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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000076-MR

DIANNE BURNS MACKEY — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTELEN, III, JUDGE
ACTION NO. 09-CI-01887

FLEM GORDON, IN HIS CAPACITY AS PUBLIC ADMINISTATOR OF THE ESTATE OF MARY BURNS JOHNSON, DECEASED — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, STUMBO, AND VANMETER, JUDGES.

MAZE, JUDGE: Dianne Burns Mackey (Mackey) appeals from a summary judgment by the Daviess Circuit Court in favor of Flem Gordon, in his capacity as Public Administrator of the Estate of Mary Burns Johnson, deceased (the Public Administrator). Mackey argues that there were genuine issues of material fact

which precluded summary judgment on the Public Administrator's conversion claim. We agree with the trial court that Mackey failed to present any affirmative evidence to refute the undisputed evidence in support of the Public Administrator's claim. Hence, we affirm.

On April 24, 2002, Mary Burns Johnson (Johnson) executed a power-of-attorney appointing her daughter, Mackey, as her attorney-in-fact. The document was a general power of attorney, but it expressly excluded the power to make gifts on behalf of Johnson. Thereafter, in January 2006, Johnson received a check for $44,827.12, which represented a tobacco buyout payment from the United States Department of Agriculture. Mackey endorsed the check on Johnson's behalf and deposited it into an account which Mackey owned and controlled.[1]

Johnson died testate on November 27, 2008, and Mackey was appointed as executrix of the estate under the will. Subsequently, Mackey was removed as executrix and the Public Administrator was appointed for Johnson's Estate. The Public Administrator filed this action on December 29, 2009, alleging two counts for breach of fiduciary duty, fraud and punitive damages arising out of Mackey's conduct while serving as Johnson's attorney-in-fact and as executrix of Johnson's Estate. The first count alleged that Mackey had converted the tobacco-buyout check and also caused additional damages by failing to pay the income

[1] There is some dispute over the exact ownership of this account. Apparently, the account was listed in the name of Mackey's daughter, but Mackey had exclusive control over it. But since Johnson had no connection to this account, any question regarding ownership of the account is not relevant to the issues presented on summary judgment.

taxes incurred by Johnson from the payment. The second count raised another allegation that Mackey wrongfully converted other property from Johnson's Estate.

On May 31, 2011, the Public Administrator filed a motion for summary judgment on the first count of his complaint. The motion asserted that there were no genuine issues of material fact that Mackey had deposited the check into her account and had converted the funds to her own use. As a result of these actions, the Public Administrator asserted that the Estate had incurred losses in the amount of the check, as well as taxes and interests on the payment in the amount of $5,974.60. In her response, Mackey admitted depositing the check into her own account, but stated that Johnson had authorized her to do so. Mackey also disputed the Public Administrator's allegation that taxes were owed on the payment.

Following a hearing, the trial court granted the Public Administrator's motion for summary judgment on this claim. Mackey filed a timely motion to alter, amend or vacate pursuant to Kentucky Rule of Civil Procedure (CR) 59.05, alleging that there were still genuine issues of material facts on the Public Administrator's claim. In the alternative, Mackey asked the trial court to designate the judgment as final and appealable. The Public Administrator filed a motion to dismiss the second count of the complaint and also to designate the judgment as final and appealable. In an order entered on December 8, 2011, the trial court denied Mackey's motion, granted the Public Administrator's motion to dismiss Count II, and designated the summary judgment as final and appealable.

The sole issue on appeal is whether the Public Administrator was entitled to summary judgment on his conversion claim against Mackey. The standard of review governing an appeal of a summary judgment is well-settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. In *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985), the Supreme Court of Kentucky held that for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Since a summary judgment involves no fact finding, this Court's review is *de novo*, in the sense that we owe no deference to the conclusions of the trial court. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

The parties agree on the elements necessary to establish the tort of conversion. The Public Administrator had the burden of proving that: (1) Johnson

had legal title to the converted property; (2) Johnson had possession of the property or the right to possess it at the time of the conversion; (3) Mackey exercised dominion over the property for her own use and benefit and in a manner which denied Johnson's rights to use and enjoy the property; (4) Mackey intended to interfere with Johnson's possession; (5) Johnson or her Estate made some demand for the property's return which Mackey refused; (6) Mackey's act was the legal cause of the Estate's loss of the property; and (7) Johnson or her Estate suffered damage by the loss of the property. *Kentucky Ass'n of Counties All Lines Fund Trust v. McClendon*, 157 S.W.3d 626, 632, *n. 12* (Ky. 2005) (*citing* 90 C.J.S. *Trover and Conversion* § 4 (2004)).

In this case, there is no dispute regarding most of the elements of conversion. Mackey admits that she deposited the tobacco buyout payment check into an account which she controlled and that she retained the proceeds. In her original answer, Mackey stated that the check was a gift from her mother. After the Public Administrator pointed out the language in Johnson's power-of-attorney, Mackey clarified this defense, stating that her mother specifically authorized her to deposit the check in her own account and keep the proceeds. Mackey argues that such proof would negate any finding that she intended to wrongfully interfere with her mother's possession of the funds.

But since there is no writing showing that Johnson authorized these actions, the Public Administrator responds that any such proof would require inadmissible hearsay. Prior to the adoption of the Kentucky Rules of Evidence, the

"dead man's statute," KRS 421.210, prohibited a person from testifying for herself "concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by ... one who ... [is] dead when the testimony is offered to be given...." KRS 421.210(2). For purposes of the statute, an individual testifies for herself if she stands to lose or gain by the direct operation and impact of the judgment in the case in which he proposes to testify. *Cox v. Venters*, 887 S.W.2d 563, 566 (Ky. App. 1994).

KRS 421.210 was repealed concurrently with the adoption of the Kentucky Rules of Evidence. Kentucky Rule of Evidence (KRE) 804 now covers exceptions to the hearsay rule where the declarant is unavailable. The rule does not expressly adopt the provisions of the dead man's statute. However, hearsay is inadmissible except as provided under the Rules of Evidence. KRE 802. In the absence of any applicable exception, the Public Administrator argues that Mackey cannot present any evidence showing that Johnson authorized her to keep the proceeds from the tobacco buyout check.

Mackey has cited no authority to show that her testimony regarding Johnson's statements would be admissible. A party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial. *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992). In the absence of any admissible evidence on this point, Mackey has not shown that there was a genuine issue of material fact for trial.

Mackey also argues that there were genuine issues of material fact concerning the Estate's damages. Although she admits that she retained the proceeds from the tobacco buyout check, Mackey asserts that she expended personal funds for her mother's benefit. She contends that these expenditures show that she did not intend to improperly deprive Johnson of any funds. However, she makes no argument how these facts would establish a legal defense to the conversion claim. Furthermore, Mackey has not asserted a claim for reimbursement for these expenditures.

Finally, Mackey asserts that she is not liable for taxes on the tobacco buyout payment because those taxes have already been paid. In support of his motion for summary judgment, the Public Administrator introduced a copy of Johnson's amended 2006 tax return, filed in 2009, reporting the tobacco buyout payment. The motion also attached a copy of a check for $5,974, representing the underpayment for 2006. In response to the motion for summary judgment, Mackey submitted her affidavit stating that she had "been advised by mother's CPA that income taxes were paid with respect to the tobacco buyout payment." She also attached a copy of the Schedule D from Johnson's 2006 tax return, which included a line reporting the tobacco buyout payment as a capital gain.

The Public Administrator has never addressed the evidence which Mackey presented in opposition to summary judgment on this issue. On the other hand, Mackey presents very little evidence in support of her assertions. There is no corroborating affidavit from Johnson's CPA stating that the income was

reported in 2006. Furthermore, the 2006 Schedule D is not accompanied by a copy of Johnson's original 2006 return showing that taxes were paid on the income. Without such affirmative evidence, the trial court had no basis to find a genuine issue of material fact on this matter. Consequently, the trial court properly granted summary judgment on the full amount claimed by the Public Administrator.

Accordingly, the summary judgment by the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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