2013 IL App (3d) 120026-U

Order filed February 21, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

JOHN PLUCIENNIK, Plaintiff-Appellee, and DAN RIPPEL, Intervening Plaintiff-Appellee, v. TCB UNIVERSITY PARK COLD STORAGE, LLC, and MCV VENTURES, LLC, Defendants-Appellants, and MARK VANDENBERG and CONTINENTAL REFRIGERATED SERVICES, LLC, Defendants.	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois, Appeal No. 3-12-0026 Circuit No. 08-L-331 Honorable Barbara N. Petrungaro, Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Wright concurred in the judgment.
Justice Schmidt dissented.

ORDER

¶ 1 *Held:* In an accounting action over the sale of real property by a limited liability company, the trial court did not err in finding that the distribution of the sale proceeds was improper, in entering judgment for the plaintiffs on that basis, and in awarding plaintiffs several million dollars in damages. The appellate court, therefore, affirmed the trial court's judgment.

¶ 2 Plaintiffs, two members of a limited liability company, brought suit against defendants, the third member of the company and the company itself, seeking an accounting of the proceeds received from the sale of the company's only asset, a parcel of real property. An accounting was tendered and plaintiffs filed an objection, challenging the distribution of the net proceeds from the sale. After a bench trial, the trial court found that the distribution was improper, entered judgment for plaintiffs, and awarded several million dollars in damages. Defendants appeal. We affirm the trial court's judgment.

¶ 3 FACTS

¶ 4 In 2003, plaintiff, John Pluciennik, and defendant, Mark Vandenberg, went into business together to own and operate a refrigerated-storage warehouse. Pluciennik was a certified public accountant with more than twenty years of experience in cold storage and with an established customer base in that industry. Vandenberg was an accomplished businessman who had formed several limited liability companies and who had the ability to secure a large amount of capital. The two businessmen were brought together for the project by intervening plaintiff, Dan Rippel, who was an employee of one of Vandenberg's companies.

¶ 5 Through the use of limited liability companies, Pluciennik and Vandenberg purchased land in University Park, Illinois, and built a cold-storage warehouse on the property. The land

was owned by one of the parties' limited liability companies, TCB, and the business was operated by another of the parties' limited liability companies, CRS.[1, 2] TCB and CRS were owned 65% by MCV (one of Vandenberg's limited liability companies), 30% by Pluciennik, and 5% by Rippel.

¶ 6 The warehouse opened in 2004. Pluciennik served as the managing partner of the business and was paid a salary and expenses. Despite the parties' efforts, however, the business struggled financially. Over the years, Vandenberg was called upon to contribute additional capital to the business, which he did by having one of his other companies transfer in funds or pay the obligations of the business. In 2006, when the business was in deep financial trouble, the parties decided to sell the real property to reduce the financial obligations of the business and to lease the property back from the new owner so that the business could continue to operate. The property was sold for approximately $63.6 million. Neither Pluciennik or Rippel received any type of distribution from the proceeds of the sale. They did, however, receive a significant tax

---

[1] To avoid unnecessary complexity in this case, we have not provided the full names of the companies involved, only the acronyms. We have also not included the designation, "LLC." All of the companies referenced in this case were limited liability companies.

[2] The real property was initially owned by CRS and then transferred to a third limited liability company, UPCS. UPCS was owned in part by TCB and in part by an equity investor, WRT. At the closing of the real property sale, WRT accepted less than its agreed-upon return and was bought out. To avoid confusion in this appeal and since none of the parties have contested the propriety of that buyout, we have simply referred to TCB as the owner of the real property.

liability as each of them received a federal K-1 tax form from the business's tax person showing that they had incurred a large capital gain from the sale. Pluciennik's capital gain was listed on his K-1 as about $4.6 million, and Rippel's was listed as about $760,000. MCV also received a K-1 from the sale, which listed its capital gain as about $9.9 million. After Pluciennik received his K-1 form and became aware that he was subject to significant tax liability, the relationship between he and Vandenberg deteriorated, and in January 2008, Vandenberg or MCV fired Pluciennik and took control of the business. Rippel was also fired later that year from his employment with one of Vandenberg's other companies because of the downturn in the economy.

¶ 7 In April 2008, Pluciennik brought suit against Vandenberg, MCV, and TCB. Rippel (collectively referred to with Pluciennik as plaintiffs) intervened in the suit. Through amended complaints, plaintiffs sought an accounting as to the proceeds from the sale of the real property. Pursuant to the trial court's order, defendants tendered an accounting. Plaintiffs filed objections to the accounting, challenging the distribution of the net proceeds from the sale and the distribution of some of those proceeds to MCV.

¶ 8 A bench trial was held on the objections over several days in September 2011. During the course of the trial, the trial court heard extensive testimony from Pluciennik, Rippel, Vandenberg, the financial person for the business and some of Vandenberg's other companies, the tax person for the business who prepared the K-1 forms, and the attorney who set up the corporations and handled the sale, lease-back transaction. The trial court also had before it numerous financial and other documents, which had been admitted as exhibits.

¶ 9 Many of the material facts at trial were not in dispute. In addition to the background information provided above, the evidence established as a matter of undisputed fact that

Vandenberg or one of his companies had made significant capital contributions to the business over the years. Vandenberg or one of his companies had provided about $1 million in capital at the start of the business and additional capital at later times when the business was in financial trouble. According to Vandenberg, over the years, he or his companies had contributed about $6 to $8 million of capital to the business. In addition, as part of the sale, lease-back transaction, Vandenberg was called upon to sign a personal guaranty of about $18 million as security for the payment of rent because of the business's past financial difficulties. Neither Pluciennik nor Rippel contributed any capital to the business at any time. Vandenberg's (or MCV's) financial person and the attorney for the business handled the sale of the real estate. Out of the net proceeds of the real property sale, about $3.3 million was eventually distributed to MCV.

¶ 10 It was also undisputed fact that TCB was governed by an operating agreement, which had been prepared by one of Vandenberg's attorneys (or an attorney for one of his companies). Of relevance to this appeal, section 6.3(a)(3) of the agreement provided that:

> "(a) After giving effect to the special allocations set forth in Section 6.4, Profit from a Capital Transaction shall be allocated as follows:
>
> (3) Any Profit in excess of the foregoing allocations shall be allocated to the Interest Holders in proportion to their Percentage Interests."

¶ 11 As for the disputed facts, the trial court heard conflicting testimony as to such matters as: (1) the reasons why the business failed and who was at fault; (2) whether the parties had a verbal agreement that Vandenberg (or MCV) would be reimbursed for his capital contributions before any distributions were made to plaintiffs; and (3) whether plaintiffs were aware prior to the sale of the real estate as to the proposed distribution of the proceeds. At the conclusion of the

hearing, the trial court took the matter under advisement. Later, in a detailed written ruling, the trial court found that the distribution of the net proceeds of the sale was improper, entered judgment for plaintiffs, and awarded damages for each of them in an amount that was equal to the amount of capital gain listed on their K-1 forms. Defendants appealed.

¶ 12 ANALYSIS

¶ 13 On appeal, defendants argue that the trial court erred in finding that the distribution of the net proceeds of the sale was improper, in entering judgment for plaintiffs on that basis, and in awarding several million dollars in damages. Defendants assert that: (1) plaintiffs failed to satisfy their burden of proof to show that they were entitled to a distribution and the amount of that distribution; (2) the trial court's ruling was against the manifest weight of the evidence as to both the propriety of a distribution to plaintiffs and the amount of the distribution to be made; and (3) under the principles of estoppel and unjust enrichment, plaintiffs should not be allowed to recover. Plaintiffs argue that the trial court's ruling was proper and should be affirmed.

¶ 14 Although defendants attempt to invoke a more favorable *de novo* standard of review, it is well-settled that a trial court's ruling made after a bench trial will not be reversed on appeal unless it is against the manifest weight of the evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002); *Meyers v. Woods*, 374 Ill. App. 3d 440, 449 (2007). A ruling is against the manifest weight of the evidence only if it is clearly apparent from the record that the trial court should have reached the opposite conclusion or if the ruling itself is unreasonable, arbitrary, or not based upon the evidence presented. *Best v. Best*, 223 Ill. 2d 342, 350 (2006); *Meyers*, 374 Ill. App. 3d at 449. Under the manifest weight standard, deference is given to the trial court as finder of fact because the trial court is in a better position than the reviewing court to observe the conduct and

demeanor of the parties and witnesses. *Best*, 223 Ill. 2d at 350. When the manifest weight standard applies, the reviewing court will not substitute its judgment for that of the trial court on such matters as witness credibility, the weight to be given evidence, and the inferences to be drawn from the evidence. *Best*, 223 Ill. 2d at 350-51.

¶ 15 In a suit for an accounting, the party that manages or controls the venture and is in possession of the records has a fiduciary duty to the party seeking the accounting and has the burden to produce the accounting. *Couri v. Couri*, 95 Ill. 2d 91, 98 (1983); *Kennedy v. Miller*, 221 Ill. App. 3d 513, 521 (1991). The accounting should contain a statement of all of the receipts and disbursements of the entity in question and should list the financial contributions made to that entity and the current assets and liabilities of that entity. *Polikoff v. Levy*, 132 Ill. App. 2d 492, 499-500 (1971). The original source documents (vouchers, bills, cancelled checks, and etc.) should be tendered or made available so that the items listed in the accounting may be verified. *Polikoff*, 132 Ill. App. 2d at 500. A party is not relieved of its burden to produce a true and full accounting merely because the task is difficult or because the work is voluminous. *Polikoff*, 132 Ill. App. 2d at 500. Any doubt or uncertainty created by the lack of adequate records or by errors or omissions in the accounting itself will be construed against the party whose burden it is to produce the accounting. *Couri*, 95 Ill. 2d at 98; *Kennedy*, 221 Ill. App. 3d at 521. A party seeking credits against an accounting has the burden of proving that those credits are justified. *Kennedy*, 221 Ill. App. 3d at 521.

¶ 16 Having reviewed the record in the present case, we find that plaintiffs presented sufficient evidence to establish that they were entitled to a portion of any distribution that was made to the members of TCB from the net proceeds of the real estate sale. The evidence showed that

plaintiffs had a 35% interest in TCB (30% for Pluciennik and 5% for Rippel) and that TCB was governed by an operating agreement, which required that any distribution of profits that was made from the company to the members had to be made to all three members in a ratio that was equivalent to each member's percentage of ownership. Although Vandenberg claimed that he had an oral agreement with plaintiffs which allowed him (or MCV) to be paid back in full before any distribution was made to the other two members, the trial court found that Vandenberg's claim in that regard was not credible, and we find no basis upon which to reverse the trial court's credibility determination. See *Best*, 223 Ill. 2d at 350-51.

¶ 17 In addition, we do not agree with defendants' contention that the amount of damages awarded in this case was unsupported by the evidence. The trial court heard the testimony of the witnesses and had various financial documents before it from which to make its determination of damages. One of those documents was the accounting itself, which showed how the proceeds from the sale were allocated. The accounting indicated that the real estate was sold for $63.6 million and that the amount of funds available for distribution varied greatly depending upon which debts or expenses of the company were found to be legitimate. Under the circumstances of the present case, the trial court's ruling was not against the manifest weight of the evidence. See *Couri*, 95 Ill. 2d at 99 (in a partnership accounting case, the supreme court found that although some of the plaintiff's proof as to the net income of the partnership was imprecise, there was sufficient evidence from which the trial court could fashion an equitable decree and that the trial court was not required under the circumstances to detail the nature or method of its calculations); *Metro-Goldwyn-Mayer, Inc. v. Antioch Theatre Co., Inc.*, 52 Ill. App. 3d 122, 135 (1977) (in an accounting case over motion picture license fees where an exact computation of

damages was impossible, the appellate court found that the calculation of damages, although not exactly precise, formulated a reasonable estimation of the damages sustained by the plaintiffs).

¶ 18 We are also not persuaded that the principles of estoppel and unjust enrichment should prevent plaintiffs from recovering in this case. First, as to Rippel, he received no benefit or enrichment from this venture, but, rather, was saddled with a large tax liability. Second, as to Pluciennik, although he did not bring capital to the business venture, he did bring industry-specific experience and a customer base, which was very valuable to the business. The controlling agreement, which Vandenberg's attorney prepared, required that any distribution be made in proportion to each party's ownership interest. Rather than being inequitable or unfair, allowing plaintiffs to recover does nothing more than enforce the parties' agreement as to the operation of TCB.

¶ 19 CONCLUSION

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 21 Affirmed.

¶ 22 JUSTICE SCHMIDT, dissenting.

¶ 23 The majority notes that a party seeking credits against an accounting has the burden to prove those credits are justified then, immediately finds that the plaintiffs have satisfied this burden. *Supra*, ¶¶ 15, 16. As it is appears the trial court came to a similar conclusion based solely on the K-1 tax forms issued to Pluciennik and Rippel, I dissent from the majority's conclusion and decision to affirm the trial court's ruling.

¶ 24 It cannot be a coincidence that the K-1 issued to Pluciennik showed a capital gain of $4,587,968 and the trial court entered a judgment in his favor in the amount of $4,587,968. Nor

is it coincidental that Rippel's K-1 showed a capital gain of $764,661, which is the exact amount of the judgment entered by the trial court in his favor. Clearly, the trial court operated under the assumption that the amount of capital gain attributable to a partner in a joint venture as indicated on a K-1 equates to the exact amount of cash income the partner is entitled to receive from the venture. This assumption is inaccurate.

¶ 25 Marty Devine, a licensed certified public accountant, testified that the amounts indicated on the K-1 relate to gain attributable to each partner for the sale of the venture's assets. These amounts, Devine explained, in no way reflect the amount of money a partner is entitled to receive as an income disbursement.

¶ 26 Courts have recognized that a trial court errs when "erroneously" valuing a partnership based solely on amounts listed on schedule K-1 (*In re Marriage of Weiss*, 129 Ill. App 3d 166, 174 (1984) (The trial court "valued erroneously" the partnerships when it "elected to value these partnerships strictly on the basis of their capital accounts as of December 31, 1980, as shown on the Schedules K-1 ***.")), and acknowledged the principal that the taxable income reported on a K-1 does not equal the cash distribution to which a partner is entitled. *Labovitz v. Dolan*, 189 Ill. App. 3d 403, 406-07 (1989) (An examination of a limited partner's " 'K-1' tax form reveals that *** [i]n 1985, each partner was required to report a taxable income of $415,331 per unit, while Dolan distributed only $12,000 per unit; and in 1986 the partners were required to report a taxable income of $216,750 per unit, while again receiving a distribution of only $12,000 per unit.").

¶ 27 The majority suggests that the trial court arrived at the amount of the judgments after reviewing the "various financial documents before it." *Supra*, ¶ 17. However, it is clear given

that the trial court based its awards to the plaintiffs solely on the amounts listed on the K-1 forms. How else would the trial court arrive at those exact figures?

¶ 28 While the majority covets the fact that the plaintiffs "had a 35% interest in TCB" (*supra*, ¶ 16), I note that the amount the trial court awarded plaintiffs, combined totaling $5,352,629, is 35% of $15,293,226. Nowhere can I find an argument or amounts to support an argument that evidence contained in the record supports a conclusion that the plaintiffs are entitled to 35% of $15,293,226. That figure simply does not appear in any document presented. I am left with the inescapable conclusion that the trial court based the entirety of plaintiffs' awards on the fact that the joint venture issued them K-1s attributing certain capital gains to them, and they did not receive a corresponding cash distribution. As such, I find the trial court erred when rendering judgments "strictly on the basis" of the amounts "as shown on the Schedules K-1s" and would reverse those judgments. *In re Marriage of Weiss*, 129 Ill. App. 3d at 174.