RENDERED: NOVEMBER 1, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001529-MR

DANNY RAY KENNEDY AND
DEANNA D. KENNEDY — APPELLANTS

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 10-CI-00453

MARDELL KENNEDY;
JAMES MITCHELL DOTSON;
TINA LYNNE INGRAM; AND
MARIANNE SPEARS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: Danny Ray Kennedy and DeAnna D. Kennedy bring this appeal from a summary judgment granted by the Muhlenberg Circuit Court in a will contest case.

James G. Kennedy died on February 27, 2010. He was survived by his wife of thirty-three years, Mardell Kennedy, three natural children and three stepchildren. His will was executed four days before his death, on February 23, 2007. The will appointed Mardell as the executrix of the estate, and named her as the main beneficiary.

Two of James Kennedy's natural children, Danny Ray Kennedy and DeAnna Kennedy, filed a complaint contesting the will, naming as defendants Mardell Kennedy and the three stepchildren. The only counts of the complaint at issue in this appeal are allegations that James Kennedy lacked testamentary capacity and was subjected to undue influence in executing the will.

On February 17, 2012, the appellees filed a motion for summary judgment. The trial court heard the motion on February 27, 2012. In a final judgment entered on August 14, 2012, the counts alleging testamentary incapacity and undue influence were ordered dismissed with prejudice.

The appellants' first argument concerns the trial court's hearing the summary judgment motion less than ten days after it was filed. Kentucky Rules of Civil Procedure (CR) 56.03 requires a motion for summary judgment to "be served at least 10 days before the time fixed for the hearing." However, "[t]he ten-day requirement of CR 56.03 may be waived absent a showing of prejudice." *Equitable Coal Sales, Inc. v. Duncan Machinery Movers, Inc*., 649 S.W.2d 415, 416 (Ky. App. 1983). The trial court observed that the motion was served nine days and 22 hours before the hearing. It noted that the plaintiffs did not seek a

continuance of the hearing in order to prepare more fully; instead, they filed a detailed response addressing the substantive issues raised in the summary judgment motion. We agree with the trial court's conclusion that the ten-day requirement was waived because the appellants failed to make a request for a continuance and failed to make a showing of prejudice.

The standard of review on appeal of a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing CR 56.03). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr, Inc*., 807 S.W.2d 476, 480 (Ky. 1991).

The appellants argue that genuine issues of material fact remain regarding James Kennedy's testamentary capacity, and whether undue influence was exerted on him. Allegations of testamentary incapacity carry a high evidentiary burden: "In Kentucky there is a strong presumption in favor of a testator possessing adequate testamentary capacity. This presumption can only be rebutted by the strongest showing of incapacity." *Bye v. Mattingly*, 975 S.W.2d 451, 455 (Ky. 1998) (citations omitted). "Merely being an older person, possessing a failing memory, momentary forgetfulness, weakness of mental powers or lack of strict coherence in conversation does not render one incapable of validly executing a will." *Id*. at 456 (citation omitted).

"The essence of a claim of undue influence is that prior to or during the execution of the will, the testator was so inappropriately influenced that [he] no longer possessed the free will to dispose of [his] property in accordance with [his] own judgment." *Rothwell v. Singleton*, 257 S.W.3d 121, 124-25 (Ky. App. 2008). Because direct proof of undue influence is generally unavailable, "courts are required to examine the 'badges' of undue influence." *Id*. at 125. These "badges" include the following:

> [A] physically weak and mentally impaired testator, a will which is unnatural in its provisions, a recently developed and comparatively short period of close relationship between the testator and principal beneficiary, participation by the principal beneficiary in the preparation of the will, possession of the will by the principal beneficiary after it was reduced to writing, efforts by the principal beneficiary to restrict contacts between the testator and the natural objects of his bounty, and absolute control of testator's business affairs.

Id. (*quoting Bye*, 975 S.W.2d at 457).

The appellants' brief does not refer to any specific material facts or evidence that would support a finding of either testamentary incapacity or undue influence. The brief states only that the appellants

> strongly believe and the evidence indicates from affidavits, verified pleadings, depositions, and doctor reports and medical evidence that was available to the Plaintiffs that Mr. Kennedy suffered dementia as evidenced by doctor reports and was not able to make rational business decisions. Therefore, the Will never should have been executed. We also have the issue of Mr. Kennedy's ability to read, write and understand the written word. None of these issues were ever able to be

> presented to a jury who should decide the facts of the case and render a verdict up or down for these parties.

Furthermore, the appellants do not provide a single citation to anything in the record that supports their argument, in contravention of Kentucky Rules of Civil Procedure 76.12(4)(c)(v), which specifies that the argument must contain "ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." The record consists of two volumes comprising a total of 314 pages. There is also a DVD of courtroom proceedings, containing recordings of seven different hearings before the trial court, dating from October 25, 2010, to August 13, 2012. Although the appellants refer to depositions, there are none in the record. "It is not the job of the appellate courts to scour the record in support of an appellant['s] argument." *Dennis v. Fulkerson*, 343 S.W.3d 633, 637 (Ky. App. 2011) (citation omitted).

"[A] party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest, Inc. v. Scansteel Serv. Ctr, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). The appellants have not directed us to any affirmative evidence in the record showing that issues of material fact exist, beyond vague references to affidavits, depositions and unspecified medical reports.

Moreover, such a showing must be made in a timely fashion. Over eighteen months elapsed between the filing of the appellants' complaint and the filing of the motion for summary judgment.

> The curtain must fall at some time upon the right of a litigant to make a showing that a genuine issue as to a material fact does exist. If this were not so, there could never be a summary judgment since "hope springs eternal in the human breast." The hope or bare belief, like Mr. Micawber's, that something will "turn up," cannot be made basis for showing that a genuine issue as to a material fact exists.

Neal v. Welker, 426 S.W.2d 476, 479–80 (Ky. 1968) (citation omitted).

The summary judgment of the Muhlenberg Circuit Court is therefore affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Fred G. Greene
Russellville, Kentucky

BRIEF FOR APPELLEES:

Cary Davis
Greenville, Kentucky