

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

Kathleen Demery, Executor of the
Estate of Mary G. Baluk, etc., et al.

Court of Appeals No. E-11-027

Trial Court No. 20070CV00926

Appellees

v.

Lucinda Baluk, Executor of the
Estate of George M. Baluk

DECISION AND JUDGMENT

Appellant

Decided: September 28, 2012

* * * * *

Jonathan F. Sobel, for appellees.

Christopher M. Marinko and Carl J. Kamm III, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Lucinda Baluk, Executor of the Estate of George M. Baluk, appeals the March 8, 2011 judgment of the Erie County Court of Common Pleas which, following a trial to the court, granted judgment in favor of plaintiffs-appellees, Kathleen Demery, as Executor of the Estate of Mary Baluk, as Successor Trustee, Mary

Baluk Living Trust, and on behalf of Baluk's, Inc. For the reasons that follow, we reverse.

{¶ 2} This case concerns the administration of the estate of Mary G. Baluk. Its largest asset was a commercial property located in Westlake, Ohio. The property, known as "the Baluk building," was built in 1950. George Baluk, Sr. operated his pharmacy on the first floor and the family, George and Mary Baluk and their six children, lived on the second floor. After George Baluk Sr.'s death in 1972, Mary Baluk inherited the shares in Baluk's Westlake Pharmacy, Inc. In 1983, the business became known as Baluk's, Inc. and the business was converted to a bookstore. George, Jr., and his mother, Mary Baluk, operated the bookstore until 1998. Thereafter, in 2000 Accucare became the tenant on the first floor; it originally rented part of the first floor but grew into the entire space. In 2001, the upstairs of the building became vacant though it was eventually renovated and rented to a family.

{¶ 3} In June 2004, Mary Baluk established the Mary G. Baluk Living Trust. The trustees were listed as Mary and George Baluk and, upon Mary's death, George M. Baluk as successor trustee. The trust property consisted of the Baluk building, an Ameritrade account, and the shares of Baluk's, Inc. Upon Mary's death, the interest in the Baluk building was to be divided among her surviving children. The trust also granted George Baluk the interest in Mary Baluk's Ameritrade trust account and the shares of Baluk's, Inc. Mary Baluk died in March 2005, and George Baluk was appointed as the executor.

After George died in July 2007, his sister, Kathleen Demery, was appointed as the executor of Mary Baluk's estate and as the successor trustee of Mary Baluk's living trust.

{¶ 4} On October 30, 2007, appellees commenced this action asserting the following nine claims against appellant¹ (1) breach of fiduciary duty in the operation of the Baluk building including failure to disclose the full amount of income and absconding of funds, (2) conversion, (3) misrepresentation, (4) breach of fiduciary duties to next of kin as executor, (5) apportionment of estate taxes, (6) misappropriation of rents, (7) a request to terminate the lease with Baluk's, Inc. and to terminate any future interest in property, (8) alternatively, a request that the lease be terminated because Baluk's, Inc. is in breach of the lease agreement, and (9) that appellant wrongfully retained assets from the joint accounts George and his mother maintained which were not survivorship accounts.

{¶ 5} On the same date they filed the complaint, appellees also requested a restraining order prohibiting appellant from collecting and retaining the rents from the Baluk building and requesting the appointment of a receiver to manage the property. On October 31, 2007, the trial court granted the motion. On December 10, 2007, the temporary restraining order was converted to a preliminary injunction. The building was sold in 2009 and the receiver was discharged.

{¶ 6} On December 17, 2007, appellant filed her answer and counterclaim for declaratory judgment. In her counterclaim, appellant sought declarations regarding

¹ Lucinda Baluk, individually, was named as a defendant in the action. Appellees voluntarily dismissed her in her individual capacity.

appellant's rights and status as to the living trust, the will, the lease between Baluk's, Inc. and the Mary G. Baluk living trust, the sub-lease between Baluk's, Inc. and the Nichols' family, the Ameritrade account, and all benefits, funds and rentals involving the trust and the estate. Appellant also made a jury demand.

{¶ 7} On November 17, 2008, appellees filed a motion for partial summary judgment. Specifically, appellees sought summary judgment as to their claims regarding the apportionment of estate taxes, lease termination, the alternative breach of the lease agreement claim, and the joint bank accounts. Appellant opposed the motion.

{¶ 8} On April 27, 2009, the trial court granted appellees' motion. The court found that the First Merit savings and checking accounts were not survivorship accounts and, thus, the funds in the accounts attributed to Mary Baluk belonged to her estate. The court further found that the lease agreement between Mary Baluk Living Trust, lessor, and Baluk's, Inc., lessee, was never executed and was defective. Finally, the court determined that upon her death, Mary Baluk was the 100 percent shareholder of Baluk's, Inc.

{¶ 9} On February 17, 2010, appellees filed a motion to strike appellant's jury demand. Appellees argued that because the jury demand was made in conjunction with appellant's counterclaims and the counterclaims did not survive appellees' motion for partial summary judgment, the jury demand must be stricken. Appellees further argued that to the extent that any of the counterclaims survived, they involved the interpretation of written documents of which there is no right to a jury trial. Also, appellees stated that

because the trial court had already assumed probate jurisdiction over the case, the right to a jury trial was discretionary.

{¶ 10} In her response, appellant argued that the remaining issues were proper for jury determination because they involved “questions of monies due” and set off which are questions of fact. Additionally, appellant argued that the jury request was not limited to her counterclaims but to appellees’ claims as well.

{¶ 11} On April 20, 2010, the trial court granted appellees’ motion to strike appellant’s jury demand. The court first noted that based on its grant of partial summary judgment to appellees, most of appellant’s claims had been extinguished. The court stated that as to appellant’s claims no prayer for monetary damages remained other than claims for attorney fees and prejudgment interest. The court further noted that because it had previously assumed probate jurisdiction over the matter, the right to a jury trial was discretionary. Appellant’s request for reconsideration was denied.

{¶ 12} On February 22, 2011, the matter proceeded to a bench trial over appellant’s counsel’s renewed request for a jury trial. On March 8, 2011, the trial court issued its judgment entry. The court first noted that the only issues remaining on the date of trial were appellees’ first cause of action alleging breach of fiduciary duty and a portion of appellant’s counterclaim for declaratory judgment. The court then entered judgment in favor of appellees. Specifically, the court found that due to George Baluk’s breach of his fiduciary duties the trust suffered a loss of \$176,831 in improper trust distributions, a \$127,260 decrease in the value of the trust property, and, due to late estate

tax filing, penalties in the amount of \$10,766. The court then entered judgment in favor of appellees for a total sum of \$314,857 and ordered that the entire interest of George Baluk's estate in the estate of Mary Baluk be forfeited.

{¶ 13} On March 20, 2011, appellees filed an application for attorney fees and a request for a hearing to determine the "reasonable" amount to be awarded. Appellees attached detailed billing information. Appellant opposed the motion arguing that appellees' request, made under R.C. 5810.04 was not properly before the court because the matter did not involve the administration of a trust. Additionally, several causes of action in the case were unrelated to the Mary G. Baluk Living Trust. On June 15, 2011, the trial court granted appellees' motion awarding them \$76,567.16 in attorney fees.

{¶ 14} Appellant now raises six assignments of error for the court's consideration:

First Assignment of Error: The judgment and proceedings of the Erie County Common Pleas Court were void for lack of jurisdiction. The action was commenced in the general division of the common pleas court. The trial court lacked statutory authority to invoke its probate jurisdiction and proceed to determine issues and to deny a jury trial as if it were probate court.

Second Assignment of Error: The Erie County Common Pleas Court committed reversible error in denying the appellant a jury trial, despite the proper endorsement of a jury demand that complied with Civ.R. 38 on the answer and counterclaim.

Third Assignment of Error: The Erie County Common Pleas Court committed reversible error in granting a motion for partial summary judgment and finding that the lease between Baluk's, Inc. and the Estate of Mary G. Baluk was either apparently void or "never executed."

Fourth Assignment of Error: The trial court erred in granting plaintiffs' motion for partial summary judgment by declaring and concluding appellant had no ownership interest in Baluk's, Inc. on the date of Mary Baluk's death.

Fifth Assignment of Error: The trial court erred in awarding attorney fees to the appellees. To the extent that the award was proper, the award did not comply with R.C. 5810.04.

Sixth Assignment of Error: The trial court committed reversible error by applying R.C. 2109.43 and imposing forfeiture against appellant in addition to compensatory damages.

{¶ 15} Appellant's first assignment of error asserts that the trial court proceedings commenced in the general division were void for lack of jurisdiction because the court, sua sponte, invoked its probate jurisdiction. Conversely, appellees assert that because the judge was sitting as both a general division and probate division judge, there were no "separate" divisions to which to be transferred. Alternatively, appellees argue that under Civ.R. 73(B), the court had the authority to transfer the matter to the probate division because the claims fell under the trial court's probate jurisdiction.

{¶ 16} It has long been established in law that when two courts have concurrent jurisdiction over an issue, the court where the action was initiated is the court which maintains subject matter jurisdiction over the action until a final judgment has been ordered. *DeMar v. Mosley*, 63 Ohio Misc.2d 102, 104, 619 N.E.2d 1239 (C.P.1993); *State ex rel. Otten v. Henderson*, 129 Ohio St.3d 453, 2011-Ohio-4082, 953 N.E.2d 809, ¶ 24; *State ex rel. Racing Guild of Ohio v. Morgan*, 17 Ohio St.3d 54, 56, 476 N.E.2d 1060 (1985).

{¶ 17} Here, the action was initiated in the general division of the common pleas court. While the probate division technically had the statutory authority to take subject matter jurisdiction over the action, the trial court was required to maintain jurisdiction in the original court where it was commenced. Appellees argue that a transfer from one court to the other is unnecessary because the same judge presides over both courts. This argument is without merit. The Ohio Constitution created a separate probate division within a court of common pleas, and R.C. 2101.24(B) established concurrent jurisdiction between general divisions and probate divisions of the same court.

{¶ 18} In addition, Civ.R. 73(B) did not provide a basis for the trial court to transfer the matter to the probate division. This section deals with probate cases which have been improperly venued, not instances where courts have concurrent subject matter jurisdiction.

{¶ 19} Importantly, the trial judge never journalized the transfer of the action from the general division to the probate division. A court speaks only through its journal

entries. *Baldesari v. Baldesari*, 6th Dist. No. L-10-1199, 2011-Ohio-2957, ¶ 47; *State ex rel. Geauga Cty. Bd. of Commrs. v. Milligan*, 100 Ohio St.3d 366, 2003-Ohio-6608, 800 N.E.2d 361, ¶ 20. Due to the deficiencies in the record and the fact that the action was commenced in the general division, the trial court failed to effectuate a transfer to the probate division and, thus, erred by acting under his probate authority. However, although we find that the court erroneously acted under his probate jurisdiction, we cannot find that the entirety of the proceedings were void, only those actions taken that were inconsistent with the civil procedural rules in the general division. Appellant's first assignment of error is well-taken, in part.

{¶ 20} In her second assignment of error appellant argues that the trial court erred when it granted appellees' motion to strike her jury demand. Appellant contends that the demand complied with Civ.R. 38 and that it was made as to all claims and causes of action, not just those made in the counterclaims. Further, appellant argued that, as discussed above, because the matter was filed in the general division, the discretionary jury trial provision in probate actions was inapplicable.

{¶ 21} Having found that the court erred when it attempted to assume probate jurisdiction over the case, we now review the court's decision striking appellant's jury demand. As a question of law, we review the court's determination de novo. Article I, Section 5 of the Ohio Constitution provides that "[t]he right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

{¶ 22} Civ.R. 38(B) provides:

Any party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefor at any time after the commencement of the action and not later than fourteen days after the service of the last pleading directed to such issue. Such demand shall be in writing and may be indorsed upon a pleading of the party. If the demand is indorsed upon a pleading the caption of the pleading shall state “jury demand endorsed hereon.”

{¶ 23} Further, Civ.R. 39(A) provides, in part:

When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless * * * (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist. * * *

{¶ 24} Civ.R. 38(B) clearly states that “any” party may request a jury trial on “any issue triable by a jury.” Ohio courts have consistently interpreted the section as requiring a jury trial on all triable issues regardless of which party made the jury demand. *See Jovanovski v. Kotefski*, 9th Dist. Nos. 07CA009203, 07CA009223, 2008-Ohio-4773, ¶ 14; *Skidmore & Hall v. Rottman*, 38 Ohio App.3d 40, 525 N.E.2d 824 (9th.Dist 1987); *Rejas Invests. v. Natl. City Bank*, 2d. Dist. No. 23349, 2010-Ohio-5163.

{¶ 25} In the present case, the caption of appellant's December 17, 2010 responsive pleading specifically included a jury demand. Following her answer and counterclaim sections, appellant, in a separate section labeled "Jury Demand" specifically requested a trial by jury and did not limit the request to any particular claims. Accordingly, the trial court erred as a matter of law when it denied appellant's request for a jury trial after finding that the jury demand was limited to appellant's counterclaims. The court further erred by indicating that the award of a jury trial was discretionary because the case was proceeding in the probate division. Appellant's second assignment of error is well-taken.

{¶ 26} Based on our disposition of appellant's first and second assignments of error, we find that appellant's third and fourth assignments of error relating to the court's award of partial summary judgment are not appealable at this time and are not well-taken. In addition, we find that the fifth and sixth assignments of error which objected to the court's award of attorney fees and damages are premature, moot, and not well-taken.

{¶ 27} On consideration whereof, we find that appellant was prevented from having a fair proceeding. The April 21, 2010 judgment striking appellant's request for a jury demand is reversed and the matter is remanded for further proceedings in the general division of the Erie County Court of Common Pleas. Pursuant to App.R. 24, appellees are ordered to pay the costs of this appeal.

Judgment reversed.

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

<p>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.</p>
