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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1650-14T1
A-1670-14T1

VIRENDRA PATEL, individually and
on behalf of S&P DONUTS, LLC,
S&P LANGHORNE, LLC, S&P NESHAMINY, LLC,
S&P MAPLE, LLC, S&P FAIRLESS HILLS, LLC,
S&P PENNDEL, LLC, S&P MARLTON, LLC,
S&P RACETRACK, LLC, S&P MT. LAUREL, LLC,
S&P TIMBERLINE, LLC, S&P MEDFORD, LLC
and S&P TABERNACLE, LLC,

Plaintiffs,

v.

SUNIL SHAH, NIMESH SHAH, MUKESH
PARIKH and SUNIL J. SHAH, CPA, P.C.,

Defendants-Respondents,

and

VIRENDRA PATEL,

Plaintiff-Respondent/
Cross-Appellant,

v.

HJS FUNDING, LLC,

Defendant-Appellant/
Cross-Respondent.

VIRENDRA PATEL, individually and

on behalf of S&P DONUTS, LLC,
S&P LANGHORNE, LLC, S&P NESHAMINY, LLC,
S&P MAPLE, LLC, S&P FAIRLESS HILLS, LLC,
S&P PENNDEL, LLC, S&P MARLTON, LLC,
S&P RACETRACK, LLC, S&P MT. LAUREL, LLC,
S&P TIMBERLINE, LLC, S&P MEDFORD, LLC
and S&P TABERNACLE, LLC,

Plaintiffs-Respondents/
Cross-Appellants,

v.

SUNIL SHAH, NIMESH SHAH, MUKESH
PARIKH and SUNIL J. SHAH, CPA, P.C.,

Defendants-Appellants/
Cross-Respondents,

and

VIRENDRA PATEL,

Plaintiff,

v.

HJS FUNDING, LLC,

Defendant.

Argued February 15, 2017 – Decided March 14, 2017

Before Judges Fuentes, Simonelli and Carroll.

On appeal from the Superior Court of New
Jersey, Chancery Division, Mercer County,
Docket Nos. C-145-08 and C-29-09.

William J. Hughes, Jr. argued the cause for
appellant/cross-respondent in A-1650-14
(Cooper Levenson, PA, attorneys; Mr. Hughes,
of counsel; Howard E. Drucks, on the brief).

Steve M. Kalebic argued the cause for respondents in A-1650-14, and appellants/cross-respondents in A-1670-14.

Anne C. Singer argued the cause for respondent/cross-appellants in A-1650-14 and A-1670-14.

PER CURIAM

Plaintiff Virendra Patel was a business partner with defendants Sunil Shah, Nimesh Shah and Mukesh Parikh (collectively, the Shahs)¹ in approximately a dozen limited liability companies (LLCs), each with the designation S&P. These companies acquired and operated Dunkin' Donuts stores in New Jersey and Pennsylvania pursuant to franchise agreements. In order to construct the stores, the partners borrowed money from defendant HJS Funding, LLC (HJS), which was owned by Sunil's and Nimesh's father, Jashvant Shah, and managed by Sunil. In turn, HJS required the execution of promissory notes and guaranties. Patel executed nine promissory notes in 2006 (the 2006 loan), as well as personal guaranties, for the existing HJS loan amount, over \$5 million. In 2007, Patel executed a promissory note in favor of HJS for \$1.59 million (the 2007 loan), which constituted the balance due HJS

¹ Because Sunil Shah and Nimesh Shah share a common surname, we refer to them by their first names in this opinion for clarity and ease of reference. We intend no disrespect in doing so.

after several of the S&Ps had been sold, in part, to satisfy the debt owed HJS.

Over time, Patel became dissatisfied with the operation and financing of the stores. Consequently, on November 3, 2008, Patel filed a complaint against the Shahs claiming violations of the New Jersey Limited Liability Company Act, N.J.S.A. 42:2B-1 to -70 (LLCA),² as well as Pennsylvania law; breach of fiduciary duty; breach of the duty of loyalty as to Sunil; legal and equitable fraud; breach of contract; usurpation of business opportunities; accounting malpractice as to Sunil; civil conspiracy; conversion; fraudulent inducement; defamation as to Sunil and Nimesh; and requesting the appointment of a receiver for the S&Ps. On January 12, 2009, the Shahs filed an answer and counterclaim, asserting claims against Patel for breach of contract of both an agreement for him to purchase the S&Ps and the S&P operating agreement; breach of the covenant of good faith and fair dealing; and breach of fiduciary duty. In October 2009, Patel filed an amended complaint adding counts alleging that the Shahs violated New Jersey's Racketeering Act (RICO), N.J.S.A. 2C:41-1 to 41-6.2. On November 2, 2009, the Shahs filed an answer to the amended

² The LLCA was in effect at all times pertinent to this litigation. It has since been repealed and replaced by the Revised Uniform Limited Liability Company Act, N.J.S.A. 42:2C-1 to -94.

complaint and an amended counterclaim that similarly asserted additional claims against Patel for fraud, negligent misrepresentation, fraudulent inducement, defamation, and violations of the LLCA and RICO.

In March 2009, Patel filed a separate action against HJS claiming breach of contract, breach of the implied covenant of good faith and fair dealing, and seeking an accounting of the loans in question and an injunction against executing on the collateral that secured the loans from HJS to the S&Ps. In September 2009, HJS filed an answer along with a counterclaim seeking nearly \$5 million for amounts unpaid on the 2006 and 2007 loans.

The trial court consolidated the two cases because they involved many of the same underlying factual circumstances.³ A lengthy bench trial was conducted before Judge Mary Jacobson over twenty-three non-consecutive dates from June 11, 2011, to November 29, 2011. We incorporate by reference the evidence, factual findings, and legal conclusions set forth in Judge Jacobson's comprehensive 158-page written opinion issued on February 28, 2014, following the parties' written submissions.

³ For the same reason, we consolidate the present appeals for the purpose of our opinion.

Importantly, Judge Jacobson noted "the analysis in this case is highly dependent on the credibility of the parties." In Patel's action against the Shahs, the judge "found Patel mostly candid and credible, and came away with the strong impression that the Shahs had taken advantage of him[.]" The judge rejected defendants' efforts to discredit Patel's testimony, "especially in light of the self-dealing of defendants and the divided loyalty of the Shahs that so totally infects the record along with defendants' own credibility problems." In contrast to Patel, Judge Jacobson found Sunil's testimony with respect to the bookkeeping fees "incredible," and ultimately she "lacked confidence in Sunil's testimony." The judge likewise found Parikh's testimony was "troubling" and "lacking in credibility."

In the end, Judge Jacobson noted:

The court was struck throughout the trial by how many financial decisions of the S&Ps favored Shah-owned interests at the expense of the S&Ps and Patel's interest in the business. At every turn decisions were unfair to Patel. Defendants tried to counter the stark unfairness of the record by various arguments directed at Patel's knowledge of the decisions and ratification of them. It remained difficult for the court to believe that Patel could have been complicit in so many decisions that harmed his interest and diminished the likelihood of member distributions by the S&Ps.

Judge Jacobson went on to make detailed findings with respect to each of the parties' claims and defenses. On February 28, 2014, she memorialized her extensive findings in a judgment that ordered Patel to pay the Shahs \$100,000 for breach of the purchase agreement; held Sunil and Nimesh jointly liable for the bookkeeping and management fees totaling about \$840,000; ordered their company, Fairless Hills Development Company (FHDC), to refund \$287,854.24 to S&P Fairless Hills; required them to refund \$154,992.81 in pre-opening rent improperly paid to FHDC and \$67,596 in pre-opening rent charged by another of their companies, Penndel Realty LLC; and to pay \$863,595.77 for breach of fiduciary duty as to four of the S&Ps in connection with the 2007 loan transaction. Sunil, Nimesh, and Parikh were ordered to pay S&P Penndel \$150,000 as damages for breach of fiduciary duty. The judgment also directed the dissolution of the S&Ps and the distribution of their assets, including a sale of the remaining stores.

With respect to Patel's action against HJS, Judge Jacobson again found "the record reveals deep conflicts of interest by the Shahs, who operated on both sides of these loan transactions." The judge held that the 2006 loans and Patel's personal guarantees were void because they were procured through fraudulent inducement. Specifically, the judge found "clear and convincing

evidence that Sunil's undisclosed plan to repay the 2006 HJS loans only when and if some of the stores were sold and necessary proceeds generated was a material omission." The judge found that because "Sunil was in a fiduciary relationship with both Patel and the S&Ps themselves, as well as acting as the representative of HJS, he was under an obligation in both roles to disclose this fact."

Judge Jacobson declined to make a similar determination regarding the 2007 loan. However, she found that HJS breached its duty of good faith and fair dealing to Patel in connection with the 2007 loan transaction. She wrote:

Here, Sunil's actions on behalf of HJS in the 2007 transactions and in the time period immediately following that transaction unnecessarily saddled the S&Ps and Patel individually with an enormous sum of debt, enriched Sunil and his companies in which he or his family had exclusive ownership, and favored the interests of his father's company, HJS, all at the expense of the S&Ps and Patel. This conduct was far from decent, fair, or reasonable.

In sum, plaintiff has shown by a preponderance of the evidence that the decision to pay down the unsecured loans they themselves had made to the S&Ps, rather than reducing the secured debt owed to HJS, was not fair to the S&Ps and to Patel. That decision unnecessarily exposed the S&Ps' collateral as well as Patel's personal assets to needless risk. Moreover, the S&Ps and Patel were clearly harmed as a result of that decision. As a result, the court holds that Sunil

breached fiduciary duties owed to the S&Ps and Patel by paying down unsecured loans he and the Shah family companies made to the S&Ps instead of using that money to reduce the S&Ps' secured debt, and that HJS's complicity in this scheme violated the duty of good faith and fair dealing that it owed to Patel, through Sunil's role as HJS manager.

Since Sunil so obviously violated the fiduciary duties he owed to Patel and the S&Ps as *de facto* manager of the financial affairs of the S&Ps, and since HJS concurrently violated the implied covenant of good faith and fair dealing by employing Sunil as their representative in spite of the obvious self-dealing, there are ample grounds to fashion relief in favor of Patel and against HJS with respect to the 2007 note.

Based on these findings, the February 28, 2014 judgment rescinded Patel's personal guaranties given in connection with the 2006 loans and reduced the maximum amount HJS could collect on the 2006 loans to the principal amount plus simple interest calculated consistent with Rule 4:42-11. Judge Jacobson also entered a \$1,167,331.60 judgment on HJS's counterclaim against Patel.

On October 22, 2014, Judge Jacobson issued a comprehensive eighty-one page written opinion on the parties' post-judgment motions for counsel fees and their motions to reconsider and clarify the judgment. On the same date, she entered a memorializing order granting in part Patel's motion by increasing the refund of bookkeeping and management fees awarded to five of the S&Ps by \$52,232.90, but granting the Shahs' motion in part by

reducing that award to the other five S&Ps by \$11,040. The judge also awarded Patel \$532,173.45 in counsel fees and costs from the Shahs, pursuant to N.J.S.A. 42:2B-64, and \$260,656.39 in consequential damages, representing that portion of Patel's litigation expenses in the action against HJS that the court determined was chargeable to Sunil and Nimesh. Finally, the judge ordered Patel to pay HJS \$57,732.56 "as a reasonable counsel fee award for the limited success of [HJS] collection efforts against him based on his personal guaranties." On January 6, 2015, Judge Jacobson signed an order awarding Patel \$467,597.53 in pre-judgment interest.

In its appeal, HJS argues, among other things, that the trial court erred in: (1) determining that Sunil's fraud was imputable to HJS, thereby providing justification "for the curtailment of HJS's contractual rights;" (2) voiding Patel's personal guarantee of the 2006 loan; (3) reducing the amount of Patel's personal guarantee to HJS in connection with the 2007 loan by the \$863,595.77 damage award assessed against the Shahs on the 2006 loan; (4) reducing the contractual nine percent interest rate on the 2006 loan; (5) striking the contractual fourteen percent default interest rate on the 2007 loan; and (6) reducing its contractual counsel fee request by eighty percent. HJS further contends that the relief sought by Patel is barred by the doctrine

of unclean hands.

The Shahs separately contend that the trial court erred in: (1) ordering a \$863,595.77 refund for breach of fiduciary duty in connection with the 2007 loan; (2) ordering that they refund more than \$840,000 in bookkeeping and management fees; (3) awarding the S&P's \$150,000 for the Shahs' breach of their fiduciary duty with respect to S&P Penndel; (4) ordering a refund of pre-opening rent paid to S&P Penndel and S&P Fairless Hills, and striking the twenty-five percent FHDC development fee totaling \$287,854.24; (5) ordering a refund of Nimesh's salary; and (6) awarding attorney's fees to Patel. The Shahs also argue that the refunds and damages awarded were the result of improper "second guessing" by the court because Patel ratified the transactions and thereby waived any objection to them.

Patel urges that we affirm the February 20, 2014, October 22, 2014, and January 6, 2015 orders for the reasons expressed in Judge Jacobson's opinions. Nonetheless, in his cross-appeal, Patel argues that the judge erred in: (1) failing to find that he was fraudulently induced to sign the 2007 loan; (2) holding that the S&Ps owed interest to HJS on the money HJS loaned to FHDC; (3) not reducing the principal on the 2007 loan by the amount that Patel alleges was interest that was rolled into it from the 2006 loan; (4) dismissing the RICO claim against the Shahs; and (5)

dismissing the accounting malpractice claim against Sunil.

"The scope of appellate review of a trial court's fact-finding function is limited." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (quoting Cesare v. Cesare, 154 N.J. 394, 411 (1998)). "[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[.]" Ibid. (quoting In re Trust Created By Agreement Dated Dec. 20, 1961, ex rel. Johnson, 194 N.J. 276, 284 (2008)). "Deference is especially appropriate when the evidence is largely testimonial and involves questions of credibility." Ibid. (quoting Cesare, supra, 154 N.J. at 412). "Because a trial court hears the case, sees and observes the witnesses, and hears them testify, it has a better perspective than a reviewing court in evaluating the veracity of witnesses." Ibid. (quoting Cesare, supra, 154 N.J. at 412). However, we owe no deference to a trial court's interpretation of the law, and review issues of law de novo. State v. Parker, 212 N.J. 269, 278 (2012); Mountain Hill, L.L.C. v. Twp. Comm. of Middletown, 403 N.J. Super. 146, 193 (App. Div. 2008), certif. denied, 199 N.J. 129 (2009).

Guided by these standards, after reviewing the voluminous

record in light of the applicable law, we find no merit in either of the appeals or in the cross-appeal. Judge Jacobson's lengthy, detailed decisions, which resulted in the orders challenged here, are supported by sufficient credible evidence and are legally correct. We therefore affirm substantially for the reasons expressed in Judge Jacobson's thorough written opinions.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION