NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

LAUREL BREUNER Appellant v. STEVEN BREUNER Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1262 WDA 2013

Appeal from the Order Entered July 10, 2013
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): FD 08-007487

BEFORE: GANTMAN, P.J., FORD ELLIOTT, P.J.E., and OLSON, J.

MEMORANDUM BY GANTMAN, P.J.: **FILED JUNE 24, 2014**

Appellant, Laurel Breuner ("Wife"), appeals from the order entered in the Allegheny County Court of Common Pleas, which classified as marital debt a ninety thousand dollar ($90,000.00) loan made to Appellee, Steven Breuner ("Husband"), during the parties' marriage, in this single issue, non-jury trial following settlement of an equitable distribution proceeding ancillary to a divorce decree granted to the parties on November 11, 2011. We affirm.

In its opinion, the trial court fully and correctly sets forth the relevant facts and procedural history of this case. Therefore, we have no reason to restate them.

Wife raises one issue for our review:

> WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT AN ALLEGED INTRA—FAMILY LOAN CONSTITUTED A "MARITAL DEBT" SUBJECT TO PROPERTY DISTRIBUTION DESPITE THE ABSENCE OF MATERIAL EVIDENCE OF CONSIDERATION OR ANY MARITAL BENEFIT.

(Wife's Brief at 12).

We review equitable distribution matters as follows:

> Our standard of review in equitable distribution matters is limited. It is well established that absent an abuse of discretion on the part of the trial court, we will not reverse an award of equitable distribution. In addition, when reviewing the record of the proceedings, we are guided by the fact that trial courts have broad equitable powers to effectuate economic justice and we will find an abuse of discretion only if the trial court misapplied the laws or failed to follow proper legal procedures. **Further, the finder of fact is free to believe all, part, or none of the evidence and the Superior Court will not disturb the credibility determinations of the court below**.

Anzalone v. Anzalone, 835 A.2d 773, 780 (Pa.Super. 2003) (internal citations omitted) (emphasis added).

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Christine A. Ward, we conclude Wife's issue merits no relief. The trial court opinion comprehensively discusses and properly disposes of the question presented. (***See*** Trial Court Opinion, filed September 3, 2013, at 4-11) (finding: parties agreed to 50/50 division of marital assets and debts; at July 12, 2012 hearing to determine whether $90,000.00 loan Husband's father, Mr. Breuner, made during parties' marriage constituted "marital debt," court heard testimony from Mr. Breuner's attorney, Mr. Breuner's accountant,

Husband, and Wife;[1] Mr. Breuner's attorney and Mr. Breuner's accountant each confirmed Mr. Breuner's loan and Mr. Breuner's expectation that loan would be repaid; Mr. Breuner's accountant also explained no payments had been made on loan at time of Mr. Breuner's death, and Mr. Breuner had not forgiven loan; Husband testified he borrowed $90,000.00 from his parents to renovate marital home, Wife knew of loan, Wife thanked Husband's parents for loan, and Wife arranged for further renovations after learning of loan; Wife claimed she did not know of loan until October 2011, and did not authorize loan; court found credible Husband's evidence that Mr. Breuner made loan during parties' marriage so they could renovate marital home, that both parties knew of loan, and that Husband and Wife used loan to finance home renovations; following July 12, 2012 hearing, court decided loan constituted marital debt subject to parties' equitable distribution agreement; following Wife's motion for reconsideration alleging "new" evidence, court expressly granted reconsideration and held reconsideration hearing on May 13, 2013; Husband made strong argument that Wife's proposed evidence did not constitute "new" evidence to warrant reopening record; nevertheless, assuming *arguendo* Wife's proposed evidence was "new," Wife still failed to establish loan was not marital debt; parties' contractor testified at reconsideration hearing that parties paid him for

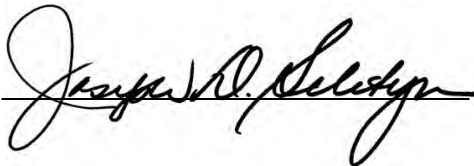
---

[1] Mr. Breuner was deceased at the time of the hearing.

renovations to marital home from their business account; court found this evidence unpersuasive to demonstrate parties did not use loan proceeds to pay for renovations, where parties failed to meticulously differentiate between their business and personal accounts; regarding Wife's attempt to impeach Husband's testimony, court resolved inconsistency in testimony in favor of Husband; parties' execution of "waiver and release" concerning their business litigation does not release Wife from obligation to repay loan; parties used their business account to pay for renovations to marital home, but court deemed those renovations personal, and not business-related subject to "waiver and release"; $90,000.00 loan is marital debt subject to parties' 50/50 equitable distribution arrangement).[2] Accordingly, we affirm on the basis of the trial court's opinion.

Order affirmed.

Judgment Entered.



---

[2] Wife also claims the court improperly considered certain hearsay testimony when rendering its decision. Wife did not raise this issue in her court-ordered Rule 1925(b) statement; thus, it is waived. ***See Commonwealth v. Castillo***, 585 Pa. 395, 888 A.2d 775 (2005) (holding any issues not raised in Rule 1925(b) statement will be deemed waived on appeal); ***Lineberger v. Wyeth***, 894 A.2d 141 (Pa.Super. 2006) (stating rules of appellate procedure apply to criminal and civil cases alike).

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/24/2014

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

LAUREL BREUNER,

Plaintiff,

v.

STEVEN BREUNER,

Defendant.

Case No. FD 08-007487

Hon. Christine A. Ward

OPINION

Copies Sent To:

Joseph M. Wymard
SHERRARD, GERMAN & KELLY, P.C.
28th Floor, Two PNC Plaza
Pittsburgh, PA 15222

Charles J. Avalli, Esq.
GENTILE, HOROHO & AVALLI, P.C.
1000 Grant Building
310 Grant Street
Pittsburgh, PA 15219

2013 SEP -3 AM 9:38
FILED

157

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

LAUREL BREUNER, **Case No. FD 08-007487**

Plaintiff,

v.

STEVEN BREUNER,

Defendant.

OPINION

WARD, J.

A. SUMMARY

A single-issue, non-jury trial was held following the settlement of an equitable distribution proceeding (hereinafter "Settlement Agreement") entered into before this Court on October 27, 2011 between Steven Breuner (hereinafter "Husband") and Laurel Breuner (hereinafter "Wife"), which was ancillary to a divorce decree granted to the Breuners on November 11, 2011. At issue was a $90,000 loan from William R. Breuner, father of Husband, which Husband received on May 3, 2000, and which came due on May 3, 2010.[1] Husband argued that, since the loan was received during the marriage and was used for improvements to the marital home, the loan was marital debt for which Wife was responsible for half, pursuant to the Settlement Agreement which set a 50/50 distribution of marital assets and debts. Wife argued that, since she did not know about the loan or consent to Husband entering into the loan agreement, the debt was non-marital and, therefore, she should not be responsible for any portion of its repayment.

The taking of testimony and the introduction of documentary evidence occurred in a non-jury trial held on July 12, 2012 before this Court. At trial Husband's witnesses were: (1) Malcolm Weintraub, Esquire (by video deposition played during trial), William R. Breuner's attorney, (2) Nathan Palani, CPA

[1] The $90,000 loan was specifically excluded from the Settlement Agreement and this Court agreed to hold a separate hearing on the issue at a later date.

(by deposition transcript), William R. Breuner's accountant, and (3) Husband testifying on his own behalf. Wife testified on her own behalf and did not call any further witnesses.

In a Memorandum and Order of Court dated January 7, 2013, this Court determined that the $90,000 loan in question (and the interest that has accrued on the loan) was marital debt and should be divided pursuant to the 50/50 distribution of marital assets and debts set forth in the Settlement Agreement. On January 30, 2013, Wife filed a Motion for Reconsideration alleging that Wife would "offer evidence and testimony... and otherwise demonstrate that equal liability of th[e] debt would be prejudicial to Wife...". Further, Wife alleged in her Motion that she has "uncovered new evidence... consisting of the public records of the Estate of William Breuner..., records of the home renovations in 2001..., records of the parties [*sic*] business Breuner Properties Partnership..., and a release signed by Husband waiving any liability of Wife incident to the purchase of said business...". This Court granted reconsideration on February 5, 2013.

A reconsideration hearing occurred before this Court on May 13, 2013. At the hearing, Wife called Charles "Chick" Schenecker (hereinafter "Mr. Schenecker"), a contractor who worked on the remodel of the marital residence, and re-called Husband. Husband played the deposition of his mother, Barbara Breuner (hereinafter "Mrs. Breuner"), re-called Wife, and testified again on his own behalf.

After considering the testimony offered at the reconsideration hearing, the case law governing reconsideration, and the briefs submitted by both parties, this Court reiterated its prior finding that the $90,000 loan was marital debt that should be divided equally pursuant to the Settlement Agreement. To that end, this Court issued a Memorandum of Law on July 10, 2013.

Wife appealed this Court's July 10, 2013 Memorandum of Law, and timely issued her Statement of Matters Complained of on Appeal, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b).

B. MATTERS COMPLAINED OF ON APPEAL

Wife filed a concise statement of errors on appeal that included the following assertions of error by the trial court.

1. The trial court misapplied the law and abused its discretion in quantifying the marital estate in a divorce action by holding a promissory note to be marital debt in the absence of material evidence of consideration or any marital benefit. The trial court's reliance on any personal knowledge about the parties' business dealings lacking the support on the record to find marital benefit is an abuse of discretion. The trial court's reliance on third party statement to find consideration in the absence of material evidence of consideration is an abuse of discretion. American jurisprudence is a system of laws based upon evidence and evidence is required to support a finding of fact. In the absence of consideration and/or marital benefit the alleged debt is non-marital.

2. The trial court abused its discretion in failing to discredit the Defendant's evidence in the face of his own contradictory testimony.

C. FACTS

On May 3, 2000, William R. Breuner loaned $90,000 to Husband. A Note documenting this loan was created and reads as follows:

> PROMISSORY NOTE
>
> May 3, 2000
>
> This document shall evidence a loan in the amount of Ninety thousand dollars ($90,000.00) made on the above date to Steven C. Breuner bearing an interest rate of five percent (5%) annually, all due and payable including all accumulated unpaid interest on May 3, 2010.

Defense Exhibit 1 (hereinafter "D. Ex. ___"). The Note was signed by Husband and dated May 5, 2001, and William R. Breuner and dated May 8, 2001. The loan was not repaid when due on May 3, 2010, and currently remains unpaid.

D. DISCUSSION (Non-Jury Trial)

Pennsylvania is an equitable distribution state, which means that in divorce proceedings, marital property and marital debts are divided by courts based on principles of fairness. This does not mean that courts will always divide the property and debts equally. Rather, under 23 Pa. C.S. §3502(a), courts are instructed to consider the following factors in dividing up marital property and marital debt: (1) the length

of the marriage, (2) the age and health of the divorcing parties, (3) any prior marriages by the parties, (4) the circumstances of the divorce, and (5) the source(s) of income of the parties.

Under Pennsylvania law, marital property is any property or income acquired during the course of the marriage, with the exception of certain gifts, inheritances, property brought to the marriage by one party and kept separate, damages awarded in personal injury lawsuits, and property excluded by pre-nuptual agreements. Under Pennsylvania law, marital debt is any debt that is accrued during the marriage. Pennsylvania courts have made it clear that, in the absence of clear evidence that the debt was acquired prior to or following the dissolution of the marriage, or that the debt was clearly not for a marital purpose, debts accrued during the marriage, whether contracted for by one or both parties, are marital.

In Duff v. Duff, the Pennsylvania Supreme Court held that tax liabilities arising from the sale of stock during a marriage were marital debt regardless of how the money received for the stock was used. 507 A.2d 371 (Pa. 1986). The Court, in affirming the reasoning of the trial court (but reversing the Order and requiring re-adjudication of the equitable distribution claim), focused on two key facts: (1) that the sale of the stock occurred prior to separation, and (2) that the money received from the sale was not used exclusively by one party in the marriage. Id. at 373. As such, the tax liability was deemed to be a marital debt, and was held to be a joint liability for purposes of equitable distribution.

Similarly, in Litmans v. Litmans, the Superior Court affirmed a trial court's finding that money borrowed from a husband's pension and profit sharing plan during the course of the marriage, which was used to fund the private school education of the couple's children, was marital debt. 673 A.2d 382 (Pa. Super. Ct. 1996). In making its decision, the Superior Court relied on Duff, supra, noting that "since the parties borrowed the sum at issue from husband's pension and profit sharing plan prior to their separation, the lower court did not err in including this amount as marital debt for purposes of equitable distribution." Id. at 392.

In the case at hand, the parties agreed by way of settlement that a 50/50 division of assets and debts is equitable. As such, the parties merely asked this Court to determine whether the $90,000 loan qualifies as marital debt subject to an equitable distribution. Based on the testimony offered at trial and

the relevant case law, this Court found that the loan is, in fact, marital debt. Two impartial witnesses were offered at trial: Nathan Palani (hereinafter "Palani") and Malcolm Weintraub (hereinafter "Weintraub"). Both of these witnesses were privy to the financial concerns of William R. Breuner, and offered testimony as to both the existence of the loan, and the expectation that the loan would be paid back. For instance, Palani (who has served as the CPA for the Breuners for over 25 years) testified as to the circumstances that led to the creation of the Note, as follows:

> A: You know, this is some time ago here, so please bear with me as I try to recall all of this. This was done—the transfer was done with William and Barbara Breuner went to visit Laurel and Steve, and while they were there, the transfer was made and Bill came back. When we were doing the analysis of this account, we would have come across the fact that there was a transfer made to Steven and Laurel or a transfer made to an account for Steve or Laurel. At that time we would have requested the note---evidence of that transaction, because at that time it was asked to Bill if this was going to be a gift or if it was a loan, and he said it was a loan, and this was the terms of the loan...

Deposition Transcript, N. Palani, p. 9 at 7-21 (hereinafter "Depo. Tr., last name, p.___ at ___"). Palani further testified that the Note was held as an asset within William and Barbara Breuner's trust account, that no payments had been made on the Note at the time of William Breuner's death, and that the Note was not, to his knowledge, ever forgiven. *See* Depo. Tr., Palani, p. 10 at 13-15, p. 11 at 4-9.

Weintraub (who has served as William and/or Barbara Breuner's attorney for over 35 years) testified, as follows:

> Q: When was the first time you ever saw this document [the Note], sir?
>
> A: When preparing the schedule of assets of Mr. Breuner's estate after his death, I had requested from Mr. Palani a schedule of assets, a list of assets. He included a line item which set forth a description of this note and he accompanied that with a copy of the note so that would have been sometime in 2005 or 2006 after Mr. Breuner died.

Depo. Tr., Weintraub, p.8 at 5-13. Weintraub testified that when filing the federal estate tax return for 2005, he had included a line item in the Continuation Schedule describing the Note and listing the amount as $86,400, an amount which was reached using a standard formula taking into account the unsecured nature of the loan. *See* Trial Exhibit 2 (hereinafter "Ex. ___") and Depo. Tr., Weintraub, pp. 10-11.

Weintraub further testified that, to his knowledge, the Note signifying the loan had not been forgiven. Depo. Tr., Weintraub, p. 11 at 20-21.

During the hearing, Husband testified that he had borrowed the $90,000 from his parents in order to renovate the home in which he and his then wife lived. According to Husband, the renovations, which included the creation of a guest room and improvements to the kitchen, exceeded $300,000. Husband further testified that Wife knew of the loan, had thanked his parents (William and Barbara Breuner) for making the loan, and had arranged for further improvements to be made to the kitchen after learning about the loan. Additionally, Husband testified that the loan had always been treated as a loan, and that, if not repaid, the loan would be deducted from his inheritance.

During the hearing, Wife testified that she did not know about the loan until October of 2011, and did not authorize her husband to take out the loan. In support of this evidence, Wife submitted the tax returns of Wife and Husband from 1999-2002, none of which reflect the loan. Wife, however, also testified that a lot of the personal expenses incurred by Husband and Wife were paid through their various businesses.[2] Wife did not dispute that the guest room and kitchen were renovated in the early 2000s or that significant funds were expended during the course of these renovations. Wife further testified that William and Barbara Breuner had forgiven loans to their children in the past.

---

[2] Wife alleges in her Statement of Matters Complained of on Appeal that "[t]he trial court's reliance on any personal knowledge about the parties' business dealings lacking the support on the record to find marital benefit is an abuse of discretion." This matter complained of likely arises from this Court's statement in its Reconsideration Memorandum that "this Court, having participated in the Settlement Agreement, knows full well that Husband and Wife did not meticulously differentiate between their business accounts and personal accounts." Notably, however, this Court's understanding of the parties' business dealings has substantial support on the record. Wife herself testified to the parties' failure to differentiate between business and personal accounts during the July 12, 2012 non-jury trial:

> Q [by Wife's Attorney on Direct Examination]: And what was your understanding of how these renovations were paid?
>
> A: A lot of the renovations were run through the business for the residence, yes, yes, which is why Chik (*sic*) was the contractor that did them all and all the stores simultaneously.

Transcript of Non-Jury Trial, pg. 40 at ¶¶ 8-13. This Court is hard-pressed to understand how Wife can allege an abuse of discretion by the Court when this Court's knowledge of the parties' business dealings is, in large part, derived directly from Wife's testimony.

In post-trial submissions, Wife asked this Court to consider an unpublished Memorandum Opinion in a case called Tolbert v. Tolbert, the facts of which Wife contends mirror the facts of the present case. 797 A.2d 1032 (Pa. Super. Ct. 2002). This Court was not persuaded by the unpublished Opinion in Tolbert. This Court does not find Tolbert to have any impact on the state of Pennsylvania law regarding marital debt. In Tolbert , a trial court affirmed the determinations of a Master, and the Superior Court determined that there was no abuse of discretion in the trial court's findings. This Court does not believe that the unpublished Opinion in Tolbert overrules any prior law concerning loans made during the course of marriage, which have always been considered marital debt.

This Court was persuaded by the evidence that the loan was made during the course of the marriage of Husband and Wife, that both parties knew of the loan, and that the loan was used to finance home renovations which both parties were able to enjoy and benefit from. As such, based on the relevant case law of Duff and Litmans, this Court found that the $90,000 loan was marital debt and was, therefore, subject to equitable division.

E. DISCUSSION (Reconsideration Hearing)

In its Memorandum following the reconsideration hearing, it was not necessary for this Court to rehash its January 7, 2013 Memorandum in support of its finding that the $90,000 loan was marital debt. Rather, this Court examined the "new" evidence offered in support of Defendants' Motion for Reconsideration and explained why this "new" evidence was unpersuasive and did not change this Court's finding that the $90,000 loan is marital debt.

First, this Court noted that Plaintiff raised a legitimate question as to whether any of the evidence presented was, in fact, appropriate for Wife to offer in a reconsideration hearing. Pennsylvania case law clearly sets forth that in order for a record on a case to be reopened, the evidence sought to be presented must (1) be discovered after the initial trial; (2) could not have been obtained by reasonable diligence at the time of the prior trial; (3) is not cumulative or merely to impeach credibility; and (4) is likely to compel a different result. Estate of Roart, 568 A.2d 182 (Pa. Super. Ct. 1989). While this Court did not

decide whether the evidence presented at the reconsideration hearing was proper, this Court did note that there was a strong argument that the evidence was all available before the July 12, 2012 non-jury trial. During cross examination, Mr. Schenecker confirmed that he would have testified if he had been asked to do so on July 12, 2012. Mr. Schenecker further confirmed that he had the records he produced at the reconsideration hearing prior to the July 12, 2012 hearing, but that he was not asked to produce them before now. As this testimony and these records were the only purported new evidence presented by Ms. Breuner, there was a legitimate argument that this evidence was not sufficient for the reopening of the record here. This Court, however, did not ultimately decide whether the evidence was appropriate because, assuming *arguendo* that the evidence was "new," after considering said evidence, this Court remained confident that the loan at issue was marital debt.

Mr. Schenecker's testimony, in relevant part, was that he was paid for the remodel with checks from Breuner Enterprises, and not personal checks from either Husband or Wife. While this testimony was clearly introduced to demonstrate that the loan from William Breuner was not used to pay for the remodel, this Court, having participated in the Settlement Agreement and having heard the testimony of Laurel Breuner referenced in footnote 2 above, knew full well that Husband and Wife did not meticulously differentiate between their business accounts and personal accounts. As such, this Court found evidence that the remodel was paid for from a business account unpersuasive to demonstrate that the loan proceeds were not used for the remodel.

Along with the testimony of and records introduced through Mr. Schenecker, Wife relied on her counsel's argument that no evidence was produced at the initial trial demonstrating that the loan proceeds were ever deposited anywhere or spent on anything. Wife's counsel argued that the Note alone is insufficient, and that evidence must be produced of an actual check. This argument was not new, noteworthy, nor novel. Wife's former counsel argued the same at the trial, and that argument was rejected by this Court. This Court held that the testimony of Mr. Palani and Mr. Weintraub as to the existence of the loan, and the listing of such in the estate, was sufficient proof that the loan issued. This Court still found such evidence sufficient at the reconsideration hearing. Further, Mrs. Breuner unequivocally stated

during her deposition (which was played during the reconsideration hearing) that she considers the $90,000 to be a loan and not a gift, and that she expects the loan to be repaid. This serves as further evidence that the loan issued.

Further, Wife argued that Mrs. Breuner's deposition statement that she did not know about the loan until after William Breuner's death impeached Husband's testimony that he and Wife had spoken with Mrs. Breuner about the loan, and thanked her for the loan. This Court resolved this question of fact in favor of Mr. Breuner. Moreover, we do not have to rely on Wife knowing about the loan in determining that the loan was marital debt. The law does not require that both marital parties assent to the loan, contract for the loan, or even know about the loan. As this Court stated in its Memorandum and Order, "Pennsylvania courts have made it clear that, in the absence of clear evidence that the debt was acquired prior to or following the dissolution of the marriage, or that the debt was clearly not for a marital purpose, debts accrued during the marriage, whether contracted for by one or both parties, are marital." (citing Duff v. Duff, 507 A.2d 371 (Pa. 1986)).[3]

Finally, Wife referred to a waiver and release executed as part of settlement of the business litigation separate and apart from the equitable distribution in which Husband agreed to release Wife from any liability in regard to Supercuts debt. Wife argued that, since the renovations were paid for by Supercuts, the renovation expenses fall under the waiver and release. This Court found this argument unpersuasive. As discussed previously, this Court is well aware that the parties here have not always differentiated between personal and business accounts, regardless of the purpose of the funds being expended. Where, as here, a business account was used to pay for a personal home improvement, this

[3] Wife cited Harasym v. Harasym as standing for the proposition that Husband here must present evidence that the sum of the loan was used to benefit the marriage, or else the loan is non-marital debt. 614 A.2d 742 (Pa. Super. Ct. 1992). The Harasym case, however, is based on very specific facts which are distinguishable from this case. In Harasym, the husband received a settlement from the United States government after claiming to have been over-billed. A Master made recommendations in the equitable distribution proceedings, and determined that the settlement was non-marital. On appeal, the Superior Court found no abuse of discretion in the trial court's reliance on the Master's recommendation. Further, the Superior Court noted that the "amount appellant agreed to pay could have been in large part a penalty and may have no relation to any amount which may have inured to appellee. Additionally, appellee played no part in the settlement agreed to by appellant. We do not find it improper that the $10,000.00 settlement by appellant, agreed to by him in connection with allegations of Medicare fraud, was not considered a marital debt."

Court chose not to deem such a payment business-related, and therefore, a subject of the waiver and release.

F. CONCLUSION

Following the reconsideration hearing, this Court reiterated its conclusion that, pursuant to Pennsylvania law, the $90,000 loan made to Husband on May 3, 2000 was marital debt, as it was accrued during the course of the marriage and was spent on improvements to the marital residence. As the parties agreed to a 50/50 division of the assets and debts of the marriage in this case, the $90,000 loan and any interest accrued on the loan, was deemed to be debt that would be subject to the same 50/50 division as the other marital assets and debt.

BY THE COURT:

DATED: Aug 29th, 2013

Christine Ward