

STATE OF MICHIGAN
COURT OF APPEALS

MICHELLE CUMMINGS and CUSTOM
GRINDING, INC.,

UNPUBLISHED
May 26, 2005

Plaintiffs-Appellees,

v

No. 251606
St Clair Circuit Court
LC No. 01-002139-CB

CAROL P. LISS,

Defendant-Appellant,

and

OLD KENT BANK and RONALD BURDA,

Defendants.

Before: Neff, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right, following a bench trial, from a judgment for plaintiff. We affirm.

This litigation arises from a family dispute regarding the recipient of the corporate interest following the death of the owner. Plaintiff¹ is the decedent's daughter from his first marriage. She testified that, following the death of his second wife, the decedent gave her documentation indicating that she would be the beneficiary of a life insurance policy. The decedent also gave her a signed certificate. The decedent told her that she should complete the documentation in the event something happened to him. The decedent gave her a previously issued stock certificate to serve as an example of how the stock certificate should be completed.

Shortly after this conversation, plaintiff testified that the decedent met defendant through a computer dating service. During the progression of the relationship between the decedent and defendant, plaintiff's relationship with the decedent became strained. However, plaintiff testified

¹ The singular "plaintiff" will refer to plaintiff Michelle Cummings only.

that she met with the decedent at the corporate location where they agreed to resume the relationship. Unfortunately, the decedent died a short time later. After learning of decedent's death, plaintiff completed the stock certificate as instructed and filed this litigation to obtain the return of corporate machinery and assets that had been sold by defendant.²

At trial, defendant disputed the transfer of the corporate entity to plaintiff. On the contrary, defendant testified that she was with the decedent the entire day that plaintiff alleged that the stock documentation had been given to her. Shortly after the death of the decedent, defendant went to the corporate offices to find that someone had entered the premises, but did not steal items of value, such as equipment, and that the corporate records were missing. Further, defendant and the decedent's attorney testified that it was decedent's belief that the corporate machinery was individually owned by the decedent. However, documentation filed for tax purposes declared the equipment, machinery, and a truck were the property of the corporate entity, Custom Grinding, Inc.

Following a bench trial, the trial court issued a written opinion, finding that plaintiff was the owner of the corporate entity based on the delivery of the stock certificate from decedent to plaintiff on February 15, 1995. The trial court found the testimony of plaintiff credible and rejected the defense theory that plaintiff had obtained the stock certificate through improper means. The trial court awarded plaintiff a monetary judgment of \$51,500 from the sale of the corporate assets. After inclusion of interest, costs, and attorney fees, plaintiff was awarded \$56,989.52.

On appeal, defendant alleges that the findings by the trial court in the bench trial are irrelevant, and the issues on appeal present questions of law for which de novo review is appropriate. We disagree. The trial court's factual findings issued following a bench trial are reviewed for clear error, although legal conclusions are reviewed de novo. *Essexville v Carrollton Concrete Mix, Inc.*, 259 Mich App 259, 265; 673 NW2d 815 (2003). An issue must be raised, addressed, and decided to be preserved for appellate review. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 533; 672 NW2d 181 (2003). "An affirmative defense must be stated in a party's responsive pleading or in a motion for summary disposition made before the filing of a responsive pleading, or the defense is waived." *Citizens Ins Co v Juno Lighting, Inc.*, 247 Mich App 236, 241; 635 NW2d 379 (2001); see also MCR 2.111(F)(3). An affirmative defense does not controvert the plaintiff's prima facie case, but denies recovery of the claim for some reason not contained in the plaintiff's pleadings. *Citizens, supra*.

Review of the trial court's opinion reveals that the purported legal issues raised by defendant were not decided by the trial court and consequently are not preserved for appellate review.³ *ISB, supra*. Indeed, the trial court did not need to address the issues because the challenges raised were not submitted as affirmative defenses. *Citizens, supra*.

² Plaintiff testified that the decedent never asked for the return of the stock certificate. However, the decedent did remove plaintiff as the beneficiary of the life insurance policy.

³ The trial court orally denied alleged legal challenges following the motion for directed verdict, (continued...)

Although not expressly stated in the trial court's written opinion, the trial court concluded that plaintiff's testimony was credible and reached the factual conclusion that the conditions for presentation of a gift were satisfied. We agree. A gift is valid: (1) if the donor possesses the intent to gratuitously transfer title to the donee; (2) there is actual or constructive delivery; and (3) the donee accepts the gift. *Davidson v Bugbee*, 227 Mich App 264, 268; 575 NW2d 574 (1997). A gift is complete even though the donor retains a lifetime interest in the donated property. See *Braidwood v Harmon*, 31 Mich App 49, 56-57; 187 NW2d 559 (1971). Consequently, plaintiff was entitled to recoup the assets of the corporate entity. Defendant's challenge to the judgment is without merit.

Affirmed.

/s/ Janet T. Neff

/s/ Donald S. Owens

/s/ Karen M. Fort Hood

(...continued)

noting that the parties could revisit the legal issues in their proposed findings of fact and conclusions of law. However, the trial court also noted that any such legal challenges had not been filed as affirmative defenses. Defendant alleges that review is de novo because only legal challenges are involved. However, the trial court, in its written opinion, did not address the legal issues raised by defendant for the first time during trial. Rather, the trial court made factual conclusions and applied the factual findings to the law addressing gifts. Consequently, the contention that this issue is solely one of law for which de novo review applies is without merit.