

No. 14-2983

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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|   |   |                               |
|---|---|-------------------------------|
| XPH DEVELOPMENT COMPANY, INC.,          | ) | Appeal from the Circuit Court |
|   | ) | of Cook County.               |
| Plaintiff-Appellant,                    | ) |                               |
|   | ) |                               |
| v.                                      | ) |                               |
|   | ) |                               |
| NICHOLAS LaPONTE, CARL LaPONTE,         | ) |                               |
| NICHOLAS CUDA, and ANTHONY CUDA         | ) |                               |
|   | ) |                               |
| Defendants                              | ) |                               |
|   | ) |                               |
| <hr/>                                   | ) |                               |
| NICHOLAS LaPONTE, CARL LaPONTE          | ) |                               |
| individually and on behalf of GRAND OAK | ) |                               |
| PARTNERSHIP and GRAND HARLEM            | ) |                               |
| PARTNERSHIP,                            | ) |                               |
|   | ) |                               |
| Plaintiffs-Cross Appellants,            | ) | No. 05 L 5406                 |
|   | ) | Consolidated with 09 CH 20154 |
| v.                                      | ) |                               |
|   | ) |                               |
| NICHOLAS CUDA, ANTHONY CUDA,            | ) |                               |
| XPH DEVELOPMENT COMPANY, INC.,          | ) |                               |
| MIDWEST BANK, by and through its agent  | ) |                               |
| GLEN HUSA, and GLEN HUSA individually,  | ) |                               |
|   | ) |                               |
| Defendants-Cross Appellees,             | ) |                               |
|   | ) |                               |
| <hr/>                                   | ) |                               |
| NICHOLAS LaPONTE and CARL LaPONTE,      | ) |                               |
|   | ) |                               |

|                                  |   |                                 |
|----------------------------------|---|---------------------------------|
| Plaintiffs-Cross Appellants,     | ) |                                 |
|                                  | ) |                                 |
| v.                               | ) |                                 |
|                                  | ) |                                 |
| NICHOLAS CUDA, ANTHONY CUDA, and | ) |                                 |
| XPH DEVELOPMENT COMPANY, INC.,   | ) | Honorable Brigid M. McGrath and |
|                                  | ) | Honorable Patrick J. Sherlock   |
| Defendants-Cross Appellees.      | ) | Judges Presiding                |

JUSTICE SIMON delivered the judgment of the court.  
 Presiding Justice Connors and Justice Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appeal taken from the summary judgment orders entered against the LaPontes is dismissed for lack of jurisdiction. The appeal from the judgment entered against the Cudas for breach of fiduciary duty is affirmed. The trial court's findings after a bench trial that the Cudas breached their fiduciary duties was not against the manifest weight of the evidence.

¶ 2 This is a case where a business relationship broke down and the damage has been exacerbated by 11 years of litigation. The principal parties are the LaPontes and the Cudas, two sets of brothers that formed a partnership and now oppose each other. This appeal pertains to two cases: one brought by the Cudas and one brought by the LaPontes. In two orders granting summary judgment in the first case—the case brought by the Cudas—the trial court found that the LaPontes were liable to answer for personal guaranties they executed to secure a loan for the partnership. The LaPontes appeal those judgments against them and that appeal is dismissed for lack of jurisdiction. In the second case—the one brought by the LaPontes—the trial court found that the Cudas were liable for multiple breaches of fiduciary duties. We affirm that judgment in its entirety.

¶ 3 **BACKGROUND**

¶ 4 In 1989, Anthony Cuda, Nicholas Cuda, Carl LaPonte, and Nicholas LaPonte formed the Grand Oak Partnership, a real estate partnership. The partnership's intention was to buy

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commercial property and lease out office space to tenants. In furtherance of that plan, the partnership took out a loan that was secured by the personal guaranties of each partner. The parties dispute the motivation, but in April 2005, the Cudas used a company owned by them, XPH Development Company, to purchase the note and the attendant guaranties from Midwest Bank. The purchase was funded by money from a Cuda family account. The Cudas contend that they purchased the note because the LaPontes failed to cooperate in providing financial information to the bank, so the loan matured and they bought it to prevent foreclosure. The LaPontes, however, contend that the Cudas surreptitiously purchased the note, intending to try to collect the entire debt from the LaPontes.

¶ 5 Nine days after the Cudas, through XPH Development, purchased the loan, XPH declared a default and demanded that the LaPontes pay off the entire debt of \$208,000. Two and a half weeks later, XPH Development sued to collect on the guaranties. Even though XPH named the Cudas as defendants, the relief sought in the complaint was for a judgment against Nicholas and Carl LaPonte for \$208,000 in principal, plus default interest, costs, and fees. The trial court granted summary judgment against the LaPontes and entered judgment against each for nearly the entire amount sought. The trial court also dismissed Nicholas LaPonte's counterclaim as a result of a discovery violation. The trial court entered an order under Supreme Court Rule 304(a) and both LaPontes appealed under that order. That appeal was dismissed after the LaPontes took no further action to press their appeal. *XPH Development Co. v. LaPonte*, No. 09-1716 (Ill. App. Ct. August 12, 2009).

¶ 6 After summary judgment was entered against them, but before they appealed, the LaPontes filed a suit against the Cudas claiming that the Cudas breached their fiduciary duties. The two main

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theories asserted by the LaPontes were that the Cudas breached their fiduciary duties when acquiring and enforcing the Midwest Bank loan and by accepting improper compensation and fees from the parties' partnerships.

¶ 7 The parties had formed a second real estate partnership, the Grand Harlem Partnership, before any problems with the Grand Oak Partnership began. The Grand Harlem Partnership purchased and managed a commercial building in Chicago. Prior to the complete breakdown of the parties' business relationship, the building was sold. Nicholas Cuda contended that he was entitled to partnership funds as a finder's fee for finding a buyer for the building and for accounting and management services he performed for the partnership. The services continued for 9 years even though Grand Harlem was not doing any business. Nicholas Cuda also made various payments to himself and to XPH Development during the course of the litigation from the assets of the Grand Oak Partnership, including to pay attorney fees to prosecute the case against the LaPontes. The trial court found that the Cudas did breach fiduciary duties to the LaPontes and the partnerships and awarded the LaPontes compensatory and punitive damages.

¶ 8 Both sets of brothers now have judgments against them and both appeal. In the LaPontes' appeal they argue that the judgments entered on the guaranties are void judgments and, thus, must be vacated. They also argue that the trial court erred when it dismissed Nicholas LaPonte's counterclaim because the severity of the dismissal sanction was disproportionate to the discovery violation. In the Cudas' appeal, they argue that the trial court erred in finding that there were breaches of fiduciary duties in the loan transaction or in Nicholas Cuda charging fees to the partnership for compensation. They also argue that the trial court erred by assessing punitive damages and ordering compensation forfeiture and disgorgement.

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¶ 9 During the course of the second case and even in this appeal, no one raised any argument that the first case and first appeal might have some type of jurisdictional or preclusive effect on the claims made in the second case or the claims made here. Oddly, the cases were consolidated at some point in time making it appear that the 2005 L 5406 case was never fully adjudicated. So, pursuant to our obligation to ensure that we have jurisdiction of all matters before us, we ordered the parties to submit supplemental briefing on the issue of jurisdiction with regard to the LaPontes' appeal filed October 7, 2014.

¶ 10 ANALYSIS

¶ 11 I. The LaPontes' Appeal

¶ 12 A review of the parties' briefs and the record revealed that in case 2005 L 5406, summary judgment was entered on the principal claims, the counterclaim was dismissed, a Rule 304(a) finding was entered, and an appeal was taken. See Nicholas and Carl LaPonte's notice of appeal, July 1, 2009. That appeal was dismissed. *XPH Development Co. v. LaPonte*, No. 09-1716 (Ill. App. Ct. August 12, 2009). We have an independent duty to determine whether we have jurisdiction over an appeal before us. *Chicago Bar Association v. White*, 386 Ill. App. 3d 955, 958 (2008). So we must determine if, after already being appealed, we can hear the LaPontes' current appeal in which they argue that summary judgment was improperly entered against them. We cannot.

¶ 13 The LaPontes ask us to review the propriety of the summary judgment orders against them. Their notice of appeal, however, indicates that they seek relief from only the trial court's April 10, 2014 order which does not address the entry of summary judgment or any substantive matters from the 2005 L 5406 case. When the 2009 CH 20154 case was filed it was consolidated with the 2005

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case and the case continued on. The cases never should have been consolidated.

¶ 14 After the Rule 304(a) ruling was entered, the LaPontes appealed. They invoked this court's jurisdiction and asked that we reverse and remand the summary judgment rulings against them—the same relief they now seek again from the court 7 years later. They do not get two appeals seeking the same relief, and the dismissal of their first appeal sealed their fate insofar as the judgments against them in the 2005 case are concerned. The trial court loses jurisdiction over a claim after making a Rule 304(a) finding and an appeal of the claim subject to that finding is filed. *Dowling v. Otis Elevator Co.*, 192 Ill. App. 3d 1064, 1069 (1989). Similarly, when an appeal is dismissed and no petition for rehearing is filed within 21 days, the dismissal becomes final and the appellate court loses jurisdiction to consider additional arguments stemming from the order appealed from. *Woodson v. Chicago Board of Education*, 154 Ill. 2d 391, 397 (1993).

Accordingly, once the appeal was dismissed, neither the trial court nor the appellate court had jurisdiction over the claims that were the subject of the 304(a) finding and the judgments against the LaPontes in the 2005 case must stand.

¶ 15 The LaPontes argue that we should entertain their arguments because the trial court found that the Cudas engaged in "egregious self-dealing," "deceptive conduct," and "bad faith." They, therefore, contend we should not allow the Cudas to benefit in any way. The trial court's statement was not that the Cudas did anything wrong during the litigation to obtain the judgment. Bad pre-litigation conduct has no bearing on our jurisdiction. The LaPontes were entitled to explore how bad the Cudas supposedly behaved when they first appealed, but they failed to do so and they permitted the judgments against them to become permanent. We lack jurisdiction to alter the judgment in the 2005 case in any way, and that appeal is dismissed.

¶ 16

## II. The XPH/Cudas Appeal

¶ 17 Initially, and again surprisingly not raised by the parties, we examine our jurisdiction to review this appeal. In the 2005 case, the LaPontes filed counterclaims against the Cudas for breach of fiduciary duty that are substantially similar to those interposed in the 2009 case. Those counterclaims were dismissed. So, we are presented with the question of: if the LaPontes cannot challenge the judgments against them, are they similarly precluded from seeking relief on their claims that are essentially a restatement of their counterclaims? We hold that they are not.

¶ 18 The motion for a Rule 304(a) finding was filed by XPH so it was the party that framed the scope of the appealable order. It only requested a finding that the June 22, 2007 judgment order become executable or appealable. When the Rule 304(a) finding was entered, it only addressed the summary judgment that was entered, not the counterclaims. The counterclaims were, in fact, not dismissed until March 13, 2009—long after the summary judgment orders were entered, so they cannot be considered incorporated. The motion for the Rule 304(a) finding and the order granting it were filed subsequent to the dismissal of the counterclaims, yet both expressly only apply to the June 22, 2007 summary judgment. XPH could have, but did not, incorporate the dismissal of the counterclaims into its request for a Rule 304(a) order.

¶ 19 Now, as expressed in section I, the fact that the Lapontes actually did appeal under the 304(a) ruling is important. But they did not specifically appeal the dismissal of their counterclaims. Even though they did include the discovery sanction in their notice of appeal which is what eventually led to the dismissal of the counterclaim, we do not find that sufficient to have any jurisdictional effect on their claims filed in 2009. Moreover, the LaPontes had already filed their 2009 case before they filed their appeal in the 2005 case, so they adequately preserved their

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claims prior to the preclusive effect of appealing under Rule 304(a). *Stroud v. News Group Chicago, Inc.*, 215 Ill. App. 3d 1006, 1010 (1991) (the trial court retains jurisdiction over the subject of a Rule 304(a) finding until the time to appeal has expired or an appeal is actually filed). The parties never sought and the trial court never issued any order to expressly terminate the 2005 case in its entirety. Its final order on the merits in that case was the Rule 304(a) order which expressly only applied to the June 22, 2007 judgment and left a number of other rulings in limbo. Then, by virtue of the 2009 case being filed and its consolidation, the case continued on its merits.

¶ 20 We are of course cognizant that the lack of subject matter jurisdiction cannot be waived by a party (*In re Marriage of Jerome & Martinez*, 255 Ill. App. 3d 374, 388 (1994)), but there is something to be said about XPH and the Cudas never raising any matter of preclusion in the 7 years since the LaPontes filed their case—and they still have not raised it. They let the 2009 case go all the way to trial without arguing that the 2005 case might have some preclusive or jurisdictional effect on the LaPontes' claims. Furthermore, the Cudas are the appellants and they submitted a jurisdictional statement to us explaining why we do have jurisdiction. Because XPH was the party that requested the 304(a) relief and got exactly what it asked for, and because the LaPontes did not specifically appeal the dismissal of their counterclaims and there was never a definitive final judgment, we hold that the LaPontes' claims against the Cudas properly proceeded in the trial court and that we have jurisdiction to review the Cudas' appeal.

¶ 21 On the merits, the Cudas argue that they should not have been found liable for any breaches of fiduciary duty and that punitive damages should not have been assessed against them. To recover for breach of fiduciary duty, a plaintiff must prove: (1) the existence of a fiduciary duty on the part of the defendant; (2) a breach of that duty; (3) proximate cause; and (4) injury to the



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plaintiff. *Visvardis v. Eric P. Ferleger, P.C.*, 375 Ill. App. 3d 719, 725 (2007). The first way in which the trial court found that the Cudas breached a fiduciary duty was by them purchasing the loan from Midwest Bank and attempting to enforce the full obligation against the LaPontes. The Cudas argue that their actions did not constitute a breach of fiduciary duty and they point to several sources that they claim demonstrate that a partner may also be a creditor of the partnership.

¶ 22 XPH and the Cudas argue that we should review whether their conduct with regard to the loan constituted a breach of fiduciary duty *de novo*. The main issue, however, that the Cudas raise is that their actions did not amount to a breach of fiduciary duty. Whether a fiduciary duty is breached is a question of fact. *DOD Techs. v. Mesirow Insurance Services, Inc.*, 381 Ill. App. 3d 1042, 1047 (2008). We review a trial court's finding that there was a breach of fiduciary duty to determine whether it is against the manifest weight of the evidence. *1515 N. Wells, L.P. v. 1513 N. Wells, L.L.C.*, 392 Ill. App. 3d 863, 874 (2009). The trial court issued a lengthy, detailed order that addresses all of the issues.

¶ 23 The trial court's ruling here was not based only on the structure of the transaction. It did not find that a partner could never be a creditor of the partnership. Instead, the trial court examined the nature of the Cudas' conduct. The trial court found that the Cudas acted wrongfully and with bad intentions when they purchased the note and attempted to collect the entire sum from the LaPontes. The trial court explained that fiduciaries "cannot use their positions for their own personal gain" (citing *Levy v. Markal Sales Corp.*, 268 Ill. App. 3d 355, 365 (1994)). Several findings of fact were made against the Cudas and XPH that amply support the trial judgment against them. They acted surreptitiously. They did not disclose their plans to their partners. They used partnership funds for themselves and for XPH to pay attorneys to prosecute and defend claims against their partners.

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They intended to erase their own liability, and then collect interest and attorney fees, all at the expense of the LaPontes. Their self-dealing was occurring at a time when Nicholas Cuda collected over \$200,000 in partnership funds as salary while the partnership was driven into significant debt. The Cudas were forced to make decisions between the best interests for XPH and for Grand Oak Partnership to the detriment of their partners whose interests were not similarly aligned. The Cudas caused XPH to be paid close to \$100,000 from the Grand Oak account for the purchased loan, money flowing to their benefit, away from the LaPontes. Ultimately, the trial court found that the Cudas acted to benefit themselves, to the disadvantage of the LaPontes and the partnership—to whom they owed a fiduciary duty. That finding was not against the manifest weight of the evidence.

¶ 24 The Cudas frame the determinative issue as whether the loan was fair. That is precisely what the trial court analyzed and it found that the Cudas conduct was not fair to the LaPontes. The court found that the Cudas used XPH to buy the loan in an attempt to secure a better position for themselves as opposed to the LaPontes, finding that they were motivated by their own self interest which was to the detriment of the partnership. The bank did not force the Cudas to purchase the note as they originally claimed. So their conduct can fairly be viewed as disloyal to the LaPontes. The trial court heard evidence that the loan problem was caused by the LaPontes unwillingness to provide financial information, and the court rejected that. Instead, the court found that the bank would have been willing to work with the partnership on a solution as they had done in the past. Their conduct coupled with their motivation supports the trial court's judgment that they were liable for breaching their fiduciary duties to the LaPontes.

¶ 25 The other basis on which the trial court found the Cudas to have breached fiduciary duties

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was by Nicholas Cuda's acceptance of compensation while the partnership faltered. Nicholas Cuda was taking between \$20,000 and \$30,000 a year in salary, despite the fact that the partnership was barely doing business. The Cudas also used partnership assets to sue the LaPontes to collect on the note. The trial court heard the evidence and found that, because Nicholas Cuda was acting in breach of a fiduciary duty, he was required to forfeit all compensation obtained during the period of the breach (citing *LID Associates v. Dolan*, 324 Ill. App. 3d 1047, 1071 (2001)). The Cudas argue that the compensation obtained by Nicholas Cuda was necessary, documented, and reasonable. After hearing testimony though, the trial court found otherwise.

¶ 26 Carl LaPonte testified that it was never disclosed that Nicholas Cuda was taking more than \$20,000 in salary each year from the partnership. There is some correspondence that should have alerted all of the partners to the fact that Nicholas Cuda was performing some services for the partnership, but there was no evidence that the parties consented to him paying himself to that extent from partnership funds. In fact, Nicholas Cuda testified himself that he did not notify the LaPontes about certain times he was paying himself from the company. The services continued for 9 years even though the partnership was not really doing any business. It is apparent that the business could have been wound up much sooner. The partnership bank account was then slowly depleted by Nicholas Cuda performing menial tasks and charging the partnership without the other partners' consent. The trial court heard evidence that the parties never agreed the Cudas would get a finder's fee for simply carrying on the partnership business. It resolved that question in favor of the LaPontes and found that it was improper for the Cudas to hold the partnership assets hostage under a claim it was entitled to such a fee and for them to refuse to wind up the company on that basis. The trial court had ample evidence to find that the finder's fees, the management fees, and

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the other compensation was inadequately disclosed, not agreed upon by the partners, and that it should be remunerated to the partnership. None of the trial court's findings were against the manifest weight of the evidence.

¶ 27 The Cudas also argue that the trial court should not have assessed punitive damages against them. Punitive damages are permissible where a duty based on a relationship of trust is violated and where the violation has been willful. *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, 81 (1994). The trial court's order addresses that exact situation. We review the court's determination of whether punitive damages should be awarded under the abuse of discretion standard. *Tully v. McLean*, 409 Ill. App. 3d 659, 672 (2011). An abuse of discretion occurs where no reasonable person would agree with the position adopted by the trial court.

¶ 28 There is evidence that the sets of brothers had something of a personal vendetta. They have been litigating these cases now for 11 years. Meanwhile, the partnership funds have all been depleted. The trial court found that Nicholas Cuda put himself in a position where he accepted a duty of trust and that he used that position for his own benefit and to the detriment of the LaPontes. The finding was tantamount to the Cudas' conduct constituting a misappropriation of partnership funds. The trial court explained in its findings that it found the Cudas to have engaged in "egregious self-dealing," "deceptive conduct," and "bad faith." The Cudas were found to have used partnership assets for themselves and XPH to pay their legal bills, all in a wrongful attempt to get the LaPontes to pay the entirety of the partnership debt. The trial court's decision to assess punitive damages was not an abuse of discretion.

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¶ 29

## CONCLUSION

¶ 30 Accordingly, we affirm the judgment against the Cudas and we dismiss the appeal filed by the LaPontes.