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.

UNPUBLISHED
August 7, 2012

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

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

PER CURIAM.

Petitioners, David L. Solomon, Robert Solomon and Lois Renee Solomon Richards, challenge the grant of summary disposition in favor of respondent Sarah Ronanye Milmet pursuant to MCR 2.116(C)(8).[1] We reverse and remand for further proceedings.

[1] Petitioners also appealed an order granting summary disposition in favor of respondent Douglas Chartrand. During the pendency of this appeal, Chartrand was dismissed pursuant to a

At the outset, we note that the parties have referenced a myriad of documents in setting forth the facts of this case. Because summary disposition was granted pursuant to MCR 2.116(C)(8), and the trial court indicated it was relying solely on the pleadings, we also look only to the pleadings in determining the relevant facts.

This appeal concerns the petitioners' executed disclaimers of their interests in the residuary estate of Morris Milmet. David Solomon and Sarah Milmet, the decedent's wife, were named co-personal representatives of the estate and retained attorney David Sutherland to represent them. Petitioners averred:

> [I]n June 2004, David P. Sutherland (and possibly others) conceived a method by which the Estate could avoid estate tax being paid on the non-marital portion of the Residuary Estate by shifting all of such assets into the Sarah Milmet Marital Trust by means of the Residuary Beneficiaries executing Disclaimers of their interests in the Residuary Estate and the Residuary Beneficiaries agreeing to pay taxes individually at either lower personal income tax rates or capital gains rates in the future on the cash equivalents of those assets as and when those assets were distributed to them as agreed upon by, between and among the Residuary Beneficiaries and Sarah Milmet.

Petitioners alleged that the agreement with Milmet was conceived in an effort to protect the viability and continuation of an investment firm through restructuring taxes in a manner that would not necessitate its dissolution to meet tax obligations while simultaneously protecting the monetary interests of the investment firm's beneficiaries. Sutherland insisted that the petitioners consult with an independent attorney and obtain a written opinion before proceeding to disclaim their interests. Petitioners retained Douglas Chartrand who issued a letter on July 23, 2004, "outlining the consequences if they were to execute Disclaimers of their residuary interest." Thereafter, petitioners executed the disclaimers. Petitioners averred that they executed the disclaimers "in exchange for Sarah Milmet's agreement to provide the Residuary Beneficiaries with the value of their interest in the Residuary Estate at a later date." Petitioners averred that "after the Estate's 706 [federal estate tax return] was allowed by the Internal Revenue Service with the foregoing Disclaimers, Sarah Milmet breached the foregoing agreements by, among other breaches, repudiating the same and retaining the 40 [percent] of the Residuary Estate bequeathed to the Residuary Beneficiaries for her own account."

Petitioners alleged causes of action against Milmet for breach of contract, breach of fiduciary duty, fraud, and fraud in the inducement, conversion, civil conspiracy, unjust enrichment, and promissory estoppel. Petitioners also labeled one count "Rescission," asserting that the disclaimers were procured by wrongful conduct and that equitable principles necessitated rescission of the disclaimers.

In finding that petitioners failed to state common law and equitable claims against Milmet, the probate court concluded that petitioners' disclaimers were irrevocably binding under

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stipulation by the parties. Accordingly, the issue raised in petitioners' appellate brief pertaining to respondent Chartrand will not be addressed.

the provisions pertaining to the "disclaimer of property interests law," MCL 700.2901, *et seq.*, within the Estates and Protected Individuals Act (EPIC), MCL 700.1101 *et seq*. The trial court concluded that EPIC required that the petitioners be treated as having never received their interests, as if they had predeceased the decedent, and had "absolutely no right or interest whatsoever" in the estate. The court concluded that petitioners could not avoid EPIC by alleging a private agreement that would render the law a nullity. The court concluded that because the enforcement of such an alleged agreement would permit a result statutorily prohibited, the agreement would be unenforceable as a matter of law and that any claims would be barred. On reconsideration, the court clarified that its disposition encompassed the fraud claim. Specifically, the court held that the disclaimer law could not be avoided by alleging fraud and that the disclaimers and Chartrand's opinion letter obviated any claim of fraud.

Whether EPIC bars relief to petitioners requires a review of the statute, which constitutes a question of law that we review de novo. Whether summary disposition was properly granted pursuant to MCR 2.116(C)(8) for failure to state a claim is also reviewed de novo. *In re Baldwin Trust*, 274 Mich App 387, 396; 733 NW2d 419 (2007). The factual allegations in the complaint must be accepted as true and only the pleadings may be considered. To grant summary disposition under MCR 2.116(C)(8), the claim must be "'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) (citation omitted). Whether public policy bars the contract and equitable claims, also constitutes a question of law, which we review de novo. *Beach v Lima Twp*, 489 Mich 99, 105-106; 802 NW2d 1 (2011).

EPIC, MCL 700.2901, *et seq.*, encompasses the disclaimer of property interest law. Specifically, 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.* [Emphasis added.]

"Events barring [the] right to disclaim property" are delineated in MCL 700.2910 as follows:

> (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.
>
> (b) A written waiver of the right to disclaim.
>
> (c) An acceptance of the disclaimable interest or a benefit under the disclaimable interest after actual knowledge that a property right has been conferred.

(d) A sale of the property under judicial sale.

(e) The expiration of the permitted applicable perpetuities period.

(2) The right to disclaim is barred to the extent provided by other applicable law. A partial bar does not preclude the disclaimant from disclaiming all or any part of the balance of the property if the disclaimant has received a portion of the property and there still remains an interest that the disclaimant is yet to receive. An act that bars the right to disclaim a present interest in joint property does not bar the right to disclaim a future interest in joint property.

We find that a genuine issue of material fact existed whether the parties' disclaimer was barred premised on MCL 700.2910(1)(a). In the circumstances of this case, the allegations contained in petitioners' complaint regarding the existence of an agreement or contract in exchange for the effectuation of the disclaimers calls into question both the legitimacy of the disclaimers and the propriety of granting summary disposition under MCR 2.116(C)(8). The trial court erred in determining the effect of the disclaimer without first deciding petitioners' assertion of the existence of a contractual agreement with respondent. Because the existence of such an agreement would preclude the validity of the disclaimers, the trial court effectively placed the cart before the horse.[2] On remand, should the trial court determine the existence of an agreement between the parties, the executed disclaimers would be void ab initio, making the remedy of specific performance or enforcement of the disclaimers unavailable. *Bailey v Bailey*, 321 Mich 166, 177; 32 NW2d 429 (1948). As such, the parties and estate would be returned to the status existing before execution of the disclaimers.

The trial court also held that petitioners' fraud claims could not stand because they would undermine the clear mandates of the disclaimer statute. The probate court concluded, based on Chartrand's letter and the disclaimers, that petitioners could not satisfy the reasonable reliance element necessary to establish their fraud claim. We note that the motion before the trial court was brought in accordance with MCR 2.116(C)(8). Thus, it was improper for the trial court could to look beyond the pleadings, and consider Chartrand's letter, in rendering a decision on the claim. Petitioners averred that they disclaimed their interests "in exchange for Sarah Milmet's agreement to provide the Residuary Beneficiaries with the value of their interest in the

[2] We further note that such an outcome is consistent with the related statutory provision, MCL 700.2910(2), which serves to bar a disclaimer "to the extent provided by other applicable law." Specifically, 26 USCA § 2518(b)(3) of the Internal Revenue Code has been interpreted such that "[a] qualified disclaimer cannot be made with respect to an interest in property if the disclaimant has accepted the interest or any of its benefits, expressly or impliedly, prior to the disclaimer. Acceptance is manifested by an affirmative act which is consistent with ownership. . . . In addition, the acceptance of any consideration in return for making the disclaimer is an acceptance of the benefits of the entire interest disclaimed." *Estate of Monroe v CIR*, 124 F3d 699, 705 (CA 5, 1997). Specifically, "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. . . ." *Id.* at 710.

Residuary Estate at a later date." Because this allegation must be accepted as true for purposes of the motion, the grant of summary disposition was not appropriate.

We next address petitioners' breach of fiduciary duty claim. Milmet owed a fiduciary duty to the beneficiaries under the will in accordance with MCL 700.3703(1). This would include a duty to administer the will in the interest of the beneficiaries. MCL 700.3703(1); MCL 700.7802(1). If, as alleged, she schemed to fraudulently induce petitioners to relinquish their interests through disclaimers, she could be found liable for breach of her fiduciary duty. Because petitioners stated a potential claim, summary disposition was inappropriate.

Regarding petitioners' claim of civil conspiracy, we note that in *Advocacy Org for Patients and Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003), this Court stated:

> A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means. In count six of the complaint, plaintiffs' alleged that defendants conspired to tortiously interfere with plaintiffs' business and contractual relationships. However, a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort. [Internal citations and quotation marks omitted.]

Petitioners averred that the conspirators were Milmet, Chartrand, and Sutherland. Milmet contends that this claim cannot be maintained because Chartrand and Sutherland have been dismissed from the lawsuit. Contrary to Milmet's assertion, it is permissible for an action to be maintained against any one conspirator without joining the coconspirators "based upon an established conspiracy." *Brown v Brown*, 338 Mich 492, 504; 61 NW2d 656 (1953). Petitioners asserted that the alleged conspirators deprived them of their interests in the residuary estate through all of the underlying actions. The deprivation of rights was legal pursuant to the disclaimers, but petitioner avers that it was accomplished through unlawful means. One of these alleged means was fraud in the inducement. Thus, petitioners have alleged a separate actionable tort.

Petitioners have, however, failed to state a claim for conversion. In *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004), this Court stated:

> Conversion is defined as any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein. To support an action for conversion of money, the defendant must have obtained the money without the owner's consent to the creation of a debtor-creditor relationship and must have had an obligation to return the specific money entrusted to his care. [Internal citations and quotation marks omitted.]

Petitioners asserted that Milmet exercised wrongful dominion and control over the assets belonging to the residuary estate. Accepting petitioners' allegations as true, she obtained dominion and control *with* petitioners' consent to the creation of a debtor-creditor relationship

and, presuming the agreement existed and was valid, she had a duty to return moneys pursuant to her promise to pay, not to return the residuary assets. This was not a conversion.

Regarding the claim of unjust enrichment, in *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006), this Court has previously stated:

> The essential elements of a quasi contractual obligation, upon which recovery may be had, are the receipt of a benefit by a defendant from a plaintiff, which benefit it is inequitable that the defendant retain. Thus, in order to sustain a claim of quantum meruit or unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. In other words, the law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense. [Internal citations omitted.]

Milmet argued that there was no unjust enrichment because petitioners had relinquished their interests in the residuary estate. This ignores the allegation that Milmet promised to pay petitioners the equivalent of their disclaimed interests.

In response to petitioners' breach of contract claim, Milmet argued that petitioners had failed to state a claim because they had not pleaded the existence of a contract. Petitioners did assert that they "executed the . . . [d]isclaimers in exchange for Sarah Milmet's agreement to provide [them] with the value of their interests in the Residuary Estate at a later date." "The essential elements of a valid contract are . . . (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005), quoting *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). So long as there was a proper subject matter, petitioners have sufficiently stated a claim for breach of contract.

The court also held that the claims were barred on public policy grounds because petitioners' claims all centered on an agreement, which the court implies was illegal. Milmet posits that the alleged arrangement would be contrary to federal law in that it was a scheme to avoid payment of federal estate taxes. In fact, this was a basis relied on by Milmet in the lower court to argue that petitioners had failed to state a claim for breach of contract and the only basis for asserting that petitioners had failed to state a claim for promissory estoppel.

While this Court will not engage in an interpretation of federal law, we note that a significant difference exists between tax avoidance and tax evasion. It is not immediately obvious or determinable based on the record before this Court regarding which the proposed contract may have contemplated. Petitioners represent that the arrangement was intended to protect the continuation of an investment firm by structuring the taxable events in a way that would not require its dissolution in order to pay taxes, while taking a countermeasure to protect petitioners' monetary interests. Based on the disclaimers and the related treatment of the residuary estate, the estate legally avoided having to pay as much in taxes. Had petitioners been given the cash equivalencies of what they lost, they presumably would have had to pay taxes on those receipts. Before the claims can be dismissed on public policy grounds it must be

established that the actions of the parties was illegal and not merely a legitimate restructuring of taxes. Thus, we remand for development of a record or legal argument on whether the disclaimer agreement was illegal and/or otherwise impermissible such that it would be void based on public policy.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan