

[Cite as *Chase v. Kiernan*, 2004-Ohio-2745.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

MADELINE CHASE, ET AL. :

Plaintiffs-Appellants : C.A. CASE NO. 2003CA70

vs. : T.C. CASE NO. 9303WC03-28

JEAN E. KIERNAN, ET AL. : (Civil Appeal from  
Common Pleas Court)

Defendants-Appellees:

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O P I N I O N

Rendered on the 28<sup>th</sup> day of May, 2004.

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GRADY, J.

{¶1} This is an appeal from an order of the Probate Court that granted an executor's motion to dismiss an action brought to contest the validity of a will.

{¶2} The testator, Helen L. Helvie, died on September 3, 2002. Thereafter, Defendant-Appellee, Jean E. Kiernan, offered Helvie's will for probate. The Probate Court admitted the will to probate and appointed Kiernan executor of Helvie's estate.

{¶3} On November 4, 2002, and pursuant to R.C.

2107.19(A)(3), Kiernan filed a certificate signed by Plaintiffs-Appellants, waiving their right as persons interested in Helvie's will to notice that the will had been admitted to probate. Three months and six days later, on February 10, 2003, Plaintiffs commenced an action in the Probate Court contesting Helvie's will.

{¶4} The complaint that Plaintiffs filed contains three claims for relief. Count I alleged that Helvie lacked the testamentary capacity required to make a valid will. Count II alleged fraud on the part of the executor, Kiernan. Count III alleged that Kiernan had converted Helvie's property to Kiernan's use and benefit.

{¶5} Kiernan filed two pleadings responsive to the complaint, one as executor and another individually. Together, her Answers denied the claims for relief in all three counts of the complaint. Concerning the fraud and conversion claims against her in Counts II and III, respectively, Kiernan asserted an affirmative defense that the Probate Court lacked jurisdiction to determine those claims for relief.

{¶6} Approximately three months after her responsive pleadings were filed, on June 9, 2003, Kiernan filed a motion to dismiss the fraud and conversion claims for relief in Counts II and III of Plaintiffs' complaint for lack of jurisdiction, asserting again the jurisdictional grounds of her affirmative defense.

{¶7} On June 17, 2003, Kiernan filed a motion to

dismiss the claim for relief in Count I of the complaint for lack of jurisdiction. She argued that the claim for relief was barred because it was not filed within three months after she certified that Plaintiffs waived their right to notice that Helvie's will was admitted to probate, a time requirement imposed by R.C. 2107.76.

{¶8} The trial court granted the motion to dismiss the fraud and conversion claims in Counts II and III of the complaint, finding that it lacked jurisdiction to determine them. The court also dismissed the claim for relief in Count I alleging a lack of testamentary capacity, because Plaintiffs' action on the claim was not timely commenced.

{¶9} Plaintiffs filed a timely notice of appeal from the trial court's order of dismissal. They argue that the trial court erred when it dismissed Count I of their complaint, which alleged that Helvie lacked the testamentary capacity to execute a valid will.

{¶10} The Probate Court did not expressly dismiss Count I for lack of jurisdiction, the defect which Kiernan alleged in her motion of June 17, 2003. Rather, the court granted the motion for the reason which Kiernan cited, that the action on the claim involved is barred by R.C. 2107.76 and therefore was not timely filed. We conclude that the court was not authorized to grant the motion for that reason.

{¶11} Subject matter jurisdiction connotes the power and authority to decide particular types of cases on the merits

and to render valid judgments therein. *Morrison v. Steiner* (1972), 32 Ohio St.2d 86. The jurisdiction of the court of common pleas and its divisions is determined by statute. Article IV, Section 4(B), Ohio Constitution; *Mattone v. Argentina* (1931), 123 Ohio St. 393. Per R.C. 2101.01, the Probate Court is a division of the court of common pleas. Therefore, proceedings in the probate court are restricted to those actions permitted by statute. *Corron v. Corron* (1988), 40 Ohio St.3d 75.

{¶12} R.C. 2107.71(A) provides that a person who is interested in a will or codicil admitted to probate, and which has not been declared valid, "may contest its validity by a civil action in the probate court in the county in which such will or codicil was admitted to probate." *Id.* The claim for relief in Count I of the complaint makes that allegation.

{¶13} R.C. 2107.71(A) is jurisdictional. Invocation of the court's jurisdiction is nevertheless restricted by a limitation of actions provision in R.C. 2107.76, which states:

{¶14} "No person who has received or waived the right to receive the notice of the admission of a will to probate required by section 2107.19 of the Revised Code may commence an action permitted by section 2107.71 of the Revised Code to contest the validity of the will more than three months after the filing of the certificate described in division (A) (3) of section 2107.19 of the Revised Code."

{¶15} Plaintiffs-Appellants do not dispute that the complaint contesting the validity of Helen L. Helvie's will which they filed on February 10, 2003, commenced the action on their claims more than three months after Kiernan filed the certificate required by R.C. 2107.19(A)(3), on November 4, 2002. Rather, Plaintiffs argue, as they did in the trial court in opposition to Kiernan's motion to dismiss, that Kiernan was barred from seeking dismissal for the reasons she alleged and on which the Probate Court relied.

{¶16} R.C. 2107.76 is, as we have said, a limitation of actions provision, barring commencement of an action invoking the subject-matter jurisdiction that R.C. 2107.71(A) otherwise confers on the Probate Court. Statute of limitations restrictions are affirmative defenses that must be specifically averred in a pleading responsive to a complaint. Civ.R. 8(C). If not so pleaded they are waived, and therefore may not thereafter be raised by written motion or at trial. *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1.

{¶17} Defendant, Kiernan, argues that the R.C. 2107.76 three-month filing requirement is jurisdictional, relying on *Barnes v. Anderson* (1984), 17 Ohio App.3d 142. We have reviewed *Barnes* and find that it was instead concerned with the effect of the savings statute, R.C. 2305.19. The court's concluding comment that the effect of the limitation of actions provision in R.C. 2741.09, which is applicable to comparable actions filed in the general division, is jurisdictional, in our view was misplaced.

{¶18} The correct view was stated in *Division of Aid For Aged v. Marshall* (1944), 42 L.Abs. 131, 59 N.E.2d 942, a decision of this court. We held that provisions of the Probate Code that impose similar time limitations on when a claim against an estate may be presented are statutes of limitation. As such, claims averring a failure to comply with that form of requirement are affirmative defenses and subject to the pleading requirements of Civ.R. 8(C), which bars motions on such claims that are filed after responsive pleadings in which the claim was not affirmatively pleaded. *Hoover v. Sumlin*.

{¶19} Kiernan did not plead the Plaintiffs' failure to satisfy the R.C. 2107.76 limitation of actions provision as an affirmative defense to the claims in Count I of Plaintiffs' Complaint in either of the two Answers she filed. Therefore, her motion of June 17, 2003, making that claim for the first time, was barred. The court was likewise barred from granting the relief the motion requested, notwithstanding the fact that the motion mischaracterized the claim as jurisdictional rather than one asserting a prohibited statute of limitation defense.

{¶20} The assignment of error is sustained. The judgment of the Probate Court dismissing Count I of Plaintiffs' complaint is reversed and the cause is remanded for further proceedings consistent with this opinion.

WOLFF, J., and YOUNG, J., concurs.

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