

[Cite as *In re Estate of Demsey*, 2016-Ohio-8153.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104400

IN RE: ESTATE OF LOUISE J. DEMSEY

[Appeal by Kenneth Demsey]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Probate Division
Case No. 2010 EST 0160457

BEFORE: Kilbane, P.J., Stewart, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: December 8, 2016

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MARY EILEEN KILBANE, P.J.:

{¶1} Appellant-beneficiary, Kenneth Demsey (“Kenneth”), appeals the trial court’s decision granting sanctions against Kenneth and his counsel (“Counsel”).¹ For the reasons set forth below, we affirm.

{¶2} The instant appeal arises from the distribution of the estate of Louise J. Demsey (“Louise”) among her five children: Kenneth, Kevin Demsey, Nancy Demsey Daniels, Sharlene Haberek, and Jean McCleod.

{¶3} Louise died testate on June 13, 2010. Her first will, dated February 17, 1996, was presented for probate, with her daughter Sharlene Haberek as the executor. This will was vacated and set aside by the admission of her later dated will — February 19, 1996. This will was presented for probate by Kenneth on August 13, 2010. In this will, Louise directs that the net estate be distributed equally among her five children and Lawrence G. Sheehe, Jr. (“Executor”) be appointed as the executor of the estate. Sheehe was appointed as the Executor on September 3, 2010.

{¶4} The record demonstrates that while Louise was alive, Kenneth lived with his mother and dutifully cared for his mother in a house she owned. Kenneth continued to live in the house after her death. In January 2011, the probate court ordered Kenneth to vacate the property within 60 days and pay \$1,000 per month in rent to the estate retroactive to the date of Louise’s death. Kenneth did not pay rent or vacate the

¹This appeal is a companion to *In re: Estate of Louise J. Demsey*, 8th Dist. Cuyahoga No. 104398, which was also filed by Kenneth.

premises. The Executor, after providing Kenneth with a three-day eviction notice, filed a forcible entry and detainer action with an accompanying claim for damages in Parma Municipal Court. Kenneth demanded a jury trial and filed a counterclaim against the estate. A verdict was rendered in favor of the estate, and an order of restitution of possession of the property to the estate was issued that same day. Kenneth was removed from the property by July 30, 2012.

{¶5} A second trial on the issue of damages was conducted in May 2013. The Parma Municipal Court found that the estate had shown \$16,691 in damages, but entered judgment for the maximum jurisdictional amount of \$15,000. Kenneth appealed from this decision to our court in *Sheehe v. Demsey*, 8th Dist. Cuyahoga No. 99965, 2014-Ohio-305. We dismissed the appeal as moot because Kenneth failed to immediately appeal or stay removal from the premises. *Id.* at ¶ 10.

{¶6} During the pendency of the forcible entry and detainer case, Kenneth filed an action against the estate in the Cuyahoga County Common Pleas Court. Kenneth alleged that he was “owed \$280,000 for ‘healthcare and personal services’ he had provided for his mother before she died; \$23,000 he loaned her to pay taxes, insurance, utilities, and maintenance on her home; and \$9,968 for her funeral expenses.” *Demsey v. Sheehe*, 8th Dist. Cuyahoga No. 100693, 2014-Ohio-2409, ¶ 3. The trial court dismissed Demsey’s complaint against the estate, with prejudice, because of Demsey’s failure to fully comply with the court’s order. *Id.* at ¶ 5. Kenneth appealed to this court, challenging the trial court’s dismissal. *Id.* at ¶ 6. We dismissed the appeal for lack of final appealable order.

Id. at ¶ 13.²

{¶7} In the interim, Kenneth continued to file exceptions and objections to the inventories and accounts filed by the Executor. The notice of exception that is the basis of the current appeal was filed by Kenneth on November 16, 2015. The Executor opposed the exceptions, arguing that the exceptions were untimely and sought sanctions against Kenneth and counsel. Kenneth, in turn, sought sanctions against the Executor. Counsel issued a subpoena duces tecum to the Executor's attorney, demanding that he appear at counsel's office with certain documents.

{¶8} The probate court held a hearing on the matter on February 8, 2016. After the hearing, the court issued a judgment entry ordering \$2,036.35 in attorney fees to the Executor's attorney. The court ordered that this amount be awarded against Kenneth and counsel jointly and severally. The court also awarded \$11,400 to the Executor for extraordinary fiduciary fees. The court ordered that these fees be allocated against Kenneth's share of the estate. The court further ordered that the \$15,000 judgment from Parma Municipal Court issued against Kenneth, and in the favor of the estate, be charged against Kenneth's share of the estate. The court found Kenneth's sanctions motion without merit and denied it.

{¶9} It is from this order that Kenneth now appeals, raising the following two assignments of error for review.

²Kenneth also appealed to this court in *In re: Estate of Louise J. Demsey*, 8th Dist. Cuyahoga No. 96384. This appeal was voluntarily dismissed by Kenneth.

Assignment of Error One

The lower court erred and abused its discretion in failing to sustain objections by the beneficiary Kenneth Demsey to the exhibits presented by the Executor.

Assignment of Error Two

Beneficiary Kenneth Demsey established cause * * * and therefore “good grounds” were presented by him pursuant to Rule 11 of the Ohio Rules of Civil Procedure.

Evidence

{¶10} In the first assignment of error, Kenneth argues the court erred when it considered certain evidence at the sanctions hearing. Specifically, he contends that testimony from his other cases were improperly admitted into evidence.

{¶11} Evid.R. 401 provides that evidence is relevant when it has the tendency to make the existence of any material fact more or less probable than it would be without the evidence. However, relevant evidence must be excluded if its probative value is substantially outweighed by the threat of unfair prejudice. Evid.R. 403.

{¶12} We recognize that the trial court has broad discretion in the admission of evidence and, unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere. *State v. Cooper*, 8th Dist. Cuyahoga No. 86437, 2006-Ohio-817, ¶ 10, citing *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967). “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” (Citations omitted.) *Blakemore v. Blakemore*, 5 Ohio St.3d 217,

219, 450 N.E.2d 1140 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980).

{¶13} In the instant case, Counsel objected to the admission of evidence relating to the other cases. In overruling his objection, the trial court stated: “Well, I think the issue is the fact that an estate has been delayed significantly five years, almost six years because of other actions filed in other courts as a result of the estate, so I think it’s relevant for the purpose and it’s [admitted].” We agree.

{¶14} We find that this evidence was relevant to the trial court’s determination. The evidence was relevant for the purpose of understanding the long delay in the administration of Louise’s estate. Thus, we find that no abuse of discretion occurred.

{¶15} Accordingly the first assignment of error is overruled.

Sanctions

{¶16} In the second assignment of error, Kenneth argues he established “good cause” for his exceptions to the Executor’s inventories and accounts. As a result, he contends the court erred in awarding the Executor sanctions under Civ.R. 11.

{¶17} Civ.R. 11 governs the signing of pleadings, motions, and other documents and provides in pertinent part:

The signature of an attorney * * * constitutes a certificate by the attorney * * * that the attorney * * * has read the document; that to the best of the attorney’s * * * knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. For a willful violation of this rule, an attorney * * *, upon motion of a party or upon the court’s own motion, may

be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule.

{¶18} In ruling on a Civ.R. 11 motion for sanctions, the trial court should consider whether the party signing the document: (1) has read the document, (2) harbors good grounds to support the document to the best of the person's knowledge, information, and belief, and (3) did not file the document for purposes of delay. *Mitchell v. W. Res. Area Agency on Aging*, 8th Dist. Cuyahoga Nos. 83837 and 83877, 2004-Ohio-4353, ¶ 18. "If the court determines that any of these requirements have not been met, it must then determine whether the violation was willful as opposed to merely negligent." *ABN Amro Mtge. Group, Inc. v. Evans*, 8th Dist. Cuyahoga No. 98777, 2013-Ohio-1557, ¶ 17, citing *Ceol v. Zion Indus., Inc.*, 81 Ohio App.3d 286, 290, 610 N.E.2d 1076 (9th Dist.1992). In deciding whether a violation was willful, a trial court must apply a subjective bad-faith standard. *Id.*, citing *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789, 874 N.E.2d 510, ¶ 19. If the court determines that the violation was willful, it may impose appropriate sanctions. *Taylor v. Franklin Blvd. Nursing Home, Inc.*, 112 Ohio App.3d 27, 32, 677 N.E.2d 1212 (8th Dist.1996).

{¶19} We note that the decision to grant sanctions under Civ.R. 11 rests with the sound discretion of the trial court. *Taylor* at 31, citing *Riley v. Langer*, 95 Ohio App.3d 151, 642 N.E.2d 1 (1st Dist.1994); *Lewis v. Celina Fin. Corp.*, 101 Ohio App.3d 464, 655 N.E.2d 1333 (3d Dist.1995). A reviewing court will not reverse a trial court's decision to deny or grant sanctions absent an abuse of discretion. *ABN Amro Mtge. Group, Inc. v. Evans* at ¶ 12, citing *Taylor*.

{¶20} In the instant case, the probate court imposed sanctions upon Kenneth and Counsel as a result of Kenneth filing his November 2015 notice of exceptions to the Executor's inventories and accounts. The court issued a written opinion, in which it states:

The Court finds that this latest round of extraordinary estate administration commenced on November 16, 2015 when estate beneficiary Kenneth Demsey, his attorney and a court reporter checked in with this Court for their "hearing on exceptions to inventory." Upon being instructed that no such hearing was scheduled due to the absence of any exceptions having been filed, counsel for [Kenneth] handwrote a list of "exceptions" on a legal pad and filed same with the Clerk's office. The filing was summarily dismissed by the Court as having been untimely filed. Unfortunately, [Kenneth's] attempt to once again challenge the administration of this Estate required further action on behalf of the Executor and his counsel, including response to an ill-advised subpoena.

This Court finds that the Estate has now been pending for nearly 6 years. The Court further finds that counsel for Kenneth Demsey is or should be aware of the statutory requirement for filing exceptions to account at least 5 days prior to the date set for approval of same. The Court further finds that counsel's persistence in submitting untimely exceptions and follow-up motions were unprofessional, unjustifiable and in violation of Ohio Civil Rule 11.

The Court finds that in furtherance of his unprofessional and unjustifiable behavior, counsel for Kenneth Demsey issued a subpoena to counsel for the Executor one week prior to this hearing in an attempt to obtain any records that Executor's counsel intended to introduce at this hearing.

The Court finds that the persistent disregard of law and procedure demonstrated by Kenneth Demsey and his counsel has damaged and delayed the administration of this Estate to the detriment of the other beneficiaries.

The Court finds that testimony and documented evidence was submitted at this hearing to establish the additional attorney and fiduciary fees incurred

as a result of the behavior of Kenneth Demsey and his counsel.

{¶21} We agree with trial court's analysis and find it did not abuse its discretion by imposing sanctions. The court noted that Kenneth once again challenged the estate, which caused further action on behalf of the Executor and his counsel. The court found that: (1) Counsel's persistence in submitting untimely exceptions and motions were unprofessional, unjustifiable and in violation of Civ.R. 11; (2) Counsel's issuance of a subpoena to the Executor's attorney one week prior to this hearing was unjustifiable and unprofessional; and (3) the persistent disregard of law and procedure demonstrated by Kenneth and his Counsel has damaged and delayed the administration of this Estate to the detriment of the other beneficiaries.

{¶22} Accordingly, the second assignment of error is overruled.

{¶23} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, probate division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

MELODY J. STEWART, J., and
SEAN C. GALLAGHER, J., CONCUR