

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME CASE NO. 20170332
DICKEY COUNTY CASE NO. 2012-PR-00011

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| In the Matter of the Estate of Delbert G. Moore, Deceased |) | |
| |) | |
| Charles Minard, individually and as Personal Representative of the Estate of Delbert G. Moore, deceased, |) | |
| |) | |
| Petitioner and Appellant, |) | BRIEF OF APPELLEES DONALD B. MOORE, SCOTT MOORE, AND GLENN W. MOORE & SONS |
| v. |) | |
| |) | |
| Donald B. Moore, Terry Minard, Candice Eberhart, and Scott Moore, |) | |
| |) | |
| Respondents and Appellees, |) | |
| and |) | |
| |) | |
| Glenn W. Moore & Sons, |) | |
| |) | |
| Claimant and Appellee. |) | |

APPEAL FROM THE JULY 5, 2017 JUDGMENT BY THE DICKEY COUNTY DISTRICT COURT, SOUTHEAST JUDICIAL DISTRICT, THE HONORABLE JOHN E. GREENWOOD, PRESIDING

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STATEMENT OF ISSUES

- I. Whether the district court correctly determined the Estate of Delbert Moore is not entitled to rental income from the Glenn W. Moore & Sons Partnership.

STATEMENT OF FACTS

[¶1] Delbert Moore (“Delbert”) died on March 5, 2012. (App. 19). Prior to his death, Delbert was a partner in the Glenn W. Moore & Sons Partnership (“Partnership”) along with his brother, Donald Moore (“Donald”), and his nephew, Scott Moore (“Scott”). (Id.) The Partnership conducted farming and ranching operations upon certain real estate in Dickey County owned by Delbert and Donald as tenants in common. (App. 33-45).

[¶2] In January 1990, Delbert and Donald executed an agreement entitled “Addition and Clarification of Partnership Agreement” wherein they agreed the “[I]and owned as tenants in common by Delbert and Donald Moore is contributed to the partnership without charge” and that such “contribution cannot be retracted except on dissolution of the partnership or agreement by both partners.” (App. 16). The agreement further provides that the Partnership “is not automatically dissolved on death of a partner; however, the estate of a deceased partner cannot make business decisions for the partnership without the approval of the surviving partner.” (Id.)

[¶3] Probate proceedings were commenced for the Estate of Delbert Moore and Delbert’s stepson, Charles Minard (“Charles”), was appointed Personal Representative in March 2012. (App. 3, Doc ID # 1-5). Under the terms of his will, Delbert devised his interest in certain real property to Donald. (App. 54). This devise included Delbert’s interest in Donald’s residence located in the NW1/4 of Section 5, Township 129N, Range 65W, together with the contiguous acreage located to the south by the existing creek and

hill as marked by existing fences. (Id.) With the exception of the real property devised to Donald, Delbert directed his personal representative to sell his interest in the remaining real estate and distribute its proceeds equally among his three step-children, Candice Eberhart (“Candice”), Terry Minard (“Terry”), and Charles, and his nephew Scott. (App. 54-55). Delbert’s will provided that said real estate was to be sold in a commercially reasonable manner to derive the most value therefrom; the sale was to occur within six (6) months from Delbert’s death. (App. 55). Delbert further devised his one-third interest in Partnership property to Candice, Terry, and Charles. (Id.)

[¶4] Contrary to Delbert’s wishes, Charles executed a personal representative’s deed on May 11, 2012, recorded in Dickey County as Document No. 180793. (App. 12-15). The deed conveyed property to the four above-named devisees, and wrongfully included Delbert’s interest in the property to be devise to Donald. (App. 8-11). The deed was also executed contrary to the requirement that Delbert’s land not devised to Donald be sold in a commercially reasonable manner with the net proceeds paid to his four devisees. (Id.)

[¶5] On June 18, 2012, Donald petitioned the district court to invalidate the personal representative’s deed. (Id.) Charles subsequently executed a corrective personal representative’s deed on August 23, 2012, to remove the property which should have been devised to Donald, recorded in Dickey County as Document No. 181261. (App. 12, 14). However, the corrective deed still improperly conveyed the real estate to Candice, Terry, Charles, and Scott in contravention to Delbert’s will.

[¶6] Charles, Terry, and Candice commenced a parallel lawsuit on May 17, 2012, to partition the land owned as tenants in common between the Estate of Delbert Moore and Donald Moore. *See* Charles Minard et al. v. Donald B. Moore et al., Dickey County Case

No. 11-2012-CV-00076. That action resulted in the subsequent sale of the property by auction with the proceeds equally divided between Donald and Delbert's Estate. Id. In the probate proceedings, the Partnership (and its surviving partners Donald and Scott) pursued the allowance of a claim against the Estate for recovery of funds in excess of \$300,000, which Donald and Scott alleged were embezzled/misappropriated by Delbert and his wife between January 1978 and February 2012. (App. 3-4, Doc ID # 8, 19, 21). In December 2012, the Estate moved to have a receiver appointed for the Partnership and requested a forensic audit of the Partnership assets. (App. 4, Doc ID # 25). A hearing on the Estate's motion was scheduled for March 28, 2013, and later rescheduled to May 3, 2013. (App. 4, Doc ID # 34, 36). At the time of the hearing, the Estate withdrew its request for the appointment of a receiver. (App. 4, Doc ID # 37). The district court entered an order on June 27, 2013, directing Eide Bailly to conduct a forensic audit of the Partnership and valuation of Partnership assets as of the date of Delbert's death. (Id.)

[¶7] A status hearing was held on June 18, 2014, to take up the issues of the partition action, vacating the personal representative's deed, and the status of the Eide Bailly audit. (App. 4, Doc ID # 44). On September 12, 2014, the district court entered an order vacating the personal representative's deeds. (App. 12-13). An amended order was entered on December 18, 2014 to correct an error in the legal description of the September 2014 order. (App. 14-15). The district court's order "set aside, vacated, and declared void" both of the improper deeds executed by Charles as personal representative (Dickey County Document Numbers 180793 and 181261). (App. 12-15). As a procedural matter, the district court indicated that a certified copy of its order shall be recorded against the properties as a means of nullifying the transfers as though said

transfers never occurred. (App. 13, 15). The district court further stated that “[t]itle to the property shall hereinafter revert back to the Estate of Delbert Moore.” (Id.) It is unclear from the record in this case whether the district court’s order was recorded.

[¶8] A bench trial was held in the partition action on September 19, 2014, and the district court ordered the property to be sold through the use of a professional auction company. *See* Dickey County Case No. 11-2012-CV-00076 at Doc ID # 49. The property was sold at auction by Bitz Auction Services on March 3, 2015, with the net proceeds therefrom in the amount of \$7,061,209.97 to be allocated equally between Donald and Delbert’s Estate. Id. at Doc ID # 72. Donald purchased certain parcels for \$2,954,100.00, with the remainder of the property purchased by a third party. Id. These transactions closed on May 18, 2015. Id.

[¶9] In July 2015, the forensic accounting report by Eide Bailly was submitted in the probate and a hearing was scheduled for October 26, 2015, to address the allowance of the creditor claim against the Estate by the Partnership and Donald and Scott Moore. (App. 5, Doc ID # 60-62). On the day of the hearing, the parties reached a settlement pursuant to which the Estate agreed to pay the sum of \$37,446.06 to the Partnership. (App. 31).

[¶10] A hearing was held on February 9, 2016, at which time the district court addressed remaining issues, including valuation of the Partnership and the issue of whether the Partnership owed rent to the Estate for its use of property owned by Delbert and Donald as tenants in common. (App. 5, Doc ID # 65). As to the rental issue, the district court entered its *Memorandum Opinion* on July 28, 2016, concluding the Estate was not entitled to rental income from the Partnership. (App. 33-45). The Court further

required attorney Radermacher, on behalf of the Estate, to prepare proposed findings. (App. 45). After a delay of nearly six (6) months, attorney Elhard submitted proposed findings on February 6, 2017, on behalf of the Partnership and its surviving partners, Donald and Scott. (App. 6, Doc ID # 99). A subsequent status hearing was scheduled for March 28, 2017. (App. 6, Doc ID # 100). It was not until the day before the scheduled hearing, March 27, 2017, that proposed findings were submitted by attorney Radermacher, nearly eight (8) months after the district court had issued its *Memorandum Opinion* in July 2016. (App. 6, Doc ID # 102).

[¶11] The district court entered its *Findings of Fact, Conclusions of Law, and Order for Judgment* on May 30, 2017, and a *Judgment* was entered on July 5, 2017. (App. 17-32, 46-49). A notice of entry of judgment was filed on July 24, 2017, by the Estate. (App. 50). A satisfaction of judgment was also filed on July 24, 2017, acknowledging the Estate's receipt of payment for Delbert's one-third interest in the Partnership. (App. 6, Doc ID # 115). A *Notice of Appeal* was filed by Charles Minard as personal representative of the Estate of Delbert Moore on August 30, 2017. (App. 51-52). The sole issue on appeal is whether the district court correctly determined the Estate of Delbert Moore is not entitled to rental income from the Partnership. (*Id.*) Charles, Terry, and Candice also commenced a separate lawsuit against Donald, Scott, and the Partnership concerning the rental issue in March 2018. See Charles Minard et al. v. Donald Moore et al., Dickey County Case No. 11-2018-CV-00018.

LAW AND ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THE ESTATE OF DELBERT G. MOORE IS NOT ENTITLED TO RENTAL INCOME FROM THE GLENN W. MOORE & SONS PARTNERSHIP.

[¶12] On appeal, Charles, individually and as personal representative of the Estate of Delbert Moore, argues the district court erred in finding that the Estate was not entitled to rental income from the Partnership. (Doc. ID # 16, Appellant Brief). In support of his position, Charles contests the factual findings of the district court regarding the partnership clarification agreement between Delbert and Donald, and ownership of the real estate contributed to the Partnership by Delbert and Donald. (Id.) Additionally, Charles contests the district court’s conclusion that the Estate failed to establish the required elements of a claim for unjust enrichment. (Id.) As discussed below, the district court correctly found the Estate is not entitled to rental income from the Partnership. The factual findings made by district court in connection with the Estate’s rental claim are not clearly erroneous, and the Estate cannot establish the required elements of unjust enrichment.

A. The district court’s factual findings regarding the Estate’s rental claim are not clearly erroneous.

[¶13] This Court reviews factual findings in probate proceedings under the clearly erroneous standard of review. In re Estate of Johnson, 2015 ND 110, ¶ 20, 863 N.W.2d 215. “A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all of the evidence, we are left with a definite and firm conviction a mistake has been made.” Id. “Findings of fact are adequate if they provide this Court with an understanding of the district court’s factual basis used in reaching its determination.” Id. A district court’s findings are presumptively correct and a court’s choice between two permissible views of the weight of the evidence is not clearly erroneous. Border Res., LLC v. Irish Oil & Gas, Inc., 2015

ND 238, ¶ 14, 869 N.W.2d 758. Simply because this Court may view the evidence differently does not permit a reversal of the trial court. Id.

[¶14] In reaching its determination that the Estate of Delbert Moore is not entitled to rent from the Partnership, the district court found the real estate owned by Delbert and Donald as tenants in common to be an integral component of the Partnership business. (App. 26-27). Without the real estate, the Partnership would be unable to conduct its business to the extent it had while Delbert was alive. (App. 27). In this regard, the district court noted the significance of the “Addition and Clarification of Partnership Agreement” pursuant to which Delbert and Donald agreed to the treatment of their contributed real estate and further clarified that the Partnership would not automatically dissolve upon death of a partner. (App. 26-27). The following is the language used in the Partnership clarification agreement:

Land owned as tenants in common by Delbert and Donald Moore is contributed to the partnership without charge. The partnership is responsible for all costs and management associated with the land and treats the land as if owned by the partnership. This contribution cannot be retracted except on dissolution of the partnership or agreement by both partners. Any land owned [by] other persons operated by the partnership is leased by the partnership and not by individual partners.

....

This partnership is not automatically dissolved on death of a partner; however, the estate of a deceased partner cannot make business decisions for the partnership without the approval of the surviving partner.

(App. 16).

[¶15] Recognizing the agreement contemplates the continuation of the Partnership following the death of a partner, the district court explained the distinction between the

“dissociation” of a partner (and continuation of a partnership), as opposed to “dissolution” and winding up of a partnership. (App. 26-27). The language of the Partnership clarification agreement that the “partnership is not automatically dissolved on death of a partner” reflects Delbert’s death triggering his dissociation from the Partnership, not a dissolution of the Partnership. (App. 27). If a dissolution were sought, the agreement required “at least six months written notice.” (App. 16).

[¶16] Based on the foregoing, the district court found that the partners intended there to be an extended period of time after the death of a partner to allow the Partnership business to continue while the surviving partner(s) decided how to proceed (i.e. either continuation or dissolution of the Partnership). (App. 27). Additionally, because the Partnership clarification agreement is clear that Delbert and Donald contributed the real estate to the Partnership “without charge,” the district court properly found that no rent was owed by the Partnership to the Estate for that extended period of time following Delbert’s death. (Id.)

[¶17] Such is also consistent with the language of the Partnership clarification agreement that the contribution of real estate by Delbert and Donald “cannot be retracted except on dissolution of the partnership or agreement by both partners.” (App. 16). Neither of these events has occurred; however, the contributed real estate was eventually sold in the partition action between the parties. *See* Dickey County Case No. 11-2012-CV-00076 at Doc ID # 72. Charles and the Estate cannot say the Partnership was not entitled to use the real estate as permitted by the Partnership clarification agreement from the time of Delbert Moore’s death until the property was sold in May 2015. In fact, the partition order action actually cuts short the Partnership’s right to utilize the contributed

real estate until dissolution of the Partnership or agreement of the partners as provided by the Partnership clarification agreement. (App. 16). The district court further noted the procedural history and timing of the partition action and probate proceedings, together with the amount of real estate, as having a delaying effect on the eventual sale of the property. (App. 27-28).

[¶18] The district court also found it significant that the Estate of Delbert Moore did not hold title to Delbert's interest in the real estate for a period of twenty eight (28) months from May 11, 2012, until September 12, 2014. (App. 28-29). Accordingly, the district court found the Estate did not have standing to seek compensation for use of the property during that time period. (App. 29). On May 11, 2012, Charles had deeded the property to himself, Terry, Candice, and Scott. (App. 28). On September 12, 2014, the district court invalidated those transfers with title to the real estate reverting back to the Estate of Delbert Moore. (Id.) The district court made clear the intent of its order to transfer the property back to the Estate so that it could be sold in the partition action. (Id.) During the 28 month time period, the individual grantees, and not the Estate, were the record title holders to the real estate. (App. 28-29).

[¶19] The district court's factual findings regarding the Estate's rental claim against the Partnership are not clearly erroneous. Such findings are supported by the evidence and are sufficient to provide this Court with an understanding of the basis used by the district court in reaching its determination that the Estate of Delbert Moore is not entitled to rent from the Partnership.

B. The Estate cannot establish the required elements of unjust enrichment.

[¶20] Charles and the Estate also challenge the district court’s conclusion that the Estate had failed to establish the applicability of the doctrine of unjust enrichment. (Doc. ID # 16, Appellant Brief at ¶¶ 23-29). A district court’s determination of whether there has been unjust enrichment is fully reviewable as a matter of law. Erickson v. Brown, 2012 ND 43, ¶ 25, 813 N.W.2d 531. “Unjust enrichment is an equitable doctrine, applied in the absence of an express or implied contract, to prevent a person from being unjustly enriched at the expense of another.” Erickson, 2012 ND 43, ¶ 25, 813 N.W.2d 531. “To recover under a theory of unjust enrichment one must prove five elements (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) absence of a justification for the enrichment and impoverishment; and (5) an absence of a remedy provided by law.” Id. “The essential element in recovering under a theory of unjust enrichment is the receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying for its value.” Id. “When an impoverishment results from a valid contractual arrangement made by a party, the result is not contrary to equity and there has been no unjust enrichment.” Lochthowe v. C.F. Peterson Estate, 2005 ND 40, ¶ 10, 692 N.W.2d 120. Accordingly, “there can be no implied-in-law contract when there is an express contract between the parties relative to the same subject matter.” Id.

[¶21] As an initial matter, the Estate’s unjust enrichment claim completely ignores existence of the Partnership clarification agreement regarding the Partnership’s ability to utilize the property contributed by Delbert and Donald without charge, and that such contribution could not be retracted except on dissolution of the Partnership or by agreement by the partners. (Doc. ID # 16 at ¶¶ 23-29). The Estate does not dispute the

validity of that agreement, but simply wishes it away by making the unsupported conclusory statement that the contract somehow failed to exist following Delbert's dissociation from the Partnership by virtue of his death. (Id. at ¶ 24). This is simply not the case and the Estate offers no authority to support such a position. (Id.) To the contrary, it is clear the Partnership clarification agreement was meant to control in the event of the death of Delbert or Donald by the inclusion of specific language that the Partnership would not automatically dissolve on death of a partner, and that a deceased partner's estate would be prevented from making business decisions for the Partnership without approval of the surviving partner. (App. 16). The law is clear that a claim for unjust enrichment can only exist in the absence of a contract pertaining to the same subject matter. Because an agreement exists whereby Delbert and Donald explicitly agreed to contribute the real estate to the Partnership "without charge," an express contract exists concerning the subject matter of the Estate's claim for rental income and unjust enrichment cannot exist.

[¶22] Nor is the Estate able to establish the remaining elements of an unjust enrichment claim. As found by the district court, the record evidence is insufficient to show the Partnership was enriched or that the Estate suffered an impoverishment following Delbert Moore's death. (App. 29-30). None of the parties presented evidence that the Partnership continued its business to the same extent following Delbert's death. (Id.) Whereas the evidence presented at trial focused on the time period through 2012, the year Delbert passed away, no evidence was presented to show the Partnership continued to make full use of the entire real estate after Delbert's death. (Id.) The conclusory statements of Charles that Donald and Scott were using the property and the heirs did not

benefit does not establish the Partnership's use of the land following Delbert's death. (App. 30). Accordingly, the district court found the Estate had failed to prove the doctrine of unjust enrichment is applicable. (Id.)

[¶23] Charles and the Estate attempt to mischaracterize the testimony of Scott regarding the general business practices of the Partnership as assuming the Partnership continued to utilize the real property in the same way it had prior to Delbert's death. (Doc. ID # 16 at ¶¶ 25-27). As found by the district court, "Scott Moore testified the partnership continued on after the death of Delbert Moore, as at the time of the trial he was currently a full partner with Donald Moore, and he gave a brief statement as to the timing of the sale of various head of cattle." (App. 30). Scott did not testify the Partnership continued to make the same use of the entire real estate following Delbert's death. The Estate further attempts to use the testimony of Charles that he had driven past the property over the years as imputing knowledge of the Partnership's operations before and after Delbert's death. (Doc. ID # 16 at ¶ 27). Although Charles may have driven by property on occasion, there was no testimony or other evidence to show he was involved or aware of the specifics of the Partnership business sufficient to have any personal knowledge regarding its operations either before or after Delbert's death. The record evidence is insufficient to show the partnership operated on a scale or to the extent that it utilized the real estate owned by Donald and Delbert in order to show the Partnership was enriched and the Estate suffered an impoverishment.

[¶24] Even if the Partnership did continue to operate on the same scale as it had prior to Delbert's death by making full use of the contributed real estate, such would be entirely consistent with the Partnership clarification agreement. As discussed above, the

agreement provides that the contribution of real estate by Delbert and Donald to the Partnership without charge could not be retracted except on dissolution of the Partnership or agreement by both partners. (App. 16). There is no evidence in the record that either of these events occurred. The agreement further contemplated the continuation of the Partnership following the death of a party by specifically providing that the Partnership would not automatically dissolve upon the death of Delbert or Donald, and by excluding the estate of a deceased partner from Partnership business decisions (without approval from the surviving partner). (Id.) Accordingly, the Partnership was contractually entitled to use the real estate as permitted by the Partnership clarification agreement following Delbert Moore's death. Under such circumstances, there was no unjust enrichment to the Partnership or detriment to the Estate. *See* Lochthowe, 2005 ND 40, ¶ 10, 692 N.W.2d 120 (“When an impoverishment results from a valid contractual arrangement made by a party, the result is not contrary to equity and there has been no unjust enrichment.”). Without an enrichment or impoverishment, there can be no connection between them. Furthermore, even if there was an enrichment to the Partnership and impoverishment to the Estate, there was justification for the same based on the explicit terms of the Partnership clarification agreement.

[¶25] Lastly, even if this Court determines the Estate is entitled to rental income from the Partnership, the Estate is not entitled to rentals from the date of Delbert's death as claimed. (Doc. ID # 16 at ¶ 20-22). In support of its claim that rentals should have commenced as of the date of Delbert's dissociation from the Partnership (i.e. the date of his death) on March 5, 2012, the Estate cites N.D.C.C. § 45-19-01(2) regarding the buyout price of a dissociated partner's interest as the date of dissolution. (Id.) The

Partnership does not dispute that Delbert's death triggered his dissociation from the Partnership. *See* N.D.C.C. § 45-18-01(7)(a) (providing that a partner who is an individual is dissociated from a partnership upon the partner's death). However, the Estate's argument regarding the application of N.D.C.C. § 45-19-01(2) as requiring the Partnership to pay rent commencing on the date of Delbert's dissociation again willfully ignores the Partnership clarification agreement. By statute, N.D.C.C. Chapter 45-13 through 45-21 govern relations among the partners and partnership only to the extent a partnership agreement does not provide otherwise. *See* N.D.C.C. § 45-13-03. The Estate's reliance upon N.D.C.C. § 45-19-01(2) does not apply in this case as the Partnership clarification governs the rental issue as discussed throughout this brief.

CONCLUSION

[¶26] For the foregoing reasons, the district court correctly determined the Estate of Delbert Moore is not entitled to rental income from the Glenn W. Moore & Sons Partnership, and the judgment of the district court on this issue should be affirmed.

Dated: April 26, 2018.

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CERTIFICATE OF SERVICE

[¶27] I hereby certify that a true and correct copy of the forgoing brief was electronically filed with the Clerk of the North Dakota Supreme Court on the 26th day of April, 2018, and e-mailed to the following: Terry Minard (btminard@msn.com), Candice Eberhart (Eberc@aol.com), Kimberly J. Radermacher (kimrader@radermacherlaw.com).

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