STATE OF MICHIGAN

COURT OF APPEALS

In re BARBARA HROBA Trust.

LUANN HROBA,

Petitioner-Appellee/Cross-Appellant,

v

GARY HROBA,

Respondent-Appellant/Cross-Appellee.

UNPUBLISHED
October 16, 2008

ON REMAND

No. 266783
Oakland Probate Court
LC No. 2004-294178-TV

Before: Bandstra, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

This case is on remand from the Supreme Court to address the remaining issues raised on appeal.[1] We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

Respondent alleged that the lower court erred in failing to hold that the petition was an impermissible collateral attack on the rulings of the district court that were not appealed by the trust. However, review of the brief on appeal reveals that this argument is merely a restatement of the res judicata argument that was rejected by the Supreme Court.[2] Respondent failed to cite authority addressing collateral attacks,[3] and a statement of position without citation to authority is insufficient to raise an issue before this Court. *Sherman v Sea-Ray Boats, Inc*, 251 Mich App 41, 57; 649 NW2d 783 (2002). Moreover, the underlying district court action involved summary proceedings for possession. As part of a statutory framework for summary proceedings for

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[1] *Hroba v Hroba*, 480 Mich 1191; 747 NW2d 266 (2008).

[2] *Hroba v Hroba*, 480 Mich 1059; 743 NW2d 910 (2008).

[3] Case law generally applied "collateral attacks" in the criminal area and defined the doctrine as a "challenge raised other than by initial appeal of the conviction in question." *People v Ward*, 459 Mich 602, 608; 594 NW2d 47 (1999) (Citation omitted).

recovery of possession of premises, MCL 600.5701 *et seq.*, the Legislature has provided, in pertinent part, as follows:

> The remedy provided by summary proceedings is in addition to, and not exclusive of, other remedies, either legal, equitable or statutory. A judgment for possession under this chapter does not merge or bar any other claim for relief . . . . The plaintiff obtaining a judgment for possession of any premises under this chapter is entitled to a civil action against the defendant for damages from the time of . . . notice to quit or demand for possession . . . . [MCL 600.5750.]

In *JAM Corp v AARO Disposal, Inc*, 461 Mich 161, 168-169; 600 NW2d 617 (1999), the Supreme Court advised that, through these enactments, the Legislature, intending to provide for expeditious summary proceedings for possession of property, "took [such] cases outside the realm of the normal rules concerning merger and bar in order that attorneys would not be obliged to fasten all other pending claims to the swiftly moving summary proceedings." In light of the above, this argument is without merit.

Respondent next alleges that the probate court erred in holding that the challenged amendment was invalid. We disagree. The construction and interpretation of the language used in a will or trust presents a question of law subject to de novo review. *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005); *In re Bem Estate*, 247 Mich App 427, 433; 637 NW2d 506 (2001). The language of the trust provided that any amendment must be in writing, signed by the settlor, and delivered to the trustee, and also that any exercise of a power of amendment substantially affecting the trustee's rights or obligations would be effective on the trustee only if agreed to by that trustee in writing. The court recited that, after discussions between the settlor and respondent concerning the latter's wishes for occupancy of the subject property, the settlor's attorney instructed petitioner to insert the amendment at issue into her copy of the trust. However, the court noted that, despite these machinations, the settlor never signed the amendment. The court thus concluded that the amendment was not valid.

Respondent protests that the probate court should not have arrived at such conclusions without an evidentiary hearing. However, respondent nowhere asserts that the challenged amendment was signed and otherwise executed according to the trust's original terms, nor points to any evidence of a signed amendment. Because no signed amendment had been submitted or offered to the probate court, that court did not err in concluding from the record before it that the amendment was not properly executed. *Reisman, supra*.

Nonetheless, respondent insists that the probate court should have barred petitioner from challenging the validity of the amendment through operation of judicial estoppel. Under that doctrine, "'a party who has *successfully* and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.'" *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994) (Citation omitted, emphasis in original). However, this issue is not preserved for appellate review where the probate court did not address the issue of judicial estoppel because respondent did not invoke the doctrine. Respondent argued that petitioner had changed positions and was thus pleading new facts known to her in the earlier litigation, but did so entirely under the rubric of res judicata. Again, in connection with summary proceedings for recovery of possession of premises, res judicata bars relitigation in later actions of matters actually litigated in the summary proceedings.

Jam, supra. The Supreme Court held that the validity of the amendment to the trust was not in fact litigated in the summary proceedings. *Hroba v Hroba*, 480 Mich 1059; 743 NW2d 910 (2008). Res judicata thus had no preclusive effect in this regard in the probate court. Therefore, we hold that the probate court properly reached the issue and decided it correctly.

Next, respondent contends that the probate court erred in requiring that respondent reimburse petitioner for the renter's insurance she had obtained for the subject property. We agree. The district court had held that respondent was not a renter because he instead had an estate *pur autrie vie*. But the district court was presuming the validity of the disputed amendment to the trust, which the probate court properly determined to be invalid. Stripping respondent of his estate *pur autrie vie* does not itself transform him into a renter, however. There was no lease and no demand to pay rent until January 1, 2004. From the death of the settlor until that time then, respondent was a tenant at sufferance.[4] Further, because no agreement for rent has existed, and because respondent refused to pay rent after it was demanded, he remained a tenant at sufferance. It is questionable whether such a tenant has an insurable interest in the property for purposes of renter's insurance.

At common law, a tenant at sufferance is normally liable to pay reasonable rent for the duration of that tenancy according to market value. See *Durda v Chembar Dev Corp*, 95 Mich App 706, 714; 291 NW2d 179 (1980). However, a tenancy at sufferance can exist where there is no obligation to pay rent. See *Felt v Methodist Educational Advance*, 251 Mich 512, 517; 232 NW 178 (1930). Because respondent has never been a renter, the procurement of renter's insurance for the property was gratuitous.

Moreover, given that the amendment conditioning respondent's continuing residency on his providing the needed insurance was invalid, this left petitioner, as the trustee, alone responsible for insurance. See *Hunt v Hunt*, 124 Mich 502, 505-506; 83 NW 371 (1900) ("the trustees . . . alone have the right of possession [and] the legal duty to pay the taxes, and to protect and care for the property. . . . They cannot surrender the trust to [a beneficiary]"). Further, the Estates and Protected Individuals Code[5] declares that, "except as otherwise provided in the trust instrument," the trustee has the power to "insure the trust property against damage, loss, or liability. . . ." MCL 700.7401(2)(p).

The probate court stated, "Pursuant to EPIC and Hunt, the Trustee was under a duty to insure the property; therefore, the Respondent should reimburse the Trust for expenses incurred for being forced to securing insurance on the premises while the Respondent resided in the residence." It is a contradiction to recognize petitioner's duty to provide the insurance, then require respondent to reimburse her for it. This is especially so because, as noted, petitioner obtained renter's insurance, and respondent was never a renter. Therefore, we reverse this aspect of the probate court's decision.

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[4] A tenancy at sufferance arises when a tenant comes rightfully into possession of land by permission, but holds over after termination of the permitted use. See *Pattison v Dryer*, 98 Mich 564, 565-566; 57 NW 814 (1894).

[5] MCL 700.1101 *et seq.*

Respondent next argues that the probate court erred in ordering him to pay $1,000 per month in rent to live on the subject property, because the court merely accepted petitioner's representations in the matter, making no further inquiry into the reasonableness of that amount.

However, respondent did not challenge the reasonableness of the amount below, instead arguing that he was entitled to live at the property rent-free. The lack of any challenge based on reasonableness below leaves this issue unpreserved, and thus subject to review only for plain error affecting substantial rights. See *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Because the amount demanded was not obviously excessive, as if maliciously or only symbolically demanded, respondent's complete failure to argue reasonableness as an alternative to his position that he owed nothing, or perhaps to pay what he thought was reasonable into escrow while the dispute was pending, left respondent, upon failing to prevail on his theory that he owed no rent, liable to the trust for the amount petitioner demanded.

Lastly, on cross-appeal, petitioner asserts that the probate court erred in failing to hold respondent liable for back rent dating from when rent was first demanded.

The probate court, with no explanation, ordered respondent to begin paying rent as demanded by petitioner, but only from the date of its order forward. Petitioner, on cross appeal, argues that the court should have awarded back rent dating from January 1, 2004, when petitioner first began demanding rent. It is questionable why petitioner, having vindicated her reading of the trust as authorizing her to charge, and thus requiring respondent to pay, rent in this instance did not result in an award of back rent from the date petitioner first demanded it.

Respondent defends this aspect of the decision below, first, on the ground that no rent was ever due and, alternatively, on the ground that respondent has been ordered to reimburse petitioner's insurance costs, and that "[t]he Trust cannot collect rent and also expect the 'tenant' to pay property taxes, insurance and all utilities." However, respondent has argued, successfully that he should not be obliged to reimburse petitioner for the latter's renter's insurance policy. Further, taxes, insurance, or any utilities not compatible with a rental arrangement are an issue apart from the obligation to pay rent itself. Accordingly, we reverse and remand for a determination of this issue. On remand, respondent is free to argue that certain expenses he bore on behalf of the subject property while he was living there under the assertion that he owed no rent should, in those amounts, offset his back rent obligation.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood