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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-2468-15T2

MAXINE DIAKOS, Individually and
as Administratrix of the Estate
of NICHOLAS E. DIAKOS,
Deceased,

Plaintiff-Appellant,

v.

BRENT RUDNICK, MO-NI-B, INC.,

Defendants-Respondents,

and

BARBARA LICHTMAN, JOHN J.
LICHTMAN, and STEVEN PECHTER,

Defendants.

Telephonically argued November 16, 2017 –
Decided December 15, 2017

Before Judges Koblitiz, Manahan and Suter.

On appeal from Superior Court of New Jersey,
Chancery Division, Essex County, Docket No.
C-000210-13 and Law Division, Essex County,
Docket No. L-6061-14.

Joshua S. Lichtenstein argued the cause for
appellant (O'Toole Fernandez Weiner Van Lieu,

LLC, attorneys; Kenneth B. Goodman and Peter Koenig, on the brief).

Lawrence N. Meyerson argued the cause for respondent (Rubenstein, Meyerson, Fox, Mancinelli, Conte & Bern, PA, attorneys for respondents; Andrew P. Bolson, on the brief).

PER CURIAM

Plaintiff Maxine Diakos, individually and as administratrix of the Estate of Nicholas E. Diakos, her late husband, appeals from two separate court orders. The first, a June 30, 2014 Chancery order, granted summary judgment to defendants Brent Rudnick, Mo-Ni-B, Inc., Barbara Lichtman, John J. Lichtman, and Steven Pechter and dismissed plaintiff's claims of an ownership interest in the Pilgrim Diner. The second, a January 8, 2016 Law Division order, granted defendants' motion for summary judgment dismissing plaintiff's amended claims of failure to receive overtime pay in violation of the federal Fair Labor Standards Act (FLSA), 29 U.S.C.A. §§ 201 to 219, and New Jersey Wage and Hour Law (NJWHL), N.J.S.A. 34:11-56a to -56a30. We affirm both orders.

Plaintiff argues that Nicholas Diakos (decedent) acquired a partial ownership in Mo-Ni-B through the terms of an Employment and Stock Purchase Agreement (Agreement). She claims that decedent equalized his financial position with respect to the two other

shareholders, Morton Pechter¹ and Rudnick, thereby making the decedent a one-third owner pursuant to the Agreement, and entitling him to receive profit payments from Mo-Ni-B, which owns and does business as the Pilgrim Diner in Cedar Grove.

Plaintiff argues that defendants are equitably estopped from denying that the Agreement was a binding contract because Rudnick made verbal assurances to decedent, and later to plaintiff, that decedent was a part owner of the business and made \$5,000 profit payments to decedent on at least three occasions. Alternatively, plaintiff argues that if decedent was not an owner of the business, then plaintiff was an employee of the Pilgrim Diner and is entitled to overtime pay.

Plaintiff commenced the initial action in the Chancery Division on September 30, 2013, raising only claims that the decedent was an owner of Mo-Ni-B and entitled to profits from the business. Defendants filed a motion to dismiss, arguing that plaintiff's claims were time-barred by the applicable six-year contract statute of limitations and that laches also applied. Because both parties relied on documents outside of the pleadings, the Chancery court treated the motion as a summary judgment motion. See R. 4:6-2. The court ruled that plaintiff's cause of action

¹ We will refer to Morton Pechter, who died in 2004, as "Morton" in this opinion to distinguish him from defendant Steven Pechter.

was barred by the statute of limitations because it accrued in 2004. The court also ruled that due to the deaths of Morton and decedent, laches applied because defendants would be prejudiced by the absence of those key witnesses, and plaintiff's failure to bring a lawsuit timely constituted an unexplainable and inexcusable delay. The court allowed plaintiff to amend the complaint to add overtime-pay claims, after which the case was transferred to the Law Division.

Plaintiff's amended complaint alleged that defendants violated the FLSA and NJWHL by not paying plaintiff overtime during her employment with the Pilgrim Diner. The Law Division ruled that plaintiff was a manager of the Pilgrim Diner and was thus exempt from receiving overtime pay. It granted defendants' summary judgment motion, denied plaintiff's cross-motion for summary judgment, and dismissed plaintiff's complaint.

I. Ownership Claim

Defendant Mo-Ni-B, Inc. was formed on November 25, 1997, for the purpose of purchasing the Pilgrim Diner. In January 1998, decedent and Morton, both individually and as president of Mo-Ni-B, executed the Agreement, which stated that Morton and Rudnick were both fifty-percent shareholders of Mo-Ni-B. The Agreement further stated that decedent would become the manager of the Pilgrim Diner and run the business with full authority to make

decisions concerning the operation of the business, it being "the intention of the parties that each shall become a 1/3 owner of said restaurant business."

Although named in the Agreement, Rudnick did not sign it. Rudnick claims he refused to sign because he never intended decedent to become a partner.

With regard to the payment of profits, the Agreement states:

To compute the amount of moneys each stockholder contributes for the purchase of his respective stock, the following formula shall be used:

. . . .

B. [Decedent] shall receive credit towards his 1/3 stock purchase for the following payments:

. . . .

b. In the event there is profit remaining in the business at the end of any fiscal year, such profits shall be distributed equally between the three parties, provided any moneys advanced by Pechter and Rudnick from sources other th[a]n those which are being paid back from the business, such as their personal funds, or loans which were put into the business, but are not being paid back from the business, have been paid back to each of them. In the event there is an outstanding balance due to either Pechter o[r] Rudnick for such advances, then [decedent's] 1/3 profit shall be used first to pay back both parties for such advances, and any remaining balance is to be paid to [decedent].

. . . .

C. As soon as [decedent] equalizes his position with Pechter and Rudnick, by paying his 1/3 contribution for any moneys advanced by the other two, not considering any outstanding loans which are being paid by the business, 333 1/3 shares of Mo-N[i]-B, Inc. [s]tocks shall be issued to him and he will be an equal shareholder with Pechter and Rudnick, and from that day on all profits shall be distributed equally.

[Emphasis added.]

Regarding the sale of a shareholder's stock, the Agreement states that "it is agreed between the parties, that the remaining stockholder, or stockholders shall have a right of first refusal."

The lawyer who drafted the Agreement certified that decedent became the manager of the Pilgrim Diner because of Rudnick's oral assurances that "notwithstanding Mr. Rudnick's refusal to sign the Agreement their business arrangement would proceed exactly as it was set forth in that Agreement." Decedent worked as the manager of the Pilgrim Diner until his death on December 23, 2011. Plaintiff worked as the assistant manager earning \$750 per week until her husband's death.

Plaintiff claims that decedent fulfilled his financial obligation to Morton and Rudnick, as per the Agreement, prior to Pechter's death in 2004. As evidence, she asserts that prior to Morton's 2004 death, Rudnick paid decedent \$5,000 in profits on at least three occasions. Plaintiff claims that since 1999, the business has earned "significant profits" and "virtually none of

those profits have been shared with [plaintiff] and [decedent]." No profit payments were made to decedent after Morton died, in spite of requests by decedent.

After Morton's death, his shares in Mo-Ni-B, which had passed to Katherine Pechter, were sold in 2005 to defendants Barbara and John J. Lichtman and Steven Pechter without an offer of first refusal to decedent.

According to decedent's daughter, Pauline,² in late 2007 decedent "asked Mr. Rudnick for the tax returns a number of times, but Mr. Rudnick refused to provide the documents." After, decedent "approached Mr. Rudnick about his ownership interest in the Diner," to which Rudnick made comments such as "trust me" and "we got this diner for you." Pauline also claims in her certification that starting in 2009, Rudnick began to bring prospective buyers to the diner, which made decedent question Rudnick's promises and assurances about his ownership interest.

After decedent's death in December 2011, plaintiff certified that she "had to assume [her] husband's responsibilities." Plaintiff claims that "two weeks after [decedent] passed away, Mr. Rudnick brought a potential buyer into Pilgrim Diner without asking [her] or even telling [her] in advance." Plaintiff told Rudnick that he "seem[ed] to forget that [plaintiff] had an interest," to

² At oral argument we were informed that Pauline has passed away.

which Rudnick yelled back "I said if there was profit." With the understanding that Rudnick was close to selling the Pilgrim Diner, plaintiff filed a complaint against defendants in the Chancery Division in 2013.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Globe Motor Co. v. Iqdalev, 225 N.J. 469, 479 (2016). Rule 4:46-2 provides that a court should grant summary judgment when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." The court must review the facts "in the light most favorable to the non-moving party." R. 4:46-2.

Plaintiff certifies that the court "may read certain statements [she] made in [her] certification dated September 30, 2013 . . . to mean that [decedent] and [plaintiff] were aware in 2004 that [they] should have gone to court at that time." Plaintiff claims that neither she nor decedent "had any such awareness at that time" and that decedent only "became aware sometime in 2009 that [] Rudnick may not honor the many promises that he made to [decedent] over the years" when Rudnick began to bring prospective buyers to the diner without telling decedent.

The statute of limitations on a breach of contract claim is six years from the date of accrual. N.J.S.A. 2A:14-1. A claim accrues, for statute of limitations purposes, on the date on which the right to institute and maintain a suit first arose. Cnty. of Morris v. Fauver, 153 N.J. 80, 107 (1998). The discovery rule generally does not apply to most contract actions. Id. at 110. Most contract actions "presume that the parties to a contract know the terms of their agreement and a breach is generally obvious and detectable with any reasonable diligence." Ibid.

Rudnick refused to sign the Agreement. According to Pauline's certification, "Rudnick and [decedent] never had an easy relationship." According to plaintiff, after Morton's death, Rudnick made no further profit payment to decedent. Decedent was also not offered a right of first refusal when Morton's shares were sold to defendants Barbara and John J. Lichtman and Steven Pechter in 2005.

When taken together, these undisputed facts demonstrate that decedent's relationship with Rudnick after Morton's death was contentious and adversarial, and if an enforceable agreement did exist, decedent was aware that Rudnick was not honoring that

agreement. Thus, the cause of action accrued at the latest in 2005 when the stock transaction took place.³

Equitable estoppel does not arise under these facts. "To establish a claim of equitable estoppel, the claiming party must show that the alleged conduct was done, or representation was made, intentionally or under such circumstances that it was both natural and probable that it would induce action." Miller v. Miller, 97 N.J. 154, 163 (1984). Further, the conduct must be relied on, and the relying party must act so as to change his or her position to his or her detriment. Ibid. That party's reliance must also be reasonable. E. Orange Bd. of Educ. v. New Jersey Schs. Constr. Corp., 405 N.J. Super. 132, 148 (App. Div.), certif. denied, 199 N.J. 540 (2009). Here, reliance on Rudnick's assurances after 2004 was not reasonable given his failure to sign the Agreement and repeated failures to abide by it.

Plaintiff argues the Agreement was a continuing contract, similar to an installment agreement, and that the trial court erred in rejecting the doctrine of continuing breach. Plaintiff states the Agreement called for continuing performance by decedent in exchange for, initially, credits toward his stock ownership, followed by the installment payment of dividends to the extent

³ At oral argument for the first time plaintiff's counsel raised the question of whether decedent was aware of the stock sale. Plaintiff offered no evidence of decedent's lack of knowledge.

that the corporation turned a profit. The Agreement does not call for a monthly or annual payment of profits or any other set periodic payment structure, but rather a payment of profits to the extent there is any profit, thus it is not an installment contract, where a new cause of action arises from the date each payment is missed. See Metromedia Co. v. Hartz Mt. Assocs., 139 N.J. 532, 535 (1995).

Decedent received profit payments prior to Morton's death in 2004, which, according to the Agreement, should only occur after decedent paid sufficient funds into Mo-Ni-B to obtain a one-third interest in the business. If decedent had acquired an ownership interest in the business pursuant to the Agreement, he could have asserted his ownership claim either after Rudnick stopped making profit payments to decedent in 2004, or at the latest after decedent was denied his right of first refusal before Morton's shares were sold in 2005. The complaint was not filed within six years of 2005.

II. Wage Claim

In plaintiff's certification from September 30, 2013, she states she is "currently employed as the manager of the Pilgrim Diner" and works more than 90 hours per week. She had to "assume [decedent's] responsibilities when he passed away in late December

2011." Plaintiff states that until his passing, decedent "was an owner and the manager of the Pilgrim Diner."

Plaintiff filed a cross-motion for summary judgment with regard to her overtime-pay claims, arguing that the facts were not in dispute. "The filing of a cross-motion for summary judgment generally limits the ability of the losing party to argue that an issue raises questions of fact, because the act of filing the cross-motion represents to the court the ripeness of the party's right to prevail as a matter of law." Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 177 (App. Div.), certif. denied, 196 N.J. 85 (2008). But, "there is no per se rule that the existence of cross-motions for summary judgment precludes a party from seeking, as alternative relief, a trial as to certain issues." Ibid.

During plaintiff's deposition, when asked about her title and role in the business, plaintiff answered "[d]oing managerial, you know, what every diner owner does, that they have somebody on the floor. They walk the people, they make coffee if they have to, they take cash, I do everything." She sets her own hours of work and does not ask anyone for permission to leave. She keeps track of employee hours and "call[s] them in [to] payroll." Plaintiff has also hired waitresses without asking Rudnick and "made sure they did their side work." If an employee calls out sick,

plaintiff is "the one that will have to come in and see if [she] can find somebody else to fill in." Plaintiff also closes out the diner's cash registers and sets the weekly schedules for the waitresses.

Under both Federal and New Jersey law, employees who work "in a bona fide executive, administrative, or professional capacity," are exempt from receiving overtime compensation. N.J.S.A. 34:11-56a4; N.J.A.C. 12:56-7.1; 29 U.S.C.A. § 213 (2014). The New Jersey Department of Labor and Workforce Development regulations look to the federal guidelines for determining which employees work in such a capacity. N.J.A.C. 12:56-7.2.

The federal regulations define an "employee employed in a bona fide executive capacity" as an employee:

- (1) Compensated on a salary basis . . . at a rate per week of not less than [\$455 per week] . . . exclusive of board, lodging or other facilities . . . ;
- (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- (3) Who customarily and regularly directs the work of two or more other employees; and
- (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

[29 C.F.R. § 541.100(a).]

29 C.F.R. § 541.700 states:

(a) [A]n employee's "primary duty" must be the performance of exempt work. The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include . . . the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

(c) Thus, for example, assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the

assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.

The application of an exemption under the FLSA is a matter of affirmative defense on which the employer has the burden of proof. Brock v. Claridge Hotel & Casino, 846 F.2d 180, 187 (3d Cir. 1988). The "remedial purpose of the Wage and Hour Law dictates that it should be given liberal construction." New Jersey Dep't of Labor v. Pepsi-Cola Co., 170 N.J. 59, 62 (2001).

Plaintiff argues that she is a non-exempt employee and that her title as manager did not reflect her actual responsibilities, which plaintiff argues make her more akin to a hostess or waitress entitled to overtime compensation under the Federal FLSA and the NJWHL. The New Jersey Department of Labor and Workforce Development regulations look to the federal guidelines for determining which employees work "in a bona fide executive, administrative, or professional capacity." N.J.A.C. 12:56-7.2.

Regarding the first prong under 29 C.F.R. 541.100(a), plaintiff is paid a salary of \$1,000 per week, although she was not paid during the week that Hurricane Sandy hit.

Regarding the second prong, plaintiff argues she spent "approximately 93%" of her time on non-managerial functions, such

as bussing, cleaning, and waiting tables. Time spent on non-exempt work is a factor, but not dispositive. See 29 C.F.R. 541.700.

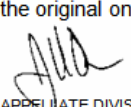
Regarding the third prong, whether plaintiff customarily and regularly directs the work of two or more employees, she has authority to set weekly schedules, tracks employee hours and manages the activities of the others when she is at the diner.

Regarding the fourth prong, whether plaintiff has authority to hire or fire employees, plaintiff admitted she has the authority to hire waitresses without Rudnick's permission.

Even giving her the benefit of all reasonable favorable inferences, plaintiff fits well within the criteria for a manager and is therefore not entitled to the protections of the FLSA or the NJWHL. She also waited too long to institute suit against defendants seeking to enforce the Agreement, thus falling afoul of the six-year statute of limitation. Both the Chancery and the Law Division dismissals were appropriate.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION