

Term 

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COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

BARBARA J. **←NICHOLS→** vs. JACQUELINE A. **←PRITZKER.→** [\[FN1\]](#)

12-P-1328

*MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

The defendant, Jacqueline A. Pritzker, appeals from (1) a judgment entered in the Superior Court in favor of the plaintiff, Barbara J. Nichols, reflecting a jury verdict dated November 17, 2011; (2) the judge's denials of the defendant's motion for judgment notwithstanding the verdict and motion for new trial, dated January 4, 2012; and (3) the judgment holding the defendant in civil contempt of an order to provide a complete accounting of all assets and real property previously belonging to the decedent, Michael A. Nichols (Michael), and the related order assessing a compensatory fine. On appeal, the defendant makes multiple arguments asserting alleged errors by the trial judge, and that the evidence was insufficient to support the verdict and the contempt judgment and subsequent compensatory fine were without merit. We affirm. 1. *Refusal to instruct*. The defendant argues the trial judge improperly instructed the jury regarding the burden of proof necessary to establish an agreement had been made. In so doing, the defendant argues both the Statute of Frauds and the Statute of Wills apply, and therefore the evidentiary clear and convincing standard controls. We disagree. Neither the Statute of Wills, G. L. c. 191, § 1, nor the Statute of Frauds, G. L. c. 259, § 5A, were implicated by the agreement between the plaintiff and Michael and his wife. The plaintiff argued she had an oral contract with Michael and his wife prior to their deaths that governed disposition of their shared property after their deaths, and that agreement does not implicate the Statute of Wills. See *King v. Trustees of Boston Univ.*, 420 Mass. 52, 62 (1995). The Statute of Frauds is similarly inapplicable, as the agreement in question was not a will, but a promise to give the plaintiff all of Michael's and his wife's property after their deaths. *Ibid*. The jury instructions therefore were not erroneous. See *Kelly v. Foxboro Realty Assocs.*, 454 Mass. 306, 310 (2009).

2. *Admission of testimony and evidence*. The defendant also claims the judge erroneously admitted (1) Nadine Dalo's testimony as character evidence in support of the plaintiff, and (2) evidence of the defendant's pretrial expenditures of cash assets belonging to Michael's estate after the plaintiff gave the defendant notice of her claims. We disagree with both assertions.

Dalo's testimony regarding the plaintiff's trustworthiness and character comprises roughly two pages out of nearly 700 pages of transcript. The judge limited Dalo's testimony, upon objection by defense counsel, to only Dalo's personal experience with these characteristics of the plaintiff. Based upon the limited nature and volume of the testimony, we cannot conclude that the exclusion of the evidence might have resulted in the jury reaching a different result. See *Grant v. Lewis/Boyle, Inc.*, 408 Mass. 269, 274 (1990).

We similarly disagree with the defendant's claim that the trial judge abused her discretion by

admitting evidence of the defendant's pretrial expenditures. See *Liarikos v. Mello*, 418 Mass. 669, 672 (1994). The judge admitted the expenditures for the purpose of showing the breach of the alleged agreement between the plaintiff and defendant, as well as for the manner and type of the defendant's expenses and evasions, each of which was relevant to the matter before the jury. The judge specifically barred admission of any evidence that a contempt hearing took place and of any findings she made at the contempt hearing.

3. *Sufficiency of evidence.* The defendant further claims that the evidence was insufficient to prove consideration existed for the agreement between the plaintiff and defendant. We disagree. As the trial judge noted in her instructions to the jury, detrimental reliance on a promise is considered a valid substitute for consideration. See *Johnny's Oil Co. v. Eladayha*, 82 Mass. App. Ct. 705, 714 (2012). See also *Weston Forest & Trail Assn., Inc. v. Fishman*, 66 Mass. App. Ct. 654, 659 (2006). The jury reasonably could -- and did -- find that the events that transpired between the plaintiff and defendant in 2008 created a reasonable expectation that the plaintiff would be compensated by the defendant for her assistance, and as such, an agreement was created and enforceable. *Loranger Constr. Corp. v. E.F. Hauserman Co.*, 376 Mass. 757, 760 (1978). See Restatement (Second) of Contracts § 90(1) (1981). The plaintiff's detrimental reliance on the defendant's promise constituted a sufficient substitute for consideration. [\[FN2\]](#)

4. *Excessive damages.* The defendant claims that the damages awarded by the jury were excessive based on the evidence presented of a sharing agreement between the plaintiff and defendant. We disagree. '[A]n award of damages must stand unless to make it or to permit it to stand was an abuse of discretion on the part of the court below, amounting to an error of law.' *Mirageas v. Massachusetts Bay Transp. Authy.*, 391 Mass. 815, 822 (1984), quoting from *Bartley v. Phillips*, 317 Mass. 35, 43 (1944). As the special verdict slip notes, the jury found the plaintiff was entitled to \$1,553,037.56 not as a result of the breach of the sharing agreement between herself and the defendant, but rather Michael's breach of his and his wife's promise to the plaintiff to give her 'everything' after their deaths. [\[FN3\]](#) The defendant makes no showing that the damages awarded were greatly disproportionate to that particular injury suffered by the plaintiff, nor were the damages a miscarriage of justice. See *doCanto v. Ametek, Inc.*, 367 Mass. 776, 787 (1975). No remittitur was required.

5. *Contempt.* Finally, the defendant claims the judge's finding of contempt was erroneous because the defendant made a good faith effort to substantially comply with the judge's accounting orders. She also claims the judge's compensatory fine for her noncompliance was excessive and erroneous. We disagree.

The defendant has failed to meet her burden of showing the judge's finding of contempt was clearly erroneous. See Mass.R.Civ.P. 52(a), as amended, 423 Mass. 1402 (1996); *Kendall v. Selvaggio*, 413 Mass. 619, 620 (1992). Her argument that she made a good faith attempt to comply with the judge's order dated December 17, 2010, is belied by the fact that good faith is not a valid defense to noncompliance with an explicit and clear court order. See *United Factory Outlet, Inc. v. Jay's Stores, Inc.*, 361 Mass. 35, 37 (1972). See also *Birchall, petitioner*, 454 Mass. 837, 853 (2009) ('[T]he disobedience must be clear, but need not be beyond doubt'). We see no reason to disturb the judge's findings. See *Millenium Equity Holdings, LLC v. Mahlowitz*, 456 Mass. 627, 637 (2012).

Similarly, the imposition of the compensatory fine was also proper. See *Allen v. School Comm. of Boston*, 400 Mass. 193, 195 (1987). The judge found that the defendant's noncompliance with the order for accounting was 'knowing, purposeful and willful.' Based on this, the formulation of the remedy was within the judge's discretion. *Eldim, Inc. v. Mullen*, 47 Mass. App. Ct. 125, 129 (1999). The compensation award of \$484,429.35 reflected four significant expenditures for which the defendant had yet to account. See *Labor Relations Commn. v. Salem Teachers Union, Local 1258, MFT, AFT, AFL-CIO*, 46 Mass. App. Ct. 431, 435 (1999). The judge was within her discretion to employ fines for these ongoing violations of the previous orders, *Arch Med. Assocs., Inc. v. Bartlett Health Enterprises, Inc.*, 32 Mass. App. Ct. 404, 407 (1992), and the fine 'need not be measured with undue precision,' especially as a result of the defendant's failure to account for these expenditures. *Department of Pub. Health v. Cumberland Cattle Co.*, 361 Mass. 817, 832 (1972).

There was no error in the amount of the compensatory fine.

*Judgments affirmed.*

*Orders denying motion for new*

*trial or to amend judgment*

*and motion for judgment*

*notwithstanding the verdict*

*affirmed.*

*Order on plaintiff's request*

*for compensatory fine*

*affirmed.*

By the Court (Cypher, Vuono & Meade, JJ.),

Entered: August 8, 2013.

[FN1](#). Individually, as trustee of the Michael A. Nichols 2005 Revocable Trust, and as executrix of the estate of Michael A. Nichols.

[FN2](#). The defendant also argues insufficient evidence existed to estop the application of the Statute of Wills and Statute of Frauds from applying to the alleged agreement between the plaintiff and Michael and his wife. For the same reasons as set forth, *supra*, regarding the alleged erroneous jury instructions, we conclude neither statute was implicated by that agreement, and therefore we need not evaluate the sufficiency of the evidence on that issue. See *King v. Trustees of Boston Univ.*, 420 Mass. at 62.

[FN3](#). The special verdict slip instead assigns damages of only \$37,000 to the plaintiff for the defendant's breach of their alleged sharing agreement.

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