

[Cite as *Ryan v. Huntington Trust*, 2015-Ohio-1881.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

KATHLEEN M. RYAN, et al.

)

CASE NO. 13 MA 29

)

PLAINTIFFS-APPELLANTS

)

)

VS.

)

OPINION

)

HUNTINGTON TRUST, JMD fka

)

SKY TRUST NA, et al.

)

)

DEFENDANTS-APPELLEES

)

CHARACTER OF PROCEEDINGS:

Civil Appeal from the Court of Common
Pleas of Mahoning County, Ohio
Case No. 10 CV 3968

JUDGMENT:

Affirmed.

JUDGES:

Hon. Cheryl L. Waite

Hon. Frank D. Celebrezze, Jr., of the Eighth District Court of Appeals, sitting by
assignment.

Hon. Sean C. Gallagher, of the Eighth District Court of Appeals, sitting by
assignment.

Dated: May 12, 2015

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APPEARANCES:

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WAITE, J.

{¶1} Appellant Kathleen M. Ryan appeals the decision of the Mahoning County Common Pleas Court overruling her motion for reconsideration relating to an entry granting summary judgment against her in a case involving the creation and administration of a trust. Appellant is the beneficiary of the trust. Appellant sued the trustee, the drafter of the trust and the trust advisor. All three defendants successfully obtained summary judgment in their favor. Appellant filed her motion for reconsideration with a supplement that included her affidavit. At the same time, Appellant filed a direct appeal of the underlying matter. On appeal, we issued a limited remand for the trial court to rule on the motion for reconsideration. The motion was overruled, and this second appeal followed.

{¶2} The original judgment has been separately affirmed on appeal. *Ryan v. Huntington Trust*, 7th Dist. No. 12 MA 84. This appeal solely concerns the trial court's decision to overrule Appellant's motion for reconsideration. Appellant's four assignments of error deal with the single issue of whether the court erred in granting a motion to strike her own affidavit submitted in support of her motion for reconsideration. Appellant argues that the trial court exceeded its jurisdiction by ruling on the motion to strike, failed to provide Appellant with a further opportunity to support her motion or oppose the motion to strike, failed to provide notice that the court would rule on the motion to strike, and generally misconstrued her affidavit in granting the motion to strike.

{¶3} It is clear from the content of Appellant's motion that it was intended to obtain reconsideration of the final appealable order issued by the court of common

pleas. Such motions are a nullity in Ohio, and it was properly overruled. The judgment of the trial court is affirmed.

Factual and Procedural History

{¶4} Appellant Kathleen Ryan initiated the underlying suit challenging the formation and administration of the family trust created by her mother, Elizabeth Ryan. Appellant alleged that the trust was mismanaged by Huntington Trust, the trustee. She alleged that Nils Johnson, the attorney who drafted the trust document, committed fraud in the inducement with regard to the creation of the trust. She also alleged that Ralph Zerbonia, the trust advisor expressly designated in the trust documents, committed various improprieties with respect to the trust and exceeded or abused his authority as trust advisor.

{¶5} Appellant's mother Elizabeth created an irrevocable trust on March 28, 2003, within a week of her husband's death. According to the trust document, Elizabeth transferred to the trust all her personal property, real property, financial accounts, and notes receivable both owned at the time of trust formation and later acquired. Elizabeth, as the initial beneficiary of the trust, received from Sky Bank, the trustee, \$2,000 per month until her death on December 11, 2004. From that time, Appellant, as the secondary beneficiary, was entitled to \$2,000 per month. (Motion for Summary Judgment of Ralph Zerbonia, Exhibit A, p. 3.)

{¶6} The trust document gives the trustee absolute discretion to pay "such amounts from principal as it deems advisable to the Beneficiary, or for the benefit of the Beneficiary for the health, education, maintenance or support of the Beneficiary in

clear and exigent circumstances,” when there has been a recommendation from the trust advisor. (Motion for Summary Judgment of Ralph Zerbonia, Exhibit A, p. 3.) The section concerning the trustee’s discretion specifically explained that the discretion is intended to manage the rate at which trust assets are dissipated: “In this regard the Settlor instructs that the Trustee is to be circumspect in making distributions to principal, being cognizant that [Appellant] has never been good at managing her finances, and recognizing that the Settlor desires that the trust principal last for the lifetime of [Appellant], if possible.” (Motion for Summary Judgment of Ralph Zerbonia, Exhibit A, p. 3.)

{¶7} Appellant began receiving funds as the trust beneficiary in January of 2005. She received \$44,075.32 in distributions in 2005; \$31,373.41 in 2006; \$33,690.26 in 2007; \$54,664.86 in 2008; approximately \$48,000.00 in 2009; and approximately \$36,000.00 in 2010.

{¶8} Each of the three Appellees filed motions for summary judgment. On April 6, 2012, the trial court granted summary judgment, in separate judgment entries, to each. On April 19, 2012, Appellant filed a motion seeking reconsideration of the three judgment entries. Appellant later filed a supplement to the motion and attached her own affidavit. On May 4, 2012, Appellee Huntington Trust filed a memorandum in opposition to the motion for reconsideration and a motion to strike the affidavit. On that same day, Appellant filed a notice of appeal of the three judgment entries granting summary judgment. This was designated as Appeal No. 12 MA 84.

{¶19} On November 6, 2012, we granted a motion for limited remand in order to allow the trial court to rule on the pending motion for reconsideration. On February 12, 2013, the trial court granted the motion to strike the affidavit and denied Appellant's motion for reconsideration. Appellant filed an appeal of this subsequent ruling, which constitutes the instant Appeal No. 13 MA 29. We allowed the two appeals to be argued together, but they have not been consolidated. Appellant's four assignments of error all deal with trial court's decision to strike Appellant's affidavit rather than directly challenging the denial of the motion for reconsideration. Accordingly, they will be treated together.

FRIST ASSIGNMENT OF ERROR

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING DEFENDANT-APPELLEE HUNTINGTON TRUST'S MOTION TO STRIKE THE AFFIDAVIT OF KATHLEEN RYAN SINCE THE MOTION TO STRIKE WAS SUBMITTED TO THE CLERK OF COURT AFTER THE NOTICE OF APPEAL WAS FILED BY APPELLANTS AND TRIAL COURT LOST JURISDICTION, AND THEN ON REMAND, LEAVE TO FILE WAS NOT SOUGHT BY THE DEFENDANT TO FILE SUCH MOTION TO STRIKE.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING DEFENDANT-APPELLEE HUNTINGTON TRUST'S MOTION TO STRIKE THE AFFIDAVIT OF KATHLEEN RYAN BY

CONSTRUING THE AFFIDAVIT AS A CONTRADICTORY AFFIDAVIT WHEN COMPARED TO THE APPELLANT/AFFIANT'S DEPOSITION AS ONE USED FOR THE PURPOSE TO CREATE A GENUINE ISSUE OF MATERIAL FACT.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING DEFENDANT-APPELLEE HUNTINGTON TRUST'S MOTION TO STRIKE THE AFFIDAVIT OF KATHLEEN RYAN AS THE TRIAL COURT MUST CONSTRUE THE EVIDENCE MOST STRONGLY IN ITS FAVOR WHEN THE MOTION TO STRIKE IS IN THE CONTEXT OF A MOTION FOR SUMMARY JUDGMENT AND THE TRIAL COURT REFUSED AND FAILED TO RECOGNIZE THE EXISTENCE OF AND CONTENT OF EXHIBITS AS EVIDENCE OF A GENUINE ISSUE OF MATERIAL FACT WHEN IT WAS ATTACHED TO APPELLANTS RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT, INCLUDING APPELLANT'S AFFIDAVIT WHICH EVIDENTIARY ISSUES CONTAINED THEREIN MUST BE CONSTRUED MOST STRONGLY IN FAVOR OF APPELLANT AS NON-MOVANT.

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING DEFENDANT-APPELLEE HUNTINGTON TRUST'S

MOTION TO STRIKE THE AFFIDAVIT OF KATHLEEN RYAN IN TAKING THE QUOTED SECTIONS OUT OF CONTEXT AND OUT OF CONTEXT OF THE ALL THE FACTS AND CIRCUMSTANCES OF THE CASE AS SET FORTH IN THE PLEADINGS, DEPOSITIONS, ANSWERS, ADMISSIONS, AFFIDAVITS, TRANSCRIPTS, EXHIBITS AND EXPERT REPORTS.

{¶10} Appellant's four assignments of error all address the trial court's decision to grant the motion to strike the affidavit filed by Appellant after the trial court entered final judgment. This affidavit was not submitted to the court with Appellant's response to the summary judgment motion, but was filed instead with her motion for reconsideration after summary judgment was granted. While the motion and supplement were pending before the trial court, Appellant filed her notice of appeal. On the date the appeal of the underlying decision was filed, Appellee Huntington Trust filed a memorandum in opposition to the reconsideration motion along with a motion to strike the affidavit. Many other documents were filed relating to the motion for reconsideration, including a request for a hearing, memorandums in opposition, further supplements, Appellant's reply memorandums, and the court's own order allowing Appellant time to file an additional response. During the course of the underlying appeal, this matter was remanded so that the trial court could rule on the motion for reconsideration. The motion was summarily overruled.

{¶11} The theory contained in all of these assignments of error is that the trial court lacked the ability to consider any documents beyond the date Appellant filed

her initial appeal on May 4, 2012, including the motion to strike her affidavit. Appellant apparently believes that the motion for reconsideration would have been granted, or at least a hearing would have been held, if the court had considered her affidavit and ignored all of the Appellees' responses. Appellant believes it was some type of procedural, due process or jurisdictional error for the trial court to consider any document filed on or after May 4, 2012 in resolving the motion for reconsideration. However, it should be self-evident that the court properly considered all the documents that were filed relating to the motion pursuant to our remand order, and ruled accordingly.

{¶12} It is irrelevant that the court decided to strike Appellant's tardy affidavit. The motion for reconsideration was properly denied for reasons that have nothing to do with this affidavit. It is well-established that the "application for a motion for reconsideration after a final judgment is simply a legal fiction created by counsel, which has transcended into a confusing, clumsy and 'informal local practice.'" *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 381, 423 N.E.2d 1105, 381 (1981). It is abundantly evident the motion that Appellant filed sought reconsideration of a final order. It cannot be construed as any other type of motion. It is over 60 pages long and challenges every aspect of the trial court's decision to grant summary judgment to the three Appellees. It is written in the form of an appellate brief, listing a multitude of assignments of error for the court to reconsider. There is no place in Ohio's civil procedure, either informally or by rule, for such a motion.

{¶13} A trial court may construe a motion for reconsideration as a motion for relief from judgment under Civ.R. 60(B), but is not required to do so. In this case, it appears that the trial court made no such attempt and properly denied the motion for reconsideration on its face.

{¶14} There were two passing references in the reconsideration motion to Civ.R. 60(B)(3), dealing with relief from judgment due to fraud or misconduct of an adverse party. The fraud described in Civ.R. 60(B)(3) is fraud that prevents the opposing party from obtaining a judgment. *Coulson v. Coulson*, 5 Ohio St.3d 12, 448 N.E.2d 809. The theme of Appellant's motion is not fraud, however, but general disagreement with the fact that summary judgment was granted, mainly because Appellant believed there were genuine issues of material fact in dispute. Hence, this motion could not have been construed as a Civ.R. 60(B)(3) motion. Further, the motion never refers to the elements of a proper Civ.R. 60(B) motion, nor does it attempt to establish 60(B)(3) elements. Those elements are as follows:

To prevail on his motion under Civ. R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ. R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken.

GTE Automatic Elec., Inc. v. ARC Industries, Inc., 47 Ohio St.2d 146, 150-151, 351 N.E.2d 113 (1976).

{¶15} Since it is apparent this motion was nothing more than a motion seeking reconsideration of the court's final judgment, and such motions are a nullity, there was no lawful recourse for the court except to overrule the motion.

Conclusion

{¶16} The trial court did not err in overruling Appellant's motion for reconsideration of the final judgment in this case. A motion for reconsideration of final judgment of a trial court decision is a nullity in Ohio and is properly denied. The trial court correctly overruled Appellant's motion, and the judgment of the trial court is hereby affirmed.

Celebrezze, Jr., J., concurs.

Gallagher, J., concurs.