IN THE COURT OF APPEALS OF IOWA

No. 0-034 / 99-0463
Filed May 31, 2000

GENE EVAN DUFOE and ELLEN LORETTA DUFOE,
Appellants,

vs.

DON A. DUFOE, SHIRLEE DUFOE, and DON DUFOE LIMITED PARTNERSHIP,
Appellees.

FILED
MAY 31 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Linn County, William L. Thomas, Judge.

Gene and Ellen Dufoe (Gene) appeal following a bench trial of their petition seeking dissolution and accounting of two partnerships. **AFFIRMED.**

Randall D. Armentrout of Moyer & Bergman, P.L.C., Cedar Rapids, for appellants.

Richard G. Hileman Jr. of Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar Rapids, for appellees.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

VOGEL, P.J.

Gene and Ellen Dufoe (Gene) appeal following a bench trial of their petition seeking dissolution and accounting of two partnerships. Because we find the partnerships were dissolved and the assets were appropriately distributed, we affirm.

Background facts. Don Dufoe and Gene Dufoe are brothers who created the partnership known as Dufoe Developers in 1976 for the purpose of purchasing and developing real estate in Center Point, Iowa. Don and his wife, Shirley, resided in Center Point while Gene and his wife, Ellen, lived in Missouri until their move to Arizona in 1986. Each partner was assigned a fifty percent interest in this venture. The brothers also formed a second partnership with a third party. Don's interest in this venture was sixty percent while Gene retained a twenty percent share. Don also solely owned a construction company which was used for many of the projects developed by the partnership. It is important to note that from 1976 until 1987, although Don ran the day-to-day operations, Gene was the partnerships' income tax preparer, with full access to the business records.

After many years of being in business together, the brothers had a dispute culminating in this lawsuit, each accusing the other of wrongdoing under the partnership agreements. The trial court found no breach of fiduciary duty, dissolved the partnerships, and entered judgment regarding each partner's capital accounts and remaining partnership assets. On appeal, Gene claims the

trial court erred in failing to appoint a special master and seeks both equitable and legal remedies.

Scope of review. Actions for an accounting upon dissolutions of partnerships are in equity. *Hum v. Ulrich*, 458 N.W.2d 615, 616-17 (Iowa App. 1990). Our review of equity cases is de novo. Iowa R. App. P. 4. We are not bound by the findings of the trial court but give weight to them. *Hyler v. Garner*, 548 N.W.2d 864, 870 (Iowa 1996); Iowa R. App. P. 14(f)(7).

Special master. Gene alleges, both at trial and on appeal, that Don, the managing partner of the ventures, breached his fiduciary duty to Gene by commingling partnership and personal funds and debts and by misappropriating funds owed to Gene over the life of the partnerships. Unsatisfied with the trial court's acceptance of Don's expert's accounting for the partnerships, Gene claims on appeal the trial court erred in refusing to appoint a special master following the close of the evidence.

A special master may be utilized by the court in extreme cases. A judge may appoint and grant such a person limited authority to hear testimony, examine evidence, and present a report to the court stating his findings of fact. Iowa Rule of Civil Procedure 207 states:

> A "master" includes a referee, auditor or examiner. On a showing of *exceptional conditions* requiring it, the court *may* appoint a master as to any issues not to be tried to a jury. (emphasis added)

When determining if the court erred in appointing a special master, the standard of review becomes one of abuse of discretion. *Moody v. Van Wechel*, 402 N.W.2d 752, 758 (Iowa 1987).

Gene has asserted, throughout the case, that Don breached his fiduciary duty to him by commingling and misappropriating partnership funds to Don's advantage. Don employed Cathy Connelly, a certified public accountant with a law degree and a master's degree in taxation, to prepare a full accounting. According to the terms of the two partnership agreements and the respective interests of the partners, Connelly painstakingly compiled a report sorting through what the trial court deemed to be "atrocious" records kept over the life of the partnerships. The trial court examined Connelly's full accounting, and made this finding:

> The Northview and Dufoe Developers accountings are based directly upon a reconstruction of the activities of the partnerships, as reflected by the actual bank records, canceled checks, invoices, receipts, mortgages, and other partnership records contained in Defendants' Exs. B and D, respectively. I conclude that both accountings are substantially accurate, at least in the sense that at this remote time, no better accounting will be able to be done by mere mortals.

Gene hired two experts, one of whom testified at trial. Although Gene was in receipt of Connelly's accountings before trial, he failed to have his own experts examine or testify regarding the content thereof. Furthermore, he did not request the court to employ a special master in this case until well after the final ruling had been issued.

Iowa Rule of Civil Procedure 207 allows the court to appoint a master on a showing of exceptional conditions. We find none here. Gene's post-trial request for a special master appears to be an attempt to relitigate an issue fully tried but with an unfavorable result to Gene. Having received an extensive accounting from Don's expert witness, Gene had his chance to challenge the

content, methodology and conclusions. He made no request at the trial to have a special master appointed and no showing in his post-trial motion of exceptional conditions. We find the trial court did not abuse its discretion in refusing to comply with Gene's request.

Gene alleged, both at trial and on appeal, that Don breached his fiduciary duty to him as a partner. Gene is correct in asserting a fiduciary duty exists between partners. *Hum v. Ulrich,* 458 N.W.2d at 617. Normally, the burden of proof rests with the partner claiming he was damaged. *Id.* "However, the burden may shift if, under the facts presented, a fiduciary is shown to be in a position to take advantage over the principal, or appears to have closer access to the facts." *Id.* Gene contends the burden shifted to Don to show that he did not breach his fiduciary duty by misappropriating and commingling funds because Don was the managing partner with access to the partnerships' records. We find the burden correctly remained on Gene to demonstrate any alleged breach of fiduciary duty because he was not without access to the partnerships' records. We have already noted that Gene was the sole income tax preparer for the partnerships. Further, Gene also provided individual tax return preparation services for Don. The trial court found the following:

> Gene recalls that he relied entirely on summaries prepared by Don Dufoe to do the partnership tax returns, and was therefore unaware of 'commingling' of partnership funds in Don's building account. The records contradict his memory. . . . The record contains tax return worksheets almost all of which are in Gene's handwriting. It is not likely that Don prepared summaries, which Gene then copied and destroyed. I conclude that Gene prepared the summaries himself and did so every year from the inception of the partnerships through 1987, a period which covers virtually all the activities of the partnerships.

We agree with the trial court's analysis. We further find the record does not provide any evidence that the daily financial records were concealed from Gene by Don. Whether Gene was aware of the commingling present in the accounts was a credibility decision made by the trial court based on the testimony and the evidence before it. When considering the credibility of witnesses in equity cases, this court gives weight to the fact findings of the trial court. Iowa R. App. P. 14(f)(7). Based on the record before us and considering the credibility the court assigned each party, we find although Don did commingle personal and partnership funds, Gene was fully aware of this activity throughout the life of the partnerships. We further find the monies have been appropriately accounted for and the record does not reflect any misappropriation of partnership funds by Don in an attempt to defraud Gene.

Equitable remedy. Gene next alleges that he is entitled to a constructive trust to provide him equitable relief for Don's alleged acts of misappropriation. A constructive trust is an instrument established by the court to effectuate a remedy for an inequity that has occurred due to the fraudulent acts or the unjust enrichment of the other party. *Neimann v. **Butterfield,*** 551 N.W.2d 652, 654 (Iowa App. 1996). Although an equity case is tried de novo on appeal, the appellant cannot request a remedy that was not advanced in the trial court. ***Mensch v. Netty,*** 408 N.W.2d 383, 386 (Iowa 1987). Gene failed to raise this issue in the trial court and cannot now raise it for the first time.

Monetary relief. In the alternative, Gene requests a monetary judgment. Because we find Connelly's accounting was sound and Gene failed to meet his

burden of proof to show a breach of fiduciary duty by Don, Gene has no valid claim for damages remaining.

Accounting errors. Gene points to five erroneous areas in Connelly's expert accounting. The first alleged mistake was the failure of the report to attribute duplexes purchased by Gene's wife, Ellen, as a sale by the partnership rather than by Don personally. This error, however, was noted by the court and Connelly's report was ordered to be changed to conform with this fact finding.

Gene next contends the court erred in accepting Connelly's valuation of the Pineview lots for which Don must compensate the partnership. Connelly's report valued the lots at the FmHA allowable sale price of $28,000. The trial court found Gene's estimate of $60,000 to be the value of the property after the sale and improvements were made by the new owner, Don. The only value in the record at the time of sale is the FmHA estimate for the property of $28,000. We agree with the trial court and find the value of $28,000 is the only acceptable figure in the record before us.

Gene contends the accounting considered by the court either failed to or incorrectly addressed several other issues as well, including a duplex purchased by Gene, Don's construction company equipment costs included in the partnership accounting and two miscopied checks. Again, however, as Gene did not raise these issues at trial or in the 179(b) motion, we cannot address them for the first time on appeal. *Id.* Gene has failed to preserve these alleged errors for our review.

Continued partnership in FmHA project. Gene also complains the trial court did not fully dissolve one partnership, because Gene and Don's shared interest in the FmHA housing project continues. In reviewing the trial court's order, however, we find the trial court dissolved the partnerships as prayed, then distributed this asset to Don and Gene. The brothers remain tenants in common in the property, but not partners under either former partnership agreement. This distribution leaves either party free to sell his interest, subject to any FmHA restrictions. We also agree with the trial court's determination that the "return to owner" funds should be paid solely to Don as Gene did not contribute to the original FmHA required operating account to qualify for these payments.

Tenor of Gene's brief. Finally, Gene made several disparaging comments about the trial court in his brief, inferring the trial court failed in its duty to find the facts. For example, Gene begins his reply brief:

> It is clear from Don's Appellee's Brief that he would like the Court to do what the district court did: find that the case is too complex and the evidence too overwhelming to sort out an equitable dissolution of the partnerships. The district court waited 18 months, from April 12, 1996 when final arguments were presented, until October 7, 1997, to issue its first ruling in the case. The court waited an additional 15 months to issue its final ruling in January 1999. Nevertheless, as conceded by the district court, it generally accepted the accounting conducted by Don's expert witness, rather than examining all the transactions between the parties. Despite Gene's illustration of many errors in Connelly's accounting both at trial and in his Rule 179(b) motion, the district court refused to look at the questionable transactions by Don, instead indicating that Gene's remedy is an appeal.

These comments make light of the obvious amount of time the trial court devoted to the eleven-day trial and twenty page, single spaced ruling. To allege the trial court erred is anticipated, but not an allegation the trial court abdicated its duty.

We find as accurate an accounting as possible was performed in this case and was thoroughly reviewed by the trial court before a ruling was made. Having reviewed all other considerations properly before us, we affirm.

AFFIRMED.