

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

Hayes Memorial United Methodist Church

Court of Appeals No. S-10-033

Appellant

Trial Court No. 20081180 B

v.

Edgar Artz, Jr., Administrator
WWA of the Estate of Raymond W.
Artz, et al.

DECISION AND JUDGMENT

Appellees

Decided: August 5, 2011

* * * * *

John L. Zinkand and Bryan B. Johnson, for appellant.

James H. Ellis III, for appellees Edgar Artz, Jr. and Gladys Artz.

Meghan K. Fowler and Milton C. Sutton, Assistant Attorneys
General, for appellee Ohio Attorney General.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Hayes Memorial United Methodist Church ("Hayes Memorial" or "church"),
appellant, appeals a judgment, journalized on June 23, 2010, of the Probate Division of

the Sandusky County Court of Common Pleas granting summary judgment against it in a will contest action brought by the church. In the action, Hayes Memorial contested the validity of a May 1, 1992 will of Raymond W. Artz ("Raymond"), deceased. The church claimed that Raymond lacked testamentary capacity to execute a valid will and that the will was procured through undue influence and fraud.

{¶ 2} Hayes Memorial named Edgar Artz, Jr. (individually and as administrator of the Estate of Raymond W. Artz), Gladys Artz, the Attorney General for the State of Ohio, and the trustee of Raymond's 1988 irrevocable inter vivos trust as defendants in the will contest. Both Edgar Artz, Jr. ("Edgar") and Gladys Artz ("Gladys") are named beneficiaries under the will. Edgar is Raymond's sole next of kin. Both are appellees. The Attorney General is also an appellee.

{¶ 3} Edgar, both individually and as administrator of the estate, and Gladys filed the motion for summary judgment in the trial court. They argued that testamentary capacity, lack of undue influence, and the validity of the will were all established in an action brought by Raymond in 1992 to declare validity of his will. He brought the action pursuant to R.C. 2107.081 in the Probate Division of the Sandusky County Court of Common Pleas.

{¶ 4} In the motion for summary judgment, Edgar and Gladys contended that Hayes Memorial is bound by the June 2, 1992 judgment and findings in the will validation proceedings. They also contended that the will contest action is barred by the

failure of Hayes Memorial to commence the will contest within the period provided under R.C. 2107.76.

{¶ 5} The Attorney General supported the grant of summary judgment in the trial court on the issues of the validity and effect of the May 1, 1992 will.

1988 Irrevocable Inter Vivos Trust

{¶ 6} Raymond created and funded an irrevocable inter vivos trust in 1988. Memorial United Methodist Church of Fremont, Ohio ("Memorial United") was a named beneficiary in the trust. Hayes Memorial succeeded to Memorial United's interests in the trust when the churches merged in 1999. It is undisputed that the May 1, 1992 will, if valid, acts to substantially diminish trust assets available for distribution upon Raymond's death to the church as a trust beneficiary.

May 1, 1992 Will

{¶ 7} The May 1, 1992 will includes no pour-over provision to fund the trust. Rather, to the extent the will refers to the trust, it identifies an obligation to use trust assets to pay bequests made in the will:

{¶ 8} "Item II

{¶ 9} "I give and bequeath to the wife of my deceased brother, Gladys Artz, and to Edgar Artz, Jr., the sum of \$700,000.00, share and share alike. I acknowledge that I presently have no money, however, under Paragraph IV. (b) of the Declaration of Trust dated September 1, 1988, the Trustee has a duty to pay any bequest in my probated Will not paid out of funds or property of my estate."

{¶ 10} On June 2, 1992, the Probate Division of the Sandusky County Court of Common Pleas declared the will valid, finding that it was properly executed and "that the testator had the requisite testamentary capacity and freedom from undue influence pursuant to section 2107.02 of the Revised Code."

{¶ 11} Raymond died approximately sixteen years later, on May 9, 2008. On June 16, 2008, Edgar Artz, Jr. applied to the trial court to admit the May 1, 1992 will to probate. The court issued an order on June 16, 2008, admitting the will to probate and ordering notice of the admission of the will to probate be given to all parties entitled to notice.

{¶ 12} Waivers of notice, signed by Edgar Artz, Jr. and Gladys Artz, were filed with the probate court on June 16, 2008. Their counsel filed a Certificate of Waiver of Notice on that date. The document certified that all persons entitled to notice had waived notice of the will's admission to probate and that copies of the waivers were filed with the court.

{¶ 13} Attorney John L. Zinkand entered an appearance in proceedings on the Estate of Raymond W. Artz, on August 20, 2008, on behalf of Hayes Memorial.

{¶ 14} Hayes Memorial commenced this will contest action with the filing of a complaint in the Probate Division of the Sandusky County Court of Common Pleas on May 3, 2010. The date of filing of the complaint is over 22 months after the will was admitted to probate and over 20 months after the Hayes Memorial's counsel entered an appearance in proceedings on Raymond's estate.

{¶ 15} Hayes Memorial asserts three assignments of error on appeal:

{¶ 16} "Assignments of Error Presented for Review

{¶ 17} "I. First Assignment of Error: The trial court erred by finding the pre-probate proceeding precluded appellant from challenging the May 1, 1992 will and testament of Raymond W. Artz.

{¶ 18} "II. Second Assignment of Error: The trial court erred in its determination that the statute of limitations had expired for appellant to challenge the May 1, 1992 last will and testament of Raymond W. Artz.

{¶ 19} "III. Third Assignment of Error: The trial court erred by applying Ohio Revised Code Sections 2107.081 through 2107.085, and 2107.71 through 2107.76, as they are unconstitutional as applied to the facts of this case, and the trial court thereby improperly denied appellant due process of law."

Record on Appeal

{¶ 20} Hayes Memorial included eleven exhibits as attachments to its appellant's brief. Appellees Edgar Artz, Jr. and Gladys Artz filed a motion to strike seven of the exhibits—numbered 3, 4, 5, 6, 7, 10, and 11—on the grounds that they are not part of the record on appeal and that appellant failed to seek to add them to the record under App.R. 9(E). The rule provides a procedure to add material to the record on appeal "[i]f anything material to either party is omitted from the record by error or accident or is misstated therein * * *."

{¶ 21} The issue is moot as to Exhibits numbered 3, 10, and 11. Those exhibits were added to the record by the trial court in a judgment filed on January 27, 2011. The trial court judgment granted a motion by appellees Edgar Artz, Jr. and Gladys Artz to supplement the record pursuant to App.R. 9(E) to add those and other records.

{¶ 22} Exhibit 7 is the Declaration of Trust dated September 1, 1998 (Raymond's irrevocable inter vivos trust). That document is in the record. Appellant filed the document with the trial court, without objection by appellees, in its opposition to the motion for summary judgment of Edgar Artz, Jr. and Gladys Artz. Accordingly the motion to strike is overruled as to Exhibits 3, 7, 10, and 11.

{¶ 23} Appellant has not filed a motion to supplement the record to add exhibits 4, 5, or 6 and has made no showing that the materials were before the trial court when the court ruled on the motion for summary judgment. Accordingly, we grant the motion to strike Exhibits 4, 5, and 6. See *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of syllabus; *State v. Anderson*, 6th Dist. No. L-09-1055, 2010-Ohio-1886, ¶ 10.

Summary Judgment

{¶ 24} Appellate courts review judgments granting motions for summary judgment on a de novo basis, applying the same standard for summary judgment as the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Such motions are based upon a showing that there is no genuine issue of material fact for trial:

{¶ 25} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of

evidence, 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." Civ.R. 56 (C).

{¶ 26} The moving party must demonstrate "(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

Effect of 1992 Judgment

{¶ 27} Under Assignment of Error No. I, appellant argues that the trial court erred in determining that appellant's will contest action challenging the validity of the May 1, 1992 will was barred by the June 2, 1992 judgment in the will validation proceeding.

{¶ 28} R.C. 2107.084(A) states that a judgment in pre-mortem probate proceedings brought by a testator to declare validity of a will "is binding in this state as to the validity of the will on all facts found unless provided otherwise in this section, section 2107.33, or division (B) of section 2107.71 of the Revised Code." Under Assignment of Error No. I, appellant argues that it comes within the exception to the bar under R.C. 2107.71(B) to will contests after an R.C. 2107.084 judgment.

{¶ 29} The statutory exception under R.C. 2107.71(B) specifically authorizes a will contest by a person "*who should have been named a party defendant in the action in*

which the will, modification, or codicil was declared valid, pursuant to section 2107.081 or 2107.084 of the Revised Code, and if the person was not named a defendant and properly served in such action. Upon the filing of an action contesting the validity of a will or codicil that is authorized by this division, the court shall proceed with the action in the same manner as if the will, modification, or codicil had not been previously declared valid under sections 2107.081 to 2107.085 of the Revised Code." (Emphasis added.)

{¶ 30} R.C. 2107.081(A) defines who may maintain proceedings to declare validity of a will and who are necessary parties to the actions. The statute provides that "[a] person who executes a will allegedly in conformity with the laws of this state may petition the probate court * * * for a judgment declaring the validity of the will." As to necessary parties to such actions, the statute provides:

{¶ 31} "The petition shall name as parties defendant all persons named in the will as beneficiaries, and all of the persons who would be entitled to inherit from the testator under Chapter 2105. of the Revised Code had the testator died intestate on the date the petition was filed." R.C. 2107.081(A).

{¶ 32} Appellant argues that the 1988 Declaration of Trust was incorporated into the will by reference pursuant to R.C. 2107.05 and appellant thereby holds the status of a person named in the will as a beneficiary. As appellant was not named as a party or served in the will validation action, appellant argues that the exception under R.C. 2107.71(B) applies to it and it may proceed with a will contest despite the June 2, 1992 judgment.

{¶ 33} Appellees disagree on multiple grounds. First, they argue that the will named only two beneficiaries, Edgar Artz, Jr. and Gladys Artz. Second, they argue that the Declaration of Trust was not incorporated into the will under R.C. 2107.05 because the requirements of the statute were not met.

{¶ 34} In our view, even were the Declaration of Trust incorporated by reference into the will under R.C. 2107.05, the incorporation would not operate to give appellant the status of a beneficiary under the will. No beneficial interest of any kind in the estate is or could be transferred to any trust beneficiary under the provisions of the May 1, 1992 will, as the will includes no pour-over provision of estate assets to fund the trust. Reference to the trust in the will serves one purpose—to assure payments are made from the trust to pay bequests under the will to Edgar Artz, Jr. and Gladys Artz should estate assets be insufficient to pay the bequests. We therefore conclude that appellant is not a named beneficiary under the will and the exception under R.C. 2107.71(B) does not apply.

{¶ 35} Additionally, the requirements of R.C. 2107.05 to secure incorporation of the Declaration of Trust into the will by reference were not met. R.C. 2107.05 requires documents claimed to have been incorporated into a will by reference be filed with probate court within 30 days of the date the will is admitted to probate. *Hodde v. Hodde* (Jan. 18, 1991), 3d Dist. No. 12-89-4; *Hirsch v. Hirsch* (1972), 32 Ohio App.2d 200, 205-206. Here the Declaration of Trust was not deposited until a year after the will was admitted to probate and 10 months after appellant held actual knowledge of pending

estate proceedings due to the death of Raymond W. Artz. Accordingly, we conclude that appellant's will contest action does not come within the exception granted under R.C. 2107.71(B) to the bar arising from the final judgment in a testator's will validation proceeding.

{¶ 36} We conclude that the trial court did not err in determining that the 1992 judgment precluded appellant from challenging the validity of the will in a will contest proceeding filed after the will was admitted to probate. The exception under R.C. 2107.71(B) which would permit a will contest to proceed despite the prior declaration of validity of the will in pre-mortem probate proceedings brought by the testator does not apply.

{¶ 37} Appellant also argues under Assignment of Error No. I that the trial court misapplied the doctrine of res judicata in its judgment. Hayes Memorial argues that the doctrine does not apply to the 1992 judgment as appellant was neither a party nor in privity with a party in those proceedings.

{¶ 38} We agree with appellees that the trial court did not base its judgment on res judicata. Rather, the trial court's determination of the preclusive effect of the 1992 judgment was statutorily based.

{¶ 39} We find Assignment of Error No. I is not well-taken.

{¶ 40} Appellant argues under Assignment of Error No. II that the trial court erred in holding the will contest action was also barred because it was not commenced within the time period set forth in R.C. 2107.76.

{¶ 41} The version of R.C. 2107.76(A) in effect at the time of Raymond's death and admission of his will to probate identifies two classes of plaintiffs and sets forth separately as to each the time period in which actions under R.C. 2107.71 to contest the validity of a will must be commenced. The first class includes any "person who has received or waived the right to receive the notice of the admission of a will to probate as required by section 2107.19 of the Revised Code." The second includes any "other person."

{¶ 42} It is undisputed that appellant neither received nor waived notice of admission of the will to probate and that the statute of limitations under R.C. 2107.76(A) applicable to any "other person" applies to appellant's will contest action. With respect to an "other person," the applicable version of R.C. 2107.76 provides:

{¶ 43} "No other person may commence an action permitted by section 2107.71 of the Revised Code to contest the validity of the will more than three months after the initial filing of a certificate described in division (A)(3) of section 2107.19 of the Revised Code."

{¶ 44} Under Assignment of Error No. II, appellant argues that the statute of limitations applicable to an "other person" never commenced to run because no certificate meeting the requirements of R.C. 2107.19(A)(3) was ever filed with probate court. The certification required under R.C. 2107.19(A)(3) is of the fact that notice required under R.C. 2107.19(A)(1) of admission of a will to probate has been given to persons entitled to such notice or that they have waived notice. R.C. 2107.19(A)(3).

{¶ 45} R.C. 2107.19 provides for notice of the admission of a will to probate to be given "to the surviving spouse of the testator, to all persons who would be entitled to inherit from the testator under Chapter 2105 of the Revised Code if the testator had died intestate, and to all legatees and devisees named in the will."

{¶ 46} Hayes Memorial argues that it was a legatee or devisee named in the will and entitled to notice under R.C. 2107.19 of admission of the will to probate. It contends that the R.C. 2107.19(A)(3) certificate filed with probate court should have reflected its status and reported the fact that it neither received nor waived notice of admission of the will to probate.

{¶ 47} We determined under Assignment of Error No. I that Hayes Memorial was not a legatee or devisee named in the will. Based on that determination, appellant's argument under Assignment of Error No. II that it was entitled to notice of admission of the will to probate because it was a legatee or devisee named in the will must also fail. Accordingly, we find that appellant's arguments claiming deficiency in the notice and certificate of notice of admission of the will to probate are without merit.

{¶ 48} The will contest complaint was not filed until May 3, 2010, more than 22 months after the filing of the R.C. 2107.19(A)(3) certificate and more than 20 months after actual notice of Raymond's death and the commencement of probate proceedings on his estate. We conclude that the trial court did not err in holding that appellant's will contest action is barred under the statute of limitations set forth in R.C. 2107.76. We find appellant's Assignment of Error No. II is not well-taken.

{¶ 49} Under Assignment of Error No. III, appellant contends that the notice provisions of R.C. 2107.081 through 2107.085 (will validation action) and R.C. 2107.71 through 2107.76 (will contest) operated to deprive it of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution. Specifically, appellant asserts a denial of procedural due process, arguing that the statutory schemes denied it notice reasonably calculated to give it sufficient opportunity to participate in Raymond's will validation proceedings in 1992 as well as to pursue a will contest after Raymond's death.

{¶ 50} Appellees cite the Ohio Supreme Court decision in *Palazzi v. Estate of Gardner* (1987), 32 Ohio St.3d 169 and argue that the fact that appellant's will contest claim was barred due to the failure to commence the will contest within the period provided by R.C. 2107.76 bars any constitutional due process challenge to the statutory scheme.

{¶ 51} R.C. 2107.71 generally provides a right to bring a will contest by "a person interested in a will or codicil admitted to probate." R.C. 2107.71(A). An exception to that right lies where the will "has been declared valid by judgment of a probate court pursuant to section 2107.084 of the Revised Code * * *." *Id.* Appellant claims an interest in the will on various grounds including the adverse effect the will has on the trust.

{¶ 52} In *Palazzi v. Estate of Gardner*, the Ohio Supreme Court considered a will contest action brought by Frederick Palazzi, Jr., the testator's grandson and a nonresident

contingent beneficiary named in the will. Id. at 170-171. It was undisputed that Palazzi was not provided actual notice of the admission of the grandfather's will to probate. Id. The record in the case was uncertain as to whether Palazzi was served notice by publication. Id. at 171, fn. 2.

{¶ 53} Palazzi's grandfather died in 1967. Palazzi filed a will contest complaint in 1985. The trial court dismissed Palazzi's will contest because it was not filed within the four month limitations period provided under the version of R.C. 2107.76 in effect at the time the will was admitted to probate.

{¶ 54} Palazzi contended that the failure to provide actual notice to nonresident heirs who would take through intestacy upon invalidation of the will denied him due process of law in violation of the Fourteenth Amendment to the United States Constitution. Id. at 172. (The statutory provisions considered in the case were subsequently modified in 1990. See 1990 H 346, Section 3.) The Ohio Supreme Court recognized that Palazzi's status as "a contingent beneficiary of the will of his grandfather supports his assertion that he possesses a property interest entitled to due-process protection." Id.

{¶ 55} However, the Supreme Court of Ohio held in *Palazzi v. Estate of Gardner* that Palazzi lacked standing to present a constitutional due process claim because he was not injured by operation of the notice provisions. Id. at 174-175. Rather, his will contest was barred under the statute of limitations:

{¶ 56} "[I]t is our determination that the present action was commenced more than four months after appellant had actual knowledge of the death of his grandfather. He therefore lacks standing to challenge the constitutionality of the lack of notice provision of R.C. 2107.13 as applied to him. Accord *In re Estate of Cluck* (1959), 168 Neb. 13, 18, 95 N.W.2d 161, 165." *Palazzi* at 175.

{¶ 57} Here, appellant had actual knowledge of Raymond's death and that probate proceedings on Raymond's estate had been initiated when the three month statutory time period to file a will contest claim had not yet expired. Nevertheless, appellant waited an additional 21 months to file the will contest complaint.

{¶ 58} Applying the Ohio Supreme Court's decision in *Palazzi* to this case, we conclude appellant's failure to file a will contest action within the time period required by R.C. 2107.76 bars its constitutional due process challenge to the notice provisions of R.C. 2107.71 through 2107.76 relating to will contests. We also conclude that the analysis in *Palazzi* is equally applicable to appellant's due process challenge to R.C. 2107.081 through 2107.085 regarding notice of pre-mortem probate proceedings to declare the validity of a will.

{¶ 59} As it is unnecessary to address the constitutional issues, we express no opinion on the merits of appellant's due process claims.

{¶ 60} We find appellant's Assignment of Error No. III is not well-taken.

{¶ 61} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Probate Division of the Sandusky

County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.
