[Cite as *In re Stropky*, 2018-Ohio-5371.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
IN THE MATTER OF:	:	Hon. John W. Wise, P.J.
JOHN STROPKY,	:	Hon. W. Scott Gwin, J.
AN INCOMPETENT	:	Hon. Earle E. Wise, J.
	:	
	:	
	:	Case No. 2018CA00055
	:	
	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Stark County Court of Common Pleas, Probate Division, Case No. 225684
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	December 28, 2018

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
W. CORY PHILLIPS 30100 Chagrin Blvd., Ste. 350 Cleveland, OH 44124	TYLER KAHLER TIMOTHY D. JOHNSON Twentieth Floor 1300 East Ninth Street Cleveland, OH 44114

Gwin, J.,

{¶1} Appellant appeals the April 10, 2018 entry of the Stark County Court of Common Pleas, Probate Division, overruling its motion to vacate the entry approving and settling account.

{¶2} *Facts & Procedural History*

{¶3} The trial court appointed appellee Tyler Kahler guardian of the estate of John Stropky ("Stropky") on May 4, 2016. Appellee filed a guardian's inventory on July 11, 2016 and an amended guardian's inventory on December 1, 2016. Appellee filed a motion to resign as guardian on December 21, 2016. The trial court granted appellee's motion on December 22, 2016 and ordered appellee to file a final account within thirty days. Appellee filed a final account on February 9, 2017. The trial court set the final account for a hearing on March 29, 2017. On March 29, 2017, the trial court issued an entry approving and settling account, finding the guardianship estate was fully and lawfully administered by appellee, and discharging appellee as guardian.

{¶4} Appellant Rose Lane Health and Rehabilitation, Inc. ("Rose Lane") filed a motion to vacate the entry approving and settling account on February 7, 2018, alleging appellee breached his statutory duties as guardian and thus good cause existed for vacating the entry approving and settling account. Attached to the motion to vacate is the affidavit of Amy Grippi, a representative of Rose Lane, providing details regarding Rose Lane's communications with appellee and stating Stropky is indebted to Rose Lane in excess of $110,000.

{¶5} Appellee filed a brief in opposition to appellant's motion on February 16, 2018. Attached to the brief in opposition is the affidavit of appellee, which provides

detailed responses to the allegations made by appellant in their motion and provides, in part, that he was unable to complete Medicaid applications due to the lack of cooperation by Stropky, that he updated representatives of appellant about the issues he was having with the Medicaid application process, and that appellant was advised of what was occurring. Appellant filed a reply brief on February 23, 2018.

{¶6} The trial court issued a judgment entry on March 5, 2018. The judgment entry stated that, based on the agreement of counsel, the trial court would decide the motion on the briefs and attached evidentiary materials.

{¶7} Appellee filed a sur-reply on March 14, 2018, arguing that while appellant did not have actual notice of the account hearing, appellant knew there was a guardianship, knew appellee was resigning, knew the trial court was going to appoint a successor guardian, and assisted in preparing the Medicaid applications that were filed by appellee.

{¶8} The trial court issued a judgment entry on April 10, 2018. The trial court stated, "It is clear that the Guardianship assets were never sufficient to pay for Mr. Stropky's nursing home care. It is also clear that Kahler was never able to qualify Mr. Stropky for Medicaid. What is not clear is whether Kahler committed the Guardianship to pay Rose for Mr. Stropky's care." The trial court then found the Health Care Residency Agreement was signed by Stropky as the resident and Amanda Hillard signed on behalf of Rose. The trial court stated Kahler knew Stropky was a resident of Rose Lane; however it did not appear that Rose Lane required Kahler to sign the Residency Agreement in his representative capacity as guardian of Stropky's guardianship estate.

{¶9} The trial court concluded, "in light of the above, there is no good reason to vacate the Entry Approving Kahler's Final Account. The Guardianship was never a party to the Residency Agreement since Kahler never signed it in his capacity as Guardian of the Estate." The trial court thus denied appellant's motion to vacate.

{¶10} Appellant appeals the April 10, 2018 judgment entry of the Stark County Court of Common Pleas, Probate Division, and assigns the following as error:

{¶11} "I. THE PROBATE COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO VACATE THE ENTRY APPROVING AND SETTLING ACCOUNT BY FAILING TO EMPLOY A SOUND REASONING PROCESS IN ITS R.C. 2109.35(B) ANALYSIS THAT CONCLUDED THAT GOOD CAUSE WAS ABSENT.

{¶12} II. THE PROBATE COURT ABUSED ITS DISCRETION AND FAILED TO EMPLOY A SOUND REASONING PROCESS BY IGNORING APPELLANT'S ALLEGATIONS AND SUPPORTING EVIDENCE THAT REASONABLY SHOWED THAT APPELLEE BREACHED HIS FIDUCIARY DUTY, WHICH CAUSED THE SUBJECT DEBTS."

I. & II.

{¶13} Appellant's assignments of error are intertwined and will be addressed together. Together they assert that the trial court erred in denying appellant's motion to vacate the entry approving and settling account pursuant to R.C. 2109.35.

{¶14} An order of the probate court approving and settling a fiduciary's final account has the effect of a final judgment, which can only be vacated under the limited procedures set forth in R.C. 2109.35. *In re Guardianship of Skrzyniecki*, 118 Ohio App.3d 67, 691 N.E.2d 1105 (6th Dist. Lucas 1997). The decision of whether to grant a motion

pursuant to R.C. 2109.35 is within the sound discretion of a probate court and will not be disturbed absent an abuse of discretion. *In re Estate of Smith*, 3rd Dist. Seneca No. 13-02-37, 2003-Ohio-1910. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 975 (1983).

{¶15} R.C. 2109.35 provides, in pertinent part:

> The order of the probate court upon the settlement of a fiduciary's account shall have the effect of a judgment and may be vacated only as follows: * * *
>
> (B) The order may be vacated for good cause shown, other than fraud, upon motion of any person affected by the order who was not a party to the proceeding in which the order was made and who had no knowledge of the proceeding in time to appear in it; provided that, if the account settled by the order is included and specified in the notice to that person of the proceeding in which a subsequent account is settled, the right of that person to vacate the order shall terminate upon the settlement of the subsequent account. A person affected by an order settling an account shall be considered to have been a party to the proceeding in which the order was made if that person was served with notice of the hearing on the account in accordance with section 2109.33 of the Revised Code, waived that notice, consented to the approval of the account, filed exceptions to the account, or is bound by section 2109.34 of the Revised Code * * *

* * *

> An order settling an account shall not be vacated unless the court determines that there is good cause for doing so, and the burden of proving good cause shall be upon the complaining party.

{¶16} Accordingly, in order to vacate a final account pursuant to R.C. 2109.35(B), appellant must demonstrate that it was a person affected by the order, it was not a party to the proceeding in which the order was made, it had no knowledge of the proceeding in time to appear in it, and there is good cause to vacate the order. R.C. 2109.35(B).

{¶17} In this case, appellant is affected by the entry approving and settling the account because R.C. 2109.33 allows interested parties to challenge a guardian's account and challenge the manner in which the fiduciary has administered the estate. In order to preserve its right to challenge the guardian's administration of the estate, appellant has to file exceptions to the guardian's final account. *In re Guardianship of Skrzyniecki*, 118 Ohio App.3d 67, 691 N.E.2d 1105 (6th Dist. Lucas 1997). Further, the docket of the proceedings demonstrates appellant was not a party to the proceeding in which the order was made because it was not a party to the guardianship case.

{¶18} Appellee contends appellant had knowledge of the proceedings because it was aware of the guardianship and was aware a new guardian was going to be appointed; thus appellant could review filings in the case online. It is undisputed that appellant had no notice of the filing of the final account, no notice of the hearing on the final account, and no notice of the entry approving the account. In the affidavit attached to the motion to vacate, Grippi averred appellant had no knowledge of the final account hearing in time to appear for it and it was not until Stropky's Medicaid application was denied that

appellant was on notice of a potential breach of duty. While appellant may have been aware of the guardianship case and a potential successor guardian, there is no evidence appellant had knowledge of the account hearing on March 29, 2017 in time to appear. See *In re Kissel*, 1st Dist. Hamilton No. C-950080, 1995 WL 757823 (Dec. 20, 1995) (holding the appellees had no knowledge of the proceeding in time to appear in it because they were not served with a notice of the hearing); *In re Guardianship of McPheter*, 95 Ohio App.3d 440, 642 N.E.2d 690 (6th Dist. Huron 1994) (finding no actual notice of hearing). Accordingly, we find appellant demonstrated it had no knowledge of the account hearing in time to appear for the hearing.

{¶19} The trial court found good cause did not exist to vacate the account. "Good cause" is not defined in R.C. 2109.35(B). However, courts addressing the good cause portion of R.C. 2109.35 have held that specific allegations of breach of fiduciary duty are sufficient to find good cause to vacate a final account. *In re Kissel*, 1st Dist. Hamilton No. C-950080, 1995 WL 757823 (Dec. 20, 1995) (finding allegations that the appellant breached his duties as a fiduciary to the estate beneficiaries in his capacity as executor established good cause for vacating the final account); *In re Guardianship of Atkinson*, 9th Dist. Wayne No. 06CA0041, 2007-Ohio-765 (holding allegations that the appellant's conduct violated a guardian's fiduciary duty to manage the estate for the best interest of the ward combined with citation to case law which supports his contention that appellant violated his fiduciary duty was sufficient to find good cause existed for vacating the final account); *In re Guardianship of McPheter*, 95 Ohio App.3d 440, 642 N.E.2d 690 (6th Dist. Huron 1994) (finding good cause to vacate the account when the movant alleged the

guardian did not act in a reasonable and prudent manner in managing the ward's assets in her best interest, thereby causing the estate to suffer financial loss).

{¶20} In this case, in its motion, appellant makes specific and detailed factual allegations that appellee breached his fiduciary duty to administer the guardianship and alleges appellee is statutorily obligated to pay Stropky's debts. In his response to the motion and in his affidavit attached to the response, appellee contends there is not sufficient supporting evidence to support appellant's contention that he breached his fiduciary duty. Appellee gives specific and detailed responses to appellant's allegations and details the difficulties he encountered with Stropky in handling the guardianship estate. Appellee also argues he never ratified the contract with appellant, so the debt is not a debt of the guardianship estate. While appellee's explanation may be reasonable and a defense to appellant's claims of breach of duty, R.C. 2109.35(B) does not require a finding of negligence and instead only requires a finding of good cause.

{¶21} We find the trial court erred in finding appellant's specific allegations of breach of fiduciary duty were not sufficient enough to constitute good cause pursuant to R.C. 2109.35(B). As detailed above, appellant demonstrated in its motion that it was a person affected by the order, it was not a party to the proceeding in which the order was made, and it had no knowledge of the proceeding in time to appear in it. Accordingly, the trial court erred in not granting appellant's motion to vacate the entry approving and settling account.

{¶22} In their briefs, appellant and appellee extensively argue as to why appellee was or was not negligent in the handling of Stropky's guardianship estate. However, the issue before this Court is not whether appellee was negligent in performing his duties as

guardian, but whether the trial court abused its discretion in denying appellant's motion to vacate entry approving and settling account. Thus, any arguments as to the issue of negligence must be heard and determined by the trial court at an account hearing. Simply because we find the trial court erred in denying appellant's motion pursuant to the procedures in R.C. 2109.35(B) does not mean we make any findings or determination as to negligence; rather, it means such a determination should be made by the trial court upon remand.

{¶23} Accordingly, appellant's assignments of error are sustained.

{¶24} The April 10, 2018 judgment entry of the Stark County Court of Common Pleas, Probate Division, is reversed and remanded for proceedings consistent with this opinion.

By Gwin, J.,

Wise, P.J. and

Wise, Earle J., concur