

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of MILMET.

DAVID L. SOLOMON, Co-Personal
Representative of the ESTATE OF MORRIS
MILMET, ROBERT SOLOMON, and LOIS
RENEE SOLOMON RICHARDS,

Petitioners-Appellants,

v

SARAH RONAYNE MILMET, Co-Personal
Representative of the ESTATE OF MORRIS
MILMET,

Respondent-Appellee,

and

DAVID P. SUTHERLAND, LAW OFFICES OF
DAVID P. SUTHERLAND, and DOUGLAS
CHARTRAND,

Respondents.

Before: MURPHY, C.J., and STEPHENS and RIORDAN, JJ.

MURPHY, C.J. (*concurring in part, dissenting in part*).

In this challenging appeal, I respectfully concur in part and dissent in part for the reasons set forth below.

This case concerns disclaimers filed by petitioners under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, and in particular Part 9, MCL 700.2901 *et seq.*, with respect to their interests in the residuary estate of Morris Milmet, which consisted of capital

UNPUBLISHED
August 7, 2012

No. 303304
Oakland Probate Court
LC No. 2003-291163-DE

stock in M&S Investment, Inc.¹ At the heart of petitioners' lawsuit is the claim that they executed and filed the disclaimers on the basis of an oral agreement with respondent Sarah Ronanye Milmet ("Milmet"). In the petition, it was alleged that petitioners signed the disclaimers "in exchange for . . . Milmet's agreement to provide the Residuary Beneficiaries with the value of their interest in the Residuary Estate at a later date." The nature of the alleged agreement is also reflected in the affidavit of petitioner David Solomon, who averred as follows:

David Sutherland proposed a method to Sarah Milmet and me by which the Estate could avoid estate tax being paid on the non-marital portion of the Residuary Estate by transferring all of such assets into the Sarah Milmet Marital Trust if the Residuary Beneficiaries would agree to execute Disclaimers of their interests in the Residuary Estate with the understanding that the Residuary Beneficiaries would later receive those assets from Sarah Milmet at a time when the stock held in M&S had appreciated in value (hereinafter the "Disclaimer Agreement")

After . . . meetings with David Sutherland, I was assured by Sarah Milmet that she would honor the Disclaimer Agreement by distributing the equity in M&S after the Estate was closed in accordance with Morris Milmet's Will if I and my brother Bob Solomon and sister Renee Solomon would accept [the] proposal.

The affidavits of the other two petitioners set forth similar averments. On the strength of the alleged disclaimer agreement, purportedly, the three petitioners each executed separate but identical disclaimers that contained, in part, the following language:

[I] irrevocably and unqualifiedly disclaim any and all interest I have in the residuary estate Further, I affirm that I have not accepted any interest in or benefit from the residuary estate, and . . . I have not received and I will not

¹ A person "may disclaim a disclaimable interest in whole or in part," MCL 700.2902(1), and a disclaimable interest includes "property" and the "right to receive or control property," MCL 700.2901(2)(b). Property, which includes both real and personal property, "means anything that may be the subject of ownership[.]" MCL 700.2901(2)(i), and "[a] disclaimer may be of a specific asset, an interest in a specific asset, a pecuniary amount, a fractional or percentage share, or a limited interest or estate[.]" MCL 700.2902(2). MCL 700.2909 provides:

(1) A disclaimer, or a written waiver of the right to disclaim, is binding upon the disclaimant or person waiving the right to disclaim, and all persons claiming through or under him or her.

(2) A disclaimer acts as a nonacceptance of the disclaimed interest, rather than as a transfer of the disclaimed interest. The disclaimant is treated as never having received the disclaimed interest.

receive any consideration for making this Disclaimer. Further, it is my intention that this Disclaimer constitute a qualified disclaimer as provided in Section 2046 and 2518 of the Internal Revenue Code of 1986, as amended, or the corresponding provisions of any subsequent federal tax law. It is also my intention that this transfer and Disclaimer constitute a qualified disclaimer as provided in M.C.L.A. Sections 700.2901 to 700.2912 [Part 9 of EPIC].

I note the inherent conflict between the alleged disclaimer agreement pursuant to which petitioners were promised consideration payable by Milmet at a future date in exchange for executing the disclaimers and the language used by petitioners in the disclaimers that denies any such arrangement by indicating that the petitioners had not received and would not receive any consideration for disclaiming their interests.

Subsequently, the estate filed a federal estate tax return, Form 706, which incorporated the disclaimers, and it was accepted and approved by the Internal Revenue Service (IRS). The probate estate was closed and, according to petitioners, Milmet then failed to keep her end of the bargain and retained the disclaimed residuary interests.² Petitioners eventually filed the instant suit against Milmet, alleging causes of action for breach of contract, breach of fiduciary duty, fraud and fraud in the inducement, conversion, civil conspiracy, unjust enrichment, rescission, and promissory estoppel.

In its ruling on Milmet's motion for summary disposition, the trial court, emphasizing the plain language in the executed disclaimers,³ stated:

In light of the clear mandates of the Disclaimer Law [under EPIC], and the express, unambiguous language of the Petitioners' Disclaimers, which is entirely consistent with that law, this Court can reach no other conclusion than that the Disclaimers, once executed and delivered, were irrevocably binding upon the

² In the petition, it was alleged that "after the Estate's 706 was allowed by the Internal Revenue Service with the foregoing Disclaimers, . . . Milmet breached the foregoing agreements by, among other breaches, repudiating the same and retaining the 40% of the Residuary Estate bequeathed to the Residuary Beneficiaries for her own account."

³ Although the trial court indicated that it was only deciding the motion for summary disposition based on the pleadings for purposes of MCR 2.116(C)(8), it is clear that the court went outside the pleadings by examining documentary evidence, i.e., the disclaimers. When a trial court relies on documentary evidence beyond the pleadings, we treat the motion as having been granted pursuant to MCR 2.116(C)(10). *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). We review de novo a trial court's ruling on a motion for summary disposition, and a motion under MCR 2.116(C)(10) tests whether there is factual support for a claim, with the court considering affidavits, pleadings, depositions, admissions, and other documentary evidence in a light most favorable to the nonmoving party in determining whether a genuine issue of material fact exists. *Id.* I have referenced documentary evidence in this opinion given the fact that the trial court also considered documentary evidence for purposes of its ruling.

Petitioners. The Petitioners must be treated as never having received their interests in the Residuary Estate, i.e., as if they had predeceased Morris Milmet. The Petitioners cannot avoid the clear mandates of the Disclaimer Law by alleging a private agreement that would render that law a nullity. As a result of their Disclaimers, the Petitioners have absolutely no right or interest whatsoever in the Estate, and no damages that they can recover. In this matter, Petitioners simply cannot circumvent the clear mandates of the Disclaimer Law by relying on their asserted common law and equitable theories. Sustaining the enforcement of such theories would require this Court to “permit indirectly what is prohibited directly by the statute. The courts have traditionally looked upon circumvention of statutes with extreme disfavor.” [Citation omitted.]

The trial court held that the alleged disclaimer agreement was “unenforceable as a matter of law.” Petitioners appeal as of right.⁴

I find that the outcome of this case is entirely controlled by whether there was a disclaimer agreement between the parties. As part of my analysis, I will first assume the existence of the disclaimer agreement and examine the legal impact of the agreement on the disclaimers themselves and on the causes of action alleged by petitioners. Thereafter, I will make the assumption that no disclaimer agreement existed, as claimed by Milmet in her affidavit,⁵ and briefly examine the legal impact of such a scenario on the disclaimers and petitioners’ causes of action. Finally, I will consider the question of the disclaimer agreement’s existence and apply my conclusions in the context of the procedural posture of the case under MCR 2.116. MCL 700.2910 provides in pertinent part:

(1) The right to disclaim property is barred by any of the following events that occur after the event giving rise to the right to disclaim and before the disclaimer is perfected:

(a) An assignment, conveyance, encumbrance, pledge, or transfer of the property, or a contract for such a transaction.

⁴ Petitioners also appealed an order granting summary disposition in favor of respondent Douglas Chartrand. During the pendency of this appeal, however, he was dismissed pursuant to a stipulation of the parties. Accordingly, the issues raised in petitioners’ brief on appeal pertaining to Chartrand will not be addressed.

⁵ Milmet averred that “[a]t no time before or after the death of my husband . . . did I, for any cause or reason, make a promise or enter into a contract, agreement or understanding with . . . [petitioners] verbally, in writing, by telephone, by electronic communication, or any other means that, in return for [petitioners] signing a Disclaimer . . ., I would pay [them] the interest to which [they were] entitled in the Residuary Estate at a later date in time.” Milmet further indicated that she had no idea why petitioners executed the disclaimers and that “their decisions to sign were made with no input, influence, suggestion, request, advice or other communication from” Milmet.

* * *

(c) An acceptance of the disclaimable interest or a benefit under the disclaimable interest after actual knowledge that a property right has been conferred.

* * *

(2) The right to disclaim is barred to the extent provided by other applicable law.

Under MCL 700.2910(1)(a), which the majority finds applicable if the disclaimer agreement truly existed, where there is a contract to transfer or convey property that arose after a person had the right to disclaim the property but before the perfection of any disclaimer, the person's right to disclaim the property would be barred. The alleged disclaimer agreement appears at first glance to fit the criteria set forth in MCL 700.2910(1)(a); however, the disclaimer agreement, in my view, was simply a contract whereby petitioners agreed to disclaim property rather than a contract under which petitioners would assign, convey, encumber, pledge, or transfer the property. "A disclaimer acts as a nonacceptance of the disclaimed interest, *rather than as a transfer of the disclaimed interest*[,] [and] [t]he disclaimant is treated as never having received the disclaimed interest." MCL 700.2909(2) (emphasis added). A "disclaimed interest devolves as if the disclaimant had predeceased the decedent." MCL 700.2907(1). Thus, despite petitioners' affidavits speaking of an agreement by them to transfer assets to Milmet's trust, the alleged oral disclaimer agreement in reality was a contract in which petitioners promised not to accept the property or residuary interests as accomplished through execution of disclaimers. This would result by operation of law in the interests remaining in the estate for an alternative disbursement, which in this case was a disbursement of the interests to Milmet's trust. Regardless of the inapplicability of MCL 700.2910(1)(a), I find that MCL 700.2910(2) applies, and perhaps MCL 700.2910(1)(c), assuming, once again, the existence of the disclaimer agreement.

As indicated above, MCL 700.2910(2) bars the right to disclaim property "to the extent provided by other applicable law." 26 USC 2518 is referenced in the disclaimers, and petitioners indicated in said disclaimers that it was their intention that the documents constitute qualified disclaimers as provided in Section 2046 and 2518 of the Internal Revenue Code of 1986[.]" 26 USC 2046 simply directs one to see 26 USC 2518, which provides in pertinent part:

(a) For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.

(b) For purposes of subsection (a), the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property but only if--

(1) such refusal is in writing,

* * *

(3) *such person has not accepted the interest or any of its benefits,*⁶ and

(4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes [Emphasis added.]

This federal statute was interpreted in *Estate of Monroe v Comm’r of Internal Revenue*, 124 F3d 699 (CA 5, 1997). The federal court, providing an overview of the case, stated:

This case requires interpretation of § 2518(b) of the Internal Revenue Code and its accompanying regulations, which describe “qualified disclaimer” of benefits, a device commonly used for “post-mortem” estate and other tax planning. The disclaimants here were 29 legatees of the wife's will, all of whom were asked by her husband and did irrevocably disclaim the proffered bequests. Shortly afterward, the husband gave them gifts equaling or exceeding the bequests, and not long after that he died at age 93. The Tax Court concluded that the disclaimers were induced or coerced by “the implied promise that [the disclaimants] would be better off if they did what Monroe wanted them to do,” even though he made no explicit promises. Finding that the “coerced/induced” standard is inconsistent with the regulations and a fair reading of the statute, we reverse on nearly all of the disclaimers. [*Monroe*, 124 F3d at 702.]

The *Monroe* court initially indicated that Treasury Regulations explained that “acceptance of the interest within the meaning of § 2518(b)(3) includes not only explicit or implied acceptance of the interest or any of its benefits, but also receipt of consideration in return for executing the disclaimer.” *Id.* at 708. The court also stated that an irrevocable and unqualified refusal to accept an interest, i.e., a qualified disclaimer, “is a relinquishment of a legal right that is incapable of being retracted or revoked by the disclaimant and is not modified by reservations or restrictions that limit its enforceability.” *Id.* The United States Court of Appeals for the Fifth Circuit ultimately held:

[A] disclaimant cannot purport to disclaim, while taking actual advantage of the property “or any of its benefits.” Further, the disclaimant cannot accept “benefits” from the property by receiving consideration in exchange for the disclaimer. The juxtaposition in the regulation between the “implied” acceptance of the interest or any of its benefits and the “consideration” that must be received in exchange for a disclaimer is not accidental. One may impliedly accept the benefits of property, for instance by pledging it as security for a loan, and therefore act inconsistently when making an alleged disclaimer. On the other hand, only by receiving “consideration” in the classic sense does one receive “property” or any of its benefits in exchange for executing the disclaimer. We thus agree with the estate that to have accepted the benefits of a disclaimed

⁶ MCL 700.2910(1)(c) has fairly comparable language, where it bars the right to disclaim property where there has been “[a]n acceptance of the disclaimable interest or a benefit under the disclaimable interest after actual knowledge that a property right has been conferred.”

interest, the disclaimant must have received actual consideration in return for renouncing his legacy.

A disclaimant's mere expectation of a future benefit in return for executing a disclaimer will not render it "unqualified." "Consideration," used deliberately in the regulations, is a term of art. *See Philpot v Gruninger*, 81 US (14 Wall) 570, 577; 20 L Ed 743 (1872); *Fire Ins Ass'n v Wickham*, 141 US 564, 579; 12 S Ct 84; 35 L Ed 860 (1891) (to constitute consideration, promise "must have been offered by one party, and accepted by the other, as one element of the contract"). This is the way the regulations are written, and it is consistent with the Commissioner's letter rulings, which are properly cited as evidence of how the Commissioner has interpreted the law in the past. In each of the three rulings cited above, the obvious expectation that the disclaimant would be better off in the long-run by renouncing his interest in favor of the decedent's spouse did not violate the bar against acceptance of the disclaimed interest or its benefits. . . . In each case, the Commissioner cited the lack of an agreement between the parties as to what the disclaimants were to receive in the future. The Commissioner implicitly recognized the distinction between the expectation that renouncing is in the disclaimant's best interest and an expectation that rises to the level of consideration. . . . Thus, the question for each disclaimer is whether the decision to disclaim was part of mutually-bargained-for consideration or a mere unenforceable hope of future benefit, whether that unenforceable hope springs from family ties, long-term friendship or employment, or a generalized fear that benefits will be withheld in the future absent execution of the disclaimer. [*Id.* at 709-710 (citations omitted).]

Here, the disclaimer agreement, which, again, I am merely presuming existed, concerned what the disclaimants (petitioners) were to receive in the future in return for executing the disclaimers. As asserted by petitioners, there was an offer, an acceptance, and mutual promises. The decisions to disclaim were part of mutually-bargained-for consideration giving rise to a contract. Indeed, that is the very foundation of petitioners' lawsuit. Petitioners had an expectation of a contractual performance that constituted legal consideration and not a mere unenforceable hope of a future benefit.⁷ The consideration for petitioners' agreement to execute the disclaimers, which allowed the assets in the residuary estate to flow into Milmet's marital trust and resulted in the avoidance of burdensome estate taxes and the preservation of M&S Investment, Inc., was Milmet's promise to convey the equivalency of those assets to petitioners after the disclaimers cleared the IRS and the estate was closed. As reflected in *Monroe*, the IRS would not have approved the disclaimers nor found them to be "qualified" under 26 USC 2518 had it been known that the disclaimers were only executed because of Milmet's agreement to

⁷ No one has contended that petitioners signed the disclaimers after discussions with Milmet wherein she simply indicated that she might contemplate making a subsequent payment, gift, or distribution to petitioners if they executed disclaimers, as opposed to definitively making a promise to do so.

make future payments or disbursements to petitioners. Although packaged and presented to the IRS as qualified disclaimers lacking any exchange or promises of consideration or conferment of benefits, that was simply not the case; the disclaimers, as maintained by petitioners themselves, were instead executed pursuant to an oral agreement involving consideration.

Assuming the existence of the disclaimer agreement, the disclaimers would be rendered invalid or unqualified under federal law, 26 USC 2518(b)(3); *Monroe*, 124 F3d 699, and additionally, EPIC would dictate that the disclaimers be deemed invalid and void, given that the “right to disclaim is barred to the extent provided by other applicable law,” MCL 700.2910(2), which would encompass federal tax law. Furthermore, as indicated earlier, the language in 26 USC 2518(b)(3) is comparable to the language in MCL 700.2910(1)(c) of EPIC, and there is a strong argument that § 2910(1)(c) should not be construed any differently than the federal statute was interpreted in *Monroe*, but it is not necessary to reach the issue considering the applicability of § 2910(2). In sum, petitioners had no right or authority to disclaim their interests under EPIC if the disclaimers were only executed because of the alleged disclaimer agreement, which is exactly what petitioners contend.

If the disclaimer agreement existed, thereby invalidating and voiding the disclaimers, the question that needs to be asked and answered is how would such a scenario affect petitioners’ lawsuit. Petitioners are effectively seeking alternative forms of relief, where they indicate that there is a basis to set aside or rescind the disclaimers, as reflected in their discussion of fraud and fraud in the inducement, and where, *absent rescinding or setting aside the disclaimers*, they seek to either enforce the disclaimer agreement, obtain a damage award for breach of the agreement, or to otherwise recover under the various causes of action alleged in the petition. If the disclaimer agreement is established, rendering the disclaimers void and effectively returning the parties and the estate to their pre-disclaimer positions, petitioners would in essence receive the very relief they requested when viewed in relationship to the specific request to rescind or set aside the disclaimers. Under those circumstances, wherein petitioners would be entitled to their residuary interests under the will, I fail to see how any of the causes of action seeking performance, damages, or other monetary recovery could survive. Either such causes of action would be rendered moot as no operative disclaimers would continue to exist or, assuming the claims could conceivably still stand minus the invalidated disclaimers, the causes of action would necessarily be predicated on an illegal and unenforceable disclaimer agreement.⁸ With

⁸ The disclaimers, *in and of themselves*, would have been perfectly legal to file as part of an effort to properly avoid federal estate taxes, but when the oral disclaimer agreement is added to the mix, the entire transaction became illegal and the disclaimers became fraudulent. Petitioners desire that a court assist them in the completion of the illegal act by allowing them a chance to receive consideration for their disclaimers by way of a civil judgment, which would be in direct contravention of law. An agreement pursuant to which a person is to file a disclaimer, which appears on its face to be a qualified disclaimer, and submit it to the government for approval in exchange for an undisclosed promise that assets or cash will later be transferred to said person, with the parties knowing full well that the disclaimer is a misrepresentation, is an illegal and fraudulent contract. See 26 USC 7201. These were disclaimers containing knowingly false statements under petitioners’ own allegations and averments presented in this lawsuit, where the

respect to any claim for which the requested relief was to set aside the disclaimers, it would be unnecessary to establish the elements of those claims, rendering them moot, as the mere existence of the disclaimer agreement, in and of itself, would support voiding and invalidating the disclaimers. I recognize that petitioners never alleged that the disclaimers should be set aside or rescinded simply because they were executed pursuant to the disclaimer agreement. However, EPIC and federal law dictate such a conclusion, and petitioners set forth all of the necessary facts in their petition that would give rise to a basis to void the disclaimers. Accordingly, if the disclaimer agreement is established, the only order or judgment that would need to be entered is one voiding or invalidating the disclaimers and reopening the estate, with petitioners' suit otherwise being dismissed.

Assuming that no disclaimer agreement existed and that Milmet never made the alleged promises, as she claimed in her affidavit, it would undermine each and every cause of action alleged by petitioners such that Milmet would be entitled to summary disposition. Ultimately, all of petitioners' claims are founded on the existence of the disclaimer agreement, and the failure to establish that the parties had an agreement would eviscerate petitioners' lawsuit. Moreover, there would also be no basis to set aside, rescind, invalidate, or void the disclaimers, where, absent the disclaimer agreement, the disclaimers would be sound under EPIC and federal law.

With respect to procedural issues regarding the question of whether the parties had a disclaimer agreement, the trial court assumed, for purposes of MCR 2.116(C)(8), that the disclaimer agreement existed, and it found that the agreement was "unenforceable as a matter of law," where the disclaimers were "express, unambiguous," and entirely consistent with EPIC. For purposes of MCR 2.116(C)(8), "all factual allegations contained in the complaint must be accepted as true," *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997), and for purposes of MCR 2.116(C)(10), we must view the documentary evidence "in a light most favorable to the nonmovant," *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). Here, petitioners alleged the existence of the disclaimer agreement in their petition, and petitioners submitted documentary evidence in the form of affidavits supporting the existence of the disclaimer agreement. Therefore, whether under MCR 2.116(C)(8) or (10), we must analyze this appeal as if there was a disclaimer agreement as maintained by petitioners. I set forth above my conclusions regarding the proper treatment of the disclaimers and petitioners' causes of action upon a finding that a disclaimer agreement existed. Given that Milmet denied the existence of the disclaimer agreement, that issue should be resolved in a remand.

disclaimers indicated that no consideration was involved and that no interest survived. Under Michigan's wrongful-conduct rule, which is rooted in the public policy that courts should not aid a party who initiates litigation founded on his own illegal conduct, a court will generally not grant legal or equitable relief to a party who knowingly entered into an illegal contract, even when the other contracting party also did so knowingly and the suing party completed his performance under the contract. *Orzel v Scott Drug Co*, 449 Mich 550, 558-561; 537 NW2d 208 (1995); *Mancourt-Winters Coal Co v Ohio & Mich Coal Co*, 217 Mich 449, 454-455; 187 NW 408 (1922) (courts "will not aid either party, but leaves them to reap the reward of their own folly").

In summation, I would find that the trial court erred in granting summary disposition in favor of Milmet, but only to the extent that the court's order precluded possible relief in the nature of voiding or setting aside the disclaimers predicated on the alleged disclaimer agreement. In all other respects, I would conclude that the trial court, albeit for different reasons, properly granted summary disposition in favor of Milmet. I would remand for trial, or possibly a renewed or new motion for summary disposition should a party choose that course, on the issue of whether the parties actually had a disclaimer agreement. If the answer is in the affirmative, the disclaimers should be voided and the estate reopened, and if no disclaimer agreement is established, petitioners would not be entitled to any relief, the disclaimers would stand, and the matter would be concluded. I find that my opinion constitutes a concurrence in relationship to: (1) the majority's decision to remand on the question whether a disclaimer agreement existed; (2) the majority's conclusion that the disclaimers would be rendered void if such an agreement is established; and (3) the majority's ruling that the conversion claim was properly dismissed. I further conclude that my opinion constitutes a dissent in relationship to the majority's determination that the fraud, breach of fiduciary duty, civil conspiracy, unjust enrichment, and breach of contract claims were improperly dismissed, as well as the majority's suggestion, when remanding on the issue, that the disclaimer agreement might perhaps be permissible under federal law as a legitimate restructuring of taxes.

I respectfully concur in part and dissent in part.

/s/ William B. Murphy