RENDERED: SEPTEMBER 26, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001717-MR

MARY MINTON EITEL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 11-CI-00544

GUARDIACARE SERVICES, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL, AND STUMBO, JUDGES.

NICKELL, JUDGE: Mary Minton Eitel, *pro se*, has appealed from the Jefferson Circuit Court's August 23, 2012, opinion and order granting summary judgment in favor of Guardiacare Services, Inc. Following a careful review of the briefs, the record and the law, we affirm.

On June 1, 2006, Guardiacare was appointed emergency successor guardian of Eitel's mother, Mary Minton Cregor Eitel ("Mother"), and was appointed as permanent guardian following a hearing two days later. Over the following months, Guardiacare took steps to auction some of Mother's personal property to pay for her continued care at Episcopal Church Home. Eitel requested and received a stay of the sale of personal property alleging some of the items belonged to her rather than Mother. Guardiacare agreed to return numerous items to Eitel upon payment of the costs of the cancelled auction and an agreed order was entered to that effect. When Eitel was unable to produce the necessary funds, Guardiacare obtained permission from the district court to dispose of the personal property.

Further difficulties and litigation[1] arose between Guardiacare and Eitel in the following months regarding Mother and Eitel's contact with her. Unfortunately, Mother passed away on December 1, 2007. An estate was opened in February 2008 and a public administrator was appointed. An action was instituted in Jefferson Circuit Court by the administrator against Eitel to recover funds allegedly misappropriated from the estate. An agreement in that action resulted in Eitel's disclaiming any interest in the assets of the estate. On July 15, 2009, the estate was closed and the administrator was discharged of further duties.

[1] Although unclear from the record before us, the parties refer to multiple actions that were instituted in the district and circuit courts of Jefferson County. The record also contains a single-page order from the United States District Court for the Western District of Kentucky, Louisville Division, dismissing an action in that court, but no explanation is provided regarding the nature of the claims presented.

On January 24, 2011, Eitel filed the instant suit[2] in Jefferson Circuit Court against Guardiacare alleging multiple claims for damages related to allegedly improper and substandard care of Mother, as well as mismanagement of Mother's financial affairs. The suit also alleged Guardiacare "broke into the home belonging to Mary Eitel, (who[sic] they were never in charge of), and removed and liquidated her property. . . . Guardiacare and Billy Collins Auctions kept all the money from the sale for their own benefit." Eitel sought compensatory and punitive damages as well as a trial by jury.

On February 15, 2011, Guardiacare moved for partial dismissal of the action based on Eitel's lack of standing to prosecute claims grounded on alleged wrongs perpetrated against Mother or her estate. Eitel did not respond to the motion. The motion was submitted for final ruling on April 4, 2011, and the trial court entered an order on May 13, 2011, indicating its belief that the motion had merit and setting a show cause hearing to permit Eitel to respond. Following the June 7 hearing, the trial court dismissed all of Eitel's claims pertaining to Guardiacare's treatment of Mother and handling of Mother's financial matters, leaving only Eitel's claim regarding trespass on her real property and conversion of her personal property. The order was not challenged.

Following a period of discovery, on May 31, 2012, Guardiacare moved for summary judgment on Eitel's remaining claim. Based on documentary

[2] John J. Robbins, Jr. was also a named plaintiff in the suit. Robbins has not appealed any adverse rulings to this Court and will therefore be disregarded in this Opinion.

evidence and court orders produced in support of the motion, the trial court determined the January 25, 2007, order of the Jefferson District Court did indeed authorize Guardiacare to remove and dispose of any and all of Mother's personal property located at her residence; a subsequent order entered on March 23, 2007, directed return of certain items of property to Eitel upon her payment of $4,923.54; and upon Eitel's failure to remit payment of said sums, Guardiacare liquidated the personal property. In light of these findings, the trial court determined no genuine issues of fact remained on Eitel's sole claim and it would be impossible for her to prevail at trial. Thus, as a matter of law, Guardicare was entitled to entry of summary judgment in its favor. An order memorializing the trial court's ruling was entered on August 23, 2012, and this appeal followed.

Initially, we note that contrary to the mandates of CR[3] 76.12(4)(c)(iv) and (v), Eitel's brief before this Court contains no references to the record supportive of her arguments nor does Eitel indicate whether or how her alleged errors were preserved for appellate review. We would be well within our discretion to strike the brief or dismiss the appeal for Eitel's failure to comply with the rules. However, because of the lenity generally afforded to *pro se* litigants, we will not impose such a harsh sanction, but we will decide the issues presented based solely on the facts appearing on the face of the record.

First, Eitel contends the trial court erred in granting summary judgment in favor of Guardiacare because genuine issues of material fact existed.

[3] Kentucky Rules of Civil Procedure.

She contends irrefutable proof of ownership of the real and personal property was produced, as was evidence of Guardiacare's unlawful conversion of her personal property, thereby precluding entry of summary judgment against her. We disagree.

Summary judgment is a device utilized by courts to expedite litigation. *Ross v. Powell,* 206 S.W.3d 327, 330 (Ky. 2006). It is deemed a "delicate matter" because it "takes the case away from the trier of fact before the evidence is actually heard." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 482 (Ky. 1991). In Kentucky, the movant must prove no genuine issue of material fact exists, and he "should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Id.* The trial court must view the evidence in favor of the non-moving party. *City of Florence v. Chipman,* 38 S.W.3d 387, 390 (Ky. 2001). *Steelvest* originally held the test would include the phrase "impossible" for the non-moving party to prevail at trial. The Supreme Court of Kentucky later clarified that the word "impossible" was "used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). The non-moving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact[.]" *Chipman*, 38 S.W.3d at 390.

On appeal, our standard of review 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). Furthermore, because summary judgments do not

involve fact-finding, our review is *de novo*. *Pinkston v. Audubon Area Community Services, Inc.,* 210 S.W.3d 188, 189 (Ky. App. 2006). With these standards in mind, we turn to the allegations of error presented.

As correctly noted by the trial court, "to prevail on her claim, Ms. Eitel must prove that she had legal title to the property in question and Guardiacare unlawfully and intentionally interfered with her right to possession. *See Meade v. Richardson Fuel, Inc.*, 166 S.W.3d 55, 58 (Ky. App. 2005)." After reviewing the evidence of record, the trial court concluded Guardiacare had sufficiently shown it acted under color of law based on the numerous district and circuit court orders authorizing it to remove and dispose of Mother's personal property. It further concluded Eitel had failed to come forward with affirmative evidence to the contrary. Our review of the record reveals the trial court was correct in its conclusion.

Eitel's combined trespass and conversion claim was based on her assertion that Guardiacare had entered her home "[w]ithout a court order" and unlawfully removed her property, auctioned the property, and retained the proceeds for itself. However, the sealed documents contained in the record clearly reveal Guardiacare was, in fact, authorized to enter the residence, remove any and all personal property located therein, and dispose of those items at an auction. Although Eitel is obviously dissatisfied with the manner in which the property was obtained and disposed of by Guardiacare, the majority of her assertions of error relate to actions taken in the guardianship action prosecuted in the district court

four to five years prior to the institution of the instant action. Those actions and related orders were not appealed or otherwise challenged in a timely manner. Thus, the trial court correctly relied upon them in reaching its decision that Guardiacare had the legal right to act in the manner it did. Eitel failed to produce a scintilla of evidence indicating Guardiacare acted outside its judicially granted authority. Under the circumstances, this failure is fatal as she is clearly unable to prove the elements of her claim and it would therefore be impossible for her to prevail at trial. The trial court's grant of summary judgment was not infirm.

Next, Eitel appears to challenge the trial court's finding that she was without standing to prosecute the majority of the claims alleged in her complaint. However, our review of the record indicates that this action of the trial court was taken in May of 2011. No request for corrective action was taken, nor was an appeal prosecuted, from the order dismissing the majority of Eitel's claims. It is axiomatic that a party may not "feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321, 327 (Ky. 2010) (citations omitted)). As the trial court was not presented with this additional argument, nor given the opportunity to rule thereon, we shall not consider it for the first time on appeal. Therefore, we conclude the question is not properly before us and requires no further discussion.

Finally, Eitel urges reversal with instructions to enter summary judgment in her favor and indicates the need "to add my son to the law suit." No

such relief was sought below. Eitel, a *pro se* litigant, fails to comprehend we are a court of review, and in the absence of a request for relief and a corresponding adverse ruling by the trial court, there is simply nothing for this Court to review.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mary Minton Eitel, *pro se*
Louisville, Kentucky

BRIEF FOR APPELLEE:

Daniel E. Murner
Elizabeth Winchell
Lexington, Kentucky