[Cite as *Gupta v. Lincoln Natl. Life Ins. Co.*, 2005-Ohio-6473.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Uma Gupta, M.D.,	:	
Plaintiff-Appellant,	:	
v.	:	No. 05AP-378 (C.P.C. No. 03CV-11012)
Lincoln National Life Insurance Co.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 6, 2005

Britt, Campbell, Nagel & Sproat LLP, and *Joel R. Campbell*, for appellant.

Porter, Wright, Morris & Arthur LLP, Carl A. Aveni II, and *David K. Orensten,* for appellee.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Plaintiff-appellant, Uma Gupta, M.D. ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Lincoln National Life Insurance Company ("appellee").

{¶2} Appellant and her husband were married in 1974. On April 10, 1987, appellant executed a general power of attorney authorizing her husband to act on her behalf. The power of attorney provided that appellant's husband was appellant's "true

and lawful attorney for herself and in her name, place and stead," and conferred upon him:

> [F]ull power and authority to do and perform all and every act and thing whatsoever, requisite, necessary or proper to be done in and about the premises, as fully to all intents and purposes, with the same validity, as She might or could do if personally present, hereby ratifying all that her said Attorney shall lawfully do by virtue hereof. This power of attorney shall not be affected by the disability of the principal.

(Complaint Ex. B, at 1.)

{¶3} It is undisputed that appellant signed the power of attorney and recognized her husband as her appointed agent. It is also undisputed that at no time did appellant ever rescind or revoke the power of attorney.

{¶4} Due to some domestic problems, appellant filed a complaint for separation from her husband on July 9, 2001. However, appellant and her husband continued to reside together until his death in November 2001.

{¶5} Appellee received a letter requesting a withdrawal of funds in the amount of $50,000 from contract no. 96-9483584, a retirement account belonging to appellant. In response, appellee sent out a loan application. Appellant's husband completed, and returned the loan application to appellee on July 9, 2001. Because the signature on the loan application did not match the signature on file at appellee's business, appellee contacted the Gupta residence via telephone. Appellant's husband informed appellee that he had completed the loan application, and that he had the authority to do so pursuant to the power of attorney executed by appellant. Appellant's husband then faxed a copy of the power of attorney to appellee. Thereafter, on July 12, 2001, appellee

processed the loan application, and on July 16, 2001, tendered a check made payable to appellant. Appellee mailed the check to the address listed on the loan application.

{¶6} Appellant learned of the withdrawal of funds from her account in August 2001 when she came across a paper "that said $50,000 from the Lincoln account." (Nov. 3, 2004 Depo. at 43.)[1] Insisting that she did not authorize the $50,000 transaction, and was not aware of her husband's actions, appellant requested that appellee restore the funds to her account. Appellee refused, and sought repayment of the loan from appellant in accordance with the loan agreement.

{¶7} Appellant filed a complaint in the Franklin County Court of Common Pleas seeking a declaratory judgment as to the "meaning, construction and validity of the use of the alleged Power of Attorney by [appellant's] deceased husband [and to] declare the rights and duties of the parties as to the funds released by [appellee] to [appellant's] now deceased husband and for costs incurred herein." (Complaint at 1.)

{¶8} Appellee filed a motion for summary judgment contending that it was justified in processing the loan request because in so doing it relied on a valid and enforceable power of attorney executed by appellant. The trial court granted appellee's motion for summary judgment, and this appeal followed.

{¶9} On appeal, appellant raises the following two assignments of error:

> ASSIGNMENT OF ERROR NO. 1:
>
> IT IS ERROR FOR THE TRIAL COURT AS A MATTER OF LAW TO GRANT SUMMARY JUDGMENT TO DEFENDANT-APPELLEE PERMITTING THE USE OF A POWER OF

[1] Appellant became aware of this transaction in August 2001. However, appellant was aware of her husband's mismanagement of money beginning in 2000, including "over-the-limit charging," bills not being paid, and her husband's unauthorized use of her credit card, all of which led appellant to open her own checking account and change her credit card. (Depo. 27, 52, 56-57.)

> ATTORNEY BY A SELF-DEALING ATTORNEY-IN-FACT IN AN UNAUTHORIZED LOAN TRANSACTION TO CREATE AN OBLIGATION TO A LENDER WITHOUT RATIFICATION BY THE PRINCIPAL.
>
> ASSIGNMENT OF ERROR NO. 2:
>
> IT IS ERROR FOR THE TRIAL COURT TO GRANT SUMMARY JUDGMENT TO DEFENDANT-APPELLEE WHEN A THIRD PARTY LENDER HAS FAILED TO VERIFY THE PRINCIPAL'S RATIFICATION OF THE AGENT'S UNAUTHORIZED USE OF A POWER OF ATTORNEY TO CREATE THE LOAN OBLIGATION

{¶10} Civ.R. 56(C) states that summary judgment shall be rendered forthwith if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

{¶11} Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 65-66. "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record * * * which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. Once the moving party meets its initial burden, the nonmovant must then produce competent evidence showing that there

is a genuine issue for trial. Id. Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359.

{¶12} Appellate review of summary judgments is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.* (1988), 42 Ohio App.3d 6, 8. We stand in the shoes of the trial court and conduct an independent review of the record. As such, we must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. See *Dresher*, supra; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶13} A power of attorney is a written instrument authorizing an agent to perform specific acts on the principal's behalf. *Testa v. Roberts* (1988), 44 Ohio App.3d 161, 164. In Ohio, the creation of a power of attorney is controlled by statute and must conform to its provisions to be valid. Id. To establish a durable power of attorney, R.C. 1337.09(A) provides in part:

> Whenever a principal designates another as attorney in fact by a power of attorney in writing and the writing contains the words "This power of attorney shall not be affected by disability of the principal," "this power of attorney shall not be affected by disability of the principal or lapse of time," or words of similar import, the authority of the attorney in fact is exercisable by the attorney in fact as provided in the written instrument notwithstanding the later disability, incapacity, or adjudged incompetency of the principal and, unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument.

{¶14} Ohio courts have noted that, "a power of attorney may be revoked by the principal." *In re Guardianship of Thomas* (2002), 148 Ohio App.3d 11, 28, citing *Smith v.*

Flaggs, (Oct. 29, 1998), Cuyahoga App. No. 74414. See, also, *Bank v. Spies* (1953), 158 Ohio St. 499, 502 (where principal grants authority to another under warrant of attorney, "the authority so granted may be revoked at any time"). It is also recognized that a durable power of attorney is a "subclass of powers of attorney which are unaffected by the disability of the principal or lapse of time." *Smith*, supra at *9.

{¶15} In her first assignment of error, appellant argues that it was error for the trial court to grant summary judgment in favor of appellee, and thereby permit the use of a power of attorney by a "self-dealing attorney-in-fact in an unauthorized loan transaction to create an obligation to a lender without ratification by the principal."

{¶16} It is a fundamental principal of law that the holder of a power of attorney has a fiduciary relationship with his or her principal. *Testa*, supra. The holder of a power of attorney owes the "utmost loyalty and honesty to his principal." Id. at 165. Further, we agree with appellant's contention that a general, durable power of attorney does not authorize the holder of a power of attorney to self-deal, or transfer assets to oneself, unless the power of attorney explicitly confers that power to the holder of the power of attorney. *In re Scott* (1996), 111 Ohio App.3d 273. While the law sets forth that the conduct of a holder of a power of attorney who engages in self dealing transactions without authority or ratification of the principal is actionable, the law does not set forth that the conduct of a third-party is actionable when the conduct was undertaken upon reliance of a valid power of attorney. See *Vogelgesang v. U.S. Bank* (2005), Ark. App. No. CA04-1179 (holding that there was no liability on behalf of a bank when the bank acted pursuant to a valid power of attorney in allowing the attorney-in-fact to withdraw funds for himself); *Vinogradova v. Suntrust Bank, Inc.* (2005), 162 Md. App. 495 (holding that there was no

duty on the bank to inform its client, the principal in the power of attorney, of account changes when the bank was acting under the direction of the holder of the valid power of attorney); *Demerath v. Knights of Columbus* (2004), 268 Neb. 132 (holding that there was no duty on the life insurance company to inquire about the change of beneficiary form when it acted pursuant to a valid power of attorney); *Olathe v. Estate of Flinn* (1992), 250 Kan. 541 (holding that the bank was not liable when it acted pursuant to a valid power of attorney and allowed the withdrawal of funds to the holder of the power of attorney).

{¶17} It is undisputed that in the case before us the power of attorney did not authorize appellant's husband to engage in self-dealing. It is also undisputed that appellant in no way ratified the actions of her husband. However, while the court can empathize with appellant's frustration and disappointment resulting from her husband's actions, we cannot find that the trial court erred in granting summary judgment to appellee. The trial court did not, as appellant suggests, "permit" the actions of appellant's husband. Rather, the trial court held that appellee, under the circumstances of this case, could not be held liable for the acts of appellant's husband.

{¶18} Appellee relied upon a general power of attorney executed, and never revoked, by appellant. It is undisputed that the general power of attorney, despite being signed in 1987, was in fact valid when used by appellant's husband. We find that appellant has failed to provide any evidence to establish a genuine issue of material fact on this issue. Accordingly, appellant's first assignment of error is overruled.

{¶19} In her second assignment of error, appellant argues that summary judgment in favor of appellee was not appropriate because appellee failed to verify appellant's ratification of her husband's use of the power of attorney to create the loan

obligation. While we agree with appellant that there is no evidence that she in any way ratified her husband's actions, we do not agree with her contention that appellee had a duty to verify such.

{¶20} Appellant cites no authority in support of her position that a financial institution has a duty to determine that the holder of a valid power of attorney is not engaging in self-dealing before honoring a request for a withdrawal of funds in the name of the principal. We conclude that no such duty exists. To impose such an onerous requirement on financial institutions would not only be impracticable, but would essentially eliminate the power of attorney as a useful tool in the transaction of business of any elderly, disabled, absent, or otherwise incapacitated individual. Id; *Vinogradova*, supra.[2]

{¶21} Appellant argues that appellee should have been aware of the "suspicious circumstances" underlying the transaction. When the signatures did not match, appellee called the Gupta residence, and appellant's husband informed appellee that he was in fact the one who signed the loan application, and that he had the authority to do so pursuant to the power of attorney. He then faxed a copy of the power of attorney to appellee, and appellee acted in accordance with the loan application. Appellee had no reason to know that appellant had filed for a separation from her husband, or that he had previously engaged in unauthorized financial transactions regarding appellant's finances, which were not related to the retirement account held by appellee. A "suspicious" circumstance, to which appellant directs us, is the fact that the check was sent to a post office box rather than appellant's residence. Appellee made the check payable to

[2] We note, however, that there is no contention that appellee had actual knowledge that appellant's husband was acting in bad faith and/or not in the best interest of appellant.

appellant, and mailed it in accordance with the directions on the loan application. However, again there is no notice to appellee, regarding the power of attorney, that appellant's husband was not authorized in completing the loan application and undertaking the financial transaction at issue here.

{¶22} In *Wickens v. Valley State Bank* (1928), 125 Kan. 751, the court looked at a similar issue in which a farmer set up a trust with a bank officer as trustee. The trustee had broad discretionary powers to invest the trust fund, and unfortunately, the trustee pocketed a substantial portion of the trust. In holding that the bank was not liable for the misappropriation of funds, the court stated:

> The selection of an agent or trustee is an individual matter, lying within the power of him who makes the selection. He may change his selection and may require such bond or security as he desires. Having sole power of appointment, he has no right to claim that any third person shall be liable for the default of his agent, selected solely by him, unless the third party has participated in the misappropriations to the extent of becoming a party to the fraud. The defendant bank in the instant case had no right to supervise the investment of the funds or the value of the securities taken, nor had it the right to refuse payment of the check or order of [the trustee].

Id. at 759.

{¶23} These sentiments, while not binding upon this court, state the general philosophy with respect to transactions undertaken by one's agent. See *Empire Trust Co. v. Cahan* (1927), 274 U.S. 473, 47 S.Ct. 661 (holding that it would be impractical to put the burden on banks to check each transaction to make sure the agent is acting within his authority).

{¶24} In the case sub judice, appellee was presented with a valid power of attorney, which was undisputedly signed by appellant. Appellant's husband was properly

identified as being the designated holder of the power of attorney. Appellee had the right to assume that appellant's husband was acting lawfully in the performance of his duties as appellant's agent. Further, appellee had a duty to honor the agent's request because it was made pursuant to a valid power of attorney. Appellee had no knowledge that appellant would not cash the check that was tendered to her at her agent's request. Absent an act amounting to participation in wrongdoing, we cannot impose liability on appellee for failing to verify the principal's ratification, or lack thereof, of the agent's actions. As stated previously, to impose such a requirement would effectively eliminate the power, and frustrate the purpose, of the power of attorney, for which the legislature has provided to facilitate the public policy of being able to authorize an individual to act on one's behalf. As such, we find that the trial court did not err in granting summary judgment in favor of appellee.

{¶25} Accordingly, appellant's second assignment of error is overruled.

{¶26} For the foregoing reasons, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BROWN, P.J., and BRYANT, J., concur.

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