[Cite as *Rutledge v. Lilley*, 2010-Ohio-2275.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

TINA RUTLEDGE Appellant v. BRITT C. LILLEY, et al. Appellees	C.A. No. 09CA009691 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 04CV137752

DECISION AND JOURNAL ENTRY

Dated: May 24, 2010

WHITMORE, Judge.

{¶1} Plaintiff-Appellant, Tina Rutledge, appeals from the judgment of the Lorain County Court of Common Pleas, granting summary judgment in favor of Defendant-Appellee, Britt Lilley. This Court affirms.

I

{¶2} Coral J. Abraham created a trust on September 27, 1999, naming herself as trustee and her children, Lilley and Leslie Dunfee, as successor co-trustees. Abraham died on May 2, 2000, and Lilley and Dunfee assumed their respective roles as co-trustees. Pursuant to the terms of the trust, Rutledge was to be paid $100,000. Both parties agree, however, that "the trust had insufficient liquid funds to distribute to Rutledge at the time of Abraham's death" due to the estate's potential tax liability. As such, Rutledge's distribution was delayed. Lilley and Dunfee ultimately distributed all $100,000 to Rutledge, paying her the following amounts on the

following dates: (1) $5,000 on August 24, 2000; (2) $10,000 on April 23, 2003; and (3) $85,000 on October 6, 2004.

{¶3} Before Rutledge received her final $85,000 distribution, she filed suit against Lilley and Dunfee on February 26, 2004, seeking the remainder of her bequest and interest at the statutory rate. After Rutledge received her entire bequest, she still maintained that the trust owed her interest.[1] On December 13, 2004, Lilley moved for summary judgment. On May 9, 2005, Rutledge filed a memorandum in opposition to summary judgment as well as her own motion for summary judgment against Lilley and Dunfee. On June 8, 2005, Lilley filed a memorandum in opposition to Rutledge's motion for summary judgment. Dunfee filed her own memorandum in opposition June 13, 2005, but never moved for summary judgment. On May 8, 2009, the court denied Lilley's and Rutledge's motions, concluding that genuine issues of material fact existed. Subsequently, the parties asked the court to reconsider their motions for summary judgment, and Rutledge and Lilley filed numerous stipulations of fact. On September 21, 2009, the court issued a journal entry. The entry provided that, upon reconsideration, Rutledge's motion was denied and Lilley's motion was granted.

{¶4} Rutledge now appeals from the court's judgment and raises one assignment of error for our review.

[1] Rutledge attempted to dismiss her remaining two claims against Lilley and Dunfee through Civ.R. 41(A). This Court has recognized that Civ.R. 41(A) only permits a party to dismiss all of its claims, not some of them. *Foley v. Empire Die Casting Co., Inc.*, 9th Dist. No. 24558, 2009-Ohio-5539, at ¶4. Rutledge's purported dismissal was, therefore, ineffective. Because the court included Civ.R. 54(B) language in its order, however, Rutledge's pending claims do not deprive this Court of jurisdiction. Id.

II

Assignment of Error

> "THE TRIAL COURT ERRED IN REFUSING TO GRANT A BENEFICIARY STATUTORY INTEREST PURSUANT TO R.C. § 1343.03(A) ON A $100,000 BEQUEST DUE HER UNDER A WRITTEN TRUST INSTRUMENT WHERE SHE HAD TO WAIT MORE THAN FOUR YEARS TO RECEIVE THE PRINCIPAL[.]"

{¶5} In her sole assignment of error, Rutledge argues that the trial court erred by granting Lilley's motion for summary judgment. Specifically, Rutledge argues that she is entitled to statutory interest under R.C. 1343.03(A) because she had to wait more than four years to receive her full $100,000 trust bequest.

{¶6} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶7} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden

of offering specific facts to show a genuine issue for trial. Id. at 293. The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶8} Both parties agree as to the facts in this case. At the time of Abraham's death, her estate had a potential federal estate tax liability of over $1,000,000 and the trust had insufficient liquid funds to distribute Rutledge $100,000 in light of the potential tax liability. Both Lilley and Dunfee had control over non-liquid trust assets, however, including: (1) a house and barn valued at approximately $150,000 at the time of Abraham's death; and (2) sole membership interest in an LLC whose assets were valued at approximately $2,254,452. Abraham's trust permitted, but did not require, the estate taxes to be paid from the trust at the discretion of the trustees. Rather than immediately sell the trust's non-liquid assets so as to create additional liquid funds, pay the estate taxes, and pay Rutledge her bequest, Lilley and Dunfee sold the LLC's assets at a later date for a larger profit. As a result, Rutledge did not receive her full $100,000 bequest for over four years.

{¶9} The sole issue in this case is whether, as a matter of law, Rutledge is entitled to statutory interest on her bequest under the trust. Rutledge argues that her bequest vested at the time of Abraham's death and she became a creditor of the trust when Lilley and Dunfee failed to pay her. According to Rutledge, she is entitled to interest under R.C. 1343.03(A) because the trust is an "instrument of writing" upon which "money bec[ame] due and payable." Lilley concedes that the trust is an "instrument of writing," but maintains that Rutledge is not a "creditor" of the trust. According to Lilley, Rutledge was simply a beneficiary of the trust and R.C. 1343.03(A) does not apply to fiduciary-beneficiary relationships.

{¶10} R.C. 1343.03(A) "establishes interest rates for both prejudgment and post-judgment interest" in actions based on contract. *John Soliday Fin. Group, LLC v. Stutzman*, 9th Dist. No. 08CA0046, 2009-Ohio-2081, at ¶7; *RPM, Inc. v. Oatey Co.*, 9th Dist. Nos. 3282-M & 3289-M, 2005-Ohio-1280, at ¶64. The statute provides, in part, as follows:

> "In cases other than those provided for in sections 1343.01 and 1343.02 of the Revised Code, when money becomes due and payable upon any *** instrument of writing, *** the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract. Notification of the interest rate per annum shall be provided pursuant to sections 319.19, 1901.313, 1907.202, 2303.25, and 5703.47 of the Revised Code." R.C. 1343.03(A).[2]

"An award of prejudgment interest encourages prompt settlement and discourages defendants from opposing and prolonging, between injury and judgment, legitimate claims." *Royal Electric Constr. Corp. v. Ohio State Univ.* (1995), 73 Ohio St.3d 110, 116-17. "The purpose of postjudgment interest awards is to guarantee a successful plaintiff that the judgment will be paid promptly, and to prevent a judgment debtor from profiting by withholding money belonging to the plaintiff." *Lovewell v. Physicians Ins. Co. of Ohio* (1997), 79 Ohio St.3d 143, 147.

{¶11} Upon our review of the record, we agree with the trial court's determination that Rutledge was not entitled to interest under R.C. 1343.03(A). Rutledge brought suit against Lilley and Dunfee because, at the time Rutledge filed her suit, she had not yet received her final distribution of $85,000 from Lilley and Dunfee. The sole claim Rutledge maintained after she purportedly dismissed her other claims alleged that Rutledge was "entitled to, and there was due and payable to her, from the written trust instrument, a sum of money, to wit, $100,000," and Lilley "owe[d] [Rutledge] the sum of $85,000 and interest on her share." Rutledge sought

"judgment for compensatory damages of $85,000 and interest at the statutory rate[.]" Even assuming that Rutledge's action against Lilley properly sounded in contract rather than tort at the time of its initiation, Rutledge received her remaining $85,000 distribution from Lilley and Dunfee during the pendency of the suit. As such, Rutledge's claim for compensatory damages became moot and she was not entitled to a judgment on that basis.

{¶12} An award of either prejudgment or post-judgment interest first and foremost requires a judgment. See *Royal Electric Constr. Corp.*, 73 Ohio St.3d at 116-17 (providing that prejudgment interest compensates for the passage of time between injury and judgment); *Lovewell*, 79 Ohio St.3d at 147 (providing that post-judgment interest ensures judgments will be paid promptly). See, also, *Myers v. Garson* (July 12, 1989), 9th Dist. No. 13939, at *5 (noting that, had the trial court decided the case upon a different theory, the plaintiff "may well have [had] no judgment upon which to claim interest"). In analyzing a demand for interest under R.C. 1343.03(A), the Tenth District has specified:

> "As a general rule, where a contract is silent as to interest so that, if it can be recovered at all, it is as an incident of the debt sued for, and only as damages to make good to the creditor the loss he has sustained by reason of breach or default, an action to recover it cannot be maintained after the payment of the principal, since such interest cannot exist without the debt; with the extinguishment of the debt, the right to claim interest must necessarily be extinguished also[.]" *Kuntz Drug Stores, Inc. v. Ohio Department of Public Welfare* (Aug. 3, 1982), 10th Dist. No. 82AP-23, at *2, quoting 45 Am.Jur. 2d 261, Interest and Usury, Section 345.

Thus, the elimination of an underlying debt on a contract that is silent as to interest also eliminates any right to demand interest on that debt because the demand for interest is parasitic in nature and cannot survive without the claim for debt. Id.

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[2] Former R.C. 1343.03(A) provided for a different rate of interest, but otherwise contained the same language as the current version of the statute.

{¶13} Although the trust at issue provided that other beneficiaries were entitled to both their bequest and the income that accrued on their bequest prior to its distribution, the trust is silent as to income or interest with respect to Rutledge's distribution. As such, any interest Rutledge sought under R.C. 1343.03(A) would have had to have been an incident of the debt upon which she sued. Id. Rutledge accepted full payment of her distribution during the pendency of her case and thereby extinguished both her claim for $85,000 and any interest on that $85,000. Therefore, Rutledge was not entitled to a judgment based upon the claim she asserted or statutory interest on that claim.

{¶14} The dissent points to *Hobart Bros. Co. v. Welding Supply Serv., Inc.* (1985), 21 Ohio App.3d 142, to argue that a plaintiff may obtain statutory interest even after receiving the full amount of principal outstanding on a past due account. The Tenth District's decision in *Hobart* is distinguishable, however, because the contract in *Hobart* was not silent as to interest. *Hobart*, 21 Ohio App.3d at 144. The contract specified that interest would accrue; it simply failed to specify the rate of that interest. Id. ("[T]he contract merely states that interest will be charged without specifying the percentage or amount of interest to be charged[.]"). As the Tenth District held in *Kuntz Drug Stores, Inc.*, a different rule applies when a contract is altogether silent as to interest. Because the trust at issue was altogether silent as to interest on Rutledge's distribution, this case is analogous to the Tenth District's decision in *Kuntz Drug Stores, Inc.*, not its decision in *Hobart*.

{¶15} Even assuming that R.C. 1343.03(A) could apply to a trust distribution, Rutledge was not entitled to statutory interest under R.C. 1343.03(A). Rutledge's sole assignment of error lacks merit.

III

{¶16} Rutledge's sole assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

MOORE, J.
CONCURS

CARR, P. J.
DISSENTS, SAYING:

{¶17} I respectfully dissent. I disagree with the majority's conclusion that R.C. 1343.03(A) requires that a party must be awarded judgment before she is entitled to interest on money due and payable to her. The statute provides an entitlement to interest under numerous circumstances, including "when money becomes due and payable upon any *** instrument of writing ***." Id. While the statute also addresses awards of pre-judgment and post-judgment interest, there is nothing in the language of the statute which limits the entitlement to interest to only those circumstances in which a judgment has first been obtained.

{¶18} In fact, the statute has been used as a mechanism solely to obtain interest on a past due account after the principal had been paid. In *Hobart Bros. Co. v. Welding Supply Serv., Inc.* (1985), 21 Ohio App.3d 142, Welding was delinquent in paying on accounts owed to Hobart. Welding ultimately paid the principal amount due. Hobart subsequently brought suit against Welding solely for the interest it claimed Welding owed. Both parties agreed that R.C. 1343.03(A) was applicable to determine the amount of interest due. *Hobart Bros. Co.*, 21 Ohio App.3d at 143. The only dispute was whether Hobart was entitled to the statutory rate of interest or the rate of interest which Hobart established internally as a matter of company policy.

{¶19} The majority at paragraph 12 cites an earlier case out of the Tenth District for the broad proposition that a claim for interest is extinguished upon the extinguishment of the debt. This proposition must be narrowly construed within the factual context of that case, however. In *Kuntz Drug Stores, Inc. v. Ohio Dept. of Pub. Welfare* (Aug. 3, 1982), 10th Dist. No. 82AP-23, the plaintiffs sought late payment of money due from a state agency. The appellate court noted that as the plaintiffs brought their action against the state, it is governed by R.C. 2743.18(A) for determination of any award of interest. That statute addresses only prejudgment and

postjudgment interest, so that "there is no independent right to interest with respect to a claim against the state." *Kuntz*, citing *State ex rel. Home Care Pharmacy v. Creasy* (1981), 67 Ohio St.2d 342. The language of R.C. 1343.03(A) is not limited to prejudgment and postjudgment interest, but rather addresses an entitlement to interest under other circumstances as well. The *Kuntz* court held in that case that there could be no computation of interest within the context of R.C. 2743.18(A) "because the claims were extinguished (paid) prior to the commencement of the action."

{¶20} Only when the *Kuntz* court assumed that the principal payment was predicated upon contract (specifically, "Medicaid provider agreements"), rather than statute, did it assert that R.C. 1343.03 would apply. The appellate court then cited the "general rule" that the right to interest is extinguished upon payment of the underlying debt where the contract giving rise to the right to payment is silent as to interest. Id., citing 45 American Jurisprudence 2d 261 (Interest and Usury, Section 345). I believe the "general rule" does not merit such broad application so as to apply in the instant case.

{¶21} R.C. 1343.03(A) further provides a right to interest "when money becomes due and payable *** upon any settlement between the parties[.]" In this case, there is no dispute that, during the pendency of the case, Lilley and Dunfee paid Rutledge the remaining principal amount due her under the trust, thereby settling the matter in regard to the principal amount owed. This did not extinguish any claim Rutledge might have had to interest on such a settlement. See *Hart v. Am. Guarantee and Liability Ins. Co.* (Jul. 10, 2002), 5th Dist. No. 2001AP100094 (recognizing a plaintiff's right to interest notwithstanding an insurance company's settlement of the underlying claim).

{¶22} The *Hart* court recognized the breadth of the applicability of R.C. 1343.03 to the right to interest beyond only those situations in which a judgment had been rendered, stating that "the entitlement to interest, whether it be prejudgment interest, postjudgment interest, or *postsettlement interest*, 'is allowed, not only on account of the loss which a creditor may be supposed to have sustained by being deprived of the use of his money, but on account of the gain being made from its use by the debtor.'" (Emphasis added.) *Hart*, quoting *Landis v. Grange Mut. Ins. Co.* (1998), 82 Ohio St.3d 339, 342. This reasoning is equally applicable in the instant situation. Here, Lilley and Dunfee delayed paying the monies owed to Rutledge only because they could secure a higher price for the sale of trust assets at a later date, thereby increasing the overall value of the trust and benefiting the trust's remainder beneficiaries, including Lilley and Dunfee. To deny Rutledge a claim for interest under these circumstances defeats the spirit of equity subsumed within R.C. 1343.03(A).

{¶23} Based on a reading of R.C. 1343.03(A), I believe that the statute provides for interest as a matter of law whenever money owed has become due and payable. Because I disagree with the majority that a person must first obtain a judgment for the principal amount of money owed before she is entitled to interest pursuant to R.C. 1343.03(A), I respectfully dissent.

APPEARANCES:

IAN ROBINSON, Attorney at Law, for Appellant.

KENNETH P. FRANKEL, Attorney at Law, for Appellee.

LESLIE DUNFEE, pro se, Appellee.