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This opinion shall not "constitute precedent or be binding upon any court."  
Although it is posted on the internet, this opinion is binding only on the  
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-2484-15T1

IN THE MATTER OF THE ESTATE  
OF JOAN MCFADDEN, Deceased.

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Argued February 6, 2018 – Decided February 22, 2018

Before Judges Fasciale, Summers and Moynihan.

On appeal from Superior Court of New Jersey,  
Chancery Division, Burlington County, Docket  
No. 2003-0952.

I. Dominic Simeone argued the cause for  
appellant John McFadden (Simeone & Raynor,  
LLC, attorneys; I. Dominic Simeone, Bryan T.  
Eggert, and Kenneth E. Raynor, on the briefs).

Herbert J. Stayton, Jr., argued the cause for  
respondents Joseph R. McFadden and Vincent J.  
McFadden (Ridgway & Stayton, LLC, attorneys;  
Herbert J. Stayton, Jr., on the brief).

PER CURIAM

John McFadden (defendant) appeals from a January 11, 2016 order directing him to repay and reconvey assets to Joan McFadden's (decedent's) estate and awarding counsel fees to Joseph R. McFadden and Vincent J. McFadden (collectively plaintiffs). We affirm.

In July 1998, decedent executed two powers of attorney (POAs) and a Living Will-Durable Health Care Power appointing defendant

(her nephew) as her agent and attorney in fact, and Mary Sexton (decedent's niece and defendant's sister) as her alternative agent and attorney in fact. The two POAs stated that they would become effective upon the following conditions: (1) incapacity declared by a court of competent jurisdiction; (2) appointment of a conservator or guardian based upon incapacity; (3) certification of two licensed physicians that decedent was incapable of caring for herself and physically or mentally incapable of managing her financial affairs; or (4) upon executed certification of the decedent that the agent was fully authorized to act under the POAs. Plaintiffs assert there was no evidence at trial to prove the POAs' prerequisites were ever satisfied.

More than a week later, decedent executed a will. The will made five specific bequests to three charitable organizations and to two friends. The will left the residue in equal parts to thirteen nieces and nephews. The will named defendant and Mary Sexton as co-executors of the estate.

Decedent was plagued with a myriad of medical issues including Parkinson's disease, multiple accidents resulting in broken hips, and degenerative mental issues. Defendant assisted decedent with day-to-day tasks and even moved to her residence to provide her care.

Decedent eventually moved to an assisted living facility, where she remained until her death. Defendant asserts that decedent expressed her wish for him to have her home, with a life estate reserved for herself, and for him to use her money to pay for his expenses so that he could remain in the area and take care of her. Plaintiffs assert no witness at trial could testify to this desire besides defendant.

In April 2001, defendant met with decedent's lawyer and indicated that decedent wanted to gift him \$50,000. Decedent's lawyer informed defendant that decedent could sign a care agreement whereby defendant would be paid \$1500 per month as decedent's geriatric care manager. In May 2001, decedent's checking account shows withdrawals of \$1200 per month. Defendant testified he did not know who received those checks.

In May 2002, decedent's lawyer prepared a deed transferring decedent's home to defendant for one dollar of consideration; it was signed by defendant as decedent's attorney in fact. In October 2002, decedent passed away.

In May 2003, Mary Sexton executed a Renunciation of Co-Executor; and defendant made an Application for Probate and was appointed the executor of decedent's estate. Defendant did not notify the beneficiaries listed in decedent's will that the will existed and had been probated.

In 2006 and 2008, defendant executed a mortgage and a home equity line of credit. When defendant transferred the deed to himself, there were no outstanding mortgages or liens against the home. At trial, defendant testified there was approximately \$285,000 outstanding on the home equity line of credit.

In late 2011, plaintiffs became aware of decedent's will. Plaintiffs alleged defendant improperly used estate funds for his own expenses. In March 2012, plaintiffs filed a verified complaint alleging breach of fiduciary duty; conversion of estate assets; negligent performance of fiduciary duties; theft of estate assets; undue influence; lack of mental capacity; fraudulent transfer, alienation, and hypothecation of estate assets; tortious interference with the expectation of inheritance; and unjust enrichment.

Following trial in July 2015, the judge found that decedent "clearly lacked testamentary capacity to change her will during the years 2001 and 2002 and clearly lacked the comprehension required to make an informed decision to allow [defendant] to reimburse himself for all the expenses that he clearly helped himself to." Furthermore, the judge found defendant

totally lacks believability, totally lacks credibility, but what is also obvious to me is that he has not even one ounce of remorse in his soul . . . for all the transgressions he has committed in his obvious quest to loot

his aunt's estate and to leave the cupboard bare for those nephews and nieces and other beneficiaries entitled to recover under the last will and testament of the decedent.

The trial judge found that although defendant may have been a caring and loving nephew for most of decedent's life, "it is just as clear that he totally abandoned his obligations to her as a fiduciary under the power of attorney and as executor of her estate." He added, "[i]t is clear to me, and I find the record amply demonstrates, that [defendant] did his very best to intentionally hide the terms of his aunt's will from the siblings and other cousins," and found that the statute of limitations (SOL) would be equitably tolled. Further, he recounted numerous medical records that described decedent's diminished capacity to comprehend and communicate from 1999 to her death in 2002. He concluded that decedent "had zero testamentary capacity, zero capacity to make informed intelligent decisions" when defendant claims she made such decisions. The judge found that defendant exercised undue influence over decedent, evidenced by an unexecuted asset protection plan prepared by her lawyers that would have protected her home and other assets.

The judge entered a final order finding: (1) the estate shall not recoup \$10,000 defendant gifted to decedent's friend, a specific beneficiary in decedent's will; (2) defendant shall

reconvey decedent's home to the estate, subject to the mortgage lien of record; (3) the parties shall inspect and inventory the personal property in the home; (4) defendant shall provide plaintiffs with documentation proving the mortgage was current as well as provide proof of payment of property taxes, homeowners insurance, and utilities; (5) defendant shall repay \$422,576 to the estate, representing the outstanding mortgage balance, payments to defendant's American Express account, and other unaccounted for funds from decedent's account plus interest; (6) plaintiffs shall be entitled to counsel fees and costs totaling \$126,875; and (7) the remaining \$7000 in the estate shall remain frozen.

On appeal, defendant argues the probate court erred by denying his motion for summary judgment; denying his subsequent cross-motion for a Lopez<sup>1</sup> hearing; failing to stay the matter to permit defendant to intervene in the Law Division matter involving decedent's banks; shifting the burden of proof to defendant without first having disposed of the Lopez hearing issue; deeming laches and SOL inapplicable, and finding plaintiffs carried their burden with regard to equitable tolling; assessing damages, and making

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<sup>1</sup> Lopez v. Swyer, 62 N.J. 267, 275-76 (1973).

findings of fact based upon documents and other information not in evidence; and the trial judge was biased.

Defendant argues the pre-trial judge erred by denying his motion for summary judgment because defendant was decedent's attorney in fact, and the SOL and laches barred the action. When reviewing an order denying summary judgment, we apply "the same standard governing the trial court." Oyola v. Liu, 431 N.J. Super. 493, 497 (App. Div. 2013). We owe no deference to the motion judge's conclusions on issues of law. Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). A court should grant summary judgment when the record reveals "no genuine issue as to any material fact" and "the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). Applying these standards, we conclude that the pre-trial judge did not err in denying defendant's motion for summary judgment.

Defendant relies on N.J.S.A. 2A:14-1, which provides:

Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6

years next after the cause of any such action shall have accrued.

Defendant argues that because decedent passed away in October 2002 and plaintiffs filed their complaint in 2012 – over the six-year SOL – plaintiffs were time-barred or, alternatively, laches applied, entitling him to summary judgment. "Laches is an equitable doctrine, operating as an affirmative defense that precludes relief when there is an 'unexplainable and inexcusable delay' in exercising a right, which results in prejudice to another party." Fox v. Millman, 210 N.J. 401, 417-18 (2012) (quoting Cty. of Morris v. Fauver, 153 N.J. 80, 105 (1998)).

Defendant argues plaintiffs had sufficient opportunity to inquire as to the status of the decedent's property and about the POA over the ten years since decedent's death. He also asserts that there was substantial unfairness to him in this case because of the amount of time that had passed. However, plaintiffs argue that the SOL only began to run in December 2011, when plaintiffs discovered the will.

There existed genuine issues as to when the action accrued and when plaintiffs knew or should have known they had a claim, especially when viewing the facts in the light most favorable to plaintiffs. The pre-trial judge found that defendant made efforts to conceal the will from the beneficiaries and recognized that

plaintiffs only found the will in 2011. She wrote a comprehensive statement of reasons and concluded there were "many factual issues that preclude summary judgment." We agree.

Next, defendant argues that the pre-trial judge improperly denied his cross-motion for a Lopez hearing to determine if he was entitled to relief from the SOL. We conclude this argument is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add the following brief comments.

The pre-trial judge carefully considered whether to grant the Lopez hearing to determine when plaintiffs knew or should have known they had a cause of action. The judge determined she could consider the evidence on the SOL issue and perform the Lopez analysis without bifurcating the trial. The trial judge later heard testimony from witnesses to determine whether the SOL applied, conducted a full Lopez analysis, and recognized the burden of proof was on plaintiffs; and he determined that plaintiffs were entitled to equitable tolling. The decision not to bifurcate this issue was not an abuse of discretion, or prejudicial to defendant.

Next, defendant argues that the pre-trial judge's decision not to stay the matter and allow defendant to intervene in a Law Division action where plaintiffs filed a complaint against decedent's bank and retirement funds institution was an abuse of discretion and clearly erroneous. Plaintiffs filed a motion to

amend their verified complaint to add Morgan Stanley and Pentagon Federal Credit Union as additional defendants, but the motion was denied. Plaintiffs then filed a separate complaint against Morgan Stanley and Pentagon Federal Credit Union in the Law Division. Defendant filed a motion to stay the trial and consolidate the actions, however, the pre-trial judge denied the motion. We conclude this decision was neither an abuse of discretion nor erroneous.

Rule 4:38-1 states, "[w]hen actions involving a common question of law or fact arising out of the same transaction or series of transactions are pending in the Superior Court, the court on a party's or its own motion may order the actions consolidated." (Emphasis added). Even if the other action involved a common question of law or fact, a judge uses his or her discretion to stay the matter and allow a party to intervene.

In her statement of reasons denying the stay, the pre-trial judge explained "there is no substantial, immediate and irreparable harm if trial is to go forward," as defendant was not a named defendant in the Law Division action, and "the equities do not favor defendant who filed these motions to consolidate and stay the trial on the eve of trial." We see no error or abuse of discretion in the judge denying the stay.

Next, defendant asserts that the trial judge improperly shifted the burden of proof to him mid-trial without conducting a Lopez analysis first. We disagree. This court will reverse a discretionary decision "when the stated 'findings were mistaken[,]. . . the determination could not reasonably have been reached on sufficient credible evidence present in the record[,]' or the judge 'failed to consider all of the controlling legal principles[.]'" Clark v. Clark, 429 N.J. Super. 61, 72 (App. Div. 2012) (alterations in original) (quoting Gonzalez-Posse v. Ricciardulli, 410 N.J. Super. 340, 354 (App. Div. 2009)). The trial judge, after plaintiffs presented their case, properly ruled without prejudice midtrial that the SOL did not bar the action and shifted the burden to defendant; yet made it clear that defendant could address Lopez and other discovery issues with testimony and other evidence for the judge to consider.

Next, defendant argues that the trial judge's decision erroneously found that the defenses of laches and SOL did not apply, and that plaintiffs met their burden for equitable tolling. The standard of review of judgments or orders entered after bench trials is well-settled. The findings of the judge are binding on appeal if they are "supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974).

The judge found that defendant took steps to conceal the will from the beneficiaries and that the beneficiaries should not have known they had a cause of action before 2011. Plaintiffs filed the action in 2012, and the judge properly found they were not barred by the SOL under N.J.S.A. 2A:14-1.

Laches is "an equitable defense that may be interposed in the absence of the [SOL]." Lavin v. Bd. of Educ., 90 N.J. 145, 151 (1982). The Court has explained that laches is "invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party." Knorr v. Smeal, 178 N.J. 169, 180-81 (2003). "Laches may only be enforced when the delaying party had sufficient opportunity to assert the right in the proper forum and the prejudiced party acted in good faith believing that the right had been abandoned." Id. at 181. "Our courts have long recognized that laches is not governed by fixed time limits, but instead relies on analysis of time constraints that 'are characteristically flexible.'" Fox, 210 N.J. at 418 (citation omitted) (quoting Lavin, 90 N.J. at 151). Whether laches applies "depends upon the facts of the particular case and is a matter within the sound discretion of the trial court." Mancini v. Twp. of Teaneck, 179 N.J. 425, 436 (2004) (quoting Garrett v. Gen. Motors Corp., 844 F.2d 559, 562 (8th Cir. 1988)).

In determining whether to apply laches, the court should consider the length of the delay, the reasons for the delay, and any changing circumstances of the parties during the delay. Fauver, 153 N.J. at 105. As to the delay, the court should look to an analogous SOL, and laches applies where "a claim derived from a statutory right had been lost through failure to make a timely demand therefor." Fox, 210 N.J. at 420.

Plaintiffs' delay in filing their verified complaint was excusable. The trial judge made factual findings that defendant did not act in good faith. Plaintiffs did not know they were beneficiaries in their aunt's will nor did they have reason to know. Defendant asserts plaintiffs had reason to inquire because defendant lived in decedent's house and plaintiffs attended decedent's funeral. However, defendant did not follow the proper procedure in notifying plaintiffs they were beneficiaries in the will pursuant to Rule 4:80-6 (requiring the executor of the estate to notify all beneficiaries within sixty days after the date of the probate of a will that the will has been probated). Defendant failed to notify any beneficiaries of the will's existence.

We find that the trial judge properly determined that the SOL and laches did not bar this matter. As the judge stated, "[t]o allow the [d]efendant in this matter to avail himself of these

defenses flies in the face of everything that a court of equity is [supposed to stand for."

Next, defendant argues that damages were improper and the judge made findings based on information not in evidence. Defendant argues the judge erroneously added the mortgage on decedent's house to damages. However, this was not an error, as the judge decided the house should be returned to the estate. The house was not encumbered with any mortgages or liens when defendant transferred the deed to himself acting as decedent's attorney in fact. Accordingly, the amount of the mortgage outstanding should rightfully be returned to the estate.

Defendant argues that some amounts that were withdrawn from decedent's bank account should not have been assessed as damages because there was no proof as to whom the checks were written. However, the judge performed a thorough analysis. He accounted for the known amounts decedent had as of April 2001, her known income from Social Security and pensions, her living expenses until her death, and her funeral expenses. The judge reviewed specific line items and decided not to add some of the checks to the damages. Furthermore, the judge rightfully assessed damages on behalf of the estate, rather than pro rata damages to plaintiffs. The judge stated, "my finding restores to the estate assets the testator intended for distribution and it is on her

behalf that I act, should act, where such actions are warranted." The judge recognized that future accountings would most likely be required.

Additionally, the judge did not improperly make findings of fact based on information not in evidence. N.J.R.E. 703 states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Plaintiffs presented evidence by a doctor who properly relied upon decedent's medical reports and records. Thus, the judge's findings were adequately supported in the record.

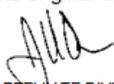
Lastly, defendant's argument that the judge was biased is without merit. Rule 1:12-1(g) states that a judge should be disqualified on the court's own motion "when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." Our Supreme Court has stated the applicable standard in determining whether disqualification is necessary: "Would a reasonable, fully informed person have doubts about the judge's impartiality?" DeNike v. Cupo, 196 N.J. 502, 517 (2008).

"[A] judge need not 'withdraw from a case upon a mere suggestion that he is disqualified unless the alleged cause of recusal is known by him to exist or is shown to be true in fact.'" Chandok v. Chandok, 406 N.J. Super. 595, 603 (App. Div. 2009) (quoting Panitch v. Panitch, 339 N.J. Super. 63, 66 (App. Div. 2001)). Moreover, "the mere appearance of bias may require disqualification. However, before the court may be disqualified on the ground of an appearance of bias, the belief that the proceedings were unfair must be objectively reasonable." State v. Marshall, 148 N.J. 89, 279 (1997) (citations omitted).

A reasonable, fully-informed person would not have doubts about the judge's impartiality. Any of the judge's comments or questions were part of the judge's fact-finding and analysis, as is his role in a bench trial. The judge took care to acknowledge that defendant cared for and must have loved his aunt. However, this love and care did not justify defendant's actions.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION