STATE OF MICHIGAN

COURT OF APPEALS

IN THE MATTER OF THE ESTATE OF DAVID M. REED, Deceased.

UNPUBLISHED
September 24, 1996

CYNTHIA VELTRI, Independent Personal Representative,

Plaintiff-Appellant,

v

No. 184847
LC No. 27775

MARGARET MACDEVITT-REED, a/k/a MARGARET A. REED,

Defendant-Appellee.

Before: Hood, P.J., and Markman and A. T. Davis,* JJ.

PER CURIAM.

Plaintiff appeals by right an order granting defendant's motion for summary disposition. Plaintiff's decedent, David M. Reed, and defendant were negotiating a property settlement agreement to be incorporated in a divorce judgment when he unexpectedly died. At issue is the enforceability of the proposed property settlement agreement. We affirm in part and reverse in part.

Reed and defendant were married on July 6, 1990. During the marriage, they bought a house and adjoining lot. They ceased living together on or before December 29, 1993. The parties refinanced the house property in December 1993. Reed, defendant and their respective attorneys met in January 1994. Defendant's attorney stated that the purpose of the discussion was to come to a property agreement in connection with a divorce. Defendant asserted and Reed's attorney agreed that the property settlement was to be incorporated into a divorce judgment.

Defendant's attorney prepared a letter, dated January 12, 1994, that set forth the terms of an agreement reached at the meeting. Relevant terms for purposes of this appeal were that Reed would

* Circuit judge, sitting on the Court of Appeals by assignment.

retain the home and adjoining lot and that he would pay defendant $50,000 ($25,000 upon approval of the outline of the agreement and $25,000 by January 1995 or upon sale of the home). Defendant conceded that the January 12, 1994 letter was an accurate statement of the agreement reached by her and Reed but that they had already agreed to some changes by the time she saw the letter. These changes were that he would initially give her $26,000 instead of $25,000 (to enable her to buy furniture for her children) and that $12,000 of the remaining $24,000 would go to her children in the form of an educational trust. She acknowledged that a January 19, 1994 letter from Reed's attorney accurately stated the agreement as modified.

Reed filed a complaint for divorce on January 19, 1994. He signed a will on February 10, 1994, in which he left everything to his three sisters.

Defendant received a $26,000 payment from Reed in the form of the refinancing check ($22,889.91) and a personal check from Reed ($3,110.09). Defendant testified that when she received the payment, she thought that the divorce would be finalized soon. However, the parties continued to disagree regarding their shared office space (they were both psychiatrists) and the terms of the educational trust.

The two attorneys met on June 14, 1994 and came to a tentative agreement regarding the divorce judgment and trust document. Defendant testified that the parties were to meet to finalize the agreement and sign it but defendant canceled the meeting because she was considering renegotiating the terms. Reed died on June 14, 1994.

On July 29, 1994, plaintiff filed suit against defendant, seeking specific enforcement of the settlement agreement reached by the parties before Reed's death. Plaintiff contends that Reed and defendant reached a settlement agreement that both defendant and Reed acknowledged through their attorneys, the terms of which are outlined in the two January 1994 letters. Plaintiff asserts that Reed's death did not extinguish the agreement.

Defendant filed a summary disposition motion pursuant to MCR 2.116(C)(10), arguing that she was entitled to judgment as a matter of law because there was no dispute of fact with respect to whether, at the time of Reed's death, the parties had agreed to the final language of a divorce judgment that was to include a property settlement agreement. Plaintiff filed a summary disposition motion pursuant to MCR 2.116(C)(7) (release and partial payment). The probate court issued an order on March 24, 1995 in which it granted defendant's motion and denied plaintiff's motion. The court essentially found that the parties never entered into an enforceable agreement regarding division of the marital assets.

On appeal, plaintiff first claims that the probate court erred in granting defendant's motion for summary disposition on the basis that Reed and defendant never reached an enforceable agreement regarding division of the marital assets. This Court reviews decisions on motions for summary

disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).

> MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to [judgment] as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Id*.]

The probate court granted defendant's summary disposition motion regarding this issue on the basis that the parties failed to make the proposed property settlement agreement binding. MCR 2.507(H) states:

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

The amended agreement, to which plaintiff seeks to hold defendant, was never made in open court nor was a writing of it subscribed by defendant or her attorney. Its terms were only summarized in writing by the January 19, 1994 letter of plaintiff's counsel. Thus, the proposed property settlement agreement was not binding on defendant.

Further, even if it we assume that the January 12, 1994 letter by defendant's counsel met the writing requirements of MCR 2.507(H), the settlement agreement was specifically intended to be part of a divorce judgment. The January 12, 1994 letter stated:

> You will recall that you and I met with our clients, to discuss a proposed separation agreement, and ultimately, negotiate a property settlement agreement that will be incorporated into a Judgment of Divorce.

Thus, we believe that it was a condition of the proposed property settlement agreement that it be incorporated into a judgment of divorce.

> In *Knox v Knox*, 337 Mich 109, 118; 59 NW2d 108 (1953) the Court stated:
> A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. . . . If the condition is not fulfilled, the right to enforce the contract does not come into existence.

Because Reed died, a divorce is no longer possible. "A court is without jurisdiction to render a judgment of divorce after the death of one of the parties." *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977).[1] Because a divorce is no longer possible, any settlement agreement cannot be

incorporated into a divorce judgment as was intended. The failure of this condition makes any settlement agreement unenforceable. *Knox*, at 118. Accordingly, the probate judge did not err in granting defendant's summary disposition motion on the basis that there was no enforceable settlement agreement.[2]

Plaintiff next contends that defendant was obligated either to specifically perform the contract or else rescind it and tender back the $26,000 she received thereunder. However, in the absence of a contract, defendant was not obligated to specifically perform the contract, rescind the contract or tender any payment back under contract principles.

Finally, plaintiff claims that defendant will be unjustly enriched if she is allowed to retain both the property and the $26,000. Unjust enrichment is an equitable doctrine. This Court reviews de novo trial court decisions to grant or deny equitable relief. *Olsen v Porter*, 213 Mich App 25, 28; 539 NW2d 523 (1995).

In *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 185; 504 NW2d 635 (1993) the Court discussed unjust enrichment:

> Even though no contract may exist between two parties, under the equitable doctrine of unjust enrichment, "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other." Restatement, Restitution, Sec. 1, p. 12. The remedy is one by which "the law sometimes indulges in the fiction of a quasi or constructive contract, with an implied obligation to pay for benefits received" to ensure that "exact justice" is obtained.

In *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993), this Court set forth the elements of unjust enrichment:

> (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant.

In the present case, the probate court held:

> Since the Court finds there never was a contract created, there is certainly no requirement that the widow rescind the contract and tender payment of the twenty-six thousand dollars ($26,000) she received from the refinancing of the marital home. Each of the parties received a benefit from this transaction. She was in no way unjustly enriched. She still remains liable on the mortgage for the debt. The parties were simply reallocating their assets and debt structure in contemplation of a property settlement to be placed before a circuit court judge.

The documentary evidence indicates that the parties reached a tentative agreement regarding property division. Both parties initiated performance of the terms of the tentative agreement.

Specifically, Reed paid defendant the initial 26,000 payment and defendant moved out of the marital home and apparently purchased a home. Based upon the amount paid and the timing of the payment, Reed's $26,000 payment to defendant clearly appears to have been made in furtherance of the tentative agreement. Defendant does not dispute that this payment was made in reliance on the tentative agreement. However, because this tentative agreement is not enforceable, we believe that equity requires that the parties be returned, to the extent possible, to the status quo ante.

Several factors make this issue difficult. First, both parties apparently received some benefit from the actions taken in reliance on the tentative agreement. Specifically, Reed received sole possession of the marital home and plaintiff moved into a home of her own. However, both parties, of course, had concomitant liabilities on these homes and defendant also remained liable on the mortgage for the marital home. Second, we acknowledge that we cannot completely restore the status quo before the tentative agreement, because we cannot "undo" plaintiff's purchase of her home pursuant to the tentative agreement. Third, most of the $26,000 payment represents proceeds from refinancing the marital home -- $22,889.91 was the refinancing check and $3,110.09 was a personal check from Reed. Defendant may be entitled to some part (or all) of these proceeds just as she may be liable for some part (or all) of the concomitant mortgage debt. Therefore, most of the $26,000 payment was not a payment of Reed's personal funds to which defendant had no claim as a spouse.

The probate court's determination that plaintiff was not unjustly enriched by receipt of the $26,000 payment had the effect of altogether avoiding determination of the distribution of the refinancing check and mortgage liability between Reed and defendant. However, the interests of the respective parties will be better served here by making this determination with some precision rather than taking an "all or nothing" approach to defendant's receipt of the $26,000 payment. Accordingly, the appropriate distribution of the refinancing proceeds and mortgage liability between Reed and defendant will have to be determined. Rather than attempt to place this Court in the minds of the parties at the time that they entered into the tentative property settlement agreement and speculate about what portion of the refinancing proceeds and mortgage liability belong to each, we will restore the proceeds to their previous position. In light of the evidence that defendant received a $26,000 payment that was made in reliance on a tentative property settlement agreement that was never completed, we find that defendant was unjustly enriched. See *Barber, supra*. The probate court erred in finding otherwise. We remand this issue to the probate court for determination of the proper distribution of joint marital assets and liabilities based on the laws of descent and distribution where, as here, the surviving widow is not provided for in an otherwise presumptively valid will.[3]

We affirm in part the probate court's ruling on the motion for summary disposition and reverse with respect to the unjust enrichment claim only. We remand for the purposes stated.

/s/ Harold Hood
/s/ Stephen J. Markman
/s/ Alton T. Davis

[1] The case at bar is distinguishable from *Kresnak v Kresnak*, 190 Mich App 643; 476 NW2d 650 (1991), in which this Court affirmed a judgment of separate maintenance entered after the death of one of the parties because the agreement at issue in *Kresnak* was not explicitly intended to be incorporated into a divorce judgment.

[2] Plaintiff also argues that even if the property settlement agreement is not enforceable as a binding contract, its terms are nevertheless enforceable under promissory estoppel. However, the failure of the condition precedent that the settlement agreement be incorporated into a divorce judgment would also bar enforcement of the settlement agreement terms under the equitable principle of promissory estoppel.

[3] The probate court is aware of the unusual circumstances of this case: that the parties were in the process of divorcing when Reed died. In settling Reed's estate, it is in a good position to equitably apportion defendant's share of marital assets and liabilities, such as the marital home, mortgage thereon and refinancing proceeds in light of these circumstances.