

STATE OF MICHIGAN
COURT OF APPEALS

In re KIMBALL Estate.

SHERI DEVLIN, Personal Representative for the
Estate of HAROLD WILLIAM KIMBALL,

UNPUBLISHED
June 12, 2014

Petitioner-Appellant,

v

ERIC V. SMITH,

No. 315130
Wayne Probate Court
LC No. 2006-704408-DE

Respondent-Appellee.

Before: WILDER, P.J., and SAAD and K. F. KELLY, JJ.

PER CURIAM.

Petitioner appeals as of right from an order granting summary disposition in favor of respondent. We conclude that the trial court erred in resolving questions of fact; accordingly, we reverse.

I. BASIC FACTS

The decedent, Harold William Kimball, died testate on March 30, 2006. His Last Will & Testament was signed on March 27, 2006. The will named petitioner as the original personal representative. Petitioner was also devised \$50,000, with the remainder of the estate to be divided equally among Kimball's grandchildren. Kimball specifically excluded his two adult children from receiving under the will. On that same day, Kimball appointed petitioner his power of attorney (POA). Three days later, on the day of his death, petitioner drafted a check for \$96,500 on a Ford Motor Money Market Account titled in both Kimball and his daughter's name, made payable to herself as POA. In her deposition, petitioner explained that Kimball did not want his daughter to have the money and wanted petitioner to have it instead. However, the check was dishonored by Ford Motor Company.

Petitioner was appointed as the original personal representative on June 11, 2006, by an application for informal probate and appointment of personal representative. She filed an inventory on December 9, 2006, alleging that the estate had \$228,000 in assets, including \$84,811.08 in liquid assets and a condominium valued at \$135,000. She also listed the disputed

Ford Motor Company Money Market Account as an asset, noting that it had a value of \$107,000, but ultimately claiming the value of the asset as “unknown.” Then, on December 9, 2006, she sought to be removed as personal representative of the estate because of a potential conflict of interest. Although petitioner believed that the proceeds of the Ford account were hers, she signed the check under POA and believed that the proceeds became an asset of the estate. She, therefore, expected to make a claim against the estate.

On February 8, 2007, the trial court granted petitioner’s request and removed petitioner as personal representative with orders to file a final accounting. That same day, Kirsten Kimball Long, the decedent’s eldest granddaughter, was appointed as successor personal representative. On August 30, 2007, petitioner filed her final account as personal representative. The account indicated that the balance of the remaining assets was \$207,554.42, consisting of \$72,354.42 in liquid assets and the condominium worth \$135,000. She petitioned the court to allow payment of \$11,819.01 in attorney fees and \$19,935 in fiduciary fees and expenses. On December 15, 2007, petitioner filed a receipt signed by Long that indicated the estate consisted of the condominium and \$47,478.42 in liquid assets. It is undisputed that Long served without bond and that she disappeared with \$47,478.42 in liquid assets. She failed to properly administer the estate and was suspended on September 16, 2009. The court appointed respondent as a special fiduciary and he qualified with the filing of an acceptance of appointment dated September 30, 2009.

On December 16, 2009, respondent filed an inventory indicating that zero estate assets had come into his possession or control. That same day, respondent notified the interested parties, including petitioner, that he had been appointed special fiduciary. He indicated that if any of the interested parties had any “knowledge of the assets of the Estate” that they should contact his office immediately. In her deposition, petitioner agreed that she received the December 16, 2009 inventory from respondent but did not file any objections. Instead, she repeatedly called respondent and Lynn Marine (respondent’s associate) and questioned them about the assets being listed as zero.

On August 2, 2011, respondent filed a petition to officially remove Long as successor personal representative, alleging that Long had failed to pay taxes on the condominium, that the condominium was lost to foreclosure, and that all the liquid assets were missing without bond. Ultimately, the probate court removed Long. On September 22, 2011, respondent qualified as the successor personal representative of the estate. Subsequently, on January 5, 2012, respondent filed an inventory stating that there was “zero inventory” and that the estate had zero assets. Respondent then filed a first annual accounting covering the period from September 30, 2009 until March 21, 2012 and again indicated that there were no assets in the estate. He also petitioned the court to approve the final account and discharge him as personal representative.

Petitioner objected to respondent’s final account and petition for complete estate settlement because he had failed to properly administer the estate, thereby damaging petitioner. Petitioner argued that respondent breached his fiduciary duties because within a reasonable time of accepting appointment as a fiduciary, respondent did not review the assets and take steps to preserve them. Had he done so, he would have discovered that the estate had three remaining assets that needed to be preserved: a condominium, a surcharge action against the previous personal representative (Long), and a wrongfully dishonored check claim.

Petitioner and respondent ultimately filed counter-motions for summary disposition. On February 13, 2013, the trial court granted respondent's motion for summary disposition, denied petitioner's motion for summary disposition and petition for surcharge, and awarded sanctions against petitioner.¹ This appeal follows.

II. ANALYSIS

Petitioner argues that the trial court erred in granting summary disposition in this case. We agree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (internal quotations and citations omitted). A (C)(10) motion "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). A genuine issue of material fact exists if the record, viewed in a light most favorable to the nonmoving party, establishes a matter in which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). A trial court "may not resolve factual disputes or determine credibility in ruling on a summary disposition motion." *Burkhardt v Bailey*, 260 Mich App 636, 647; 680 NW2d 453 (2004).

MCL 700.3712 provides that "[i]f the exercise or failure to exercise a power concerning the estate is improper, the *personal representative is liable to interested persons for damage or loss resulting from breach of fiduciary duty* to the same extent as a trustee of an express trust" (emphasis added). MCL 700.1308(1)(c) provides:

(1) A violation by a fiduciary of a duty the fiduciary owes to an heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary is a breach of duty. To remedy a breach of duty that has occurred or may occur, the court may do any of the following:

* * *

(c) Compel the fiduciary to redress a breach of duty by paying money, restoring property, or other means.

Respondent owed fiduciary duties to petitioner because she was a devisee of the decedent. See MCL 700.1212(1). At issue in this case is whether respondent breached his fiduciary duties.

¹ The sanctions were ultimately reversed by a different judge and are not an issue in this appeal.

The duties of a fiduciary are articulated in MCL 700.1212(1), which provides that “[a] fiduciary shall observe the standard of care described in section 7803 and shall discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of undivided loyalty; impartiality between heirs, devisees, and beneficiaries; care and prudence in actions; and segregation of assets held in the fiduciary capacity.” MCL 700.7803 provides that the fiduciary “shall act as would a prudent person in dealing with the property of another, including following the standards of the Michigan prudent investor rule.” Michigan’s prudent investor rule is codified at MCL 700.1501 *et seq.* MCL 700.1502 provides that “[a] fiduciary shall invest and manage assets held in a fiduciary capacity as a prudent investor would[.]” Moreover, MCL 700.1505 provides:

Within a reasonable time after accepting appointment as a fiduciary or receiving fiduciary assets, a fiduciary shall review the assets, and make and implement decisions concerning the retention and disposition of assets, in order to bring the fiduciary portfolio into compliance with the purposes, terms, distribution requirements expressed in the governing instrument, and other circumstances of the fiduciary estate, and with the requirements of the Michigan prudent investor rule.

On appeal, petitioner argues that respondent breached his fiduciary duties for failing to preserve the estate’s three remaining assets: a surcharge action against the previous personal representative (Long), a wrongfully dishonored check claim, and Kimball’s condominium.

1. SURCHARGE ACTION

Respondent’s associate, Lynn Marine, represented to the court that the surcharge action against Long was not pursued because Long did not live in Michigan and could not be located. Petitioner argues that decision was not reasonable because she was able to locate Long after searching on the computer for a few minutes. She also argues that a surcharge order could have been entered even if no one could locate Long. We conclude that there are enough questions of fact that the trial court erred in granting summary disposition.

Respondent essentially argues that the probate court could not effectuate service on Long. In order for a trial court to adjudicate a controversy, it must have personal jurisdiction over the parties, which it obtains by service of process. *Lawrence M. Clarke, Inc v Richco Constr, Inc.*, 489 Mich 265, 274; 803 NW2d 151 (2011). However, it appears that the trial court did not discharge Long as personal representative until 2011 and, presumably, continued to exercise personal jurisdiction over Long. Moreover, the record is scant as to Long’s possible contacts with Michigan and the efforts used to locate her. There were no attempts for alternate service under MCR 2.105(I). Instead, it appears that respondent’s excuse for not pursuing the surcharge had to do more with the difficulty in enforcing a resulting judgment.

In granting respondent summary disposition, the trial court blamed petitioner for turning the funds over to Long without first ensuring that a bond was filed. However, it appears petitioner acted in accordance with Long’s Letters of Authority. When Long was initially appointed successor representative in February 2007, she represented to the probate court judge that she was going to hire a local attorney to help her manage the estate. The probate court

restricted Long's ability to dispose of real estate but did not require a bond. Petitioner can hardly be held responsible for the fact that Long later absconded with the money.

Respondent complains that pursuing a surcharge would have been fruitless and expensive. Pursuant to MCL 700.1508, when managing assets, "a fiduciary may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the fiduciary estate, and the skills of the fiduciary." We believe that questions of fact remain as to whether it would have been reasonable to pursue the surcharge against Long. Once the surcharge order was entered, for example, respondent could have sold or assigned it to a collection agency or an asset purchasing company for some value. It was a question of fact as to whether such an action would have incurred significant costs to the estate for attendant fiduciary and attorney fees.

2. THE FORD ACCOUNT

Ford dishonored a \$96,500 check that was payable to petitioner as POA. Respondent decided not to pursue the matter after learning there was a beneficiary on the account. The trial court agreed that the account was not an asset of the estate because it was a jointly-held account with a right of survivorship. However, petitioner never claimed that the *account* was an estate asset. Instead, the proceeds from the *check* she wrote on the account were possibly an estate asset. Specifically, because she made the check payable to herself as POA, the check could have been an estate asset because she would have received the money in her office as Kimball's attorney-in-fact. Moreover, the probate court judge made statements on the record that questioned Kimball's capacity to execute the POA. In addressing petitioners' attorney, the judge stated:

I don't believe – let me just tell you something. I don't believe anybody that is 3 days from death is directing anybody to pull \$95,600 out of an account, I don't believe that. I don't believe that whatsoever. I don't think he had the capacity to do anything like that

Now, see you're getting me closer to the issue of the question of sanctions, because that argument doesn't make any sense, to the Court, in terms of it being, you insisting that it was a – that your client had the right to issue this check and therefore get access to this money, under her power of attorney, that's what you're insisting on.

I am saying to you is that the way that account was held, as Joint Tenants, that doesn't mean that your client had the right to get access to it with the power of attorney at that time. Because I question whether or not Mr. Kimball even had the capacity to execute any such power of attorney three days before he died. That's the issue that concerns me.

In making such comments, it is clear that the judge was resolving factual disputes, which is inappropriate on a motion for summary disposition.

3. THE CONDOMINIUM

The exact details surrounding the loss of the condominium unit are unclear. The documents in the lower court record show that the unit's property taxes were not paid from 2006 to 2009 and the unit was forfeited to the Wayne County Treasurer. The redemption period expired on March 31, 2010. Respondent qualified as special fiduciary on September 30, 2009, which was after the unit had been forfeited but before it was foreclosed upon and before the redemption period expired.

Petitioner asserts that, pursuant to MCL 700.3709, respondent was required to take reasonable measures to preserve the equity in the condominium. MCL 700.3709 provides that a personal representative "shall pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, the estate in the personal representative's possession." Further, [t]he personal representative *may* maintain an action to recover possession of, or to determine the title to, property." MCL 700.3709 (emphasis added). MCL 700.1505 requires a fiduciary to "review the assets, make and implement decisions concerning the retention and disposition of" the assets.

It is not clear on this record when respondent learned about the condominium and when he learned that the redemption period on the property had expired. It is also not clear what Marine, the individual respondent apparently tasked with administering the estate, knew about the asset. If respondent did not review the file and he did not know about the condominium until after it was lost to foreclosure, then it would have been impossible for him to have complied with his duties.

Once again, the probate court judge made factual determinations. For example, in spite of protestations to the contrary, the judge concluded that the property had been listed for 900 continuous days – "those are my findings of fact and therefore, it seems to me, that there was no ability to sell this property given that it had already been on the market so long. No takers, whatsoever." Obviously there are disputed material facts making summary disposition on the issue of the condominium inappropriate.

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

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Kirsten Frank Kelly