

RENDERED: MARCH 18, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-000480-MR

DONALD PERRY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE IRV MAZE, JUDGE  
ACTION NO. 08-CI-11267

NATIONAL CITY BANK  
AND  
CHRIS MEINHART,  
ADMINISTRATOR  
OF THE ESTATE OF  
LORETTA HAWKINS

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND WINE, JUDGES.

MOORE, JUDGE: Donald Perry appeals the Jefferson Circuit Court's order granting summary judgment on behalf of National City Bank and the Estate of

Loretta Hawkins and the order denying him leave to amend his complaint. After a careful review of the record, we affirm.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

This case involves a dispute over entitlement to funds deposited with National City Bank (Bank). Loretta Hawkins, Donald Perry's mother, received funds from a settlement in an unrelated matter from a nursing home. The check for the settlement was made payable to "Loretta Hawkins and Donald Perry as Power of Attorney for Loretta Hawkins." On March 3, 2008, Donald deposited the check into two joint accounts, naming himself and his mother as joint owners of the accounts. Loretta did not sign any documents to open these accounts.

While the Bank did authorize the opening of the accounts, whether the Bank requested that Loretta personally contact the Bank regarding the accounts is in dispute. Employees of the Bank testified that once it was discovered that the accounts were opened in error, they attempted to contact Donald several times to notify him that additional signatures were needed. Donald denies that the Bank ever made any attempt to contact him regarding the accounts.

Loretta died on April 1, 2008. Donald went to the Bank on April 2, 2008, requesting that the remainder of the funds in the accounts be released to him as joint owner. The Bank refused because Donald's power of attorney had expired upon the death of his mother, and he never had the authority to open joint accounts, for which he was a joint owner individually. Thereafter, because ownership of the

funds was in dispute, the Bank froze the accounts in accordance with the personal account agreement provided to Donald.

Donald believed that he was entitled to the funds because the accounts were opened as joint accounts with rights of survivorship and were maintained as joint accounts until his mother's death. Donald further believed that the Bank had a contractual obligation to notify him regarding issues with the accounts and to disburse the funds to him because he was a customer/depositor and because he deposited the funds into joint accounts. On that basis, he brought this action against National City Corporation<sup>1</sup> for conversion and breach of contract.

Chris Meinhart, as the Administrator of the Estate of Loretta Hawkins (Estate), filed an intervening complaint seeking an accounting, asserting that the estate was entitled to all proceeds from the accounts.

Subsequently, the Bank filed a motion for summary judgment. In its motion, the Bank requested summary judgment on the basis that Donald never had an ownership interest in the funds; therefore, the bank could not be liable to him for conversion of the funds. The Bank also argued that it was not liable to Donald for breach of contract because Donald was not acting in his individual capacity, but as power of attorney for Loretta, when opening the account. As such, no contract was created between the Bank and Donald in his individual capacity. In its response to the Bank's motion, the Estate argued that summary judgment was

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<sup>1</sup> In an agreed order substituting parties entered on May 6, 2009, National City Bank was substituted for National City Corporation and National City Bank of Kentucky. All claims against National City Corporation and National City Bank of Kentucky were dismissed with prejudice.

proper because Donald was not authorized as power of attorney to make a gift of the funds to himself.

Donald responded to the motion for summary judgment, arguing that he was entitled to the funds because, based on his affidavit, his mother wished for the funds to be held jointly and that the signature cards signed by Donald individually, and as power of attorney, created a contract between Donald and the Bank. Donald also filed a motion for leave to amend his complaint to include claims of fraud, promissory estoppel, and negligence. The trial court issued an opinion and order denying Donald's motion to amend his complaint, granting the Estate's motion, and granting summary judgment in favor of the Bank. Donald now appeals.

## **II. ANALYSIS**

### **A. CLAIM REGARDING SUMMARY JUDGMENT**

Donald argues that the court incorrectly granted summary judgment in favor of the Bank because disputed facts existed with respect to whether the Bank notified Donald that there was an issue with the accounts. The standard for granting summary judgment is whether any genuine issue of material fact exists, and, where none exists, the movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

“Non-moving parties are obligated to set forth ‘at least some affirmative evidence showing that there is a genuine issue of material fact for trial.’” *Brown v. Louisville Jefferson County Redevelopment Authority, Inc.*, 310

S.W.3d 221, 224 (Ky. App. 2010) (*citing Steelvest*, 807 S.W.2d at 482). While the court must view all evidence most favorable to the party opposing the motion, *Steelvest*, 807 S.W.2d at 480, the parties “cannot rely on the hope that the trier of fact will disbelieve the movant’s denial of a disputed fact.” *O’Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006) (*quoting Steelvest*, 807 S.W.2d at 482). Our review of a summary judgment is *de novo*. *Burton v. Kentucky Farm Bureau Mut. Ins. Co.*, 326 S.W.3d 474, 475 (Ky. App. 2010).

Here, the trial court properly determined that Donald’s claims fail because Donald was never entitled to the funds. Regardless of how Donald frames his argument, he was merely acting in his capacity as power of attorney when depositing the check on his mother’s behalf. The record supports that he has not come forth with at least some affirmative evidence that he owned any portion of the deposited funds.

Furthermore, Donald did not create a right to the funds by placing them in joint accounts and naming himself as a joint owner. Funds owned by one party that are placed in a joint account granting rights of survivorship to a third party constitute a gift of an interest created by the party’s contract with the bank to the third party. *Bishop v. Bishop’s Ex’x*, 170 S.W.2d 1, 2 (Ky. 1943). Kentucky law clearly provides, however, that a power of attorney may only make a gift, whether to himself or to a third party, if such authority is unambiguously expressed in the power of attorney document. KRS<sup>2</sup> 386.093(6).

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<sup>2</sup> Kentucky Revised Statute.

In this case, the power of attorney given to Donald did not include a power to gift. Thus, while Donald had the authority to set the accounts up on behalf of his mother, he did not possess the authority to name himself as a joint owner of the accounts.

We need not even reach Donald's assertion that a genuine issue of material fact existed as to whether the Bank notified him regarding an issue with the accounts. The court properly determined that Donald never had a right to the funds and could not establish any claim that he was entitled to them. Finally, Donald presents no evidence that would indicate the contrary. Accordingly, we find no error.

#### **B. CLAIM REGARDING DENIAL OF LEAVE TO AMEND**

Donald also contends that the court incorrectly denied his motion for leave to amend his complaint by ignoring his motion to amend and instead adjudicating his claims of fraud, promissory estoppel, and negligence. Leave to amend must be freely given when justice so requires. CR<sup>3</sup> 15.01. However, a court has broad discretion in granting or denying leave to amend, and may base its denial of leave to amend upon the "futility of the amendment itself." *First Nat. Bank of Cincinnati v. Hartman*, 747 S.W.2d 614, 616 (Ky. App. 1988). We review a denial of leave to amend a complaint for an abuse of discretion. *Graves v. Winer*, 351 S.W.2d 193, 197 (Ky. 1961).

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<sup>3</sup> Kentucky Rule of Civil Procedure.

In denying Donald's leave to amend, the court correctly found that the record provided no factual or evidentiary basis on which any of the proposed claims could survive. The court found that Donald's claim for fraud could not be sustained from the record because no evidence of the record supported that the Bank had knowingly or recklessly made any representation on which Donald could have reasonably relied. The court further noted that Donald could not have reasonably relied upon the Bank's statements that he would be able to withdraw the funds when statements contained in the personal account agreement specifically indicated that withdrawal would not be permitted in instances where ownership of the funds was in dispute.

For similar reasons, the court found that nothing in the record supported Donald's claim for promissory estoppel. The court again noted that no evidence of record supported that Donald could have reasonably relied, nor could the Bank have expected that he would rely, upon statements made by the Bank given the fact that the personal account agreement provided to Donald enumerated instances in which the Bank would deny access to funds.

Likewise, the court determined that the record did not support a claim of negligence. The court assumed, *arguendo*, that the Bank owed Donald a duty in his capacity as power of attorney. However, even assuming the Bank owed Donald, as Loretta's power of attorney, a duty of care, Donald presents no authority defining the scope of that duty that was breached.

In sum, the court found that nothing in the record supported any of the claims for which Donald sought leave to amend. We note that the trial court is entitled to great leeway in granting or denying leave to amend. *First Nat. Bank of Cincinnati*, 747 S.W.2d at 616. Because the court acted within its discretion when denying claims it found to be futile, we find no abuse.

### III. CONCLUSION

For the reasons stated above, the order of the Jefferson Circuit Court is hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Candace Curtis Kenyon  
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BRIEF FOR APPELLEE:

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