

STATE OF MICHIGAN
COURT OF APPEALS

AKRAM SEMAAN,

Petitioner-Appellant,

V

AKRAM KASSAB and BURT S. KASSAB,
Personal Representatives of the ESTATE OF
SHAMAYA D. KASSAB, a/k/a SAM KASSAB,
a/k/a SHAMYA DAOUD KASSAB,

Respondents-Appellees.

UNPUBLISHED

January 27, 2005

No. 249488

Oakland Probate Court

LC No. 2003-287248-CZ

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Petitioner appeals as of right from an order granting respondents' motion for summary disposition pursuant to MCR 2.116(C)(7) based on the expiration of the statute of limitations. The court determined that petitioner's claim against the estate was barred under MCL 700.3803, and that petitioner was not entitled to an extension based on respondents' failure to provide him the notice owed to a known creditor under MCL 700.3801. We reverse and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

MCL 700.3803(1) provides in pertinent part:

(1) A claim against a decedent's estate that arose before the decedent's death..., if not barred earlier by another statute of limitations or nonclaim statute, is barred against the estate, the personal representative, the decedent's heirs and devisees, and nonprobate transferees of the decedent unless presented within 1 of the following time limits:

(a) If notice is given in compliance with section 3801 or 7504, within 4 months after the date of the publication of notice to creditors,...

(b) For a creditor known to the personal representative at the time of publication or during the 4 months following publication, within 1 month after the subsequent sending of notice or 4 months after the date of the publication of notice to creditors, whichever is later.

(c) If the notice requirements of section 3801 or 7504 have not been met, within 3 years after the decedent's death.

MCL 700.3801(1) requires that, in addition to publishing notice, a personal representative must send notice to a known creditor of the estate. Further, this section provides in pertinent part:

[T]he personal representative knows a creditor of the decedent if the personal representative has actual notice of the creditor or the creditor's existence is reasonably ascertainable by the personal representative based on an investigation of the decedent's available records for the 2 years immediately preceding death and mail following death. [Emphasis added.]

Petitioner maintains that the respondents had actual notice of his claim, that notice was therefore required to be sent to him personally, and that, given the failure to do so, the statute of limitations did not expire until May 3, 2004, which was three years after the decedent's death. Apparently concluding that petitioner and his attorney were aware that the estate had been opened before the cut-off date for filing claims, despite representations in affidavits to the contrary, the probate court granted summary disposition, stating that it was "strictly construing the statute that no claim was filed timely" and was denying the claim "as a matter of law."

In deciding a motion under MCR 2.116(C)(7), the pleadings and the evidence must be construed in the Petitioner's favor. MCR 2.116(C)(7); *Terrace Land Dev Corp v Seeligson & Jordan*, 250 Mich App 452, 454-455; 647 NW2d 524 (2002). Moreover, the respondent bears the burden of establishing that the case was filed outside the limitations period. *Kuebler v Equitable Life Assurance Society of the United States*, 219 Mich App 1, 5; 555 NW2d 496 (1996). This Court's review is de novo. *Terrace Land Dev Corp, supra*.

It is undisputed that on July 9, 2001, before the estate was opened, petitioner, co-personal representative Akram (Al) Kassab, and a third person met with Attorney Donald Dahm regarding property owned by petitioner individually and as trustee for his father in Wayne and Hillsdale counties. The decedent held an interest in this property. Petitioner averred in his affidavit that although it was not the purpose of the meeting, he inquired about an investment of \$950,000 he had with the decedent at that time. Al Kassab said he would look into it. Dahm confirmed in his affidavit that this inquiry was made at the meeting.

Petitioner averred that after the meeting, he and Al Kassab went to Burt Kassab's office, where he again discussed the claim and said he wanted to recover. Burt Kassab denied having been informed of the claim. Petitioner further claimed that he discussed the claim with Al Kassab in October 2001, and that Al Kassab told petitioner, who lived in California, that if he provided a power of attorney he would hire an attorney for petitioner if petitioner agreed to give him one-half of any recovery. Petitioner said that he faxed a power of attorney to Al Kassab on October 24, 2001, but that on a subsequent trip to Michigan, Kassab advised that he could not help petitioner since he was going to be an executor. Petitioner also references a late 2001 meeting with Al and Burt Kassab at which he claims both men advised him that they could not help him with his claim because they were going to be executors of the decedent's estate.

Months later, on July 22, 2002, petitioner met with Dahm to discuss his claim. Dahm, who had previously been the decedent's attorney, indicated that Al Kassab set up the meeting in early July 2002, and then advised just prior to the meeting he would not attend. Petitioner provided Dahm with a letter and an "Assignment of Policy as Collateral" document, which indicated that petitioner and the decedent, as owners of an annuity that listed petitioner's deceased father as the beneficiary, were assigning the policy to NBD Bank as collateral. Petitioner claimed that the annuity was originally funded in the 1980's with a \$400,000 deposit provided by petitioner and his father, who were immigrants. Petitioner asserted that the money "was entrusted to the Decedent because of his American citizenship and his ability and agreement to manage money and financial affairs for Chaldean immigrants," and that it was made a joint account with the decedent for convenience to provide "flexibility to invest and manage the funds on behalf of Petitioner and his father." Dahm investigated further and found documents showing that petitioner and the decedent jointly requested a payout of the annuity funds in January 1993, that the decedent used this authorization to request a check for the balance of the account, and that a check was issued to him for \$1,072,928.44 on January 21, 1993. Petitioner claimed that the funds were given to the decedent as a constructive trust for investment.

We conclude that the affidavits of petitioner and attorney Dahm created a question of fact regarding whether Al Kassab had notice of petitioner's claim as of July 9, 2001. Petitioner's affidavit also created a question of fact regarding whether Burt Kassab had notice as of July 9, 2001, as well. Since this evidence must be construed in petitioner's favor and creates an issue of fact, it was error for the trial court to determine this statute of limitations question as a matter of law. Therefore, summary disposition should not have been granted on this basis.

Respondents argue that summary disposition should be affirmed on alternative grounds. However, some of these alternative grounds are presented for the first time on appeal whereas the others were set forth in one sentence assertions in respondents' motion to dismiss. We conclude that the legal arguments for alternative disposition have not been fully presented below or on appeal, and that it is not clear whether a factual record could be developed that would preclude summary disposition on these alternative grounds. Accordingly, we conclude that these arguments should first be addressed to the trial court.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Jessica R. Cooper