STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of RONALD ADAIR.

COLDWELL BANKER SCHMIDT REALTORS,

Petitioner-Appellant,

v

ELIZABETH CAROLINE RINKEVICH, Personal Representative of the ESTATE OF RONALD ADAIR,

Respondent-Appellee.

UNPUBLISHED
July 12, 2011

No. 297343
Montcalm Probate Court
LC No. 2007-029917-DE

Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

PER CURIAM.

Following the closing of the estate of decedent Ronald Adair, Coldwell Banker Schmidt Realtors (CBSR) filed a petition under MCL 700.3959 to reopen the estate. As good cause to reopen the estate, CBSR asserted: (1) that a sale of estate land had taken place during the pendency of the estate; (2) that under a listing agreement with the personal representative of the estate CBSR was entitled to a commission on that sale; (3) that CBSR had timely presented its claim; and (4) the the estate wrongly failed to pay the commission due. The probate court denied the petition on the grounds that CBSR had not presented its claim to the estate within four months as required by § 3803(2)(a) of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*. We affirm.

A probate court's denial of a petition to reopen an estate is reviewed for an abuse of discretion. *In re Hammond Estate*, 215 Mich App 379, 386; 547 NW2d 36 (1996); see also *In re Weber Estate*, 257 Mich App 558, 560; 669 NW2d 288 (2003) ("A probate court's substantive decisions, including whether to close a probate hearing, are reviewed for an abuse of discretion"). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). However, underlying issues that entail statutory construction constitute questions of law, which are reviewed de novo on appeal. *Weber Estate*, 257 Mich App at 561. Also, "[t]he proper interpretation of a contract is a question of law, which this Court reviews de novo." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). A court abuses its

discretion when it makes an error of law. *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009).

The lots in this case were originally purchased by the decedent by land contracts. In order to obtain funding to build a house on one of the lots, the decedent assigned his interest in the land contracts to a bank as security for the loan. The decedent died before completing construction. In June 2008, the bank became involved in foreclosure proceedings regarding the lake house and a notice of lis pendens was filed and recorded. Two months later, in August, the estate and CBSR entered into a one-year exclusive listing agreement to sell the lake house.[1] In December 2008, the land contract vendor executed warranty deeds conveying title of the lake lots (not the house lot) to the bank after the bank exercised its rights under the land contract assignments and paid the vendor the amounts owing under the contracts.

In April 2009, the bank, the personal representative, and Gregg Steffes, who was the only heir-beneficiary aside from the personal representative, entered into a settlement agreement providing in part that the personal representative would execute all of the necessary documents to immediately transfer title to the bank with respect to the lake house, including a deed in lieu of foreclosure. Further, if the estate was unable to make a preliminary $180,000 payment by May 20, 2009, the agreement provided that the bank could record the deed in lieu of foreclosure. The agreement also provided that the estate could regain ownership by paying the bank $725,000 on or before June 30, 2009.

The estate failed to make the $180,000 payment and, on May 22, 2009, the bank recorded its deed as to the lake house. In June, the parties amended the settlement agreement. The new terms provided for the estate to make an initial payment of $130,000 to the bank and reduced the total amount necessary to reacquire the property to $675,000.

On June 30, 2009, several transactions occurred: the bank was paid the $675,000 and quitclaimed the real property to the estate; the estate, by a quitclaim deed, conveyed the lake house and lots and another property to Steffes for an amount less than $100; and, Steffes sold the lake house to a third party purchaser.

On July 28, 2009, counsel for CBSR sent a letter to the estate's counsel that asked for details of the real estate transactions and acknowledged a prior phone discussion regarding the conveyances and, on August 6, 2009, counsel for the estate mailed a letter to CBSR's counsel explaining what had transpired.

On October 21, 2009, the estate filed a petition for complete estate settlement, with no notice to CBSR. Two days later, CBSR filed a statement and proof of claim in the probate court seeking payment of the sales commission relative to the estate's conveyance of the lake house and other lots to Steffes on June 30, 2009. On or about November 13, 2009, an order for

[1] The separate lake lots are not mentioned in the listing agreement, but CBSR did engage in an effort to sell the lake lots and the lake house.

complete estate settlement was entered. CBSR did receive notice of this order. On December 11, 2009, CBSR filed its petition to reopen the estate.

It is uncontested that in order to timely assert a claim against a decedent's estate based on a contract with the personal representative arising after the decedent's death, the claim must be presented "within 4 months after performance by the personal representative is due." MCL 700.3803(2)(a). CBSR presented its claim on October 23, 2009. Thus, in order to be timely, performance by the personal representative, i.e. payment of the commission, must have been due no earlier than June 23, 2009. CBSR argues that the four month period began on June 30, 2009, when the lots were reacquired by the estate, transferred to Steffes, and then sold to a third party.[2] Respondent maintains that when the bank obtained title to the lake lots in December 2008 upon default and the vendor's execution of warranty deeds, the listing agreement terminated as to any sales commission relative to a future sale of those lots. Respondent similarly argues that when the bank acquired title to the lake house in May 2009, the listing agreement terminated as to any sales commission relative to a future sale of the lake house. Respondent views the breaks in the chains of title wherein the bank became fee simple owner as events that nullified the listing agreement for purposes of subsequent transactions, ceasing all obligations and rights under the agreement and requiring a new listing agreement before any commission could be due on a future sale. CBSR responds that the May 2009 deed in lieu of foreclosure was conditional, created only a defeasible estate, and simply constituted security against indebtedness. It argues, therefore, that the listing agreement was not terminated by the deed transfer and instead remained in effect through the June 30, 2009 transactions.[3]

The probate court's ruling did not expressly indicate that the deeds terminated the agreement, but such a finding is implicit where the court essentially determined that the deed in lieu of foreclosure gave rise to a sales commission claim, which started the clock running on the four-month claim's period, and that CBSR's claim was therefore untimely.

The listing agreement executed by CBSR and the estate, provided in pertinent part:

> Seller agrees to pay an administration fee of $195.00 and 6% of the sales price due and payable if: the property is sold or traded by Broker or by Seller or anyone else during the listing period (including sales pursuant to options granted or contracts executed during the listing period) . . . . The brokerage fee shall be paid promptly after it is earned and in no event later than the closing of the sale of the property.

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[2] CBSR does not alternatively argue that it was entitled to a sales commission in December 2008 and May 2009 or that the failure to pursue a timely claim should be excused because of the estate's failure to provide notice of the transactions and probate proceedings.

[3] It is the transfer to Steffes upon which CBSR seeks a commission, not the sale by Steffes to the third party, even though the quitclaim deed to Steffes reflected nominal consideration in the amount of $100.

The "seller" under the agreement was the estate and the term "sale" was defined as including "any exchange or trade to which the Seller consents." The agreement referred to a "sale or transfer of the property."

The listing agreement clearly envisions and encompasses a standard real estate sale in which a buyer pays a sum certain for the property and CBSR exacts its six-percent sales commission. However, words like "trade" and "exchange" can also encompass a transaction other than a cash sale. The deeds at issue here that gave the bank title to the lake lots and house had the effect of alleviating or reducing the estate's debt and halting foreclosure proceedings, so some level of consideration was indeed received.[4] Furthermore, a "transfer" of property certainly occurred when the deeds were conveyed to the bank.[5] We conclude that, given the language in this listing agreement, the requirement to pay a commission was implicated when the deeds were executed and recorded resulting in conveyances of the property at issue to the bank in December 2008 and May 2009.[6] Accordingly, we hold that performance by the personal representative was due in December 2008 relative to the warranty deeds covering the lake lots and then again in May 2009 relative to the lake house deed in lieu of foreclosure. Thus, CBSR's proof of claim submitted in October 2009 was outside the four-month period and so barred under MCL 700.3803(2)(a). Furthermore, given that the December 2008 and May 2009 deeds triggered the right to performance under the listing agreement and that the subject matter of the agreement, the lake property, was no longer owned by the estate, the agreement terminated and could not cover the subsequent conveyances on June 30, 2009. Thus, "good cause" did not exist to reopen the probate estate and there was no abuse of discretion.

CBSR relies on our Supreme Court's early decision in *Stahl v Dehn*, 72 Mich 645, 649-650; 40 NW 922 (1888), along with the associated principle that a party may show by parol evidence that a deed absolute in form was, in fact, made as security for a loan and created an equitable mortgage. *Ellis v Wayne Real Estate Co*, 357 Mich 115, 118; 97 NW2d 758 (1959); *McArthur v Robinson*, 104 Mich 540, 549-550; 62 NW 713 (1895); *McMillan v Bissell*, 63 Mich 66, 69; 29 NW 737 (1886); *Schultz v Schultz*, 117 Mich App 454, 457; 324 NW2d 48 (1982);

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[4] Although it was the land contract vendor who executed the warranty deeds with respect to the lake lots, the listing agreement speaks of a sale or trade "by Broker or by Seller *or anyone else*." (Emphasis added).

[5] This is consistent with CBSR's position at oral argument that the estate-to-Steffes conveyance gave rise to a right to a commission even though the conveyance was to an heir because while it may not have constituted a sale, it was still a "transfer" as contemplated by the listing agreement.

[6] We find support in out-of-state caselaw for our position that foreclosure-related deeds, such as the deed in lieu of foreclosure, can implicate the right to a sales commission under a listing agreement. See *Ellingson Agency, Inc v Baltrusch*, 228 Mont 360; 742 P2d 1009 (1987); *Felbinger & Co v Traiforos*, 76 Ill App 3d 725; 394 NE2d 1283 (1979); *John Whiteman & Co v Fidei*, 176 Pa Super 142; 106 A2d 644 (1954). Also, CBSR fails to address the impact of the lake lot deeds on the listing agreement in its appellate brief, and therefore any claim for a commission on those lots is waived.

Grant v Van Reken, 71 Mich App 121, 125; 246 NW2d 348 (1976). Contrary to CBSR's argument, the estate and the bank regarded the deed in lieu of foreclosure as effecting an absolute sale or transfer, "with simply an option on the part of the [estate] to repurchase." *Stahl*, 72 Mich at 649-650 ("where it appears that the parties really intended an absolute sale, and a contract allowing the vendor to repurchase, such intention must control"). The deed in lieu of foreclosure was not made in security for a loan and was not a mortgage; a mortgage already existed. The deed in lieu of foreclosure was executed after default. It did not extinguish by merger the existing mortgage, so the mortgage continued, and the deed did not clog the estate's equity of redemption because new consideration was provided, i.e., waiver of a deficiency claim. See *C Phillip Johnson Full Gospel Ministries, Inc v Investors Financial Services, LLC*, 418 Md 86, 99-100; 12 A3d 1207 (2011). Additionally, the deeds here were not true defeasible deeds that created typical reversionary interests. See *Ditmore v Michalik*, 244 Mich App 569, 582; 625 NW2d 462 (2001); MCL 554.61. Instead, the estate simply held a right or option to repurchase the property at a later date; there was an absolute conveyance of a fee simple interest.

CBSR also argues that the trial court erred in finding that the estate did not exercise the option to repurchase the property, and that the estate did so. Contrary to CBSR's argument, the probate court simply pointed out that, absent exercise of the option, which was a possibility, the bank would continue to own the property, making May 22, 2009 the triggering date for a sales commission; therefore, May 22 should also be the trigger date even if the estate exercised the option. The probate court did not find that the estate failed to exercise the option.

CBSR additionally argues that the probate court erred by making factual findings, weighing the evidence, and summarily assessing respondent's objections to reopening the estate absent an evidentiary hearing, where the pleadings and documentary evidence created a material factual dispute regarding whether the probate estate should be reopened. CBSR maintains that the probate court should have treated the allegations in the petition to reopen the estate as true, akin to the summary disposition standard under MCR 2.116(C)(8). In support of its position, CBSR cites an unpublished opinion per curiam of this Court. However, that case did not entail any discussion or analysis regarding the proper procedure to employ when addressing a petition to reopen an estate. Rather, this Court, in reciting the facts, merely mentioned that the probate court had reopened the estate before delving into a title dispute, and its substantive discussion only addressed the issue of title to real property. In the instant case, the probate court proceeded in a fashion that was consistent with MCL 700.3959 and the court rules. We have not been directed to any authorities that impose summary disposition principles associated with MCR 2.116 on probate proceedings to reopen an estate. Moreover, CBSR voiced no opposition to the manner in which the probate court proceeded and to how it handled the petition and arguments. CBSR was ready and willing to have the probate court decide the petition at the initial hearing, so CBSR's argument here was waived.

CBSR also argues that judicial estoppel bars respondent's objections to reopening the estate, where the estate indicated that it was the property owner, not the bank, when it moved the probate court to approve the sale of estate assets. Judicial estoppel is a tool to be used by courts to impede litigants from playing fast and loose with the legal system, and it estops a party who has successfully and unequivocally asserted a position in a prior proceeding from asserting an inconsistent position in a subsequent proceeding. *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994). Here, the petition for approval of sale of assets does indicate that

the assets, real and personal property, belonged to the estate when, in fact, the property at issue had all been deeded to the bank. However, the petition and accompanying brief did expound on the enormous debt owed to the bank. Further, the focus of the petition to approve a sale of assets was not on ownership, nor was the motion concerned with a title dispute accompanied by an unequivocal assertion that the estate and not the bank was the owner. Moreover, under the circumstances, it would be illogical to find that the bank did not hold title to the lake properties based on judicial estoppel, where it is indisputable that the bank did hold title.

CBSR also argues that the probate court failed to support its ruling in fact or law and that respondent also failed to advance her position in fact or law. While the probate court's factual findings and legal conclusions were brief, it had the benefit of substantial written and oral arguments and there was a factual and legal basis for its ruling—it found that the claim was untimely under MCL 700.3803(2)(a) because a claim accrued when the deed in lieu of foreclosure was recorded in May of 2009. Further, respondent provided a legal and factual basis to sustain her position.

Finally, CBSR complains that the estate violated its promise under the listing agreement to refer to CBSR "all inquiries about the property received during the listing period." However, this argument is made in connection with the June 30, 2009, transactions, which, for the reasons stated above, were irrelevant. CBSR does not contend that it was entitled to notice of the execution and recording of the December 2008 or May 2009 deeds, as those events, in CBSR's opinion, did not implicate a right to a sales commission. On the issue of notice under the court rules, once CBSR filed a claim in the probate court, it became a claimant and an "interested person" for purposes of examination of a fiduciary's account, MCR 5.125(C)(6)(e), and the petition for an order of complete estate settlement, MCR 5.125(C)(8)(c), entitling CBSR to notice of associated court filings, MCR 5.310 and 5.311. However, any assumed notice failures that might be attributed to the estate during the proceedings below cannot serve as a basis to circumvent our holding, given that the notice failures are harmless, MCR 2.613(A), where CBSR's claim was untenable and untimely as a matter of law.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Donald S. Owens