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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2316-21**

**FRANK PALERMO, JR.
and LOUIS PALERMO,**

Plaintiffs-Respondents,

v.

MARCEL PALERMO,

Defendant-Appellant.

Argued March 14, 2023 – Decided June 9, 2023

Before Judges Gilson and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-8761-18.

David Scillieri argued the cause for appellant (David Scillieri and Jeff Thakker, attorneys; Jeff Thakker, of counsel; David Scillieri, on the briefs).

Mark A. Clemente argued the cause for respondent (Clemente Mueller, attorneys; Mark A. Clemente, on the brief).

PER CURIAM

This appeal arises out of a dispute among three brothers concerning the distribution of the net sale proceeds from their parents' former home. Following a bench trial, the judge found that the brothers had signed an agreement to share the net proceeds equally. Accordingly, the judge enforced the agreement and entered a judgment awarding \$147,994.99, which was two-thirds of the net proceeds, to plaintiffs Frank Palermo, Jr. and Louis Palermo. The third brother, defendant Marcel Palermo, now appeals from that judgment. Because the trial judge's factual findings were supported by substantial credible evidence and his legal conclusions were correct, we affirm the judgment.

I.

We discern the facts from the trial record. At trial, six witnesses testified: the three brothers (Frank, Jr., Louis, and Marcel), Vincent Macri, an attorney who had prepared various documents for the parents and the brothers, a real estate appraiser, and a neighbor.¹ The parties also submitted various documents into evidence, including agreements signed by the brothers.

The parties are the three adult sons of Frank Palermo, Sr. and Pasqualina Palermo. In 2007, the parents executed a series of documents related to their

¹ Because the parties and their parents share the same last name, we use first names but mean no disrespect.

care as elder adults and their estate. At that time, their major asset was a home they owned in Caldwell (the Home). The parents also had approximately \$140,000 in liquid assets.

In 2007, Louis arranged for Macri, an elder-law attorney, to assist the parents in planning for their elder care and the distribution of their assets. Macri testified that when he had met with the parents, they "were concerned about not losing their assets in the event of a catastrophe[,] illness[,] . . . health event[,] or accident." Accordingly, Macri prepared various documents to govern the parents' assets, including the Home.

As part of the parents' plans, they conveyed the Home to Marcel. The idea was to preserve the value of the Home should either parent become ill and need expensive medical care. Marcel had lived with his parents for his entire life. Consequently, under the plan the parents would continue to live at the Home during their lifetime and Marcel would care for them. In that regard, the deed from the parents to Marcel provided that the parents reserved a "life estate for the full benefit and use" of the Home during their lives.

At the same time that the parents conveyed the Home to Marcel, the brothers signed an agreement providing that when both parents died, the Home would be sold, and the brothers would share the net proceeds equally (the Home

Sale Agreement).² In the Home Sale Agreement, the brothers acknowledged that they made the agreement "to resolve the distribution of the net worth of the home of their parents, upon the death of the parents." They also agreed that "the consideration for the Agreement is preserving the value of the [Home] for their inheritance" The Home Sale Agreement then stated, in relevant part:

The parties hereto agree that upon the death of the last surviving parent, the [Home] will be listed for sale by MARCEL PALERMO with a reputable realtor on the multiple listing service. Upon the ultimate sale of the [Home], the net proceeds shall be divided equally between LOUIS V. PALERMO, FRANK P. PALERMO, JR., and MARCEL PALERMO after deduction of any necessary real estate commission as well as any reasonable and necessary closing costs. In the alternative, the parties may instead unanimously agree to retitle the property in all three brothers equally as tenants in common.

In May 2007, shortly after the Home had been conveyed to Marcel, Louis convinced the parents to take out a \$250,000 loan secured by a mortgage on the

² The brothers signed two agreements concerning sharing the net proceeds of the sale of the Home. The first agreement, which all the brothers signed by May 2007, provided that Marcel could continue to live at the Home, but when he chose to sell the Home, the proceeds would be evenly divided among the three brothers. The second agreement, which was fully signed by November 2007, was nearly identical to the first agreement except it provided that when both parents died, Marcel would sell the Home and the proceeds would be divided evenly among the brothers. We treat these two agreements as one agreement for purposes of this appeal because there is no dispute that the Home was sold.

Home. The proceeds from the \$250,000 loan were then sent to a Florida lawyer for purposes of investing in real estate in Florida. Louis also transferred approximately \$140,000 of the parents' assets to invest in the Florida real estate. Frank, Jr. and Louis testified that the entire \$390,000 was lost when the Florida lawyer "absconded with the money."

Apparently, the \$250,000 loan was not repaid because the bank brought an action to foreclose on the Home. Eventually, the foreclosure action was dismissed, and as part of a settlement Marcel was reimbursed for his attorney fees.

Frank, Sr. passed away in October 2011. Thereafter, Pasqualina and Marcel continued to live in the Home, but they had difficulty paying the Home's expenses. Marcel testified that he had spent \$50,000 of his own money on renovations so that part of the Home could be rented as apartments and another \$20,000 on real estate taxes.

At some time before 2015, Marcel ceased paying the fire insurance on the home. In October 2015, the Home was destroyed by a fire. The cause of the fire was never determined, but the Home was no longer inhabitable. As part of the settlement of the foreclosure action, Marcel received money to pay off a demolition lien on the Home.

Pasqualina died in April 2018. The following year, Marcel sold the land on which the Home had stood for \$250,000.³ The net proceeds from that sale were \$221,992.46, which were placed in Marcel's attorney's trust account.

Marcel refused to share the net sale proceeds with his brothers. Consequently, in December 2018, Frank, Jr. and Louis sued Marcel. They sought to have the net sale proceeds turned over to them and for Marcel's share to be eliminated or diminished for his failure to maintain fire insurance on the Home. Marcel responded with an answer and counterclaims, including claims of fraud, unclean hands, breach of fiduciary duty, and lack of consideration.

A bench trial was conducted on February 14 and 15, 2022. After hearing the testimony and considering the evidence, on February 23, 2022, the trial judge entered a judgment and issued a supporting written opinion. The trial judge found that the brothers had entered into the Home Sale Agreement and that the Agreement was valid and enforceable. The judge found that the Agreement was given for the valid consideration of preserving the value of the Home by setting up a situation where Marcel could qualify as a caregiver to his parents and obtain a Medicaid exemption so that the Home would not be sold to pay for the parents'

³ In the trial judge's written opinion, he stated that the sales price had been \$260,000. However, at trial, the parties submitted the sales settlement statement that showed the sales price was \$250,000.

care should they need medical care. The court also rejected Frank, Jr. and Louis' contentions that Marcel's share should be offset or diminished because he had failed to maintain fire insurance on the Home. In addition, the trial judge rejected Marcel's claims of fraud, unclean hands, and breaches of fiduciary duties, finding that Marcel had submitted no evidence to support those claims. The judge also rejected Marcel's claims that Frank, Jr.'s and Louis' share should be offset because of the loss of the \$390,000 sent to the Florida lawyer for the Florida real estate investment. In that regard, the trial judge found that Marcel had suffered no loss and that it was the parents who made the decision to obtain the loan. The judge also found that there was "insufficient credible evidence to find otherwise."

In short, having considered all the evidence submitted at trial, the trial judge found that none of the parties had submitted sufficient evidence to support their "equitable grounds to defeat each other's claims." The trial judge found that the net proceeds from the sale were \$221,992.46. Accordingly, he entered a judgment directing that \$147,994.99 was to be paid to Frank, Jr. and Louis, effectively leaving the remaining one-third of the net proceeds to be distributed to Marcel. Thereafter, the judge stayed the distribution pending this appeal.

II.

On appeal, Marcel makes two arguments. First, he contends that the failed Florida investment left the parents with no liquid assets and Frank, Jr. and Louis thereby breached an implied covenant of good faith and fair dealing in the Home Sale Agreement. Second, he argues that Frank, Jr. and Louis engaged in fraud and breached their fiduciary duties and, therefore, any recovery under the Home Sale Agreement should be barred by the doctrine of unclean hands. We reject these arguments because they lack factual or legal support.

We review a "trial court's determinations, premised on the testimony of witnesses and written evidence at a bench trial," under a deferential standard. Nelson v. Elizabeth Bd. of Educ., 466 N.J. Super. 325, 336 (App. Div. 2021) (quoting D'Agostino v. Maldonado, 216 N.J. 168, 182 (2013)). We accept the trial court's factual findings unless "they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence so as to offend the interests of justice." D'Agostino, 216 N.J. at 182 (quoting Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011)). A trial court's legal conclusions and the legal consequences that flow from established facts are reviewed de novo. Motorworld, Inc. v. Benkendorf, 228 N.J. 311, 329

(2017); Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

A. The Home Sale Agreement.

After hearing all the testimony and considering all the evidence submitted at trial, the judge found that this was a straightforward contractual dispute. Specifically, the judge found that the three brothers had entered into a valid and enforceable agreement. The judge also found that there was valid consideration supporting the Home Sale Agreement because, as expressly acknowledged in the Agreement itself, the Agreement helped to preserve the Home for purposes of the brothers' inheritance. There was no dispute that all three brothers signed the Home Sale Agreement and that the Agreement called for the equal distribution of the net sale proceeds when the Home was sold. There was also no dispute that the Home was sold and that the net sales proceeds were \$221,992.46. Consequently, the trial judge enforced the Home Sale Agreement.

The trial judge's factual findings concerning the Home Sale Agreement were supported by substantial credible evidence presented at the trial. See D'Agostino, 216 N.J. at 182. The judge's legal conclusions were also correct. See Pacifico v. Pacifico, 190 N.J. 258, 266 (2007) ("As a general rule, courts should enforce contracts as the parties intended.").

B. Marcel's Contentions Concerning the Implied Covenant of Good Faith and Fair Dealing.

An implied covenant of good faith and fair dealing exists in every contract in New Jersey. Wood v. N.J. Mfrs. Ins. Co., 206 N.J. 562, 577 (2011); Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420 (1997). The covenant requires that parties to a contract "refrain from doing 'anything which will have the effect of destroying or injuring the right of the other party to receive' the benefits of the contract." Brunswick Hills Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 224-25 (2005) (quoting Palisades Props., Inc. v. Brunetti, 44 N.J. 117, 130 (1965)). "The party claiming a breach of the covenant of good faith and fair dealing 'must provide evidence sufficient to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties.'" Id. at 225 (quoting 23 Williston on Contracts § 63:22, at 513-14 (Lord Ed. 2002)). Consequently, the implied covenant "cannot override an express term in a contract." Wilson v. Amerada Hess Corp., 168 N.J. 236, 244 (2001). "Proof of 'bad motive or intention' is vital to an action for breach of the covenant." Brunswick Hills, 182 N.J. at 225 (quoting Wilson, 168 N.J. at 244).

Marcel argues that all the documents relating to the parents' estate plans and plans for their care are interrelated. Marcel then argues that Frank, Jr. and

Louis caused the parents to take out a loan and invest \$390,000 in a failed Florida property investment. Finally, Marcel contends that the loss of the parent's money set up a chain of events that substantially diminished the value of the Home.

Those arguments were all made to the trial judge. The judge, however, found no evidence to support Marcel's contentions. The judge did not find that the Home Sale Agreement was related to any of the other trust documents. The court also expressly rejected Marcel's contention that Frank, Jr. and Louis caused the loss of the money sent to the Florida lawyer.

C. The Alleged Unclean Hands.

The doctrine of unclean hands is an equitable doctrine, which provides that "a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit." Borough of Princeton v. Bd. of Chosen Freeholders, 169 N.J. 135, 158 (2001). The application of the doctrine, however, is limited and "should not be used as punishment but to further the advancement of right and justice." Pellitteri v. Pellitteri, 266 N.J. Super. 56, 65 (App. Div. 1993). Absent an abuse of discretion, we defer to the trial court's ruling on the applicability of the unclean hands doctrine. Goldfarb v. Solimine, 460 N.J. Super. 22, 37 (App. Div. 2019).

Marcel argues that because his parents' liquid assets of \$140,000 were lost in the failed Florida real estate investment, he had to spend \$70,000 of his own money on renovations and maintaining the Home. Because he blames Frank, Jr. and Louis for the failed Florida real estate investment, he contends that it would be inequitable for them to share in the proceeds of the sale of the Home. Marcel goes on to contend that because the trial judge did not make express mention of the \$140,000, we owe no deference to the trial judge's factual findings. We reject this argument.

The trial judge heard all the testimony Marcel had presented concerning the Florida real estate investment and the \$140,000 from the parents' bank account. Although the trial judge did not expressly mention the \$140,000, he was very clear in rejecting Marcel's contentions about fraud, unclean hands, and alleged breaches of fiduciary duty. Our review of the record satisfies us that there was no evidence of unclean hands that would support the contention that Frank, Jr. and Louis should be denied their share of the net sale proceeds from the Home.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION