

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-195

MAY TERM, 2019

Sharon Pawlick et al.* v. Jonathan Apgar et al.	}	APPEALED FROM:
	}	
	}	Superior Court, Addison Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 22-2-16 Ancv
		Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

Plaintiffs, siblings who filed suit against their brother and his wife over the latter's handling of their mother's home after her death, appeal the trial court's denial of their claims against their brother's wife and its refusal to award them attorney's fees based on the judgment they obtained against their brother. We affirm.

For the most part, the trial court's findings are unchallenged. The parties' parents owned a large home in New Haven, Vermont, which they ran as a "retirement home" for elderly people. The parties' father predeceased their mother, who was advised by counsel when her health began to decline to transfer title to the home to protect it from a Medicaid lien after her death. She was advised to transfer the home to only two of her children to make it easier to sell quickly, particularly given that several of the siblings lived out of state.

In October 2006, shortly before the mother's death, her son George, who had power of attorney, sold the home on her behalf to her children Jon and Katie. Before the conveyance, the local siblings came to an understanding that Jon and Katie would take title to the property to protect it from an expected Medicaid lien and would sell it and share the proceeds equally among all the siblings. There was no plan to renovate the house before selling it, although it needed significant repairs, and there was no discussion of who would pay the mortgage or the upkeep on the house before the house sold.

The house was appraised in October 2006 for \$254,000, and Jon placed it on the market the next month for \$275,000. The house remained on the market at that price for a year, at which time Jon lowered the price to \$250,000. The listing agreement expired in May 2008 and was not renewed. The house ended up in foreclosure, apparently because Jon and Katie did not pay the mortgage. In August 2008, after none of his siblings expressed an interest in buying the house, Jon paid off the mortgage for \$102,000.

The same day that Jon paid off the mortgage, he and Katie quitclaimed the property to him and his wife Patti. From that point forward, Jon and Patti considered the house their property, as the trial court found with respect to defendants' counterclaims. Jon obtained a \$200,000 loan to

repair and renovate the house. In October 2009, after the renovations were done, the property was appraised at \$365,000 and listed for sale at \$375,000. Jon and Patti's daughter lived in the home rent-free from June 2010 through February 2011. Jon and Patti sold the property in August 2013 for \$363,000. They received \$158,165 after all the expenses were paid at closing. Taking into account the renovations they made to the house, they netted \$47,000 when it sold.

Plaintiffs filed a complaint against Jon and Patti, alleging breach of fiduciary duty, conversion, and unjust enrichment. Defendants asserted counterclaims for reimbursement of necessary expenditures to maintain the property and for unjust enrichment. Prior to trial, the superior court granted plaintiffs summary judgment on the issue of whether the house was conveyed to Jon and Katie to preserve the property for the benefit of all the siblings.

Following a two-day trial in December 2017, the trial court: (1) rejected defendants' arguments that plaintiffs' claims were barred by the applicable statute of limitations and the equitable doctrine of laches; and (2) concluded that Jon had breached his duties to his siblings under the acknowledged constructive trust by not prudently managing the sale of the property, by not keeping all the beneficiaries apprised of what he was doing with the property, and by selling the property to himself and his wife. As for Patti, the court found that she was not a trustee, and could not be liable for breach of the trust, because she was never asked to, or agreed to, hold the property for the benefit of Jon's siblings. The court stated that because it was finding a breach of fiduciary duty, it did not need to reach the alternative theories of conversion or unjust enrichment. Regarding the counterclaims, the court deducted payments Jon and Patti made for the house prior to when it was sold to defendants. In the end, the court awarded each of the four plaintiffs damages in the amount of \$21,219. The court declined to award attorney's fees, finding that Jon had acted out of ignorance rather than bad faith in his dealings with the house.

Plaintiffs filed a motion to alter or amend the judgment, arguing that the court was required to consider their alternate theory of unjust enrichment after it determined that Patti was not a trustee to the constructive trust. The trial court denied the motion, stating that Patti was not liable based on an equitable theory of unjust enrichment because the duty owed to the siblings was Jon's, not hers, and because, although she obtained a benefit from living in the home, she and Jon put more time and money into the property than it was ultimately worth.

On appeal, plaintiffs argue that the trial court erred by finding that Patti was not a trustee, by not finding her liable under their alternative theory of unjust enrichment, and by not awarding them attorney's fees. Regarding their first argument, plaintiffs contend that, by accepting the deed to the property in 2008, Patti agreed, at least implicitly, to act as trustee for the benefit of Jon's siblings because she knew that the property was to be sold and the proceeds distributed to the siblings. We disagree. Patti testified that she was "[n]ot normally" involved in any of the siblings' conversations about their mother's house. On cross-examination, she testified that she was aware of the quitclaim deed titling the property to Jon and her and of Jon's desire to pay off the mortgage and clear his parents' name. She also testified that after she and John paid off the mortgage they treated the house as their own, intending to renovate it to prepare it for sale, but that there was no plan with respect to determining what interest, if any, the other siblings would have in the house from that point going forward. She explained that the purpose of the renovations was to make the house marketable and that she never thought the other siblings were "out of the picture," but when she and Jon kept putting more and more money into the house, it became clearer over time that it was for her and Jon's benefit. She testified that, as late as August 2010, it was still unclear to her what interest the siblings may have had in the house, but that she "[p]robably" believed that the property was legally hers and Jon's by the time they moved into the house in 2011, given all of the money and time they had put into it. We conclude that Patti's testimony neither undermined the

trial court's finding that Patti never agreed to hold the property for the benefit of the siblings nor compelled the court to find that, in 2008 when the property was quitclaimed to Jon and her, she became an implicit trustee of the constructive trust that arose from the siblings' earlier oral discussions. See Estate of Kuhling by Kuhling v. Glaze, 2018 VT 75, ¶ 11 (“On appeal, we review the trial court’s findings of fact for clear error, and its legal conclusions de novo.”); Mann v. Levin, 2004 VT 100, ¶ 17, 177 Vt. 261 (“[W]e will uphold the court’s factual findings unless, taking the evidence in the light most favorable to the prevailing party, and excluding the effect of modifying evidence, there is no reasonable or credible evidence to support them.”).

Plaintiffs argue, however, that because Patti was in a confidential relationship with her husband Jon, who received an interest in the property in 2006 under the constructive trust, she became a constructive trustee as a matter of law in 2008 when title to the property was transferred to Jon and her. Again, we disagree. In support of this argument, plaintiffs quote “a familiar principle of equity that a trust is implied whenever the circumstances are such, that the person taking the legal estate, whether by fraud or otherwise, cannot enjoy the beneficial interest without violating the rules of honesty and fair dealing.” Legault v. Legault, 142 Vt. 525, 529 (1983) (quotation omitted). As indicated in Legault, this is an equitable principle that allows courts to impose a constructive trust as a tool “to prevent unjust enrichment.” Id.

The issue, then, is whether the evidence compelled the trial court to impose the constructive trust on Patti on the basis that she was unjustly enriched by her husband’s breach of his fiduciary duty with respect to the trust property. See Kellogg v. Shushereba, 2013 VT 76, ¶ 13, 194 Vt. 446 (“We review the trial court’s legal conclusions without deference, but we give deference to the trial court’s decision to grant or withhold equitable remedies.” (citation omitted)). The elements of the doctrine of unjust enrichment are: “whether (1) a benefit was conferred on defendant; (2) defendant accepted the benefit; and (3) defendant retained the benefit under such circumstances that it would be inequitable for defendant not to compensate plaintiff for its value.” Reed v. Zurn, 2010 VT 14, ¶ 11, 187 Vt. 613 (mem.) (quotation omitted). The doctrine “rests upon the principle that a [person] shall not be allowed to enrich himself [or herself] unjustly at the expense of another.” Legault, 142 Vt. at 531 (quotation omitted). Thus, “the inquiry is whether, in light of the totality of circumstances, it is against equity and good conscience to allow defendant to retain what is sought to be recovered.” Id. (citation omitted). “[W]hether there is unjust enrichment may not be determined from a limited inquiry confined to an isolated transaction,” but rather “must be a realistic determination based on a broad view of the human setting involved.” Id. (quotation omitted).

The trial court rejected this equitable theory of recovery with respect to Patti, noting that only Jon had a fiduciary duty as constructive trustee of the property, that Patti was not in a position to take any action different from the path taken by Jon as the trustee of the property, and that, in the end, she and Jon put more time and money into the property than it was ultimately worth. Plaintiffs argue that Patti breached her fiduciary duty, but this argument is dependent on their unsuccessful claim that the trial court erred by finding that she was not a constructive trustee with respect to the subject property. Plaintiffs also see an inconsistency between the court’s finding in its original decision that the house had a net value of \$47,000 after all the renovations were completed and its finding in its decision denying their motion to alter and amend the judgment that the time and money defendants put into the property exceeded the property’s value. There is no inconsistency. Both Jon and Patti testified to the significant sweat equity they both put into the property over the years, in addition to the money they spent for renovations, and Jon testified that they lost money on the renovations. Although, in determining the net value of the property, the court did not credit them for their sweat equity following the 2008 title transfer because of its determination that Jon breached his fiduciary duty as trustee of the constructive trust, defendants’

testimony regarding their sweat equity supported the court’s determination that ultimately Patti did not benefit from Jon’s breach of his fiduciary duty regarding the trust. Thus, we discern no basis in the record to overturn the trial court’s rejection of plaintiffs’ claim of unjust enrichment with respect to Patti.*

Finally, plaintiffs argue that the trial court erred in declining to award them attorney’s fees. Plaintiffs contend that the court failed to consider awarding attorney’s fees under 14A V.S.A. § 1004, which provides that “[i]n a judicial proceeding involving the administration of a trust, the probate division of the superior court, as justice and equity may require, may award costs and expenses, including reasonable attorney’s fees, to any party.” Plaintiffs sought attorney’s fees at trial based on defendants’ having acted in bad faith. They also argued that while § 1004 directly applied only in actions before the probate division, the trial court’s decision “should also be informed by 14A V.S.A. § 1004.” The question of whether attorney’s fees should be awarded under § 1004 “as justice and equity may require” is “largely indistinguishable” from the question of whether attorney’s fees should be awarded for “reasons of justice” under the common law. Curran v. Bldg. Fund of United Church of Ludlow, 2013 VT 118, ¶ 23, 195 Vt. 319. Here, in response to plaintiffs’ motion, the trial court chose not to impose attorney’s fees on Jon because he acted out of ignorance rather than bad faith. Plaintiffs argue on appeal that bad faith is not a requirement to impose attorney’s fees under § 1004; however, as noted, they asked the trial court to impose attorney’s fees on that basis. They cannot now claim error based on the trial court’s rejection of their claim that defendant acted in bad faith. Nothing in the record persuades us that the court abused its discretion by denying plaintiffs’ motion for attorney’s fees. *Id.* (noting our case law holding that “awards for attorney’s fees are generally reviewed for abuse of discretion”).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

* Plaintiffs ask us to follow the lead of a case in which the Colorado Supreme Court held that a finding of malfeasance is not required to satisfy the third element of an unjust enrichment claim involving close family members. See Lewis v. Lewis, 189 P.3d 1134, 1143-1145 (Colo. 2008) (en banc) (reversing court of appeals’ rejection of unjust enrichment claim brought by ex-wife against her former in-laws who sold house she had lived in for fourteen years after she separated from her husband). We need not determine whether we would follow a similar path because, as we explain here, the record supports the trial court’s finding, with respect to the unjust enrichment claims, that ultimately Jon and Patti put more money into the property than it was worth. In other words, no benefit was conferred on, or retained by, Jon or Patti.