COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-587

ROBERT A. COSTANTINO

vs.

JOHN LONARDO[1] & others.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Robert A. Costantino appeals from a judgment, following a jury-waived trial, dismissing his breach of contract claim against defendant John Lonardo, and declaring him jointly and severally liable to MassHealth for an outstanding lien for medical assistance benefits provided to Michelina Lonardo, John Lonardo's late mother, along with John Lonardo and the

[1] Individually and as administrator of the estate of Michelina Lonardo.

[2] Marc Chapdelaine. The amended complaint also named the Commonwealth of Massachusetts as a real party in interest. The Commonwealth's Medicaid program, MassHealth, is administered by an agency within the Massachusetts Executive Office of Health and Human Services. MassHealth was formerly known as the Division of Medical Assistance. We use "MassHealth" to refer to both the program and the agency.

codefendant Marc Chapdelaine.[3] Finding no reason to disturb the judgment, we affirm.[4]

Background. We draw our summary of the facts from the judge's detailed findings, all supported by the evidence. Dating back to 2002, Costantino provided various legal services to John and his mother, Michelina. The Lonardos lived in Michelina's three-family house located in East Boston (the property) on the same street as Costantino's law office. In 2002, John sought Costantino's financial help because the property was facing foreclosure due to Michelina's falling behind in her mortgage payments. Despite never having met Michelina, Costantino loaned her $30,000 in exchange for a promissory note and mortgage on the property. In May 2004, after John advised Costantino that the $30,000 had "been spent" and that Michelina was again facing foreclosure, Costantino loaned her another $97,000 in exchange for a mortgage and deed granting him a one-half, tenancy in common interest.[5] About a

[3] We refer to the Lonardos by their first names to avoid confusion.

[4] Neither John nor Chapdelaine appealed from the judgment. On appeal, Costantino has waived his breach of the implied covenant of good faith and fair dealing claim against John. Shortly after the judgment entered, Costantino apparently paid the lien in full.

[5] The only time that Costantino met Michelina was when she signed this mortgage to him. Given Michelina's history of dementia, her irregular signature, and the misspelling of the notary's

year later, Costantino and Michelina took out a $300,000 loan and mortgage against the property. After paying off the previous mortgages, from the remaining $186,000, Costantino paid himself $75,022.

Thereafter, in 2007, Costantino drove John to meet with another attorney to facilitate Michelina's receipt of MassHealth medical assistance benefits. On September 20, 2007, Costantino received a letter from that attorney confirming Michelina's eligibility for MassHealth medical assistance benefits, which she began receiving on May 25, 2007. The judge found that "[b]y 2007, Costantino clearly [was] on notice that" the property was Michelina's only asset, and should have reasonably inferred "that there may well be a lien asserted [against the property] by MassHealth." On November 27, 2007, MassHealth recorded a lien against the property. See G. L. c. 118E, § 34. By the time of her death on March 19, 2008, Michelina had received $43,673.80 in medical assistance from MassHealth.

In May 2009, John filed a pro se complaint in the Superior Court, raising personal claims against Costantino (the 2009 Superior Court action). The judge found that John filed the lawsuit because he was upset that Costantino had obtained a one-

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name, the judge expressed concerns about Michelina's competency and the propriety of the transaction.

half tenancy in common interest in the property. John subsequently retained Chapdelaine to represent him therein.[6]

In December 2009, John, as Michelina's sole heir, petitioned the Probate and Family Court (Probate Court) to administer her estate, and was appointed administrator in June 2010 (estate proceeding). Costantino provided the Probate Court filing fee and helped John fill out the petition. Crediting Chapdelaine's testimony, the judge found that Costantino did not want his name on the petition because he lacked malpractice insurance. In the petition, John falsely certified under the pains and penalties of perjury that, as required by law, see G. L. c. 118E, § 32 (a), he sent copies of his petition for administration and Michelina's death certificate to MassHealth. In fact, although John and Costantino knew about this notice requirement, neither provided these documents to MassHealth.

In 2012, Costantino and John resolved the 2009 Superior Court action after five days of trial. Pursuant to the terms of the settlement agreement, Costantino acquired the remaining one-

[6] In his perfunctory pro se complaint, John alleged that Costantino "ha[d] stolen monies" from his mother's estate by having her sign a mortgage she was "not competent" to sign. John, the judge found, only sought recovery for himself, and not for the estate. Based on the fee agreement, the judge found that Chapdelaine understood the nature of the representation to involve work solely for John, and that as demonstrated by Chapdelaine's invoices, none of his legal work or fees related to Michelina's estate.

half interest in the property for $104,500, to be paid over time. Although Chapdelaine raised the issue of the lien with Costantino before that trial began, neither raised it again during the settlement negotiations.[7] The lien was neither satisfied nor even addressed in the settlement agreement.

The judge found that Costantino "was adamant" that he receive a quitclaim deed from John for the remaining one-half tenancy in common interest in the property because "[Costantino] then understood that a quitclaim deed would require the owner [i.e., John] to have satisfied all the liens." The judge further found that in order to avoid the possibility that the Probate Court would discover the existence of the lien, Costantino opposed Chapdelaine's plan to seek a license from that court to sell the property. From Costantino's actions, the judge inferred that at all times during the resolution of the 2009 Superior Court action, Costantino was cognizant of the lien and tried his best to evade it.

Thereafter, on December 27, 2012, a week after Costantino made a $76,000 payment to John pursuant to the settlement

[7] The judge found that while the absence of a discussion about the lien might have been due to Chapdelaine's "faulty memory," Costantino intentionally chose not bring it up. The judge found that Chapdelaine, who had not appeared as counsel for John in the 2009 Superior Court action until 2010, could not be faulted for failing to verify that MassHealth had been given notice as represented on the petition.

agreement, Costantino faxed a copy of the settlement agreement to MassHealth's estate recovery unit. Prior to that date, Costantino had called MassHealth, seeking waiver of the lien. The judge discredited Costantino's testimony that he first learned of the lien in January 2013, finding that he had learned of the lien at least by February 2010, and ignored it when the 2009 Superior Court action settled in March 2012. The judge further found that Costantino called MassHealth in December 2012 only in anticipation of making the $76,000 payment to John. On this point, the judge reasoned: "[Costantino] did not want to [make the payment] without being as secure as he could be that he was not going to be liable for MassHealth's lien." On or about January 5, 2013, MassHealth filed a notice of claim in the estate proceeding.[8] At that time, Chapdelaine and Costantino again discussed the lien, and Costantino reiterated his position that the lien was invalid.

[8] On February 21, 2013, Costantino filed an equity complaint for declaratory relief in the Probate Court against John, seeking an order requiring that any remaining payments he owed to John under the settlement agreement be paid to MassHealth. On September 16, 2013, MassHealth filed a petition to compel payment of the MassHealth claim in the estate proceeding. In February 2014, Costantino's equity matter was consolidated with the earlier estate proceeding. At the request of MassHealth in this case, the judge took judicial notice of the consolidated Probate Court proceedings and adopted two summary judgment decisions issued therein as the law of the case. As herein relevant, the Probate Court judges ruled that MassHealth's lien was valid and enforceable against Michelina's estate and against Costantino's interest in the property.

Meanwhile, John used some of the $93,500 in settlement payments from Costantino to pay attorney's fees that he owed to Chapdelaine, and spent the rest on himself. The judge found that the payment to Chapdelaine covered attorney's fees incurred by John individually in the 2009 Superior Court action and that none of Chapdelaine's legal services performed for John benefited Michelina's estate. The judge found that the property was the sole asset of the estate; that Chapdelaine, John, and Costantino received estate assets from the sale of the property; that the payments to Costantino, John, and Chapdelaine were subject to "clawback" by MassHealth; and that the lien remained in place because the estate was improperly probated. See G. L. c. 118E, § 32 (a).

The judge ruled that while Costantino and John were both personally liable to MassHealth for the full amount of the lien ($43,673.80 plus interest), Chapdelaine was only liable to MassHealth for $44,666.67, the amount "he received from the estate" in legal fees, but which the judge found did not benefit the estate. The judge found that although Costantino received the benefit of a distribution from Michelina's estate, he failed to pay off the lien, and therefore he, with John, remained jointly and severally liable to MassHealth in the full amount of the lien, plus interest.

Discussion. Costantino challenges several of the judge's findings as unsupported by the evidence. The judge's findings of fact must stand unless they are clearly erroneous. See Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 509 (1997) (Demoulas I). In assessing findings under this standard, we must afford "due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses." Mass. R. Civ. P. 52 (a), as amended, 423 Mass. 1408 (1996).

Here, presented with conflicting testimony, the judge found that Costantino had notice of the lien dating back to February 2010. This finding is amply supported by Chapdelaine's testimony.[9] The judge's related findings regarding Costantino's communications with MassHealth were supported by the testimony of the manager of MassHealth's estate recovery unit. To the extent that Costantino argues that "it makes no sense" that he would have paid John $76,000 on December 20, 2012, if he had known about the lien, the judge reasonably concluded that Costantino believed he had successfully orchestrated the placement of the lien payment obligation solely on John.

[9] The judge found that Chapdelaine met with Costantino in February 2010 and informed Costantino that, among other things, based on his research, there was a MassHealth lien on the property. Costantino took the position with Chapdelaine that the lien was not valid because it contained an incorrect address. The judge inferred from Costantino's incorrect address defense that Costantino knew of the lien before that meeting.

Costantino testified that he was unaware of the lien and admitted he did not do a title search. On this issue, the judge found: "I accept that the lien goes with the property. Costantino was foolish to not have done a title search if he, in fact, did not know of the lien before March 2012, which I do not find. I find that he well knew of the lien prior to his February 2010 meeting with Chapdelaine."

The judge's finding that Costantino made a false statement to the Social Security Administration (SSA) about the nature of his ownership in the property is, likewise, well grounded in the evidence. Although Costantino accurately told the SSA that he "jointly owned" the property with Michelina, he knew that they owned the property as tenants in common, not as joint tenants. Thus, the judge found that Costantino's words falsely implied to the SSA that he and Michelina owned the property as joint tenants with the right of survivorship, rather than as tenants in common.[10] This behavior supports the judge's findings that Costantino made the statement (1) to mislead the SSA into believing that he, as the only surviving joint tenant, was the sole owner of the property; and (2) "so that the SSA would not

[10] To this end, in his July 1, 2008 letter to SSA, Costantino misleadingly advised: "As I understand it, [Michelina's] interest in the property was her only asset and the filing of a petition in the probate court will have no effect on the property."

realize that Michelina's interest, as a tenant in common, was still potentially reachable."

Contrary to Costantino's assertion, the judge did not expressly find that Costantino (rather than John) had the duty to provide MassHealth with copies of Michelina's death certificate and petition for administration. The judge found that Costantino, an attorney, actively assisted John with his pro se administration petition and was aware that John did not send notice of the petition to MassHealth, and thus, that Costantino, as a distributee of the estate assets, should be held with John as jointly responsible for the full amount of the lien. The judge's detailed subsidiary findings support her conclusion. In sum, based on the record before us, we are not "left with the definite and firm conviction that a mistake has been committed" (quotation omitted).[11] Demoulas I, 424 Mass. at 509.

We are unpersuaded by Costantino's argument that the judge's findings demonstrate "unreasonable prejudice" against him. In a thorough and thoughtful decision, the judge issued comprehensive findings of fact and rulings of law resolving the claims before her. The many credibility determinations that she made against Costantino fell within the scope of her duties as

[11] We note that Costantino failed to include copies of most of the forty-six trial exhibits in the record appendix.

the finder of fact. The judge was in the best position to assess the weight and the credibility of the evidence. See Picard v. Zoning Bd. of Appeals of Westminster, 474 Mass. 570, 575 (2016). The inferences drawn against Costantino were grounded in the evidence, and thus, permissible. The judge's ultimate conclusion -- that Costantino and John were jointly and severally liable for satisfying the lien -- was also grounded in the evidence.

We also reject Costantino's suggestion that the judge somehow made "inappropriately forgiving" findings toward Chapdelaine. To the contrary, the judge rejected Chapdelaine's preferred creditor status based on his claim that any payments to him were expenses of Michelina's estate entitled to priority over the MassHealth lien. Concluding that Chapdelaine's services did not benefit the estate, the judge properly found him responsible for satisfaction of the lien to the extent of the monies he received from the estate.[12] See G. L. c. 190B, § 3-805.

[12] In a footnote and without analysis, Costantino claims error in the judge's ruling limiting Chapdelaine's liability to $44,666.67, the amount he had received from Michelina's estate. This argument does not meet appellate standards and need not be addressed. See Mole v. University of Mass., 442 Mass. 582, 603 n.18 (2004). Nevertheless, to the extent that Costantino developed this argument in his reply brief, he failed to demonstrate error. By its express terms, G. L. c. 118E, § 32 (g), requires claims allowed pursuant to § 32 to bear interest "[u]nless otherwise provided in any judgment entered." Here,

Costantino also fails to demonstrate any legal error in the judge's findings and rulings related to his breach of contract claim against John. The judge correctly concluded that the Probate Court's ruling that the validity of the lien was the "law of the case,"[13] and was thus enforceable against Costantino's interest in the property because Costantino took the one-half interest in the property in March 2012 from Michelina subject to the lien. The judge found that Costantino not only had actual notice of the lien at the time of transfer, but also that he deliberately attempted to avoid his responsibility for the lien. In light of these findings, the judge properly ruled that Costantino was not a bona fide purchaser of the property from John. See Demoulas v. Demoulas, 432 Mass. 43, 60 (2000) ("Where a purchaser acquires property . . . with notice of an adverse claim, he is not a bona fide purchaser").

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the judgment provided otherwise with respect to the amount assessed against Chapdelaine.

[13] The "law of the case" doctrine holds that "[a]n issue once decided, should not be reopened unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice" (quotation and citation omitted). King v. Driscoll, 424 Mass. 1, 8 (1996). None of those circumstances is present in this case.

Moreover, given Costantino's actual knowledge of the encumbrance, the quitclaim deed executed by John may not serve as a basis of contractual liability against John, who could convey only the rights he possessed. Costantino well knew that John did not have clear title. No provision of the purported contract at issue extinguished Costantino's liability for satisfaction of the lien.[14]

Finally, Costantino argues that John and Chapdelaine, rather than he, were "primarily" responsible for the MassHealth lien and that the judge erred by not establishing a "priority" order of payments to satisfy the lien. We disagree. Costantino did not raise with the judge, with sufficient clarity, the issue of so-called "primary" or "priority" liability. Likewise, when the judge read her decision from the bench (later transcribed), Costantino failed to request a ruling that he was not primarily liable for the lien. "We do not consider issues, arguments, or claims for relief raised for the first time on appeal." Cariglia v. Bar Counsel, 442 Mass. 372, 379 (2004). We add that even if this issue were properly preserved, there was no error.

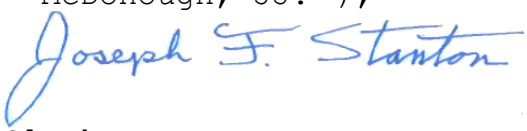
[14] John and Chapdelaine maintain that any error by the judge in dismissing Costantino's breach of contract claim was harmless because Costantino still may seek equitable contribution from both in a separate action. See Insurance Co. of the State of Pa. v. Great N. Ins. Co., 473 Mass. 745, 747-749 (2016). We take no position on whether the doctrine applies in the circumstances of this case.

General Laws c. 118E, § 44, which authorizes the imposition of civil penalties and criminal prosecutions for violations of c. 118E, does not impose a "priority" or "primary" payment obligation among responsible parties. The governing State statute and regulations do not establish a mandatory estate recovery order of primary liability. See G. L. c. 118E, § 32 (a); 130 Code Mass. Regs. §§ 515.011 and 515.012 (2014).

We have considered Costantino's remaining arguments and find them lacking in merit.[15,16]

Judgment affirmed.

By the Court (Kinder, Singh & McDonough, JJ.[17]),



Clerk

Entered: July 23, 2019.

[15] We do not consider arguments raised for the first time in the reply brief. See Katz, Nannis & Solomon, P.C. v. Levine, 473 Mass. 784, 795 n.15 (2016).

[16] John and Chapdelaine seek an award of attorney's fees and costs against Costantino, pursuant to G. L. c. 231, 6F, and Mass. R. A. P. 25, as appearing in 481 Mass. 1654 (2019), in connection with this appeal. In our discretion, we have determined that Costantino's appeal is not so frivolous as to fall within the class of "egregious" cases meriting sanctions. Marabello v. Boston Bark Corp., 463 Mass. 394, 400 (2012). The request is denied.

[17] The panelists are listed in order of seniority.