

IN THE NEBRASKA COURT OF APPEALS

ABC Native American Consulting,)
and Richard E. Scott,)
Appellees,)
v.)
William Hatch,)
Appellant.)

No. A-07-1185

MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL

FILED

SEP 23 2008

IRWIN, SIEVERS, and CARLSON, Judges.

SIEVERS, Judge.

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

Richard Scott, Chester Brooks, and William Hatch formed a partnership to perform consulting services for Indian tribes involved in gaming activities. Compensation for such services was to be divided equally among the partners. Hatch obtained \$402,000 from the Shawnee Tribe of Indians as a "finder's fee" for work related to gaming activities in Pennsylvania. Hatch divided this fee with Brooks, but he gave no portion of it to Scott, claiming the fee was not obtained via ABC. Scott sued for breach of contract, breach of fiduciary duty, and an accounting. Scott recovered a judgment and Hatch now appeals.

FACTUAL AND PROCEDURAL BACKGROUND

On November 20, 2002, William Hatch, Jr., Chester Lee Brooks, and Richard Scott entered into an agreement (ABC Agreement) as ABC Native American Consulting (ABC). The ABC Agreement provided that Hatch, Brooks, and Scott would divide

equally among themselves any profits ABC gained from its efforts providing consulting to Indian tribes. The ABC Agreement reads as follows:

ABC Native American Consulting has entered into a letter of authorization with the Delaware Tribe of Indians, and anticipates entering agreements or authorizations with additional Tribes. In said authorizations there will be compensation paid to ABC.

For good and valuable consideration ABC Native American Consulting agrees to pay William T. Hatch, Jr., Richard Scott and Chester Lee Brooks equal shares of the proceeds under these authorizations or agreements. . . .

Hatch, Brooks, and Scott each received equal compensation for ABC's work on the Delaware Tribe's behalf. The Delaware Tribe was seeking to identify both tribal lands in Pennsylvania where it could build a casino as well as identify outside investors to finance the building of a casino on such lands. ABC located investors known as the Foxfire Partnership, which consisted of H.A. Dennis and Luis Figuerito. ABC's role was essentially to bring together the Delaware Tribe with the Foxfire Partnership. For doing so, ABC received \$25,000 per month from Dennis. From this amount, Hatch, Scott, and Brooks each received \$7,000 per month with the remainder being retained for expenses. Eventually, however, the Delaware Tribe project ended unsuccessfully, and no further payments were received by

ABC for that project. Further details of this business transaction are not pertinent to the instant case.

On March 17, 2005, Hatch entered into a letter of agreement with Bobcat Development L.P. (which Hatch also referred to as Visions Property), an effort related to Indian gaming in Pennsylvania. As part of this agreement, Hatch received a "finder's fee" of \$402,000, paid in monthly installments of \$33,500, for his services as a broker/finder for introducing Bobcat to the Shawnee Tribe of Indians in connection with the Bobcat project. Hatch received this payment from H.A. Dennis, the same person who paid ABC for its efforts on behalf of the Delaware Tribe when it also was pursuing gaming opportunities in Pennsylvania. Hatch divided the Bobcat Development money by paying \$195 in "wire fees," \$102,000 to H.A. Dennis for a finder's fee, \$150,125 to Brooks, and the remainder, \$149,680, to himself. No portion of the Bobcat finder's fee was paid to Scott. In his agreement with Bobcat Development, Hatch represented that he was the sole person providing the services for which the finder's fee was being paid. We discuss this transaction in further detail below in our analysis of Hatch's argument that this transaction was not related to ABC.

On June 1, 2005, Scott filed a complaint against Hatch and Brooks in the district court for Lancaster County alleging breach of contract, unjust enrichment, breach of fiduciary duty, conversion, and requesting an accounting and declaration of the

parties' rights. Brooks was dismissed from the case because he was not properly served, and he is not part of this litigation. The court bifurcated the proceedings into a first phase in which it was determined whether Scott was entitled to an accounting from Hatch, and a second phase in which Hatch was required to provide an accounting of certain business activities.

In its October 31, 2006, order after the first phase of the bench trial on whether Scott was entitled to an accounting, the court determined that in the ABC Agreement the parties had formed a for-profit partnership to carry on the business of entering into authorizations and agreements with various Indian tribes relating to Indian gambling. At trial, Hatch testified to the existence of a finder's fee of approximately \$384,000 paid in monthly installments of \$32,000, which he received from an entity called Visions Property. Hatch shared this fee with Brooks but not Scott. Under the ABC Agreement, the court found that Scott was entitled to one-third of the "finder's fee" received by Hatch and Brooks from Visions Property, and that Scott was entitled to an accounting from Hatch.

At the second phase of the bench trial on April 18 and 20, 2007, evidence was adduced of Hatch's agreement with Bobcat Development L.P., which Hatch testified was the same project he had previously referred to as Visions Property. We discuss this transaction in further detail below in our analysis of Hatch's argument that it was unrelated to ABC.

The district court found that Hatch was liable to Scott for one-third of the \$402,000, minus certain sums, for a total judgment of \$130,150.42 plus interest from the time of the judgment. The district court also found that the finder's fee Hatch paid Dennis was improper. Hatch timely appealed.

ASSIGNMENTS OF ERROR

Hatch assigns the following errors to the district court: (1) finding that Scott met his burden of proof to support his request for an accounting; (2) determining that the \$402,000 he received from Visions Property/Bobcat Development fell within the terms of the ABC Agreement and that Scott was entitled to one-third of that amount; (3) finding that the finder's fee Hatch paid to H.A. Dennis was not a proper expense; and (4) determining that the entire amount due to Scott was to be paid by Hatch.

STANDARD OF REVIEW

The construction of a contract is a question of law, in connection with which an appellate court reaches an independent conclusion irrespective of the determination made by the lower court. *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993). A suit for damages arising from breach of a contract presents an action at law. *Anderson Excavating v. SID No. 177*, 265 Neb. 61, 654 N.W.2d 376 (2002). In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly

erroneous. *In re Trust Created by Martin*, 266 Neb. 353, 664 N.W.2d 923 (2003). The appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Phipps v. Skyview Farms*, 259 Neb. 492, 610 N.W.2d 723 (2000).

In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Ferer v. Aaron Ferer & Sons Co.*, 273 Neb. 701, 732 N.W.2d 667 (2007).

ANALYSIS

Whether the District Court was Clearly Wrong in Finding that the \$402,000 Hatch Received from Visions Property Fell Within the Terms of the ABC Agreement and that Scott was Entitled to One-Third of that Amount.

The district court found that the ABC Agreement entitled Scott to one-third of the \$402,000 that Hatch received from Visions Property/Bobcat Development. Hatch argues this was error. The ABC Agreement reads as follows:

ABC Native American Consulting has entered into a letter of authorization with the Delaware Tribe of Indians, and anticipates entering agreements or authorizations with

additional Tribes. In said authorizations there will be compensation paid to ABC. . . .

For good and valuable consideration ABC Native American Consulting agrees to pay William T. Hatch, Jr., Richard Scott and Chester Lee Brooks equal shares of the proceeds under these authorizations or agreements. . . .

Evidence was adduced that between March 2005 and February 2006, Hatch received \$402,000 from Visions Property/Bobcat Development for a venture related to the Shawnee Tribe of Indians involving the potential for a casino to be built in Pennsylvania. The contact person for the Shawnee Tribe of Indians was Greg Pitcher. Hatch claimed the money he was paid was a "finder's fee," not a consulting fee, and as such, this fee was not covered by the ABC Agreement, and Scott was not entitled to any portion of this fee. Scott claimed that he should have been paid a portion of the finder's fee under the ABC Agreement because the Visions Property/Bobcat Development project was within the scope of the ABC project.

Scott adduced substantial evidence that supported his argument that the Visions Property/Bobcat Development project should be considered an ABC endeavor. He testified that in June 2003, he met with Hatch, Brooks, and Greg Pitcher in Oklahoma. Scott said he had prior contact with Pitcher and had already provided him with a memorandum of understanding between ABC and Pitcher's tribe, the Shawnee Tribe of Indians, with whom Hatch

ultimately entered into the Bobcat project. Scott produced a 2002 letter between his attorney and Pitcher discussing the Shawnee Tribe of Indians and Pennsylvania gaming. Such evidence supports the trial court's conclusion that the Visions Property/Bobcat Development project was related to ABC.

Additionally, the chronology of certain events and the "overlap" of certain key people within the Visions Property/Bobcat Development project and ABC likewise support the trial court's conclusion. The \$402,000 Hatch received for the Bobcat project was paid to him by H.A. Dennis, who was also the source of funds for the Delaware Tribe project, which was an ABC endeavor. Payments for the Bobcat project were initiated in March 2005. This is notable because in a December 6, 2004, correspondence, only three months before Hatch began receiving money for the Bobcat project, Hatch and Dennis exchanged correspondence discussing "Shawnee Casino Development." In that correspondence, Dennis states "(w)hat I will propose to the partners is as follows, a monthly payment of \$25,000 plus an annual payment of \$3,000,000, which will be paid from casino revenues." Hatch responded to Dennis by saying, "This is not acceptable by myself or the partners of ABC Consulting nor the attorney for myself and ABC." The content and date of the December 6, 2004, correspondence clearly suggest that what is being discussed is the Bobcat project, and Hatch was speaking for ABC as a member of ABC at that time. Hatch testified that

this correspondence referred to a completely different project than the Bobcat project, but he produced no other evidence to corroborate this claim, and the December 6, 2004, letter is readily seen as referring to the Bobcat project as an ABC endeavor--and as an admission against Hatch's interest in this litigation.

We cannot say that the district court was clearly wrong in finding that Scott was entitled to one-third of the Visions Property/Bobcat Development finder's fee of \$402,000 under the ABC Agreement. The ABC Agreement clearly contemplates ABC earning profits by entering into agreements with Indian tribes, and the Visions Property/Bobcat project fits that description. Further, multiple pieces of evidence, such as the 2002 letter between Scott's attorney and Pitcher, the 2004 correspondence between Dennis and Hatch, the chronology of the events, and the overlapping people involved with all of the projects described above, clearly support the conclusion that the Visions Property/Bobcat project deal was to be an ABC endeavor.

Throughout Hatch's briefing, he continually asserts that no letter of authorization or agreement exists between ABC and Bobcat Development. We have discussed the evidence that supports the district court's finding that there was such an agreement. However, even if there was no such agreement between ABC and Bobcat, such fact would simply show that Hatch violated his

fiduciary duty as an ABC partner. The agreement regarding the Bobcat project reads as follows:

Dear Mr. Hatch:

This letter of Agreement shall memorialize the understanding reached between Bobcat and you. . . In consideration of your services as a broker/finder for introducing Bobcat to the Shawnee Tribe. . . Bobcat agrees to pay you a finder's fee of \$402,000. . . In addition, you represent that you are the sole person involved in providing the services for which the finder's fee is being paid. (The letter is then signed by Hatch).

Rather than proving that Hatch was solely entitled to the \$402,000, this document could be taken by the fact finder as evidence that Hatch usurped an opportunity that should have been ABC's. It is well known that partners owe each other a duty of fidelity that has been expressed as follows:

(P)artners have a duty not only regarding property currently owned and transactions engaged in by the partnership but also regarding their outside business activities that involve opportunities--or potential property or transactions--of the partnership. Although the partnership does not have a conventional property right in such "opportunities" in the sense of being able to exclude third parties from possession, it does have such a right as against the partners individually. One reason for giving the partnership this property right is that exploitation of a partnership opportunity may involve use of partnership

assets and information. . .A second reason is that, like self-dealing liability, preventing partners from exploiting partnership opportunities helps ensure that the partners will exercise their energies for the benefit of the partnership rather than for their personal gain. . .If an opportunity is deemed to belong to the partnership, the courts will usually hold the usurping partner accountable. . .

I.P. Homeowners, Inc. v. Radke, 5 Neb. App. 271, 285-86, 558 N.W.2d 582, 591 (1997) (quoting II Alan R. Bromberg & Larry E. Ribstein, *Bromberg and Ribstein on Partnership* § 6.07(d) at 6:77-6:83 (1996)).

Under the ABC agreement, Hatch had a duty as a partner in ABC to share the opportunity to participate in the Bobcat project. Because he did not do so, he must be held accountable to his partners. Therefore, we find that the district court did not err in its finding that the ABC Agreement entitled Scott to a share of the \$402,000 finder's fee Hatch received from Dennis.

The district court's conclusion that Scott was entitled to a share of the money at issue also addresses Hatch's argument that Scott failed to meet his burden of proof to establish his right to an accounting. Generally, in order to be entitled to the equitable remedy of accounting, it is necessary to allege a fiduciary, trust, or confidential relationship; a complicated series of accounts; or the inadequacy of a remedy at law, the latter being the basic reason for asserting equitable

jurisdiction. See, *Trump, Inc. v. Sapp Bros. Ford Center, Inc.*, 210 Neb. 824, 317 N.W.2d 372 (1982).

Hatch argues that Scott did not show any letter of authorization or agreement between ABC and the Shawnee Tribe in regards to the Visions Property/Bobcat Development endeavor; however, we have discussed above that the evidence does establish an agreement between Hatch and the Shawnee Tribe of Indians that fell within the ambit of the ABC Agreement had Hatch not usurped the opportunity, and therefore Scott did establish his right to an accounting. Further, Scott established that Hatch was his partner and thus owed him a fiduciary duty, which entitled Scott to an accounting. See, *Lone Cedar Ranches, Inc. v. Jandebur*, 246 Neb. 769, 772, 523 N.W.2d 364, 368 (1994) (generally, in order to be entitled to an equitable remedy of an accounting, it is necessary to allege a fiduciary, trust, or confidential relationship). *Lone Cedar Ranches Inc. v. Jandebur*, *supra*, also points out that in addition to the equitable remedy, there is an action at law for accounting based on an express or implied contract citing *Harmon Care Centers v. Knight*, 215 Neb. 779, 340 N.W.2d 872 (1983). In an action for a legal accounting to lie, the defendant must have received property or money not belonging to him or her, for which he or she is bound to account to the plaintiff because the plaintiff is the owner of such property or money. *Id.* The distinction between the two types of

accounting is important with reference to our standard of review.

In this case, Scott's request for an accounting is an equitable remedy because Scott alleges Hatch breached his fiduciary duty to Scott arising from the ABC agreement. The trial court's finding of such fiduciary duty is not clearly erroneous, and thus we have affirmed such.

Whether Hatch's Payment to Dennis was Proper.

Because Scott's request for an accounting here is an equitable remedy, we review the relief granted, the accounting, de novo on the record. As part of its accounting, the district court found that the \$102,000 Hatch paid to D.H. Dennis for a "finder's fee" in the Bobcat project, which would reduce the net fee available to the ABC partners, was improper. The court so concluded because Hatch stated in the Bobcat project agreement that he was the only person involved in providing the services for which the \$402,000 fee was paid, and Hatch introduced no evidence to contradict his own representation that would justify handing over a fourth of the fee to D.H. Dennis, to the obvious detriment of the ABC partners. After our de novo review of the record, the district court's treatment of the money given to Dennis by Hatch is completely accurate, and we affirm its decision in this regard.

Whether Hatch was Responsible to Scott for One-Third of the Proceeds from the Visions Property/Bobcat Development Endeavor.

Hatch argues that even if Scott were entitled to one-third of the Bobcat Development fee, Hatch should only be liable for one-half of Scott's share because Hatch split this fee with Chester Brooks. In other words, Hatch argues that he would only owe Scott one-sixth and Brooks would be liable for the other one-sixth of the fee. However, as Scott's partner, Hatch owed Scott a fiduciary duty. See, *Bode v. Prettyman*, 149 Neb. 179, 188, 30 N.W.2d 627, 632 (1948) (partners must exercise the utmost good faith in all their dealings with the members of the firm and must always act for the common benefit of all). Because Dennis paid the \$402,000 to Hatch, and Hatch therefore controlled the money, it was Hatch's fiduciary duty to see that Scott received his one-third share of that amount, but instead Hatch paid the money to himself, Dennis, and Brooks. See, *Trieweller v. Sears*, 268 Neb. 952, 986, 689 N.W.2d 807, 839 (2004) (director who misappropriated corporate assets and distributed them to innocent third party was required to compensate corporation). Clearly, Hatch violated his fiduciary duty when he distributed the money, and in this lawsuit the trial court properly entered judgment against Hatch in Scott's favor for Scott's one third. (Any "contribution" by Brooks to Hatch is not part of this suit.) Therefore, we affirm the district court's decision entering judgment against Hatch in

favor of Scott in the sum of \$130,150.42 together with 7.012% simple interest per annum from the date of the district court's October 9, 2007, order until the judgment is paid in full.

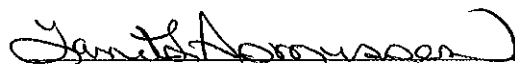
AFFIRMED.

THE STATE OF NEBRASKA, ss.

I hereby certify that I have compared the foregoing copy of an opinion filed by this Court with the original on file in my office and that the same is a correct copy of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand
and caused to be affixed the Seal of this Court, in the City of
Lincoln.




Clerk/Deputy Clerk

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