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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1362-14T3

SALLY A. ROBERTS, DO,

Plaintiff-Appellant,

v.

ANSON MOISE, M.D., MATTHEW CHALFIN, M.D., and NORTHEAST ANESTHESIA AND PAIN MANAGEMENT, LLC,

Defendants-Respondents.

Argued January 11, 2016 – Decided February 8, 2016

Before Judges Simonelli, Carroll, and Sumners.

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. C-166-13.

Janie Byalik argued the cause for appellant (Pashman Stein, attorneys; Adam B. Schwartz, on the briefs).

Michelle L. Greenberg argued the cause for respondents (Frier & Levitt, LLC, attorneys; Ms. Greenberg and Jonathan E. Levitt, on the brief).

PER CURIAM

Following a bench trial in the Chancery Division, Judge Menelaos W. Toskos dismissed the complaint filed by plaintiff Sally Roberts, DO, that sought to establish her entitlement to a

membership interest in defendant Northeast Anesthesia and Pain Management, LLC. (NEA or the Company). In a written opinion, Judge Toskos concluded that plaintiff failed to demonstrate she held such a membership interest. The judge further determined that, even if plaintiff had succeeded in proving her claim, she failed to show she suffered any damages. We affirm substantially for the reasons contained in the thorough and well-written decision of Judge Toskos.

The facts adduced at trial are set forth at length in Judge Toskos's opinion and need not be repeated in the same level of detail here. We summarize the most salient facts. Plaintiff first met defendants Anson Moise, M.D. and Matthew Chalfin, M.D. (collectively "defendants") while they all served anesthesiology residencies at St. Joseph's Medical Center in Paterson. The three became friends, and their friendship continued after their residencies were concluded.

In fall 2010, Moise formed NEA to provide anesthesiology services for an ambulatory surgery center that was opening in Englewood. Chalfin joined NEA at Moise's request in March 2011, and they invested their energy and savings in establishing the anesthesiology practice. In addition to the anesthesia services, Moise also performed pain management services to generate added revenue for the Company.

Moise and Chalfin entered into an Operating Agreement (OA) for NEA, in which they were the sole members and managers. The OA specified that Chalfin's duties "shall include the provision of anesthesiology services in New Jersey," while Moise was to provide "anesthesiology and pain management services in New Jersey, Brooklyn, and Manhattan." Section [Six] of the OA provided that "[a]dditional members may be admitted to the Company and will participate in the [p]rofits, [l]osses, distributions and ownership of the assets of the Company on such terms as are determined by the Members." Under the OA, any annual profits and losses were to be allocated to the members in proportion to their percentage interests in the Company. Also, Moise's consent was specifically required for any actions of the members that needed majority approval.

As the business grew, defendants saw the need to hire two more anesthesiologists. Consequently, they contacted plaintiff and Andrew Boruta, M.D., a former resident at St. Joseph's with whom they had also worked. Plaintiff informed defendants that she felt it was a risk to leave her current employment for a startup company with only one client. After several meetings, the parties entered into an employment agreement (EA) on September 19, 2011. The EA provided that plaintiff's employment with NEA would commence on October 1, and continue for one year

unless terminated earlier for specified reasons. It also contained an "option" whereby plaintiff could become a member of NEA at the end of the one-year term if deemed eligible by the Company. In such event, the EA required that:

> To become a member of the Company, [plaintiff] must: (I) sign a joinder agreement with respect to the Company's [OA], a form of which shall be provided by the Company, (II) purchase a [one-third] membership interest in the company in exchange for a purchase price based on the Company's book value at that time . . . which the Company anticipates shall be nominal, and (III) agree to take any and all other actions deemed reasonably necessary by the Company to accomplish the foregoing. Upon [plaintiff] becoming a member of the Company, the Company shall have a "closing of the books" for accounting purposes so that [plaintiff] shall have no claim of right with respect to the Company's then-current accounts receivable.

On October 1, 2012, Moise sent plaintiff an email "welcom[ing] [her] to the family." The email contained an attachment that set forth the parameters of plaintiff's proposed membership interest. These included, among other things, one-third of all anesthesia income, one-third of a quarterly bonus pool that included a portion of the pain management income, and "perks" such as phone, car, and travel expenses.

Plaintiff rejected this proposal, and the parties then continued to negotiate. Defendants next proposed to retain ten percent of NEA's total gross revenue and expenses as a founder's

fee, and to split the remaining ninety percent of anesthesia and pain profits equally among Moise, Chalfin, and plaintiff. Defendants testified that plaintiff told them this arrangement was acceptable. Accordingly, plaintiff was paid under these terms from October 2012 to March 2013, without a written agreement. She was also issued a Schedule K-1 for 2012 indicating that she was a thirty-percent partner in the Company. At trial, Chalfin testified that he was unaware that this K-1 was filed. Rather, the Company's accountants were informed that negotiations were ongoing and defendants anticipated that they would be settled and memorialized in writing soon.

In March 2013, defendants sent plaintiff a proposed "Amended and Restated Operating Agreement" and ancillary documents incorporating these payment terms and providing that plaintiff would have a one-third membership interest in NEA. On April 12, 2013, plaintiff rejected this proposal, insisting that "anything less" than full and equal partnership status was "completely unacceptable."

On May 17, 2013, defendants withdrew their offer and advised plaintiff that the partnership negotiations were ended. Defendants proposed to retain plaintiff as an employee of NEA and pay her sixty-five percent of her net revenues, which they anticipated would represent a significant increase above the

compensation that she had received under the now-expired EA. Plaintiff declined to sign the new employment agreement and instead commenced the present action against Moise, Chalfin, and NEA on June 7, 2013. The complaint asserted claims for specific performance of the EA (count one); breach of the EA (count two); breach of the covenant of good faith and fair dealing (count three); a declaratory judgment that plaintiff became a member of NEA as of October 1, 2012 (count four); and breach of fiduciary duty (count five). Plaintiff also sought access to NEA's books and records (count six); and an accounting of NEA's finances (count seven).

Trial spanned nine non-consecutive days beginning June 3, 2014, and ending on July 29, 2014. Plaintiff testified that during the negotiations that led to the EA, no distinction was drawn between the anesthesia and pain management profits. Accordingly, it was her understanding that she would receive a one-third membership interest in the Company and be entitled to receive one-third of all profits. She also testified that she had never asked for or received a copy of the OA for NEA and was therefore unfamiliar with its contents.

Defendants drew a different picture. They testified that in their discussions plaintiff was advised that she would receive one-third of the anesthesia profits only. The pain

management profits were to be divided between defendants, who had established the business. Additionally, only Moise was performing pain management services, while plaintiff generated no pain management revenue.

Defendants also cited the significant risk they both undertook to start and build the business. Chalfin left his employment at St. Joseph's, worked without income for months, and had to borrow money from his father. In contrast, plaintiff took no financial risk and brought no new business with her when she became employed at NEA.

Chalfin testified that during the discussions that led to the EA, plaintiff never indicated that she wanted equal voting or management rights. Nor did plaintiff demand such rights during the initial stages of their membership negotiations. Moise testified that defendants wished to retain control over major management decisions.

Defendants' position was buttressed by the testimony of Boruta, the anesthesiologist who began working at NEA one month after plaintiff. Boruta was told by defendants that his employment agreement mirrored plaintiff's except that he would not become eligible to acquire a membership interest for two years rather than one. Boruta's understanding was that if he

became a member of NEA he would only receive a share of the anesthesia revenue.

Both sides presented expert forensic accountants. Plaintiff's expert, Michael Gould, CPA, calculated that NEA underpaid plaintiff $392,385 from October 1, 2012, until January 24, 2014, when her employment at NEA ceased. He also projected that her net lost future profits for a two-year period following her termination were $779,789, resulting in total damages of $1,172,174.

Defendants' expert accountant, Eric Barr, CPA, employed much the same methodology as Gould. However, Barr indicated that Gould failed to account for the "closing of the books" as required under the EA had plaintiff acquired a membership interest in the Company. Consequently, Barr opined that plaintiff had actually been overpaid by approximately $22,271.

Following the trial Judge Toskos rendered a fifteen-page written decision on October 3, 2014. He first addressed plaintiff's claim that defendants breached the EA by not offering her a one-third full and equal membership in the Company. Defendants in turn contended that the EA only provided an "option" to plaintiff to become a member and that the terms of a "joinder agreement" with respect to the Company's OA were open to negotiation. Judge Toskos found that plaintiff failed

to sustain her burden of proof on her breach of contract claim. He reasoned:

> The [EA] is not clear and unambiguous in stating that [p]laintiff automatically became a full and equal member when [d]efendants sent the October 2012 email. In fact the [EA] is open to both [p]laintiff['s] and [d]efendants' interpretation. Defendants point to the language in the [EA] that states that [p]laintiff will receive an [OA] ". . . a form of which shall be provided by the Company." This permitted [d]efendants to offer [p]laintiff the terms of her joining the company. The circumstances surrounding the execution of the [EA] and subsequent actions by the parties further support this interpretation. First, plaintiff was never given a copy or even shown the existing [OA] when she signed the [EA] nor was [p]laintiff familiar with the terms of that [OA]. The existing [OA] was not attached to the [EA], neither was it identified in the EA. Plaintiff testified that she assumed she would immediately become a full and equal member under the existing [OA] without ever knowing the terms of the [OA]. Finally, when given the proposed terms [p]laintiff negotiated with [] [d]efendants, she rejected three proposals but was willing to accept something less than full and equal membership if only for one year. The [c]ourt, therefore, finds the parties never agreed to the terms of [p]laintiff's proposed membership in NEA.

Judge Toskos also determined that defendants did not breach the covenant of good faith and fair dealing. The judge noted that such covenant is "implied in every contract in New Jersey," (quoting Wilson v. Amerada Hess Corp., 168 N.J. 236, 244

(2001)), and requires the aggrieved party to show bad motive or intention to establish a breach of the covenant. Id. at 251. The judge concluded:

> Here, [p]laintiff has not presented any evidence that either [] Moise or [] Chalfin were motivated by a bad intention. Rather, it was their friendship with [plaintiff] that first prompted the discussions about employment with NEA. Furthermore, each of the proposals made to [p]laintiff provided her with a significant increase in her compensation, accommodated her desire to work fewer hours than the other members, and made no imposition on her to obtain business. Certainly, these actions cannot be considered "bad motive or intention." As such, the [c]ourt finds no breach of the covenant of good faith and fair dealing.

Judge Toskos next addressed plaintiff's claims that she was entitled to a membership interest in the Company based on the doctrines of equitable and judicial estoppel. Plaintiff's claims hinged on the K-1 and a letter from the Company's accountant indicating that plaintiff was a thirty-percent member. Plaintiff contends that defendants cannot now take a contrary position in this litigation. The judge reviewed applicable legal principles and then rejected plaintiff's equitable estoppel argument, explaining:

> Here, [p]laintiff has failed to show that [d]efendants engaged in conduct that induced reliance or that she relied upon the conduct of [d]efendants to her detriment. Defendants offered [p]laintiff several proposals. Plaintiff rejected all of these

> offers. Each would have resulted in higher compensation than her current salary. These negotiations were not circumstances that would lead [p]laintiff to believe that she was already a member. The accountant's letter was prompted by [p]laintiff in her desire to obtain a home equity loan. It was issued on the assumption by [d]efendants that [p]laintiff was accepting their offer of a [ten-percent] founders' fee and [thirty-percent] division of money. Furthermore, [p]laintiff relies on the accountant's letter and the K-1 to claim that she was already a member, but then contends that the K-1, which lists a [thirty-percent] interest in NEA, does not reflect the actual terms of her membership. With respect to the accountant's letter, [p]laintiff has not provided any evidence that she relied on it to her detriment. The [c]ourt finds that [p]laintiff's equitable estoppel claims lack merit.

The judge similarly rejected plaintiff's contention that the filing of the K-1 judicially estopped defendants from denying that they made her a member, stating:

> Defendants testified that they did not direct or authorize the K-1 filing. The [c]ourt finds no attempt by [d]efendants to play "fast and 'loose with, or otherwise manipulate, the judicial process.'" [] (quoting State v. Jenkins, 178 N.J. 347, 359 (2004)). Instead, [p]laintiff was being compensated based on an assumption by her friends that she was accepting their proposal. Finally, the K-1 did not reflect what [p]laintiff claimed was her partnership interest because it lists [p]laintiff as a [thirty-percent] member and not [a] [one-third] member. Therefore the [c]ourt determines that the filing of the K-1 cannot serve as a basis for the [c]ourt to invoke judicial estoppel.

Plaintiff also asserted a claim of breach of fiduciary duty, premised on her contention that she was a member of NEA. However, because plaintiff failed to establish her membership interest, this claim similarly failed.

Finally, Judge Toskos determined that "[e]ven if [p]laintiff were successful in proving she is a member, the evidence shows that [she] suffered no damage." The judge found that defendants did not waive their unequivocal right to "close the books" had plaintiff become a member. He accepted Barr's testimony that this would have resulted in plaintiff being overpaid. The judge was "equally persuaded that [p]laintiff's alleged damages calculation [was] unfounded," noting:

> Gould testified to the time necessary to become a partner without documentary support. [] Gould also failed to consider that [p]laintiff's membership in fact would be diluted with the addition of more members. Furthermore, [] Gould failed to consider the fact that NEA was essentially reliant on only one customer and if it left, NEA could be out of business. All of these are reasonable factors that should have been considered in [] Gould's damage analysis.

Plaintiff presents the following arguments on appeal:

> I. THE TRIAL COURT ERRED IN DETERMINING THAT DR. ROBERTS WAS NOT A MEMBER OF NEA
>
> A. Dr. Roberts is a Member under N.J.S.A. 42:2B-21(b)(1)

B. Defendants are Barred from Denying Dr. Roberts' Membership Interest Under the Doctrine of Judicial Estoppel

II. THE TRIAL COURT ERRED IN DETERMINING THAT DEFENDANTS DID NOT BREACH THE EMPLOYMENT CONTRACT

A. There is no Ambiguity in the Employment Contract

B. The Trial Court's Interpretation of the Employment Contract Is Incorrect as it Renders Several Words Meaningless

C. Defendants Breached the Employment Contract

III. THE TRIAL COURT ERRED IN DETERMINING THAT DEFENDANTS DID NOT BREACH THE OPERATING AGREEMENT OR THE FIDUCIARY DUTIES THEY OWED TO DR. ROBERTS

A. Defendants Breached the NEA Operating Agreement

B. Defendants Breached the Fiduciary Duties They Owed to Plaintiff

IV. THE TRIAL COURT ERRED IN DETERMINING THAT DR. ROBERTS FAILED TO PROVE DAMAGES

A. Dr. Roberts is Entitled to Money She Should Have Received As a One-Third Member from October 1, 2012 to January 24, 2014

B. Dr. Roberts is Entitled to the Profits She Should Have Earned as a One-Third Member After She was Terminated

C. Defendants Did Not and Cannot Now "Close the Books"

D. Even if the Trial Court Disagrees with Portions of Mr. Gould's Calculation it Could and Should Fashion an Appropriate Remedy

Our scope of review after a bench trial is limited. We must defer to the trial judge's fact-findings and credibility determinations, in light of his "opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Locurto, 157 N.J. 463, 471 (1999) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). "Findings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974) (citing N.J. Tpk. Auth. v. Sisselman, 106 N.J. Super. 358 (App. Div.), certif. denied, 54 N.J. 565 (1969)). Thus, "we 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[.]" Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (quoting In re Trust Created by Agreement Dated December 20, 1961, 194 N.J. 276, 284 (2008)).

However, we owe no deference to the trial court's "interpretation of the law and the legal consequences that flow from established facts." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). We review such decisions de novo. 30 River Court E. Urban Renewal Co. v. Capograsso, 383 N.J. Super. 470, 476 (App. Div. 2006) (citing Rova Farms, supra, 65 N.J. at 483-84).

Guided by these standards, we find no basis to disturb Judge Toskos's determinations, which are supported by substantial credible evidence in the record. We therefore affirm substantially for the reasons the judge expressed in his comprehensive and well-reasoned written opinion. We add the following limited comments.

It is certainly less than clear whether the EA contemplated a "joinder agreement," or instead an amended operating agreement, as a condition precedent to plaintiff becoming a member of NEA. Plaintiff interprets the phrase "joinder agreement" to impose an obligation on the Company to provide her with a document whereby she would join NEA's existing OA. However, plaintiff conceded that she never saw the OA and was not familiar with its provisions. The OA permitted the admission of new members "on such terms as are determined by the members." The EA did not clearly and unambiguously provide that

plaintiff would become a full one-third member, and the OA left the precise terms to be determined by the members. The record clearly establishes that the parties were unable to agree on the essential terms of plaintiff's membership in the Company, including her entitlement to the pain management revenues and her management and voting rights.

Plaintiff also argues that the trial court did not address her claim that she is entitled to membership in the Company pursuant to N.J.S.A. 42:2B-2(b)(1).[1] Specifically, she contends that her membership was established as a matter of law when defendants consented to her admission as a member and identified her as such on NEA's tax returns and the K-1. Defendants argue that plaintiff was never a member because she did not accept any of their membership proposals, the conditions precedent to membership as set forth in the EA were not met, and plaintiff's receipt of the K-1 does not on its own provide a sufficient basis to establish her membership in NEA.

N.J.S.A. 42:21B-21 provides in relevant part:

> (b) After the formation of a limited liability company, a person acquiring a limited liability company interest is

[1] Although N.J.S.A. 42:2B-21(b)(1) has since been repealed by L. 2012, c. 50, § 95, eff. March 1, 2014, upon enactment of the Revised Uniform Limited Liability Company Act, N.J.S.A. 42:2C-1 to -94, it was in effect at all times relevant to this litigation.

> admitted as a member of the limited liability company:
>
> (1) In the case of a person acquiring a limited liability company interest directly from the limited liability company, at the time provided in and upon compliance with the operating agreement or, if the operating agreement does not so provide, upon the consent of all members and when the person's admission is reflected in the records of the limited liability company.

Plaintiff's argument lacks merit. Implicit in the judge's decision is his determination that the parties did not reach a meeting of the minds and therefore defendants never consented to plaintiff's admission. Also, although the 2012 tax return and the K-1 reflect a membership interest, the trial court found credible defendants' contention that plaintiff was compensated as a member for a short time based on their good-faith belief that an agreement would soon be reached, and that they were unaware of and had not authorized issuance of the K-1. Moreover, here the OA is not silent but rather makes explicit provision for the admission of new members. It required the members to determine the terms of such new membership, and here defendants were unable to arrive at such a determination with plaintiff.

We conclude, as did Judge Toskos, that plaintiff failed to establish her entitlement to a membership interest in NEA.

Accordingly, we need not address plaintiff's breach of fiduciary duty and damage claims.

Affirmed.