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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001248-MR

BARRY P. BUCHIGNANI — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT,
HONORABLE JOHN E. REYNOLDS, JUDGE
ACTION NO. 16-CI-02329

SUSAN C. WHITE, EXECUTRIX OF
ESTATE OF SIDNEY M. CRANFILL,
DECEASED — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, KRAMER, AND L. THOMPSON, JUDGES.

KRAMER, JUDGE: Barry Buchignani appeals from an order of the Fayette Circuit Court granting dismissal of Count I of his complaint and summary judgment on Count II of his complaint to Susan White, executrix of the estate of Appellant's late stepfather, Sidney Cranfill. Upon careful review, we affirm.

Factual and Procedural Background

Sidney and Ann Cranfill married in 1972 or 1973. At the time of the marriage, both parties had children from prior relationships. Barry is Ann's natural son, and Susan is Sidney's natural daughter. Sidney and Ann remained married until Ann's death in 2007. Upon her death, Ann left a home in Naples, Florida, and the marital home in Lexington, Kentucky, to Sidney. However, Sidney's sources of income were very limited after Ann's death, and he could not afford upkeep and property taxes on two homes in addition to paying his usual monthly expenses. Barry provided Sidney with approximately $85,000.00 in cash sometime after Ann's death.[1] Barry claims that the cash was a loan and that Sidney promised to pay him back by: (1) making payments throughout his lifetime; (2) taking out a life insurance policy in the amount of $50,000.00 payable to Barry upon Sidney's death; and (3) leaving the Florida home to Barry upon his death.

Sidney passed away in January 2016. He left a life insurance policy payable to Barry in the amount of $35,140.00; however, the Florida home was left to Susan under the directive of Sidney's will. Susan was also named executrix of

[1] This is the amount claimed by Barry. Susan does not dispute the amount in her brief to this Court; however, the record before us shows that exact amount was disputed in the deposition testimony of both parties.

Sidney's estate. Barry submitted a claim to the estate for recovery of $85,000.00 plus the home in Florida. Susan denied the claim, and Barry filed the instant action in Fayette Circuit Court. His verified complaint included two causes of action: Count I, entitled "Breach of Contract and Claim Against the Estate"; and Count II, entitled "Unjust Enrichment."

Susan sought to dismiss Count I pursuant to Kentucky Rule of Civil Procedure (CR) 12.02(f) for failure to state a claim upon which relief could be granted. She argued that because Barry asserted that there was only an oral agreement between himself and Sidney regarding conveyance of the Florida home, the agreement to devise real property was unenforceable under Kentucky Revised Statute (KRS) 371.010(6) (Kentucky's Statute of Frauds). The circuit court heard oral arguments of the parties and agreed with Susan; an order was entered dismissing Count I with prejudice.

In May 2019, Susan moved the circuit court for summary judgment regarding Count II of the complaint. She argued that there could be no unjust enrichment because the transfer of funds by Barry to Sidney was a gift. Susan attached as an exhibit a handwritten letter from Barry to Sidney, the contents of which, she argued, contained repeated admissions that the money was in fact a gift. Barry filed a cross-motion for summary judgment. The circuit court heard oral arguments and entered an order granting Susan's motion for summary judgment

and denying Barry's cross-motion for same. This appeal followed. Further facts will be developed as necessary.

Analysis

Barry makes numerous arguments on appeal. He asserts the circuit court erred by: (1) granting Susan's motion to dismiss Count I pursuant to CR 12.02(f); (2) granting summary judgment in favor of Susan as to the balance of Count I; (3) granting summary judgment in favor of Susan as to Count II because the funds provided to Sidney were not a gift; and (4) failing to grant him summary judgment.

1. Count I: Breach of Contract and Claim Against Estate

We turn to Barry's arguments regarding Count I of his complaint. He first argues that the circuit court erred in granting Susan's motion to dismiss Count I pursuant to CR 12.02(f). We disagree.

"It is well settled in this jurisdiction when considering a motion to dismiss under [CR 12.02] that the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." *Mims v. Western-Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. App. 2007) (citing *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987)). Because "a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's

determination; instead, an appellate court reviews the issue de novo." *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (footnote omitted).

Reviewing the issue *de novo*, we also conclude that – even accepting the factual allegations relating to Count I as true – Barry is not entitled to relief. This is because, as Susan points out and as the circuit court concluded, Barry asserted in his complaint that there was only an *oral* agreement that upon Sidney's death, the Florida home would be conveyed to Barry. An oral agreement does not satisfy Kentucky's Statute of Frauds. KRS 371.010(6) states,

> No action shall be brought to charge any person: . . . [u]pon any contract for the sale of real estate, or any lease thereof for longer than one year . . . unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent. It shall not be necessary to express the consideration in the writing, but it may be proved when necessary or disproved by parol or other evidence.

Barry argues that a last will and testament executed by Sidney in 2006 (*i.e.*, at least one year before Barry provided the funds to Sidney) satisfies the Statute of Frauds with regard to the home in Florida.[2] This assertion is perplexing and must fail for several reasons. First, Barry did not contest the will admitted into

[2] Sidney executed a last will and testament at a later date that superseded the 2006 will. According to Susan's deposition, the last will and testament admitted into probate was executed by Sidney in 2010.

probate in his complaint filed in circuit court which left the Florida home to Susan.[3] Indeed, his complaint fails to reference the 2006 will at all. We agree with Susan that the 2006 will was outside of the pleadings at the time Susan made her motion to dismiss pursuant to CR 12.02, and the circuit court was correct to reject it. Moreover, *even if* the 2006 will had been part of the pleadings before the circuit court, it fails to satisfy the Statute of Frauds. To successfully argue that a writing satisfies the Statute of Frauds, "the real estate contemplated must be sufficiently designated or designated with such reasonable certainty as to locate it, else extrinsic evidence for the purpose of location would not be allowable." *Wheeler v. Keeton*, 242 S.W.2d 1013, 1015 (Ky. 1951). The 2006 will does not designate the Florida home to *any* beneficiary (nor is the property mentioned in the will at all) because Sidney did not own the home at the time. In fact, it designates only that Sidney's residuary estate was to be divided equally among his child and stepchildren. Clearly, the Statute of Frauds is not satisfied regarding the conveyance of the Florida home to Barry. Therefore, his argument must fail.

Barry next argues, for the first time, that the circuit court erred in dismissing "the balance" of Count I of his complaint. He now contends that Count I pertained to all sums allegedly owed to Barry by Sidney's estate, not just the

[3] *See* KRS 24A.120 and KRS 394.240.

Florida home. However, during oral arguments before the circuit court, Barry agreed that Count I pertained only to the Florida home when asked by the circuit court. Therefore, Barry's argument is not only contradicted by the record before us, it is unpreserved, and we shall not consider it.[4]

2. Count II: Unjust Enrichment

Barry argues that summary judgment was improper because the funds he provided to Sidney were not a gift. Again, we must disagree.

When a trial court grants a motion for summary judgment, the standard of review for the appellate court is *de novo* because only legal issues are involved. *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. The movant bears the initial burden of demonstrating that there is no genuine issue of material fact in dispute. The party opposing the motion then has the burden to present, "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807

[4] *See* CR 76.12(4)(c)(v).

S.W.2d 476, 482 (Ky. 1991) (citations omitted). A party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings. *Continental Casualty Co. v. Belknap Hardware & Manufacturing Co*., 281 S.W.2d 914, 916 (Ky. 1955). "If the summary judgment is sustainable on any basis, it must be affirmed." *Fischer v. Fischer*, 197 S.W.3d 98, 103 (Ky. 2006). Here, Susan filed a motion for summary judgment, followed by Barry's cross-motion for summary judgment.

We affirm the circuit court's decision to grant summary judgment to Susan with regard to Count II of Barry's complaint. Similar to the circuit court, we interpret the handwritten letter from Barry to Sidney contained in the record before us as an admission that the funds were given to Sidney as a gift. We agree with the circuit court's analysis and incorporate it herein:

> An inter vivos gift is defined as "a voluntary transfer of property by one living person to another living person, without any valuable consideration, which is perfected and becomes absolute during the lifetime of the parties." *Howell v. Herald*, 197 S.W.3d 505, 507 (Ky. 2006). The Supreme Court of Kentucky in *Howell* lists the elements of a valid inter vivos gift which are as follows: (1) a competent donor, (2) an intention on the part of the donor to make the gift, (3) a donee capable to take the gift, (4) the gift must be complete, (5) the property must be delivered and go into effect at once, and (6) the gift must be irrevocable. *Id.*
>
> In the case at hand, the letter presented as [Susan's] Exhibit A clearly demonstrates that the elements of an inter vivos gift were met in the transfer of funds from

[Barry] to [Sidney]. There is no dispute that [Barry] was competent when transferring the funds to [Sidney], thus fulfilling the first element. [Sidney] was clearly capable of taking the $85,000.00, as he did so, thus meeting the third element. The money was delivered to [Sidney], the fifth element, and the transfer was irrevocable upon completion, which was the sixth element.

Looking closely at [Susan's] Exhibit A letter, [Barry] repeatedly states his intentions to give the money to [Sidney] while expecting nothing in return. [Barry] writes, "I gave you the money [Ann] left me, I didn't ask you for anything in return." (Letter, at 1). He goes on to repeat, "I never asked you for anything," and states, "I gave you that money out of love and nothing else." (*Id.* at 2). While [Barry] presents affidavits of witnesses disputing the perception that the transfer of funds was a gift, these statements in the letter written by [Barry] himself clearly refute that notion and demonstrate [Barry's] intentions in gifting the money to [Sidney], thus fulfilling the second element of an inter vivos gift.

Finally, the fourth element of an inter vivos gift was met immediately upon the transfer of the funds. [Barry] plainly repeats in his letter, "I didn't ask you for anything in return," indicating that there were no expectations by either party to initiate some means of repayment. *Id.* Without any further expectations, the gift was complete.

All of the elements of an inter vivos gift being met, the unjust enrichment claim by [Barry] fails due to the nature of the transaction. The Kentucky Court of Appeals has stated that unjust enrichment "is a legal fiction invented to permit recovery where the law of natural justice says there should be a recovery as if promises were made." *Perkins v. Daugherty*, 722 S.W.2d 907, 909 (Ky. App. 1987). In the case at hand, where a gift is given without fraud, mistake, duress, or undue influence present, there is no inequity to allow recovery as if promises were made. The unjust

> enrichment claim fails due to the transaction being a completed gift.

We further note that the letter states, "I never asked for anything, but I did say keep me in mind for the house in Florida if anything happens to you. I told you I'd love to live there." Barry argues that his deposition contained in the record before us puts the letter into context and demonstrates that the funds were not in fact a gift. We disagree. Although Barry disagreed that the funds were a gift to Sidney, his testimony fails to contradict the admissions in the letter. We are also unpersuaded by Barry's argument that an alleged partial repayment by Sidney during his lifetime is evidence that the funds were not in fact a gift.[5] This argument is inapplicable to Barry's unjust enrichment claim because "[t]he doctrine of unjust enrichment has no application in a situation where there is an explicit contract which has been performed." *Codell Const. Co. v. Commonwealth*, 566 S.W.2d 161, 165 (Ky. App. 1977) (citation omitted). We agree with Susan that the very nature of an unjust enrichment claim concedes that no enforceable contract exists. Accordingly, we discern no error. Susan was entitled to summary

[5] Barry asserts that Sidney repaid him $10,000.00 of the funds owed. However, his own deposition testimony contradicts this because he testified that Sidney actually loaned the money to Barry to prevent Barry's home from going into foreclosure. The circuit court did not make a finding regarding the nature of the $10,000.00 payment from Sidney to Barry, presumably because it is inapplicable to Barry's claim for unjust enrichment.

judgment, and Barry's cross-motion for summary judgment was not warranted under the facts of this case.

Conclusion

In light of the foregoing, we AFFIRM the judgment of the Fayette Circuit Court granting summary judgment to Susan.

ALL CONCUR.

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