54 N.E.3d 607 (Table)
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

Edward SARRO & another [1]
v.
Sandra CIANCARELLI.

No. 14–P–230.
|
July 7, 2016.

By the Court (CYPHER, BLAKE & HENRY, JJ.). [2]

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

***1** Following the death of their sister Carmella LaMar, the plaintiffs, Edward Sarro (Edward) and Richard Sarro (Richard), filed a complaint in the Superior Court alleging, inter alia, that the defendants, Sandra Ciancarelli (Sandra), Edward Ciancarelli (Edward C.), and Jennifer Noyer, interfered with their expectancy of an inheritance. A jury returned a verdict awarding damages against Sandra in the amount of $90,000 to the plaintiffs. Sandra now appeals, [3] arguing that the judge erroneously introduced a new theory of liability into the case and misstated the law in his response to jury questions. She also claims the evidence presented did not support the verdict. We affirm.

Background. Mindful of the jury's verdict, we summarize relevant facts in the light most favorable to the plaintiffs. See *Foley v. Polaroid Corp.*, 400 Mass. 82, 85 (1987). In 1983, LaMar executed a will devising her residence at 135 Webster Street in East Boston to Edward and Richard, her brothers. As LaMar's health began to deteriorate in the 1980's, Sandra, her niece, became involved in her care, including assisting her with her financial affairs. To facilitate the payment of LaMar's living expenses, Sandra opened a joint account in both her and LaMar's names. In July of 2003, LaMar was admitted to a nursing home. Shortly thereafter, on August 26, 2003, a durable power of attorney was executed appointing Sandra attorney-in-fact for LaMar. A few months later, pursuant to her durable power of attorney, Sandra sold the East Boston residence to her son, Edward C., and his girl friend, Jennifer Noyer, for $135,000. [4] The deed was recorded on February 5, 2004, and the proceeds of the sale were deposited into the existing joint account. Sandra used some of the proceeds to continue to pay for LaMar's nursing home care. LaMar died on April 5, 2004, at the age of eighty-two. After all of the final expenses following her death were paid, approximately $90,000 remained in the account. Those funds were retained by Sandra.

On July 10, 2007, the plaintiffs filed a complaint alleging against Sandra counts for fraud, fraud in the inducement, deceit, interference with inheritance, undue influence, breach of confidential relationship, breach of fiduciary relationship, and breach of contract, as well as counts against all three defendants for fraudulent conveyance, unjust enrichment, and quantum meruit—all arising out of the sale of the East Boston home. As relief, the plaintiffs sought a declaratory judgment, a resulting trust, and monetary damages. The defendants moved for summary judgment, which the judge allowed only as to the breach of contract, quantum meruit, and fraudulent conveyance claims. The remainder of the plaintiffs' case proceeded to a jury trial. [5]

During their deliberations, the jury submitted the following two-part question to the judge:

> "If a will had been executed and properly submitted to probate, would any funds in a joint account be considered as part of the deceased's estate? In other words, do the survivorship rights of the joint account [']trump['] ... a possible will or intestate succession?"

***2** Over the objection of defense counsel, [6] the judge responded:

> "It depends on the terms pursuant to which the account was opened and the intentions of the person or persons whose funds were in the account. There has been no evidence as to survivorship rights on the joint account in the case. However, as a general matter, the answer to your question would depend on the terms pursuant to which the account was opened and the intentions of the person or persons whose funds were in the account."

The jury returned a verdict finding Sandra liable for interference with inheritance and unjust enrichment, and awarded damages of $45,000 each to Edward and Richard on the former count. [7] The jury found in favor of the defendants on all remaining counts of the complaint. On June 14, 2012, Sandra moved for judgment notwithstanding the verdict (judgment n.o.v.), arguing that the evidence failed to establish an interference with inheritance claim. She also renewed the prior objection to the judge's response to the jury's questions, arguing that it raised a new theory of liability in the case and was an incorrect statement of the law. The judge denied the motion and judgment entered on October 2, 2012, awarding the plaintiffs $90,000 against Sandra as described, and dismissing all other claims against the defendants. This appeal by Sandra followed.

1. *New theory of liability.* On appeal, Sandra reiterates her claim that, by answering the jury's questions about the joint bank account, a subject which did not appear in the complaint or any other pretrial pleadings or memoranda, the judge improperly introduced a new theory of liability into the case. Sandra claims that as a result she suffered prejudice, as she had no opportunity to prepare a defense related to the ownership of the contents of the bank account.

The requirement of confining issues to the pleadings ensures the " 'fundamental fairness' [of] the inclusion of [a] theory at trial." *The Woodward Sch. for Girls, Inc. v. Quincy,* 469 Mass. 151, 170 (2014), quoting from *Jensen v. Daniels,* 57 Mass.App.Ct. 811, 816 (2003). That fairness is protected by using the pleadings to provide all parties with notice of the claims to be brought at trial. "But notice in fact, and not notice delivered in a particular fashion or in a particular place, is ultimately what counts." *Jensen v. Daniels, supra* at 815. "[W]hen 'issues not raised by the pleadings are tried by express or implied consent of the parties, [we treat them] in all respects as if they have been raised in the pleadings.' " *Id.* at 816, quoting from Mass.R.Civ .P. 15(b), 365 Mass. 761 (1974). Generally, whether an issue was tried by consent is a matter within the sound discretion of the trial judge. See *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.,* 439 Mass. 387, 399 (2003).

On similar facts in *Jensen v. Daniels, supra,* we held that the issue whether joint bank accounts were "convenience" accounts and therefore part of a deceased's estate, while not specifically pleaded, was tried by implied consent where the parties were "aware of the issue's presence and actually dealt with it at various times." The result is the same in the present case. Here, where the plaintiffs were seeking damages for being deprived of the residence they would have inherited, it should have come as no surprise to Sandra that ownership of the bank account containing the proceeds of the sale of that residence would be an issue at trial. On these facts, we are hard-pressed to say that the subject of the bank account was, in fact, an unpleaded, new theory of liability in the case.

***3** Nevertheless, even if it were, the bank account, and the attendant facts of its opening and use over the years, were raised numerous times during the course of the case. It was the subject of deposition testimony and discovery. Several checks and bank statements were introduced as exhibits during the trial. The account was mentioned in the plaintiffs' opening statement, without objection. Finally, during Sandra's direct examination at trial, defense counsel objected when it became a subject of inquiry. Following a lengthy sidebar discussion, the judge overruled the objection on the ground that counsel should have been aware of the subject as it was raised in Sandra's pretrial deposition testimony. In these circumstances, if the subject was, as Sandra suggests, an unpleaded, new theory of liability, it was tried by the implied consent of all parties and Sandra suffered no undue prejudice. See *Jensen v. Daniels, supra* at 814–817.

2. *Jury instructions.* During the sidebar discussion on the proposed instructions in response to the jury's questions, defense counsel objected to the judge's proposal and, citing *Desrosiers v. Germain,* 12 Mass.App.Ct. 852, 855–856 (1981), requested a more detailed instruction describing the burden of proof regarding survivorship rights in a joint account. The judge's response was an accurate statement of the law. "A judge is under no obligation to charge the jury in the specific language requested by a party, so long as the charge is complete and correct in its essentials." *Hopkins v. Medeiros,* 48 Mass.App.Ct. 600, 614 (2000), quoting from *Drivas v. Barnett,* 24 Mass.App.Ct. 750, 754 (1987). The judge stated that the answer to the jury's question "depends on ... the intentions of the person or persons whose funds were in the account." Within the context of the evidence and issues in the case, the answer provided the jury with the essential knowledge they needed to reach a verdict, and was a correct statement of the law under *Desrosiers v. Germain, supra.* There was no error.

3. *Directed verdict and judgment n.o.v.* Sandra challenges the denials of her motions for a directed verdict and judgment n.o.v., arguing the evidence did not support a verdict for interference with an expectancy of an inheritance. Such a motion is properly denied if "anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the [nonmoving party]." *Goldberg v. Northeastern Univ.,* 60 Mass.App.Ct. 707, 709 (2004), quoting from *Poirier v. Plymouth,* 374 Mass. 206, 212 (1978). To succeed on a claim of intentional interference with an expectancy of a legacy, "[t]he plaintiff must show that the defendant's interference acted continuously on the donor until the time the expectancy would have been realized." *Labonte v. Giordano,* 426 Mass. 319, 321 (1997). Sandra contends that the plaintiffs did not prove continuous interference because there was evidence presented that Edward and Richard had contact with LaMar prior to her death, and, during that time, had an opportunity to discuss their concerns regarding her estate plans.

***4** Sandra's argument confuses the plaintiffs' burden. The element of continuous interference is concerned with the effect of a defendant's wrongdoing, not the conduct of a plaintiff. See *ibid.* The jury could have inferred that Sandra's interference acted upon LaMar until her death, as there was evidence that Sandra never told LaMar that she had sold LaMar's home, and that on the day prior to her death, LaMar described the house as belonging to her brothers. The motions were properly denied.

Judgment affirmed.

All Citations

54 N.E.3d 607 (Table), 2016 WL 3633495

Footnotes

1 Joanne **Sarro**, administratrix of the estate of Richard **Sarro**. After the complaint was filed, but prior to the entry of judgment, plaintiff Richard **Sarro** passed away. With the consent of all parties, his administratrix was substituted as party plaintiff. For convenience, however, we shall refer to Richard as the plaintiff.

2 The panelists are listed in order of seniority.

3 The other two defendants are not party to this appeal.

4 Back in 1994, after being diagnosed with cancer, LaMar conveyed the 135 Webster Street residence by quitclaim deed to her brothers, retaining only a life estate for herself. In 1999, however, the home was restored to LaMar's name after Sandra advised the brothers that the transfer was necessary for Medicare purposes.

5 The Superior Court docket indicates that Sandra's motion for a directed verdict was denied.

6 Although the transcripts list one attorney for Sandra, and another for Edward C. and Noyer, it appears that the two attorneys shared in the representation of Sandra, Edward C., and Noyer. The latter defense attorney objected to the judge's response to the jury's questions while the other defense attorney remained silent. In these circumstances, we deem the issues related to the judge's response to be preserved as to Sandra.

7 The jury also found that Sandra was unjustly enriched in the amount of $75,000. However, the judgment provides that no additional damages are awarded for unjust enrichment, as they are subsumed within the damages awarded for interference with inheritance. The correctness of that reasoning is not at issue in this appeal.

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