

STATE OF MICHIGAN
COURT OF APPEALS

GREGORY J. ZACK,

Plaintiff/Counter-Defendant-
Appellant,

v

MARY A. ZIELINSKI,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED
March 28, 2013

No. 307284
Macomb Probate Court
LC No. 2010-200019-CZ

Before: CAVANAGH, P.J., and SAAD and SHAPIRO, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent.

The primary dispute in this case was whether defendant was entitled to the bank account opened by decedent before her death, on which defendant was listed as the “payable on death” beneficiary. Central to this determination was the testimony of Peter Tranchida, the attorney who prepared the decedent’s will and who, during the critical events following decedent’s death, represented defendant as the personal representative of the estate until his role as a witness required him to withdraw as counsel. In his deposition Tranchida testified in some detail as to the intent of the decedent that her son receive all her assets upon her death and that certain critical documents such as a power of attorney and the bank account change were executed in favor of the defendant without his knowledge although he was counsel for the decedent.

Defendant’s trial attorney subpoenaed Tranchida and he was present for the first day of trial. Plaintiff intended to call Tranchida the following day as part of his case-in-chief. However, the witness did not appear on the second day of trial despite the subpoena. Plaintiff’s counsel learned that morning that the defense had released the witness from its subpoena and the witness had left town for the rest of the week. I agree that the trial court did not err in refusing to enforce the subpoena as the attorney that signed it did in fact release the witness.

However, I conclude that the trial court erred in its refusal to grant the alternative forms of relief requested by plaintiff. Plaintiff asked that the trial court adjourn the case to allow Tranchida to testify or, in the alternative, to allow plaintiff to present the testimony obtained at Tranchida’s de bene esse deposition. Defendant opposed plaintiff’s requests and noted that

although the deposition had been noticed as a de bene esse deposition, she had objected to that status at the outset of the deposition. This is correct. However, the reason she gave for objecting to the deposition being de bene esse was that “we have no reason to believe he wouldn’t be available at trial.” In fact, however, the witness was not available at trial and the reason was that plaintiff’s counsel mistakenly relied on the subpoena issued by defense counsel. Given the strong relevancy of this witness’s testimony to the matters at issue and given that this was a bench trial, I would conclude that denying both alternatives, i.e., adjournment and admission of the deposition testimony, was an abuse of discretion and so reverse and remand.

/s/ Douglas B. Shapiro