

STATE OF MICHIGAN
COURT OF APPEALS

In re CARING TRUST AGREEMENT.

THOMAS J. SULICH, STEVEN E. SULICH and
ROBERT S. SULICH,

UNPUBLISHED
May 29, 2012

Petitioners-Appellees,

v

No. 302604
Oakland Probate Court
LC No. 2010-331778-TV

MARY JANE KATA,

Respondent-Appellant.

Before: RONAYNE KRAUSE, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

Respondent appeals as of right an order granting petitioners' motions for summary disposition and default judgment in this action regarding respondent's use of funds belonging to her father, John L. Sulich (the decedent), while serving as his fiduciary. For the reasons set forth in this opinion we affirm the trial court, and pursuant to MCR 7.219 hold that petitioners are entitled to costs.

Petitioners initially brought this action seeking to set aside instruments and for trust supervision, surcharge and other relief as a result of respondent's alleged misuse of \$134,662.71 of their father, John L. Sulich's (the decedent), funds. This amount included the decedent's disbursement from a reverse mortgage and social security proceeds. Petitioners asserted, among other allegations, that respondent misused the decedent's funds because she had been unwilling to provide them with a proper accounting of the funds. Petitioners went on to make many allegations of wrong doing on the part of respondent including the following:

Kata has arrogated to herself the powers of a fiduciary, but has failed to fulfill the responsibilities of a fiduciary in several respects apparent at this time. Kata has failed[,] [after requested], to provide [petitioners with] information about decedent's financial affairs before his death. Kata has failed to disclose information about financial affairs occurring after the decedent's death in violation of the Estate[s] and Protected Individuals Code (EPIC) and the common

law governing fiduciaries, Kata has failed to produce the 2008 power of attorney, the reverse mortgage and the revised trust.

Accordingly, in count three of the petition, petitioners asserted that respondent acted as the decedent's fiduciary in the years prior to the decedent's death and, upon information and belief, respondent wasted and/or misused the decedent's funds including the \$100,000 distribution from the reverse mortgage. Petitioners further alleged that respondent's conduct violated the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, as well as common law standards for fiduciary conduct. Petitioners requested that respondent be ordered to disclose and fully account for all the decedent's financial transactions that had taken place since respondent had moved into the decedent's home and be removed as the decedent's fiduciary. On September 13, 2010, petitioners filed a motion for a temporary restraining order and order to show cause against respondent. Petitioners requested the court make the following orders:

- a. That Mary Jane Kata is enjoined and restrained, directly and indirectly, whether alone or in concert with others, from disbursing, spending, transferring or using any of the assets belonging to John L. Sulich, his trust or his probate estate until further order of this Court . . . ;
- b. That Mary Jane Kata file with the Court a full and accurate disclosure of all assets within her possession or control relating to or owned by John L. Sulich, his trust or his probate estate;
- c. That Mary Jane Kata file with the Court a full and accurate disclosure of all financial transactions engaged in by decedent in calendar years 2008, 2009 and 2010[;]
- d. That Mary Jane Kata file with the Court, with service on the Petitioners, a copy of the 2008 power of attorney, the 2008 reverse mortgage, the 2008 trust and any other financial or legal instrument executed by or on behalf of decedent in calendar years 2008, 2009, and 2010.

On September 15, 2010, the trial court entered a temporary restraining order and order to show cause against respondent. The trial court ordered that respondent was enjoined and restrained from disbursing, spending, or transferring any of the decedent's assets. The court further ordered that respondent must show cause before the Court on October 6, 2010, why a preliminary injunction should not be ordered according to the above conditions. The court also ordered respondent to disclose all financial transactions engaged in by the decedent in 2008, 2009, and 2010, and file with the court, with service to the petitioners, the 2008 reverse mortgage, the 2008 power of attorney, and the 2008 trust within seven days.

On October 4, 2010, petitioners filed a supplemental brief in support of their petition for surcharge and other relief and their motion for a temporary restraining order and order to show cause. Petitioners asserted that respondent had made a partial financial disclosure, which did not comply with the court's temporary restraining order. However, petitioners asserted that this partial disclosure confirmed broad financial misconduct on the part of respondent, and thus, requested the court to continue its injunction against respondent's further involvement with the

decedent's estate and enter an order appointing petitioner, Steven E. Sulich, as special fiduciary of the decedent's assets. On November 24, 2010, petitioners filed motions for default judgment and summary disposition. Petitioners sought a default judgment against respondent for failing to answer their petition in accordance with MCR 5.119(B) and failing to comply with the court's order to disclose her use of the decedent's funds and produce financial documents in response to petitioners' subpoena in violation of MCR 2.313 and MCR 2.506. Petitioners also sought summary disposition pursuant to MCR 2.116(C)(10). Petitioners asserted that there were no issues of disputed fact regarding respondent's misuse of large amounts of the decedent's funds while serving as his fiduciary. Petitioners asserted that in the years prior to the decedent's death, respondent began tapping into the decedent's bank account at OUR Credit Union, and provided documentation of several withdrawals that respondent made at various casinos from the decedent's bank account, including withdrawals made after the decedent's death. Petitioners alleged that these withdrawals were a portion of several withdrawals made by respondent from the decedent's account for her own personal use. Additionally, attached to their motions, petitioners provided documentation that on August 27, 2008, the decedent executed a power of attorney, appointing respondent his attorney in fact with full power to conduct all of his affairs, including power over his finances and assets. Petitioners provided a copy of a disbursement check received by the decedent, which was distributed on August 12, 2009, allegedly from the reverse mortgage, in the amount of \$102,417.71, which was endorsed by respondent. Petitioners also provided a copy of the decedent's bank statement, and allege that the disbursement was eventually entirely used by respondent.

On December 8, 2010, respondent served, by mail to petitioners' counsel, an answer to petitioners' motions for default judgment and summary disposition. However, this answer was not received for filing by the court until December 13, 2010, two days prior to the scheduled hearing. In respondent's answer to petitioners' motions for default judgment and summary disposition she asserted that she did assist the decedent in taking out a reverse mortgage, however, the mortgage was necessary to finance the decedent's home healthcare and it was also used to pay back a \$30,000 loan respondent had made to the decedent. Respondent asserted that she had to employ a healthcare staff to care for the decedent because she was unable to care for him by herself. Also, the decedent required other living expenses. Respondent also conceded that she commingled her funds with the decedent's funds. Respondent denied all the other accusations of wrongdoing in petitioners' motions. On December 13, 2010, respondent filed an affidavit, stating that for 10 months, from October of 2008 to June of 2010, she paid \$15 per hour for 24 hour care for the decedent to herself, Corrin Nesbitt, Lorena Sulich, Steven Kata, Michael Sulich, and Adriana Moreya, for a total expense of \$108,000. Additionally, respondent stated that from October of 2008 to June of 2010 the decedent incurred other expenses in the amount of approximately \$33,000.

On December 15, 2010, the trial court held a hearing regarding petitioners' motions for default judgment and summary disposition. Respondent's attorney was not physically present during the hearing; however, he made his appearance on the record over the phone.

Based on a review of the file, the trial court held:

I am going to grant the motion for summary disposition. I don't believe there's any issue of fact either. Obviously these monies were taken. There's no response

indicating where they have gone. There is no accounting. Whether documents were turned over, that may be, but your clients are entitled to have an accounting; that was not done. So at this point I will find the respondent in default and I will grant your motion for summary disposition if you want to present it.

Accordingly, the trial court entered an order granting petitioners' motions for default judgment and summary disposition. The trial court entered a judgment against respondent in the amount of \$134,662.71, payable to the Estate of John L. Sulich.

On December 20, 2010, respondent filed a motion for rehearing. Respondent asserted that she was entitled to have her defense to petitioners' motion for summary disposition decided based on its merits, since the court had not received respondent's answer at the time of the motion hearing. Hence, on January 26, 2011, the trial court held a hearing for respondent's motion for reconsideration. The trial court ruled:

In this case we look to whether there was a demonstrated palpable error by which the court and the parties may have been misled and show that a different disposition must result.

First off, procedurally, we did not receive the respondent's answer timely. We received it two days prior to the hearing. The court rule provides for seven days.

Secondly, we have the fact that, regardless of what the circumstances were, we didn't have counsel appear timely on the day -- even if we accept that you contacted the Court and said you had to come late, at 10:30, we called the matter after 10:30, counsel was not here. And there was not an appropriate motion to adjourn. I mean obviously if there's a dispute between you, you could have brought a motion to adjourn, and that was not done.

Third, with respect to the merits, I'm satisfied that the Court ruled correctly with respect to the merits. There were some very serious concerns in this case. We did not have a proper accounting. She may have given copies of these bank accounts, but we didn't have a proper accounting to the Court. I was very concerned with the fact that these caregiver expenses were being -- just [sic] without any kind of court supervision or permission, being expended to the tune of over \$100,000. There were times when this incompetent individual was taken to the casino and there were casino expenses. All of that raises huge red flags for the Court.

Those were not appropriate expenditures, they were not permitted by the Court, and I'm satisfied that with respect to the summary disposition motion we ruled correctly on the merits. So I am going to deny the request for reconsideration.

* * *

On appeal, respondent argues that the trial court erred by granting petitioners' motion for summary disposition prior to the close of discovery. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Davis v City of Detroit*, 269 Mich App 376, 378; 711 NW2d 462 (2006). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests

the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The party moving for summary disposition must specifically identify the matters that have no issues of disputed fact. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). Then the party opposing the motion has the burden of showing, through documentary evidence, that a genuine issue of disputed fact exists. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). This Court considers only “what was properly presented to the trial court before its decision on the motion.” *Pena v Ingham County Rd Comm’n*, 255 Mich App 299, 310; 660 NW2d 351 (2003). This Court must review a “motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.” *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). “Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule [(C)(10)] shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.” MCR 2.116(G)(6). “There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). A motion for summary disposition should only be granted if the evidence presented to the trial court by the parties does not establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 224-225.

Generally, summary disposition under MCR 2.116(C)(10) is premature if it is granted before discovery on a disputed issue is complete. However, the mere fact that the discovery period remains open does not automatically mean that the trial court’s decision to grant summary disposition was untimely or otherwise inappropriate. The question is whether further discovery stands a fair chance of uncovering factual support for the opposing party’s position. In addition, a party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence. [*Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009).]

A trustee’s mere failure to properly account for the disposition of trust funds establishes a loss by the beneficiaries. See *In re Titsworth’s Estate*, 288 Mich 652, 654; 286 NW 97 (1939) (“[T]he duty rests upon a trustee to render proper account, the burden being upon him to establish the correctness of the account. His failure to produce evidence within his control raises the presumption that if produced it would operate against him and every intendment must be made in favor of the opposite party.”). Furthermore, any response to a motion for summary disposition, including by brief or affidavit, must be filed and served at least seven days prior to the motion hearing. MCR 2.116(G)(1)(a)(ii).

As previously stated, petitioners sought a default judgment against respondent for failing to answer their petition in accordance with MCR 5.119(B) and failing to comply with the court’s order to disclose her use of the decedent’s funds and produce financial documents in response to petitioners’ subpoena in violation of MCR 2.313 and MCR 2.506. Petitioners also sought summary disposition pursuant to MCR 2.116(C)(10). Petitioners asserted that there were no issues of disputed fact regarding respondent’s embezzlement of large amounts of the decedent’s funds while she served as his fiduciary. Petitioners specifically asserted that during the time

period of August of 2008 to June of 2010, respondent embezzled \$102,417.71 in mortgage loan proceeds and \$32,245 in social security income from the decedent, for a total of \$134,662.71. Petitioners asserted that in the years prior to the decedent's death, respondent began tapping into the decedent's bank account at OUR Credit Union. Petitioners alleged and provided documentation of several withdrawals that respondent made at various casinos from the decedent's account, including withdrawals made after the decedent's death. Petitioners alleged that these withdrawals were a portion of several withdrawals made by respondent from the decedent's account for her own personal use. Petitioners also provided documentary evidence in support of their motion for summary disposition.

We find that petitioners identified, with supporting documentation, that there were no issues of material fact regarding whether respondent had misused \$134,662.71 of the decedent's funds. Respondent concedes to using the funds. However, respondent did not file a timely response to petitioners' motion for summary disposition and did not file an accounting for the funds. Respondent failed to show, through documentary evidence, that there were issues of disputed fact. Thus, the trial court did not err by granting petitioners' motion for summary disposition prior to the close of discovery.

Next, respondent argues that the court committed reversible error by removing her as the decedent's trustee.

For an issue to be properly preserved for appellate review, it must be raised before, and addressed and decided by the trial court. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Furthermore, "[w]hen a party approves an order or consents to a judgment by stipulation, the resultant judgment or order is binding upon the parties and the court," *Walker v Walker*, 155 Mich App 405, 406; 399 NW2d 541 (1986), and it is not subject to appeal, *Trupski v Kanar*, 366 Mich 603, 607; 115 NW2d 408 (1962). Respondent did not raise any challenge in the trial court to the consent order entered by the trial court, which she stipulated and agreed to, which removed her as the decedent's fiduciary. Therefore, respondent is not entitled to any relief on this issue.

Lastly, respondent argues that the trial court erred in entering a default judgment of \$134,662.71 against her. If a party fails to cite any supporting legal authority for their position, the issue is deemed abandoned. *Berger v Berger*, 277 Mich App 700, 715; 747 NW2d 336 (2008). Additionally, "[a] party abandons a claim when it fails to make a meaningful argument in support of its position." *Id.* at 712.

Respondent makes the legally unsupported argument that the trial court erred by ruling that proceeds from the decedent's estate could not be used for the decedent's daily living expenses, food, medication, clothing, transportation, entertainment, property taxes, insurance, utilities, or 24 hour home care. Respondent's argument is not meaningful because the trial court actually entered a default judgment for \$134,662.71 against her, ruling that she had acknowledged using the funds without providing the petitioners with the required accounting. Furthermore, respondent does not provide any legal support for her argument in her brief on appeal. Therefore, respondent has abandoned this claim. *Id.* at 712-715.

Affirmed. Petitioners, having prevailed in this matter, are entitled to costs. MCR 7.219.

/s/ Amy Ronayne Krause
/s/ Henry William Saad
/s/ Stephen L. Borrello