

RENDERED: AUGUST 16, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001475-MR

DIANE SWEENEY

APPELLANT

v. APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 07-CI-00159

JAMES LUKE

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, CAPERTON, AND MAZE, JUDGES.

CLAYTON, JUDGE: Diane Sweeney appeals from the July 27, 2012, order of the Morgan Circuit Court. Said order found in favor of Sweeney in her lawsuit against James Luke, in which Sweeney alleged that Luke had improperly performed his role as Executor of the parties' father's estate. Because Sweeney's only argument

challenges a previously denied motion for summary judgment, which is interlocutory and unappealable, we affirm.

On July 17, 2007, Sweeney filed a complaint with the Morgan Circuit Court, in which she alleged that Luke had made false statements during his appointment of executor of the estate of the parties' deceased father, Harold J. Luke ("decedent"). Sweeney further alleged that she had suffered economic harm as a result of her reliance on Luke's false statements. In particular, Sweeney alleged that an estate inventory filed with the probate court contained false statements and misrepresentations of the decedent's estate and that Luke failed to properly distribute the entirety of the decedent's estate. Although Luke initially filed an answer, his participation in the lawsuit was sparse at best. On August 11, 2009, Sweeney filed a motion for summary judgment, which was subsequently denied. Thereafter, Luke failed to appear for a deposition, failed to respond to requests for admission, failed to attend a status hearing, and otherwise failed to defend the lawsuit. Sweeney filed a renewed motion for summary judgment, which was denied in an order entered on October 26, 2010.

On November 21, 2011, Sweeney filed a motion to strike Luke's answer and dismiss his counterclaim for failure to prosecute. On May 7, 2012, Sweeney filed a motion for entry of judgment. The trial court issued an order striking answer, dismissing counterclaim, and granting judgment for favor of the plaintiff, entered on July 27, 2012. Therein, the trial court determined that

Sweeney's actual damages were \$87,500.00, and granted judgment against Luke in that amount, plus costs. This appeal followed.

Sweeney's sole argument on appeal is that the trial court erred when it denied her August 29, 2009, motion for summary judgment. We disagree. Due to its interlocutory nature, a denial of a motion for summary judgment is generally not appealable. *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829, 830 (Ky. App. 2000). The exception to this rule is when "(1) the facts are not in dispute, (2) the only basis of the ruling is a matter of law, (3) there is a denial of the motion, and (4) there is an entry of a final judgment with an appeal therefrom." *Id.* quoting *Transportation Cabinet, Bureau of Highways, Commonwealth of Kentucky v. Leneave*, 751 S.W.2d 36, 37 (Ky. App. 1988). Sweeney argues that she should have been awarded summary judgment in the amount of \$109,000.00. Because the amount of damages is in dispute, the trial court's denial of summary judgment is interlocutory and unappealable. The trial court entered extensive findings in support of its \$87,500.00 award, of which Sweeney makes no challenge. This appeal is therefore without merit.

For the foregoing reasons, the July 27, 2012, order of the Morgan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

William D. Elkins
Winchester, Kentucky

BRIEF FOR APPELLEE:

No brief was filed on behalf of
appellee.

