partners' summer home for a few years as they investigated whether the property could be developed so as to contain four condominium units with a dock. Upon learning that only two units could be developed on the property, two partners were bought out, and in 1992, the remaining partners borrowed funds, encumbered the property with a mortgage as a result of that borrowing, and began construction of two side-by-side, multi-story condominium units.

When, in 1995, defendant Stampone decided to construct two separate condominium units, another member withdrew, leaving Stampone and Foster as the partnership's only remaining members. At the same time, without Foster's knowledge, legal title to the property was transferred to Stampone and his wife -- Foster's brother-in-law and sister.

By 2003, Foster and Stampone's capital accounts were unequal. As a result, the property was refinanced, and Stampone

obtained sufficient cash from the loan to equalize the capital accounts. From those loan proceeds, Stampone set aside $30,000 to do repair work, which he referred to as giving the property a "facelift."

The increased loan payments resulting from the refinance, as well as divorce proceedings in which Foster became embroiled, made difficult Foster's ability to make capital contributions to the degree sought by Stampone. Additionally, it quickly became apparent that Stampone had more in mind than a "facelift" for the property. In November 2004, Stampone sent Foster plans for renovations that would purportedly cost between $100,000 and $150,000. Foster, who was in the construction business, anticipated these proposed renovations would exceed Stampone's estimate. He wrote to Stampone urging him to "stop" because the project was "over the top," and he could not "foot half the bill." Stampone proceeded with the renovations notwithstanding Foster's objections, the cost eventually exceeded $300,000, and Stampone asked Foster to pay half. Foster forwarded more than $150,000 in contributions in 2005, although not enough to cover his capital contributions because of other operating expenses. Their disagreements led Stampone, an attorney, to write to Foster on November 9, 2005, advising Foster he expected him to "vacate the premises . . . within thirty (30) days of receipt

hereof" and, if Foster refused, he would "avail" himself of his "legal remedies."

Stampone thereafter exclusively possessed the property. He and his wife borrowed $1,650,000 against the property, using $542,000[1] of those proceeds to retire the existing mortgage; they retained the balance for their sole use.

In July 2009, Foster and his wife filed a complaint in the Chancery Division against Stampone and his wife, Julia Stampone (Julia). His three-count complaint sought a determination that a partnership existed, and the imposition of either a resulting or constructive trust. Stampone filed a counterclaim, alleging that Foster breached the partnership agreement and violated the fiduciary duties he allegedly owed Stampone; he also sought a judgment declaring that Foster "abandoned, withdr[e]w, and/or [sic] was expelled from" the partnership.

Julia moved for summary judgment, alleging she had "no interest in the property" and wherever her name appeared in relevant documents, including the deed to the property, it was as a nominee. The parties executed a consent order, which was entered on May 18, 2010, that: dismissed the counts of the complaint that sought the imposition of a trust; dismissed

[1]The parties disagree about the precise payoff amount. It has not been shown that the Chancery judge's finding that it was $542,000 is not entitled to our deference.

Foster's wife as a plaintiff; added the partnership as a defendant; dismissed the claims asserted against Julia; confirmed that the disposition of the action was to be governed by the partnership agreement; and conceded the property was owned exclusively by the partnership. By way of the consent order, Julia also agreed to submit to the court's jurisdiction to the extent necessary, and Stampone and Julia agreed they would "seasonably . . . execute such documents as reasonably are necessary to effectuate" the court's disposition, if any, of the property.

Following a trial that explored the parties' disagreements and claims for credits, the Chancery judge determined that the partnership should be deemed dissolved as of November 2005. The judge also decided that the equitable way to divide the partnership assets was for Stampone to retain the property and for Foster to receive from Stampone $738,357 "representing the distribution due [Foster] as a result of the dissolution of the partnership," which was based on the principal amount of $718,596, together with an award of prejudgment interest. The July 20, 2010 judgment directed that if payment was not made by Stampone by November 1, 2010, Foster would be entitled to seek a sale of the property.

Stampone timely moved for a new trial, arguing that the judge erred by, among other things: entering judgment against him instead of against the partnership; failing to properly credit the $542,000 mortgage payoff in assessing Foster's share of the partnership assets; and erroneously refusing to apply the partnership agreement's section 2.6(b), which provides a methodology for repayment when one partner pays a capital contribution due from another. The Chancery judge denied the motion in all respects.

Stampone appealed, arguing:

> I. IT WAS ERROR FOR THE COURT TO HAVE FAILED TO CREDIT JOSEPH P. STAMPONE'S CAPITAL ACCOUNT WITH THE RE-PAYMENT OF THE MORTGAGE OF $542,000.00 AND INSTEAD REDUCING THE VALUE OF THE REAL ESTATE BY THAT AMOUNT.
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> II. IT WAS ERROR TO HAVE FAILED TO IMPLEMENT SECTION 2.6(b) OF THE SUNSET LAKE PARTNER-SHIP AGREEMENT IN DETERMINING A DISTRIBUTION OF PARTNERSHIP ASSETS FOLLOWING DISSOLUTION.
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> III. IT WAS ERROR TO ORDER SALE OF NON-PARTNERSHIP PROPERTY.

Points I and II challenge the Chancery judge's non-jury findings. Point III relates to an order enforcing the judgment that was entered on January 20, 2011, after the notice of appeal was filed. Although the notice of appeal was never amended, both parties briefed and argued the issue, and, as a result, we exercise our discretion to entertain the merits of Stampone's

argument. Foster did not file a cross-appeal, but he too argues that the judge erred in declining to apply section 2.6(b) of the partnership agreement. We reject all of these contentions.

Stampone's first two points challenge the sufficiency or accuracy of the Chancery judge's findings of fact. Our review of nonjury fact findings is limited. Those findings "are considered binding on appeal when supported by adequate, substantial and credible evidence" and will not be disturbed "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." Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 484 (1974) (internal quotations and citations omitted); see also Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011). Having applied this standard, we find insufficient merit in Stampone's Point I to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only the following brief comments.

Stampone contends in Point I that the judge failed to provide him with a credit for having paid off the $542,000 mortgage. It is true the judge did not account for the $542,000 mortgage and its satisfaction in the same way that Stampone believes was correct, but the judge clearly accounted for the pay off of that mortgage; he simply applied this circumstance in

calculating the value of the property before determining the proper share due each partner. Stampone has not convincingly demonstrated that the Chancery judge's approach was either inappropriate or resulted in a final determination that did not fully and fairly consider his payment of the mortgage. Certainly, it would have been inappropriate for the judge to have done what Stampone argues here -- namely, to consider the mortgage in determining the value of the property and then give Stampone a credit for paying off the mortgage; that approach would have resulted in double-counting in favor of Stampone.

In considering Point II, it is helpful to understand the judge's view of the nature of the case. The judge examined the circumstances that we have briefly outlined and concluded that the relationship between the partners was irretrievably ruptured in November 2005, when Stampone unilaterally demanded that Foster vacate the property. The judge, in so many words, considered this to be a de facto dissolution, resulting from Stampone's wrongful ejectment of Foster, and that his function was to craft an equitable remedy for the distribution of the partnership assets. He properly viewed November 2005 as the time at which the property was to be evaluated and the parties' interests fixed.

Stampone argues that in fixing those interests, the Chancery judge should have applied section 2.6(b) of the partnership agreement. We reject this argument for three reasons.

First, implicit in the Chancery judge's decision is his appropriate determination that section 2.6(b) was likely not intended to apply to the circumstances that ended the partnership.[2] Article Six of the partnership agreement contains

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[2]Section 2.6 states in full:

> In the event that any Partner elects not to pay an Assessment made pursuant to Paragraph 2.5 of this Agreement within the time period prescribed in the notice of such Assessment, the following actions shall be available to the Partnership, in the sole discretion of the Managing General Partners:
>
> (a) the Partnership may proportionally reduce such Partner's interest in the Partnership to reflect only the amount of capital actually contributed by such non-contributing Partner to the aggregate amount of all contributions to the capital of the Partnership, including Assessments, and
>
> (b) the Managing General Partner may, at his option, contribute, or permit a contributing Partner (a "Substitute Assessee") to contribute, the amount of any such Assessment to the capital of the Partnership on behalf of any non-contributing Partner. If any such advances are made, that portion of Partnership costs and expenses resulting from the expenditure of funds advanced which otherwise would have been allocated to the non-

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provisions that govern the winding down of the partnership and the division of its assets upon the agreement of a majority of the partners to dissolve. Section 6.5 declares that upon such a dissolution, the capital account "shall be posted as of the date of dissolution." There is no evidence that the election arguably permitted by section 2.6(b) had been made by that time.

Second, the judge viewed that part of section 2.6(b) that provides one partner, who advances a capital contribution on behalf of another, upon election, to "200% of the amount advanced" on a non-contributing partner's behalf, as penal.

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> contributing Partner shall be allocated to the account of the Substitute Assessee, as the case may be, and there shall be allocated and, when appropriate pursuant to this Agreement, distributed to the Substitute Assessee, as the case may be, all Partnership items and Distributions which otherwise would have been allocated to the non-contributing Partner, until such time as there have been distributed to the Managing General Partners or the Substitute Assessee, as the case may be, 200% of the amount advanced on such Partner's behalf and thereafter Partnership items shall be allocated among the Partners as if the non-contributing Partner had paid such Assessment. The General Partner's right to exercise the alternative in this clause (b) is such that if he elects or causes a Substitute Assessee to contribute the amount of any non-contributed Assessment, he will be obligated to contribute and/or cause the Substitute Assessee to contribute the entire non-contributed portion of that Assessment.

Implicit in the judge's decision is his finding that the dissolution was caused by Stampone's unilateral action. Accordingly, the refusal to apply section 2.6(b), to the extent it suggested Stampone's entitlement to a premium upon a dissolution he caused, was entirely appropriate.

And, third, we agree with the Chancery judge that section 2.6(b) was subject to multiple interpretations that clouded its intent and warranted its rejection in favor of the simpler and fair division of assets that he fashioned. For example, as we observed above, the judge interpreted section 2.6(b) as providing Stampone with a premium as a result of the parties' unequal capital contributions; Foster, in also arguing that section 2.6(b) applies,[3] provides an alternative but plausible interpretation that would provide him with a greater entitlement than that awarded by the judge. These conflicting but plausible interpretations demonstrate section 2.6(b)'s ambiguity and warranted its rejection when ascertaining a fair division of assets. In addition, the judge found that sections 2.5 and 2.6

[3]We also reject Foster's argument that section 2.6(b) should have been applied -- so long as his interpretation prevailed -- because Foster did not file a cross-appeal and, thus, his claimed entitlement to an enhancement of the judgment has not been properly sought. See State v. Elkwisni, 190 N.J. 169, 175 (2007); Reich v. Fort Lee Zoning Bd. of Adj., 414 N.J. Super. 483, 499 n.9 (App. Div. 2010).

were ostensibly intended to operate together but both provisions presupposed the managing partners would act as a group "in calling for the assessment under 2.5 and . . . in electing whether to proceed under 2.6." However, the provision then takes an inconsistent turn. As the judge recognized, in instances when the partners elect to proceed under either subsection (a) or (b) of section 2.6, the agreement becomes "confusing" because "at one point there's a shift from referring to general managing partners acting, presumably together, to actions being taken by a general managing partner" and that it is "difficult to interpret the [p]artnership [a]greement as giving Mr. Stampone the right to resolve any of those issues on his own as long as he and Foster were still the two managing general partners." In short, part of the section presupposes the joint or mutual action of the managing partners -- i.e., both Stampone and Foster -- while other aspects of the section speak of the unilateral action of only one partner. Section 2.6's schizophrenic qualities certainly provided ample reason for the judge to decline its application in equitably distributing the partnership's assets based upon the degree to which the remaining partners had made capital contributions. We, thus, have been presented with no principled reason for

second-guessing the judge's decision to fix the parties' relative interests without applying section 2.6(b).

We lastly turn to Point III, in which Stampone argues that the Chancery judge erred in enforcing the judgment by ordering a sale of the property. Although we are entitled to disregard these arguments -- because a notice of appeal was not filed seeking its review and the notice of appeal that was filed was not amended to include this order, see R. 2:5-1; Sikes v. Twp. of Rockaway, 269 N.J. Super. 463, 465-66 (App. Div.), aff'd o.b., 138 N.J. 41 (1994) -- the parties have fully briefed the issue; as a result, we have determined to consider the issue on its merits. We reject Stampone's arguments.

First, Stampone seems to contend that the Chancery judge lacked jurisdiction to enter the order. This is incorrect. A trial court retains the power to enforce its orders, even when an appeal is pending, absent the entry of a stay pending appeal. See R. 2:9-1(a) (declaring that a trial court "shall have continuing jurisdiction to enforce judgments and orders").

Second, Stampone argues that the order erroneously impacts on property that Stampone now claims is marital property jointly owned by him and Julia. This argument studiously ignores the consent order entered on May 18, 2010, in which Julia consented to the court's jurisdiction and agreed to abide by any

appropriate order directing disposition of the property, which the parties -- including Julia -- conceded in the consent order was partnership property.

Third, Stampone mistakenly disregards the nature of the judge's disposition of the property. That is, as the parties had previously conceded by way of the consent order, regardless of how legal title was held, the property was equitably owned by the partnership. The judge's approach to equitably dividing the partnership assets was twofold: Stampone received the property on the condition that he reimburse Foster the value of Foster's interest. When Stampone failed to compensate Foster by the deadline set by the Chancery judge, the judge was certainly empowered to ensure Foster's receipt of his interest through a sale of the property. We have been presented with no reason to question the Chancery judge's exercise of his considerable discretion in this manner.

Affirmed.