[Cite as *Novel v. Estate of Gallwitz*, 2010-Ohio-4621.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
ABBY NOVEL	:	Julie A. Edwards, P.J.
	:	Sheila G. Farmer, J.
Plaintiff-Appellant	:	John W. Wise, J.
	:	
-vs-	:	Case No. 10 CA 000005
	:	
	:	
THE ESTATE OF GLEN GALLWITZ	:	O P I N I O N
Defendant-Appellee		

CHARACTER OF PROCEEDING:	Civil Appeal from Knox County Court of Common Pleas Case No. 09OT09-526
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 27, 2010

APPEARANCES:

For Plaintiff-Appellant

ABBY NOVEL
301 North Main Street
P.O. Box 416
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For Defendant-Appellee

WM. DOUGLAS LOWE, ESQ.
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Edwards, P.J.

{¶1} Plaintiff-appellant, Abby Novel, appeals from the January 26, 2010, Judgment Entry of the Knox County Court of Common Pleas granting summary judgment to defendant-appellee Estate of Glen Gallwitz.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant Abby Novel is the biological child of Carrie Mulligan. In October of 1989, Carrie Mulligan and Glen Gallwitz were married. Prior to their marriage, the two had entered into a Prenuptial Agreement. Paragraph 8 of the Prenuptial Agreement states, in relevant part, as follows:

{¶3} "The parties do further mutually agree to refrain from any action or proceeding which may tend to void or nullify, to any extent or any particular, the terms of any Last Will and Testament or of any trust or testamentary substitute created by the other and the parties further agree not to contest or oppose the probate of any Last Will & Testament executed by the other."

{¶4} On or about March 25, 1994, Carrie Gallwitz (formerly Mulligan) executed a will. The will provided that her interest in specified real estate was to be equally divided between her grandchildren. The will further nominated and appointed Charles Mulligan, her son, as Executor and, in the event that he was unable to serve, then appointed appellant Abby Novel as Executrix. On or about February 22, 2005, Carrie Gallwitz signed a Power of Attorney appointing either appellant or Anna Craig as her attorney in-fact.

{¶5} Carrie Mulligan died on August 20, 2007, and Glen Gallwitz died on July 2, 2009.

{¶6} On September 8, 2009, appellant, Anna Craig and Mike Mulligan, who were Carrie's biological children, filed a complaint for breach of contract against appellee Estate of Glen Gallwitz. Appellant alleged in her complaint that, on August 30, 2007, Glen Gallwitz indicated that he was the fee simple owner of both of Carrie Mulligan's homes through joint survivorship deeds. Appellant further alleged as follows:

{¶7} "16. Sur Novel [appellant's son] disagreed that Glen Gallwitz was fee simple owner of one (1) of the two (2) homes since Glen Gallwitz and Carrie Gallwitz had executed a signed, notarized and witnessed deed transferring this property to Sur Novel as Trustee of the Carrie (Mulligan) Gallwitz living trust back on May 18, 2000. (Exhibit D)

{¶8} "17. On August 30, 2007 Sur Novel as Trustee requested Glen Gallwitz to compensate Carrie Mulligan's four (4) biological children who were the beneficiaries of the Carrie Gallwitz living trust if he wanted to keep both of the houses, but Glen Gallwitz refused to offer any compensation.

{¶9} "18. On October 5, 2007 Glen Gallwitz filed a quiet title action in Knox County Court of Common Plea against Carrie Mulligan's grandson Sur Novel as Trustee and Sur Novel's Mother Abby Novel.

{¶10} "19. On November 30, 2007 Glen Gallwitz caused an action to be filed in Knox County Court of Common Pleas Probate Division alleging Abby Novel had misappropriated funds from Carrie Mulligan during her lifetime through his same attorney Jeffery Zapor that was representing him in the quiet title action.

{¶11} "20. Attorney Jeffery Zapor was supported by his Co-Counsel attorney Alan Gustafson in both the action filed on October 5, 2007 and the action filed on November 30, 2007.

{¶12} "21. Glen Gallwitz and his attorney Jeffery Zapor never had any reasonable grounds to believe that there was any intentional misappropriation by Abby Novel, but were only trying to maliciously prosecute Abby Novel because they falsely believed and accused her of being the party that caused Sur Novel to record the deed to the disputed property on August 31, 2007."

{¶13} Appellant, in her complaint, also alleged that Carrie Mulligan's original signed will was not admitted to Probate Court until May 27, 2008, and the same had been intentionally withheld from Carrie Mulligan's family by Glen Gallwitz and his attorney for nine months after her death. Appellant also asserted that Glen Gallwitz and his attorney had intentionally withheld the Prenuptial Agreement and that appellant and Carrie Morgan's beneficiaries did not discover that the same existed until March 30, 2009. According to appellant, "Glen Gallwitz and his attorney Alan Gustafson's strategy was clearly to maliciously prosecute [appellant] by bleeding her for attorney fees and driving up the Commissioner and Administrator costs for Carrie Mulligan's Estate in order to totally disinherit Carrie Mulligan's four (4) biological children." Appellant alleged that "[t]he terms of Carrie Mulligan's Will have been voided and nullified by the actions of Glen Gallwitz in breach of Section 8 of the Prenuptial Agreement as it is clear there was a broad legal duty imposed by Glen Gallwitz to refrain from any action or proceeding against Carrie Mulligan's appointed Executrix [appellant] in Probate Court."

Appellant finally alleged that, as a result of Glen Gallwitz's actions, both Carrie Mulligan's Estate and appellant had been financially damaged.

{¶14} On October 5, 2009, appellee filed a Combined Motion to Dismiss and for Summary Judgment. Appellee, in its motion, argued, in part, that Anna Craig and Mike Mulligan lacked standing to assert claims for alleged wrongs to appellant. Thereafter, on November 2, 2009, Anna Craig and Mike Mulligan dismissed their claims against appellee with prejudice. Appellant filed a response to appellee's motion on November 6, 2009.

{¶15} Pursuant to a Judgment Entry filed on January 26, 2010, the trial court granted appellee's Motion for Summary Judgment, finding that there were no genuine issues of material fact and that appellee was entitled to judgment as a matter of law.

{¶16} Appellant now raises the following assignments of error on appeal:

{¶17} "I. THE COURT ERRED IN RULING THERE WERE NO GENUINE ISSUES OF MATERIAL FACT WHEN IT DETERMINED THERE WAS NO BREACH OF THE PRENUPTIAL AGREEMENT BY DEFENDANT-APPELLEE.

{¶18} "II. THE COURT ERRED IN RULING THERE WERE NO GENUINE ISSUES OF MATERIAL FACT WHEN IT DETERMINED THAT ATTORNEY JEFFERY ZAPOR REPRESENTED HIMSELF DURING THE FRIVOLOUS MISAPPROPRIATION LAWSUIT AGAINST PLAINTIFF-APPELLANT.

{¶19} "III. THE COURT ERRED IN RULING THERE WERE NO GENUINE ISSUES OF MATERIAL FACT WHEN IT DETERMINED THAT PLAINTIFF-APPELLANT HAD NOT BEEN FINANCIALLY DAMAGED BY DEFENDANT-

APPELLEE'S TWO (2) FRIVOLOUS LAWSUITS IN BREACH OF THE PRENUPTIAL AGREEMENT.

{¶20} "IV. THE COURT ERRED IN RULING TO SHIFT THE BURDEN OF PROOF ON THE NONMOVING PARTY, PLAINTIFF-APPELLANT, BASED ON THE EVIDENCE SUBMITTED BY DEFENDANT-APPELLEE.

{¶21} "V. THE COURT ERRED IN RULING THERE WERE NO GENUINE ISSUES OF MATERIAL FACT BASED ON THE EVIDENCE SUBMITTED BY THE PLAINTIFF-APPLLANT (SIC).

{¶22} "VI. THE COURT ERRED BY NOT CONSTRUING THE EVIDENCE PRESENTED MOST STRONGLY IN FAVOR OF THE NONMOVING PARTY, PLAINTIFF-APPELLANT."

I, II, III, IV, V & VI

{¶23} Appellant, in all six of her assignments of error, challenges the trial court's award of summary judgment to appellee.

{¶24} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56 which provides, in pertinent part: "* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it

appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor. * * * ”

{¶25} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall,* 77 Ohio St.3d 421, 429, 1997-Ohio-259, 674 N.E.2d 1164, citing *Dresher v. Burt,* 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264.

{¶26} It is pursuant to this standard that we review appellant’s assignment of error.

{¶27} As an initial matter, we note that appellant, in her second and third assignments of error, argues that the trial court erred (1) in determining that Attorney Jeffrey Zapor represented himself during the misappropriation action filed against appellant and (2) in determining that appellant had not been financially damaged by appellee’s two lawsuits filed against her. However, the trial court, in its entry of January 26, 2010, which is the entry appealed from in this case, did not make any findings. The

trial court merely indicated that it was granting appellee's motion because there were no genuine issues of material fact in dispute. As noted by appellee, there is no indication in the trial court's decision that it considered the issue of alleged damages. We note that appellee, in the motion filed in the trial court, did not raise the issue of damages. Moreover, while appellant maintains that the trial court erred in shifting the burden of proof on to the non-moving party and erred in not construing the evidence in her favor, there is nothing in the trial court's Judgment Entry from which we can conclude that the trial court did so.

{¶28} As is stated above, appellant filed a breach of contract action against appellee alleging that Paragraph 8 of the Prenuptial Agreement had been breached by Glen Gallwitz. Appellee filed a Motion for Summary Judgment in response to the complaint.

{¶29} The certified documents attached to appellee's Motion for Summary Judgment establish that after Carrie Gallwitz's estate was granted a release from administration, Glen Gallwitz, who was then her surviving spouse, discovered new assets belonging to Carrie Gallwitz and disclosed the same. As noted by appellee, "[t]hat can hardly been seen as an effort 'to void or nullify' Ms. Gullwitz's trust or will." By disclosing the same, Glen Gallwitz benefitted Carrie Gallwitz's estate and thus benefitted her beneficiaries including appellant.

{¶30} While appellant, in her complaint, alleged that Carrie Gallwitz's original will had intentionally been withheld by appellee for nine months, a certified copy of a Judgment Entry from the Knox County Probate Court, which was attached to appellee's motion as Exhibit E, clearly indicated that the original will had been left with the court on

January 22, 2008, and had not yet been admitted to probate. On January 22, 2008, appellant had filed her memorandum in opposition to the Motion to Reopen her mother's Estate. Carrie Gallwitz's will was attached to the same. Thus, the original will referred to by the Probate Court was provided to the Probate Court by appellant on January 22, 2008. As is stated above, Carrie Gallwitz died on August 20, 2007. Thus, the original will was not intentionally withheld for nine months.

{¶31} While appellant, in her complaint, appears to contend that Glen Gallwitz prevented her from being appointed executor of her mother's estate, appellant opposed any reopening of her mother's estate after it had been granted a summary release from administration. As noted by appellee, "far from trumpeting her right to be executor, [appellant] did not want her mother's estate to be administered by anyone." Moreover, as evidenced by Exhibit F to appellant's Motion for Summary Judgment, which is a certified copy of a June 9, 2008, order, the Probate Court, on its own motion, appointed a neutral administrator. At the time it appointed an administrator, the Probate Court would have been in possession of Carrie Gallwitz's will and would have been aware of the language contained therein regarding the appointment of an Executor. As is stated above, appellant was designated in such Will as an alternative executor.

{¶32} Appellant, in her complaint, also argued that Glen Gallwitz filed a frivolous misappropriation claim against her in violation of Paragraph 8 of the Prenuptial Agreement. However, as evidenced by Exhibit G to appellee's Motion for Summary Judgment, the misappropriation action was filed by Attorney Jeffrey Zapor in his own name, not by Glen Gallwitz. Moreover, while appellant alleged in her complaint that the misappropriation claim against her was frivolous, as demonstrated by Exhibit H to

appellee's motion, appellant was ordered by the Knox County Probate Court, pursuant to a Journal Entry filed on January 25, 2008, to make immediate restitution of $3,000.00. Finally, appellee presented evidence that appellant had filed a motion in Probate Court requesting an award of reasonable attorney fees for the frivolous conduct of Glen Gallwitz. (SEE Exhibit B to appellee's Motion for Summary Judgment.). As memorialized in a Journal Entry dated October 5, 2009 that is attached as Exhibit C to appellee's motion, the Probate Court denied such request.

{¶33} Moreover, Glen Gallwitz's quiet title action against appellant regarding the real estate does not constitute a breach of the prenuptial agreement. While appellant contends that by filing such action, Glen Gallwitz violated Paragraph 8 of the Prenuptial Agreement, "[a]n assertion of ownership is far different than a claim" against the estate. *In the Matter of the Estate of Gordon J. Wenig, Executor of the Estate of Laura E. Williams Wenig* (1987), Wood App. No. Wd-86-80, 1987 WL 16862 at 2. By filing such action, Glen Gallwitz was asserting his ownership interest in the subject real estate, not making a claim against the Estate.

{¶34} Finally, we note that Glen Gallwitz never challenged the validity of Carrie Gallwitz's will and did not assert any rights as a surviving spouse against the same.

{¶35} Appellant on November 6, 2009, filed a response to appellee's Motion for Summary Judgment. Attached to the same were various documents.

{¶36} Civ. R. 56(E) governs the type of evidence permitted on summary judgment: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.

Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit ...” Documents submitted in opposition to a motion for summary judgment which are not sworn, certified, or authenticated by affidavit have no evidentiary value and may not be considered by the court in deciding whether a genuine issue of material fact remains for trial. *Citizens Ins. Co. v. Burkes* (1978), 56 Ohio App.2d 88, 95-96, 381 N.E.2d 963, 967-968.

{¶37} The attachments to appellant’s response to appellee’s Motion for Summary Judgment are not sworn, certified or authenticated and, therefore, were not properly before the trial court as admissible evidence. Moreover, appellant’s response contains many hearsay statements. “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Evid.R. 801(C). Hearsay is not admissible except as otherwise provided by rule, statute, or constitution. Evid.R. 802. We note that appellant did not file any affidavits in support of the assertions made in her memorandum in opposition to appellee’s Motion for Summary Judgment.

{¶38} In short, we find that appellee supported its Motion for Summary Judgment with properly authenticated Civ.R. 56(C) evidence demonstrating that appellant had no evidence supporting her allegations which constituted the basis for her breach of contract claim. See *Dresher* at 293. Appellee presented evidence that Glen Gallwitz did not take the actions which appellant alleged had constituted a breach of the Prenuptial Agreement and/or took action(s) which failed to constitute a breach or breaches. As a result, the burden then shifted to appellant to demonstrate genuine issues of material fact. Upon our review of the record, and construing the evidence in

appellant's favor, we find that appellant has failed to meet such burden and that the trial court did not err in granting appellee's Motion for Summary Judgment. Appellant presented no evidence to the trial court in support of her claims.

{¶39} Appellant's six assignments of error are, therefore, overruled.

{¶40} Accordingly, the judgment of the Knox County Court of Common Pleas is affirmed.

By: Edwards, P.J.

Farmer, J. and

Wise, J. concur

s/Julie A. Edwards

s/Sheila G. Farmer

s/John W. Wise

JUDGES

JAE/d0803

[Cite as *Novel v. Estate of Gallwitz*, 2010-Ohio-4621.]

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ABBY NOVEL	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
THE ESTATE OF GLEN GALLWITZ	:	
Defendant-Appellee	:	CASE NO. 10 CA 000005

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Knox County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/Sheila G. Farmer

s/John W. Wise

JUDGES