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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0626-21**

TD AMERITRADE, INC.,

Plaintiff-Respondent,

v.

NICHOLAS KAMBITSIS,

Defendant-Respondent/  
Cross-Appellant,

and

DEMETRIUS KAMBITSIS,

Defendant-Appellant/  
Cross-Respondent,

and

ELLAS INVESTMENT GROUP,  
LLC,

Defendant.

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Submitted November 7, 2022 – Decided November 23, 2022

Before Judges Mayer and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-0596-21.

O'Toole Scrivo LLC, attorneys for appellant/cross-respondent Demetrius Kambitsis (Joshua A. Zielinski, of counsel and on the briefs; Laura V. Studwell, of counsel; Alex R. Daniel, on the briefs).

Brach Eichler LLC, attorneys for respondent/cross-appellant Nicholas Kambitsis (Bob Kasolas, of counsel and on the briefs).

Baritz & Colman LLP, attorneys for respondent TD Ameritrade, Inc. (Andrew Colman, on the brief).

#### PER CURIAM

Defendant Demetrius Kambitsis<sup>1</sup> appeals from the portion of a September 15, 2021 order discharging plaintiff TD Ameritrade, Inc. (TD) from any liability or further obligation regarding a brokerage investment account held for defendant Ellas Investment Group, LLC (Ellas) and removing all restrictions on that account. Defendant Nicholas Kambitsis cross-appeals from a May 7, 2021 order denying a motion for summary judgment on his counterclaim against TD and crossclaims against Demetrius. We affirm all orders on appeal.

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<sup>1</sup> Because the individual defendants share the same last name, we refer to each brother by his first name. No disrespect is intended.

Initially, the brothers were close and had a good relationship, personally and professionally. During Demetrius' divorce litigation, a dispute arose between the brothers concerning the management and control of the investment account at TD (Ellas account). As of 2021, the Elas account held more than \$60 million in assets.

Ellas, a New Jersey limited liability company, was formed on February 11, 2005. Nicholas and Demetrius each hold a fifty percent membership interest in Elas. According to Nicholas, he and Demetrius entered into a written agreement governing the operation and management of Elas (Operating Agreement). The Operating Agreement governed the members' rights and responsibilities regarding Elas.

Under the Operating Agreement, Nicholas was "regarded as owning the majority of [Ellas]. No other members shall have any role in the management of [Ellas] . . . ." The Operating Agreement also stated Nicholas "ha[d] the sole and exclusive authority to market, administer and manage the day-to-day affairs of [Ellas]." Demetrius denied ever seeing or signing the Operating Agreement. He also claimed the signature on that document was not his signature.

In April 2007, Nicholas opened the Elas account at TD. Nicholas and Demetrius were listed as the account's authorized agents. According to

Demetrius, both brothers had trading authorization and power of attorney. Demetrius claimed Nicholas instructed TD to follow the instructions of either authorized agent, including requests to withdraw or transfer securities and funds. Nicholas maintained Demetrius never managed or made any financial contribution to the Ellas account.

Believing Nicholas improperly transferred funds from the Ellas account, Demetrius instructed TD to place "No Funds Out" and "No Trade" restrictions on the Ellas account. TD complied with Demetrius' instructions. Six months later, Nicholas sent a written demand to TD regarding the Ellas account. In his demand, Nicholas told TD to remove Demetrius as an authorized agent, preclude Demetrius from accessing the account, and lift all restrictions on the Ellas account. Nicholas then sent a November 19, 2020 letter of instruction again directing TD to remove Demetrius from the Ellas account. TD complied with Nicholas' instructions.

On January 8, 2021, Demetrius learned that he had been removed as an authorized agent on the Ellas account and the restrictions were rescinded. That same date, Demetrius wrote to TD demanding that he be reinstated as an authorized agent on the Ellas account. He also instructed TD to "refreeze" the account.

Because it was unclear to TD which brother had ownership rights to the Ellas account, on January 28, 2021, TD filed a complaint for interpleader relief, requesting that the court determine who was the rightful owner of, and had access to, the Ellas account. As part of its interpleader action, TD sought permission to liquidate the Ellas account and deposit the money into court.

Nicholas filed an answer to TD's interpleader complaint, a counterclaim against TD, and crossclaims against Demetrius. Nicholas asked the court for a declaratory judgment deeming him the sole manager of the Ellas account. A few weeks later, Demetrius filed an answer to TD's complaint and asserted crossclaims against Nicholas.

On March 25, 2021, TD filed a motion to liquidate the Ellas account, deposit the liquidated funds into court, and discharge TD from all obligations regarding the Ellas account. The next day, Nicholas moved for summary judgment, seeking declaratory relief against Demetrius and TD, and dismissal of TD's interpleader action. Nicholas also filed a separate motion to dismiss Demetrius' crossclaims.

On May 7, 2021, the motion judge heard oral argument on the pending motions and denied all requested relief. Regarding TD's motion, the judge found depositing the liquidated funds into court would result in "approximately \$20

million in tax consequences to the business," and concluded "the prejudice as a result to the company, as well as its owners, far outweighs the interest in terms of having the money turned over."

Regarding the denial of Nicholas' summary judgment motion, the judge determined the motion was premature as discovery had not begun and there were material factual issues in dispute. The judge concluded discovery was necessary to determine who held an ownership interest in the Ellas account.

On June 7, 2021, the motion judge dismissed Demetrius' crossclaims without prejudice, finding they were procedurally improper pursuant to Rule 4:7-5.<sup>2</sup> The judge directed Demetrius to file his crossclaims against Nicholas in a separate shareholder dissolution action in the Chancery Division. Alternatively, the judge stated Demetrius could amend his existing Chancery Division action, seeking books and records related to Nicholas' various businesses, to include the claims related to the Ellas account.

On July 9, Nicholas filed a motion to sever Demetrius' crossclaims in the interpleader action or, alternatively, transfer the crossclaims to a different action. On or about August 12, Demetrius filed a shareholder dissolution action against Nicholas in the Chancery Division. Demetrius also opposed Nicholas'

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<sup>2</sup> Demetrius has not appealed from the June 7, 2021 order.

motion to transfer, and cross-moved to sever Nicholas' crossclaims against him and transfer those claims to the newly filed shareholder dissolution action.

On August 20, 2021, the motion judge heard argument on the motions. The judge instructed Demetrius and Nicholas to address their claims against each other regarding the Ellas account in Demetrius' shareholder dissolution action. In discharging liability against TD, the judge stated, "TD is an innocent stakeholder that's caught in the middle of this dispute between the Kambitsis brothers." The judge explained it was unreasonable for TD to be involved in any continuing litigation because Nicholas and Demetrius were litigating claims against each other in the shareholder dissolution action and asserting claims "that shouldn't be raised under the umbrella of this interpleader action." The judge asked counsel to submit a consent order "so that TD can get out of the case."

In her decision on the motions to sever crossclaims in the interpleader action, the judge held the brothers' crossclaims could and should be litigated in the shareholder dissolution action. The judge reasoned:

I don't think TD [] should be caught in a position where it [is] sort of collateral damage to the fight between Nic[holas] and Demetrius with respect to the many different entities that they own and have control over and as they iron that out in the Chancery matter[,] I

don't see the reason for the interpleader action to have to continue.

Regarding TD's interpleader action, the judge indicated she was "likely to enter an order consistent with what [TD] is requesting in terms of it discharging any obligation as the parties iron out what's going to occur in connection with the [shareholder dissolution action]." The judge asked counsel to submit a consent order memorializing her decisions. However, the parties were unable to agree on a form of order.

On September 7, 2021, each party submitted proposed orders under Rule 4:42-1(c), known as the five-day rule. On September 15, 2021, the judge entered an order as follows: discharging TD from any and all liability to Demetrius and Nicholas regarding the Ellas account; discharging TD from any and all further obligations to Demetrius and Nicholas with respect to the interpleader action and the Ellas account; directing Demetrius and Nicholas to litigate all aspects of their dispute related to the Ellas account in the pending shareholder dissolution action; and instructing TD to remove any and all restrictions on the Ellas account, including the "No Funds Out" restriction.

Demetrius appeals from the portions of the September 21, 2021 order discharging TD from any liability to the defendants and removing the "No Funds Out" restriction on the Ellas account. Nicholas cross-appeals from the judge's



denial of summary judgment on his counterclaim against TD and his crossclaims against Demetrius.

We first address Demetrius' appeal. In his appeal, Demetrius argues the judge's September 15, 2021 order exceeded the scope of relief available in an interpleader action and improperly immunized TD from "any and all liability" regarding the Ellas account. He also contends the judge failed to set forth her findings, consistent with Rule 1:7-4, regarding the decision to discharge TD from any and all liability. Demetrius further asserts the judge erred in lifting the "No Funds Out" restriction on the Ellas account while the parties continued litigating their claims in the shareholder dissolution action. We reject Demetrius' arguments.

We begin with Demetrius' contention that the judge improperly immunized TD from any and all liability regarding the Ellas account, depriving him of the right to assert claims against the bank for breach of fiduciary duty. He also argues the judge's order precipitously precluded his ability to assert claims against TD for negligence as a result of the bank allowing Nicholas to remove significant sums from the Ellas account.

We review a trial court's interpretation of law de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). The "trial court's

interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P., 140 N.J. at 378). However, we defer to a trial court's findings of fact. Balducci v. Cige, 240 N.J. 574, 595 (2020). We will accept a trial court's findings of fact unless the "findings are 'manifestly unsupported' by the 'reasonably credible evidence' in the record." Ibid. (quoting Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011)).

An interpleader action permits a plaintiff holding disputed funds subject to multiple claims of ownership to file a complaint, deposit the funds into court, and withdraw from litigation, thus relieving the plaintiff from further obligation to competing claimants. 612 Assocs., LLC v. North Bergen Mun. Utilities Auth., 215 N.J. 3, 25 (2013); Prudential Ins. Co. of Am. v. Hovis, 553 F.3d 258, 262 (3d Cir. 2009). "Persons having claims against [a] plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability." R. 4:31. Upon the filing of an interpleader action, the trial court initially "determines whether the interpleader complaint was properly brought and whether to discharge the stakeholder from further liability to the claimants." Hovis, 553 F.3d at 262. If

it is determined that the interpleader was properly brought, then "the court determines the respective rights of the claimants to the interpleaded funds."

Ibid.

To contest a judgment, a party must have legal standing, or the "ability or entitlement to maintain an action before the court." Petro v. Platkin, 472 N.J. Super. 536, 558 (App. Div. 2022) (quoting N.J. Dep't of Env't Prot. v. Exxon Mobil Corp., 453 N.J. Super. 272, 291 (App. Div. 2018)). Only a party "aggrieved by a judgment" may appeal, and to be aggrieved, the party "must have a personal or pecuniary interest or property right adversely affected by the judgment." State v. A.L., 440 N.J. Super 400, 418 (App. Div. 2015) (quoting Howard Sav. Inst. v. Peep, 34 N.J. 494, 499 (1961)).

Here, Demetrius claims that as a co-owner and authorized agent on the Ellas account he has standing to assert claims against TD. However, at no time during the pendency of the interpleader action did Demetrius file a counterclaim against TD. Although Demetrius filed an answer and affirmative defenses to the interpleader complaint and crossclaims against Nicholas in the interpleader action, he never filed a counterclaim for affirmative relief against TD. For the first time on appeal, Demetrius raises his potential claims against TD and asserts those claims were foreclosed as a result of the September 15, 2021 order.

Rule 2:10-2 provides that when an issue was not properly presented to the trial court, as in this case, the issue may be presented on appeal only if the question goes "to the jurisdiction of the trial court or concern[s] matters of great public interest." Zaman v. Felton, 219 N.J. 199, 227 (2014) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). We are satisfied that the issue Demetrius belatedly presents to this court was not raised in the trial court. Nor does the issue concern a matter of great public interest or challenge the jurisdiction of the trial court.

Demetrius filed a crossclaim against Nicholas in the interpleader action and clearly had ample opportunity to also assert a counterclaim against TD in the interpleader action. However, Demetrius failed to do so. Only after the judge signed the September 15, 2021 order and in his filed notice of appeal did Demetrius express an intent to pursue relief against TD. Demetrius' failure to timely assert claims against TD in the interpleader action bars his requesting such relief after the judge discharged TD from any and all liability related to the Ellas account.

Because Demetrius failed to assert claims against TD in the interpleader action, we are satisfied the judge properly discharged the bank "from any and all liability" in connection with the Ellas account.<sup>3</sup>

We next address Nicholas' cross-appeal. In the cross-appeal, Nicholas argues the judge erred in denying his motion for summary judgment. Nicholas requests a declaratory judgment from this court, finding that he is the sole manager of the Ellas account and declaring Demetrius has no rights regarding that account. We are not persuaded by his arguments and decline to exercise original jurisdiction by deciding who has rights to the Ellas account.

We review the trial court's grant or denial of a summary judgment motion de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). Summary judgment is appropriate "if 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." Friedman v. Martinez, 242 N.J. 449, 471–72 (2020) (quoting R. 4:46-2(c)).

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<sup>3</sup> We note that the judge had no obligation to set forth findings of fact or conclusions of law related to an issue that Demetrius failed to present to the trial court.

The evidence must be considered in the light most favorable to the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The key determination is whether the evidence presented "[is] sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Ibid. "Summary judgment should be granted, in particular, 'after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Friedman, 242 N.J. at 472 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

Having reviewed the record, we are satisfied the judge properly denied summary judgment on Nicholas' claims, finding the issue premature for adjudication based on the need to conduct discovery and the existence of material factual disputes between the brothers. Demetrius and Nicholas dispute the roles and responsibilities each had regarding the family's business holdings. Demetrius also contends there are inconsistencies in the document governing the Ellas account, including that the signature on the document did not belong to him.

Further, the statements made by Demetrius during his divorce action may not be inconsistent with his position in this litigation. As the judge noted, Shelcusky v. Garjulio, 172 N.J. 185, 194 (2002), addressing the sham affidavit doctrine, allows a party to proffer a reasonable explanation for any alleged inconsistency between Demetrius' statements in this matter and any statements he may have made during his divorce litigation. Demetrius will have an opportunity to explain any inconsistent statements in the shareholder dissolution action.

Additionally, because discovery in the shareholder dissolution action was ongoing, there was no evidence regarding the source of the funds placed in the Ellas account. Those funds may have been derived from a variety of sources, including monies deposited by Demetrius or other family members. Thus, Nicholas' position that Demetrius had no entitlement to the funds in the Ellas account because he made no financial contribution had yet to be established as an undisputed fact when the judge denied summary judgment. "When 'critical facts are peculiarly within the moving party's knowledge,' it is especially inappropriate to grant summary judgment when discovery is incomplete." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988) (quoting Martin v. Educational Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981)).

Under the circumstances, we are satisfied the judge properly denied summary judgment pending further discovery and an opportunity to obtain critical facts peculiarly within Nicholas' knowledge.

To the extent we have not addressed any arguments raised in the appeal and cross-appeal, we conclude they are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION