

STATE OF MICHIGAN
COURT OF APPEALS

MITCHELL T. FOSTER,

Plaintiff-Appellant,

v

ALYSON T. OLIVER,

Defendant-Appellee,

UNPUBLISHED
September 22, 2015

No. 322816
Oakland Circuit Court
LC No. 2013-136610-CZ

Before: K. F. KELLY, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition on the ground that plaintiff's claims were barred by the judgment entered in defendant's bankruptcy proceeding under the doctrine of res judicata. We reverse.

This action arises from the dissolution of a law firm operated by the parties from December 2008 to September 2009. When the parties agreed to dissolve their law firm, they entered into a dissolution agreement dated September 11, 2009. The dissolution agreement provided that plaintiff would keep certain cases, and defendant would keep "all other civil cases." It also provided as follows:

Medtronic work for plaintiff's committee earned in the name of Alyson Oliver, Mitchell Foster, or any other named entity will be split 50% if there is a settlement or payment of these costs which are estimated at approximately \$40,000.00. If there is no settlement of the Medtronic cases or no funds are recovered, then neither party will be liable to the other for any costs or fees for Medtronic case.

Subsequently, in October 2010, the Medtronic litigation settled. In November 2010, defendant filed a personal bankruptcy petition under Chapter 7 and listed plaintiff and their law firm as creditors. Defendant's bankruptcy case was resolved in April 2011. Sometime in 2012, defendant apparently received a payment of about \$45,000 for work performed on the Medtronic case. When plaintiff sought his half of those proceeds, defendant responded that her indebtedness to him was discharged in her bankruptcy case in 2011.

Thereafter, on October 7, 2013, plaintiff filed this complaint for accounting and for recovery of embezzled property. In count I of his complaint, plaintiff alleged a breach of

fiduciary duty with regard to the proceeds from the Medtronic case. In count II, plaintiff alleged embezzlement on the grounds that defendant misappropriated for her own use all of the proceeds from the Medtronic litigation contrary to the terms of their dissolution agreement. In count III, plaintiff alleged a claim of statutory embezzlement contrary to MCL 600.2919a, and requested treble damages.

Eventually defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(4) and (C)(7). Defendant argued that any debt she owed to plaintiff was discharged in her bankruptcy proceeding. Under the bankruptcy code, a “debt” means liability on a claim and a “claim” is defined to include unliquidated and contingent rights to payment; thus, plaintiff’s contractual right to payment was discharged. Plaintiff could have and should have raised his claims before the bankruptcy court for adjudication. Because this action was barred by the bankruptcy code and the prior judgment of discharge, defendant requested dismissal.

Plaintiff responded to defendant’s motion for summary disposition, arguing that the bankruptcy discharge did not bar his claim. The dissolution agreement between the parties did not give rise to a “debt;” rather, it gave rise to a joint venture regarding the Medtronic case and parties to a joint venture owe each other a fiduciary obligation. Further, defendant was the trustee of the proceeds to which plaintiff was entitled a one-half share. However, upon receipt, defendant breached her fiduciary duty and embezzled the proceeds. Accordingly, plaintiff argued, defendant was not entitled to the summary dismissal of his complaint.

Defendant replied to plaintiff’s response, arguing in part that the trial court did not have jurisdiction to determine the dischargeability of a debt in bankruptcy and, in any case, the parties’ dissolution agreement showed that they did not enter into a joint venture.

The trial court granted defendant’s motion for summary disposition pursuant to MCR 2.116(C)(7), holding that plaintiff’s claims were barred by the judgment entered in the bankruptcy proceeding under the doctrine of res judicata. First, the bankruptcy action was decided on the merits and a final decree was entered. Second, plaintiff’s claim could have and should have been decided in the bankruptcy case. Plaintiff’s right to payment constituted a contractual contingent debt which arose before defendant filed her bankruptcy petition and it was a dischargeable claim. The trial court rejected plaintiff’s argument that the dissolution agreement created a joint venture that gave rise to a post-petition fiduciary duty in defendant to act as trustee of the Medtronic proceeds when they were received. The court concluded that the dissolution agreement ended a joint venture; it did not create a joint venture. Third, the court held that both actions involved the same parties in that plaintiff was listed as a “creditor” in defendant’s bankruptcy documents. And fourth, the court concluded that plaintiff’s claim arose out of the same core of operative facts as the bankruptcy proceedings. Accordingly, defendant’s motion for summary disposition was granted and plaintiff’s complaint was dismissed. This appeal followed.

Plaintiff argues that the trial court erred in holding that the dissolution agreement created a contractual contingent debt with regard to the Medtronic litigation proceeds that was subject to defendant’s personal bankruptcy proceeding. We agree.

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition is properly granted under MCR 2.116(C)(7) when a claim is barred by prior judgment. The reviewing court must accept as true all allegations in the complaint, unless contradicted by documentary evidence. *Id.* at 119. And, although the movant is not required to file supportive evidence, such motions may be supported by documentary evidence as long as the content or substance is admissible in evidence. *Id.* Further, whether the doctrine of res judicata applies presents a question of law that is also reviewed de novo. *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001).

It is clear from the terms of the dissolution agreement that the parties' law firm, "Foster Oliver PLLC," was organized as a professional limited liability company. See MCL 450.4901, 450.4903. And it appears that management of its business affairs was vested in both plaintiff and defendant as member-managers, including for purposes of applying the Michigan Limited Liability Company Act, MCL 450.4101 *et seq.* See MCL 450.4401, 450.4901. A limited liability company is an independent legal entity and has all of the powers granted to corporations in the business corporation act, MCL 450.1101 *et seq.* See MCL 450.4210, 450.4901(2). Thus, a limited liability company may acquire and own assets, as well as make contracts, and is liable for its own debts and liabilities. See MCL 450.1261. Members of a limited liability company are generally not liable for the acts, debts or obligations of the company. See MCL 450.4501(4). In a law firm organized as a professional limited liability company, pending lawsuits, clients, and accounts receivable are not personal assets of its members. As provided in MCL 450.4504(2), a "member has no interest in specific limited liability company property." Accordingly, when the parties decided to dissolve Foster Oliver PLLC, they entered into a dissolution agreement regarding the law firm's assets and liabilities. See MCL 450.4801, 450.4808.

The provision of the dissolution agreement giving rise to plaintiff's cause of action provides:

Medtronic work for plaintiff's committee earned in the name of Alyson Oliver, Mitchell Foster, or any other named entity will be split 50% if there is a settlement or payment of these costs which are estimated at approximately \$40,000.00. If there is no settlement of the Medtronic cases or no funds are recovered, then neither party will be liable to the other for any costs or fees for Medtronic case.

It is well-established that contractual language is to be given its ordinary and plain meaning with the primary goal to honor the intent of the parties. *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010); *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). This paragraph of the dissolution agreement clearly references attorney services that were provided by Foster Oliver PLLC and the possibility of future remuneration, i.e., "earned in the name of Alyson Oliver, Mitchell Foster, or any other named entity," with regard to a particular litigation, the "Medtronic case." The provision further provides that any such payment or settlement—which was earned by the law firm and would have been an asset of that limited liability company—would be split equally between plaintiff and defendant. That is, the right to remuneration accrued to Foster Oliver PLLC before dissolution and any proceeds Foster Oliver

PLLC eventually realized would be split equally between the parties as members of the company.

It is undisputed that defendant was responsible for winding up the unfinished business associated with the Medtronic litigation. See MCL 450.4805. That is, attorney fees were earned but not paid before dissolution of Foster Oliver PLLC. Consequently, defendant filed a claim seeking payment of \$78,560 for those legal services. In that regard, defendant had a duty to act “in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the manager reasonably believes to be in the best interests of the limited liability company.” MCL 450.4404(1); see also MCL 450.4805(2).

It is also undisputed that defendant eventually received payment for the legal services provided with regard to the Medtronic litigation, although the amount of the award is unclear. Pursuant to MCL 450.4404(5): “[A] manager shall account to the limited liability company and hold as trustee for it any profit or benefit derived by the manager from any transaction connected with the conduct or winding up of the limited liability company or from any personal use by the manager of its property.” However, defendant admits that she did not provide an accounting to Foster Oliver PLLC or plaintiff, did not hold the award as a trustee of Foster Oliver PLLC, and did not equally split the award with plaintiff as set forth in the dissolution agreement. Instead, defendant claimed that her agreement to split the proceeds from the Medtronic case, as set forth in the dissolution agreement, constituted a “debt” for purposes of her Chapter 7 bankruptcy proceeding. And, defendant argued, because plaintiff did not make a claim for his share of the Medtronic case proceeds in the bankruptcy court, this “debt” was discharged.

But the money defendant recovered from the Medtronic litigation was not defendant’s money—it was the law firm’s money, as discussed above. And although Foster Oliver PLLC was being dissolved, dissolution is not complete until all outstanding business is resolved. See MCL 450.4805(3); see also, e.g., MCL 449.30. Defendant was merely acting as a trustee of Foster Oliver PLLC with regard to the recovered attorney fees during the winding up of the business affairs of this limited liability company. See MCL 450.4404(5). Once defendant recovered those proceeds, a duty of accounting to Foster Oliver PLLC arose, as well as a duty to act as trustee of those proceeds on behalf of Foster Oliver PLLC. See *id.* Then, as an asset of Foster Oliver PLLC, the proceeds were to be split equally between plaintiff and defendant pursuant to the dissolution agreement.

Although defendant listed Foster Oliver PLLC and plaintiff as creditors on her bankruptcy documents, she did not personally owe either Foster Oliver PLLC or plaintiff any money recovered from the Medtronic litigation. It was not defendant’s money. Defendant was only acting as a trustee for Foster Oliver PLLC with regard to those funds. Thus, plaintiff was not a “creditor” of defendant as defined in the Bankruptcy Code because he did not have a “claim,” i.e., a right to payment, against defendant for the Medtronic proceeds. See 11 USC 101(5)(A), (10)(A). Simply stated, defendant did not personally owe plaintiff his equal share of the recovered proceeds, Foster Oliver PLLC did. Thus, this obligation to plaintiff was not a personal debt of defendant’s that could be discharged in her bankruptcy proceeding. Accordingly, the trial court’s holding that the doctrine of *res judicata* applied to bar plaintiff’s claims against defendant was erroneous. *Res judicata* bars a second action when the matter contested in the second action could have been resolved in the first action. See *Stoudemire*, 248

Mich App at 334. This matter could not have been resolved in defendant's bankruptcy proceeding.

As discussed above, defendant's actions as a member-manager during the winding up of the business affairs of Foster Oliver PLLC were subject to MCL 450.4404(5), which provides: "[A] manager shall account to the limited liability company and hold as trustee for it any profit or benefit derived by the manager from any transaction connected with the conduct or winding up of the limited liability company or from any personal use by the manager of its property." Further, pursuant to MCL 450.4404(1), defendant had a duty to act "in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the manager reasonably believes to be in the best interests of the limited liability company." And pursuant to MCL 450.4404(6):

An action against a manager for failure to perform the duties imposed by this act shall be commenced within 3 years after the cause of action has accrued or within 2 years after the cause of action is discovered or should reasonably have been discovered by the complainant, whichever occurs first.

It appears from the record evidence in this case that defendant received the proceeds from the Medtronic litigation sometime in 2012. In 2013, plaintiff filed this complaint for accounting and for recovery of embezzled property. Because plaintiff's claims against defendant, as a member-manager and trustee of Foster Oliver PLLC, were not discharged in defendant's bankruptcy proceeding, we reverse the trial court's order granting summary disposition in defendant's favor and remand this matter for further proceedings.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff is entitled to costs as the prevailing party. MCR 7.219(A).

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Henry William Saad