NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3168-10T4
A-4095-10T4

RICHARD C. PFEIFER, KATHERINE PFEIFER, DEBORAH MCCANDLESS, LISA FLYNN, FRANCES PERO and JOHN OBERMULLER,

Plaintiffs-Respondents,

v.

JOAN A. LANGONE and JOHN A. LANGONE,

Defendants-Appellants.

Argued February 7, 2012 - Decided February 29, 2012

Before Judges Carchman and Baxter.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-1995-10.

Cindy Cheung argued the cause for appellants (Polizzotto & Polizzotto, L.L.C., attorneys; Alfred Polizzotto III, on the brief).

Charles E. Starkey argued the cause for respondents (Starkey, Kelly, Kenneally, Cunningham & Turnbach, attorneys; Mr. Starkey, of counsel; Dina R. Khajezadeh, on the brief).

PER CURIAM

In this estate matter, defendants Joan A. Langone and

John A. Langone appeal from two Law Division orders. The order of January 25, 2011 entered judgment in favor of plaintiffs, Richard C. Pfeifer, Katherine Pfeifer, Deborah McCandless, Lisa Flynn, Frances Pero and John Obermuller, and against both defendants jointly and severally, in the amount of $100,810.51. That order also entered judgment against Joan Langone individually in the amount of $116,088.49, and assessed punitive damages against her in the amount of $54,224.75. Finally, the January 25, 2011 order required defendant Joan Langone to pay the reasonable attorney's fees and costs incurred by plaintiffs, the amount of which would be determined in a separate order after the court had an opportunity to consider the affidavit of services submitted by plaintiffs' counsel.

The second order, dated March 18, 2011, was issued after the affidavit of services was submitted. This order entered judgment in favor of plaintiffs and against defendant Joan Langone in the amount of $34,495.17 representing the attorney's fees and costs plaintiffs incurred in proceeding against defendant Joan Langone.

Defendants' appeal from the January 25, 2011 order is docketed as A-3168-10, and their appeal from the March 18, 2011

order bears docket number A-4095-10.[1]

We agree with defendants' contention that Joan's mother, and John's grandmother, Verna Obermuller, was a necessary party whose life estate should have been the subject of valuation before judgment was entered against defendants by order of January 25, 2011. Verna died on January 17, 2011, eight days before the January 25, 2011 order was issued. We reverse the order of January 25, 2011 and remand for a hearing to determine the monetary value of Verna's life estate, and for a determination of her beneficiaries. On remand, the court shall identify Verna's beneficiaries and evaluate whether the January 25, 2011 judgment should be modified accordingly, and, if so, to what extent.[2] As for the award of punitive damages in the January 25, 2011 order, and the award of counsel fees in the order of March 18, 2011, we affirm the monetary amounts of those orders, but remand for a determination of whether any person or

[1] Because the appeal in A-3168-10 was interlocutory, and defendants had not sought leave to appeal, plaintiffs moved to dismiss that appeal. By the time the motion for dismissal was filed in A-3168-10, defendants had already filed an appeal from the March 18, 2011 final order. For that reason, on May 3, 2011, we denied plaintiffs' motion to dismiss A-3168-10, and consolidated it with the appeal filed under A-4095-10.

[2] We express no view on whether such proceedings should occur in New Jersey, or instead in New York, where Verna was domiciled at the time of her death.

persons, in addition to plaintiffs, should share in the punitive damages award.

I.

On October 6, 1999, Verna Obermuller, and her husband John Obermuller, conveyed their real property located in Brooklyn to their daughter defendant Joan Langone, subject to the life estates of both parents. On the same date, John and Verna executed a Trust Agreement between themselves as grantors, and Joan as grantee, in which Joan acknowledged that the Brooklyn property was transferred to her subject to the life estates of her parents, and also subject to a power of appointment held by them. In the Trust Agreement, John and Verna reserved the right to change or alter the remainderman in their Will, but agreed not to designate as remaindermen anyone other than their four children. The Trust Agreement identified their four children as Richard C. Pfeifer, Walter K. Pfeifer, John Obermuller, Jr.[3] Specifically, the Trust Agreement states:

> The Grantors reserve unto the Grantors, a Power of Appointment to change or alter the remaindermen of said premises by Will duly executed or by an instrument in writing, duly acknowledged and containing a specific reference to this Agreement, but the Grantors shall not be entitled to

[3] Although the Trust Agreement does not use the suffix, Jr. to refer to John Obermuller, we shall refer to him in that fashion to avoid confusion with his father, whose name was the same.

> appoint themselves or his or her creditors or any person other than a descendant of JOHN OBERMULLER and/or VERNA OBERMULLER, as remaindermen.

In the Trust Agreement, Joan specifically acknowledged that she held the property in trust for herself and her three siblings. Notably, the Trust Agreement prohibited Joan from mortgaging or encumbering the property in any way. The Trust Agreement states:

> The Grantee further agrees that she shall not mortgage or encumber the property in any way.

Despite Joan's agreement to not mortgage or encumber the property, in March 2002, she obtained a $100,000 mortgage on the property from GreenPoint Mortgage Funding, Inc. Approximately eight months later, on November 4, 2002, she conveyed the property to Francesco DiLeo and Assuntino DiLeo for $230,000. From the $230,000 proceeds, Joan satisfied the $100,000 mortgage, and used the $113,000 remaining from the net proceeds to establish a stock portfolio in her own name.

On June 22, 2009, Joan's siblings instituted the present action seeking an accounting and other relief. By this time, Joan's brother Walter had died; Walter's wife Katherine Pfeifer, and Walter's three children Deborah McCandless, Lisa Flynn and Frances Pero, succeeded to his interest and were named as plaintiffs in his stead. By this time, plaintiffs' father, John

Obermuller, Sr. had died, but their mother, Verna, the other life tenant, was still living.

Plaintiffs' June 22, 2009 complaint alleged that by mortgaging and selling the Brooklyn property, and by misappropriating all of the settlement proceeds from the sale of the property, Joan had breached her fiduciary duty to them. Plaintiffs sought compensatory damages, namely, compelling Joan to distribute the proceeds of the sale in accordance with the terms of the October 6, 1999 Trust Agreement. They also alleged that Joan's misconduct should result in the award of punitive damages equal to the forfeiture of her share of the proceeds.

On September 16, 2010, defendants moved to dismiss the complaint based upon a lack of subject matter jurisdiction because the real property that was the subject of the Trust Agreement was located in New York. During the course of oral argument on their motion, defendants argued that Verna Obermuller, a life tenant, was a necessary party, although they did not move to add her to the complaint. Plaintiffs disagreed, arguing that neither Verna nor John, Sr. were necessary parties as the sale of the property had extinguished their life estates. The judge determined that New Jersey, not New York, was the proper forum, as the proceeds from the fraudulent sale of the property were deposited into an account in New Jersey. He also

rejected defendants' contention that Verna and John were necessary parties. By the time defendants filed their motion, a trial date had been established.

On December 7, 2007, both defendants consented to the entry of default against them on liability, but reserved the right to challenge the amount of damages to be awarded. Pursuant to the December 7, 2010 consent order, the judge conducted a proof hearing on January 12, 2011.

At the January 12, 2011 proof hearing, defendants argued that without knowing the identity of their mother Verna's beneficiaries, it was impossible to determine who was entitled to attorney's fees as a result of Joan's fraudulent conduct. The judge responded that it was too late for defendants to argue that Verna was an indispensable party, as they had conceded liability and had consented to the entry of default against them.

The judge observed that the consent order entered on December 7, 2011, included a concession of fraud. He also noted that portions of Joan's deposition supported a finding of fraud because Joan admitted taking money from her parents' estate even though "a portion of the monies were . . . actually, equitably owned by the beneficiaries." Ultimately, the judge concluded that fraud had been sufficiently pled, documented, and

established to support an award of punitive damages. Addressing defendants' renewed argument that the value of Verna's life estate should be considered in reducing the award to plaintiffs, the court stated:

> the arguments do not become persuasive in terms of preservation of an amount attributed to a life estate. Those arguments, in the court's eyes, would be more compelling, number one, again, if this was a trial without a concession of liability; and, secondly -- as the court considers that in part as a defense -- but, secondly, the life estate preservation, calculations related thereto from the I.R.S. would be attributable to real estate, real property. . . . [I]t strikes the court that the actual closing transfer itself would have extinguished those arguments as well.

At the conclusion of the proof hearing, the court entered judgment: declaring defendants jointly and severally liable in the amount of $100,810.51, representing the amount of the payoff from the GreenPoint mortgage, the proceeds of which Joan gave to her son, defendant John Langone, to pay back an existing debt he had incurred; entering judgment in favor of plaintiffs and against Joan Langone, individually, in the amount of $116,088.49, which represented the proceeds she received at the closing; awarding punitive damages in the form of a forfeiture, specifically, that Joan forego her one-fourth interest in the trust estate, valued at $54,224.75, as a result of her fraudulent violation of her fiduciary duties; and compelling

defendant Joan Langone to pay plaintiffs' reasonable attorneys fees and costs, to be finalized within ten days of the entry of the order. The judge later set those fees at $34,495.17.

On appeal, defendants present the following claims: 1) Verna Obermuller should have been named as a necessary party to the action; 2) the value of her life estate should have been considered in determining plaintiffs' damages; and 3) the award of punitive damages against defendants was error in the absence of proof of fraud or collusion.

II.

We first determine whether Verna was a necessary party to the action. A party whose absence prevents the court from granting complete relief must be joined as a party to the action. Rule 4:28-1(a) provides:

> A person who is subject to service of process shall be joined as a party to the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person's absence may either (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other inconsistent obligations by reason of the claimed interest.

Here, John and Verna Obermuller transferred the property via a Trust Agreement to their daughter Joan, reserving for themselves life estates. Pursuant to the Trust Agreement, Joan was obliged to hold the property in trust for the remaindermen, namely herself and her three siblings. When Joan sold the property, Verna was still alive. As a result of the sale, Joan deprived Verna of her ability to possess and enjoy her property interest, namely, her life estate.

We recognize that a life estate can be terminated if the life tenant renounces his or her life estate. Bennett v. Fid. Union Trust Co., 122 N.J. Eq. 455, 462 (Ch. 1937). However, there is nothing in the record to suggest that Verna did so. Consequently, her life estate had a monetary value until the time of her death, under both New York and New Jersey law. See In re Begley, 794 N.Y.S.2d 810, 810-11 (N.Y. Sup. Ct. 2005); In re Estate of Baia, 266 N.Y.S.2d 299, 300-02 (N.Y. Sup. Ct. 1966); Mt. Freedom Presbyterian Church v. Osborne, 81 N.J. Super. 441, 444-47 (Law Div. 1963) (discussing the proper way to compensate a life tenant for his interest, determining the proceeds should be invested and the income from the proceeds paid to the life tenant).

Because Verna's life estate interest in the Brooklyn property was not relinquished, surrendered or terminated when

Joan sold the property, and because Verna was still living at the time plaintiffs filed their complaint, Verna had a financial interest in the litigation.[4] Plaintiffs' failure to join Verna as a party to the litigation exposed defendants to the risk of further liability and damages, and ensuing multiple recoveries. For that reason, Verna was an indispensable party within the meaning of Rule 4:28-1(a)(2)(ii). That Rule requires the joinder of any person as a party to the action if such person has an interest in the subject of the action and concluding the litigation in the absence of that person has the capacity to "leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other inconsistent obligations by reason of the claimed interest." R. 4:28-1(a)(2)(ii). The award of damages to the present plaintiffs, in a sum representing the entire value of the Brooklyn property, impairs and impedes the ability of Verna, or her beneficiaries, to protect her interest.

[4] None of the parties has asserted that John Sr., Joan's father, should have been joined as a party, even though he was alive at the time of the sale, and remained living for another year. The parties appear to have assumed that the monetary value of John Sr.'s life estate likely passed to his wife Verna as his sole beneficiary. As the parties have not raised the possibility of John Sr.'s estate being a necessary party, we decline to consider that issue.

Alternatively, if Verna's beneficiaries file a subsequent claim against defendants seeking monetary compensation for the value of Verna's life estate, defendants will be exposed to financial liability over and above the monetary amount of their wrongdoing, because the judgment entered on January 25, 2011 fully distributed the proceeds of Joan's wrongful sale of the property. For these reasons, Verna was a necessary party who should have been joined in the action.

The next question is whether, pursuant to subsection (b) of that Rule, Verna was an indispensable party. Rule 4:28-1(b) specifies the factors a court should consider when determining whether, if the absent party cannot be served with process, the action should proceed among the parties presently before the court, or whether instead, the action should be dismissed. The Rule provides:

> If a person should be joined pursuant to R. 4:28-1(a) but cannot be served with process, the court shall determine whether it is appropriate for the action to proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, the extent to which a judgment rendered in the person's absence might be prejudicial to that person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence

> will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.
>
> [R. 4:28-1(b).]

Nothing in the record enlightens us as to whether Verna's estate could have been served prior to the entry of judgment on January 25, 2011. As we have noted, Verna passed away on January 17, 2011, eight days earlier. At this point, as Verna's estate was an indispensable party, the matter must be remanded to allow her estate to be served with process and joined as an indispensable party so that the value of her life estate can be determined. When Verna died, her life estate terminated and the remaindermen's interests became converted into a fee simple ownership. Young v. Eagon, 131 N.J. Eq. 574, 576 (1942).

We recognize that there are two ways in which Verna's status as a necessary and indispensable party may be moot. First, if Verna died testate and the beneficiaries of her estate are limited to the present plaintiffs, it would be unnecessary to join her estate because the estate would merely be a conduit through which the ultimate judgment would be distributed to the same parties already named in the January 25, 2011 judgment. Second, if Verna died intestate, her estate, which would include the value of the wrongfully-terminated life estate, would be divided equally among "the decedent's descendants by

representation[.]" N.J.S.A. 3B:5-4(a). Here, those entitled to take by intestacy would be plaintiff Richard Pfeifer, defendant Joan Langone, and Walter Pfeifer's widow and three children, plaintiffs Katherine Pfeifer, Deborah McCandless, Lisa Flynn and Frances Pero. Under either of those two circumstances, the need to join Verna's estate as an indispensable party would become moot.

In contrast, if Verna died testate, and the beneficiaries of her Will are different from the four remaindermen in the Trust Agreement, her estate should be joined as a party to this litigation because those beneficiaries would be entitled to share in the value of her life estate at the time the property was sold. See N.J.S.A. 3B:10-25 (conferring on the "personal representative of a decedent domiciled in this State at his death . . . the same standing to sue and be sued in the courts of this State . . . as his decedent had immediately prior to death").

At appellate oral argument, we inquired of the parties if Verna left a Will. Neither side knew the answer to that question. Consequently, we remand for a hearing to determine the beneficiaries of Verna's estate, as she was an indispensable party.

On remand, if the court determines that no person other than the existing parties would have been entitled to assert an interest in Verna's life estate, then the judge shall confirm the entry of the $100,810.51 judgment against both defendants, and the $116,088.49 judgment against Joan. If, in contrast, there are additional beneficiaries, the judge shall proceed accordingly.

Having agreed with defendant's contention that Verna should have been named as a necessary party to the action, and that the value of Verna's life estate should have been taken into consideration in determining damages, we turn to defendants' remaining claim.

Joan next asserts that the award of punitive damages -- the forfeiture of her interest in the Brooklyn property -- was improper as there was no proof of fraud. As we have noted, at the proof hearing, the judge reasoned that Joan's stipulation of liability, and her consent to the entry of default subject only to a hearing on damages, encompassed a confession that she committed fraud. The court observed that the October 1999 Trust Agreement imposed a fiduciary duty on Joan to safeguard the interests of the remaining beneficiaries named in the Trust Agreement, and that by conveying the property to third parties and appropriating all of the settlement proceeds, Joan violated

the express terms of the Trust Agreement, and thereby breached her fiduciary duty to the remaining beneficiaries. The judge also observed that the complaint alleged that Joan's diversion of the settlement proceeds to herself and her co-defendant, her son John, constituted fraud. The judge reasoned that by stipulating to liability, Joan had acknowledged that those allegations were true. The judge stated:

> [Joan] clearly indicates that the [$]100,000, for example, was being utilized to pay off the loan . . . that her son had received from the wrong kind of people. . . . [Therefore], in the Court's eyes [there is] a sufficient basis for, clearly, a violation of her contractual duties, responsibilities to her siblings, but, more importantly, it's a violation of her fiduciary duties whereby she agreed and acknowledged using those monies for personal interest.

It is undisputed that Joan, as trustee, was obliged to administer the trust solely for the benefit of the beneficiaries, herself and her siblings. A trustee is "not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiary[.]" McAllister v. McAllister, 120 N.J. Eq. 407, 411 (Ch. 1936). Whether conceptualized as a surcharge against Joan's interest, see Silverstein v. Last, 156 N.J. Super. 145, 156 (App. Div. 1978) (specifying that a surcharge should be imposed when a trustee is found to have violated his or her fiduciary duty), or

punitive damages, see Maul v. Kirkman, 270 N.J. Super. 596, 620 (App. Div. 1994) (holding that an award of punitive damages is appropriate to compensate a party for the egregious wrongdoing of a defendant), the judge correctly determined that Joan's conduct constituted both fraud and a breach of her fiduciary duty. We affirm the award of punitive damages against her.

In sum, we affirm the monetary awards set forth in the January 25, 2011 judgment (A-3168-10), and the counsel fee award contained in the March 18, 2011 order (A-4095-10). We remand, however, for further proceedings to determine whether there are any additional beneficiaries entitled to compensation. If so, the judge shall value Verna's life estate. He should also identify the parties entitled to share in the compensatory damages, and adjust the dollar amounts of the judgments and punitive damages accordingly.[5] If there are no additional beneficiaries,[6] the two orders under review should be reinstated.

Affirmed in part; reversed in part, and remanded. We do not retain jurisdiction.

[5] Even if there are other beneficiaries, they would not be entitled to share in the counsel fee award, as they were not parties to the present action. For that reason, we have excluded the counsel fee award from the remand proceedings.

[6] As we have already noted, the judge should initially determine whether the relevant proceedings should be conducted in New York or New Jersey.