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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THOMAS BLESSENT,

Plaintiff and Respondent,

v.

HEATHER MILLER,

Defendant and Appellant.

E055260

(Super.Ct.No. PROPS0800566)

OPINION

APPEAL from the Superior Court of San Bernardino County. J. Michael Welch, Judge. Affirmed.

Richard G. Anderson, Inc., and Jeff W. LeBlanc for Defendant and Appellant.

Law Office of Gary C. Wunderlin and Gary C. Wunderlin for Plaintiff and Respondent.

Plaintiff and respondent, Thomas Blessent, a son of Maxine Blessent, filed a complaint for damages and the imposition of a constructive trust upon certain real

property.¹ After a court trial, the court imposed a constructive trust upon a home in Upland in the amount of \$965,232.64. Defendant and appellant, Heather Miller, appeals.

THE ESTATE PLAN²

Mrs. Blessent had five children: Michael, Thomas (plaintiff), and John Blessent, Barbara Dodson, and Patricia Steffler. Defendant is the daughter of Patricia Steffler.

After the death of her husband in 2004, Mrs. Blessent consulted Suzanne Graves, an estate planning attorney.³ Attorney Graves prepared an estate plan with the following elements.

¹ Unfortunately, the complaint is not in our record. The case began when a petition to establish a trust was filed.

² Equally unfortunate, the parties provide many pages of alleged facts without record citation. California Rules of Court, rule 8.204(a)(1)(C) provides: “Each brief must: [¶] . . . [¶] (C) Support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears.” “A party on appeal has the duty to support the arguments in the briefs by appropriate reference to the record, which includes providing exact page citations. We have no duty to search the record for evidence and may disregard any factual contention not supported by proper citations to the record. [Citation.]” (*Air Couriers Internat. v. Employment Development Dept.* (2007) 150 Cal.App.4th 923, 928.) Accordingly, we have disregarded factual statements in defendant’s briefs that are unsubstantiated. Plaintiff cites the rule and then provides a three-page statement of the case with no record citations. We also disregard plaintiff’s unsubstantiated factual assertions.

³ Attorney Graves testified that she represented defendant individually in the past, and as a trustee of the trust and as a general partner of the partnership. She represented defendant in her trustee capacity at the time of trial.

1. *Family Limited Partnership (Blessent Holdings, LP)*

Attorney Graves prepared a family limited partnership named Blessent Holdings, LP.

2. *The General Partner (Blessent Enterprises, Inc.)*

Originally, Mrs. Blessent and defendant, a granddaughter, were the equal shareholders and directors of Blessent Enterprises, Inc. Mrs. Blessent was president of the corporation and defendant was the corporate secretary. This case involves an allegedly unauthorized withdrawal of \$700,000 from the limited partnership, Blessent Holdings, LP, during Mrs. Blessent's lifetime.

After the death of Mrs. Blessent on February 11, 2008, defendant became the president, sole shareholder, and sole director of the corporation and, therefore, had the effective authority to act as the general partner of Blessent Holdings, LP. Blessent Enterprises, Inc., has a one percent interest as general partner of Blessent Holdings, LP. The limited partners hold the remaining 99 percent.

3. *The Limited Partners (The Maxine Blessent Living Trust)*

On December 6, 2004, Mrs. Blessent signed a living trust. The living trust was restated in January 2008 to facilitate the \$700,000 withdrawal.

The living trust provides that Mrs. Blessent and defendant are the initial trustees. After Mrs. Blessent's death, defendant became the sole trustee of the living trust.

The trust became irrevocable upon Mrs. Blessent's death. The trust provides that, at that time, real property in Newport Beach was to be distributed to Patricia Steffler, and real property in Upland (the subject of this litigation) was to be distributed to defendant.

Defendant was also given all of Mrs. Blessent's interest in Blessent Enterprises, Inc., and all funds held with American Funds. The balance was to be distributed to individual trusts for the five children.

The trust was initially funded with \$3 million. In 2006, each child contributed \$50,000 to the trust, for a total contribution of \$250,000. In February 2008, the \$700,000, which is at issue here, was withdrawn from the trust.

THE \$700,000 WITHDRAWAL

On January 23, 2008, a special meeting of the directors and shareholders (i.e., Mrs. Blessent and defendant) of Blessent Enterprises, Inc., was held. The minutes state: "The President announced that the purpose of this meeting was to discuss and vote on a request by Maxine Blessent to distribute funds to her, in the amount of \$700,000. Maxine Blessent's level of care has increased, and she is currently living in assisted living. She would like funds distributed from Blessent Holdings, LP, so she can purchase a new home that would be large enough to allow her granddaughter and her family to move in with her. She would then be able to move out of the assisted living facility. The Directors discussed the fact that the partnership has only made distributions for tax purposes in the past. The officers believe that since this would be a large distribution, a proportionate distribution to all partners should take place if approved by the Board of Directors. . . ."4

⁴ The minutes do not name the "President" who made this announcement. However, Mrs. Blessent was president at the time. The minutes also do not name the "officers" who commented. The minutes are signed by defendant, as secretary.

The Board then passed a resolution: “That Blessent Holdings, LP, will forthwith distribute \$700,000 to Maxine Blessent. It is further resolved that all partners will receive a proportionate distribution once a business valuation is completed on behalf of the partnership.”⁵

Attorney Graves testified that, during several meetings, Mrs. Blessent expressed a desire to buy a home large enough for her to live in with defendant and defendant’s family. At a meeting on January 23, 2008, Mrs. Blessent again expressed a strong desire to buy a new home so she could live with defendant and her family. She mentioned a specific property in Upland, which was selling for \$1.2 million. Defendant made an offer on the property, and the sale had to occur by February 11, 2008. The 2008 amendment to the living trust reflected these wishes.

The source of funds for the purchase was discussed. Mrs. Blessent intended to use her own funds from American Funds, amounting to about \$500,000 to \$700,000. Under the living trust, these funds would go to defendant. She also wanted to pay the balance with a partnership distribution of \$700,000 because this would be the quickest way to get the funds needed.

⁵ In her opening brief, defendant states: “[T]he evidence is clear that [defendant] did not vote and did not participate in the decision making process, she was simply present at the wishes of her grandmother, MAXINE BLESSANT.” The argument disregards the fact that defendant testified that she voted as a director, and the minutes signed by her recorded the unanimous vote of the board of directors (Mrs. Blessent and defendant) to withdraw the \$700,000.

Attorney Graves expressed some concern about the tax consequences of such a transaction. According to her, the issue was resolved by “a restatement to her trust where we wrote in that the additional tax liability created from the purchase of that home would have to be born[e] by [defendant].” As discussed *post*, Attorney Graves also referred to a check from defendant in the sum of \$260,000.⁶

Finally, Attorney Graves testified that, although the distribution violated the provisions of section 5.09 of the partnership agreement, it was corrected by treating the excess as a loan to the partnership. Gregory Barragar, the trust accountant, testified that an adjustment was made on the books, but no loan documents were ever signed.

The home was purchased, title was taken in joint tenancy, and defendant ended up with full title to the home when Mrs. Blessent died three days after the closing.⁷

⁶ The check (exh. 18) is not in our record. The restatement is the restated living trust signed on January 25, 2008. The subject of a house purchase is authorized at article Four, section 3. a. of the living trust if Mrs. Blessent is disabled. Although the signing was videotaped, it is not in our record, and it is unclear whether she was actually disabled at the time.

⁷ The specific documents are not in our record, but the net effect appears to be that defendant made an offer on the property on January 13, 2008, the home was purchased on February 8, 2008, title was taken in joint tenancy, and defendant became owner of the entire home when Mrs. Blessent died on February 11, 2008. All of the money for the home purchase came from Mrs. Blessent.

THE STATEMENT OF DECISION

The trial court filed its statement of decision on July 29, 2011. It agreed with plaintiff that the \$700,000 withdrawal was in violation of section 5.09 of the partnership agreement. The trial court also found that the withdrawal required the unanimous consent of the limited partners under section 6.03 of the partnership agreement.⁸

The trial court found that “[t]he general partner acts as a fiduciary for the limited partners.” It concluded that defendant breached her fiduciary duties: “It is a clear act of self-dealing. The \$700,000 from the actions of the general partnership ‘sits’ in the real property now owned by [defendant].” The court then imposed a constructive trust on the Upland real estate in the sum of \$700,000, plus interest.

APPELLATE ISSUES

Defendant argues: (1) the trial court improperly relied on and misinterpreted section 5.09 of the partnership agreement; (2) the trial court misinterpreted and misconstrued section 6.06 of the partnership agreement; and (3) the trial court improperly denied defendant a credit for Mrs. Blessent’s estate taxes that defendant paid on the property transfer.

⁸ It appears that the trial court intended to refer to section 6.06 b. of the partnership agreement, discussed *post*.

Plaintiff argues that the judgment should be affirmed because: (1) there was ample substantial evidence that defendant breached her fiduciary duties to the limited partners; (2) the trial court correctly found that the distribution violated section 5.09 of the partnership agreement; and (3) having found a breach of fiduciary duty, the trial court had the discretion to impose a constructive trust on the full withdrawal amount.

DEFENDANT'S BREACH OF FIDUCIARY DUTIES

Since the trial court found that defendant breached her fiduciary duties, we will summarize her testimony and conclude that it provides ample substantial evidence to support the trial court's conclusion.

Defendant testified that she was the general partner of Blessent Holdings, LP, by virtue of being an officer of Blessent Enterprises, Inc. She was not sure if Blessent Enterprises, Inc., was a corporation, but she was the president and sole director at the time of trial. She was also a director and officer before her grandmother's death.

Section 7.02 of the partnership agreement provides that the general partner is a fiduciary for the limited partners. Specifically, "the General Partner may not act in any manner contrary to this agreement; receive extra compensation not provided in the agreement; commingle Partnership funds; fail to disclose material facts involving transfers to and from the Partnership; take a Partnership opportunity for its own benefit; or derive a secret personal profit from dealing with the Partnership."

Defendant was directed to section 7.02 of the partnership agreement and asked what she understood the term “fiduciary” to mean. She responded: “I didn’t understand it to mean anything in particular.” She was asked about each of the above duties in detail and generally replied that she was aware of each duty at the time of trial but was unaware in February 2008. She also testified that Attorney Graves did not give her any advice with regard to her fiduciary duties.

With regard to section 5.09 of the partnership agreement, defendant testified that, in January 2008, she was aware of the limitation on distributions in that section. Her accountant subsequently made the calculation and advised her that the maximum amount of the distribution was approximately \$400,000.

The \$700,000 was subsequently disbursed and deposited into escrow for purchase of the Upland property. After the purchase, defendant advised the limited partners that it had taken place. She told the limited partners that Mrs. Blessent paid for half of the home and defendant paid for the other half. She admitted this statement was false.⁹

We agree with the trial court that there was ample evidence of breach of fiduciary duty by defendant. In addition to violating the general fiduciary duties of a partner (Corp. Code, § 16404), she clearly violated the specific fiduciary duties set forth in sections 7.01 and 7.02 of the partnership agreement.

⁹ She therefore violated the provision of section 7.02 of the partnership agreement, which states that she may not “fail to disclose material facts involving transfers to and from the Partnership.”

Defendant was also an initial and successor trustee of the living trust. Section 4 of article Thirteen of the trust provides that she had a responsibility to make information available to trustees. Section 6 of article Thirteen provides: “During the term of this trust agreement, my Trustees are fiduciaries on behalf of my trust beneficiaries.” Section 23 of article Thirteen states: “My Trustee shall exercise all Trustee powers, rights, duties, and discretions in a fiduciary capacity only and shall not, directly or indirectly, gain, derive, or receive any benefit, interest, property, or advantage because of the office of Trustee.” Section 2 of article Fourteen provides: “[M]y Trustee shall not exercise any power in a manner inconsistent with the beneficiaries’ right to the beneficial enjoyment of the trust property in accordance with the general principles of the law of trusts.”

Defendant therefore violated her fiduciary obligations under the partnership and under the living trust.

THE VIOLATION OF SECTION 5.09
OF THE PARTNERSHIP AGREEMENT

The trial court also found that defendant violated section 5.09 of the partnership agreement. That section states: “The General Partner shall not have the authority to distribute in any single year more than an amount equal to the partnership income for the previous tax year plus 5% of the value of the assets of the partnership on the last day of the previous calendar year, without the unanimous consent of all partners.”

Attorney Graves, attorney for the partnership and drafter of the document, specifically testified that the withdrawal of the \$700,000 was a violation of section 5.09 of the partnership agreement. Although plans were made to alleviate the problem by treating the overage as a loan, the unanimous consent of the limited partners was not sought or obtained.

Defendant argues that section 5.09 of the partnership agreement only applies to distributions to partners, and defendant was not a partner. The agreement defines partners to mean the general partner (Blessent Enterprises, Inc.) and all of the limited partners.

The argument rests upon the assumption that Blessent Enterprises, Inc., was a viable corporation. However, the evidence was clear that Mrs. Blessent and defendant were the shareholders, officers, and directors of the corporation. Mrs. Blessent urged the withdrawal of \$700,000 from the partnership in order to purchase the Upland property for defendant. Defendant, the only other director, voted to approve the withdrawal.

While it is true that corporations are frequently used to shield corporate shareholders, directors, and officers from personal liability, the testimony here was that Mrs. Blessent and defendant acted in disregard of the corporate entity, in disregard of the fiduciary obligations of the corporation as stated in the partnership agreement, and without obtaining the consent of the limited partners.

Defendant was asked: “Who’s the general—current general partner?” She replied: “Me.” She denied even knowing that Blessent Enterprises, Inc., was a corporation. She also admitted that, at the time of the meeting, she had no understanding of her fiduciary obligations.

Although piercing the corporate veil issues were not raised by either party at trial and were not addressed in the statement of decision, there was substantial evidence that defendant acted in disregard of the corporate entity and her fiduciary obligations. There was no evidence that the corporation was properly formed and in good standing, or that the corporate formalities, including adequate capitalization, had been followed.

Even if the corporation was a viable entity, the evidence clearly showed that defendant violated her fiduciary obligations as a director and as trustee of the living trust. (*Remillard Brick Co. v. Remillard-Dandini* (1952) 109 Cal.App.2d 405, 419-420.) “It is a cardinal principle of corporate law that a director cannot, at the expense of the corporation, make an unfair profit from his position. He is precluded from receiving any personal advantage without fullest disclosure to and consent of *all* those affected.” (*Id.* at p. 419.)

Defendant’s appellate argument is based on the contention that the trial court erred in finding a violation of section 5.09 of the partnership agreement. She states: “But for the Court’s erroneous finding that Section 5.09 [of the partnership agreement] applied to the transfer, there would have been no breach of [defendant’s] fiduciary duty.”

We disagree. But even if the trial court erred in its interpretation of section 5.09 of the partnership agreement, defendant's breaches of fiduciary responsibility discussed *ante* provide a firm basis for the imposition of a constructive trust.

Defendant acted for her own interests in approving the \$700,000 withdrawal to buy a home for her and Mrs. Blessent. Since she took title in joint tenancy, she claims she now owns the home. As the trial court found, this is clearly self-dealing.

“‘The law does not permit a fiduciary to deal with himself in any transaction in his individual capacity [citation].’ [Citations.] ‘Neither a trustee nor any of his agents may take part in any transactions concerning the trust except when a fully informed beneficiary who is free from the trustee’s influence authorizes the transaction [citation].’ [Citation.]” (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 13.)

Section 5.09 of the partnership agreement specifically provides for the unanimous consent of all partners for distributions in excess of the limit stated in that section. The withdrawal here exceeded that limit, and defendant testified that the limited partners were not notified of the planned withdrawal and did not consent to any such withdrawal. This failure to communicate with the limited partners was itself a breach of fiduciary duty.

THE ALLEGED BREACH OF SECTION 6.06 OF THE PARTNERSHIP AGREEMENT

Defendant argues that the trial court misinterpreted section 6.06 of the partnership agreement. Section 6.06 b., entitled “Acts Requiring Unanimous Approval of the Partners,” states: “The General Partner shall not have the power, without the unanimous written consent of all Partners, to do any of the following: [¶] . . . [¶] Distribute more

than twenty-five percent (25%) of the fair market value of the Partnership's assets in any tax year." We agree with defendant that section 6.06 of the partnership agreement is inapplicable here because the amount distributed was less than 25 percent of the value of the partnership's assets. Nevertheless, section 5.09 of the partnership agreement was applicable, and it also requires unanimous partner approval for distributions in excess of the limits in that section.¹⁰

SHOULD DEFENDANT BE ENTITLED TO A CREDIT
FOR ESTATE TAXES?

Although the issue was not fully developed at trial, defendant argues that she reimbursed the trust for \$260,000, the estate tax due as a result of the \$700,000 withdrawal. She claims she was under no obligation to make this payment, and she should get credit for it.

The trial court did not address the issue in its statement of decision. In her objection to the statement of decision, defendant argued that she should get a credit for the \$260,000 she paid for federal estate taxes on behalf of Mrs. Blessent.

¹⁰ Defendant argues that she should get credit for the amount of the distribution that would have been authorized under section 5.09 of the partnership agreement. However, as discussed *ante*, the trial court had the discretion to impose the constructive trust on the entire \$700,000 as a result of defendant's breach of fiduciary duty.

At the hearing on the objections, the trial court stated: “I had operated on the basis that when the money was taken out of the tax-free investment accounts that were set up . . . that generated a taxable event and that was the reason the tax was paid; although, now, I guess I stand corrected because there was some testimony concerning maybe some other gifts that held the reason for the taxes.”

Attorney Graves testified that taxes were a concern: Mrs. Blessent “did not believe that it would be fair for her children to have to bear the burden of that tax consequence if she was taking an asset and now giving it to [defendant], so [defendant] was getting the asset and the children would then have that additional tax liability.” She also testified that the problem was solved by making defendant responsible for the tax.

Accordingly, section 3 of the schedule of specific distributions of the trust property now states that defendant will inherit the Upland house. It further provides that: “Property passing under this Section shall pass free of any administrative expenses. However, property passing under this Section shall pass subject to death taxes, liens, security interests or other encumbrances.” We therefore agree with the trial court that defendant was obligated to pay the taxes and is not entitled to a credit for taxes paid as a result of the purchase transaction.

THE CONSTRUCTIVE TRUST

Imposition of a constructive trust is an appropriate equitable remedy when a person holds property to which they are not entitled. Civil Code section 2223 provides: “One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner.” Civil Code section 2224 provides: “One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.” Acting under these Civil Code sections, the trial court may impose a constructive trust as an equitable remedy to prevent unjust enrichment and to enforce restitution. (*Haskel Engineering & Supply Co. v. Hartford Acc. & Indem. Co.* (1978) 78 Cal.App.3d 371, 375.)

Under Civil Code section 2224, “[a]ll that must be shown is that the acquisition of the property was wrongful and that the keeping of the property by the defendant would constitute unjust enrichment. [Citations.]” (*Calistoga Civic Club v. City of Calistoga* (1983) 143 Cal.App.3d 111, 116; see also *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 600.)

Defendant’s several breaches of fiduciary duties, including self-dealing, were sufficient wrongful acts to allow the trial court to impose a constructive trust as an equitable remedy. Defendant has not met her burden of demonstrating that the trial court abused its discretion in doing so. Accordingly, she has not shown that the trial court erred.

DISPOSITION

The judgment is affirmed. Plaintiff to recover his costs on appeal.

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McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

RICHLI
J.