STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of JOHN V. PLASSMAN, Deceased.

Estate of JOHN V. PLASSMAN,

Petitioner-Appellee,

v

CORRIE KETTLER,

Respondent-Appellant.

UNPUBLISHED
April 30, 2009

No. 280113
Wayne Probate Court
LC No. 2005-685980-DE

Before: Murray, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

Respondent appeals as of right a probate court order imposing on her a surcharge in the amount of $222,331. We affirm.

Shortly after decedent John V. Plassman's death on November 16, 2004, respondent, his niece, became the personal representative of the decedent's estate. The decedent's father, Robert F. Plassman, had died earlier in 2004, leaving a widow, Marilyn L. Plassman, and three sons, all of whom were identified as beneficiaries of the Robert F. Plassman Amended & Restated Living Trust. Sometime before mid-November 2004, D. James Barton, the attorney who drafted Robert Plassman's trust documents, prepared a "Partial disclaimer" of interests held by Marilyn Plassman and her three sons in a portion of Robert Plassman's trust. On November 12, 2004, Barton notarized the disclaimer signatures of Marilyn Plassman and two of her sons, Robert and Donald. Although a disclosure signature also appeared over the decedent's typed name, later investigation revealed that the decedent's name had been forged after his death.

In April 2006, the probate court appointed a successor personal representative of the decedent's estate. The parties subsequently disputed the validity of respondent's final accounting on behalf of petitioner, and some discovery took place. In May 2007, petitioner filed a motion for summary disposition pursuant to MCR 2.116(C)(10), seeking a declaration as a matter of law that respondent had breached her fiduciary duties and engaged in various negligent conduct, and requesting an order surcharging respondent "in the amount of loss the estate has

incurred as a result of her breach, malfeasance, misfeasance and/or nonfeasance."[1] Petitioner attached to its motion requests for admission, in which respondent conceded that the decedent had never signed the November 12, 2004 partial disclaimer, and that "the signature on page two of the Partial Disclaimer is not the *authentic signature* of John V. Plassman." (Emphasis in original). Petitioner also attached deposition testimony by respondent, in which she repeatedly asserted her Fifth Amendment right against self-incrimination in refusing to answer questions about her performance as petitioner's personal representative.

At a summary disposition hearing, the probate court found "that the inferences requested can be made against [respondent], in relation to . . . . her refusal to answer those questions in the civil deposition," and that "[t]he $222,331 that was disclaimed from the Estate was removed from this Estate pursuant to an invalid disclaimer, and therefore that is to be returned to this Estate." The probate court deemed the $221,331 "a surcharge against [respondent] individually." In July 2007, the probate court entered an order of surcharge that provided in pertinent part as follows:

> 1. IT IS HEREBY ORDERED that an adverse inference can and should be drawn against [respondent] upon refusing to respond or answer in regard to her actions as fiduciary.
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> 2. IT IS HEREBY ORDERED that the court has granted the motion for summary disposition in part, accordingly, [respondent] is found liable for breach of her fiduciary duty and surcharged only as to:
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> (a) $222,331.00 which represents the amount removed from the estate by a disclaimer invalid as to John V. Plassman's signature; should this amount be placed in the Estate from any other source, this liability is relieved. . . .

Respondent contends on appeal that the probate court improperly surcharged her in the amount of $222,331 "without holding an evidentiary hearing or allowing any evidence as to the damage suffered by the Estate because of the Disclaimer." We review de novo the probate court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, *supra* at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, *supra* at 183.

[1] The motion contained other allegations and requested additional relief not at issue in this appeal.

At the summary disposition hearing, respondent conceded that she "is not in a position to argue that . . . the signature of John Plassman is John Plassman's. And as to liability, whatever that is, she's not in a position to make any arguments." Petitioner presented evidence that under Article III(5)(d) of the Robert Plassman Trust, on Marilyn Plassman's death "the Trustee shall divide the balance of the body or corpus of the trust property and estate into separate shares of equal value, creating one such share for each child of [Robert], who shall then be living . . . . Distribution shall be outright to [Robert's] surviving children." Petitioner also observed that pursuant to Michigan's Disclaimer of Property Interests Law, MCL 700.2901 *et seq*., Marilyn Plassman's disclaimer "acts as a nonacceptance of the disclaimed interest," § 2909(2), and that under § 2908(1), "If a disclaimed interest arises out of joint property created by a governing instrument, testamentary or nontestamentary, the following apply: . . . (b) If the disclaimant is not the only living owner, the disclaimed interest devolves to the other living joint owners equally or, if there is only 1 living owner, all to the other living owner." Given that the decedent undisputedly did not sign the November 12, 2004 partial disclaimer that his mother and other brothers signed, under the terms of the Robert Plassman Trust and the Disclaimer of Interests Property Law the decedent, who was alive on November 12, 2004, as a matter of law became vested with a one-third interest in family trust property when Marilyn Plassman signed the disclaimer. Article III(5)(d).

With respect to petitioner's claimed damages amounting to $222,331, petitioner offered in support of this amount an October 2006 letter authored by Harold Fisher, C.P.A., in which he identified an Internal Revenue Service determination that "based on the disclaimer, $666,994 of the Trust B assets have been disclaimed by Marilyn Plassman and Robert Plassman's three sons," and observed that "assuming there would be no change in the valuation of the assets currently proposed by the IRS, the gross amount allocated to John Plassman would only be $222,331 ($666,994/3)." Although Fisher's letter characterized the $222,331 amount as "overstated because there are significant estate expenses . . . not yet included in the IRS calculations and we believe there are still valuation adjustments yet to be made," respondent's counsel conceded at the June 20, 2007 summary disposition hearing that petitioner's portion of the amount arising from the disclaimer was $222,331. Respondent's counsel acknowledged at oral argument before this Court that petitioner had presented to the probate court evidence establishing that its portion of the Robert Plassman trust property wrongfully disclaimed by respondent totaled $222,331. Moreover, although respondent had ample opportunity to respond to petitioner's motion for summary disposition, respondent presented no documentary evidence giving rise to a material question of fact that the amount of petitioner's asserted share of the disclaimed property constituted a specific number other than $222,331. *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006) (citing MCR 2.116(G)(4) for the proposition that a nonmoving party must offer "[a]ffidavits, pleadings, depositions, admissions, or other documentary evidence . . . to survive summary disposition"). Because the only amount ever presented to the probate court as wrongfully disclaimed by respondent was $222,331, despite that respondent had the opportunity to and did in fact respond to the summary disposition motion while presenting no conflicting evidence of damages, we find that the probate court properly held as a matter of law pursuant to MCR 2.116(C)(10) that respondent breached her fiduciary duties in a manner that cost petitioner $222,331. *Coblentz*, *supra* at 569; see also *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003) (rejecting the plaintiff's "invitation to consider events that occurred after the summary disposition motion was decided" because this Court "must limit our

review to the evidence presented to the trial court at the time . . . [a summary disposition] motion was filed").

Respondent also maintains on appeal that instead of surcharging her for petitioner's share of the wrongfully disclaimed property, the probate court should have imposed a constructive trust on the funds, which were improperly transferred to the Robert Plassman Estate. "A probate court's decision whether to surcharge a personal representative or a trustee is . . . reviewed for an abuse of discretion." *In re Duane V Baldwin Trust*, 274 Mich App 387, 397; 733 NW2d 419, aff'd on other grounds 480 Mich 915 (2007); *In re Thacker Estate*, 137 Mich App 253, 264; 358 NW2d 342 (1984).

Several provisions of the Estates and Protected Individuals Code plainly contemplate the imposition of personal liability on a personal representative who violates standards governing estate and trust administration:

> (1) A fiduciary is liable for a loss to an estate that arises from embezzlement by the fiduciary; for a loss through commingling estate money with the fiduciary's money; for negligence in the handling of an estate; for wanton and willful mishandling of an estate; for loss through self-dealing; for failure to account for an estate; for failure to terminate the estate when it is ready for termination; and for misfeasance, malfeasance, nonfeasance, or other breach of duty. [MCL 700.1308.]
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> (1) A personal representative is a fiduciary who shall observe the standard of care applicable to a trustee as described by section 7302. A personal representative is under a duty to settle and distribute the decedent's estate in accordance with the terms of a probated and effective will and this act, and as expeditiously and efficiently as is consistent with the best interests of the estate. The personal representative shall use the authority conferred by this act, the terms of the will, if any, and an order in a proceeding to which the personal representative is party for the best interests of claimants whose claims have been allowed and of successors to the estate.
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> (2) A personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. . . . [MCL 700.3703.]
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> If the exercise or failure to exercise a power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of fiduciary duty to the same extent as a trustee of an express trust. . . . . [MCL 700.3712.]

Here, the parties agreed that respondent violated her duties as petitioner's personal representative by permitting the disclaimer of petitioner's interest in a portion of estate assets; as mentioned above, according to the evidence presented to the probate court, the loss petitioner incurred amounted to $222,331. Because respondent undisputedly breached her fiduciary duty to petitioner, and the EPIC unambiguously provides for the imposition of personal liability for her breach, we conclude that the probate court did not choose a disposition falling outside the range

of principled outcomes when it decided to surcharge respondent in the amount of $222,331—even were we to assume that a constructive trust qualified as another potential remedy in this case. *In re Baldwin Estate*, *supra* at 397.[2]

Affirmed.

/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

[2] Respondent cites only *In re Cain Estate*, 147 Mich App 615; 382 NW2d 829 (1985), for the proposition that "the remedy where the personal representative makes the wrong decision in good faith is not ordinarily removal, but rather intervention by the court to correct the error, or, if the error cannot be satisfactorily corrected, to surcharge the personal representative." *Id*. at 621. Unlike the factual scenario in *Cain*, however, no evidence in this record tends to substantiate that respondent's forgery constituted a good faith mistake.