NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2425-13T1

ALL SAINTS UNIVERSITY OF MEDICINE, ARUBA, ASUMA LLC and RICHMOND PAULPILLAI,

Plaintiffs,

and

JOSHUA YUSUF,

Plaintiff-Respondent/
Cross-Appellant,

v.

GURMIT SINGH CHILANA,

Defendant-Appellant/
Cross-Respondent,

and

PETER SILBERIE,

Defendant.

Argued September 21, 2015 – Remanded October 27, 2015
Reargued telephonically July 20, 2016 –
Decided August 5, 2016

Before Judges Sabatino, Accurso and O'Connor.

On appeal from Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. C-147-08.

Arthur P. Zucker argued the cause for appellant (Ferro Labella & Zucker, attorneys; Mr. Zucker, of counsel and on the brief).

Bernard Wishnia argued the cause for respondent.

PER CURIAM

This matter returns to us following our most recent remand "for the limited purpose of allowing the trial court to consider anew the remedy for Yusuf's breaches of his fiduciary duties and duty of loyalty, including leave to consider whether Yusuf's wrongful conduct warrants a forced buyout." All Saints Univ. of Med. Aruba v. Chilana, No. A-2425-13 (App. Div. Oct. 27, 2015) (slip op. at 22). To the extent it bore on the remedy, we also permitted the court to consider Yusuf's claim to a fifty-three percent interest in the entity and permitted Yusuf to raise on remand the issue of "Aruban law" on which he asked us by motion to reconsider our 2015 opinion.

Because this matter has such a protracted and complicated history, and we write only for the parties, we eschew a complete retelling of the facts and procedure and relate only so much as is necessary to make comprehensible what has brought us to this point.

Following a six-day trial in 2009, Judge Contillo found defendant-counterclaimant Gurmit Singh Chilana proved plaintiffs

Joshua Yusuf and Richmond Paulpillai had breached their fiduciary duties and duty of loyalty to ASUMA, a New Jersey limited liability company they formed in 2007 to manage the medical school formerly known as All Saints University of Medicine, Aruba, and entered judgment for Chilana on the derivative count of his counterclaim. Pursuant to section 2B-24b of the New Jersey Limited Liability Company Act, N.J.S.A. 42:2B-1 to -70, since repealed, the judge ordered Yusuf and Paulpillai dissociated from ASUMA and paid fair value for their interests, which value was determined to be zero on the stipulated valuation date.

Yusuf, but not Paulpillai, appealed. We affirmed the judgment dissociating Yusuf, rejecting his appeal. All Saints Univ. of Med. Aruba v. Chilana, No. A-2628-09 (App. Div. Dec. 24, 2012) (slip op. at 3, 39-48). We also, however, determined to clarify an issue Yusuf had not specifically raised. We held "that, despite what the parties and the trial judge may have otherwise assumed, N.J.S.A. 42:2B-24b does not compel the sale of the shares of a dissociated member." Id. at 3. Thus, although affirming Judge Contillo's finding that ASUMA was without value on the stipulated valuation date, we remanded to provide Yusuf the opportunity to withdraw from the stipulation in the event the Chancery judge found Yusuf had entered into it

under "a mistaken assumption that dissociation under the statute would compel the dissociated members to tender their shares to the remaining members, regardless of whether they wanted to do so." Id. at 55.

On the initial remand, Judge Contillo was unable to find the parties had stipulated to a forced sale with the understanding that N.J.S.A. 42:2B-24b does not compel the sale of a dissociated party's interest. The judge rejected Chilana's argument that the court should order a forced sale as an equitable remedy for Yusuf's adjudicated breaches of his fiduciary duties and duty of loyalty. Judge Contillo concluded "the remand mandate did not include leave to consider or reconsider whether wrongful conduct on the part of plaintiffs — either statutory (3(c)) or common law — warranted a forced buy out."

The judge accordingly entered an order on December 17, 2013, modifying the prior judgment by declaring that Yusuf, having been dissociated from ASUMA since January 6, 2010, had since that date "only the rights of an assignee of a member's limited liability interest pursuant to N.J.S.A. 42:2B-24.1 and N.J.S.A. 42:2B-44, with no right to participate in the management in the business and affairs of the LLC."

Chilana appealed, arguing the Chancery judge too narrowly construed the remand order to preclude consideration of an equitable remedy for Yusuf's breaches of his common law fiduciary duties and duty of loyalty. Yusuf countered that "'[t]he Chancery judge . . . fully considered the common law breaches and decided not to deprive Yusuf of his shares' on that basis." All Saints Univ. of Med. Aruba, No. 2425-13, supra, slip op. at 12-13. Yusuf also argued that we "'remanded with the specific finding that the Operating Agreement signed by all parties forbids a forced sale,'" and that determination had become the law of the case and could not be revisited. Id. at 13; see Polidori v. Kordys, Puzio & Di Tomasso, 228 N.J. Super. 387, 394-95 (App. Div. 1988).

We rejected Yusuf's arguments. We concluded in our 2015 opinion after reviewing the record that we could not "find that Judge Contillo considered Yusuf's breaches of his fiduciary duties and duty of loyalty on remand and determined not to deprive Yusuf of his shares on that basis." All Saints Univ. of Med. Aruba, No. 2425-13, supra, slip op. at 12-13. Instead, we found that Yusuf had "obtained a windfall we did not intend." Id. at 14. We explained that our remand was "premised on the fact that the parties had stipulated to a buyout upon dissociation. Had there been no stipulation, we would have

remanded for the court to consider the question of remedy anew. There would have been no other option." Ibid.

We thus remanded the case to Judge Contillo a second time to consider the remedy for Yusuf's breaches of his fiduciary duties and duty of loyalty to ASUMA, and, if necessary, Yusuf's claim that he owned fifty-three percent of ASUMA following his asserted acquisition of Paulpillai's interest after entry of the judgment in 2010.

Yusuf moved for reconsideration, reiterating his contention that we had determined in our 2012 opinion that the "Agreement between All Saints University of Medicine Aruba Foundation and Dr. Gurmit Chilana," which the parties treated as an operating agreement for ASUMA, barred a forced sale. He argued not only had that finding become the "law of the case," which we should not have revisited in 2015, but that our 2015 finding that the Agreement did not bar a forced sale was premised on a faulty understanding of the structure of the Foundation, i.e., the claimed "Aruban law"[1] issue. We denied the motion without

[1] The appellation is somewhat of a misnomer. In our 2015 opinion, we noted that "[t]he paragraph of the Operating Agreement that provides that a shareholder cannot be compelled to give up or sell his share for any reason and that no shareholder can buy out another shareholder is in the paragraph of the Agreement allocating shares in All Saints; no such restriction appears in the paragraph allocating their interests in ASUMA." Id. at 16. Yusuf contends because "Aruban law" does (continued)

prejudice to Yusuf raising the issue on remand to Judge Contillo.

On the second remand, Judge Contillo determined "that the appropriate remedy in this case is and remains the involuntary buy-out by Dr. Chilana of Dr. Yusuf's ownership interest in ASUMA LLC." The judge found "[i]t would be grossly inequitable to permit Dr. Yusuf to reap the benefits of a continuing economic interest in an entity he was content to see destroyed." Referring to the 2010 judgment, the judge wrote that he believed he was "severing Dr. Yusuf's interest . . . and conveying it to Dr. Chilana, for what it was worth: zero." Judge Contillo concluded:

(continued)
not recognize "shares," we missed that the parties must have been referring to ASUMA and not to All Saints in those parts of the poorly-drafted Agreement forbidding a forced sale. As New Jersey law likewise does not recognize "shares" in a limited liability company such as ASUMA, and the issue was not dispositive of our opinion, reconsideration on that basis is not appropriate.

The "Aruban law" argument is, in any event, beside the point as Yusuf does not challenge the Chancery court's power to compel a forced sale of Yusuf's interest in ASUMA for his breaches of fiduciary duties and duty of loyalty, notwithstanding any term of the Operating Agreement. Our review of the May 27, 2010 decision of the Court of First Instance of Aruba, furnished to us in Yusuf's appendix, which removed Paulpillai and suspended Yusuf as members of the All Saints Foundation Board pending a final decision on Yusuf's appeal in this matter, does not alter our analysis or preclude the disposition we reach.

> Perpetuating the toxic relationship of Dr. Yusuf and Dr. Chilana — even the recast relationship of a full LLC member (Chilana) versus dissociated member with ongoing economic interest (Yusuf), is neither practicable, feasible nor equitable. What was and remains equitable is for Dr. Yusuf to be bought out of his membership interest in ASUMA LLC for what that interest is worth — a value his own actions (positive and negative) helped to establish.

Regarding the issue of "Aruban law," Judge Contillo found it "irrelevant to the remedy to be provided to Dr. Chilana in this case." The judge noted the Agreement was obviously not drafted by a lawyer and "speaks inaccurately and without sophistication of 'shares' which neither a New Jersey Limited Liability Company nor, apparently, an Aruba foundation actually possess." More important, however, the judge noted that even if the Agreement could be read to preclude a forced sale among members, "such a provision would not disable a court of equity from expelling a member of an LLC — after seeing that he is fairly paid for his interest."

Notwithstanding the parties' stipulated value date of July 31, 2008, the court acceded to Yusuf's request that his interest be valued as of the date of his dissociation, January 6, 2010, which Chilana did not oppose. See DeNike v. Cupo, 394 N.J. Super. 357, 379-81 (App. Div.), rev'd on other grounds, 196 N.J. 502 (2008). Although provided the opportunity by the court,

Yusuf did not present a valuation opinion on remand. Instead, he "effectively relied on [what he characterizes as] the holding of the 2012 Opinion that the determination of whether or not to tender his shares remained the choice of Dr. Yusuf."

Relying on the valuation testimony presented at trial that the value of the entity was zero in September 2009 and ASUMA's tax returns for 2008 and 2009 showing losses of $50,000 and $209,070 respectively, Judge Contillo determined ASUMA still was without value as of January 6, 2010. Finally, Judge Contillo determined that Paulpillai's shares could not be acquired by Chilana post-judgment. That latter ruling left Chilana with a twenty-six and one-half percent interest in ASUMA and not the fifty-three percent interest he claims.

Yusuf now appeals. He does not, however, identify any flaws in Judge Contillo's remand order, with the exception of the judge's finding regarding the non-alienability of Paulpillai's shares post-judgment. Instead, Yusuf argues "that there should not have been a second remand regarding common law remedies," which he contends Judge Contillo considered and rejected at trial in 2009, and that "[t]he remedy of dissociation imposed by the trial judge in his decision of December 23, 2009, should have been affirmed."

It is important to note that Yusuf does not challenge the power of a court of equity to have ordered a forced sale of his shares for his adjudicated breaches of his fiduciary duties and duty of loyalty to ASUMA. Yusuf concedes Judge Contillo could have ordered a forced sale of his interest in ASUMA, notwithstanding any provision of the Operating Agreement. See Fortuqno v. Hudson Manure Company, 51 N.J. Super. 482, 504-05 (App. Div. 1958) (declining to apply agreement's asset distribution method on termination where doing so would be inequitable because of partner's repeated breaches of fiduciary duties); cf. Kaye v. Rosefielde, 223 N.J. 218, 236 (2015) (holding equitable remedy of disgorgement of an employee's compensation for breach of duty of loyalty available, even in absence of employer's economic loss). His argument is that Judge Contillo chose the statutory remedy of dissociation over equitable remedies in 2009, and that we erred in 2015 in remanding the matter to allow the judge to consider the issue of remedy anew.

Yusuf's argument ignores that Judge Contillo in 2009 determined the appropriate non-statutory remedy for Yusuf's breaches of his fiduciary duties and duty of loyalty to ASUMA was the forced sale of his interest to Chilana. By holding in 2012 "that, despite what the parties and the trial judge may

have otherwise assumed, N.J.S.A. 42:2B-24b does not compel the sale of the shares of a dissociated member," All Saints Univ. of Med. Aruba, No. 2628-09, supra, slip op. at 3, we, in effect, vacated Judge Contillo's chosen statutory remedy for the judgment Chilana secured against Yusuf on derivative count five of the counterclaim. Of course, Judge Contillo could have just as well based that remedy on the parties' stipulation or, as Yusuf necessarily concedes, on the court's general equitable powers. Our opinion only clarified that the statute would not support it.

When, however, Judge Contillo could not find on remand that the parties had stipulated to a buyout with the knowledge that the statute did not compel a forced sale, or that we gave him leave to reconsider the remedy in light of our clarification of the law, Yusuf obtained a windfall. Instead of the forced sale remedy the court ordered for his breaches of his fiduciary duties and duty of loyalty, Yusuf was allowed to retain his interest in ASUMA, albeit stripped of his management role.

Judge Contillo's opinion on this most recent remand makes clear beyond all doubt that he determined in 2009 and still believes "that the appropriate remedy in this case is and remains the involuntary buy-out by Dr. Chilana of Dr. Yusuf's ownership interest in ASUMA LLC." That opinion makes clear that

Judge Contillo did not, as Yusuf maintains, consider the equitable remedy of a buyout in 2009 and reject it in favor of statutory dissociation. On the contrary, the judge determined, after a six-day trial, that the appropriate remedy for Yusuf's breaches was the one he ordered, a forced buyout. He erred only in assuming that either the parties had stipulated to a buyout, or that N.J.S.A. 42:2B-24b compelled the sale of the shares of a dissociated member in relying on the statute to achieve that result instead of on the court's equitable powers.

Our conviction in that regard has been affirmed by the Chancery judge's express findings that "[i]t would be grossly inequitable to permit Dr. Yusuf to reap the benefits of a continuing economic interest in an entity he was content to see destroyed," and that "[a] contrary holding would grant an undeserved windfall to Dr. Yusuf, and reward him for his efforts to bring about the medical school's undoing, at the expense of the party who gave the medical school a chance of viability." Even were we to agree with Yusuf as to the application of the law of the case doctrine to our 2012 opinion, which we do not, see All Saints Univ. of Med. Aruba, No. 2425-13, supra, slip op. at n.9, we would never agree the doctrine could be used as a sword to perpetrate an injustice. See Wilkins v. Hudson County

Jail, 217 N.J. Super. 39, 44-45 (App. Div.), certif. denied, 109 N.J. 520 (1987).

The only issue on appeal remaining for our resolution is Yusuf's percentage ownership in ASUMA. Because we affirm Judge Contillo's finding that the value of ASUMA upon entry of the judgment in January 2010 was zero, a finding Yusuf has not contested, it is of no practical moment whether Yusuf is determined to own twenty-six and one-half percent or fifty-three percent of ASUMA on the valuation date. Nevertheless, we acknowledge the rule of E & K Agency, Inc. v. Van Dyke, 60 N.J. 160, 163 (1972), "that where reversal of a judgment eliminates all basis for recovery against a nonappealing party, as well as against the party who has appealed, the benefit of the judgment will be made available to all alike."

Applying the rule here, Paulpillai's interest should be treated the same as Yusuf's through appeal and remand. Accordingly, per the trial court's January 6, 2010 and April 25, 2016 orders and this opinion, Paulpillai's twenty-six and one-half percent dissociated interest in ASUMA, regardless of whether owned by Paulpillai or Yusuf, is deemed to have been sold to Chilana for zero dollars as a remedy to Chilana for Paulpillai's breaches of his common law fiduciary duties and duty of loyalty and is now owned by Chilana. The trial court

shall enter an amended judgment within twenty days to reflect our ruling. We do not retain jurisdiction.

Affirmed as modified.