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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000075-MR

JAN M. CURRIN
AND TIM THOMAS CURRIN APPELLANTS

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND II, JUDGE
ACTION NO. 12-CI-02278

ESTATE OF JOHN C. BENTON, JR.
BY MARY M. MARCUM AS EXECUTOR APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND L. THOMPSON, JUDGES.

JONES, JUDGE: At the heart of this dispute is a house located in Boone County. Prior to his death in 2014, John C. Benton owned and operated the Benton Family Farm, located in Walton, Kentucky (the "Farm"). John and his wife, Rose Mary, built the house at issue (the "House") on the Farm in 2006. In 2010, John deeded

the House to the appellants, Jan and Tim Currin. A little over two years after the deed was executed, John filed suit against the Currins seeking to set it aside. Ultimately John prevailed, and the trial court entered a judgment and order cancelling the deed. The Currins appeal from that judgment, as well as the trial court's order denying their motion for judgment notwithstanding the verdict. Following a review of the record and applicable law, we reverse and remand.

I. BACKGROUND

John was close friends with Jan's father and had known Jan since she was born. As a result of her father's friendship with John, Jan frequently visited the Farm during her childhood. As Jan grew older and began her adult life, her contact with John and her visits to the Farm lessened; however, she and John continued to see each other at least once a year when Jan would bring her children to the Farm to pick pumpkins. The nature of John and Jan's relationship changed in 2007, following Jan's brother's unexpected death. Shortly after Jan's brother's funeral, which John attended, John reached out to Jan and requested that she come to the Farm to visit. When Jan did so, John told her that he wanted to give her five acres of the Farm. Shortly thereafter, Jan, Tim, and their children visited the Farm together and John staked off the five acres that he intended to give to Jan. From that point forward, Jan and Tim began travelling to the Farm on a regular basis,

both to socialize with John and his family and to volunteer their time to operations on the Farm.[1]

Rose Mary committed suicide in the House in April of 2010. Following this tragedy, John had difficulty residing in the House and expressed his desire to give it to the Currins and construct a new residence on the Farm for himself. In September of 2010, John had his attorney draft a quit claim deed conveying the House to the Currins. That deed indicated that John was conveying the House to the Currins "for the consideration of $1.00 and other consideration," and that the consideration reflected therein was the "full consideration paid for the property."

The parties agreed that John would continue to reside in the House until construction of his new residence was completed. John moved into his new residence in November of 2011, at which point the Currins were given the keys to the House. The Currins, however, did not move into the House at that time and, in fact, have not spent the night there since receiving the keys. While the parties take different positions as to what exactly transpired, it is undisputed that the Currins drastically decreased any communication with John and members of his family shortly after John vacated the House and gave the Currins the keys.

[1] The parties dispute how often Jan and Tim visited the Farm during this period and how much work they did when they were there; however, it is undisputed that Jan and Tim began visiting the Farm at least semi-regularly in 2007 and that they did do work while there.

In November of 2012, John filed suit against the Currins alleging failure of consideration and fraud in the inducement. In his complaint, John alleged that after Jan and Tim began volunteering on the Farm in 2007, they had repeatedly requested that they be given a stake in the Farm in exchange for their work. John alleged that he had attempted to deed the Currins a five-acre tract of the Farm in 2009 to fulfill Jan's request, but had been blocked from doing so by the Kenton County planning and zoning committee.[2] John contended that, following Rose Mary's death, Jan had persisted in her requests that she be given a portion of the Farm. Because the Currins promised him that they would help maintain the Farm and assist in his agro-tourism business, John agreed to give them the House. John alleged that the Currins had agreed that they would do everything possible to ensure that the Farm stayed in one piece and was not developed. The Currins had not fulfilled this promise, having instead "dropped out" of his life as soon as he conveyed the House to them.

The Currins responded to the complaint by filing a motion for summary judgment, which was denied. On February 11, 2013, the Currins filed an answer, counterclaim and third-party complaint. The Currins brought counterclaims of fraudulent acquisition of services, unjust enrichment, promissory estoppel, and fraudulent misrepresentation against John. In support of those

[2] The county line for Boone and Kenton counties cuts through the Farm.

claims, the Currins contended that John had induced them to work without pay on the Farm by promising to convey a five-acre tract of the Farm to them; a promise they had only recently discovered John was unable to fulfill. The Currins asserted that they would have never volunteered on the Farm if they had known that John was not going to give them the five-acre tract he had promised. The Currins alleged that they had suffered financially as a result of volunteering on the Farm, in that they had used their own vehicles to commute to the Farm from Cincinnati, Ohio, and had worked fewer hours at their full-time jobs in order to be able to volunteer. By their third-party complaint, the Currins added Benton Family Farms, Inc. and John C. Benton as the Trustee of the John C. and Rose M. Benton Trust as third-party defendants.[3] The Currins claimed that Benton Family Farms, Inc. was not authorized to perform business in Kentucky, as it operated under the name "Benton Family Farm," but had not filed a certificate of assumed name pursuant to KRS[4] 365.015. They also brought claims of unjust enrichment and fraud against Benton Family Farms, Inc. and the Trust, alleging that those entities had fraudulently misrepresented to Jan that she had an ownership interest in the Farm to induce her to perform work without pay.

[3] Based on the record, it appears that John had transferred title of the Farm to the Trust in 2001. John, Rose, and their children were trustees of the Trust. Benton Family Farm, Inc. was incorporated as a non-profit corporation in 2011.

[4] Kentucky Revised Statutes.

John passed away on May 31, 2014. On January 6, 2015, his counsel filed a motion under CR[5] 25.01 to substitute the Estate of John C. Benton, Jr. and Mary R. Marcum, as Executrix of the Estate of John C. Benton, Jr. (collectively referred to as the "Estate") as plaintiffs in the action. On January 7, 2015, the Currins filed a motion to revive their counterclaim pursuant to KRS 395.278. Both motions were granted by orders entered January 14, 2015.

The Currins filed a renewed motion for summary judgment on May 26, 2017. Following the Estate's response and the Currins' reply, the trial court denied the motion for summary judgment on August 11, 2017, concluding that material issues of fact remained. That same day, the Currins filed a motion to dismiss all of the Estate's claims against them on the grounds that those claims had not been properly revived under KRS 395.278. The Currins acknowledged that John's counsel had timely filed a CR 25.01 motion substituting the Estate as plaintiff in the action. They contended, however, that the motion to substitute had been fatally defective as it had not requested that the trial court revive the causes of action John had brought against them. The Currins contended that a party was required to file both a CR 25.01 motion and an application to revive under KRS 398.278 in order to properly revive an action and avoid dismissal. The Estate responded to the Currins' motion to dismiss on September 7, 2017. As an initial

[5] Kentucky Rules of Civil Procedure.

matter, the Estate noted that the Currins had filed the motion to dismiss after the deadline that the trial court had set for filing dispositive motions. The Estate additionally contended that KRS 395.278 was not a law relating to pleading, practice, or procedure, but rather a statute of limitations. The Estate argued that the rule of procedure required to revive an action was found in CR 25.01. The Estate had filed a motion compliant with CR 25.01 and had done so within one year of John's death as required by KRS 395.278. Accordingly, the Estate contended that there was no basis to dismiss its claims for failure to revive. The trial court agreed with the Estate's interpretation of KRS 395.278, and denied the Currins' motion to dismiss by order dated September 15, 2017.

A three-day jury trial took place over September 18, 19, and 20, 2017. Much of the testimony given concerned the amount of time the Currins spent at the Farm between 2007 and 2011 and the amount of work they performed while there. The Estate additionally offered testimony from numerous witnesses casting doubt on the close familial relationship the Currins alleged that they had with John and his family. As related to the alleged oral agreement and the transfer of the House, Jan and Tim both gave testimony denying that they had made any agreement with John in connection with him deeding them the House. Jan testified that, following Rose Mary's death, John had insisted that the Currins have the House. Jan testified that at first she had ignored John when he mentioned giving them the House, but

she had eventually acquiesced. Jan believed that John wanted to give them the House as a gift so that they would not have to commute back and forth to the Farm. While Jan acknowledged that she had told John and his daughter, Mary Marcum, that she would continue working on the Farm, she testified that doing so had not been a stipulation to her receiving the deed to the House. Jan testified that the only reason that she had not continued working on the Farm was because her mother, who has dementia, had declined in health and had moved in with her and Tim in 2011. A portion of Tim's deposition testimony was read to the jury. Therein, Tim testified that John had given the Currins the House because he wanted them to be a part of the Farm, wanted their commute to be less painful, and because he considered them family. Tim testified that he had felt like he was a part of the Farm and felt like it was his obligation and duty to help the Farm succeed. However, Tim testified that in April of 2012, he received a text message from Mary telling him that his and Jan's services were no longer needed on the Farm.

John's videotaped deposition testimony was played for the jury. He testified that he had transferred the House to the Currins because they told him that they wanted to see the Farm continue on in the future. John testified that Tim had promised that he would give 110% to help keep the Farm going, but had not fulfilled this promise. John testified that he told the attorney who drafted the deed for him that he was giving the House to the Currins as a gift in exchange for their

helping him on the Farm. He testified that it was his intent to give the House to the Currins as a gift. John stated that the oral promise was that the Currins would give 110% to the Farm, but that he did not know exactly what that meant. John testified that there was no set time-frame for the alleged oral agreement, but that it could not have been fulfilled within one year. He believed that Jan and Tim promised to take care of the Farm for the rest of their lives. Mary testified that John told her that he wanted to give the House to the Currins. Mary had talked to Jan about this, and Jan told her that if she and Tim were to continue working on the Farm, they needed to know that they had a stake in it. Mary testified that Jan told her that she wanted the House so that she did not have to drive back and forth so much. Mary testified that she initially believed Jan when Jan said that she would help to preserve the Farm in the future. However, Mary testified that after receiving the keys to the House, the Currins stopped coming to the Farm and stopped responding to her phone calls, texts, and letters.

On September 20, 2017, the jury returned a verdict finding that: John had not intended to deed the House to the Currins as a gift; John had entered into an agreement with the Currins, which the Currins had not fulfilled; and the Currins had not made a material misrepresentation to John. On October 31, 2017, the trial court entered an order and judgment in accordance with the jury's verdict. As the jury found that there had been an agreement between the Currins and John, but that

the Currins had not fulfilled that agreement, the trial court concluded there was a failure of consideration for the deed and cancelled it.

On November 2, 2017, the Currins filed a motion for judgment notwithstanding the verdict; motion to alter, amend, or vacate the judgment; and a motion to rehabilitate the verdict by operation of law. Therein, the Currins maintained their argument that the action should have been dismissed based on the Estate's failure to properly revive the claims against the Currins. Additionally, the Currins contended that because a jury had concluded that they had not committed fraud, the doctrine of unclean hands, the statute of frauds, the doctrine of merger, and estoppel by deed barred the Estate from prevailing on its claims against them as a matter of law. Further, the Currins argued that the testimony heard at trial established that any oral promise they made to John was illusory and unenforceable. They noted that, while John's testimony indicated that the Currins had promised to give him "110 %" to keep the Farm going, neither he nor any other witness had been unable to explain what exactly that promise meant, and the jury had not made any findings as to what the alleged agreement required. Additionally, the Currins contended that the way the jury had been instructed on consideration constituted palpable error. They argued that the jury should have only have been instructed on failure of consideration if it first found that the Currins had committed fraud. Finally, the Currins argued that John's testimony

had been so contradictory that it could not possibly constitute clear and convincing evidence on which the jury could base its verdict.

On January 2, 2018, the trial court entered an order denying the Currins' motions. This appeal followed.

II. ANALYSIS

The Currins raise multiple arguments on appeal as to why the trial court's orders and judgment cancelling the deed are erroneous. Ultimately, however, we need only consider one of those arguments—that the trial court erred in concluding that the Estate had properly revived John's claims against them. In concluding that the action had been properly revived, the trial court reasoned that KRS 395.278 operates only as a statute of limitations for filing a motion to substitute under CR 25.01. Therefore, because the Estate had filed a CR 25.01(1) motion within one year of John's death, the trial court concluded that there was no need for the Estate to specifically request that the action be revived. R. 456. The Currins contend that this was erroneous, as a party must file *both* an application to revive and a motion to substitute to properly revive an action. "At common law, if one of the parties died, all subsequent proceedings had without revivor were void." *Davis v. Catlettsburg-Kenova-Ceredo Water Co.*, 136 Ky. 66, 123 S.W. 335, 336 (1909). Accordingly, if the Currins are correct that the Estate failed to properly revive John's claims, all proceedings in the trial court subsequent to John's death

on May 31, 2014—including the final judgment and order entered on October 31, 2017—are void. "Whether an action has been timely revived is a matter of law." *Frank v. Estate of Enderle*, 253 S.W.3d 570, 575 (Ky. App. 2008). Therefore, we review the trial court's conclusion that the Estate properly revived the action *de novo*. *Id.*

The proper procedure to follow when seeking to revive a decedent's claim is revealed by reading CR 25.01 and KRS 395.278 in tandem. *Id.* CR 25.01 reads, in pertinent part, as follows:

> If a party dies during the pendency of an action and the claim is not thereby extinguished, the court, within the period allowed by law, may order substitution of the proper parties. If substitution is not so made the action may be dismissed as to the deceased party.

KRS 395.278 directs that "[a]n application to revive an action in the name of the representative or successor of a plaintiff, or against the representative or successor of a defendant, shall be made within one (1) year after the death of a deceased party." Thus, the Estate and the trial court are correct that KRS 395.278 is a statute of limitation, setting "the period allowed by law" in CR 25.01 as one year following the decedent's death. *See Hardin Cty. v. Wilkerson*, 255 S.W.3d 923, 926 (Ky. 2008) ("Since its inception, and through its various incarnations, the revival statute has consistently been read as one of limitation."). This does not mean, however, that reviver is accomplished simply by filing a CR 25.01 motion.

The confusion as to what is necessary to revive an action is understandable. At the outset of its discussion of reviver requirements in *Frank*, this Court stated that "[w]hen a party to litigation pending in a Kentucky court dies, the action is abated, unless and until the action is revived *by substituting the decedent's representative*." *Frank*, 253 S.W.3d at 575 (emphasis added). That statement has been repeated numerous times by this Court.[6] We acknowledge that a reading of that sentence *in isolation* would lead one to believe that reviver is accomplished "by substituting the decedent's representative." However, a further reading of *Frank*—and the cases following it—indicates that more is required to successfully revive an action: "[I]f within one year of a litigant's death an action is not revived against the administrator of a decedent's estate ***and*** the administrator substituted as the real party in interest, then the suit must be dismissed." *Frank*, 253 S.W.3d at 575 (emphasis added) (citing *Snyder v. Snyder*, 769 S.W.2d 70, 72 (Ky. App. 1989)). We additionally note that, fourteen years prior to *Frank*'s rendition, the Kentucky Supreme Court concluded that "KRS 395.278 and CR 25.01(1) require that when a plaintiff dies any action pending on the part of the deceased plaintiff must be revived by the decedent's successor or personal

[6] *See Lococo v. Kentucky Horse Racing Comm'n*, 483 S.W.3d 848, 850 (Ky. App. 2016); *Koenig v., Pub. Protection Cabinet*, 474 S.W.3d 926, 929 (Ky. App. 2015); *Hendrix v. Holbrook*, No. 2008-CA-001917-MR, 2010 WL 135122 at *1 (Ky. App. Jan. 15, 2010); *Allen v. Conner*, No. 2013-CA-000709-MR, 2014 WL 811837 at *2 (Ky. App. Feb 28, 2014); *Univ. of Louisville v. Grande*, Nos. 2014 CA-0001268-MR, 2014-CA-001527-MR, & 2015-CA-000512-MR, 2018 WL 1995958 at *1 (Ky. App. Apr. 27, 2018).

representative within one year, ***and*** the successor or personal representative must be substituted as the real party in interest." *Hammons v. Tremco, Inc.*, 887 S.W.2d 336, 338 (Ky. 1994) (emphasis added). The use of the word "and" indicates that two things must be done to revive an action: (1) a decedent's personal representative must be substituted in the action, and (2) that representative must request that the court revive the decedent's claims. Both *Frank* and *Hammons*, however, concerned situations where counsel for the decedent had not filed a motion to revive *or* a motion to substitute parties within one year of the party's death. Thus, one could reasonably argue that substituting a decedent's representative under CR 25.01 was substantially compliant with the reviver requirements.

However, this Court specifically addressed whether substituting a decedent's representative in an action, by itself, was sufficient to revive an action in *Koenig*, answering that question in the negative. In *Koenig*, the plaintiff died shortly before final judgment was entered in her declaratory judgment action. Within one year of her death, the plaintiff's estate filed a motion with this Court to substitute the estate as an appellant. This Court granted the estate's motion, but ordered the estate to show cause as to why the action should not be dismissed for failure to revive. The estate in *Koenig* argued that it had filed a motion to substitute compliant with CR 25.01, which was sufficient to revive the action.

This Court disagreed. While the Court did note that the estate's motion to substitute had referenced neither CR 25.01 nor KRS 395.278, it reiterated the "*mandatory* notice of filing *both* a CR 25.01 [motion] *and* a KRS 395.278 motion . . . ." in concluding that the estate had failed to properly revive the action. *Koenig*, 474 S.W.3d at 929 (citing *Frank*, 253 S.W.3d at 575) (emphases added).

"[T]he courts in this and other jurisdictions have held that a personal representative does not automatically succeed to the rights and status of a decedent. Rather, he is permitted, by an act of the legislature, to revive an action which dies with the decedent." *Mitchell v. Money*, 602 S.W.2d 687, 688 (Ky. App. 1980). As such, it is insufficient for a decedent's representative to simply be substituted as a party in pending litigation. The representative must additionally request that the action be revived. The record in this case reveals that the Estate never filed a motion to revive the action. Additionally, the Estate's CR 25.01 motion makes no mention of revival or KRS 395.278. Accordingly, we must conclude that the Estate failed to revive the action. Any order entered after John's passing is therefore void. *Davis*, 123 S.W. at 336.

III. CONCLUSION

In light of the foregoing, we REVERSE the order and judgment of the Boone Circuit Court entered October 31, 2017, and the order entered January 2,

2018, and REMAND.[7] On remand, the trial court is instructed to set those orders aside as void.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Charles E. Bullard
Mary G. Hayes
Ft. Mitchell, Kentucky

BRIEF FOR APPELLEE:

Marcus S. Carey
Erlanger, Kentucky

[7] "[I]n the absence of a motion to dismiss an appeal from a void judgment, we should entertain the appeal and declare such judgment void." *Epling v. Ratliff*, 364 S.W.2d 327, 328 (Ky. 1963).