

Circuit Court for Baltimore County
Case No. 03-C-15-007123

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1723

September Term, 2016

JAMES BERNDT, ET AL.

v.

GARY HOFFMAN, ET AL.

Eyler, Deborah S.,
Wright,
Friedman,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: November 13, 2017

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

Gary Hoffman and PRP, LLC (“PRP”), appellees, brought suit in the Circuit Court for Baltimore County against James Berndt, Jim’s Plumbing and Heating (“Jim’s Plumbing”), and Christine Gagliano, appellants, seeking a declaratory judgment, permanent injunction, and money damages. The dispute arose out of the appellants’ continued use and occupation of real property belonging to PRP and Berndt’s insistence that he was a 50% owner of PRP.

Following a bench trial, the court found that Hoffman was the majority owner of PRP and that he had the authority to determine the use and occupancy of PRP’s properties. The court enjoined Berndt, Jim’s Plumbing, and Gagliano from using or occupying property belonging to PRP without first paying commercially reasonable rent, and it awarded PRP money damages against Berndt. Berndt and Gagliano noted this appeal.

FACTS AND PROCEEDINGS

The undisputed facts and the non-clearly erroneous factual findings of the trial court established the following.

Hoffman has a background in engineering and manufacturing. Berndt is a master plumber. They met socially and have known each other since the 1980s.

In the late 1970s, Hoffman formed General Services Engineering (“GSE”), a company that manufactured microwave equipment and subcontracted with the government. Hoffman was the sole owner of GSE. In 1988, GSE purchased 9731 Philadelphia Road (“9731”), in Baltimore County. GSE made improvements to that

property over time. By the mid-1990s, GSE's business had diminished and Hoffman decided he would "probably have to shut [GSE] down[.]" Hoffman began to sell off GSE's assets. In 1997, he sold 9731 to Berndt for \$90,000. Hoffman provided Berndt with a \$90,000 loan to make the purchase. The loan was secured by a promissory note. Berndt never made any payments on the note, however.

In 2000, Hoffman learned that property located at 9733 Philadelphia Road ("9733") was going up for auction. 9733 is adjacent to 9731 and the two properties share a driveway. Hoffman and Berndt decided to form PRP in order to combine, improve, and lease the two properties. Berndt transferred 9731 to PRP, and Hoffman accepted that as satisfaction of the unpaid note. PRP then purchased 9733 with money provided entirely by Hoffman.

PRP's Operating Agreement identified Hoffman and Berndt as the LLC's only members and specified that Hoffman's ownership percentage was 99% and Berndt's was 1%. The Operating Agreement was signed by both men. In addition to setting forth the ownership percentages, the Operating Agreement contained the following relevant provisions:

5.4.3 Each Member understands and acknowledges that the conduct of the Company's business may involve business dealings and undertakings with Members and their Affiliates. In any of those cases, those dealings and undertakings shall be at arm's length and on commercially reasonable terms.

...

9.4 Complete Agreement. This Agreement constitutes the complete and exclusive statement of the agreement among the Members. It supersedes

all prior written and oral statements, including any prior representation, statement, condition, or warranty. Except as expressly provided otherwise herein, this Agreement may not be amended without the written consent of all of the Members.

During the next several years, Hoffman and Berndt renovated 9733. In 2005, PRP leased 9733 to a tenant.

On May 30, 2006, Hoffman presented Berndt with a document entitled “PRP.LLC Depreciable consideration” (“DC document”). According to Hoffman, the DC document was prepared to “show[] the percentage of interest and ownership that existed in PRP” based on the efforts Hoffman and Berndt each had put into improving the two properties. The DC document reflected an increase in Berndt’s ownership interest from 1% to 15.8% and represented Hoffman’s ownership interest as 84.2%. Hoffman considered the DC document to be an amendment of the Operating Agreement, although he did not use those words when talking to Berndt about it. On May 30, 2006, Hoffman and Berndt signed the DC document.

In 2014, Berndt informed Hoffman that he (Berndt) owned 9731 and that Hoffman had purchased it for him. Hoffman was concerned about this, because, in fact, PRP owned 9731. On November 13, 2014, Hoffman discussed the issue with Berndt and both men again signed the DC document.

In 2015, Hoffman decided that he wanted to begin winding down PRP and selling its properties. By then, Berndt was operating his plumbing business, Jim’s Plumbing, out of 9731. (Jim’s Plumbing is Berndt’s sole proprietorship.) Gagliano, Berndt’s daughter, was an employee of Jim’s Plumbing and she worked out of 9731. While working for

Jim's Plumbing, Gagliano also performed clerical duties for another plumbing company, Goedeke Plumbing, Heating and Water Systems ("Goedeke"). Goedeke paid Jim's Plumbing \$465.69 per week, "primarily[] for . . . Gagliano's services." Jim's Plumbing paid Gagliano a salary that compensated her for her work for Jim's Plumbing and for Goedeke.

In the fall of 2015, Hoffman asked Berndt to start paying rent to PRP for Jim's Plumbing, for its use of 9731. Berndt refused, stating that he was a 50% owner of PRP and therefore Hoffman did not have the authority to demand rent payment.

Hoffman brought suit against Berndt, Jim's Plumbing, and Gagliano, seeking declaratory and injunctive relief and damages. As noted, the case was tried to the court. The court found that the ownership percentages in PRP were as set forth in the DC document: Hoffman, 84.2%; Berndt, 15.8%. The court recognized that the DC document had modified the Operating Agreement because it referenced Berndt's original ownership percentage (1%). The court ruled that as the majority owner of PRP, Hoffman had "the right to determine the use and occupancy of 9731 and 9733[.]"

A revised Declaratory Judgment Order and Order for Additional Relief was entered on September 1, 2016. In it the court directed Berndt to pay damages in the amount of (1) \$2,100 per month for the period beginning November 1, 2015, and concluding on the date that Jim's Plumbing vacates 9731, and (2) \$465 per month for the period beginning August 1, 2013, and concluding January 1, 2016. The \$465 per month was intended to account for "monies paid by Goedeke . . . to Jim's Plumbing" for the use

of 9731. The Order also enjoined Berndt, Jim's Plumbing, and Gagliano from using or occupying 9731 and 9733 without paying commercially reasonable rent.

On September 9, 2016, Berndt and Gagliano filed a Motion to Alter Judgment/Motion for New Trial, which the court denied on September 21, 2016. Berndt and Gagliano then noted a timely appeal, presenting four questions, which we have combined into three and rephrased:

- I. Did the trial court err by finding that Hoffman's and Berndt's ownership interest in PRP was, respectively, 84.2% and 15.8%?
- II. Did the trial court err by awarding damages for a portion of the money that Goedeke paid to Jim's Plumbing?
- III. Did the trial court err by enjoining Gagliano?¹

We answer each question in the negative and shall affirm the judgment of the circuit court.

¹ Berndt and Gagliano phrase their questions presented as follows:

- I. Did the lower court err in determining, as a matter of law, that the PRP operating agreement could only be amended in a writing signed by [sic] each of the members?
- II. Did the lower court err, as a matter of fact, in determining that the columnar analysis [the DC document] prepared by Hoffman and signed by him and Berndt was an amendment to the PRP operating agreement?
- III. Did the lower court err in determining, as a matter of law and fact, that Goedeke Plumbing had a leasehold interest in some part of the property?
- IV. Did the lower court err in refusing to dismiss the case against Christine Gagliano?

DISCUSSION

Standard of Review

Maryland Rule 8-131(c) provides that

[w]hen an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Thus, we use the “clearly erroneous” standard of review when reviewing a trial court’s factual findings and shall “view[] the evidence in the light most favorable to the prevailing party.” *Dynacorp Ltd. v. Aramtel Ltd.*, 208 Md. App. 403, 451 (2012) (citing *City of Bowie v. MIE Props., Inc.*, 398 Md. 657, 676 (2007)).

I.

Ownership of PRP

At trial, Berndt testified that on April 21, 2006, before the first time the DC document was signed, Hoffman returned from a meeting with PRP’s accountant and told him that he (Berndt) owned 50% of PRP and that he (Hoffman) was “happy with that.”

The evidence showed that from 2005 to 2014, PRP’s K-1 forms showed that Hoffman and Berndt shared profits and losses on a 50/50 basis and PRP’s tax returns for those years reflected that Hoffman and Berndt each had a 50% share of profit, loss, and capital in the LLC.

Hoffman testified that the K-1 forms and tax returns were prepared in error and that when he learned of the error he had the tax returns amended to properly show the

84.2% and 15.8% ownership interests. Hoffman testified that he never told Berndt that they each had a 50% ownership interest in PRP. The trial court credited Hoffman's testimony on that point and commented that Berndt's testimony on the issue was not "particularly credible."

Berndt contends the trial court's finding that he has a 15.8% ownership interest in PRP was incorrect. Specifically, he insists that in 2006, before he and Hoffman signed the DC document, Hoffman told him that he (Berndt) was a 50% owner in PRP; that that oral statement constituted an amendment to the Operating Agreement, notwithstanding the provision prohibiting non-written modifications; and the 50/50 ownership interests were not subsequently amended by the DC document.

Berndt's argument assumes the truth of his own testimony that Hoffman told him that they each owned 50% of PRP. The trial court found the opposite, opining that Berndt's testimony on the matter was not credible. As the Court of Appeals has explained, "[t]he trial judge is physically present during the testimony and is able to observe matters not usually reflected in a cold record, such as the demeanor and credibility of witnesses." *In re Anthony W.*, 388 Md. 251, 278 (2005). When a factual issue hinges on the contradictory testimony of two witnesses, as happened below, it is generally within a trial court's discretion to decide the issue based on a credibility assessment. *See* Md. Rule 8-131(c).

Before this Court, Berndt argues that the trial court should have been swayed by evidence suggesting that there was a 50/50 ownership, *i.e.*, the K-1 forms attached to

PRP's 2005 to 2014 tax returns. As noted, these forms, which were completed by PRP's accountant, stated that Berndt's share of profit, loss, and capital in PRP was 50%. Hoffman testified that he did not realize that the share was listed that way until it was pointed out to him in 2015, and when he learned of the error, he amended PRP's 2012 to 2014 tax returns and K-1 forms so that they listed Berndt's profit/loss/capital share as 15.8%. The trial court considered this evidence and related testimony, but rejected Berndt's testimony about it:

Mr. Berndt testified that sometime earlier, in 2006, that Mr. Hoffman had come to him after seeing their accountant, and that Mr. Hoffman said that their respective interests were 50 percent, and that . . . he was happy with that. I, I don't find this testimony particularly credible[,] . . . even though the K-1s that were introduced show that Mr. Berndt's profit/loss ratio was at 50 percent."

There is no basis on which to upset the trial court's factual finding that Hoffman did not tell Berndt that he owned 50% of PRP, which was not clearly erroneous and was made based on the court's credibility assessments. Therefore, we need not consider Berndt's corollary arguments that Hoffman's statement to Berndt modified the Operating Agreement and that the DC document did not subsequently modify the ownership percentages. The trial court's finding that the ownership interests in PRP were established by the DC document (Hoffman 84.2% and Berndt 15.8%) was supported by the evidence and was not made in error.

II.

Monies Paid by Goedeke to Jim's Plumbing

It was undisputed that Goedeke paid Jim's Plumbing \$465.69 per week (which equals \$2,017.99 per month) from August 2013 to January 2016. The trial court found that while the payments were primarily for the services Gagliano performed for Goedeke, a portion of the payments were also for Gagliano's use of 9731 while working for Goedeke and the storage of Goedeke's paperwork at 9731. In its ruling, the court explained:

Gagliano was answering the phones [for Goedeke], she was filling out work orders there on the property for Goedeke, she was filling out checks [for Goedeke] because the checkbook was there [at 9731] and, then, someone from Goedeke would . . . stop by and pick up the check to pay bills. So, there were a number of things that were being done for Goedeke Plumbing. Money was being collected by Jim's Plumbing, and none of that was shared with Mr. Hoffman.

The court found that \$465 of the \$2,017.99 monthly amount Goedeke had been paying to Jim's Plumbing was effectively for rent, as it was for the use of 9731. It ordered Berndt to pay damages of "\$465.00 per month for the period beginning August 1, 2013, and concluding January 1, 2016."

Berndt contends that ruling was legally incorrect because there were no facts in the record to show that Goedeke had a leasehold interest in PRP's property. Hoffman responds that whether or not a lease existed is beside the point because the damages of \$465 per month from August 1, 2013, to January 1, 2016, "was intended to address Berndt's and Jim's Plumbing's usurpation of a corporate opportunity for PRP." We agree with Hoffman.

As noted, the trial court found that a portion of the payments Goedeke was making to Jim's Plumbing was for Goedeke's use of 9731.² This finding was not clearly erroneous. Gagliano's trial testimony and Kenneth Goedeke's³ deposition testimony established that Gagliano performed clerical services for Goedeke while she was working at 9731. This included operating the telephone and handling invoices and other paper work. Goedeke's employees would often visit 9731 to collect work orders and checks from Gagliano.

Even though Goedeke was making use of 9731, both directly and indirectly, it made no payments to PRP. Instead, Goedeke made payments to Jim's Plumbing. Therefore, Jim's Plumbing, *i.e.*, Berndt, was receiving money for the use of PRP's property. Clearly that money should have gone to PRP. Not only did Berndt breach his fiduciary duty to PRP by taking the money from Goedeke without passing any of it to PRP,⁴ he breached section 5.4.3 of the Operating Agreement, which mandates that

² The trial court properly determined that not all of the \$465.69 per week that Goedeke was paying to Jim's Plumbing was for Gagliano's services. Gagliano received a \$32,000 salary from Jim's Plumbing. This was for the work she did for Jim's Plumbing *and* for Goedeke. Gagliano testified that about 60% of the work that she did was for Jim's Plumbing and that the remaining 40% was for Goedeke. Forty percent of \$32,000 is \$12,800. Goedeke, however, was paying Jim's Plumbing about \$24,280 per year (465.69 x 52.14 weeks in the year). That amount is nearly double the amount Goedeke owed Jim's Plumbing for Gagliano's services.

³ Kenneth Goedeke is the owner and corporate designee of Goedeke.

⁴ "[M]anaging members of LLCs owe common law fiduciary duties to the LLC and to the other members." *George Wasserman & Janice Wasserman Goldsten Family*

(Continued...)

business dealings between PRP and its “Members and their Affiliates . . . be at arm’s length and on commercially reasonable terms.” The trial court therefore did not err by ordering Berndt to pay back funds that he improperly retained.

III.

Injunction against Gagliano

In his first amended complaint, Hoffman specifically requested that the trial court enjoin Berndt from using PRP property for his personal business. Hoffman also included a count against Berndt, Jim’s Plumbing, and Gagliano in which he alleged that he and PRP were entitled to possession of 9731, but that the “Defendants [we]re in possession of [9731] . . . [and] have refused to turn over possession of the Property to Hoffman.” Hoffman sought money damages and “any other relief th[e] Court deem[ed] appropriate.” In its ruling, the trial court declared that Hoffman, the majority owner of PRP, had the right to determine the use and occupancy of 9731 and enjoined Berndt, Jim’s Plumbing, and Gagliano “from continuing to use or occupy 9731 . . . without paying commercially reasonable rent to PRP[.]”

(...continued)

LLC v. Kay, 197 Md. App. 586, 616 (2011). These duties include the duty of loyalty, *King v. Bankerd*, 303 Md. 98, 108 (1985), as well as the duty not to exclude principals from corporate opportunities. *Ebenezer United Methodist Church v. Riverwalk Development Phase, II, LLC*, 205 Md. App. 496, 501 (2012). The PRP Operating Agreement provides that “[t]he Company shall be managed by the Members.” §5.1. Therefore, both members owed fiduciary duties.

We review “a circuit court’s decision to grant or deny injunctive relief . . . under an abuse of discretion standard.” *Voters Organized for the Integrity of City Elections v. Baltimore City Elections Bd.*, 451 Md. 377, 391 (2017) (citing *Colandrea v. Wilde Lake Community Ass’n*, 361 Md. 371, 394 (2000)). We apply a non-deferential standard of review, however, to the extent that a trial court’s decision involves a question of law. *Id.* (citing *Ehrlich v. Perez*, 394 Md. 691, 708 (2006)).

Gagliano contends the trial court abused its discretion by issuing an injunction against her because Hoffman did not specifically seek injunctive relief against her and by enjoining her “from undertaking certain conduct[, even though t]here is no evidence that she had ever so conducted herself.” Neither argument has merit.

First, Rule 15-502(b) provides that “the court, at any stage of an action and at the instance of any party or on its own initiative, may grant an injunction upon the terms and conditions justice may require.” We agree with the trial court that justice in this matter required that Gagliano, who obviously had no majority ownership interest (or any ownership interest) in PRP and no right to be present at 9731, be prohibited from using and occupying that property without PRP’s permission and on the terms required by PRP. Moreover, as Hoffman points out, any injunction that prevented Berndt from operating Jim’s Plumbing at 9731 would necessarily implicate Gagliano, as she was an employee of Jim’s Plumbing.

Second, Gagliano’s assertion that there is no evidence that she used and occupied 9731 is demonstrably incorrect. At trial, Gagliano admitted on cross-examination that

her primary location for work was 9731. Accordingly, the trial court acted well within its discretion by enjoining Gagliano from using and occupying property belonging to PRP.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**