

2013 IL App (5th) 120121-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

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Appellate Court of Illinois,
Fifth District.

ESTATE of Clyde L. WEBSTER, Jr., by its
Executor, Joseph P. Webster, Plaintiff–Appellee,

v.

Larry L. THOMAS, James W. Theis, and TT
& W Agri–Partners Co., also known as T & T
Agri–Partners Co., Defendants–Appellants.

No. 5–12–0121. | Jan. 7, 2013.

Appeal from the Circuit Court of Christian County. No. 08–
CH–112, [James L. Roberts](#), Judge, Presiding.

ORDER

Justice [WEXSTEN](#) delivered the judgment of the court:

*1 ¶ 1 *Held*: The circuit court properly determined that the defendants had failed to liquidate and distribute the partnership assets pursuant to agreement and court order and that the plaintiff was not precluded pursuant to the doctrine of “unclean hands” from asserting his claims.

¶ 2 The plaintiff, the Estate of Clyde L. Webster, Jr., by its executor, Joseph P. Webster, filed an action for declaratory judgment, accounting, breach of fiduciary duty, and specific performance in the circuit court of Christian County against the defendants, Larry L. Thomas, James W. Theis, and TT & W Agri–Partners Company, also known as T & T Agri–Partners Company. Following a bench trial, the circuit court ordered the defendants to provide to the court a detailed accounting and a plan to liquidate the partnership according to the partnership agreement and to pay the plaintiff’s attorney fees.

¶ 3 On appeal, the defendants argue that the circuit court erred in finding that they failed to comply with the partnership agreement, that Theis violated a fiduciary duty to the plaintiff

following the dissolution of the partnership, and that the plaintiff was not estopped pursuant to the equitable doctrine of “unclean hands” from asserting the claims in the complaint. We affirm.

¶ 4 BACKGROUND

¶ 5 Clyde L. Webster, Jr., who formed T & T Agri–Partners Company with partners Theis and Thomas, died September 18, 2002. The T & T Agri–Partners Company owns approximately 180 acres of farmland in Christian County, subject to mortgage liability to the Rochester State Bank and/or Farm Credit Services of Central Illinois. This farmland constitutes T & T Agri–Partners Company’s only asset.

¶ 6 The September 1, 1997, partnership agreement executed by Clyde, Theis, and Thomas created “a general partnership formed pursuant to the laws of the State of Illinois.” The partnership issued 180 partnership units, with Thomas holding 40 (22.2%), Theis holding 80 (44.5%), and Clyde holding 60 (33.3%). The partnership agreement further provided as follows:

“10. If the Partnership is dissolved and the dissolution occurs, then any indebtedness of the Partnership shall be assumed by the Partners of the Partnership at the time of dissolution according to their then respective Partnership interests. * * *

Unless extended by the written consent of those Partners whose combined ownership interest equals at least one hundred twenty (120) Partnership units, the Partnership shall continue until the first to occur of January 31, 2010 A.D., or the earlier dissolution of the Partnership. * * *

The Partners further acknowledge and agree that in the event of the * * * withdrawal of any Partner or the attempt by any Partner to dissolve, terminate or liquidate or a petition to the Court by any Partner for the dissolution, termination or liquidation of the Partnership * * *, the withdrawing Partner shall be deemed to have made an irrevocable ninety (90) day offer to sell his entire Partnership interest to the Partnership according to the terms contained in the next paragraph.

*2 The purchase price of the above reference irrevocable offer shall be ninety percent (90%) of the fair market value of the Partnership assets as determined by appraisal

by Farm Credit Services * * * less the amount of all Partnership liabilities. * * * The adjusted book value and total of all liabilities shall be determined by the Partnership's certified public accounting firm and shall be conclusive and binding on all parties hereto, and shall be made as of the last day of the month immediately preceding the event of withdrawal ('Valuation Date'). * * *

* * * If a Partner dies, the Partnership will be dissolved, unless those Partners owning at least one hundred twenty (120) Partnership units including the personal representative of the deceased Partner's estate or trustee of the trust which has legal title to the deceased Partner's interest in the Partnership (deceased Partner's Successor) vote to continue the Partnership within one hundred twenty (120) days of the date of the deceased Partner's death. In such event, the deceased Partner's Successor shall be deemed to be the successor Partner to the deceased Partner and shall be vested with all the same rights, title and interest as the deceased Partner.

11. Upon dissolution, the assets of the Partnership shall be liquidated and distributed in the following order:

- (a) To the payment of creditors in the order of priority as provided by law* * *
- (b) To the Partners for the credit balance in their respective drawing accounts; and
- (c) To the Partners in proportion to their capital accounts.

Any gain or loss on disposition of the Partnership properties in the process of liquidations shall be credited or charged to the Partners in proportion to their interest in profits or losses as specified in Section 2.

* * *

24. Any Partner who shall violate any of the terms of this Agreement, in addition to being subject to any and all other remedies, liabilities and obligations herein or by law or equity imposed upon him for such violation, shall indemnify and hold harmless the Partnership, and all other Partners from any and all claims, demands, actions, losses, liabilities, and obligations, including but not limited to attorneys' fees, incurred by the indemnities which may arise from such violation."

¶ 7 On October 14, 2008, the plaintiff filed its complaint against the defendants. The plaintiff's complaint sought a

declaratory judgment ordering the partnership assets to be distributed based upon the then-current value of the acreage. The plaintiff also sought an order requiring the defendants to produce financial information and further alleged an action for breach of fiduciary duty.

¶ 8 In response, the defendants asserted that the net value of Clyde's partnership interest as of the date of Clyde's death was tendered to the plaintiff and rejected, that the plaintiff was unresponsive to and uncooperative with the defendants' efforts to effectuate the partnership dissolution upon Clyde's death, and that the plaintiff was estopped from asserting his claims pursuant to the equitable doctrine of "unclean hands."

*3 ¶ 9 On December 9, 2009, the circuit court entered an order granting summary judgment on count I of the plaintiff's complaint. The circuit court determined that section 10 of the partnership agreement was not intended to govern liquidation after the death of a partner. Instead, the circuit court agreed with the plaintiff's interpretation that section 11 of the agreement governed the circumstances and provided that upon dissolution, which occurred at Clyde's death on September 18, 2002, and as a result of the remaining partners not agreeing to continue the partnership, T & T Agri-Partners Company's assets were to be liquidated and distributed and that any gain or loss was to be credited or charged to the partners. The circuit court held that, upon liquidation of T & T Agri-Partners Company's assets, pursuant to the partnership agreement, the plaintiff was entitled to 33.3% of the fair market value of the partnership interest at the time of liquidation, minus applicable liabilities.

¶ 10 On June 24, 2010, the plaintiff filed an amended complaint. In count I of its amended complaint, the plaintiff again sought declaratory judgment determining that upon termination of the partnership, its assets should be distributed based upon the then-current value of the 180 acres of farmland and pursuant to paragraph 11 of the partnership agreement. In count II, the plaintiff sought an accounting, requesting the court to order the defendants to produce financial information. In count III, the plaintiff alleged that the partners had breached a fiduciary duty by failing to pay Clyde's share of the partnership. In count III, the plaintiff specifically alleged that the defendants failed to liquidate the assets of the partnership pursuant to paragraph 11 of the agreement and sought payment for attorney fees. In count IV, the plaintiff sought specific performance requesting the court to order the defendants to liquidate the assets of the

partnership according to paragraph 11 of the partnership agreement.

¶ 11 At trial, the evidence revealed that although it was sent documentation regarding a buy-out proposal valuing Clyde's partnership interest as of the date of death, the plaintiff rejected the defendants' offer. The correspondence in evidence revealed the defendants' continued assertion, and the plaintiff's rejection, that in computing the surviving partners' obligations to the estate, the partnership's land was to be valued at the time of Clyde's death.

¶ 12 Theis and Thomas sent correspondence to the plaintiff, including exhibits dated March 14, 2003, and March 22, 2004, regarding the sale of the partnership interest, but the plaintiff did not respond to the correspondence. Joseph testified at trial that he had made a decision not to sell the partnership interest because the estate was a partner and "there was no reason to move forward with * * * a sale of the * * * property."

¶ 13 Theis testified that he saw Joseph in September 2002, shortly after Clyde died, but was not again in his presence until March 2010. Theis testified that during this time, Joseph did not contact him. Theis testified that the partnership had been proceeding in the belief that the valuation at the time of Clyde's death was the valuation that should be used. Theis acknowledged that the partnership's tax returns filed through 2006 indicated on their face that the plaintiff was included as a partner. Theis testified that the partnership had thereafter amended the tax returns to remove the plaintiff as a partner and to reflect the dissolution.

*4 ¶ 14 On February 13, 2007, the plaintiff wrote Theis, stating that because "August 2007 w[ould] complete the 10th year of the Partnership," it wanted the property address and information to arrange a current appraisal. In May 2007, Theis retained an appraiser and instructed him to appraise the farmland as of the time of Clyde's death.

¶ 15 On July 19, 2007, in a letter from the defendants' attorneys to the plaintiff, the attorneys recognized that pursuant to paragraph 10 of the partnership agreement, the partnership was dissolved upon the death of any partner in that the owners of at least 120 partnership units had not voted to continue the partnership within 120 days of the deceased partner's death. In the letter, the defendants, through their attorneys, appraised the 181 acres of farm ground as of the date of Clyde's death as \$588,250, with Clyde's interest valued at \$196,064 at his death. The letter revealed that "[t]he

surviving partners [we]re prepared to tender this amount to" the plaintiff.

¶ 16 In a follow-up letter dated September 14, 2007, the defendants' attorneys noted that the plaintiff had not responded to the July 19, 2007, letter. The defendants enclosed in this letter a certified check for \$76,498.50, representing "the net amount the partnership owed to Clyde upon its dissolution on the date of his death."

¶ 17 In February 2008, the plaintiff's transaction attorney sent a counteroffer to the defendants, indicating that it was willing to receive \$225,000 as its interest in the partnership. The plaintiff's transaction attorney testified at trial that in May 2008, he believed that the parties had reached an impasse and contacted a litigation attorney to commence litigation action against the defendants to enforce the partnership agreement.

¶ 18 On January 27, 2010, the plaintiff sent a letter to the defendants, noting that the partnership agreement ended by its terms on January 31, 2010. The letter stated: "As of that date, I stand ready to cooperate in the liquidation of the Partnership." Joseph testified that before this letter stating that he stood ready to liquidate and cooperate in the liquidation of the partnership, he was not ready for liquidation of the partnership.

¶ 19 On September 2, 2011, after the bench trial, the circuit court entered its order, finding that the partnership expired by its terms on January 31, 2010, and despite demand by the plaintiff, the partnership had failed and refused to liquidate the assets and disburse funds to the plaintiff according to paragraph 11 of the partnership agreement. The circuit court thereby ordered the defendants to liquidate the partnership in accordance with paragraph 11 and ordered the defendants to provide a detailed accounting of all receipts and disbursements.

¶ 20 The circuit court held that the plaintiff was not estopped by the equitable doctrine of unclean hands. The court found that Clyde, prior to his death, and the plaintiff thereafter, chose not to accept an offer by the defendants to purchase the plaintiff's interest in the partnership pursuant to paragraph 10 of the partnership agreement. The circuit court found that after Clyde's death, the defendants continued to operate the partnership through the summer of 2007. The circuit court found that the plaintiff's suit was not an abuse of the judicial process or a bad-faith attempt to secure an economic windfall.

*5 ¶ 21 The circuit court further found that the defendants owed a fiduciary duty to the plaintiff to conduct the affairs of the partnership and to wind up the affairs of the partnership in accordance with the partnership agreement. The circuit court found that, in failing to properly liquidate the partnership and forcing the plaintiff to retain counsel to file suit to prosecute the action, the defendants breached their duties to Clyde and the plaintiff. The circuit court ordered, pursuant to paragraph 24 of the partnership agreement, reasonable attorney fees and costs incurred by the plaintiff.

¶ 22 On February 10, 2012, the circuit court entered an amended order, finding no just reason to delay enforcement or appeal of the judgment. See Ill. S.Ct. R. 304(a) (eff. Feb. 26, 2010). On March 8, 2012, the defendants filed a notice of appeal.

¶ 23 ANALYSIS

¶ 24 “Parties to a contract are not entitled to specific performance as a matter of right. Instead, the remedy of specific performance is granted in the exercise of the trial court’s sound discretion.” *WestPoint Marine, Inc. v. Prange*, 349 Ill.App.3d 1010, 1013 (2004). “[C]lear, explicit[,] and convincing evidence is required to support a grant of specific performance,” and where testimony is conflicting in a bench trial, the trial court’s factual findings will not be disturbed unless they are against the manifest weight of the evidence.” *Id.* (quoting *Butler v. Kent*, 275 Ill.App.3d 217, 227 (1995)). Issues involving contract interpretation, however, are subject to *de novo* review. *Board of Education v. Jackson*, 401 Ill.App.3d 24, 31 (2010). Keeping these principles in mind, we address the arguments raised by the defendants on appeal.

¶ 25 As noted by the plaintiff, the defendants do not dispute on appeal the circuit court’s December 9, 2009, order interpreting the partnership agreement to require valuation of Clyde’s partnership interest at the time of liquidation. The defendants have therefore waived this issue by failing to argue it. See *Lozman v. Putnam*, 379 Ill.App.3d 807, 823 (2008).

¶ 26 On appeal, the defendants argue that the circuit court erred in finding that they had failed and refused to liquidate the assets of the dissolved partnership and disburse funds to the plaintiff in accordance with the partnership agreement. The defendants assert that the evidence revealed that Joseph, as executor to Clyde’s estate, misled Theis and Thomas by continuing the pretense of a partnership, waiting out the

expiration of the dissolved partnership’s 10-year term, and then insisting upon a “liquidation” based upon 2011–2012 real estate values.

¶ 27 The defendants cite no authority in their brief for this argument. “[I]t is well settled that a contention that is supported by some argument but does not cite any authority does not satisfy the requirements of Supreme Court Rule 341(h)(7), and bare contentions that fail to cite any authority do not merit consideration on appeal.” *In re Marriage of Johnson*, 2011 IL App (1st) 102826, ¶ 25.

*6 ¶ 28 Citing the Uniform Partnership Act (1997) (805 ILCS 206/404 (West 2010)), the defendants next argue that the circuit court erred in finding that Theis violated a fiduciary duty to the plaintiff following the dissolution of the partnership and appear to argue that this finding was therefore insufficient to support the circuit court’s award for attorney fees.

¶ 29 Although a fiduciary relationship exists between partners in a partnership and each partner is bound to exercise the utmost good faith in transactions related to the partnership, including its winding up (*1515 North Wells, L.P. v. 1513 North Wells, L.L.C.*, 392 Ill.App.3d 863, 874 (2009)), the circuit court’s award for attorney fees in this case was sufficiently supported by the language of the partnership agreement.

¶ 30 Although, under the common law, the losing party in a lawsuit does not have to pay the winning party’s attorney fees, parties to a contract may agree otherwise. *Erlimbush v. Largent*, 353 Ill.App.3d 949, 951 (2004). In this case, paragraph 24 of the partnership agreement clearly provided that any partner who violated the partnership agreement’s terms shall indemnify and hold harmless the partnership and other partners from any losses, including attorney fees, incurred by the indemnities arising from the violation.

¶ 31 Unambiguous contract terms should be given their plain and ordinary meaning. *Highland Supply Corp. v. Illinois Power Co.*, 2012 IL App (5th) 110014, ¶ 28. “Where the words of the contract are clear, the contract should be enforced as written.” *Id.*

¶ 32 Further, “[i]t is well established that the duty of good faith and fair dealing is implied in every contract.” *Gore v. Indiana Insurance Co.*, 376 Ill.App.3d 282, 286 (2007). “Its purpose is to ensure that parties do not take advantage of

each other in a way that could not have been contemplated at the time the contract was drafted or do anything that will destroy the other party's right to receive the benefit of the contract." *Id.* "Disputes involving the exercise of good faith arise when one party is given broad discretion in performing its obligations under the contract." *Id.* "The duty of good faith and fair dealing is a limitation on the exercise of that discretion, requiring the party vested with discretion to exercise it reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the parties' reasonable expectations." *Id.*

¶ 33 The partnership agreement clearly provided that upon Clyde's death and the partners' failure to vote to continue the partnership, the partnership dissolved. See *Susman v. Cypress Venture*, 187 Ill.App.3d 312, 318 (1989) ("A dissolution of a partnership is a change in the relationship of partners caused by any partner ceasing to be associated in the carrying on, as distinguished from the winding up of the business."). Pursuant to the plain language of the partnership agreement, the assets upon dissolution were to be liquidated and distributed by paying the partners in proportion to their capital accounts. Yet, the defendants failed to do so.

*7 ¶ 34 On December 9, 2009, seven years after Clyde's death, the circuit court entered summary judgment on count I of the plaintiff's complaint and construed the partnership agreement by determining that upon dissolution, which occurred at Clyde's death on September 18, 2002, and as a result of the remaining partners not agreeing to continue partnership, the assets of the partnership were to be liquidated and distributed and that any gain or loss was to be credited or charged to the partners. At this time, the circuit court held that, pursuant to the partnership agreement, the plaintiff was entitled to 33.3% of the fair market value of the partnership interest *at the time of liquidation*, minus applicable liabilities. Again, however, despite the agreement's language and despite the circuit court's order, the defendants failed to liquidate the partnership assets. In failing to do so, they violated the partnership agreement and were liable for the plaintiff's attorney fees pursuant to the same agreement. We therefore find the circuit court's award of attorney fees sufficiently supported by the record.

¶ 35 The defendants also contend that the "unclean hands" doctrine should have precluded the plaintiff from obtaining any relief from the court. According to the defendants, the plaintiff has "unclean hands" in that the plaintiff failed to cooperate in the attempted timely liquidation of Clyde's

partnership interest following his death and misled Theis and Thomas by not disclosing his true intentions to wait out the expiration of the dissolved partnership's 10-year term and then insist upon liquidation based on 2011–2012 real estate values.

¶ 36 The doctrine of unclean hands precludes a party who has been guilty of misconduct, fraud, or bad faith in connection with the matter in dispute from receiving any relief from a court of equity. *Jackson v. Board of Election Commissioners of the City of Chicago*, 2012 IL 111928, ¶ 26. "It is based on the principle that litigants should not be permitted to enlist the aid of a court of equity to further their fraudulent or unlawful purposes or take advantage of their own wrongdoing." *Id.* "To determine whether a party acted with unclean hands, the court must look to the intent of that party." *Thomson Learning, Inc. v. Olympia Properties, LLC*, 365 Ill.App.3d 621, 634 (2006). "The invocation of the doctrine of unclean hands is within the trial court's discretion and its application has not been favored by the courts." *La Salle National Bank v. 53rd-Ellis Currency Exchange, Inc.*, 249 Ill.App.3d 415, 437 (1993).

¶ 37 In this case, the circuit court found that the plaintiff was not estopped pursuant to the doctrine of "unclean hands" from asserting his claims. Although the evidence suggested that the plaintiff rejected the defendants' terms during the liquidation process, the record does not support a finding of misconduct, fraud, or bad faith on the plaintiff's part. Instead, the defendants had the authority and responsibility pursuant to the partnership agreement to liquidate and distribute the partnership assets. We therefore cannot conclude that the circuit court abused its discretion in allowing the plaintiff to assert the claims in this action.

¶ 38 CONCLUSION

*8 ¶ 39 For the foregoing reasons, the judgment of the circuit court of Christian County is affirmed.

¶ 40 Affirmed.

Justices **WELCH** and **CHAPMAN** concurred in the judgment.

All Citations

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