NO. COA06-14

NORTH CAROLINA COURT OF APPEALS

Filed: 17 October 2006

THELMA COSTON MASON, And her children, ROBERT M. MASON, JR. CHERYL MASON and CYNTHIA MASON TIMMONS,
Plaintiffs,

v.

Duplin County
No. 04 CVS 307

TURNER DAVIS COSTON (SENIOR) and his daughter, RACHEL Y. COSTON,
Defendants.

Appeal by defendants from order entered 14 July 2005 by Judge W. Allen Cobb, Jr., in Duplin County Superior Court. Heard in the Court of Appeals 21 September 2006.

Ingram & Ingram, by Charles M. Ingram, for plaintiff appellees.

Hale and Harrell, by R. Kent Harrell, for defendant appellants.

McCULLOUGH, Judge.

Defendants appeal from an order entered granting summary judgment declaring defendants' quitclaim deed void *ab initio* and determining that defendant Rachel Coston breached her fiduciary duty to Samuel Bert Coston pursuant to a power-of-attorney and determining that there was no genuine issue of material fact. We affirm the order of the superior court.

FACTS

Samuel Coston drafted a will executed on 20 December 2002 containing his intentions to divide his estate after his death by devising a 9.82-acre tract of land in Duplin County, North Carolina, to Thelma Coston Mason and her children (hereinafter "plaintiffs"). Defendant Rachel Coston was named as executor of the estate.

On 4 September 2003, Samuel Coston appointed Rachel Coston as his attorney-in-fact and the documents conferring such powers were recorded with the Duplin County Register of Deeds. The power-of-attorney generally conferred on Rachel Coston the power to act in Samuel Coston's name and stead in matters regarding real property and personal property transactions along with other named affairs. Thereafter, on 8 September 2003, Rachel Coston, as attorney-in-fact for Samuel Coston, transferred a 9.82-acre tract located in Teachey, North Carolina, to her father, defendant Turner Davis Coston, Sr., by quitclaim deed for the recited consideration of $10.00 and "other good and valuable consideration[.]" The day after the quitclaim deed was drafted pursuant to the power-of-attorney, Samuel Coston passed away. Thereafter, Rachel Coston recorded the deed to the 9.82-acre tract of land with the Duplin County Register of Deeds on 15 September 2003. At the time of recordation, there were no real estate excise tax stamps affixed;

however, the property records indicated that the land had a value of $73,500.00.

On 14 April 2004, plaintiffs filed suit against Turner Davis Coston and Rachel Coston alleging breach of fiduciary duties, fraud, constructive fraud, civil conspiracy, and seeking a declaratory judgment to have the quitclaim deed drafted by Rachel Coston through her power-of-attorney declared void. Subsequently, on 31 May 2005, plaintiffs brought forth a motion for partial summary judgment on the issues of breach of fiduciary duty and the issuance of a declaratory judgment deeming the deed void.

On 24 August 2005 the superior court entered an order granting plaintiff's motion for partial summary judgment as to plaintiff's first two claims for relief, declaring the quitclaim deed void and Rachel Coston to have breached her fiduciary duty.

Defendants now appeal.

ANALYSIS

Defendants contend on appeal that the trial court erred in granting summary judgment in favor of plaintiffs where there was a genuine issue of fact and plaintiffs were not entitled to judgment as a matter of law. Specifically, defendants contend that the trial court erred in declaring the quitclaim deed void *ab initio* and declaring that defendant Rachel Coston breached her fiduciary duty to Samuel Coston. We disagree.

We first note that on an appeal from a grant of summary judgment, this Court reviews the trial court's decision *de novo*. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513

S.E.2d 572, 574 (1999). Granting summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005); *Petty v. Owen*, 140 N.C. App. 494, 497, 537 S.E.2d 216, 218 (2000).

Quitclaim deed

Defendants contend on appeal that the trial court erred in voiding the deed executed by Rachel Coston as attorney-in-fact, conveying the 9.82-acre tract of land and home thereon to Turner Coston where there was a genuine issue of material fact as to whether the deed was supported by valuable consideration. We disagree.

It is well settled that "'"an attorney-in-fact acting pursuant to a broad general power of attorney lacks the authority to make a gift of the principal's real property unless that power is expressly conferred . . . ."'" *Estate of Graham v. Morrison*, 156 N.C. App. 154, 158, 576 S.E.2d 355, 358 (2003)(quoting *Whitford v. Gaskill*, 345 N.C. 475, 478, 480 S.E.2d 690, 692, *amended on allowance of reh'g*, 345 N.C. 762, 489 S.E.2d 177 (1997)). The North Carolina Supreme Court noted in *Whitford*, that while a general power-of-attorney authorizes an agent to sell and convey property at a price and on terms that he or she may deem proper, it also "'implies a sale for the benefit of the principal, and does not authorize the agent to make a gift of the property, or to convey or

transfer it without a present consideration inuring to the principal.'" *Whitford*, 345 N.C. at 477, 480 S.E.2d at 691 (citation omitted). Such a notion is founded on the principle that an attorney-in-fact is presumed to act in the best interest of the principal and that gifting is inherently adverse to the interest of such principal. *Estate of Graham*, 156 N.C. App. at 158-59, 576 S.E.2d at 358.

While it is true that the recital of valuable consideration within a deed creates a presumption that such recital is correct, the presumption is rebuttable and therefore the inquiry does not end there. *Patterson v. Wachovia Bank & Trust Co.,* 68 N.C. App. 609, 613-14, 315 S.E.2d 781, 784 (1984). For instance, a party may rebut such a presumption by offering evidence which tends to show a great disparity between the nominal amount of stated consideration and the actual value of the property. *See id.* Moreover, a presumption of consideration paid may be overcome by the showing of an absence of revenue stamps affixed to the deed at the time of recordation. *See Burnett v. Burnett,* 122 N.C. App. 712, 715, 471 S.E.2d 649, 651 (1996) (stating that evidence of a lack of payment of excise tax is indicative of a donative intent); *see also Patterson*, 68 N.C. App. at 612-14, 315 S.E.2d at 783-84 (holding that evidence showing no revenue stamps affixed to a deed coupled with a large disparity between the stated consideration and the actual value of the property enough to overcome the presumption that matters stated in the deed are true). Further, it is a long-standing and well-recognized rule that past performance is not

valuable consideration. *Estate of Graham*, 156 N.C. App. at 159, 576 S.E.2d at 359.

In the instant case, the document appointing Rachel Coston as attorney-in-fact for Samuel Coston was a short-form power-of-attorney which did not grant the specific power to gift out of the estate. The quitclaim deed which purported to transfer title to Turner Coston recited as consideration $10.00 and other good and valuable consideration. A review of the depositions of Rachel and Turner Coston reveals that Turner had, in the past, helped Samuel with a number of things including farming, cooking and helping care for him. The record further reveals that there were no revenue stamps affixed to the deed at the time of recordation; however, the property value was assessed at $73,500.00.

Where the record reveals that $10.00 and the past performance of services by Turner Coston were relied upon as consideration for the quitclaim deed drafted and executed by Rachel Coston, such recitations do not convert the gift into a transfer for value. *See Patterson,* 68 N.C. App. at 614, 315 S.E.2d at 784. Thus, the deed from Rachel Coston conveying the property of Samuel Coston to Turner Coston was a gift deed and therefore void where Rachel Coston, as attorney-in-fact, did not possess the authority to gift property out of the estate of Samuel Coston. *See Estate of Graham*, 156 N.C. App. at 159, 576 S.E.2d at 358-59.

We also note that defendants point to conversations between Samuel Coston, the deceased, and defendants as evidence that the

deed is supported by valuable consideration. However, these statements are barred by the Dead Man's Statute.

> [T]estimony of a witness is incompetent under the provisions of the Dead Man's Statute when it appears "(1) that such witness is a party, or interested in the event, (2) that his testimony relates to a personal transaction or communication with the deceased person, (3) that the action is against the personal representative of the deceased or a person deriving title or interest from, through or under the deceased, and (4) that the witness is testifying in his own behalf or interest."

In re Will of Lamparter, 348 N.C. 45, 51, 497 S.E.2d 692, 695 (1998) (citation omitted). Where these statements are not competent evidence, we decline to review them as supporting defendants' contention that there was a genuine issue of material fact as to whether there was valuable consideration for the quitclaim deed.

This assignment of error is therefore overruled.

Breach of fiduciary duty

Defendants further contend that there was a genuine issue of material fact as to whether defendant Rachel Coston breached her fiduciary duties imposed upon her as attorney-in-fact. We disagree.

As stated *infra*, one acting as an attorney-in-fact has a fiduciary obligation to act in the best interest of the principal and the act of gifting out of the estate by the attorney-in-fact is inopposite to the best interest of the principal. *Whitford*, 345 N.C. at 478, 480 S.E.2d at 691-92; *see also Estate of Graham*, 156 N.C. App. at 158-59, 576 S.E.2d at 358. Where we have held that the purported deed drafted by Rachel as attorney-in-fact lacked valuable consideration and was in fact a deed of gift, it therefore

follows that she breached her fiduciary duties imposed by the power-of-attorney.

Therefore, this assignment of error is overruled.

Accordingly, we affirm the decision of the lower court in granting partial summary judgment, declaring the quitclaim deed void and finding that Rachel Coston breached her fiduciary duty as attorney-in-fact.

Affirmed.

Judges WYNN and McGEE concur.

Report per Rule 30(e).