

FILED: October 29, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

EVERGREEN WEST BUSINESS CENTER, LLC,
an Oregon limited liability company,
Plaintiff-Respondent
Cross-Appellant,

v.

TERRY W. EMMERT,
Defendant-Appellant
Cross-Respondent,

and

PREMIER WEST BANK,
Impartial.

Clackamas County Circuit Court
CV07020348

A146301

On remand from the Oregon Supreme Court, *Evergreen West Business Center, LLC v. Emmert*, 354 Or 790, 323 P3d 250 (2014).

Jeffrey S. Jones, Judge.

Submitted on remand March 31, 2014.

Stuart M. Brown and Wiles Law Group filed the briefs for appellant - cross-respondent.

John M. Berman and J. Rion Bourgeois filed the briefs for respondent - cross-appellant.

Before Wollheim, Presiding Judge, and Armstrong, Judge, and Schuman, Senior Judge.

SCHUMAN, S. J.

Affirmed on appeal and on cross-appeal.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent on appeal; Cross-Respondent on cross-appeal.

No costs allowed.

Costs allowed, payable by Appellant on appeal; Cross-Appellant on cross-appeal.

Costs allowed, to abide the outcome on remand, payable by

1 SCHUMAN, P. J.

2 In this action for breach of fiduciary duty, plaintiff alleged two alternative
3 forms of relief: damages as compensation for the breach, or imposition of a constructive
4 trust whereby property obtained by virtue of the breach would be sold and the proceeds
5 distributed to plaintiff's creditors and its members. With respect to the damages remedy,
6 the jury returned a verdict in plaintiff's favor for \$1 in economic damages and \$600,000
7 in punitive damages. However, the trial court reduced the punitive damages award to \$4
8 (based on a four-to-one ratio of punitive to economic damages), at which point plaintiff
9 requested that the trial court instead impose the equitable remedy of a constructive trust.
10 The trial court granted that request.

11 Plaintiff appealed, and defendant cross-appealed. In *Evergreen West*
12 *Business Center, LLC v. Emmert*, 254 Or App 361, 375, 296 P3d 545 (2012), we held that
13 plaintiff had an adequate remedy for damages at law and was therefore not entitled to the
14 equitable remedy of a constructive trust "simply because the jury returns a lesser verdict
15 than requested." However, we also held that the trial court had erred in reducing the
16 punitive damages award, so we remanded the case for further proceedings consistent with
17 that conclusion. *Id.* at 385-86.

18 Plaintiff and defendant both sought review of our decision. The Supreme
19 Court allowed review and reversed our decision regarding plaintiff's entitlement to a
20 constructive trust. *Evergreen West Business Center, LLC v. Emmert*, 354 Or 790, 323
21 P3d 250 (2014). The court concluded that "the trial court properly permitted plaintiff to

1 elect its equitable remedy" and, for that reason, the court "reinstate[d] * * * the
2 constructive trust award." *Id.* at 792, 807. The court further concluded that, because
3 plaintiff had pleaded its legal and equitable remedies in the alternative, the reinstatement
4 of the equitable remedy meant that the "jury's damage award--including the punitive
5 damage award--must be vacated." *Id.* at 806. Thus, the court held that the issues
6 defendant raised in its cross-petition regarding the damages award were moot.¹ *Id.*

7 Although the Supreme Court's decision obviated the need to address any
8 issues related to plaintiff's damages claim, the court explained that the reinstatement of
9 the constructive trust also put back in play two assignments of error that we had not
10 reached regarding that equitable remedy. *Id.* at 805 n 4, 807. The first assignment,
11 which was raised by defendant, was whether "he was entitled to a greater reimbursement
12 than the trial court allowed" for the costs he had incurred in keeping and maintaining the
13 property. *Id.* at 805 n 4. The second assignment, raised by plaintiff, was whether the trial
14 court erred in ruling that punitive damages were not legally available on plaintiff's claim
15 for a constructive trust. *Id.* at 806-07. So, rather than affirming the trial court's
16 judgment, the Supreme Court remanded the case to us "for consideration, in light of [its]
17 decision, of the parties' remaining assignments of error." *Id.* at 807.

¹ In its briefing in this court, plaintiff had argued that its election of the constructive trust remedy was made "in light of the rulings at the time"--most notably, the court's ruling that \$4 was the maximum permissible punitive damages award--and it requested that we address all of its assignments of error (including the amount of punitive damages) and then allow plaintiff to elect its preferred remedy. The Supreme Court's holding, however, treated plaintiff's election of the constructive trust remedy as a binding election, 354 Or at 806, and plaintiff did not seek reconsideration on that issue.

1 We now consider those two remaining assignments of error, beginning with
2 defendant's contention that "[t]he Trial Court erred by imposing a constructive trust that
3 included terms that did not require reimbursement of Defendant for his costs incurred in
4 keeping and maintaining the Property from the time he purchased the Property." As the
5 Supreme Court explained, the facts stated in the light most favorable to plaintiff, the
6 prevailing party at trial, *Liles v. Damon Corp.*, 345 Or 420, 423, 198 P3d 926 (2008), are
7 as follows:

8 "Plaintiff is a limited liability company that looked to defendant, who was
9 one of its members, to save its property from foreclosure by a lender.
10 Defendant did save the property from foreclosure by purchasing the loan
11 and associated encumbrance for his own benefit for \$613,979.49.
12 Defendant then foreclosed on the property himself, bought it at a
13 foreclosure sale with a maximum credit bid, and then encumbered the
14 property with a \$900,000 loan from a different lender."

15 354 Or at 792.

16 Defendant contended that, although he purchased the loan for a total of
17 \$613,979.49, he actually paid more than that (\$699,487.21) at the foreclosure sale, and
18 then made payments to keep and maintain the property, including loan fees, interest,
19 insurance, and taxes. He argued that, if a constructive trust was to be imposed, he should
20 be reimbursed for all of those costs, plus any additional costs that he incurred after trial to
21 keep and maintain the property. The trial court rejected that argument.

22 On appeal, defendant again argues that, if a constructive trust is imposed,
23 he is entitled to be reimbursed for costs to keep and maintain the property. He relies on
24 *Bechtel v. Bechtel*, 162 Or 211, 212-13, 91 P2d 529 (1939), as well as its "predecessors

1 and progeny," to argue that "a constructive trustee who, *in good faith*, improves the
2 property and/or pays taxes and interest on a mortgage (carrying costs) will be entitled to
3 reimbursement of those amounts as a condition precedent to the reconveyance of the
4 property back to the beneficiary of the constructive trust." (Emphasis added.) Defendant
5 contends that he "has acted at all times in good faith" and "gave [p]laintiff every
6 opportunity to acquire financing" and avoid foreclosure.

7 The short answer to defendant's argument is that his predicate--that he acted
8 in "good faith"--is inconsistent with the trial court's and the jury's view of the record. The
9 trial court repeatedly expressed its desire to credit the jury's factual findings when
10 imposing the constructive trust. And, as we explained in our previous decision, there was
11 ample evidence to support the jury's implicit finding that defendant "saw potentially large
12 profits in breaching his fiduciary duties to [plaintiff] and obtaining the company's real
13 property for himself; and that he made a calculated decision to breach his duties to the
14 company in pursuit of that perceived individual profit." 254 Or App at 386. Because
15 there was evidence to support a finding, which the jury and trial court implicitly made,
16 that defendant's expenses to keep and maintain the property were part of a calculated
17 breach and not incurred in good faith, we reject his reimbursement argument without
18 further discussion.²

² Defendant argues that we should "try the case anew on the record" because the trial court did not make explicit factual findings as to why it did not require reimbursement. We are not persuaded that we should exercise our discretion to review *de novo* in this case, because the jury and trial court were in better positions to assess the credibility of the witnesses and their implicit factual findings are sufficient for purposes

1 The other remaining assignment of error concerns plaintiff's entitlement to
2 punitive damages as part of its claim for a constructive trust. After the jury returned its
3 verdict, plaintiff contended that it was entitled to punitive damages *in addition to* the
4 remedy of a constructive trust. In response, defendant argued that plaintiff's

5 "alternative remedies are damages (legal remedy) or imposition of a
6 constructive trust (equitable remedy). The remedies are not 'mix and
7 match,' they are 'either/or.' Not only is this the law, *see Venture Properties,*
8 *Inc. v. Parker*, 223 Or App 321, 324-25, 195 P3d 470 (2008), but that is the
9 way that Plaintiff has pleaded his case. Plaintiff may elect either remedy,
10 not both."

11 (Underscoring in original.)

12 Plaintiff conceded that "[t]he pleadings refer to the two claims as being in
13 the alternative, and the punitive damage allegation is in the legal claim, but not in the
14 equitable claim." Nonetheless, plaintiff argued that the pleading problem "is not a barrier
15 to the Court in including the award of punitive damages with the equitable relief,
16 especially in light of the jury's determination that the profit has not yet been determined *
17 * *." Defendant disagreed, maintaining that "[t]he initial complaint pleads two claims for
18 alterative relief: One legal, asking for damages; the second, asking for imposition of a
19 constructive trust. The cases are pleaded alternatively; either/or." Defendant further
20 explained that the damages claim

21 "was amended at one point last year to ask for punitive damages. The
22 claim for constructive trust was never amended to ask for punitive
23 damages. The claims, themselves, are mutually exclusive. A claim for
24 damages cannot be combined with a claim for constructive trust."

of our review.

1 Defendant then went on to explain why, in his view, Oregon appellate cases provide that,
2 "[i]f you do have an availability of damages, then you don't have the equitable remedy of
3 constructive trust."

4 After further argument by the parties, the trial court ruled, without
5 elaboration, that "punitive damages are not available on the equitable claim," and it later
6 entered judgment to the effect that "[p]unitive damages are not legally available for
7 [p]laintiff's equitable claim for a constructive trust, and the Court will therefore not
8 impose an award of punitive damages with regard to the constructive trust remedy."

9 On appeal, plaintiff argues that "[p]unitive damages are awardable in
10 Oregon in equity without an award of monetary damages where a plaintiff has suffered an
11 actual harm." *See Goodale v. Lachowski*, 97 Or App 158, 162, 775 P2d 888 (1989) ("[I]n
12 Oregon, proof of actual harm is a sufficient basis upon which punitive damages may be
13 awarded, even without a specific finding or award of actual damages." (Citing *Klinicki v.*
14 *Lundgren*, 298 Or 662, 695 P2d 906 (1985).)) Defendant responds that the trial court's
15 ruling was correct for either of two reasons: (1) because plaintiff did not plead an
16 entitlement to punitive damages as part of his equitable claim, and (2) because, even if
17 properly pleaded, there was no proof that defendant actually harmed plaintiff, in light of
18 the fact that the constructive trust "allows [p]laintiff only a share of sale proceeds over a
19 certain amount, and there is no evidence that there will be any." We agree with
20 defendant's first argument and affirm on that basis.

21 Plaintiff's complaint, and its request to add punitive damages, are

1 unambiguous. In the complaint, plaintiff alleged two "claims" as follows:

2 "FIRST CLAIM
3 "(Constructive Trust)

4 "7.

5 "Defendant Emmert obtained title to said real property by fraud and breach
6 of his fiduciary duty to Plaintiff and the other members of Plaintiff, and by
7 taking an opportunity that belonged to Plaintiff.

8 "8.

9 "The Court should declare that Defendant Emmert holds title to said real
10 property in trust for Plaintiff and said members.

11 "9.

12 "The affairs of Plaintiff should be wound up, said real property sold for the
13 benefit of Plaintiff, and the proceeds distributed first to creditors and then
14 to members as their interests may appear.

15 "SECOND CLAIM
16 "(Damages)

17 "10.

18 "Plaintiff incorporates by reference paragraph 7.

19 "11.

20 "As a result of said breach of fiduciary duty, Plaintiff has been damaged in
21 a sum to be determined at trial, but not less than \$800,000.

22 "12.

23 "Plaintiff reserves the right to plead punitive damages under ORS 31.725."

24 The prayer, which the Supreme Court likewise quoted in its opinion,
25 expressly makes the two claims "alternative":

1 "1. Pursuant to its FIRST CLAIM that the Court declare that
2 Defendant holds said real property in a constructive trust for Plaintiff, that
3 the affairs of Plaintiff be wound up and said property sold, and that the
4 proceeds [be] disbursed to pay Plaintiff's creditors and any remaining sum
5 to be distributed to Plaintiff's members; *or*

6 "2. *In the alternative and in the event no constructive trust is*
7 *ordered, then for damages equal to the difference between the fair market*
8 *value of said real property and the price paid for it by Defendant Emmert,*
9 *together with any punitive damages that may be awarded against him[.]"*

10 (Emphasis added.)

11 When plaintiff subsequently amended the complaint to allege punitive
12 damages, it amended only paragraph 12 of the complaint (part of the "Damages" claim)
13 and paragraph 2 of the prayer (relating to the "Damages" claim).

14 Given the way in which this case was pleaded and tried by the parties--*i.e.*,
15 as a case involving *alternative* forms of very specific relief--the trial court did not err in
16 concluding that plaintiff was entitled to a constructive trust *or* punitive damages. As the
17 Supreme Court observed, "[i]t is undisputed that plaintiff was required to elect between
18 its damage and constructive trust claims. Plaintiff pleaded the claims alternatively in its
19 complaint and, as noted, plaintiff expressed its preference for the equitable remedy in its
20 complaint." 354 Or at 806. Presented with two specific alternatives--a claim that sought
21 punitive damages and a constructive trust claim that did not--the trial court correctly
22 ruled that punitive damages were unavailable on plaintiff's constructive trust claim.
23 *Accord Head v. Head*, 261 Or App 478, 489, 323 P3d 505 (2014) (explaining that,
24 although "parties in equity are not necessarily limited to the relief that they seek in their
25 complaint," the "broad power of a court of equity should not be invoked to shape a

1 decree which was not reasonably contemplated by the parties and which * * * represents
2 a substantial departure from the pleadings and the legal theories relied upon by the
3 parties" (quoting *Shumate v. Robinson*, 52 Or App 199, 205, 627 P2d 1295 (1981)).³

4 Our rejection of the parties' remaining assignments of error regarding the
5 constructive trust remedy, coupled with the Supreme Court's decision, resolves all of the
6 parties' challenges on appeal--none of which, in the end, was well taken. Accordingly,
7 we affirm on appeal and on cross-appeal.

8 Affirmed on appeal and on cross-appeal.

³ This case is further distinguishable from those in which courts have fashioned equitable remedies under a prayer for general relief, in that plaintiff here sought very specific remedies.