

RENDERED: DECEMBER 5, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000436-MR

BETH ANN J. KLOIBER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 12-CI-05027

DANIEL KLOIBER DYNASTY TRUST;
PNC DELAWARE TRUST CO., AS TRUSTEE
OF THE DANIEL KLOIBER DYNASTY TRUST;
DANIEL JOSEPH KLOIBER; JAMES E.
HARGROVE; AND FROST BROWN TODD, LLC.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, CLAYTON, AND NICKELL, JUDGES.

CAPERTON, JUDGE: Beth Ann J. Kloiber appeals from the Fayette Circuit Court's dismissal of her claims with prejudice against the Appellees. After a

thorough review of the record, the parties' arguments, and the applicable law, we affirm the trial court.

Beth and Appellee Daniel Kloiber had been litigating an almost two-year old dissolution of marriage action in Fayette Family Court when Beth filed this action in Fayette Circuit Court.¹ At issue, Daniel's father, Glenn Kloiber, created and funded² Dynasty Trust in 2002, with the help of James Hargrove, an attorney with Frost Brown Todd, LLC. (hereinafter "FBT") at the time. The Trust was to be administered by the trustee, PNC Bank, Delaware.³ Daniel, in addition to being the beneficiary, was appointed the special trustee and had the power to control investments and distributions of the trust assets. In 2003, Daniel sold stock in Exstream Software to Dynasty Trust for \$6,000,000.00, a price which was based on a valuation by the accounting firm of Dean Dorton and Ford.

Approximately five years later, Hewlett-Packard acquired Exstream for an alleged \$720,000,000.00. Beth asserts that the stock in the trust is worth \$200,000,000.00 and that Daniel told her that the purpose of the trust was for "tax reasons." In 2012, after the dissolution of marriage proceedings had been pending for over a year, Beth alleged that Daniel's conveyance of his Exstream stock to the Dynasty Trust almost ten years prior had been a scheme to deprive her of interest

¹ According to Daniel, Beth attempted to first assert similar novel tort claims against him in family court. When the family court held the tort claims in abeyance, Beth filed this action in circuit court to assert the same claims again.

² Beth alleges that the trust was only funded with \$5,000.00 from Glenn.

³ As discussed *infra*, the Trustee is currently PNC Delaware Trust Co.

in marital property. She further alleged that FBT and Hargrove aided and abetted Daniel in the alleged scheme. While Beth has acknowledged that the “number one place for her remedy is the divorce court, to have it considered marital property,”⁴ she nevertheless filed the complaint which we have summarized:

Count I-Fraudulent Conveyance: The conveyance of the stock to the Dynasty Trust constituted a conveyance or transfer of property with the intent to defraud creditors and other persons, including Beth, and is therefore void per KRS [Kentucky Revised Statutes] 378.010. The conveyance was without valuable consideration and is void as to then existing creditors, including Beth, per KRS 378.020. Because the conveyance was void as to Beth, Beth is entitled to the have the proceeds of the stock, constituting the Dynasty Trust assets, adjudged to be property belonging to Daniel and thus subject to equitable division by the court in their divorce proceedings. Alternatively, Beth is entitled to damages against Daniel and the Trust and Trustee, jointly and severally.

Count II-Tortious Interference with Marital Property Rights: The assertion of provision 13.4^[5]of the trust agreement and the transfer of stock to the trust constituted an intentional tort by Daniel of deliberately and fraudulently interfering with the valuable marital property rights of Beth. Beth requested the trust assets be conveyed to Daniel for equitable distribution by the family court or alternatively, have damages awarded.

Count III-Breach of Fiduciary Duty: Beth asserted that by virtue of their marriage, Daniel had a fiduciary duty to Beth and he breached said duty by creating the Dynasty Trust and the transfer of stock thereto by depriving her of her marital interest in the stock and its proceeds and was entitled to damages.

⁴ See VR 2/7/2013 at 2:02:50.

⁵ This provision set forth the definition of “Grantor’s son’s wife,” and provided that Daniel was currently married to Beth and that if they were divorced, the trust shall be administered as if the Grantor’s son’s wife predeceased the Grantor’s son. The *inter vivos* and testamentary powers of appointment granted to the Grantor’s son’s wife would not be exercised.

Count IV-Constructive Trust: to remedy the wrongful tortious and fraudulent actions and breach which occurred by the Defendants' creation of the Trust, Beth requested the court to declare a constructive trust on the assets of the Dynasty Trust in favor of Beth.

Count V-Aiding and Abetting: Hargrove knew or should have known that the purpose of the trust was to defraud creditors and Beth, to deprive Beth of her marital interest and valuable marital property rights, to tortiously interfere with those rights, and would constitute a breach of fiduciary duty owed by Daniel to Beth. Hargrove took specific steps to accomplish the scheme, including advising Daniel and others as to the method of accomplishing the scheme and drafting the trust agreement. Hargrove is therefore liable to Beth and as an employee of FBT, FBT was also liable for damages.

Count VI-Civil Conspiracy: Hargrove conspired with Daniel and others to accomplish the scheme and took steps in furtherance of the conspiracy by advising Daniel and others and drafting the trust agreement. Hargrove and FBT as Hargrove's employer, were liable to Beth for damages from this conspiracy.

Count VII-Punitive Damages: The actions of Daniel, Hargrove, and FBT were done with oppression, fraud, and malice toward Beth and as such, they are liable for punitive damages.

The Appellees moved the trial court to dismiss Beth's complaint.

PNC Delaware Trust Co. argued that the court did not have personal jurisdiction based upon the complaint. Daniel argued that the tort counts failed to state claims upon which relief could be granted and were barred by the applicable statutes of limitations. FBT and Hargrove additionally argued that no facts were alleged to support the allegations against the attorneys nor did Beth explain how she could be a creditor when the trust was formed some ten years prior to the initiation of the divorce proceedings. Beth then argued that if her claims were untimely, they were

filed prematurely, not after the statute of limitations had run, due to the fact that the divorce case was still pending.

After hearing the parties' arguments, the circuit court concluded that any remedy available to Beth was in family court and the court entered an order dismissing the claims against the Appellees. Specifically, the court dismissed with prejudice the claims against FBT and Hargrove, dismissed those against PNC Delaware Trust Co. for lack of jurisdiction, and dismissed the claims against Daniel. Thereafter, Daniel timely moved the court to alter its prior order and to dismiss the claims against him with prejudice, which the court entered. It is from these orders that Beth now appeals.

On appeal, Beth argues the court erred in dismissing the claims against Attorney Hargrove and FBT. In support thereof, Beth argues: (1) the court erred in dismissing the claims against Hargrove and FBT on the merits; (2) Beth stated claims against Hargrove and FBT; and (3) the claims against Hargrove and FBT in Count VI, civil conspiracy, are not barred by the statute of limitations.

Beth next argues that the court erred in dismissing the claims against Daniel. In support thereof, Beth argues: (1) the court erred in dismissing unaccrued claims with prejudice; (2) dismissal of claims for lack of ripeness was error; (3) Count II, tortious interference with marital rights, states a claim upon which relief can be granted; and (4) Count III, breach of fiduciary duty, states a claim upon which relief can be granted. Additionally, Beth argues that the court erred in dismissing the trustee, PNC Delaware Trust Co., for lack of jurisdiction.

Daniel argues the court properly dismissed all but one of Beth's claims against him with prejudice as: (1) Kentucky does not recognize a cause of action for tortious interference with marital property rights; (2) no spousal fiduciary duty exists in Kentucky; (3) Beth's claims for constructive trust and punitive damages are remedies not causes of action;⁶ (4) the statute of limitations bars Counts II and III;⁷ and (5) alternatively the court correctly dismissed all of Beth's claims against Daniel without prejudice.

Appellees FBT and James E. Hargrove argue that the court correctly dismissed the claims against FBT and Hargrove with prejudice, as: (1) the civil conspiracy allegations are barred by the statute of limitations; (2) Kentucky does not recognize a claim for aiding and abetting a fraudulent conveyance⁸; (3) Kentucky does not recognize the tort of aiding and abetting interference with marital property rights; and (4) the claim of aiding and abetting Daniel's alleged breach of fiduciary duty against the attorneys was properly dismissed.

⁶ "[A] constructive trust arises when a person entitled to property is under the equitable duty to convey it to another because he would be unjustly enriched if he were permitted to retain it." *Terrill v. Estate of Terrill*, 217 S.W.3d 858, 860 (Ky. App. 2006), citing *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky.App.1985) (citing *Becker v. Neurath*, 149 Ky. 421, 149 S.W. 857 (1912)). We reiterate that the family court is in the best position to equitably distribute the parties' marital property. Moreover, it appears that Beth has abandoned these claims on appeal as neither her brief nor the reply brief mention constructive trust or punitive damages; thus, we decline to address this further.

⁷ The parties argue over the applicability of which statute of limitations to apply to the claims of tortious interference with marital property rights, breach of fiduciary duty, and civil conspiracy; and whether Daniel's representations regarding the trust tolled said statute of limitations. Given that we agree with the trial court in dismissing the claims on other grounds, we decline to address the arguments concerning the applicable statute of limitations.

⁸ Moreover, Hargrove and FBT argue that Beth's alleged interest in the property was only an expectation and therefore is not actionable.

Appellee PNC Delaware Trust Co. argues that Beth's claim against it was properly dismissed of lack of personal jurisdiction. With these arguments in mind, we turn to our applicable standard of review.

In ruling on a motion to dismiss, the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true. *Mims v. Western–Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. App. 2007). As such, “[t]he court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” *Pari–Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL–CIO v. Kentucky Jockey Club*, 551 S.W.2d 801 (Ky. 1977). Therefore, “the question is purely a matter of law.” *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002). Accordingly, the trial court's decision will be reviewed *de novo*. *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717, 719 (Ky. 2000). With this in mind we turn to issues presented by the parties.

First, we shall address the claims involving Daniel, as the FBT and Hargrove claims appear to be derivative thereof. Beth's first claim against Daniel for a fraudulent conveyance was premised upon KRS 378.010 and KRS 378.020. KRS 378.010 states:

Every gift, conveyance, assignment or transfer of, or charge upon, any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to delay, hinder or defraud creditors, purchasers or other persons, and every bond or other evidence of debt given, action commenced or judgment suffered, with like intent, shall be void as against such creditors, purchasers

and other persons. This section shall not affect the title of a purchaser for a valuable consideration, unless it appears that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor.

KRS 378.020 states:

Every gift, conveyance, assignment, transfer or charge made by a debtor, of or upon any of his estate without valuable consideration therefore, shall be void as to all his then existing creditors, but shall not, on that account alone, be void as to creditors whose claims are thereafter contracted, nor as to purchasers from the debtor with notice of the voluntary alienation or charge.

Beth styles herself as a creditor but has failed to explain to this Court how a spouse, ten years prior to the filing of the dissolution of the marriage, qualifies as a creditor under KRS Chapter 378, Debtor-Creditor Relations. As such, we do not find error in the trial court's dismissal of this claim.

Next, Daniel and Beth disagree over whether Kentucky recognizes a cause of action for tortious interference with marital property rights. Beth relies upon *Leach v. Duvall*, 71 Ky. 201, 1871 WL 6615(Ky. 1871), wherein the court stated:

When Mrs. Duvall married Lewis Duvall he was in possession of the one hundred and fifty acres of land conveyed to his daughters, and she no doubt believed he was the owner thereof; indeed there is no reason shown why she could doubt it; and if she married him, the land would afford them both a comfortable support during their joint lives, and if she survived him, she would be endowed of one third of all the land, unless she voluntarily parted with that prospective right, which dower interest would secure her the necessary comforts during her life. These were just and reasonable

expectations, and a conveyance of the whole or a valuable part of his estate without her knowledge, after the agreement to marry had been entered into, and upon

the eve of its consummation, must be regarded in equity as a fraud on her marital rights, and consequently not binding on her.

Leach at 204-05.

We disagree with Beth that *Leach* recognized the cause of action of tortious interference with marital property rights, as the court further ordered:

The judgment must be therefore reversed, and the cause remanded with directions to the court below to render judgment in favor of appellee, Rhoda Duvall; that said deed is a fraud on her marital rights, and so far as it might operate to deprive her of her potential right of dower in the lands therein embraced is inoperative and void; but that said grantees in said deed will be entitled to the land subject to her prospective rights aforesaid; and that each party must pay their own costs in the court below and in this court.

Leach at 205 (1871).

We must conclude that *Leach* was limited to situations involving fraud and potential dower rights, and not for adjudging property to be marital property as Beth wishes this Court to do. We concur with the trial court that such decisions are properly vested with the family court. Accordingly, we agree with Daniel that the court below did not err in dismissing this claim.

Next, the parties disagree about whether Kentucky places a fiduciary duty on a spouse in marriage. Beth relies upon *Priestley v. Priestley*, 949 S.W.2d

594 (Ky. 1997), to assert that a fiduciary duty exists between spouses due to marriage. We disagree. *Priestly* involved the fiduciary duties of a spouse who served as a guardian and an attorney in fact. We do not interpret *Priestly* as establishing a fiduciary duty between spouses simply due to their marriage.⁹ In *Priestly*, the fiduciary duties did not arise due to the marriage but instead were from the formal granting of power through the spouse's appointment to guardian and attorney in fact. This not being the case *sub judice*, the court did not err in dismissing this claim.

Given that we agree with Daniel that Kentucky does not recognize a cause of action for a spouse's breach of fiduciary duty based on marriage alone and tortious interference with a marital right based on the facts alleged, we decline to address the arguments regarding whether said claims were unripe or unaccrued. As the trial court noted, the proper recourse for Beth lies in family court and its equitable distribution of the marital property. Accordingly, we find no error in the trial court's dismissal of the claims against Daniel.

Next, we address Beth's claims against FBT and Hargrove. First, Beth alleged that FBT and Hargrove were liable for aiding and abetting Daniel's fraudulent conveyance, in his tortious interference with marital rights, and in breaching his fiduciary duty. While Beth is correct that *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 486 (Ky. 1991), states, "One who knowingly aids, abets, or joins a fiduciary in the breach of his duty in order to make a profit

⁹ The parties argue over whether this Court should be persuaded by our sister states to adopt a fiduciary duty upon a spouse simply due to marriage. We decline to so do.

becomes jointly liable with the fiduciary for such profits,” there can be no liability here as there was no fiduciary duty owed to Beth by Daniel or any other Appellee. Moreover, as we have discussed, Beth did not qualify as a creditor for the fraudulent conveyance statute and the claim for tortious interference with marital rights was properly dismissed; therefore, the derivative claim of aiding and abetting was also properly dismissed.

Beth then alleged that FBT and Hargrove were liable for their civil conspiracy. This Court addressed a civil conspiracy in *James v. Wilson*, 95 S.W.3d 875 (Ky. App. 2002):

A conspiracy is inherently difficult to prove. Notwithstanding that difficulty, the burden is on the party alleging that a conspiracy exists to establish each and every element of the claim in order to prevail. We begin our analysis with a definition of the term civil conspiracy, a topic rarely dealt with in Kentucky case law. In *Smith v. Board of Education of Ludlow*, [264 Ky. 150, 945 S.W.2d 321 (Ky. App. 1936)] Kentucky's highest court defined civil conspiracy. “As a legal term the word ‘conspiracy’ means a corrupt or unlawful combination or agreement between two or more persons to do by concert of action an unlawful act, or to do a lawful act by unlawful means.” The Supreme Court reaffirmed this definition when it again addressed the issue of conspiracy in *Montgomery v. Milam* [910 S.W.2d 237 (Ky. 1995)]. The Court emphasized that in order to prevail on a claim of civil conspiracy, the proponent must show an unlawful/corrupt combination or agreement between the alleged conspirators to do by some concerted action an unlawful act.

Our attention must then shift to determine what is meant by “concerted action.” Kentucky's highest court provided direction as to the necessary components of a conspiracy in the case of *Davenport's Adm'x v. Crummies Creek Coal Co.* [299 Ky.79, 184 S.W.2d 887

(Ky. 1945)] in which the decedent's personal representative sued a coal company alleging that a conspiracy was formed between the company and its employees to commit a wrongful act resulting in the death of an innocent party. The Court held that before a conspiracy can be found, a “necessary allegation is that the damage or death resulted from some overt act done pursuant to or in furtherance of the conspiracy.” The Court acknowledged that there is no such thing as a civil action for conspiracy, noting that the action is for damages caused by acts committed pursuant to a formed conspiracy. In the absence of such acts done by one or more of the conspirators and resulting in damage, no civil action lies against anyone since the gist of the civil action for conspiracy is the act or acts committed in pursuance of the conspiracy, not the actual conspiracy.

In *Farmer v. City of Newport*, [748 S.W.2d 162 (Ky. App. 1988)] this Court analyzed a civil conspiracy claim in the context of a product liability action. In so doing, we referenced Restatement (Second) of Torts, Section 876, relative to “concert of action”:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct separately considered, constitutes a breach of duty to the third person.

Based upon these requirements and consistent with Kentucky authority, we held that if the plaintiffs could prove that the manufacturers acted tortiously, pursuant to a common design, or rendered substantial assistance to others to accomplish a tortious act, they could maintain a viable claim based on concert of action.

Clearly, the law in Kentucky requires the actual commission of the tortious act or a concert of action where substantial assistance has been provided in order for liability to attach based on a civil conspiracy theory. In the present case, appellants have failed to produce evidence that any of the alleged co-conspirators

participated in an act in furtherance of the alleged conspiracy.

Id. at 896-98 (internal footnotes omitted). We agree with FBT and Hargrove that the civil conspiracy claim was properly dismissed as the allegations fail to show a recognized tort committed by any Appellee. Thus, there was no error in dismissing the civil conspiracy claim.

Additionally, Beth argues that the court erred in dismissing the trustee, PNC Delaware Trust Co., for lack of jurisdiction, with which PNC Delaware Trust Co. disagrees. We agree that the court properly dismissed the trustee PNC Delaware Trust Co. First, in the complaint, Beth wrongfully identified the current corporate entity as the trustee and once this was brought to light, did not move to amend the complaint.¹⁰ In the complaint, Beth stated that PNC is a Delaware corporation authorized to do business in the Commonwealth of Kentucky, but alleged no further facts to establish a *prima facie* showing of jurisdiction over an out-of-state entity. The Kentucky Supreme Court has made it clear that the plaintiff carries the burden of proof of establishing jurisdiction over the defendant:

When a lawsuit is filed in Kentucky against a non-resident defendant, the plaintiff carries the burden of establishing jurisdiction over the defendant. *Auto Channel, Inc. v. Speedvision Network, LLC*, 995 F.Supp.

¹⁰ This oversight was certainly understandable given the complex corporate changes that have occurred over the past ten years with the trustee. First, the trust instrument named as trustee PNC Bank Delaware. Thereafter, PNC Financial Services Group, Inc. acquired National City Corporation, including NatCity Trust Company of Delaware, its wholly owned Delaware limited purpose trust company. In July 2009, NatCity Trust Company of Delaware was renamed PNC Delaware Trust Company, the current trustee.

761, 763 (W.D.Ky.1997). Because the circuit court did not conduct an evidentiary hearing on the issue of personal jurisdiction in considering Robey's motion to dismiss pursuant to CR 12.02, Hinners “need only make a prima facie showing of jurisdiction.” *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir.1996) (Applying federal counterpart to CR 12.02). Hinners can meet this burden by “establishing with reasonable particularity sufficient contacts between [Robey] and the forum state to support jurisdiction.” *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 887 (6th Cir.2002) (citing *Provident Nat'l Bank v. California Fed. Savings & Loan Ass'n*, 819 F.2d 434, 437 (3d Cir.1987)). The question of whether our courts may exercise personal jurisdiction over Robey is an issue of law, and so our review is *de novo*. *Appalachian Regional Healthcare, Inc. v. Coleman*, 239 S.W.3d 49, 53–54 (Ky. 2007) (“The question of jurisdiction is ordinarily one of law, meaning that the standard of review to be applied is *de novo*.”).

Hinners v. Robey, 336 S.W.3d 891, 895 (Ky. 2011) (internal footnotes removed).

See also Berthelsen v. Kane, 759 S.W.2d 831, 832 (Ky. App. 1988) (internal citation omitted) (“In ruling on a motion to dismiss on jurisdictional grounds, the trial court, in addition to considering the material allegations in the complaint and construing them as true, is free to hear evidence regarding jurisdiction and to rule on that issue before trial, resolving factual disputes when necessary”).

Once PNC Delaware Trust Co. asserted a lack of personal jurisdiction, the trial court properly looked to the complaint and heard counsel’s arguments. PNC Delaware Trust Co. argued the complaint did not allege the trust assets were in Kentucky, no affidavits were tendered, and no evidentiary hearing on jurisdiction was requested. We agree with PNC Delaware Trust Co. that the trial

court properly concluded that such a paltry offering concerning the wrong corporate entity¹¹ in the complaint did not meet the plaintiff's burden of proof; accordingly, we find no error in the dismissal of the claims against PNC Delaware Trust Co. for lack of personal jurisdiction.

Finding no error, we affirm the trial court's order of dismissal of Appellant's claims against the Appellees.

ALL CONCUR.

¹¹ Beth presented to the trial court internet printouts concerning PNC's wealth management services, of which establishing a trust was one such service. We note that PNC does indeed offer wealth management services in some Kentucky locations and provided appropriate Kentucky-based contact information, but the website concerning PNC Delaware Trust Co. clearly listed its contact information in Delaware. Given that PNC Delaware Trust Co. is a distinct corporate entity from PNC Financial Services Group, Inc., we are unprepared to say that such printouts were sufficient to sustain Beth's burden of proof.

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