In The Court of Appeals Seventh District of Texas at Amarillo

Nos. 07-18-00415-CV & 07-19-00051-CV

KAREN POOLE, APPELLANT

V.

DANNY POOLE AND JAYME POOLE-RITTENBERRY, APPELLEE

On Appeal from the 251st District Court
Potter County, Texas
Trial Court Nos. 106,839-C, 107,650-C, Honorable Ana Estevez, Presiding

August 21, 2019

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Karen Poole appealed from the trial court's judgment denying her recovery upon her counterclaims against her two children, Danny Poole and Jayme Poole Rittenberry, removing her as trustee of her children's trusts, ordering her to return monies taken from a partnership, and assessing attorney's fees against her. Apparently, mother and children had a difficult relationship. The underlying dispute generally concerned a family limited partnership known as Entrania Springs L.P. Its general partner was Poole IV, Inc., whose management consisted of Danny and Jayme. In turn, 99.5% of the limited partnership

was owned or controlled by Karen, through various means. For reasons superfluous to this opinion, Poole IV and Entrania secured a loan from AXA Equitable Life Insurance Company for approximately $9.9 million. Repayment of that debt was secured by realty of the limited partnership. Karen purportedly did not know of the loan and objected upon discovering it. She also undertook various actions in response, including the removal of funds from various family entities or businesses. Danny, Jayme, and various family businesses sued her alleging causes of action sounding in breached fiduciary duties, trespass, theft, civil conspiracy, and unjust enrichment. So too did they seek declaratory relief. Karen counterclaimed, alleging among other things claims of breached fiduciary duty against her children. The facts underlying these claims were tried to a jury which ultimately found in favor of Danny and Jayme. Judgment was entered upon the verdict, and Karen appealed.

Six issues pend for our review. We affirm.

Issues One and Two

Through the first two issues, Karen avers that the "trial evidence unequivocally prove[d] that Danny Poole and Poole IV breached their duties to Entrania Springs and failed to comply with the Entrania Springs partnership agreement." Each is based upon the belief that the borrowers were obligated under the limited partnership agreement to obtain her consent to the loan and security agreement, which consent she never gave. We overrule the issues.

Two specific provisions of the limited partnership agreement allegedly establish the accuracy of her contentions. The provisions in question state as follows:

> Partnership Interest Pledge or Encumbrance. No Partner may grant a security interest in or otherwise pledge, hypothecate, or encumber his

> interest in this Partnership or such Partner's distributions without 70 Percent in Interest of Limited Partners. It is understood that the Partners are under no obligation to give consent nor are they subject to liability for withholding consent. [XIII.C. of the Entrania Springs Partnership Agreement]
>
> [and]
>
> Restrictions on General Partner. The General Partner will not have the authority to enter into any of the following transactions without the consent of 70 Percent in Interest of the Limited Partners/Unanimous Consent: . . . (5) make, execute, or deliver any assignments for the benefit of creditors, or on the Assignee's promise to pay the debts of the Partnership. [VII.F.5. of the Entrania Springs Limited Partnership Agreement]

Addressing these issues requires us to construe the meaning of each provision. In construing them, our primary goal "is to ascertain and effectuate the intent of the parties to the agreement" by reading "the instrument as a whole and accord[ing] its language its plain grammatical meaning unless doing so defeats the parties' intent," *Renda v. Erikson*, 547 S.W.3d 901, 913 (Tex. App.—Amarillo 2018, pet. granted), or the contract itself shows that the words were used in a technical or different sense. *Whittington v. Green*, No. 07-15-00102-CV, 2016 Tex. App. LEXIS 13533, at *15 (Tex. App.—Amarillo Dec. 20, 2016, pet. denied) (mem. op.).

Regarding the first provision, we see that it refers to "partners" granting security interests or encumbrances. The subject of those encumbrances is the partner's or "***his interest*** in this Partnership or ***such Partner's distributions***." (Emphasis added). "[H]is" interest in and his distributions from the partnership refer to the property rights or interests which the partner may have in the partnership itself. Indeed, our jurisprudence has long recognized that a partner does not own a specific interest in particular chattel or property of a partnership. *Sherk v. First Nat'l Bank of Hereford*, 206 S.W. 507, 509 (Tex. Comm'n App. 1918, judgm't adopted). What is owned is a right to receive distributive shares of

the partnership's profits and surpluses. *Stanley v. Reef Sec., Inc.*, 314 S.W.3d 659, 664 (Tex. App.—Dallas 2010, no pet.). The aforementioned section of the limited partnership agreement reflects that right by prohibiting a partner from encumbering his interest in his distributive shares of partnership profits or surpluses without approval.

Neither Danny nor Poole IV pledged or otherwise encumbered his or its own respective interest in any partnership, that is, in their own respective right to receive distributive shares of partnership profits or surpluses. The property being pledged or encumbered was not a partnership interest as we know that term to mean. It consisted of realty apparently owned by Entrania, the limited partnership. Consequently, neither Poole IV nor Danny had an obligation to obtain Karen's consent under the provision at issue before executing the deed of trust in favor of AXA.

As for the second paragraph and its prohibition against Poole IV, the general partner, executing an "assignment for the benefit of creditors" or an assignment "on the Assignee's promise to pay the debts of the Partnership," we say the following. Over the years, the phrase "assignment for the benefit of creditors" has come to refer to or mean a particular type of conveyance. More importantly, it differs from a conveyance reflected in a mortgage or deed of trust. The latter generally describes a conveyance of an estate or property by way of pledge for the security of a debt and which estate ends upon payment of the debt. *Dwight v. Overton*, 35 Tex. 390, 408 (Tex. 1872). The former denotes a conveyance of all interest in and control over property by an insolvent debtor to its creditors in payment or discharge of debts. *Id.* at 408–09 (first observing that the deed conferred full and absolute power on the trustees, to sell and dispose of the lands, make deeds to purchasers, receive purchase money, and apply it to the uses expressed

in the instrument, and do and perform every act which the grantor himself could have done had he never executed the deed and then noting that mere mortgages lack such powers); *see also O'Brien v. Perkins*, 276 S.W. 308, 311 (Tex. Civ. App.—Amarillo 1925), *aff'd*, 285 S.W. 260 (Tex. Comm'n App. 1926, judgment adopted) (holding that the transaction was a deed of trust lien as opposed to an assignment for the benefit of creditors because 1) it does not provide that the trustee shall take possession of the property; 2) it impliedly provided that possession shall remain in the grantor since the grantor retained the duty of caring for, paying taxes upon, and keeping the premises in good condition; 3) it did not convey all of the grantor's property; 4) it authorized the trustee to sell the property only in the event the grantor failed to pay the creditors named in it; 5) the grantor retained the ability to reclaim the property by paying the debt; 6) it provided that any surplus be paid the grantor; and 7) the grantor was not wholly insolvent when he executed it); *accord Nat'l Debenture Corp. v. Adams*, 115 S.W.2d 757, 760 (Tex. Civ. App.—Galveston 1938, no writ) (observing that the legal effect of a deed of trust is to leave the title to, and the control over, the mortgaged property with the mortgagor while assignments for benefit of creditors involve conveyances where the property conveyed is, in virtue of such conveyance, placed beyond the control of those making such assignment and where no equity of redemption remains). It is these technical definitions developed over time that we accord to the verbiage within the limited partnership agreement.

Here, the deed of trust executed by Entrania simply granted a third party the authority to sell the realty described therein and pay AXA if the debtor defaulted on the loan made by AXA. Additionally, the power of the individual granted the authority to sell

was finite and triggered only by Entrania's default. Entrania also retained possession of the realty as well as the obligation to care for and pay taxes imposed upon it. Given these attributes, the deed of trust executed by Poole IV was nothing more than a security for the repayment of a debt. It was a mortgage and not an assignment for the benefit of creditors.

In short, the loan transaction at issue breached neither provision of the limited partnership agreement urged by Karen.

Issue Three – Attorney's Fees

In her third issue, Karen attacks that portion of the judgment obligating her to personally pay all "Appellees' attorney fees." She believes such was error because the fees "have been paid out of an account belonging to Poole Leasing Co., Inc." and she "owns 50% of Poole Leasing." So, in her view, she "has already paid 50% of Appellees' attorney fees."

Missing from her argument is effort to explain why the separate entity theory of corporations has no application. That is, a corporation is a legal entity separate from its shareholders or owners who compose it. *Mathis v. Mathis,* No. 01-17-00449-CV, 2018 Tex. App. LEXIS 10432, at *10–11 (Tex. App.—Houston [1st Dist.] Dec. 18, 2018, no pet.) (mem. op.); *State v. DeSantio*, 899 S.W.2d 787, 789 (Tex. App.—El Paso 1995, pet. ref'd). Thus, its property is property of a separate entity and not that of the shareholders. *Id.* This is true even if the corporation is a family business. *See Mathis*, 2018 Tex. App. LEXIS 10432, at 10–11.

Given that the notation "Inc." appears at the end of the name "Poole Leasing Co., Inc.," the latter apparently is a corporation. *See* TEX. BUS. ORGS. CODE ANN. § 5.054(a)(1),

(2) (West 2012) (stating that the name of a corporation must contain the word "company," "corporation," "incorporated," or "limited" or an abbreviation of one of them). As a corporation, its assets are not those of Karen. So, logically, any supposed monies paid by Poole Leasing Co., Inc., were and are not monies owned and paid by Karen. And, we say "supposed monies paid" because she cites us to nothing of record illustrating that the corporation paid anything to Danny or Jayme to recompense them for attorney's fees they incurred. This issue also is overruled.

Issues Four and Five – Karen's Theft and Breached Fiduciary Duties

In her final issues, Karen contends that no evidence was presented at trial that she breached any fiduciary duty owed to Poole IV, Inc., or to the Danny Poole Trust or the Jayme Poole Trust or that she committed theft when withdrawing funds from Entrania's bank account. The latter argument is premised upon the supposition that she "made that withdrawal to protect Entrania Springs in light of the unauthorized $9,900,000 Entrania Springs loan." Again, the loan was purportedly unauthorized because it violated the two limited partnership paragraphs underlying her complaints addressed in issues one and two. Given our earlier disposition of issues one and two and conclusion that neither of those paragraphs were contravened, the foundation of her argument *viz-a-viz* theft crumbles.

Indeed, she does not question on appeal that 1) she took funds belonging to Entrania, 2) Poole IV, as general partner, had the exclusive authority to manage the limited partnership under the limited partnership agreement, and 3) she took the funds without Poole IV's consent and to render them unavailable to Entrania or Poole IV, as general partner. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 134.002 (West 2019) (defining

theft as unlawfully appropriating property as described in § 31.03 of the Texas Penal Code); TEX. PENAL CODE ANN. § 31.03(b)(1) (West 2019) (stating that appropriation is unlawful if it is without the owner's effective consent); *Farnsworth v. Deaver*, 147 S.W.3d 662, 667 (Tex. App.—Amarillo 2004, no pet.) (finding evidence legally and factually sufficient to support the jury's finding of civil theft when appellant admitted to having taken the property in question while knowing that it was partnership property). So, there is evidence to support a finding of theft.

As for her argument relating to her breach of fiduciary duties, appellant cites to neither legal authority nor the record in support of it. Nor did she accompany her complaint with analysis consisting of other than the single sentence, to wit: "There was no evidence presented at trial that Karen Poole breached any duty owed to Poole IV, Inc. or to the Danny Poole Trust or the Jayme Poole Trust." Consequently, she inadequately briefed, and, therefore waived the issue. *See Jackson v. Vaughn*, 546 S.W.3d 913, 922 (Tex. App.—Amarillo 2018, no pet.) (holding that Jackson's issue was inadequately briefed and, therefore, waived since he did not demonstrate how the trial court erred, cite legal authority supporting his contention, or explain his contention). Simply put, we have no obligation to *sua sponte* develop an argument for her, find pertinent legal authority, and peruse the record in search of evidentiary support for what we may develop. *See Jordan v. Jefferson Cty.*, 153 S.W.3d 670, 676 (Tex. App.—Amarillo 2004, pet. denied) (observing that "we know of no authority obligating us to become advocates for a particular litigant through performing their research and developing their argument for them").

Issues four and five are overruled, as well.

We affirm the trial court's final judgment.

Brian Quinn
Chief Justice