UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

PATRICK BARNETT, Trustee of the Patricia J. Hamman Family Trust, Plaintiff,	)	
v.	)	Cause No.: 2:14-CV-4-PRC
TAMMY MARSHALL, Defendant.	)	

OPINION AND ORDER

There are three motions before the Court: Plaintiff's Motion for Summary Judgment [DE 36], filed on March 16, 2015, Defendant Tammy Marshall's Motion for Summary Judgment [DE 39], filed on March 18, 2015, and a Motion to Strike Portions of the Affidavit of Tammy Marshall [DE 50], filed by Plaintiff on April 16, 2015. These matters became fully briefed on May 7, 2015.[1]

The Federal Rules of Civil Procedure mandate that motions for summary judgment be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Rule 56 further requires the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (citing Fed. R. Civ. P. 56(c)). "[S]ummary judgment is appropriate—in fact, is mandated—where there are no disputed issues of material fact and the movant must prevail as a

[1] The parties filed forms of consent to have this case assigned to a United States Magistrate Judge to conduct all further proceedings and to order the entry of a final judgment in this case. Therefore, this Court has jurisdiction to decide this case pursuant to 28 U.S.C. § 636(c).

matter of law. In other words, the record must reveal that no reasonable jury could find for the non-moving party." *Dempsey v. Atchison, Topeka, & Santa Fe Ry. Co.*, 16 F.3d 832, 836 (7th Cir. 1994) (citations and quotations omitted).

A party seeking summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 323; Fed. R. Civ. P. 56(c). When the nonmoving party would have the burden of proof at trial, the moving party is not required to support its motion with affidavits or other similar materials negating the opponent's claim. *Celotex*, 477 U.S. at 323, 325; *Green v. Whiteco Indus., Inc.*, 17 F.3d 199, 201 n.3 (7th Cir. 1994); *Fitzpatrick v. Catholic Bishop of Chi.*, 916 F.2d 1254, 1256 (7th Cir. 1990). However, the moving party, if it chooses, may support its motion for summary judgment with affidavits or other materials, and, if the moving party has "produced sufficient evidence to support a conclusion that there are no genuine issues for trial," then the burden shifts to the nonmoving party to show that an issue of material fact exists. *Becker v. Tenenbaum-Hill Assoc.*, 914 F.2d 107, 110-111 (7th Cir. 1990) (citations omitted); *see also Hong v. Children's Mem'l Hosp.*, 993 F.2d 1257, 1261 (7th Cir. 1993).

Once a properly supported motion for summary judgment is made, the non-moving party cannot resist the motion and withstand summary judgment by merely resting on its pleadings. *See* Fed. R. Civ. P. 56(e); *Donovan v. City of Milwaukee*, 17 F.3d 944, 947 (7th Cir. 1994). Rule 56(e) provides that "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact

undisputed for purposes of the motion [or] grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it . . . ." Fed. R. Civ. P. 56(e)(2), (3); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986). Thus, to demonstrate a genuine issue of fact, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts," but must "come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (quoting Fed. R. Civ. P. 56(e)).

In viewing the facts presented on a motion for summary judgment, a court must construe all facts in a light most favorable to the non-moving party and draw all legitimate inferences in favor of that party. *See Anderson*, 477 U.S. at 255; *Srail v. Vill. of Lisle*, 588 F.3d 940, 948 (7th Cir. 2009); *NLFC, Inc. v. Devcom Mid-Am., Inc.*, 45 F.3d 231, 234 (7th Cir. 1995). A court's role is not to evaluate the weight of the evidence, to judge the credibility of witnesses, or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. *See Anderson*, 477 U.S. at 249-50.

The material facts in this case are straightforward, and there are no significant differences between Plaintiff's and Defendant's version of events. After being thrown out of his house by his wife sometime in late 2009, Lloyd Hamman (Lloyd) moved in with his friends Defendant Tammy Marshall (Tammy) and her husband. He was treated like a grandpa, though he was not related to them. He never paid rent or helped pay for groceries or utilities. The Marshalls cooked for him, cleaned his living area, did his laundry, and even built an addition to their house so that Lloyd could have the ground-floor bedroom.

One day Lloyd overheard the Marshalls talking about buying some real estate in LaPorte,

Indiana. He offered to give them the money for the purchases as a thank you and repayment for all that they had done for him. They accepted his proposal. Lloyd then spent about $293,000 on one piece of property and around $38,000 on a second, making Tammy the sole owner of each.

Unbeknownst to Tammy, however, the money was not Lloyd's to give, but belonged to a Trust of which he was the trustee. Lloyd died a few years later, and the new trustee, Plaintiff Patrick Barnett, discovered the transfer and sued Tammy, claiming that she took her interest in the properties subject to the trust.

Both motions for summary judgement present a single issue: did Tammy exchange something of value with Lloyd for the properties he gave her, or were they simply a gift? The distinction matters because Indiana law provides that if a trustee transfers trust property to a third person in violation of the trust, the third person "takes his interest free of the trust if he: (1) takes for value and without notice of the breach of trust" and "(2) is not taking part in what he knows to be an illegal action." Ind. Code. § 30-4-4-2.[2]

Tammy testified at her deposition that Lloyd told her that the property was his "thank you for all that you have done for me." In a later affidavit, she added that he said it was a "repayment" for all that she had done for him—providing him with a home, food, laundry, and cleaning as well as a family community.

Plaintiff moves to strike this portion of affidavit under Federal Rule of Civil Procedure 56 on the grounds that parties are usually barred from creating "an issue of fact by submitting an affidavit whose conclusions contradict prior deposition or other sworn testimony." *Buckner v. Sam's*

[2] The parties contend that Indiana law applies. Federal "[c]ourts do not worry about conflict of laws unless the parties disagree on which state's law applies," and the Court therefore applies Indiana substantive law. *Auto-Owners Ins. Co. v. Websolv Computing, Inc.*, 580 F.3d 543, 547 (7th Cir. 2009).

Club, Inc., 75 F.3d 290, 292 (7th Cir. 1996) (internal citations omitted). The phrase "takes for value" means that the underlying exchange was supported by consideration. *See* Ind. Code § 30-4-4-2; Restatement (Second), Trusts §§ 284 (mirroring § 30-4-4-2); *id.* §§ 298 ("If money is paid or other property is transferred or services are rendered as consideration for the transfer of trust property, the transfer is for value."); *accord Given v. Cappas*, 486 N.E.2d 583, 591 (Ind. Ct. App. 1985). And it seems likely that Tammy submitted this affidavit to shore up deficiencies in her deposition testimony by indicating that the transfer was a payment, not a gift, but as will be seen it makes no difference.

There is no dispute that the Marshalls welcomed Lloyd into their home without any agreement for, or expectation of, payment. Generally, "[i]f a person has been benefited [sic] in the past by some act or forbearance for which he incurred no legal liability and afterwards, whether from good feeling or interested motives, he makes a promise to the person by whose act or forbearance he has benefited [sic], and that promise is made on no other consideration than the past benefit, it is gratuitous," and not an enforceable contract. *Jackson v. Luellen Farms, Inc.*, 877 N.E.2d 848, 858 (Ind. Ct. App. 2007) (quoting *Brown v. Addington*, 114 Ind. App. 404, 52 N.E.2d 640, 641 (1944)) (internal quotation marks omitted). The properties were given as a thank you to Tammy for her past acts, acts that did not impose legal liability. The "repayment" was not supported by consideration, and it was therefore not "for value."[3]

[3] *Cf. Given v. Cappas*, 486 N.E.2d 583, 591 (Ind. Ct. App. 1985) ("[T]he parent child relationship may constitute sufficient consideration to support the transfer of property." (citing 76 Am. Jur. 2d Trusts § 275)). There is no familial relationship here, however, and though Tammy suggests at points that a familial-type relationship undergirded the exchange, the Court understands her argument to be that Lloyd was repaying her for the value of the care they had provided. *See* DE 40 at 12 ("If the parent-child relationship constitutes value in this type of transfer[,] as it would be in the *Given* case, surely the relationship here where value is actually transferred would satisfy the value requirement."); *cf. Graham v. Plotner*, 151 N.E. 735, 739 (1926) (construing a similar transfer as a gift).

It might be argued that, since Lloyd continued to live with the Marshalls after he gave Tammy the properties, he was also paying for *future* benefits. But the evidence contradicts such a claim. To begin with, Lloyd used the past tense in referring to the transfer—it was his "thank you for all that you *have done* for me," it was "repayment," not payment. Consistent with this, Tammy testified that Lloyd never received anything back from her for the property.[4]

As the properties were not taken for value, but were, as Tammy testified at her deposition, a gift, her ownership of them was taken subject to the Trust, and she is therefore a constructive trustee. *See Given*, 486 N.E.2d at 591. This is not to impute any wrongdoing to Tammy, who had no knowledge of the trust. Rather, this ruling simply reflects the law's preference for the beneficiaries of the Trust over the interests of someone who received a gift. In Lord Chief Justice Wilmot's memorable phrase: "Let the hand receiving the gift be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it." *Id.* (quoting *Brennan v. Persselli*, 187 N.E. 820, 822 (1933) (quoting Lord Chief Justice Wilmot in 1 Perry on Trusts and Trustees § 211 (7th Ed.)) (internal quotation marks omitted).

For these reasons, the Court **GRANTS** Plaintiff's Motion for Summary Judgment [DE 36]. Since it turns on the same question, the Court **DENIES** Defendant Tammy Marshall's Motion for Summary Judgment [DE 39]. And the Court **DENIES as moot** the Motion to Strike Portions of the Affidavit of Tammy Marshall [DE 50]. The Court hereby enters summary judgment in favor of Plaintiff Patrick Barnett, as Trustee of the Patricia J. Hamman Family Trust, and against Defendant

[4] It is also doubtful that any reasonable factfinder would conclude that Lloyd was paying over $300,000 to Tammy for a few years' room and board. *See* Restatement (Second) of Trusts § 298 (1959) (Comment) ("The fact that the value of the consideration is insignificant as compared with the value of the trust property is evidence that the transaction was not a bargain but a gift."). But there is no need to insist on this as the evidence before the Court conclusively shows that the properties were a gift.

Tammy Marshall on the issue of liability for a constructive trust. This settles the question of liability as to this issue, but not of damages, and the Court accordingly **REAFFIRMS** the Final Pretrial Conference setting of **July 14, 2015, at 10 a.m.** (C.S.T.) and a three-day Jury Trial beginning **August 10, 2015, at 9:00 a.m.** (C.S.T.).

SO ORDERED this 2nd day of July, 2015.

s/ Paul R. Cherry
MAGISTRATE JUDGE PAUL R. CHERRY
UNITED STATES MAGISTRATE JUDGE