[Cite as *Weygandt v. Ward*, 2010-Ohio-2015.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

EARLY WEYGANDT, et al.	C. A. No. 09CA0050
Appellants	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
VIRGIL F. WARD, et al.	COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO
Appellees	CASE No. 09-CV-0088

DECISION AND JOURNAL ENTRY

Dated: May 10, 2010

Per Curiam.

{¶1} Plaintiff-Appellants, Early Weygandt, Penny Renner, Florence Cardillo, Virginia Young, and Terry Weygandt (collectively "Appellants"), appeal from the judgment of the Wayne County Court of Common Pleas, dismissing their complaint against Defendant-Appellees, Virgil Ward, Karoline Ward, Linda Flickinger, Roger Baker, Diane Baker, Karla Forrer, Jeff Weygandt, and Sandra Clause (collectively "Appellees"). This Court reverses.

I

{¶2} All of the individuals involved in this appeal are either the descendants or the spouses of the descendants of Fred Ward. In 1976, Fred Ward executed a will, devising his property to his wife, Clara, for the remainder of her life and further devising his property to five of their children upon her death. The five children Fred named in his will were Virgil Ward, Linda Flickinger, Virginia Young, Florence Cardillo, and Dorothy Weygandt. Fred specifically devised 19.26 acres of real property to Dorothy in his will and $12,500 to Florence, which he

later increased to $25,000 by way of a codicil. As for his remaining real estate, Fred gave Virgil a life estate in the property as well as the authority to sell any or all of the property during Virgil's lifetime. Fred specified that any proceeds from such a sale would be divided in sixths between his children and their descendants, with two parts going to Virgil and one part going to each of the other four children named in the will. Fred died in 1988, and Clara died shortly thereafter.

{¶3} On April 18, 2008, Virgil took several actions with regard to the real property he inherited under Fred's will. First, Virgil executed a warranty deed granting 240 acres of property to Roger and Diane Baker (collectively "the Bakers"), the grandchildren of his sister Linda Flickinger. The warranty deed indicated that: (1) Virgil granted the property for the consideration of $10.00; (2) Virgil was reserving a life estate to reside in his residence on the property along with his wife; and (3) the deed was subject to both the agricultural easement and mortgage deed executed at the same time. Second, a mortgage deed was executed between Virgil and the Bakers; however, the consideration exchanged under the mortgage deed is unclear from the face of the document as it references a promissory note, the terms of which are unknown. Third, Virgil received an agricultural easement and agreement from the Bakers in which they agreed that: (1) the 240 acres of property be used exclusively for agricultural purposes; (2) in the event of a sale, they would encumber the land with an agricultural easement to benefit Virgil, his siblings, and their descendants; and (3) in the event of a sale in which an agricultural easement would not be in the best interests of Virgil, his siblings, and their descendants, the Bakers would obtain the consent of Virgil, his siblings, and their descendants to remove the easement and divide the proceeds of the sale with all of them.

{¶4} On February 2, 2009, Appellants filed suit against Appellees for declaratory judgment, seeking a declaration that the warranty deed, agricultural easement and agreement, and the mortgage deed were null and void and sought any relief that would put the parties in the same position as if the agreements were void. They alleged in their complaint that the warranty deed, agricultural easement and agreement, and the mortgage deed, were made without the consent of the Appellants, were made in violation of Virgil's fiduciary duties and were made with inadequate consideration to constitute a good faith sale under the provisions of the will. On April 2, 2009, Virgil and Karoline Ward filed a Civ.R. 12(B)(6) motion to dismiss. On April 6, 2009, the Bakers and Linda Flickinger also filed a Civ.R. 12(B)(6) motion to dismiss. Appellants responded in opposition. On July 29, 2009, the trial court dismissed Appellants' complaint with prejudice. In its judgment entry, the trial court stated that Appellants "claim that the sale violated fiduciary duties [] owed to the remaindermen, was made for insufficient consideration and exceeded the authority granted [Virgil] by the will. The [Appellees] in their motion to dismiss argue that Virgil's power of sale was absolute and he acted under that authority. The court agrees."

{¶5} Appellants now appeal from the trial court's dismissal and raise a single assignment of error for our review.

II

Assignment of Error

> "THE TRIAL COURT ERRED AS A MATTER OF LAW BY DISMISSING THIS DECLARATORY JUDGMENT ACTION AND HOLDING THAT APPELLEE, VIRGIL WARD, HAD AN ABSOLUTE POWER OF SALE AND HE ACTED UNDER THAT AUTHORITY."

{¶6} In their sole assignment of error, Appellants argue that the trial court erred by dismissing their complaint. We agree.

{¶7} This Court reviews de novo a trial court's decision to grant a motion to dismiss. *Niepsuj v. Summa Health System*, 9th Dist. Nos. 21557 & 21559, 2004-Ohio-115, at ¶5. We have stated that:

> "In an action for declaratory judgment, the trial court must declare the rights of the parties or dismiss the complaint because either 1) no real controversy or justiciable issue exists between the parties or 2) the declaratory judgment will not terminate the uncertainty or controversy. *Fioresi v. State Farm Mut. Auto. Ins. Co.* (1985), 26 Ohio App.3d 203, 203-04. If the plaintiff has no rights under the facts submitted to the relief requested, then the trial court must so state. *Bruckman v. Bruckman Co.* (1938), 60 Ohio App. 361.
>
> **"**This dismissal of the declaratory judgment complaint for failure to state a claim without specifying one of the two allowable bases is error. If, however, the trial court nevertheless, actually declared [the plaintiffs'] rights in its judgment, this procedural error may not be reversible error." *Miller v. Summit Cty. Bd. of Ed.* (Apr. 7, 1993), 9th Dist. No. 15847, at *1-2.

{¶8} The trial court did not determine that there was no real controversy between the parties or that a declaratory judgment would not terminate this controversy. As such, it erred by dismissing Appellants' complaint. *Mt. Eaton Community Church, Inc. v. Ladrach*, 9th Dist. No. 07CA0092, 2009-Ohio-77 at ¶8. We likewise conclude that the error was not harmless because the trial court could not, based upon the evidence before it, determine the rights and responsibilities of the parties. See *Miller*, at *2.

{¶9} As the trial court concluded that Virgil had the *absolute* power of sale, and that he thus acted within his authority, the trial court must also have determined that Virgil did not owe Appellants a duty. Appellants, however, maintain that Virgil did owe them a fiduciary duty. We agree with the Appellants, for reasons outlined below.

{¶10} Appellants concede that Fred Ward's will vested Virgil with the authority to sell the real property at issue, but argue that it did not vest him with the authority to gift the property.

According to Appellants, Virgil essentially gifted the property to the Bakers by selling it for inadequate consideration and thereby breached his duty to Appellants.

> "When considering a question of will construction, this [C]ourt must attempt to ascertain the intent of the testator and give effect to his intention wherever legally possible. The fundamental principles of will construction are provided by the Ohio Supreme Court in *Townsend's Exr. v. Townsend* (1874), 25 Ohio St. 477:
>
> "1. In the construction of a will, the sole purpose of the court should be to ascertain and carry out the intention of the testator.
>
> "2. Such intention must be ascertained from the words contained in the will.
>
> "3. The words contained in the will, if technical, must be taken in their technical sense, and if not technical, in their ordinary sense, unless it appears from the context that they were used by the testator in some secondary sense.
>
> "4. All the parts of the will must be construed together, and effect, if possible, given to every word contained in it." (Internal citations omitted.) *In re Estate of Hernton* (2005), 164 Ohio App.3d 306, 308-09.

"If the terms and expressions employed by a testator forbid interpretation by reason of their clarity, a court is without power to change them." *Everhard v. Brown* (1945), 75 Ohio App. 451, 461.

> **{¶11}** Fred Ward's will provides, in part, as follows:
>
> "Upon my death if my wife, Clara, does [not] survive me, or upon her death, if she does survive me, all real estate owned by me at the time of my death not hereinbefore devised, I give and devise to my son, Virgil Ward, for and during his natural lifetime, the remainder at his death to become a part of the residue of my estate. I hereby authorize and empower my said son, Virgil Ward, during his lifetime to sell and dispose of any or all of said real property for such prices and upon such terms as he in his own discretion may deem advisable, and to do all things necessary or proper to carry into effect the power and authority hereby given. In the event of any such sale, the said Virgil Ward shall forthwith divide the net proceeds of such sale as follows:
>
> "Two parts to himself or to his wife * * * if Virgil is deceased;
>
> "One part to my daughter, Linda Lou Flickinger, or her lineal descendants per stirpes;

> "One part to my daughter, Dorothy Weygandt, or her lineal descendants per stirpes;
>
> "One part to my daughter, Virginia Young, or her lineal descendants per stirpes;
>
> "One part to my daughter, Florence Cardillo, or her lineal descendants per stirpes."

Under the plain language of the will, Virgil received Fred Ward's real property "for and during [Virgil's] natural lifetime" and had the power "to sell and dispose of any or all of said real property." Thus, Virgil received a life estate with the power to sell. *Johnson v. Johnson* (1894), 51 Ohio St. 446, paragraph one of the syllabus (concluding that widow received life estate with power to sell where will devised her property until "the time of her decease" and gave her "full power to bargain, sell, convey, exchange, or dispose of the same as she may think proper").

{¶12} This Court agrees with Appellants' assertions that they are remaindermen under Fred Ward's will and Virgil owed them a duty. The will gave Appellants a remainder interest in the estate upon Virgil's death and, importantly, did not give Virgil the right to consume the entire bequest himself. Appellants were entitled to the remaining real property, *or in the event of a sale*, to a portion of the proceeds resulting from the sale. As such, Appellants' interest was not contingent upon something remaining at the end of Virgil's life. Compare *Bodmann German Protestant Widows' Home v. Lippardt* (1904), 70 Ohio St. 261, 293 ("The estate given to the plaintiff below is contingent upon something remaining, and, inasmuch as the power of disposal given to the widow is unlimited, and as she may see fit, there is nothing upon which to raise a trust, or a right to question the wisdom of her discretion."). The Ohio Supreme Court has held that a person who receives a life estate in real property with a power to sell is "by implication, a quasi trustee for those in remainder." *Johnson*, 51 Ohio St. at paragraph two of the syllabus. Because Appellants are remaindermen under the will, Virgil owed them a duty as their implied, quasi trustee.

{¶13} As we have concluded that Virgil owes Appellants a duty, it is clear that the trial court's conclusion that Virgil had the absolute power of sale was error. Whether Virgil acted within his authority under the will, as the trial court also found, therefore, depends on the facts and circumstances of the sale.

{¶14} Civ.R. 8(A) provides that "[a] pleading that sets forth a claim * * * shall contain [] a short and plain statement of the claim showing that the party is entitled to relief * * *." "'Notice pleading' under Civil Rule 8(A) and 8(E) merely requires that a claim concisely set forth only those operative facts sufficient to give 'fair notice of the nature of the action * * *.'" *Asefi v. Ellet Neon Sales and Serv. Inc.* (Apr. 5, 1995), 9th Dist. No. 16931, at *2, quoting *DeVore v. Mut. of Omaha Ins. Co.* (1972), 32 Ohio App.2d 36, 38. "A plaintiff is not required to prove his case at the pleading stage." *Asefi*, at *2.

{¶15} Here, as previously noted, the Appellants alleged that the warranty deed, agricultural easement and agreement, and the mortgage deed, were made without the consent of the Appellants, were made in violation of the fiduciary duties of Virgil and were made with inadequate consideration to constitute a good faith sale under the provisions of the will. They, therefore, sought a declaration that the warranty deed, agricultural easement and agreement, and the mortgage deed were null and void and sought any relief that would put the parties in the same position as if the agreements were void. Moreover, the evidence attached to the complaint, including the warranty deed and the mortgage deed, at least in part supports Appellants' allegations; the documents raise numerous questions about whether the sale was in fact a sale or was instead a gift or a transaction for insufficient consideration.

{¶16} Thus, Appellants' complaint states a cause of action for declaratory judgment and the allegations contained in the complaint cannot be resolved at this early stage of the

proceedings. The trial court, therefore, did err in concluding that Virgil acted within his authority, as such cannot possibly be determined from the complaint.

{¶17} Thus, the trial court committed reversible error by dismissing Appellants' complaint, as the court could not resolve the legal issues presented based upon the facts known at the time.

III

{¶18} Appellants' sole assignment of error is sustained. The judgment of the Wayne County Court of Common Pleas is reversed, and the cause is remanded for further proceedings consistent with the foregoing opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees..

EVE V. BELFANCE
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

WHITMORE, J.
DISSENTS, SAYING:

{¶19} I respectfully dissent, as I would affirm the lower court's dismissal by concluding that it amounts to harmless error. I agree with the majority that the will created an implied, fiduciary relationship between Virgil and Appellants. I further agree that Appellants' complaint set forth a potential claim for breach of fiduciary duty because it alleged that Virgil sold the property for inadequate consideration. I disagree, however, that Appellants have set forth a meritorious argument on appeal.

{¶20} Appellants' brief only contains an argument that Virgil gifted the property based on the plain language of the will and the materials Appellants attached to their complaint. The plain language of the will is extremely broad and vests Virgil with a high degree of discretion and authority. Further, the materials attached to the complaint show that Virgil sold the property to family members who: (1) agreed to a $240,000 mortgage; (2) agreed to an easement to benefit Appellants; (3) agreed that the easement would run with the land to continue to benefit Appellants in the event of another sale; and (4) agreed that, in the event of another sale, if Appellants wanted the easement removed they would share the proceeds of the sale with Appellants. There is no evidence that Virgil divested Appellants of their interest or gifted the property. Nor do Appellants argue that additional evidence, such as testimony as to the value of the real property, would have shown that Virgil did so. See App.R. 16(A)(7). Because the

record supports the conclusion that Virgil "acted under [his] authority" and Appellants have not set forth any meaningful argument to rebut that conclusion, I would affirm the lower court's dismissal. As such, I respectfully dissent.

APPEARANCES:

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