2015 IL App (1st) 134031-U

No. 1-13-4031

Fifth Division
June 30, 2015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

EUGENE HARDIMAN, Plaintiff-Appellee, v. PAUL HARDIMAN, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 06 CH 19427 The Honorable Rita M. Novak, Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* Where plaintiff purchased the subject property and lived there with his children, where he alone contributed financially to all expenses, including the earnest money and paying off the mortgages, where defendant never lived at the property, or contributed financially, or received any of the loan proceeds, and where defendant did not receive any benefit from the mortgages, we affirm the trial court's finding that the parties did not intend for defendant to have an ownership interest in the property and defendant signed as an accommodation to plaintiff. Additionally, we affirm the trial court's directed finding for defendant on plaintiff's slander of title claim because plaintiff did not prove the element of malice.

¶ 2 This case involves an ownership dispute between plaintiff Eugene Hardiman and defendant Paul Hardiman, two brothers, regarding a two-flat building in Wilmette. Although plaintiff lived at the home from 1995 until 2007 and paid all expenses, when he initially purchased the property Cole Taylor Bank (Cole Taylor) required a co-signer on the mortgage, and defendant co-signed. The property was later conveyed into a land trust with Cole Taylor as the trustee and the brothers as beneficiaries; plaintiff was given the sole power of direction over the property.

¶ 3 The brothers owned a law firm with plaintiff's wife, Patricia, which encountered difficulties when plaintiff and Patricia decided to dissolve their marriage. Defendant filed a lawsuit in late 1995 concerning issues involving their law firm and amended his complaint in early 1998 to include counts pertaining to the subject property requesting partition. The amendment to the complaint occurred shortly after plaintiff had failed to pay a trustee fee which caused Cole Taylor to resign as trustee of the land trust, at which time they conveyed the subject property to plaintiff and defendant as joint tenants with the right of survivorship. The parties settled that suit and signed an agreed settlement order, which was entered in 2004.

¶ 4 Plaintiff filed a suit to quiet title in 2006, claiming defendant had released his claim to the property in the settlement order. Plaintiff later added a count for slander of title, and the case went to a bench trial in the summer of 2013. At the close of plaintiff's case, the court entered a directed finding in defendant's favor on the slander of title claim. Following the trial, the court entered judgment for plaintiff, finding defendant was only an accommodation signer and had no ownership interest in the property. Defendant appeals the judgment of the court

that he had no property interest and plaintiff cross-appeals the directed finding that there was no slander of title. For the reasons that follow, we affirm.

¶ 5 BACKGROUND

¶ 6 Since this case concerns plaintiff's fifth amended complaint, we draw the facts from that complaint and the exhibits attached to it.

¶ 7 On June 1, 1995, plaintiff signed a written contract to purchase the property located in Wilmette, Illinois. He obtained two mortgages from Cole Taylor in the amounts of $392,000 and $48,965, but Cole Taylor requested plaintiff to provide a co-signer on the loans. Defendant co-signed the notes and mortgages, and plaintiff alleged defendant did so as an accommodation to plaintiff. When the property was purchased, it was conveyed into a land trust with the brothers as joint beneficiaries with plaintiff having the sole power of direction.

¶ 8 Plaintiff paid the earnest money, loan costs, land trust fees, and closing expenses required to purchase the property in 1995. Since the purchase, plaintiff has paid all mortgage, real estate tax, insurance, repair and maintenance payments on the property. Defendant has never paid for anything related to the property.

¶ 9 On October 28, 1997, plaintiff's "inadvertent" failure to pay $540.50 in trust fees caused Cole Taylor to resign as trustee causing them to convey the property out of the land trust to plaintiff and defendant as joint tenants without preserving plaintiff's sole power of direction. Plaintiff alleges that he never received the resignation notice sent to him by the Cole Taylor land trustee and the trustee's deed of resignation was never delivered to him.

¶ 10 Plaintiff paid the full loan amounts from Cole Taylor and the brothers were released from their obligations on May 16, 2001, which included any liability under the notes and mortgages. At approximately the same time as the Cole Taylor mortgages were released,

plaintiff obtained a mortgage from Banco Popular, which did not require him to obtain any deed, conveyance, or signature from defendant.

¶ 11 Plaintiff lived at the property with his children from the time of the purchase in 1995 until it was vacated in November 2008. The property has been vacant and uninhabitable since that time. Defendant has never used the property for any purpose.

¶ 12 I. 1995 Suit

¶ 13 Plaintiff's fifth amended complaint contains background information regarding prior litigation between the brothers.

¶ 14 On December 1, 1995, defendant filed a complaint for declaratory judgment and accounting against plaintiff, Patricia, and the law firm in which the three had been shareholders (the 1995 suit). The complaint concerned defendant's rights upon withdrawal from the firm and made no mention of the subject property at issue in the instant case. On January 5, 1998, less than 90 days after Cole Taylor's resignation as trustee, defendant amended the complaint, adding three counts pertaining to the subject property, including a request for partition.

¶ 15 On November 4, 2004, the parties settled the 1995 suit and an agreed settlement order was signed by all of the parties and entered by the circuit court. Paragraph 4 of the agreed settlement order provided:

> "All other claims filed by the parties in this matter shall be dismissed with prejudice. The Plaintiff and the Defendants fully release each other from any claims alleged herein and any other claims whatsoever that they may have against each other for any reason whatsoever up to the date of entry of this Agreed Settlement Order."

¶ 16 II. Instant Suit

¶ 17 On September 18, 2006, plaintiff filed a suit for declaratory judgment to quiet title against defendant and Cole Taylor, alleging that defendant refused to sign a quitclaim deed conveying his interest in the property to plaintiff in violation of the agreed settlement order, and that Cole Taylor refused to amend the trustee's deed to convey the property solely to plaintiff, and that any interest defendant claimed in the property was released pursuant to the agreed settlement order. On August 16, 2007, defendant filed a counterclaim and third party complaint for partition against Banco Popular, the current holder of plaintiff's mortgage. On July 31, 2008, the circuit court granted in part plaintiff's motion for summary judgment on counts I and II of defendant's second amended counterclaim and third party complaint, finding that the claim for partition was released under the terms of the agreed settlement order.

¶ 18 On September 9, 2008, plaintiff filed a verified third amended complaint to quiet title. On January 20, 2009, defendant filed a motion to dismiss the third amended complaint pursuant to section 2-615 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-615 (West 2006)), and the court granted his motion on June 2, 2009, with leave for plaintiff to replead the complaint.

¶ 19 On November 18, 2009, plaintiff filed a *pro se* verified fourth amended complaint. Count I of the complaint sought reformation of the settlement order entered in the 1995 suit, and count II requested rescission of the settlement order. On March 11, 2010, defendant filed a motion to dismiss plaintiff's fourth amended complaint pursuant to section 2-615 of the Code. On June 17, 2010, the court granted defendant's motion to dismiss plaintiff's fourth

amended complaint with prejudice, finding that it lacked jurisdiction to modify the 2004 order.

¶ 20 Plaintiff appealed and on March 2, 2012, we affirmed the trial court's dismissal of his claims for rescission and reformation and reversed the dismissal of plaintiff's claim to quiet title. *Hardiman v. Hardiman*, 2012 IL App (1st) 102384-U.

¶ 21 On September 27, 2012, plaintiff filed a *pro se* verified fifth amended complaint. Count I was a quiet title action, with plaintiff seeking a finding that defendant signed the Cole Taylor mortgage documents as an accommodation to plaintiff, asking for a finding that defendant should have been removed from the title to the property when the Cole Taylor mortgage was released, and requesting an order compelling defendant to quitclaim any and all interest and claimed interest in the property to plaintiff, and further requesting an order compelling defendant to execute any documents necessary to transfer any and all interest or claimed interest in the property to plaintiff. Count II was for a slander to title and alleged that defendant intentionally made false and malicious oral and written publications that he was rightfully on title to the property after the Cole Taylor mortgage was released.

¶ 22 This matter proceeded to a bench trial, which was held over two separate days, June 11, 2013, and August 15, 2013. The brothers were the only two witnesses at trial with each brother testifying twice—once in plaintiff's case in chief and once in defendant's.

¶ 23 A. Plaintiff's Case In Chief

¶ 24 On June 11, 2013, plaintiff[1] called defendant as his first witness. Defendant testified that he is an attorney and had worked at the law firm with plaintiff and Patricia from around 1983 to October 5, 1995. He testified that he and plaintiff were involved in a number of business

[1] Plaintiff largely represented himself at trial, although Patricia, his ex-wife, filed an appearance and examined plaintiff on the witness stand.

ventures in the 1980s, including a real estate development in Barrington Hills and North Barrington; owning real estate in the uptown, Logan Square, and Lincoln Park areas in Chicago; and investing in a restaurant. He testified that up to July 31, 1995, he considered plaintiff as one of his best friends; he was the godfather of one of plaintiff's children.

¶ 25 Defendant testified that there had been turmoil in their law office throughout 1995 because of the divorce, and defendant told him Patricia would be leaving the firm and that the brothers would continue to practice together.

¶ 26 Defendant testified he was aware plaintiff was looking for a home in the springtime of 1995, and he recalled plaintiff requested that he visit the subject property around May 31, 1995. He visited the property and described it as a two-flat house, one of which was a large apartment. At that time, he and plaintiff concluded the rental value of the larger apartment was about $2,000. When questioned at trial, defendant recalled very little about the configuration of the home.

¶ 27 With regards to why defendant agreed to cosign, the following exchanged occurred:

> "Q: You agreed to cosign on the loan because you believed I would remain your law partner well into the future. Is that right?
>
> A: Yes. You would continue in that professional corporation. You would work diligently. You would get your act together, and that was going to be helpful to you because you very much wanted a single-family home in Wilmette, which this wasn't, but it was a two flat, and it was better because you got income and you could afford it."

¶ 28 He agreed that plaintiff had signed the contract with the sellers. He recalled providing his financial information to Cole Taylor to obtain the mortgage. Defendant testified that he did not put any money into the home.

¶ 29 Regarding the allegation of slander, defendant testified that in the past 12 months, he did not think he discussed with anyone outside the litigation that he was the owner of the property in question. However, he also testified:

> "Q: Okay. Since November 2004, have you ever represented to anybody outside of the judicial proceedings that you were the owner of [the property]?
>
> A: Yes. I've had discussions with my family, my wife, and daughters that I was an owner of the property. It also may have been mentioned to other people during that period of time.
>
> Q: What other people?
>
> A: Can't recall.
>
> Q: But you're sure that you represented yourself as an owner of the property during that period of time?
>
> A: Yeah. I'm listed as an owner of the property. Originally, I was a beneficial owner of the property with rights of survivorship, and after you didn't pay the trust deed fee, I became a legal owner."

¶ 30 Plaintiff also testified on his own behalf that he is an attorney and that he and defendant had both attended law school in Chicago and defendant was his best friend. He and defendant had other business dealings, including the same developments, real estate, and restaurant defendant had discussed on direct. When asked about how he and defendant

handled the various projects, he testified they were brothers and did not need their agreements in writing.

¶ 31 Plaintiff testified that he thought the state of the business in the years leading up to July 31, 1995, was "near perfection" and everyone was doing well. He and Patricia were not doing well in their home life, so they agreed to a divorce in January 1995, but the divorce "did not adversely and significantly affect the law practice." However, because of the divorce, he and Patricia agreed they should not be working together and he and defendant agreed to stay together. He testified that Patricia was agreeable to a $40,000 buyout to leave the firm and take her workers' compensation files, and defendant resigned overnight on October 5, 1995.[2]

¶ 32 Plaintiff testified that he moved out of the family home in November 1994 and moved about a mile away into a small, one-bedroom apartment. At the time, he had four children and routinely had overnight visits, so he could not stay in the apartment. He visited a property across the street from his children's school on May 30 or 31, 1995. He signed the contract offer almost immediately, negotiating the price to $490,000, and he paid the earnest money of $1,300. He testified that his main goal in life at that time was to reside in the property.

¶ 33 He testified he did not recall defendant being on the premises, and he did not ask defendant to visit the property because the deal was done quickly. He testified that he did not need defendant's expertise because, in his opinion, he "was an expert on real estate in that point in time."

[2] Plaintiff does not testify why defendant resigned. However, plaintiff's complaint included a letter from defendant to plaintiff and Patricia dated October 5, 1995, stating his reasons for resigning as plaintiff and Patricia's adversarial relationship, Patricia remaining at the firm, and issues with the firm finances.

¶ 34 After he and the sellers signed the contract, he testified he contacted Cole Taylor because he "already had it lined up." He testified:

"Q: Okay. You had some discussions with Cole Taylor Bank about mortgaging?

A: Yes. Well, the first day was June 2nd. I talked to them and they gave me the deals of it, and then we had some discussions and he said that in light of the divorce, that they were looking for a cosigner to guarantee the loan.

Q: Was that a requirement?

A: I'm not sure if he said the word requirement.

Q: What did he say?

A: I think he said we need or want it. My understanding was that I could, you know, find somebody to cosign with me, and I had a couple of people available.

Q: And then what did you do?

A: Well, either Paul, because he was my partner on so many things, and we'd done so much together, or my brother-in-law, Richard McLaughlin *** But I talked to Paul about it. I said, hey, they're looking for a cosigner to guarantee the loan because of the divorce, and he basically said no problem. It wasn't a situation where he said I need this, this, and this. I'm not going to sign. We–our relationship was not like that. There was nothing like that. We set out these prerequisites, and we didn't do business like that. None. No, we did things orally ***."

¶ 35 The closing was on July 31, 1995, and plaintiff paid all of the closing costs and down payment. He testified that he maintained a bank account for the property and he was the only signatory on that account.

¶ 36 Plaintiff testified that Cole Taylor required "a land trust as beneficiaries and joint tenancy," but that he had sole power of direction, meaning that he alone would control the property. He agreed that he and defendant were named beneficiaries under the trust.

¶ 37 He testified that regarding the divorce, he and Patricia agreed that he was going to keep the subject property and she was going to keep their current home, where they had lived with the children, and defendant was aware of that arrangement prior to closing.

¶ 38 Plaintiff first learned defendant was claiming some form of interest in the property in the third amended complaint in the 1995 suit and he believed that complaint was verified in January 1998. He testified that "October 28, 1997, Cole Taylor unilaterally deeded the property out of the trust because I had not paid a $465 trust – trust deed fee, and when they deeded it out, it didn't retain the sole power of direction, and I believe in the trust agreement there's a 30-day period where you can substitute the trust or trustee, I forget the exact legal language, after that resignation. But I didn't have notice. One of my kids signed a certified letter, and I never got it. So that 30-day period past [*sic*] and then he filed -- filed this complaint claiming an interest in the property. That's the first time."

¶ 39 Plaintiff testified that he paid off the Cole Taylor loans himself. In 2002, he refinanced with Banco Popular for $257,000. He alone negotiated the refinancing and he alone was the borrower. His operational expenses since closing included: real estate taxes; insurance; mortgages, including the Cole Taylor and Banco Popular mortgages, plus all related expenses in obtaining the mortgage from Banco Popular; utilities; and repairs and maintenance, including replacing the roof and paying a handyman for help with projects. He testified that defendant did not contribute financially to any of those expenses.

¶ 40 Plaintiff testified that he also paid for architectural drawings because he planned to rehabilitate the house. The plans were drawn out and he had submitted them to the village, but when he applied for a loan at Premier Bank, once they reviewed the title they denied the loan. He testified that now the house had deteriorated and he moved out; currently, the house is uninhabitable and vacant. The real estate taxes were reduced by two-thirds because of the condition of the house.

¶ 41 Plaintiff testified that since the time of the closing, he had lived in the house and his children had lived in the house routinely. He had lived there until about five or six years ago. He further testified that there were "absolutely never any discussions of [Paul] having any form of ownership in my home, never."

¶ 42 On cross-examination, plaintiff testified that he knew defendant was anxious for Patricia to leave the firm in January, but she had not left by the time defendant resigned on October 5, 1995. He did not think that tension between him and defendant started until August or September of 1995. Prior to the time defendant signed the promissory note, they had had discussions about Patricia leaving the firm.

¶ 43 Plaintiff testified that he is not a real estate lawyer, but he is an experienced real estate investor. He had read the trust agreement at the time he executed the document, but had a lawyer handle the deal for him. He understood that joint tenants with right of survivorship meant that he was not the only owner of the beneficial interest in the property, and if something happened to him or defendant, the other one would own the property wholly and completely, unless it was successfully contested by testators.

¶ 44 He testified that at the time Cole Taylor required a co-signer they knew it was not his intent for defendant to own the property and that was the reason plaintiff had the sole power

of direction. He testified that his understanding was that the person who has sole power of direction controls the real estate, and agreed that it meant the person with the power to direct the land trust had the power to act on behalf on the real estate.

¶ 45 Plaintiff testified that he had had a conversation with defendant where they had discussed renting one apartment but he never committed to renting it out. He did not recall discussing tax breaks for renting out one apartment.

¶ 46 Plaintiff testified that when he and defendant had a conversation, it was untrue that defendant made certain conditions; defendant never said the conditions included that Patricia leave the office, that plaintiff start performing at the office, that he wanted protection, and that he wanted to be on title of the subject property.

¶ 47 He testified that defendant sued for breach of contract and partition in January of 1998, and at that time plaintiff had missed mortgage payments and a foreclosure was filed.

¶ 48 On redirect examination, plaintiff testified Patricia stayed at the firm for as long as she did because defendant said he was not going to pay her the buyout. He said another source of tension in the office was that defendant took a $1.1 million check made out to Hardiman & Hardiman two weeks before leaving, without telling plaintiff and Patricia.

¶ 49 At the close of plaintiff's case in chief, on August 15, 2013, defendant moved for a directed finding with respect to count II, the slander of title claim. Defendant argued that the court had indicated during a pretrial hearing that if any of Defendant's claims that he was an owner appeared in a pleading or court record, it was subject to an absolute privilege. Defendant argued that there was no testimony outside judicial proceedings indicating that defendant claimed he was the owner of the property. Plaintiff responded that defendant had testified he had represented he was the owner to family members and other people he could

not remember. Defendant responded that defendant's testimony regarding representing he was the owner of the property was true and that he was "contending he's the owner of the property because he is on the title. There's nothing about that that is slanderous because it is all true." The trial court directed a finding with respect to count II, the slander of title claim. The court stated it had no indication in its notes that there was testimony of statements to family members and the only publication that had been admitted or was in evidence was in the pleading, which was subject to an absolute privilege.

¶ 50 B. Defendant's Case In Chief

¶ 51 In defendant's case in chief, plaintiff testified that sometime after defendant made a claim on the property, he spoke to his children and told them if he died, they should be able to claim his property, not defendant.

¶ 52 Plaintiff testified that the sole power of direction gave him the ability to do anything with the deed, and he believed that when the property fell out of the trust, he could have conveyed it to himself or anyone else. He testified that when the land trustee conveyed the property into a deed naming him and defendant as joint tenants with right of survivorship it was fundamentally different from the land trust because it did not preserve his sole power of direction.

¶ 53 Plaintiff testified that defendant was preventing him from living in the house because he could not obtain a loan to rehabilitate the house because defendant was on title. He thought the first time there was a cloud on title was when Cole Taylor unilaterally deeded out the property and did not preserve his sole power of direction.

¶ 54 On cross-examination, plaintiff testified that he was first aware that Cole Taylor "wanted the title to be taken in joint tenancy with the sole power of direction" on July 27 or 28, 1995,

which was after defendant agreed to cosign and after he and defendant signed the commitment letter around June 29, 1995.

¶ 55 He testified that his creditworthiness was great around the time he was buying the house. The year before he obtained a loan on his own and in 1996 he obtained a $475,000 loan on his own to refinance his restaurant.

¶ 56 He testified that there was never any written agreement that defendant would have an ownership interest. He testified that at the time or prior to closing, it was his intention that if he died, his assets would pass to his children, not defendant. He testified it has never been his intention that if he died the property would pass to defendant.

¶ 57 Defendant testified on his own behalf that during the time plaintiff and Patricia were going through a divorce and were working together, morale in the office was "horrible," but his desire at that time was to continue working and make money for his family.

¶ 58 Defendant testified that plaintiff wanted him to visit the subject property at some point in 1995, and further testified:

> "PAUL: *** [Eugene] said it would get his life together, he'd get directed, focused in his business, and he was going to work diligently in the law firm and he wanted to continue in practice with me without his divorcing wife, and he was going to get back on track.
>
> Q: What does that have to do with buying a house in Wilmette?
>
> A: What that has to do with it, because that leads up to him asking me to cosign on the house.
>
> Q: Okay.

A: And he told me as far as the finances of that, about how much he could get from one or the other of the apartments, 1500 bucks or so, that would offset a good amount of the expenses, it could be depreciated as well, and that, you know, he asked me to sign on it."

¶ 59 The total of the loan was about $441,000, and defendant had reservations about signing because it was a large amount. Defendant testified that shortly after May 31, 1995, he and plaintiff had a conversation and "discussed how much that was, which was considerable, a very large amount of money. It was discussed as far as renting out the apartment, the depreciation of half of the building because of the fact that it would be a rental [or] part rental. Those two things were discussed. And then what the cost might be, and that he could swing it and make timely payments on it. He also stated that this would give him focus, get his life back together, and he'd be working hard in the practice of law, both of us practicing in the practice of law without his divorcing wife." At the time he signed the promissory notes, defendant was satisfied the conditions he and plaintiff had discussed were going to be met and that his primary concern was the office situation.

¶ 60 Defendant testified he and plaintiff discussed ownership, and plaintiff had said it was going to be a joint tenancy with right of survivorship because he did not want Patricia to receive the house, and if he died he wanted defendant to have the house. Defendant testified it was material to his decision to sign that he was going to be on title as a joint tenant with right of survivorship and would not have signed otherwise because he would not want a $450,000 mortgage and no interest in the property. Plaintiff had not asked him to pay any money for the purchase of the property, and plaintiff would be making all the payments.

¶ 61 Defendant testified that plaintiff could not obtain a mortgage on his own because of the divorce and his creditworthiness. Over the few years prior, there were threats of shutting off utilities in one or more of the properties plaintiff was involved in because bills had not been paid.

¶ 62 Defendant testified that he was fine with plaintiff having the power of direction and did not believe plaintiff having the power of direction affected his claim to title and to the property.

¶ 63 Defendant testified that when he signed the promissory notes he did not do so as a favor or accommodation to plaintiff, he did so expecting that he would remain in title to the property until it was sold.

¶ 64 On cross-examination, defendant testified that none of the loan proceeds from Cole Taylor were paid to him and none of the loan proceeds from Cole Taylor were placed into any account on which he was a signatory or a named account holder. Nothing was paid directly to him, and he never placed any money into the house. He testified that plaintiff never had an ownership interest in his home.

¶ 65 Defendant did not remember if he attended closing but he signed the papers before closing. He testified that he did not understand all the language in the land trust document regarding power of direction. He thought he and plaintiff had held some properties in a trust previously.

¶ 66 C. Trial Court Ruling

¶ 67 The court issued its written memorandum opinion and order on December 5, 2013. The court noted the only factual issue in dispute was whether the parties intended defendant to have an ownership interest in the property. The court began its analysis by discussing a

resulting trust and stated that even when the language in a deed appears to create an express trust, a court could find a resulting trust exists when one party pays the purchase price. The court also stated that another factor to consider in determining whether a resulting trust exists is whether the parties intended one party to sign as an accommodation.

¶ 68 The court concluded that the parties did not intend for defendant to have a beneficial interest in the property when he cosigned the mortgages. The court noted that plaintiff made all payments toward the property and that "evidence alone tends to demonstrate that the parties did not intend for Paul to have a beneficial interest when he agreed to co-sign the Cole Taylor mortgages." However, the court also considered the issue of whether defendant was an accommodation signer. Based on solely the mortgage documents, there was no indication that defendant signed as an accommodation signer, so the court discussed whether defendant had received a benefit from the mortgages. The court determined plaintiff was the only one to benefit from the mortgages. The evidence showed that defendant knew plaintiff was looking for a property as his primary residence that was large enough for him and his children. Defendant had also testified that he had spoken to plaintiff about renting a portion of the property out, but it was never rented out. The court found that defendant "did not testify or identify any benefit he received, and the evidence does not reveal one." Therefore, the court determined that defendant was an accommodation signer because he did not receive any benefit from the mortgages.

¶ 69 The court concluded "the parties did not intend for Paul to have a beneficial interest in the property when he co-signed the mortgages" and ordered:

> "1. The Defendant's Motion for a Directed Verdict on Count II—Slander of Title of the Verified Fifth Amended Complaint—is granted according to the Court's ruling

on August 15, 2013. That cause is dismissed and judgment on Count II is entered in favor of the Defendant.

2. Judgment is entered in favor of the Plaintiff on Count I—Quiet Title Action of his Verified Fifth Complaint.

3. In accordance with the above findings and conclusions:

a. The conveyance of the title to Paul and Eugene Hardiman 'as joint tenants with the right of survivorship and not as tenants in common' on October 28, 1997 represents a cloud on title, as the Defendant has no valid claim to title; and

b. Title to the property *** is quieted in the Plaintiff.

4. The Defendant is ordered to execute a deed transferring his one-half interest in [the property] to the plaintiff."

¶ 70 Defendant filed a notice of appeal on December 27, 2013. Plaintiff filed a notice of cross-appeal on January 6, 2014.

¶ 71 ANALYSIS

¶ 72 On appeal, defendant argues that the court erred in determining there was a resulting trust, erred in not considering parol evidence, and erred in determining defendant was an accommodation signer. On cross-appeal, plaintiff argues that the court erred in directing a judgment for slander of title.

¶ 73 I. Quitclaim Action

¶ 74 As an initial matter, with respect to defendant's claims, we note that the parties disagree about the applicable standard of review. Defendant argues that our review should be *de novo* because the trial court erred as a matter of law in determining that a resulting trust had arisen at the time of conveyance. Plaintiff argues that our review should be whether the trial court's

findings were against the manifest weight of the evidence because the issue in dispute was a factual issue of whether the parties intended defendant to have an ownership interest in the property. We agree with plaintiff. "In a bench trial, the trial court must weigh the evidence and make findings of fact. In close cases, where findings of fact depend on the credibility of witnesses, it is particularly true that a reviewing court will defer to the findings of the trial court unless they are against the manifest weight of the evidence." *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002) (citing *Chicago Investment Corp. v. Dollins*, 107 Ill. 2d 120, 124 (1985)). Therefore, the applicable standard of review is whether the trial court's findings were against the manifest weight of the evidence. "A decision is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Eychaner v. Gross*, 202 Ill. 2d at 251 (citing *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill. 2d 213, 242 (1996)).

¶ 75 In the case at bar, the trial court determined there was a resulting trust and that defendant was an accommodation signer, and defendant argues that both conclusions were in error. However, we note that at trial the parties agreed that the only issue was whether defendant was an accommodation signer, so we begin our discussion with that issue.

¶ 76 A. Accommodation Signer

¶ 77 An accommodation signer is a person who "signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given." 810 ILCS 5/3-419 (eff. Sept. 17, 1992). An accommodation signer signs to "[lend] his name to another." *Estate of Muscato v. Northwest National Bank*, 181 Ill. App. 3d 44, 47 (citing *Godfrey State Bank v. Mundy*, 90 Ill. App. 3d 142, 144 (1980)). The parties' intentions are "the significant element is determining whether a party is an accommodation maker."

Muscato, 181 Ill. App. 3d at 47-48 (citing *Holcomb State Bank v. Adamson*, 107 Ill. App. 3d 908, 911 (1982)). Therefore, we will consider the parties' intentions when signing the mortgage documents and whether defendant received a benefit from signing.

¶ 78 The trial court noted that none of the mortgage documents explicitly indicate that defendant was signing as an accommodation signer, and we agree. The trial court then discussed the parties' intentions and whether defendant received a benefit from signing the mortgage documents. Considering those factors, along with other evidence, the trial court determined defendant was an accommodation signer and had no beneficial interest in the property. We agree and discuss the trial court's findings below.

¶ 79 The trial court first considered the parties' intentions, and the trial testimony shows the brothers differed in their intentions regarding defendant's status as an accommodation signer and defendant's ownership interest, if any. Plaintiff testified that defendant had agreed to sign "no problem," and imposed no conditions on signing. Plaintiff also testified that he and defendant never discussed defendant having an ownership interest in the property. However, defendant testified that prior to signing, he imposed conditions on plaintiff, including that plaintiff remain at the law firm and work diligently. He stated he and plaintiff had discussed ownership and that plaintiff said the property was going to be a joint tenancy with right of survivorship because he did not want Patricia to receive the house, and if he died he wanted defendant to have the house. Finally, defendant testified that he did not sign as an accommodation to Eugene.

¶ 80 In addition to the parties' intentions, the trial court next considered whether defendant received a benefit from signing the mortgage documents to determine if he was an accommodation signer. The trial court found that plaintiff was the only party to benefit from

the Cole Taylor mortgages and found no evidence that defendant received a direct or indirect benefit. Defendant argues that this was an error because he received a direct benefit from signing because it would benefit the law firm. He also argues that the right of survivorship was an indirect benefit.

¶ 81 "When a party receives no direct benefit from the execution of the note it is likely he will be regarded as an accommodation party." *Holcomb State Bank v. Adamson*, 107 Ill. App. 3d 908, 911 (1982) (citing *Godfrey State Bank v. Mundy*, 90 Ill. App. 3d 142, 146 (1980)).

¶ 82 At trial, defendant testified that he agreed to sign the mortgage documents because he thought once plaintiff lived on the property he would "continue in that professional corporation. [Eugene] would work diligently. [Eugene] would get [his] act together." This demonstrates defendant believed the law practice would benefit if he agreed to sign the mortgage documents. Defendant also testified that if plaintiff were to die, he would receive the entire property because he had a right of survivorship, which demonstrates another benefit.

¶ 83 Plaintiff, however, testified defendant had not set forth any conditions that plaintiff work harder at the law firm prior to signing the mortgage documents, and defendant agreed to sign "no problem." This demonstrates that plaintiff believed defendant would receive no benefit if he agreed to sign the mortgage documents. Plaintiff further testified that he had discussed with his children that they should receive the property if he were to die, not defendant, indicating his belief that defendant did not benefit from the property.

¶ 84 The trial court considered other evidence, in addition to the parties' intentions and whether defendant received a benefit, to determine if defendant had an ownership interest in the property. Plaintiff was the only party to contribute financially to the property; he paid the

purchase price and all additional expenses related to the property. Defendant did not pay any portion of the earnest money and did not pay any of the mortgage loan payments, real estate taxes, insurance maintenance, repairs, or the land trustees fees related to the property. Defendant testified that he had made no financial contribution to the property and had received no loan proceeds from Cole Taylor. Plaintiff was also the only party to ever live on the property, which was his primary residence and large enough to accommodate his children. Although there were discussions about renting out a portion of the property, it was never rented out, and therefore there was no rental money as a benefit. Finally, plaintiff alone negotiated with the sellers, and he alone negotiated the Cole Taylor mortgages and Banco Popular mortgage.

¶ 85 Although there was some testimony that showed defendant may have had received a benefit from signing the mortgage documents, the trial court considered all the evidence and determined that the parties did not intend for defendant to have a beneficial interest and plaintiff was the only party to benefit from the mortgages. "The trial court is in a superior position to hear and weigh the evidence and determine the credibility of the witnesses," and "we decline to substitute our judgment for that of the trial court." *In re Estate of Feinberg*, 2014 IL App (1st) 112219, ¶ 38 (citing *In re Estate of Teall*, 329 Ill. App. 3d 83, 91 (2002). In the case at bar, we cannot find the trial court's conclusion that defendant received no benefit from signing the mortgage documents and signed as an accommodation to plaintiff to be against the manifest weight of the evidence.

¶ 86 Other courts have used similar reasoning as the trial court to conclude that a party is an accommodation signer and listed four factors to consider, which include: "(1) the party did not participate in negotiations for credit or subsequent modifications of credit arrangements,

(2) the evidence showed that the creditor was aware that the party was not the one seeking the credit, (3) the party was not the one to whom proceeds were credited and (4) the party had no interest in the purpose for which the proceeds were used." *Chandler v. Maxwell Manor Nursing Home*, 281 Ill. App. 3d 309, 324 (1996) (citing *Agribank, FCB v. Whitlock*, Ill. App. 3d 299, 304 (1993)). Although the trial court did not use these elements, it discussed each to determine that defendant was an accommodation signer.

¶ 87 Defendant argues the trial court did not consider parol evidence of the parties' intentions, but we cannot find his argument persuasive. Both parties testified extensively about whether they intended defendant to have an ownership interest in the property, and the trial court determined the credibility of each witness. In its memorandum opinion and order, the trial court specifically discusses each party's intentions regarding ownership interest in the property, indicating it did not ignore the testimony of each party presented in court. Because we cannot determine the credibility of the witnesses, we defer to the trial court.

¶ 88 B. Resulting Trust

¶ 89 The trial court also determined that a resulting trust existed, and defendant argues that the trial court erred "in determining that a resulting trust had arisen at the time of conveyance of the property at closing in 1995, with [plaintiff] as the sole beneficiary" because this was an express trust and a resulting trust cannot exist if there is already an express trust. However, because we affirm the trial court's decision regarding Paul's status as an accommodation signer, there is no need to consider the resulting trust issue.

¶ 90 II. Slander of Title

In his cross-appeal, plaintiff argues that the court erred in directing a finding for slander of title. In the instant case, the trial court entered a directed finding in the slander of title

action at the close of plaintiff's case. A directed finding is "appropriate when, viewing the evidence in a light most favorable to the nonmovant, the evidence so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand." *Scardina v. Nam*, 333 Ill. App. 3d 260, 268 (2002). "A directed verdict in favor of a defendant is appropriate when the plaintiff has not established a *prima facie* case. A plaintiff must present at least some evidence on every essential element of the cause of action or the defendant is entitled to judgment in his or her favor as a matter of law." *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 123 (2004). Because this is a matter of law, the applicable standard of review is *de novo*. *Sullivan*, 209 Ill. 2d at 112. *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 91 "A plaintiff asserting slander of title bears the burden of proving the following: (1) the defendants made a false and malicious publication, either oral or written; (2) that such publication disparaged the plaintiff's title to property; and (3) damages due to such publication." *Gambino v. Boulevard Mortgage Corporation*, 398 Ill. App. 3d 21, 62 (2009) (citing *Chicago Title & Trust Co. v. Levine*, 333 Ill. App. 3d 420, 424 (2002)). "A plaintiff must also prove that the defendants acted with malice." *Levine*, 333 Ill. App. 3d at 424 (2002) (citing *American National Bank & Trust Co. v. Bentley Builders, Inc.*, 308 Ill. App. 3d 246, 252 (1999). "To prove malice, the plaintiff must show that the defendants knew that the disparaging statements were false or that the statements were made with reckless disregard of their truth or falsity." *Levine*, 333 Ill. App. 3d at 424 (citing *Bentley Builders*, 308 Ill. App. 3d at 251-52). "A defendant acts with reckless disregard if he publishes the allegedly damaging matter despite a high degree of awareness of its probable falsity or if he has serious

doubts as to its truth." *Levine*, 333 Ill. App. 3d at 424 (citing *Bentley Builders*, 308 Ill. App. 3d at 252).

¶ 92 Plaintiff failed to prove the first element of a slander of title action because he failed to prove that defendant "made a false and malicious publication." At trial, there was very little discussion regarding the slander of title claim. To establish the elements of slander of title, plaintiff questioned defendant and the following exchange occurred:

"Q: Okay. During the past 12 months, have you represented to anybody outside of the judicial proceedings here that you were the owner of [the property]?

A: Did I make a representation? I don't think I discussed it with other people other than with regard to the litigation.

***

"Q: Okay. Since November 2004, have you ever represented to anybody outside of the judicial proceedings that you were the owner of [the property]?

A: Yes. I've had discussions with my family, my wife, and daughters that I was an owner of the property. It also may have been mentioned to other people during that period of time.

Q: What other people?

A: Can't recall.

Q: But you're sure that you represented yourself as an owner of the property during that period of time?

A: Yeah. I'm listed as an owner of the property. Originally, I was a beneficial owner of the property with rights of survivorship, and after you didn't pay the trust deed fee, I became a legal owner."

¶ 93 Plaintiff did not prove that defendant acted with malice. There was no evidence to show that defendant "knew that the disparaging statements were false or that the statements were made with reckless disregard of their truth or falsity." *Levine*, 333 Ill. App. 3d at 424 (citing *Bentley Builders*, 308 Ill. App. 3d at 251-52). Defendant had good reason to believe he was an owner of the property because his name is on the Cole Taylor mortgage documents, deed, and title.

¶ 94 Plaintiff argues that implied malice is sufficient and relies on *Home Investment Fund v. Robertson*, 10 Ill. App. 3d 840, 842 (1973), which states, "[a]lthough no Illinois case discusses the issue, it is clear from other jurisdictions that actual malice need not be shown; implied malice is sufficient." *Home Investment*, 10 Ill. App. at 842 (citing *Rogers Carl Corp. v. Moran*, 246 A.2d 750, 753 (1968)). However, more recent cases have called that holding into question and require a showing of actual malice. See e.g. *Contract Development Corp. v. Beck*, 255 Ill. App. 3d 660, 665 (1994); *Pecora v. Szabo*, 94 Ill. App. 3d 57, 66 (1981). Although plaintiff argues that the history of litigation between the brothers supports a finding of implied malice, the standard is actual malice and he did not prove defendant knew the statements were false or acted with reckless disregard.

¶ 95 Because plaintiff did not prove the first element, we do not find it necessary to discuss the other two. We affirm.

¶ 96 CONCLUSION

¶ 97 For the foregoing reasons, we find defendant's arguments on appeal are not persuasive and plaintiff's arguments on cross-appeal are not persuasive, and we affirm the trial court's decision.

¶ 98 Affirmed.