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NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

CHRISTOPHER M. **→STEVENS→** vs. ESTHER K. **→STEVENS→** [FN1] & another. [FN2]

→12-P-773→

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Christopher Stevens, brought this action against his mother, Esther Stevens, and his brother, David Stevens, claiming that they wrongfully deprived him of his share of a family trust. [FN3] After a twenty-five day bench trial, during which David represented himself, a judge of the Superior Court ruled in favor of Christopher, [FN4] and awarded him damages in the amount of \$918,546. Esther and David appeal from the judgment and other rulings. We affirm.

Background. The judge issued a detailed fifty-eight page decision from which we summarize the most pertinent findings. In July, 1983, Esther (then age seventy-three), executed a declaration of trust establishing the DEC Realty Trust (trust) for the purpose of holding title to certain property in Marshfield (property). The letters DEC stood for David, Esther, and Christopher. Esther appointed herself sole trustee and executed a schedule of beneficiaries designating Christopher and David as the sole beneficiaries, each with a fifty percent interest; Christopher and David each signed the schedule as well. Under the terms of the trust, Esther could not make changes to the beneficial ownership of trust property unless authorized by both David and Christopher.

On March 18, 1984, David came to Esther seeking to effectuate a change in beneficial ownership of the trust whereby he would have a fifty-one percent interest, and Christopher a forty-nine percent interest. Esther rejected the idea, crossed out the percentages shown on the schedule presented to her by David, wrote fifty percent next to each name, and signed her name next to each fifty percent designation. This document was signed on March 18, 1984, but executed by Esther as trustee, as of July 10, 1983, the date when the trust was established, thus reiterating the original arrangement.

Thereafter, Christopher and David worked together to market the property, but without immediate success. In 1988, Christopher learned that David disputed the amount of Christopher's beneficial interest in the trust, but Esther reassured Christopher that he still held fifty percent. In 1991, Esther, as trustee, with David's knowledge and consent, purported to convey the property to herself and David as tenants in common (sixty percent to David, forty percent to herself), without informing Christopher.

From 1991 to 2001, Christopher, with the encouragement of Esther and David, continued to work to market the property, still believing that it was owned by the trust and that he held a fifty percent interest. In 2001, when a buyer was located, Esther and David finally disclosed to Christopher that they, and not the trust, were record owners of the property. They assured him, however, that he still had a fifty percent beneficial interest and that they would make things right. After receiving

this reassurance, Christopher continued his involvement in the negotiation of the terms and conditions of the sale.

For a time, Esther and David made good on their promise. Periodic payments made by the buyer under the purchase and sale agreement were placed in escrow, and the defendants' attorney, Thomas Kramer, made four distributions to Christopher and David, whereby each received one-half. Esther and David also advanced Christopher an additional \$29,000 on the third distribution to pay his personal income taxes. However, after May, 2004, with the closing of the property scheduled for December 8, 2004, Esther and David jointly ceased all communication with Christopher and denied that he ever had any beneficial ownership in the property. At their direction, Attorney Kramer stopped making any further distributions of sale proceeds to Christopher, and refused to make an accounting.

Discussion. 1. *Denial of David's motion to recuse.* [FN5] On the sixth day of trial, David filed a motion seeking recusal by the judge, claiming that comments made by her reflected bias. The judge denied the motion, and David petitioned for interlocutory relief from a single justice of this court. After requesting and receiving findings from the trial judge addressing the *Lena* factors, see *Lena v. Commonwealth*, 369 Mass. 571, 575 (1976), the single justice denied the petition.

Our review of the interchanges between the judge and David reveals that, for the most part, the judge showed remarkable patience with David. While David had the right to represent himself, his court room behavior frequently was disruptive and disrespectful. David routinely interrupted the judge, refused to follow the judge's admonitions to stick to relevant matters, and complained when the judge attempted to redirect him. That said, despite the judge's understandable frustration with David's deportment, certain comments (particularly those relating to David's choice to represent himself) were better left unsaid. [FN6]

The issue presented, however, is whether the judge abused her discretion in denying David's motion to recuse. We conclude that in the particular circumstances presented, she did not abuse her discretion as to either her subjective determination that she harbored no actual bias, or her objective appraisal that others would not reasonably question her impartiality.

2. *Schedule of beneficiaries.* No party could produce the original schedule of beneficiaries. The judge found that the contents of the original schedule were proved by Exhibit 120 -- the document presented by David to Esther on March 18, 1984 -- and not by Exhibit 135, which showed Esther and David as the sole beneficiaries with a fifty percent interest each. Substantially for the reasons stated in Christopher's brief at pages 26-34, the judge reasonably could find (1) that Exhibit 135 was fraudulent, and (2) that the document presented by David to Esther on March 18, 1984, was a copy of the first page of the original schedule of beneficiaries that Esther signed on July 18, 1983, but with altered percentages (fifty-one for David; forty-nine for Christopher) that Esther then crossed out in order to restore and confirm the brothers' original fifty-fifty percentages of beneficial ownership. There was no clear error.

3. *Statute of limitations.* We need not dwell on the defendants' various challenges to the judge's extensive findings relative to the application of the discovery rule and the defendants' fraudulent concealment, because, at a minimum, Christopher's promissory estoppel claim plainly was not time barred. In 2001, the defendants promised to honor and restore Christopher's fifty percent beneficial interest in the trust. Christopher relied upon that promise by continuing his active involvement in the parties' efforts to sell the property. Christopher's reliance was reasonable, as reflected by the fact that, for several years thereafter, the defendants acted in accordance with their promise. However, at the end of May, 2004, the defendants reneged, refused to communicate with Christopher, and denied him further proceeds of the sale. Christopher's lawsuit was filed on June 21, 2005.

We treat a claim of promissory estoppel as equivalent to a contract action. *Rhode Island Hosp. Trust Natl. Bank v. Varadian*, 419 Mass. 841, 850 (1995). As Christopher's promissory estoppel claim was brought well within the applicable six-year limitations period, it was timely filed. See G. L. c. 260, § 2.

4. *Denial of motion for a new trial.* We discern no abuse of discretion in the judge's denial of the defendants' motion for a new trial based on her alleged bias. As previously observed, it is evident from the trial transcript that this case did not always bring out the best in either the defendants or the judge. All told, however, the defendants have failed to show that the case was not fairly adjudicated. Contrary to the defendants' contention, the judge's decision was well supported by the evidence presented, and cannot be explained away as the product of bias.

5. *Denial of motion for relief from judgment.* The defendants moved for relief from judgment pursuant to Mass.R.Civ.P. 60(b)(2), 365 Mass. 828 (1974), based upon their alleged discovery after trial of a thermal fax copy of Exhibit 135, which, they contend, contradicted the judge's finding that Exhibit 135 was fraudulent. Even if there were any substantive difference between the new document and Exhibit 135, the defendants have failed to show that the new document meets the standard for newly discovered evidence. By the defendants' own account, the new document was retrieved from the files of Attorney Kramer, who was their counsel and a codefendant in the case. [FN7] Because it was available by means of formal or informal discovery, it did not qualify as evidence that could not by due diligence have been discovered earlier by the movant, *Cahaly v. Benistar Property Exch. Trust Co.*, 451 Mass. 343, 361 (2008); quoting from *United States Steel v. M. DeMatteo Constr. Co.*, 315 F.3d 43, 52 (1st Cir. 2002).

Judgment affirmed.

Order denying motion for new trial affirmed.

Order denying motion for relief from judgment affirmed.

By the Court (Cohen, Green & Vuono, JJ.),

Entered: September 3, 2013.

FN1. Individually and as trustee of the DEC Realty Trust.

FN2. David P. Stevens.

FN3. Because the parties share a surname, we refer to them hereafter by their first names.

FN4. The judge found for Christopher on various alternative theories of recovery, and expressly rejected counterclaims asserted by Esther and David.

FN5. Because Esther did not join in the motion to recuse, we consider the issue to be properly raised only by David.

FN6. The judge, herself, recognized this and apologized.

FN7. Attorney Kramer is not a party to this appeal.

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