[Cite as *In re Estate of Jarriett v. Parkview Fed. Sav. Bank*, 2010-Ohio-1434.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93289

IN RE: ESTATE OF RICHARD JARRIETT, DECEASED

PLAINTIFF-APPELLEE

vs.

PARKVIEW FEDERAL SAVINGS BANK

CLAIMANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Probate Division
Case No. 2005 EST 0100948

BEFORE: Stewart, J., McMonagle, P.J., and Cooney, J.

RELEASED: April 1, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Claimant-appellant, Parkview Federal Savings Bank, appeals from a probate division order finding that Parkview failed to timely challenge a final accounting and distribution of assets from the estate of decedent Richard Jarriett. Parkview's claim centered on a debt from a home equity line of credit used by Jarriett during his lifetime, and it alleged that although collateralized by Jarriett's house, the loan remained in deficit even after the house had been sold in foreclosure. The court held that the line of credit was a contingent claim for which Parkview failed to make a timely claim against the estate. Parkview's two assignments of error contest this ruling.

{¶ 2} With one exception, the parties have stipulated to the facts. At the time of his death, Jarriett's assets consisted of two houses. One of those houses later sold through private sale with proceeds of $32,905.62. The other house was used as collateral for a home equity line of credit that Parkview issued to Jarriett. At the time of Jarriett's death, Parkview claimed to be owed $71,299.16 on the line of credit, so it filed a complaint for money foreclosure in the general division of the court of common pleas, naming the executrix of the estate as a party. Parkview also filed a claim in the probate division against the estate. In the probate proceedings, the estate denied Parkview's claim, giving rise to the sole factual dispute in this case — whether Parkview received notice of this rejection. The estate claims it sent notice of the rejection by ordinary mail; Parkview denied receiving notice of any kind.

The house sold in foreclosure some 15 months later, leaving a deficiency balance of $40,258.25 owed to Parkview. By this time, the probate division had approved the estate's final accounting, so Parkview sought to vacate that accounting and surcharge the executrix's bond for the deficiency.[1] The estate contested Parkview's request to vacate the accounting on grounds that the request had not been timely filed from the initial rejection of the claim.

{¶ 3} The court referred the matter to a magistrate for hearing. In conclusions of law, the magistrate found that claims against an estate must be made within six months of the decedent's death and that Parkview timely filed its claim. It further found that the estate did not validly issue its notice of rejection of the claim because it failed to serve notice of that rejection by certified mail. Finally, the magistrate rejected the estate's argument that Parkview had only made a contingent claim because the foreclosure action on the house was not required as a prerequisite for Parkview to establish the validity of the decedent's debt under the home equity line of credit.

[1] That bond was issued by the Fidelity and Deposit Insurance Company of Maryland ("Fidelity"). Although not formally joined as a party to the action, Fidelity entered into stipulations submitted to the magistrate and participated in the hearing before the magistrate. On appeal, the estate requested service of its brief on Fidelity, causing Fidelity to issue a notice of appearance and a request to file a brief that would ratify and incorporate by reference all of the arguments advanced by the estate. Parkview opposed that request by way of a motion to strike. We granted Parkview's motion to strike (Motion No. 426120), reiterating that Fidelity is not a party to this proceeding.

{¶ 4} The estate filed objections to the magistrate's decision. The court sustained those objections and overruled the magistrate's decision, finding that "Parkview's claim is a contingent claim and was improperly presented under R.C. § 2117.37, Parkview had notice of the denial of the claim, and that Parkview improperly waited more than 18 months, after the distributions to the beneficiaries had been paid out, to notify the Administrator of the deficiency."

I

{¶ 5} We first address Parkview's second assignment of error. Parkview contends that the estate did not validly reject its claim against the estate because the estate did not follow the statutory requirements for sending notice of a rejected claim by certified mail. The court did not directly address this contention — it simply stated that "Parkview had notice of the claim[.]"

{¶ 6} Any creditor having a claim against an estate must present that claim pursuant to R.C. 2117.06. Once a claim is properly made, the executor or administrator must allow or reject the claim within 30 days. See R.C. 2117.06(D). The executor or administrator can reject a claim only in writing, and "notice shall be given to the claimant pursuant to Civil Rule 73." See R.C. 2117.11. If a claim is rejected, the claimant must file suit in the general division within two months after rejection or within two months after that

debt or part of the debt that was rejected becomes due, or be forever barred from maintaining an action on the claim. See R.C. 2711.12.

{¶ 7} Civ.R. 73(E) governs service of notice within the probate division of the court of common pleas. Civ.R. 73(E)(5) provides that notice may be served by ordinary mail, but only "after a certified or express mail envelope is returned with an endorsement showing that it was unclaimed, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery[.]"

{¶ 8} The parties stipulated that Parkview made a timely claim against the estate. The estate sent notice of its rejection of the claim by ordinary mail. Parkview maintained that it did not receive any correspondence from the estate, but the estate notes that its rejection letter was not returned by the postal authorities showing a failure of delivery.

{¶ 9} The estate concedes that it did not first attempt to serve notice by certified mail as required by Civ.R. 73(E)(5), but argues that certified mail service was unnecessary due to ordinary mail service. In *Harmer v. Smith* (July 20, 1994), 2nd Dist. No. 3101, the Second District Court of Appeals characterized the notice provision of R.C. 2117.11 as "directory[ ] rather than mandatory" and held that an estate had validly issued notice of its rejection of a claim by ordinary mail when it had not first sent notice of rejection by certified mail.

{¶ 10} The Second District's characterization of R.C. 2117.11 as "directory" finds no support from the plain language of the statute. The statute uses the mandatory word "shall" when stating that "notice shall be given to the claimant pursuant to Civil Rule 73." Rules of statutory construction have long held "the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that [it] receive a construction other than [its] ordinary usage." *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, 271 N.E.2d 834, paragraph one of the syllabus.

{¶ 11} We might find some justification for the Second District's proposition if the evidence had shown that Parkview actually received ordinary mail notice of the estate's rejection of the claim but nonetheless argued a lack of notice because of a violation of Civ.R. 73(E). The spirit of the notice provision would be subverted if a party had actual notice of the rejection of a claim but nonetheless insisted that the failure to follow the dictates of Civ.R. 73(E)(5) trumped that notice. But the parties stipulated that Parkview claimed it did not receive ordinary mail notice that the claim had been rejected. And as the magistrate noted, the estate offered no proof to contradict Parkview's assertions that it did not receive service of notice by ordinary mail.

{¶ 12} Civ.R. 73(E)(5) is written in mandatory terms: a party may only use ordinary mail service in the event service by certified mail is returned as undeliverable. The benefit of a mandatory notice provision is that it avoids the kind of scenario that developed in this case — had the estate followed Civ.R. 73(E) and first attempted service of notice by certified mail, the issue of notice could have been avoided. And it bears noting that the rule provides several different options for completing service of notice, including hand delivery. See Civ.R. 73(E)(1).[2] Any one of those options might have averted the notice controversy that arose in this case. For unknown reasons, the estate chose not to follow the mandatory terms of the rule.

{¶ 13} The estate argues that even if it did not comply with Civ.R. 73(E)(5), Parkview nonetheless had notice of the rejection of the claim by virtue of the estate's answer in the foreclosure action filed in the general division of the court of common pleas. In that answer, the estate admitted that Parkview had an interest in the decedent's real property, "but denies the estate owes the amount alleged and denies each and every other allegation of the Complaint not specifically admitted herein."

{¶ 14} An answer to a civil foreclosure action in the general division of the court of common pleas is not the same thing as a rejection of a claim

[2]Addresses contained on the estate's rejection letter show that offices of the estate's attorney and Parkview's attorney were located just a few blocks apart in downtown Cleveland.

against an estate in the probate division of the court of common pleas. The rules do not provide for "cross-action" notice and the dissimilarity of the actions suggests that no such cross-action notice could be implied. The estate's answer denying the allegations of the foreclosure complaint in the general division was not enough to put Parkview on notice that the estate had likewise rejected Parkview's claim in the probate division. We therefore find that the court erred by finding that Parkview had notice that the estate rejected its claim.

{¶ 15} With the estate having failed to serve notice of its rejection of Parkview's claim, it follows that Parkview became a creditor of the estate. See R.C. 2117.06(H). The court erred by closing the administration of the estate before that claim had been allowed or rejected. It follows that the court erred by denying Parkview's motion to vacate the final account on grounds that Parkview did not receive proper notice that its claim had been denied by the estate prior to the final asset distribution.

II

{¶ 16} Parkview also maintains that the court erred by characterizing the debt on the home equity line of credit as a "contingent claim" under R.C. 2117.37. Calling the debt a contingent claim invoked the time limits set forth under that section, and the court found that Parkview did not timely present

the estate with notice that the property had been sold in foreclosure, thus barring the claim.

{¶ 17} R.C. 2117.37 states:

{¶ 18} "If a claim is contingent at the time of a decedent's death and a cause of action subsequently accrues on the claim, it shall be presented to the executor or administrator, in the same manner as other claims, before the expiration of one year after the date of death of the decedent, or before the expiration of two months after the cause of action accrues, whichever is later, except as provided in section 2117.39 of the Revised Code. The executor or administrator shall allow or reject the claim in the same manner as other claims are allowed or rejected. If the claim is allowed, the executor or administrator shall proceed to pay it. If the claim is rejected, the claimant shall commence an action on the claim within two months after the rejection or be forever barred from maintaining an action on the claim."

{¶ 19} The consequence of having Parkview's claim characterized as contingent is that once the property sold in foreclosure on November 27, 2006, the claim was no longer contingent and Parkview had two months in which to assert its claim against the estate. The court approved the final account of

the estate on March 3, 2008, but Parkview did not seek to vacate the final account until May 22, 2008, well beyond the two-month time period.[3]

{¶ 20} In *Pierce v. Johnson* (1939), 136 Ohio St. 95, 98, 23 N.E.2d 933, the supreme court defined a "contingent claim" as one upon which liability is dependent on some uncertain future event that may or may not occur. It is the element of dependency upon an uncertainty that renders a claim contingent. *Carter v. Bank One of Ohio* (1986), 31 Ohio App.3d 82, 84, 508 N.E.2d 1023. So a contingent debt is one in which there is a triggering event or some condition precedent for the debt to exist. This happens most often in cases of garnishment, surety, or endorsement because the obligation to pay on the debt does not arise until some triggering event like a default occurs. See, e.g., *United States Fid. & Guar. Co. v. Stahl* (Apr. 29, 1993), 8th Dist. No. 62186 (finding sums sought to be recovered under an indemnification agreement to be a contingent claim). The estate maintained that Parkview's claim was contingent because Jarriett's promissory note was secured by an open-ended mortgage on the property, so "[i]t could not be determined as to what the estate would have owed on the mortgage, if anything, until the real property was sold." See Appellee's Brief at 6. We disagree.

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[3]Some states have avoided the problems caused by R.C. 2117.37 by adopting Section 3-803 of the Uniform Probate Court that requires contingent claims to be presented and prosecuted within their regular non-claim periods.

{¶ 21} At all times, the Parkview line of credit was a discrete and ascertainable debt based on an account — Jarriett borrowed a sum certain from Parkview and paid interest on that amount. Indeed, Parkview's claim against the estate stated the amount of debt in very certain terms: $71,299.16 plus interest which continued to accrue. There was nothing contingent about that debt at the time of the claim.

{¶ 22} By finding the home equity line of credit to be a contingent claim, the court appeared to believe that the amount owed to Parkview could not be ascertained until after the sale of the collateral of the secured debt. But the amount owed on a debt does not depend on how much money the collateral might be worth in the event of a default, for this erroneously presupposes that the amount of the debt is somehow affected by the value of the collateral. Regardless of whether the loan had been secured by collateral, the amount of the loan did not change and Parkview did not have to wait until after the sale of the collateral before making its claim against the estate. The debt existed in a sum certain at all times.

{¶ 23} We likewise find the estate's reliance on *Keifer v. Kissell* (1947), 83 Ohio App. 133, 75 N.E.2d at 693, to be misplaced. *Keifer* concerned a claim against a decedent's estate for an amount that the claimant was required to pay as an amount due on the note that had been secured by a mortgage on a house. The claimant's decedent signed as surety for the decedent against

whose estate the claim had been filed. The court held that this was a contingent claim because the surety's obligation could not be ascertained until the house had sold. Plainly, the surety's debt in *Keifer* could not arise until after the disposition of the house, at which time the amount of the deficiency owed by the surety could be ascertained. In this case, there is no surety whose liability would depend on the value of the debt less the value of the collateral. At all times, Jarriett's debt to Parkview remained and Parkview had no obligation to liquidate the collateral before filing a claim against the estate. The existence of collateral for the debt did not render the amount of the debt any less certain.

{¶ 24} It follows that the court erred by finding Parkview's claim to be contingent pursuant to R.C. 2117.37. We therefore reverse and remand this matter to the court for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellee its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas — Probate Division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR