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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4418-15T3

DANIEL SHALIT, as attorney-in-fact for MILDRED SHALIT,

Plaintiff-Appellant,

v.

MICHAEL SHALIT,

Defendant-Respondent.

Argued November 16, 2017 – Decided December 6, 2017

Before Judges Simonelli and Haas.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-1032-15.

Lawrence S. Berger argued the cause for appellant (Berger & Bornstein, LLC, attorneys; Gregory J. Cannon, on the brief).

David B. Rubin argued the cause for respondent.

PER CURIAM

Plaintiff Daniel Shalit, as attorney-in-fact for the parties' mother, Mildred Shalit,[1] appeals from the January 22, 2016, and May 3, 2016 Law Division orders granting defendant Michael Shalit's motion for summary judgment and dismissing plaintiff's complaint. We affirm.

According to plaintiff's complaint, Mildred invested money in a real estate project defendant began developing in Old Bridge and Bricktown in 1989. When the project was completed in 1998, defendant put $574,664.89 that Mildred received as a return on her investment into a joint bank account in his and Mildred's names.

In June 2001, defendant withdrew $450,000 from the joint account and plaintiff contends that defendant used it "to invest in another real estate venture located on Veronica Avenue in Franklin Township[.]" Plaintiff concedes in this complaint that defendant did not give Mildred "any security or collateral, nor any ownership or partnership interest in the Veronica Avenue [p]roject" and that defendant "used the $450,000[] for his own personal investment in" the project.

Defendant never returned these funds to the joint account. On December 31, 2008, more than six years after he took the money

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[1] Because the parties share the same surname, we refer to Mildred Shalit as Mildred in this opinion and, in doing so, intend no disrespect.

from the joint account, defendant sent a letter to Mildred in response to a letter she sent him eleven months earlier.[2] At the end of the letter, defendant wrote:

> The money you advanced me for the land in Franklin will be paid back. I never said I wouldn't pay you. It is unfortunate that the township fought all the approvals and caused the closing to be postponed so many years. I will refund your advance as soon as I sell Tapatio or the Franklin property.

On December 28, 2012, Mildred executed a Durable Power of Attorney (POA) naming plaintiff as her attorney-in-fact. On July 24, 2015, plaintiff filed a complaint in his representative role against defendant seeking the return of the $450,000.[3] Counts one, two, and three of the complaint alleged that defendant's withdrawal of the funds from the joint account was either conversion, fraud, or breach of contract. Based on the same factual allegations contained in the first three counts, plaintiff sought to impose a constructive trust on the Veronica Avenue

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[2] Mildred's November 12, 2007 letter was not introduced as an exhibit in the trial court and, therefore, is not a part of the record on appeal.

[3] The claims asserted by plaintiff in this case were originally brought by him as a counterclaim in a Chancery Division action defendant filed against plaintiff in Morris County, Shalit v. Shalit, Docket No. MRS-0091-14. Pursuant to an agreement between the parties, all claims in that matter were voluntarily withdrawn with the condition that the statute of limitations would be tolled as of October 1, 2014, the date plaintiff filed his counterclaim.

project in count four and, in count five, claimed "an equitable partnership and/or ownership interest" in the project.

Defendant filed a motion for summary judgment, asserting that plaintiff's claims were barred by the six-year statute of limitations of N.J.S.A. 2A:14-1.[4] In his brief opposing the motion, plaintiff admitted that the statute of limitations for all five counts of his complaint was six years. However, he asserted that defendant's December 31, 2008 letter to Mildred "revived" his cause of action under N.J.S.A. 2A:14-24. At oral argument on the motion, however, plaintiff argued for the first time that the twenty-year statute of limitations for "every action at law for real estate" established in N.J.S.A. 2A:14-7 applied to counts four and five of his complaint because defendant used the money he took from the joint account to invest in the Veronica Avenue real estate project.

Following oral argument, Judge Yolanda Ciccone rendered a thorough written opinion granting defendant's motion for summary judgment on counts one, two, and three of the complaint. Citing the well-established case law interpreting this statute, the judge

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[4] Defendant also argued that plaintiff's POA did not authorize him to bring a lawsuit on Mildred's behalf against one of her children. The trial judge denied defendant's motion for summary judgment on this ground and, in view of our resolution of this appeal, we do not address this contention further in this opinion.

explained that N.J.S.A. 2A:14-24 could only revive a statute of limitations period when a defendant unequivocally acknowledged a specific debt in writing and stated that the debt would be paid immediately or on demand. Because defendant's letter did not promise an immediate payment of the disputed debt, Judge Ciccone concluded that the first three counts of the complaint were barred by the six-year statute of limitations set forth in N.J.S.A. 2A:14-1.

Based upon plaintiff's newly-minted argument concerning the possible application of N.J.S.A. 2A:14-7 to this matter, the judge "preliminarily denied" defendant's motion for summary judgment on counts four and five, and invited the parties to make new submissions addressing the issue. Thereafter, defendant filed another motion for summary judgment, again asserting that counts four and five of the complaint were barred by N.J.S.A. 2A:14-1. In his response, plaintiff offered yet another new contention, this time arguing that counts four and five raised purely equitable claims for which there was no statute of limitations.

After considering these contentions, Judge Ciccone rendered an oral decision granting defendant's motion as to counts four and five and dismissing plaintiff's complaint. The judge found that the twenty-year statute of limitations for real estate transactions did not apply because plaintiff never demonstrated

that Mildred held any "interest or possessory right to real estate." Therefore, the judge determined that these counts were also actions at law that were barred by the six-year statute of limitations. This appeal followed.

With one exception,[5] plaintiff presents the same arguments on appeal that he unsuccessfully raised before Judge Ciccone. Our standard of review on appeal is well established. We review a trial court's order granting summary judgment de novo, applying the same standard the trial court applies, namely, the standard set forth in Rule 4:46-2(c). Conley v. Guerrero, 228 N.J. 339, 346 (2017).

We have considered plaintiff's contentions in light of the record and applicable legal principles and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We are satisfied that Judge Ciccone

[5] For the first time on appeal, plaintiff asserts that defendant's December 31, 2008 letter to Mildred was another act of fraud under count two of his complaint because defendant agreed to return the $450,000 and then never did. However, in addition to failing to raise this claim in opposition to defendant's two motions for summary judgment, plaintiff never even made this allegation in his complaint. We ordinarily decline consideration of an issue not properly raised before the trial court, unless the jurisdiction of the court is implicated or the matter concerns an issue of great public importance. Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (citing Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). Neither situation exists here and, therefore, we do not consider plaintiff's contention on this point.

properly granted summary judgment to defendant, and affirm substantially for the reasons expressed in her written and oral opinions. However, we add the following brief comments.

The judge correctly found that all of plaintiff's claims were barred by the six-year statute of limitations. Defendant withdrew the money from the joint account in June 2001, and plaintiff did not file his claims until October 2014, over seven years after the expiration of the limitations period in June 2007. Defendant's December 31, 2008 letter to Mildred did not re-start the limitations period under N.J.S.A. 2A:14-24. That statute states:

> In actions at law grounded on any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, so as to take any case out of the operation of [the applicable statute of limitations], or to deprive any person of the benefit thereof, unless such acknowledgment or promise shall be made or continued by or in some writing to be signed by the party chargeable thereby.

"In addition to the requirement of a writing[,] it is also necessary that the acknowledgment relied upon be such as in its entirety fairly supports an implication of a promise to pay the debt immediately or on demand." Denville Amusement Co. v. Fogelson, 84 N.J. Super. 164, 170 (App. Div. 1964) (citing Bassett v. Christensen, 127 N.J.L. 259, 261 (E. & A. 1941). Thus, in order "[t]o constitute a promise to pay sufficient to remove

the bar of the statute of limitations the promise [also] must be unconditional and unqualified." Evers v. Jacobsen, 129 N.J.L. 89, 91 (E. & A. 1942) (emphasis added).

Defendant's December 31, 2008 letter did not meet this test. He did not promise to repay any money to Mildred immediately or on demand. He also qualified his statement by saying he would "refund [Mildred's] advance" only after he sold one of two properties at some unknown date in the future. It is not even clear whether defendant's letter was referring to the $450,000 from the joint account, or some other "advance." Therefore, N.J.S.A. 2A:14-24 was clearly not applicable.

The judge also properly rejected plaintiff's assertion that there was no statute of limitations for counts four and five because they were equitable, rather than legal, claims. It is well settled that when an individual has an adequate remedy at law based on a set of facts, but allows the applicable limitations period to expire, he or she cannot revive the claim merely by seeking alternate equitable relief based upon that same set of facts. Partridge v. Wells, 30 N.J. Eq. 176, 178-80 (Ch. 1878), aff'd sub nom., Wells v. Partridge, 31 N.J. Eq. 362 (E. & A. 1879). Rather, the court must ask: "Had the suitor a remedy at law which he has lost? If the complainant . . . had a complete remedy at law, which has been lost by lapse of time, he is not entitled to

the remedy he seeks here." Id. at 179. Because plaintiff had a complete remedy at law, which he lost by allowing the statute of limitations to lapse, he was not entitled to pursue an equitable remedy based upon the same set of facts underlying all of his claims.

Finally, plaintiff specifically stated in his complaint that Mildred had no "security or collateral, nor any ownership or partnership interest in the Veronica Avenue [p]roject[.]" Thus, she plainly had no interest in any real estate involved in this project and, therefore, the twenty-year statute of limitations period for "[e]very action at law for real estate" under N.J.S.A. 2A:14-7 did not apply. See J & M Land Co. v. First Union Nat'l Bank, 166 N.J. 493, 517 (2001) (making clear, after a thorough review of the history of statutes of limitation applicable to property actions, that the twenty-year statute of limitations in N.J.S.A. 2A:14-7 is limited to claims asserting possessory rights or title to real estate).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION