SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2799-14T3

JARWICK DEVELOPMENTS, INC.,
ADA REICHMANN and JOSEF HALPERN,

Plaintiffs-Respondents,

v.

JOSEPH WILF and THE ESTATE OF
HARRY WILF, deceased, individually
and as partners in the partnership
known as J.H.W. Associates;
LEONARD A. WILF; ZYGMUNT WILF, MARK WILF;
SIDNEY WILF; RACHEL AFFORDABLE HOUSING;
HALWIL ASSOCIATES, a partnership; and
PERNWIL ASSOCIATES, a partnership,

Defendants-Appellants,

and

MARVIN L. COHEN CPA and MIRONOV,
SLOAN & PARZIALE, LLC f/k/a BECK,
WEISS & COMPANY, P.A.,

Defendants.

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Argued April 17, 2018 – Decided June 1, 2018

Before Judges Yannotti, Carroll and DeAlmeida.

On appeal from Superior Court of New Jersey, Chancery Division, Morris County, Docket No. C-000184-92.

Peter C. Harvey argued the cause for appellants (Patterson Belknap Webb & Tyler, LLP and Lasser Hochman, LLC, attorneys; Peter C. Harvey, on the brief; Sheppard A. Guryan and Bruce H. Snyder, of counsel and on the briefs).

Alan M. Lebensfeld argued the cause for respondent Josef Halpern (Lebensfeld Sharon & Schwartz, PC, attorneys; Alan M. Lebensfeld and David M. Arroyo, on the brief).

Price O. Gielen (Neuberger, Quinn, Gielen, Rubin & Gibber, PA) of the Maryland bar, admitted pro hac vice, argued the cause for respondents Jarwick Developments, Inc. and ADA Reichmann (Lowenstein Sandler LLP, and Price O. Gielen, attorneys; Michael T.G. Long and Price O. Gielen, on the brief).

PER CURIAM

This appeal arises from the denial of a post-judgment motion filed by defendants Josef Wilf, the Estate of Harry Wilf, Leonard A. Wilf, Zygmunt Wilf, Mark Wilf, Sidney Wilf, Rachel Affordable Housing, Halwil Associates (collectively, "defendants"), and the Pernwil Associates Partnership ("Pernwil" or "the Partnership"). Defendants' motion sought to escrow the entire proceeds from the court-ordered sale of Pernwil's sole asset, a 764-unit garden apartment complex known as Rachel Gardens.

The appeal was argued back-to-back with defendants' appeal in No. A-2053-13 from the December 20, 2013 judgment entered in favor of plaintiffs Jarwick Developments, Inc., Ada Reichmann, and Josef Halpern (Halpern) following a lengthy bench trial. The

judgment awarded plaintiffs substantial compensatory and punitive damages along with attorney's fees, and ordered the dissolution of Pernwil. The decades-long history that resulted in that judgment is fully set forth in our unpublished opinion in No. A-2053-13 and incorporated by reference here.

Contemporaneously with the entry of the December 20, 2013 judgment, the trial court ordered the parties to execute an agreement with independent real estate broker Kislak Company, Inc. to list and sell Rachel Gardens (the "sale order"). Defendants chose not to comply with the sale order and instead unsuccessfully sought a stay of the partnership dissolution. On April 11, 2014, the trial court granted Halpern's application for an order in aid of litigant's rights, directed defendants to execute the listing agreement within five days, and awarded plaintiffs reasonable attorney's fees necessitated by defendants' failure to comply with the sale order. On June 30, 2014, the court denied defendants' motion for reconsideration, and awarded Halpern $10,000 for attorney's fees and costs associated with his application to compel defendants' compliance. Defendants' subsequent appeal from the April 11 and June 30, 2014 orders awarding attorney's fees was also argued back-to-back with the present appeal and No. A-2053-13, and is the subject of our separate unpublished opinion in No. A-5752-13 affirming those orders.

Kislak procured an offer from Cammeby's International, Ltd. to purchase Rachel Gardens for $136 million. On May 15, 2014, the trial court entered an additional order in aid of litigant's rights that authorized plaintiffs to execute a purchase and sale agreement with Cammeby's on behalf of the Partnership for $136 million. The order further provided that, following the closing of the sale, "the parties forthwith shall proceed to dissolve the Partnership, to satisfy its debts, and to liquidate and distribute its assets. . . ."

To facilitate the dissolution of the Partnership and the impending sale of Rachel Gardens, on May 28, 2014, the parties entered into (i) a Service Agreement, and (ii) a Redemption and Sale Agreement ("RSA").

The Service Agreement provided that defendants would manage the property in strict compliance with designated orders previously entered by the trial court. It expressly stated it "contain[ed] the entire agreement between the parties relating to management of the [Rachel Gardens] Property . . . ." Notably, it was silent as to any management fee. It also stipulated that:

> In the event that any motion or proceeding is commenced to obtain a declaration of rights hereunder, or to enforce any provision hereof, the prevailing party in any such motion or proceeding shall be entitled to recover its or his reasonable attorney's fees, in addition

> to any and all other relief, whether legal or equitable, to which it or he may be entitled.

Pursuant to the RSA, for tax purposes, defendants transferred their collective fifty percent partnership interest to Pernwil. In return, they received a fifty percent interest, as tenants in common, in the Rachel Gardens property. The RSA also contained a provision awarding attorney's fees to a prevailing party, similar to that set forth in the Service Agreement.

On June 25, 2014, on the eve of the scheduled sale of Rachel Gardens, defendants moved to escrow the entire sale proceeds. They contended Jarwick's interest in the partnership should be fixed either as of December 15, 2006, the date of our prior remand[1], or October 2009, the date Jarwick filed an amended complaint seeking dissolution of the Partnership. Defendants also sought a management fee for their management of the Partnership during the dissolution period. Finally, they asserted an escrow was necessary pending the resolution of several potential claims against the Partnership. These included (i) health insurance premiums paid on behalf of Halpern by an unrelated partnership totaling $216,826.56; (ii) a performance bond posted to the Township of

[1] Jarwick Devs., Inc. v. Wilf, No. A-5027-03 (App. Div. Dec. 15, 2006).

Montville in the amount of $168,334; and (iii) a refund claim by Verizon Communications for $152,800.

In addition to opposing the motion, on June 26, 2014, plaintiffs' counsel served defendants with a frivolous litigation notice ("FLN"), pursuant to Rule 1:4-8(b)(1). The FLN stated defendants' motion to escrow the sale proceeds presented frivolous arguments, and demanded the motion be immediately withdrawn.

Upon the trial judge's retirement, the case was re-assigned to Judge Stephan C. Hansbury. Due to Judge Hansbury's unavailability, defendants' escrow motion was heard by Assignment Judge Thomas L. Weisenbeck on July 11, 2014. Following oral argument, Judge Weisenbeck denied the motion in a comprehensive oral opinion.

Addressing first the potential claim held by Verizon, Judge Weisenbeck concluded an uncertain debt that may never become payable is not subject to levy and sale. Relying on Canger v. Froysland, 283 N.J. Super. 615 (Ch. Div. 1994), and Cohen v. Cohen, 126 N.J.L. 605 (E. & A. 1941), the judge elaborated:

> [L]et me deal first with the Verizon claim . . . the thrust of the argument here is that there is alleged a possible breach of contract by Garden Communications not necessarily by plaintiffs. The claim is characterized . . . as a "possible Verizon refund claim." And that the "status of the agreement remains uncertain at this time." In summary[,] this is a speculative claim which is inadequate in

> this court's view to cause a withholding of any net proceeds.

Next, with respect to the performance bond posted with the Township of Montville, the judge found it "uncontroverted that there is $791.37 which seems to be the potential outstanding claim. . . ." In any event, the judge noted "there is some $1 million in the partnership account," which could be utilized "to the extent that there is any call for this amount."

The judge next rejected defendants' claim for health insurance premiums paid on behalf of Halpern for "a number of reasons." First, the court noted this claim, even if genuine, belonged to Knoll Manor Associates, a separate partnership that was not a party to this litigation. Additionally, relying on Knorr v. Smeal, 175 N.J. 431 (2003), the court noted defendants "knew of this claim since at least May 31, 2012 . . . but they failed to pursue it until now." Accordingly, the doctrine of waiver barred relief. Similarly, the judge relied on McNally v. Providence Washington Insurance Company, 304 N.J. Super. 83 (App. Div. 1997), in finding this claim was also barred by the entire controversy doctrine. That doctrine "requires that a party who has elected to hold back from an initial lawsuit a related component of the controversy be barred from thereafter raising it

in a subsequent proceeding." McNally, 304 N.J. Super. at 92 (citation omitted).

Next, Judge Weisenbeck denied defendants' application for management fees in light of the trial judge's March 17, 2011 order that barred payment of management fees to defendants. That order was incorporated by reference in the parties' Service Agreement and the parties expressly agreed to be bound by it.

Finally, with respect to the appropriate valuation date, Judge Weisenbeck concluded that defendants' request to limit Jarwick's interest in the Partnership to either 2006 or 2009 was "not supported by any adequate legal basis." Drawing guidance from N.J.S.A. 42:1A-45(a) and (b), the judge determined "the valuation date is not uncertain but occurs upon the sale of [Rachel Gardens]." The judge declined to address plaintiffs' application for attorney's fees but advised that they could renew their application before Judge Hansbury.

On July 24 and 25, 2015, plaintiffs filed separate motions for frivolous litigation sanctions pursuant to Rule 1:4-8, and for attorney's fees under the prevailing party provisions of the RSA and Service Agreement. Judge Hansbury granted the motions, finding defendants' application to set a valuation date completely lacked merit both substantively and procedurally. The judge also characterized defendants' request for a $30 million escrow as

"shocking" and "most egregious." The judge added that the motion was one of the least meritorious motions he had ever heard. The court entered memorializing orders on August 22, 2014 and September 3, 2014, awarding plaintiffs reasonable attorney's fees against defendants and their counsel, and directing plaintiffs' counsel to file and serve a certification of services in compliance with Rule 4:42-9.

After considering the certification of services filed by plaintiffs' respective counsel, which defendants contested as excessive, on January 6, 2015, Judge Hansbury awarded $48,241.86 in counsel fees to Jarwick and $34,026.21 to Halpern. In a written statement of reasons, the judge found defendants' valuation claim "was without reasonable basis in law, equity or good faith argument."

The judge noted that, in our prior 2006 remand, we held that the valuation of Jarwick's interest at a fixed moment in time was inadequate as an appropriate remedy.[2] The judge explained that:

> In partnership dissolution, by definition the business entity is being dissolved; its assets are being liquidated; and the cash is being distributed to each of the partners in accordance with their ownership interest. See N.J.S.A. 42:1A-45(a)(b). Thus, no ownership entity continues to operate the business or own property, and there is no rationale to

[2] See Jarwick Devs., Inc., No. A-5027-03 (slip op. at 14).

> cut-off any partner's interest at any prior point in time. . . .

Judge Hansbury found defendants' reliance on Musto v. Vidas, 333 N.J. Super. 52 (App. Div. 2000), misplaced. The judge explained that, in Musto, in ordering a buy-out of an oppressed minority shareholder, we were "guided by N.J.S.A. 14A:12-7(8), the statute pertaining to oppressed minority shareholders in a closely-held corporation." In contrast, in the present case,

> [the trial judge] ordered dissolution, not a compelled buy out, and therefore, the [c]ourt is guided by the partnership statute[,] N.J.S.A. 42:1A-39 and [-]45. Upon dissolution a liquidation of the partnership's assets occurs and the partnership ceases to exist. In a buy-out the corporation continues to own and operate the corporation.

Judge Hansbury proceeded to separately address defendants' claim for management fees, and for outstanding claims allegedly owed for Halpern's health insurance premiums, the performance bond to Montville, and a refund of services to Verizon. After carefully analyzing each of these claims, the judge concluded defendants' motion to hold the sale proceeds in escrow was frivolous pursuant to Rule 1:4-8, the Service Agreement, and the RSA, and consequently plaintiffs were entitled to an award of counsel fees. Finally, the judge engaged in a thorough analysis of the various factors set forth in RPC 1.5(a) in calculating the amount of the fee awards.

Defendants appeal from the orders denying their motion to escrow the proceeds from the sale of Rachel Gardens and awarding attorney's fees to plaintiffs. They argue, as they did before the trial court, that: (1) a judicially-liquidated partnership is valued as of the date liquidation is sought; (2) they were entitled to management fees for partnership dissolution services they performed; (3) the outstanding partnership liabilities required escrow of the sale proceeds; and (4) their arguments sought legal clarity and did not warrant sanctions. Additionally, they contend the fee awards were excessive.

Having considered these arguments in light of the record and applicable legal standards, we conclude they lack sufficient merit to warrant extended discussion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons stated by Judges Weisenbeck and Hansbury in their thorough and thoughtful opinions. We add the following comments.

As a preliminary matter, defendants argued before the trial court that the proceeds of the sale should not have been distributed until the contingent liabilities were settled. However, in their brief on appeal and at oral argument before us, defendants acknowledged that "the passage of time has now rendered escrow for these liabilities moot." An issue is considered moot when our decision "can have no practical effect on the existing

controversy." Redd v. Bowman, 223 N.J. 87, 104 (2015) (citation omitted); Greenfield v. N.J. Dep't of Corr., 382 N.J. Super. 254, 258 (App. Div. 2006). "[C]ourts of this state do not resolve issues that have become moot due to the passage of time or intervening events." State v. Davila, 443 N.J. Super. 577, 584 (App. Div. 2016) (alteration in original) (quoting City of Camden v. Whitman, 325 N.J. Super. 236, 243 (App. Div. 1999)). Accordingly, we decline to address defendants' contention that outstanding partnership liabilities require escrow of the sale proceeds.

Next, we review a trial court's imposition of frivolous litigation fees for an abuse of discretion. Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005). Reversal is warranted only when "the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Ibid.

An award of fees against a party engaging in frivolous litigation is governed by N.J.S.A. 2A:15-59.1, which requires a judge to determine whether a pleading filed by a non-prevailing party was frivolous. N.J.S.A. 2A:15-59.1(a)(1). In order to award fees under the statute, the court must consider "the pleadings, discovery, or the evidence presented" and find that a

claim or defense was either pursued "in bad faith, solely for the purpose of harassment, delay or malicious injury" or made with knowledge that it "was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." N.J.S.A. 2A:15-59.1(b)(1), (2).

Rule 1:4-8 supplements the statute, with each assigning different responsibility for frivolous litigation. McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 498 (App. Div. 2011); Ferolito v. Park Hill Ass'n., 408 N.J. Super. 401, 407 (App. Div. 2009). While the frivolous litigation statute applies only to parties, Rule 1:4-8 is directed to the conduct of attorneys. ASHI-GTO Assocs. v. Irvington Pediatrics, P.A., 414 N.J. Super. 351, 363 (App. Div. 2010).

Rule 1:4-8 provides that, by signing a pleading, the attorney attests to its accuracy and legitimacy – specifically, that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

> (1) the paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the

> extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the factual allegations have evidentiary support or, as to specifically identified allegations, they are either likely to have evidentiary support or they will be withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support.
>
> (4) the denials of factual allegations are warranted on the evidence or, as to specifically identified denials, they are reasonably based on a lack of information or belief or they will be withdrawn or corrected if a reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support.
>
> [R. 1:4-8(a).]

"The nature of conduct warranting sanction under Rule 1:4-8 has been strictly construed, and 'the term "frivolous" should be given a restrictive interpretation' to avoid limiting access to the court system." First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 432-33 (App. Div. 2007) (citation omitted) (quoting McKeown Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 561-62 (1993)).[3] Therefore, imposing sanctions in the form of attorney's fees "is not warranted where the [attorney] has a reasonable good faith belief in the merit[s] of [the] action."

[3] Frivolousness is interpreted similarly under Rule 1:4-8 and the frivolous litigation statute. See DeBrango v. Summit Bancorp, 328 N.J. Super. 219, 226-27 (App. Div. 2000).

J.W. v. L.R., 325 N.J. Super. 543, 548 (App. Div. 1999). The Rule does, however, impose a continuing duty on the attorney who filed an action to amend or withdraw allegations if, upon further investigation and discovery, they have no evidentiary support. LoBiondo v. Schwartz, 199 N.J. 62, 98 (2009).

Here, defendants relied on baseless arguments in support of their motion to escrow the entire net proceeds from the sale of Rachel Gardens. Their request to set a valuation date contradicted our 2006 opinion remanding the matter, which rejected the concept that Jarwick was entitled to damages based on the value of its interest in the Partnership as of a specific, fixed date. In addition, even if an alternative valuation date was appropriate, as defendants contend, they nonetheless sought to escrow the entire proceeds of the sale rather than a reasonable estimation of the disputed amount. Nor did they tailor their application so as to only seek to escrow the amount of the purported contingent liabilities. Further, defendants made no convincing showing that, if they were successful in appealing the trial court's judgment and post-judgment orders, the funds, if distributed, were unlikely to be returned.

Defendants' request for management fees was similarly baseless, given the absence of any provision in the partnership agreement according them that right. The post-judgment Service

Agreement between the parties similarly did not provide for management fees, and it incorporated by reference the trial judge's March 17, 2011 order that barred payment of management fees to defendants.

Additionally, the parties' May 28, 2014 Service Agreement and RSA each contain a prevailing party provision that constitutes an independent basis for awarding attorney's fees to plaintiffs. As an exception to the so-called "American Rule," a prevailing party can recover attorneys' fees if expressly provided for by contract. Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 440 (2001) (citing Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 504 (1983)); cf. Satellite Gateway Commc'ns, Inc. v. Musi Dining Car Co., 110 N.J. 280, 285 (1988) (noting although Rule 4:42-9(a) does not include contracts within its eight exceptions under which attorney's fees may be awarded, fees may be awarded by contract). Having prevailed on the motion to escrow the sale proceeds, which also unsuccessfully sought to collect management fees, plaintiffs were contractually entitled to attorney's fees pursuant to the Service Agreement and RSA.

In calculating the amount of reasonable attorneys' fees, "an affidavit of services addressing the factors enumerated by RPC 1.5(a)" is required. R. 4:42-9(b). Courts then determine the "lodestar," defined as the "number of hours reasonably expended"

by the attorney, "multiplied by a reasonable hourly rate." Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009) (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21 (2004)). "The court must not include excessive and unnecessary hours spent on the case in calculating the lodestar." Furst, 182 N.J. at 22 (citing Rendine v. Pantzer, 141 N.J. 292, 335-36 (1995)). The court is required to make findings on each element of the lodestar fee. Id. at 12. The fee awarded must be "reasonable," RPC 1.5(a), and reasonableness is a "calculation" to be made in "every case." Furst, 182 N.J. at 21-22.

We afford trial courts "considerable latitude in resolving fee applications." Grow Co., Inc. v. Chokshi, 424 N.J. Super. 357, 367 (App. Div. 2012). We will not disturb the trial court's award of counsel fees "except 'on the rarest occasions, and then only because of a clear abuse of discretion.'" Ibid. (quoting Rendine, 141 N.J. at 317). Here, Judge Hansbury engaged in a thorough analysis of the applicable factors when calculating the fee award. We discern no abuse of discretion.

Affirmed.