SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3662-14T3

AVNESH SUPPIAH,

Plaintiff-Appellant,

v.

SYSTEMS 3000, INC.,
LORENZO FIORENTINI, and
ALLISON MEISENBACHER,

Defendants-Respondents.

Argued October 18, 2016 – Decided April 10, 2017

Before Judges Koblitz and Rothstadt.

On appeal from Superior Court of New Jersey, Chancery Division, Monmouth County, Docket No. C-163-13.

Michael Stein argued the cause for appellant (Pashman Stein Walder Hayden, P.C., attorneys; Brendan M. Walsh and Adam B. Schwartz, on the briefs).

Daniel Z. Rivlin argued the cause for respondents (Buchanan Ingersoll & Rooney, P.C., attorneys; Rosemary J. Bruno and Christopher J. Dalton, of counsel and on the brief; Mr. Rivlin, on the brief).

PER CURIAM

Plaintiff Avnesh Suppiah filed a complaint alleging an ownership interest in his former employer, defendant Systems 3000, Inc. (Systems), and seeking various related relief. The company, its shareholders and principles – defendant Lorenzo Fiorentini and his former wife, defendant Allison Meisenbacher – filed responsive pleadings denying plaintiff's allegations. The parties agreed to a bifurcated trial, addressing only Count Three of the complaint that alleged plaintiff had an ownership interest in Systems. After a bench trial in the Chancery Division, the trial judge entered orders dismissing the parties' claims because she determined that plaintiff was not a shareholder as alleged in his complaint. Plaintiff appeals from those orders.

On appeal, plaintiff argues that the trial judge misinterpreted the parties' agreement and erred as "a matter of law" by failing to recognize that, while the agreement provided for the transfer of stock to plaintiff over a ten-year vesting schedule, with conditions, the parties later modified that agreement by their conduct. The modification eliminated the vesting schedule and recognized plaintiff's ownership interest at an earlier point in time. In addition, he asserts defendants were judicially estopped from denying his status as a shareholder, the weight of the evidence did not support the trial judge's findings, and that his claims should be reinstated. We disagree and affirm.

Many of the material facts were not disputed at trial. The parties acknowledged that plaintiff was employed by Systems for almost ten years when he and Fiorentini entered into an agreement in May 2005 that expressly required plaintiff to continue to be employed by Systems as of May 15, 2015 in order to receive an interest in the company. Mechanically, the May 2005 Agreement required Fiorentini, Systems' sole shareholder at that time, to issue five shares of stock in plaintiff's name for nine years and four shares in the tenth year that Systems was to hold in escrow until 2015. It was also undisputed, however, that the company issued stock certificates to plaintiff in 2009 and 2013, and terminated plaintiff's employment later in 2013. Also, as to both the 2009 and 2013 stock certificates, it was undisputed that there was no discussion between the parties that either of the certificates were to be held in escrow by anyone or any conversation about the certificates' relationship to the May 2005 Agreement.

In her oral decision placed on the record on November 21, 2014, the trial judge reviewed the history of the parties' relationship, their written agreement, and its alleged modification, before concluding that there was no modification or discharge of the condition that plaintiff remain employed in order to obtain his ownership interest. The trial judge entered a

judgement on December 1, 2014, declaring that plaintiff did not have an ownership interest in Systems and dismissing the Third Count of plaintiff's complaint with prejudice. After concluding that the remainder of the parties' claims hinged upon plaintiff having an ownership interest, the judge entered two additional orders on March 20, 2015, dismissing all remaining claims filed by all parties.[1] This appeal followed.

"Final determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review: 'we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]'" Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (alteration in original) (quoting In re Tr. Created By Agreement Dated Dec. 20, 1961, ex rel. Johnson, 194 N.J. 276, 284 (2008)). "[W]e do not weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence." Mountain Hill, L.L.C. v. Twp. of Middletown, 399 N.J. Super. 486, 498 (App. Div. 2008) (quoting State v. Barone,

[1] The dismissals were with prejudice, except one count of the counterclaim relating to defendants' allegation that plaintiff removed company property, which was dismissed without prejudice.

147 N.J. 599, 615 (1997)). "[I]n reviewing the factual findings and conclusions of a trial judge, we are obliged to accord deference to the trial court's credibility determination[s] and the judge's 'feel of the case' based upon his or her opportunity to see and hear the witnesses." N.J. Div. of Youth & Family Servs. v. R.L., 388 N.J. Super. 81, 88 (App. Div. 2006) (citing Cesare v. Cesare, 154 N.J. 394, 411-13 (1998)), certif. denied, 190 N.J. 257 (2007). Our task is not to determine whether an alternative version of the facts has support in the record, but rather, whether "there is substantial evidence in support of the trial judge's findings and conclusions." Rova Farms Resort, Inc. v. Inv'r Ins. Co., 65 N.J. 474, 484 (1974); accord In re Tr. Created By Agreement, supra, 194 N.J. at 284. Legal conclusions, however, are reviewed de novo. Manalapan Realty v. Twp. Comm. of the Twp. of Manalapan, 140 N.J. 366, 378 (1995).

Applying this standard, we conclude the trial judge's findings were supported by substantial credible evidence and her legal conclusions were correct. We reject all of plaintiff's arguments to the contrary.

The trial focused on the parties' dispute about whether the May 2005 Agreement was modified by their conduct as it was undisputed that there was no written or oral agreement to change any of its terms. It was plaintiff's position that when the

certificates were considered with the Systems' accountant's treatment of his ownership interest, and plaintiff being placed on Systems' board of directors, it was clear that the parties abandoned the restrictions contained in the May 2005 Agreement.

It was undisputed at trial that plaintiff worked for Systems from 1996 to 2013. He started as a software developer and rose to be president of the company in 2009. In 2005, Systems' then sole shareholder, Fiorentini, proposed a plan for plaintiff to succeed him as owner when Fiorentini retired.[2] That proposal developed into a written agreement between the parties that they entered into on May 15, 2005.

The May 2005 Agreement stated in its preamble that its purpose was to provide plaintiff with additional compensation should he continue to be "employed by Systems for a period of ten (10) years from the date of this Agreement." It required Fiorentini to deliver to the company five shares of stock each year between 2005 and 2013, and an additional four shares in 2014, which were to "be held in escrow by Systems and . . . not transferred, except as set forth in the Agreement." Paragraph three of the agreement stated:

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[2] The proposal was made as plaintiff approached his tenth year with Systems. Fiorentini originally proposed that after ten additional years of plaintiff being employed, they would become equal shareholders. Plaintiff accepted the proposal but requested that he only receive forty-nine percent interest so that Fiorentini, the company's founder, would maintain control.

"In the event [plaintiff] continued to be employed by Systems on May 15, 2015 (the "Vesting Date"), Systems shall transfer to [plaintiff] the forty-nine (49) shares of Stock transferred to Systems by Fiorentini hereunder." The agreement also stated that neither Fiorentini nor Systems was obligated to transfer any stock if plaintiff's "employment with Systems has been terminated at any time prior to the Vesting Date, regardless of reasons of said termination of employment."

The parties' agreement contained two express provisions addressing its modification. It stated:

> 13. This Agreement contains the entire agreement between the parties hereto. No variations or modifications of or amendments to the terms of this Agreement shall be binding unless reduced to a writing and signed by the parties hereto.
>
> 14. This Agreement may not be changed orally, but only by an agreement in writing signed by the party against whom enforcement of any waiver, change, modification or discharge is sought.

In 2007, Fiorentini and Meisenbacher became involved in an amicable dissolution of their marriage. According to plaintiff, by 2009 he became concerned about his anticipated ownership interest in Systems due to the divorce. After expressing that concern to Fiorentini in January 2009, the company issued to plaintiff a certificate representing twenty-five shares of stock.

The shares were issued without any writing relating to the terms of the parties' May 2005 Agreement or otherwise, except for an acknowledgement of receipt signed by plaintiff.

Immediately after the shares were issued, Fiorentini and Meisenbacher entered into an agreement in February 2009 relating to their divorce. That agreement distributed one-half of Fiorentini's interest in Systems to Meisenbacher and subjected both of their interests to plaintiff's rights under the May 2005 Agreement. The divorce agreement recited that Fiorentini was the owner of "100 shares of stock" in Systems, incorporated by reference the May 2005 Agreement with plaintiff, and had attached to it a copy of that agreement. Plaintiff signed a consent to the transfer between Fiorentini and Meisenbacher that was also attached. There was no mention of plaintiff having any ownership interest in Systems at that time, except as anticipated in the May 2005 Agreement.

In May 2013, Systems issued additional stock certificates to plaintiff. Specifically, it issued an additional twenty shares after, according to plaintiff, he discussed with Fiorentini concerns he had regarding his estate plans. According to Meisenbacher, however, plaintiff asked for the certificate in connection with his unauthorized unsuccessful attempt to lease a vehicle in the company's name for his own use. Other than another

receipt for the certificates that plaintiff signed, there were no other documents prepared and signed by the parties in connection with the issuing of the additional shares. Fiorentini signed the certificate as president of the company, despite plaintiff being president at that time. Additionally, the certificate was not stamped with the corporate seal as the previous certificate had been.

Systems terminated plaintiff in September 2013 for reasons that were unchallenged in the lawsuit. Fiorentini and Meisenbacher testified that plaintiff never held himself out as an owner of the company prior to his termination, a fact that was confirmed by the testimony of two Systems' employees who worked with plaintiff.

Plaintiff testified that he originally understood that shares of stock were going to be held in escrow under the agreement until 2015 when they vested, but he contended that the May 2005 Agreement was "nullified" when Fiorentini issued the first stock certificate in 2009 because of plaintiff's concern about Fiorentini's divorce from Meisenbacher. He testified that he then requested that he "have an actual transfer be on the books, as opposed to the 2005 agreement where everything was held in escrow."

Fiorentini disagreed that the shares were issued because of his divorce. According to Fiorentini, plaintiff never expressed concern about how his divorce would affect the business in 2009,

and he issued the stock certificate because plaintiff asked for it. He stated that he was not apprehensive about issuing the certificate because "[a]t that time, it didn't matter about the certificate. The vesting dat[e] agreement [was] what . . . mattered." Fiorentini and Meisenbacher testified that the certificates were issued in good faith as an accommodation to plaintiff's requests, but really did not mean anything in terms of changing the parties' original agreement as it related to the vesting schedule and the condition that plaintiff remain employed for ten years.

Fiorentini contended that he never intended for the stock certificates to modify the May 2005 Agreement, he never planned on modifying it, nor did he ever tell plaintiff that the agreement was modified. He also stated that plaintiff made no mention of company ownership at any time prior to his termination, nor did plaintiff ever indicate that he understood the stock certificates to mean that the May 2005 Agreement was modified.

Systems' accountant testified and explained that he treated plaintiff as a shareholder for tax purposes beginning in 2009 through 2012. The company's K-1 forms that he prepared indicated the extent of plaintiff's ownership as initially twenty-five percent in 2009, but then increased over the years until 2012 when it reached forty percent. Neither Fiorentini nor the accountant

could explain why the K-1's were issued to plaintiff or prepared in that fashion, although the accountant recognized that there were discrepancies in the number of shares attributed to the three parties. According to the accountant, he never saw the May 2005 Agreement, but recalled maybe hearing about it. The accountant was unaware that plaintiff's ownership would not vest until 2015 and that the stock was to be held in escrow. If he had been aware of the restriction on plaintiff's shares, he would have prepared the tax documents differently.

Fiorentini testified that he had a discussion with the accountant in 2009 about plaintiff. He told the accountant that Meisenbacher became a shareholder and that twenty-five shares of stock were issued to plaintiff and additional shares would be issued pursuant to the May 2005 Agreement. Fiorentini never provided the accountant with a copy of the May 2005 Agreement and the accountant never requested a copy. Fiorentini stated that he did not see the error in the K-1 issued to plaintiff because he stopped looking at the returns years earlier as he relied upon his long-time accountant's preparation of the forms. Meisenbacher also stated that she never reviewed the returns prepared by the accountant. To the extent the issuing of the K-1 to plaintiff created any additional tax liability, Systems issued a bonus to him as well as Fiorentini and Meisenbacher to cover that liability.

After considering the evidence and the applicable case law, the trial judge concluded that there was no agreement – written or oral – to discharge the restriction imposed on plaintiff's shares by the May 2005 Agreement. She observed that immediately upon issuing the certificate in January 2009, Fiorentini and Meisenbacher acknowledged the viability of the May 2005 Agreement in their divorce agreement and, because the May 2005 Agreement remained in force as written, plaintiff did not acquire an ownership interest because he did not remain employed until the Vesting Date. The judge also observed that there was no change in plaintiff's job duties after he received the stock certificates and there was no consideration for the discharge of the restriction. The judge also concluded that the K-1 issued to plaintiff did "not modify the agreement."

On appeal, plaintiff first argues that his possession of the stock certificates establishes his ownership in Systems. Additionally, because the certificates did not list any restrictions, his ownership rights transferred at the time he was provided the stock certificates. Finally, plaintiff argues that the certificate stubs kept in the corporate books memorialize the immediate transfer of share ownership and further solidify that plaintiff should be recognized as an owner in Systems.

Plaintiff's argument ignores the impact of the May 2005 Agreement on his interest in Systems. While it is true that stock certificates are evidence of ownership of shares in a corporation, see N.J.S.A. 14A:7-11(1), a holder's interest remains subject to any "defense[s] or a defect[s] going to the validity of the security." N.J.S.A. 12A:8-114(3)-(4) (emphasis added). "If it is shown that a defense or defect exists, the plaintiff has the burden of establishing that the plaintiff . . . is a person against whom the defense or defect cannot be asserted." Ibid. A "restriction on the transfer of shares" is a valid defense to a claim of ownership "if imposed by . . . a written agreement among any number of shareholders or among such holders and the corporation." N.J.S.A. 14A:7-12(2). The restriction will not be enforceable against a certificate holder who was not a party to the agreement, unless he or she has actual knowledge of the restriction. Ibid.

The trial judge, therefore, correctly determined that plaintiff's mere possession of the certificates did not establish his ownership interest. As the trial judge found, based on the undisputed evidence, the parties had a written agreement that restricted plaintiff from acquiring an ownership interest unless he continued to be employed as of the Vesting Date. The agreement further provided that any modification had to be in writing signed

by the parties and it was undisputed there was no written modification.

Turning to plaintiff's next contention, we conclude his argument that the trial judge misinterpreted the May 2005 Agreement by applying it to the certificates he received, because they were not delivered by Fiorentini to Systems and then released to him, to be without sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E). Suffice it to say, plaintiff's ownership interest continued to be subject to his remaining employed by Systems as of the Vesting Date, regardless of the mechanics of how the certificates were delivered or when they were issued.

We also find no merit to plaintiff's contention that defendants should be judicially estopped from now asserting that he was not a shareholder. In support of his argument, plaintiff relies upon the treatment of his interest for tax purposes as evidence of an inconsistent position taken by defendants in an earlier proceeding. The mere filing of a tax return, however, does not support the imposition of the doctrine of judicial estoppel as it does not involve a party's successful reliance on a position taken in an earlier litigation "before a court or other tribunal," Bray v. Cape May City Zoning Bd. of Adjustment, 378 N.J. Super. 160, 166 (App. Div. 2005), or proceeding within the same litigation, either in court or in an administrative matter.

See Bell Atl. Network Servs., Inc. v. P.M. Video Corp., 322 N.J. Super. 74, 95 (App. Div.), certif. denied, 162 N.J. 130 (1999). Contrary to plaintiff's assertion, defendants' filing of a tax return without the resolution of a dispute with the Internal Revenue Service in its favor, see e. g. S & D Envtl. Servs., Inc. v. Rosenberg Rich Baker Berman & Co., P.A., 334 N.J. Super. 305, 314 (Law Div. 1999), does not support the imposition of judicial estoppel.

We turn next to plaintiff's contention that the parties' actions evinced an agreement to modify. We find no merit to this contention either.

"A written contract is formed when there is a 'meeting of the minds' between the parties, evidenced by a written offer and an unconditional, written acceptance." Morton v. 4 Orchard Land Tr., 180 N.J. 118, 129-30 (2004) (quoting Johnson & Johnson v. Charmley Drug Co., 11 N.J. 526, 538-39 (1953)). A contract modification is "a change in one or more respects which introduces new elements into the details of a contract and cancels others but leaves the general purpose and effect undisturbed." Wells Reit II-80 Park Plaza, LLC v. Dir., Div. of Taxation, 414 N.J. Super. 453, 466 (App. Div. 2010) (quoting Int'l Bus. Lists, Inc. v. Am. Tel. & Tel. Co., 147 F.3d 636, 641 (7th Cir. 1998)).

After forming the contract, the parties "may, by mutual assent, modify it." Cty. of Morris v. Fauver, 153 N.J. 80, 99 (1998) (citing Bohlinger v. Ward & Co., 34 N.J. Super. 583, 587 (App. Div. 1955)). "A modification can be proved by 'an explicit agreement to modify or by the actions and conduct of the parties as long as the intention to modify is mutual and clear.'" Wells Reit II-80 Park Plaza, LLC, supra, 414 N.J. Super. at 466 (quoting DeAngelis v. Rose, 320 N.J. Super. 263, 280 (App. Div. 1999)). A court can find an agreement to modify a contract based on the parties' actions. See Cty. of Morris, supra, 153 N.J. at 99. Parties to a contract may orally agree to modify contract provisions, even when the original agreement precludes oral modifications. Sodora v. Sodora, 338 N.J. Super. 308, 312 (Ch. Div. 2000).

Regardless of the form of the purported modification, "[a] proposed modification by one party to a contract must be accepted by the other to constitute mutual assent to modify." Cty. of Morris, supra, 153 N.J. at 100 (citation omitted). The parties must clearly and mutually intend to modify. Id. at 99. If a party to a contract "might reasonably infer that the original contract is still in force," modification of the contract is not established. Id. at 99-100.

In addition, an agreement to modify a contract "must be based upon new or additional consideration." Id. at 100 (citing Ross v. Orr, 3 N.J. 277, 282 (1949)). A court's determination of whether consideration was given should be based on "an objective examination of all of the relevant circumstances." Oscar v. Simeonidis, 352 N.J. Super. 476, 486 (App. Div. 2002). The value of consideration need not be substantial and "whatever consideration a promisor assents to . . . is legally sufficient consideration." Id. at 485 (internal quotation omitted). An act or forbearance of a legal duty that is not uncertain or doubtful is insufficient to establish consideration. Id. at 487.

Plaintiff contends that that his continued employment after expressing his concern about the defendants impending divorce constituted sufficient consideration to support modifying the May 2005 Agreement. Alternatively, he asserts that consideration can be found by a change in his job title (from Vice President to President), and his appointment to the Board of Directors. Plaintiff relies on Eliasberg v. Standard Oil Co., 23 N.J. Super. 431, 448 (Ch. Div. 1952), aff'd, 12 N.J. 467 (1953) (finding adequate consideration for a stock option plan where "options [could not] be exercised by the optionees until after one year of service, and the granting and exercise of future options depends upon continuance of service"), to support the argument that his

continued employment was sufficient consideration to establish an enforceable modification. We find his reliance to be inapposite.

Plaintiff's suggestion that his continued employment provided additional consideration ignores the facts that the certificates were issued to him for the reasons he stated and not in exchange for additional consideration. To the extent he relies upon his continued employment as consideration, it was the very same consideration for the May 2005 Agreement. The agreement specifically required his continued employment for ten years before he would have an ownership interest. It therefore could not provide the additional consideration for accelerating that interest, especially where there was no evidence that he was contemplating leaving Systems earlier than 2015 and was being provided with an incentive to remain employed. Moreover, there was no evidence that plaintiff was being required to perform any new duties for Systems. Plaintiff concedes that his day-to-day job duties remained the same, and it was only his job title that changed.

Plaintiff also claims that only the vesting schedule and requirement that he be employed on the Vesting Date were modified. However, there was no conclusive evidence that defendants assented to any modification. Plaintiff concedes that when the certificates were given to him, there was no discussion of modifying the terms

of the May 2005 Agreement orally or in writing. The only reasons for the certificates being issued, as found by the trial judge, came essentially from plaintiff's testimony. The judge found that his concern about the divorce and his estate planning needs resulted in Systems issuing the certificates. Those concerns alone were not sufficient to rebut the defense arising from the May 2005 Agreement.

Finally, as to the accountant's preparation of the K-1, and defendants' signing of the returns, plaintiff argues that it too was sufficient to establish that the parties intended to modify the May 2005 Agreement. We disagree. Fiorentini's and his accountant's testimony supported the judge's conclusion that it was meaningless as, at best, it established that the returns were issued in error based upon a miscommunication or lack of communication between Fiorentini and the accountant.

In sum, we conclude substantial credible evidence supported the trial judge's determination that plaintiff failed to satisfy his burden of establishing that the May 2005 Agreement's requirement that he remain employed as of May 15, 2015 should not have been applied to his claim.

Affirmed.