STATE OF MICHIGAN

COURT OF APPEALS

In re ROBERT A. BURCH TRUST.

ROBERT A. BURCH,

Petitioner-Appellant,

v

LINDA KAY CARSON,

Respondent-Appellee.

UNPUBLISHED
February 26, 2004

No. 242285
Livingston Probate Court
LC No. 01-004868

Before: O'Connell, P.J., and Wilder and Murray, JJ.

PER CURIAM.

Petitioner in this action to remove a trustee appeals as of right from an order granting respondent's motion for summary disposition. We affirm.

I. Material Facts And Proceedings

The instant case arises from a trust agreement executed by petitioner and his wife, Bea A. Burch, on September 27, 1990. The document named respondent and Bea as both the trustors and as the trustees of the resulting trust. Respondent, Bea's daughter from an earlier marriage, was named as successor trustee. As trustors, petitioner and his wife conveyed two properties to the trust. Theses consisted of their house at 10868 Bobwhite Beach Boulevard in Whitmore Lake and a condominium in Pompano Beach, Florida. No other assets were ever contributed to the trust and the two properties have not generated any income.

Bea died on November 25, 1996, and pursuant to the trust, respondent assumed the role of successor trustee. In this capacity, she leased the Bobwhite Beach property to herself in March of 1997 for a period of five years. Petitioner signed and approved the lease, and respondent also forwarded the lease to the attorneys who drafted the trust. On February 5, 2001, Burch filed a petition seeking to remove respondent from her position. After the close of discovery, respondent filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Petitioner did not timely file or serve a response. The probate court granted respondent's motion for summary disposition and this appeal followed.

II. Analysis

Petitioner first contends that the probate court erred as a matter of law in granting respondent's motion because respondent violated the prohibition on self dealing found in MCL 700.1214. We review de novo decisions to grant or deny summary disposition, *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002), and the same standard applies to the interpretation and application of statutes. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

MCL 700.1214, contained within the Estates and Protected Individuals Code (EPIC), prohibits self-dealing by fiduciaries except in certain limited circumstances. *In re Cummin Estate*, 258 Mich App 402, 408; 671 NW2d 165 (2003). The statute states in pertinent part as follows:

> Unless the governing instrument expressly authorizes such a transaction or investment, unless authorized by the court, or except as provided in section 4405 of the banking code of 1999, . . . a fiduciary in the fiduciary's personal capacity shall not engage in a transaction with the estate that the fiduciary represents . . . A fiduciary in the fiduciary's personal capacity shall not personally derive a profit from the purchase, sale, or transfer of the estate's property . . . .

EPIC took effect on April 1, 2000 and applies to all proceedings pending on or commenced after that date. MCL 700.8101(2)(b). However, MCL 700.8101(2)(d) states that EPIC "does not impair an accrued right or an action taken before that date in a proceeding." In *Cumin*, *supra* at 407-408, the respondent transferred a piece of real property to herself before the effective date of the statute. This Court found that her "accrued right as owner of the property would be impaired by invalidating the transaction or imposing a constructive trust." *Id.* Therefore, MCL 700.8101(2)(d) precluded the transaction from being invalidated under MCL 700.1214 *Id.*

EPIC does not define an "accrued right." *In re Smith Estate*, 252 Mich App 120, 127; 651 NW2d 153 (2002). But "the word 'accrued' is closely analogous to 'vested.'" *Id.*, quoting *In re Finlay Estate*, 430 Mich 590, 600 n 10; 424 NW2d 272 (1988). "A vested right is a present or future right to do or possess certain things not dependent upon a contingency." *Henry L Meyers Moving & Storage v Michigan Life & Health Ins Guaranty Ass'n*, 222 Mich App 675, 691; 566 NW2d 632 (1997), quoting *Wylie v Grand Rapids City Comm*, 293 Mich 571, 586-587; 292 NW 668 (1940).

The action complained of, the leasing of the Bobwhite Beach property, took place in March of 1997. This Court has defined a lease as a "conveyance by the owner of an estate of a portion of the interest therein to another for a term less than his own for a valuable consideration." *De Bruyn Produce Co v Romero*, 202 Mich App 92, 98; 508 NW2d 150 (1993). It "gives the tenant the possession of the property leased and exclusive use or occupation of it for all purposes not prohibited by the terms of the lease." *Id.* Based on the definition of "accrued" derived from *Smith* and *Meyers Moving & Storage*, respondent has accrued rights under the lease. As in *Cumin*, these rights would be impaired if the lease were invalidated and thus MCL 700.8101(2)(d) prevents MCL 700.1214 from applying to the instant case. Therefore, we find that the probate court did not err in failing to apply EPIC.

Even if MCL 700.1214 had been applicable to the instant case, we would affirm the probate court's finding that no self-dealing occurred. Paragraph (b) of the section of the trust agreement labeled Powers and Duties states that the trustee may lease real estate belonging to the trust. And the section further provides that either of the trustors retains the power to direct the trustee in the exercise of the powers listed within it. The trustee must "submit to the trustor all investment recommendations for approval prior to executing them." In the instant case, the governing instrument expressly authorized respondent's actions. Petitioner also gave his express approval as trustor when he signed the lease agreement.[1] Additionally, respondent informed the attorney who had drafted the trust, of the lease and the arrangement established between petitioner and respondent. As the probate court held in denying petitioner's motion for reconsideration, the trustee should not be removed for exercising the powers given to her in the trust. Unlike the trustee in *In re Green Charitable Trust*, 172 Mich App 298; 431 NW2d 492 (1988), cited by petitioner, respondent did not act in bad faith. Because of this, the probate court did not err in granting summary disposition on the issue of whether respondent breached her fiduciary duties by executing the lease.

Petitioner's final argument is that the probate court erred as a matter of law in granting respondent's motion for summary disposition because genuine issues of material fact existed.

Under MCR 2.116(C)(10), summary disposition is appropriate when there is "no genuine issue as to any material fact." A question of material fact exists "when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). And the issue must be material to the parties' dispositive legal claims. *Auto Club Ins Ass'n v State Automobile Mut Ins Co*, 258 Mich App 328, 333; 671 NW2d 132 (2003), citing *State Farm Fire & Cas Co v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1990). In deciding a motion under this rule, the trial court must consider "the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party." *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). Where, as in this case, the non-moving party has the burden of proof at trial, it cannot rest on allegations but must instead set forth specific facts showing that a genuine issue of material fact exists. *Kelly-Stehney & Assoc v MacDonald's Industrial Products, Inc*, 254 Mich App 608, 611-612; 658 NW2d 494 (2003).[2]

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[1] We point out that petitioner has not alleged that respondent exerted undue influence over him, or that he was otherwise operating under some illegal duress or coercion in signing and approving the lease.

[2] Petitioner failed to submit a brief within the time proscribed by MCR 2.116(G)(1)(a)(ii), which requires any response to a motion for summary disposition, including briefs and affidavits, to be filed and served on the opposing party at least seven days before the hearing. In the instant case, petitioner's attorney claimed to have mailed her brief in response to respondent's motion for summary disposition to the wrong address. Because the court did not receive the brief seven days before the hearing as required by MCR 2.116(G)(1)(a)(ii), the probate court did not abuse its discretion in excluding it from consideration. *Prussing v General Motors Corp*, 403 Mich 366, 370; 269 NW2d 181 (1978).

Petitioner argues that three questions of material fact remain unresolved. However, two of these issues, respondent's intent in drafting the lease agreement and the fair rental value of the Bobwhite Beach property, are not material to a dispositive legal issue as required under *Auto Club Ins Ass'n*. As discussed above, respondent acted within the authority granted to her in the trust document. Regardless of respondent's intent or the rental value of the property, no breach of fiduciary duty occurred. Therefore, no questions of material fact existed and the probate court properly granted summary disposition on this issue.

Petitioner also failed to establish a genuine issue of material fact with respect to the third issue, whether respondent violated her duties by not distributing income or principal to him. As petitioner concedes in his brief on appeal, the trial court did not consider any evidence from petitioner because he filed and served his response late. Thus, petitioner did not raise a genuine issue of material fact in opposition to respondent's motion. *Kelly-Stehney, supra.* There is simply no evidence in the record before the trial court establishing that petitioner is entitled to a disbursement from the trust, assuming there even was any income or principal available.[3]

Affirmed.

/s/ Kurtis T. Wilder
/s/ Christopher M. Murray

[3] Because discovery was closed at the time the trial court decided the motion, contrary to petitioner's assertions, the issue is not what he *could* have produced to create a jury submissible issue. Rather, it is what evidence he *did* produce. *Pena v Ingham Co Rd Comm,* 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).