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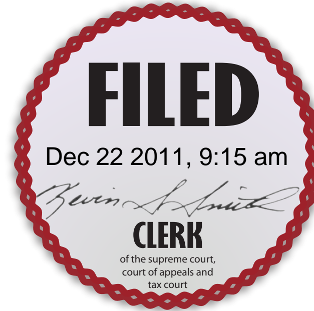

ATTORNEY FOR APPELLANT:

JOHN D. GAY
North Vernon, Indiana

IN THE COURT OF APPEALS OF INDIANA

MARY LOU DUFF,

Appellant,

vs.

SHAWN D. DUFF and REBECCA DUFF,

Appellees.

No. 40A05-1012-PL-755

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable Jon W. Webster, Judge
Cause No. 40C01-1007-PL-252

December 22, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Mary Lou Duff ("Mary Lou") filed a complaint in Jennings Circuit Court against her son, Shawn Duff, and his wife, Rebecca Duff (collectively "the Duffs") claiming that they were in possession of her personal property. Shortly after filing her complaint, Mary Lou filed a "Motion for Entry of Partial Judgment on the Pleadings and for Final Order of Possession." In response, the Duffs argued that Mary Lou's claim to the property was resolved against her in Joe Duff's Estate. After a hearing was held on her motion, the trial court concluded that Mary Lou was seeking to re-litigate the ownership of the personal property in a plenary forum after she failed to prevail in the Estate, and her motions were denied. Mary Lou now appeals and argues her complaint to recover possession of personal property is not barred under the principles of res judicata.

We affirm.

Facts and Procedural History

Joe Duff ("Joe") and Mary Lou began living together in 1970. Although they held themselves out as being husband and wife, they were never legally married. But Joe did adopt Mary Lou's son, Shawn. After Joe died on April 20, 2005, Attorney Mark Dove was initially named personal representative of Joe's estate, but Shawn was later appointed personal representative.

The Application for Letters of Administration was filed on June 13, 2005. Shawn was listed as the estate's sole heir. The estate's only significant asset was a farm, which had a mortgage of $80,000. On March 27, 2007, Shawn filed a petition to close Joe's Estate and stated that the assets had been collected, fully administered, and distributed, and that all claims had been paid, settled, or disposed.

In April 2007, Mary Lou filed a motion for declaratory judgment and motion for supervised estate. Mary Lou alleged that she was entitled to possession of certain personal property that she had inherited from her relatives or that was purchased while she resided with Joe. Mary Lou attached a twenty-two page handwritten exhibit to the motion listing the personal property that she alleged belonged to her that was located in Joe's residence.[1] Shawn moved to dismiss Mary Lou's motion for failure to state a claim pursuant to Trial Rule 12(B)(6) because she was not an heir to the estate and the time for filing claims against the estate had passed.

The parties were ordered to mediate the dispute, but mediation was unsuccessful, and the mediator issued a report on March 19, 2009. Appellant's App. p. 91. Approximately one year after the failed mediation, Shawn renewed his motion to dismiss Mary Lou's motion for declaratory judgment and supervised estate. A hearing was held on these motions on June 11, 2010. Shortly thereafter, the probate court granted Shawn's motion to dismiss Mary Lou's motion for declaratory judgment and supervised estate.

On July 16, 2010, Mary Lou filed a complaint in Jennings Circuit Court against the Duffs and alleged that they unlawfully retained her personal property, which was described in a twenty-seven page exhibit attached to the complaint. In response, Rebecca Duff sent a letter to the trial court stating that she had no interest in any items belonging to Joe's Estate. Appellant's App. p. 41. The Duffs, who alleged that they were financially unable to hire an attorney to represent them, jointly sent another letter to the trial court on August 12, 2010, in response to Mary Lou's complaint.

[1] The estate inventory listed miscellaneous household goods, but assigned a value of $0 to those items.

On August 10, 2010, Mary Lou filed a Motion for Entry of Default, which motion was not included in the record on appeal. Two weeks later, Mary Lou filed a "Motion for Entry of Partial Judgment on Pleadings and for Final Order of Possession." Appellant's App. p. 3. That same day, she also filed a motion to dismiss and motion to strike. The grounds for these motions are not known because they also were not included in the record on appeal.

A hearing was held on all pending motions on October 5, 2010. After argument of the parties, the trial court stated that it was going to review the pleadings filed in Joe's Estate and pleadings filed in prior litigation between the parties in Jennings Superior Court. The next day, the trial court issued its order on all pending motions and denied Mary Lou's 1) Motion for Entry of Default and for Final Order of Possession, 2) Motion for Entry of Partial Judgment on Pleadings and for Final Order of Possession, and 3) Motion to Dismiss and Motion to Strike. Appellant's App. p. 10. The court's order provides in pertinent part:

> 1. This Court retains continuing jurisdiction of this proceeding.
>
> ***
>
> 7. The Duffs argue that the issues of tangible personal property w[ere] resolved in Shawn Duff vs. Mary Lou Duff, Jennings Superior Court cause number 40D01-0701-SC-140 and/or The Unsupervised Estate of Joe Duff, Jennings Circuit Court cause 40C01-0506-EU-016.
> 8. The Court reviewed the 40D01-0701-SC-140 file which shows no adjudication of ownership of any tangible person property.
> 9. This Court also reviewed the 40C01-0506-EU-016 file which shows that on April 24, 2007, Mary Lou Duff, via her attorney, Charles R. Waggoner, filed a Verified Motion for Declaratory Judgment and Motion for Supervised Estate that raised the issue of ownership of personal property listed on an attached exhibit which is twenty-two (22) handwritten pages of tangible personal property. The [then] personal representative, Mark J. Dove, filed a Motion to Dismiss on April 30, 2007, and then the [successor]

> personal representative, Shawn Duff, by counsel, Sean G. Thomasson, filed a Renewed Motion to Dismiss on March 25, 2010, and after a hearing held on June 11, 2010, Special Judge Stephen R. Heimann entered an Order on Motion to Dismiss on June 16, 2010, which granted the personal representative's Motion to Dismiss.
> 10. No appeal was filed by Mary Lou Duff and no Amended Claim was filed by Mary Lou Duff.
> 11, Mary Lou Duff now seeks to re-litigate the ownership of tangible personal property in a plenary forum after having not prevailed in the Estate. This she cannot do.

Appellant's App. p. 10.

Mary Lou then moved to certify the trial court's order for interlocutory appeal, which the trial court granted on November 19, 2010. Our court accepted jurisdiction of this appeal on February 11, 2011.

Standard of Review

We initially observe that the Duffs have not filed an appellees' brief. Therefore, we will not undertake the burden of developing their arguments and may reverse upon a showing of prima facie error. Strowmatt v. Rodriguez, 897 N.E.2d 500, 502 (Ind. Ct . App. 2008). Prima facie error is defined as error "at first sight, on first appearance, or on the face of it." Id. (citation omitted).

Discussion and Decision

Mary Lou initially attempted to challenge the Duffs' ownership of the property by filing a motion for declaratory judgment in Joe's Estate. Heir and personal representative Shawn Duff moved to dismiss Mary Lou's motion for failure to state a claim pursuant to Trial Rule 12(B)(6) because she was not an heir to the estate and the time for filing claims against the estate had passed. Shawn's motion to dismiss was eventually granted,

and Mary Lou now seeks to litigate her claim to certain personal property in a plenary forum.

Indiana Code section 29-1-14-1, provides in pertinent part that all claims against a decedent's estate

> shall be forever barred against the estate, the personal representative, the heirs, devisees, and legatees of the decedent, unless filed with the court in which such estate is being administered within:
>
> > (1) three (3) months after the date of the first published notice to creditors; or
> >
> > (2) three (3) months after the court has revoked probate of a will, in accordance with IC 29-1-7-21, if the claimant was named as a beneficiary in that revoked will;
>
> whichever is later.

The term "claim" as used in section 29-1-14-1 has a restrictive meaning and refers specifically to "a debt or demand of a pecuniary nature which could have been enforced against the decedent in his lifetime." Kappel v. Kappel, 946 N.E.2d 58, 60 (Ind. Ct. App. 2011) (quotations and citations omitted).

But Mary Lou is seeking the return of certain personal property, which she alleges she owned prior to cohabitating with Joe, inherited, or purchased with her own funds during the thirty-five years of cohabitation. Therefore, Mary Lou is not making a "claim" against Joe's Estate, as that term is used in section 29-1-14-1.

Mary Lou's claim for personal property in possession of Joe's Estate is governed by Indiana Code section 29-1-14-21, which states:

> When any person claims any interest in any property in the possession of the personal representative adverse to the estate, the person **may** file, prior to the expiration of three (3) months after the date of the first published notice to creditors, a petition with the court having jurisdiction of the estate setting out the facts concerning such interest, and thereupon the court shall

> cause such notice to be given to such parties as it deems proper, and the case shall be set for trial and tried as in ordinary civil actions.

(emphasis added). The use of the term "may" renders section 29-1-14-21 permissive, not mandatory.

"Unlike the general claim statute, under which an untimely claim is forever barred, the consequence of a failure to file a timely claim under IC 29-1-14-21 is that the claimant must proceed against the distributees, rather than the estate." In re Estate of Penzenik v. Penz Prods. Inc., 749 N.E.2d 61, 64-65 (Ind. Ct. App. 2001) (citing Estate of Baker v. Lahrman, 505 N.E.2d 104, 105 n. 4 (Ind. Ct. App. 1987)); see also Estate of Verdak et al. v. Butler Univ., 856 N.E.2d 126, 135-36 (Ind. Ct. App. 2006) (holding that Butler University was not statutorily required to pursue its replevin claim directly against the Estate, and therefore, "it was permissible for Butler to advance its replevin claim against whomever it believed wrongfully possessed its property-the Defendants")

Likewise, in this case, Mary Lou is seeking return of personal property that she alleges the Duffs wrongfully possess. Pursuant to section 29-1-14-21, Mary Lou was not required to pursue her replevin claim directly against Joe's Estate.

But Mary Lou attempted to do so, and even though the probate court incorrectly determined that her claim was barred by the nonclaim statute,[2] Mary Lou chose not to appeal that ruling. The probate code does not prevent Mary Lou from pursuing a replevin claim directly against the distributees of the estate, but we must consider whether Mary

[2] Had the trial court properly considered Mary Lou's request for return of personal property in the Estate's possession under Indiana Code section 29-1-14-21, her complaint was also likely time-barred under the time limits prescribed by that statute.

Lou's prior attempt to litigate the matter in Joe's Estate renders her complaint against the Duffs barred by the principles of res judicata.

Res judicata prevents the repetitious litigation of disputes that are essentially the same where a final judgment has been rendered on the merits by a court of competent jurisdiction. See Matter of Sheaffer, 655 N.E.2d 1214, 1217 (Ind. 1995); French v. French, 821 N.E.2d 891, 896 (Ind. Ct. App. 2005). The principles of res judicata are divided into two branches: claim preclusion and issue preclusion, also referred to as collateral estoppel. French, 821 N.E.2d at 896. Collateral estoppel bars the subsequent relitigation of the same fact or issue where the fact or issue was necessarily adjudicated in a former suit and the same fact or issue is presented in a subsequent action. In re L.B., 889 N.E.2d 326, 333 (Ind. Ct. App. 2008).

Unquestionably, the instant action involves the same issue, i.e. whether Mary Lou is entitled to possession of certain personal property, as that litigated in Joe's Estate. Moreover, the same parties are involved in both actions. Consequently, we need only consider whether the probate court's dismissal of Mary Lou's complaint for declaratory judgment was a decision rendered on the merits.

In the probate court, Shawn moved to dismiss Mary Lou's motion for failure to state a claim pursuant to Trial Rule 12(B)(6) because she was not an heir to the estate and the time for filing claims against the estate had passed. The trial court granted Shawn's 12(B)(6) motion to dismiss. Dismissal of a complaint for failure to state a claim pursuant to Rule 12(B)(6) operates as an adjudication on the merits. See Ind. Trial Rule 41(B) ("Unless the court in its order for dismissal otherwise specifies, a dismissal under this

subdivision or subdivision (E) of this rule *and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction,* operates as an adjudication upon the merits." (emphasis added)); Ragnar Benson, Inc. v. Wm. P. Jungclaus Co., Inc, 352 N.E.2d 817, 820 (Ind. Ct. App. 1976) (stating "[i]t is generally considered that the entry of judgment following dismissal on the ground of failure to state a claim upon which relief could be granted constitutes an adjudication on the merits of the asserted claim barring its subsequent assertion"); Cf. Thacker v. Bartlett, 785 N.E.2d 621, 624 (Ind. Ct. App. 2003) ("A plaintiff is entitled to amend his complaint pursuant to Trial Rule 12(B)(6) and Trial Rule 15(A), or elect to stand upon his complaint and to appeal from the order of dismissal. . . . A Trial Rule 12(B)(6) dismissal becomes an adjudication on the merits only after the complaining party opts to appeal the order instead of filing an amended complaint.").

When Mary Lou attempted to litigate this issue in the Estate, although it was not barred by the nonclaim statute, she also likely ran afoul of the time limits established by Indiana Code 29-1-14-21. The probate court's Rule 12(B)(6) dismissal, which Mary Lou failed to appeal, constitutes an adjudication on the merits. Mary Lou should have pursued her replevin action in a plenary forum from the outset, but did not do so. For these reasons, we conclude that the trial court properly determined that she cannot re-litigate the ownership of the personal property in the instant cause of action. Accordingly, the trial court's October 6, 2010 Order is affirmed.

Affirmed.

BAILEY, J., and CRONE, J., concur.