In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00057-CV

DIANE DEALEY MONTGOMERY, APPELLANT

V.

ANDREW S. MONTGOMERY, INDIVIDUALLY AND AS TRUSTEE OF THE JAMES F. MONTGOMERY IRREVOCABLE TRUST, APPELLEE

On Appeal from the 237th District Court
Lubbock County, Texas
Trial Court No. 2015-515,367, Honorable Les Hatch, Presiding

December 6, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and HANCOCK, JJ.

Diane Dealey Montgomery (Diane) appeals from a final summary judgment denying her recovery against Andrew S. Montgomery, individually and as trustee of the James F. Montgomery Irrevocable Trust (Andrew). We reverse.

Background

The following is a description of the suit and circumstances underlying it. The description contains only those facts necessary to dispose of the appeal and provide a relevant framework for the issues in dispute.

Diane had sued Andrew asserting a myriad of claims, including fraudulent conveyance, tortious interference with a contract, conversion, and conspiracy. The claims relate to an agreement executed between Andrew's father, James F. Montgomery, and Diane. James and Diane had been married. During that marriage, Diane was the stepmother of Andrew. When James and Diane divorced, the two executed a "marital settlement agreement" wherein James agreed to pay Diane spousal support of $21,000 a month until she remarried or died.[1] James apparently performed that aspect of the agreement for a number of years and then ceased doing so.

More importantly, Andrew obtained a durable power of attorney from his father. The document granted Andrew the authority to modify, restate, and terminate any revocable trust of his father. One such trust was the James F. Montgomery revocable trust. It contained assets exceeding five million dollars. Via the authority granted him under the power of attorney, Andrew converted the revocable trust to an irrevocable one, and the aforementioned assets of the former became the assets of the latter. The instrument also contained a spendthrift clause expressly insulating the trust assets from the creditors of the beneficiaries. The category of beneficiaries did not include Diane but rather were limited to James, Andrew, and apparently the siblings of Andrew.

James died on December 13, 2012, a day after the irrevocable trust became operative, and an administrator was appointed to administer the decedent's estate. Thereafter, Diane filed her initial claim against the estate, which claim memorialized the spousal support obligation allegedly due her. The sum sought exceeded one million dollars. However, the administrator denied the claim on May 1, 2014. Notification of

[1] It appears that the trial court approved of and incorporated the settlement agreement into its divorce decree.

that decision was mailed to Diane the next day. Also appearing in the notice was a line item purporting to estimate the estate's value. That value was "$ 0.00."

The May 1st notice further contained the following information:

> From the date that notice of rejection is given, you must act on the rejected claim (e.g., file a lawsuit) as follows:
>
> 1. Claim due: within 90 days* after the notice of rejection.
>
> 2. Claim not due: within 90 days* after the claim becomes due.
>
> ***The 90-day period mentioned above may not apply to your claim because some claims are not treated as creditors' claims or are subject to special statutes of limitations, or for other legal reasons. You should consult with an attorney if you have any questions about or are unsure of your rights and obligations concerning your claim.**

(Emphasis in original). Diane filed a suit, but it was not against the valueless estate of her ex-husband and debtor. Instead, she commenced the legal action spawning this appeal.

Her original petition carried the file-mark of "07/21/2014," a date within 90 days from the day the administrator rejected her claim against James' estate. In that petition, she described Andrew's conduct which we mentioned above. That conduct evinced acts of 1) tortious interference with the marital settlement agreement and the $21,000 monthly contractual payment due her thereunder, 2) fraudulent transfer or conveyance, 3) conversion, and 4) conspiracy, alleged Diane in her suit.[2] Andrew filed an answer. Soon to follow was his motion for summary judgment.

Andrew alleged (in both his individual capacity and capacity as trustee of the irrevocable trust) that he was entitled to a summary judgment declaring that Diane "take

[2] Diane also sued Michael Fauver who she alleged was a "special trustee" of the original James F. Montgomery Trust. The trial court sustained Fauver's special appearance and dismissed him from the suit.

nothing on her claims against him." He believed himself entitled to such relief because "all [of Diane's claims were] based on the underlying premise that she is due spousal support payments from James' estate." Yet, "because [her] claim for unpaid spousal support is barred, she cannot maintain her present claims against [him] for fraudulent transfer, unjust enrichment and tortious interference with existing contract." And, her claim against James' estate is purportedly "time barred because she failed to initiate a lawsuit against the estate challenging the rejection of her claims within the 90-day period set forth . . ." in the notice of rejection or within "a year of James' death." Diane responded via both a reply to that motion and her own motion for summary judgment. The trial court granted that of Andrew and denied that of Diane. Diane appealed and challenged both decisions.[3]

Andrew's Summary Judgment

The pertinent standard of review is well settled and need not be reiterated. Suffice it to say that it is sufficiently explained in *Jordan v. Tarrant Cty. Hosp. Dist.*, No. 07-16-00034-CV, 2016 Tex. App. LEXIS 8284, at *2-3 (Tex. App.—Amarillo August 2, 2016, no pet.) (mem. op.).

Next, Andrew does not contend that the spousal support obligation was legally unenforceable or otherwise invalid prior to the death of James. Nor does he assert that it was such when the administrator of James' estate denied Diane's claim. Instead, it became unenforceable, in his view, simply because she did not abide by various California statutes controlling the prosecution of claims against a decedent's estate. The first statute required Diane to file her claim against the decedent's estate and have

[3] Via her reply brief, Diane expressly waived her issues relating to the trial court denying her own motion for summary judgment.

it rejected. *See* CAL. PROBATE CODE ANN. § 9351 (West 2008) (stating that "[a]n action may not be commenced against a decedent's personal representative on a cause of action against the decedent unless a claim is first filed as provided in this part and the claim is rejected in whole or in part."). If rejected in whole or in part, according to the second statute at issue, the claimant is obligated to commence a suit on the claim within 90 days of notice that it was rejected if the claim was due when rejected or 90 days after the claim became due if not originally due at the time of rejection. *Id.* § 9353(a)(1) & (2) (stating that ". . .a claim rejected in whole or in part is barred as to the part rejected unless, within the following times, the creditor commences an action on the claim or the matter is referred to a referee or to arbitration: (1) If the claim is due at the time the notice of rejection is given, 90 days after the notice is given [or] (2) If the claim is not due at the time the notice of rejection is given, 90 days after the claim becomes due.").

The third statute requires one with a chose-of-action against a decedent to sue within one year of death. CAL. CODE CIV. P. ANN. § 366.2(a) (West 2010) (stating that "[i]f a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply."). Andrew conceded in his motion for summary judgment that the operation of this provision was tolled for the 90 days mentioned in § 9353(a).

The fourth statute supposedly in play would not be tolled during that period, according to him. It encompasses claims founded upon an agreement with a decedent

to a "distribution" from an estate, trust or other instrument; it requires one to commence "an action to enforce the claim to distribution" within "one year" of the decedent's death. *Id.* § 366.3(a) (stating that "[i]f a person has a claim that arises from a promise or agreement with a decedent to distribution from an estate or trust or under another instrument, whether the promise or agreement was made orally or in writing, an action to enforce the claim to distribution may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply.").

Each of the foregoing statutes bars Diane from pursuing her claim against James' estate because she did not sue James or his estate within the times specified. Indeed, she never sued James or his estate and cannot now do so due to those statutes, or so the argument goes. And because she cannot, she cannot pursue the causes of action alleged against Andrew via the suit at bar. We disagree in several respects.

One cause of action involves tortious interference with a contract. It is a tort serving to recognize the legal truism that a contract not only confers rights on the parties to it but also "'imposes on all the world the duty of respecting that contractual obligation.'" *Raymond v. Yarrington*, 96 Tex. 443, 73 S.W. 800, 803 (Tex. 1903), *citing, Temperton v. Russell*, [1893] 1 Q. B. Div. 715. Consequently, one's knowingly inducing a party to the agreement to breach the accord "is as *distinct* a wrong. . . ." *Id.* (emphasis added); *see Goodrich v. Superior Oil Co*., 640 S.W.2d 680, 681 (Tex. App.—Houston [14th Dist.] 1982, no pet.) (quoting *Raymond* and stating that "[i]t is the law of Texas that 'where one knowingly induces another to break his contract with a third person, such third person has a right of action against the one so causing the breach for

any damages resulting to him by such breach. . . .'"). *Raymond* further tells us that the wrong is not founded upon whether the injury arising from the breached contract can be addressed in a suit against the party who breached it. *Raymond v. Yarrington,* 73 S.W. at 803. Liability is also that of the party inducing the breach, which liability reflects the benefits the injured party would have received had the contract been performed. *See American Nat'l Petroleum Co. v. Transcontinental Gas Pipe Line Corp*., 798 S.W.2d 274, 278 (Tex. 1990) (stating that the "basic measure of actual damages for tortious interference with contract is the same as the measure of damages for breach of the contract interfered with, [that is] to put the plaintiff in the same economic position he would have been in had the contract interfered with been actually performed."); *Fitness Evolution, L.P. v. Headhunter Fitness, L.L.C.*, No. 05-13-00506-CV, 2015 Tex. App. LEXIS 11496, at *73-74 (Tex. App.—Dallas November 4, 2015, no pet.) (op. on rehrg.) (mem. op.) (stating the same and also recognizing that the contract need not be breached for the cause of action to arise so long as the interference caused damage). Given this, it matters not whether any statute of limitations barred Diane from suing James or his estate to enforce the spousal support obligation. If Andrew knowingly impeded the performance of that obligation by placing the assets of the revocable trust into an irrevocable trust before James died, then it is that alleged misconduct which serves as the foundation of Diane's claim of tortious interference. And, under *Raymond*, any potential liability for his engaging in the tort is independent of any liability James or his estate incurred due to breaching the spousal support agreement. So, whether limitations barred Diane from also recovering against James or his estate is irrelevant. This leads us to conclude, then, that the grounds urged in Andrew's

summary judgment motion did not entitle him to judgment as a matter of law on the claim of tortious interference.[4]

As for the allegation regarding fraudulent conveyance, it, like tortious interference with contract, is also a tort, though statutory in nature. *Challenger Gaming Solutions, Inc. v. Earp*, 402 S.W.3d 290, 295-96 (Tex. App.—Dallas 2013, no pet.). The remedy consists of recovering the property from whom it was transferred. *Id.* at 294. That is, one pursuing the claim may "recover judgment for the value of the asset transferred . . . or the amount necessary to satisfy the . . . claim, whichever is less." TEX. BUS. COM. CODE ANN. § 24.009(b) (West 2015). Furthermore, that judgment may be recovered against "the first transferee of the asset or the person for whose benefit the transfer was made" or "any subsequent transferee" other than one who acquired the asset in good faith and for value. *Id.* § 24.009(b)(1) & (2); *Esse v. Empire Energy III, Ltd.*, 333 S.W.3d 166, 181 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (indicating that liability may be imposed on the majority shareholders of a corporation to which the asset was transferred if the transfer benefitted them). Here, Andrew's argument concerns whether the aforementioned statutes of limitation or repose somehow negated the existence of Diane's claim. We conclude that they do not.

It is undisputed that one attempting to avoid a transfer as fraudulent must fall within the status of a creditor. *See e.g.* TEX. BUS. & COM. CODE ANN. § 24.005(a) (West 2015) (stating that a "transfer made or obligation incurred by a debtor is fraudulent as to a *creditor*, whether the creditor's claim arose before or within a reasonable time after the

[4] We do not address whether Andrew's conduct was sufficient to satisfy the elements of tortious interference. Nor do we address whether liability also could be imposed on the irrevocable trust if Andrew were also acting in his capacity as trustee of that trust when committing the purported wrongs. Those were not issues encompassed within the motion for summary judgment.

transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation . . . with actual intent to hinder, delay, or defraud any *creditor* of the debtor . . . ."); *Id.* § 24.006(a) (stating that a "transfer made or obligation incurred by a debtor is fraudulent as to a *creditor* whose claim arose before the transfer was made or the obligation was incurred . . . ."). (emphasis added). Next, statute defines a "creditor" as "a person . . . who has a claim," *id.* § 24.002(4), while the word "claim" means "a right to payment or property, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Id.* § 24.002(3). As previously mentioned, no one questions whether the promise to pay spousal support contained in the divorce settlement agreement constituted a "claim" prior to James' death. Nor does Andrew contest its status as a right to payment or property when the administrator of James' estate issued his notice of rejection on May 1, 2014. Rather, we are asked to decide whether the purported expiration of the limitation periods mentioned in above referenced California statutes caused Diane's purported right to payment to lose its status as a claim under § 24.002. Admittedly those statutes would bar the claim from being asserted against James' estate. But, does that prevent it from being a claim for purposes of a fraudulent conveyance? A Texas Supreme Court opinion rendered long ago guides our answer to that question.

In *Markward v. Murrah*, 138 Tex. 34, 156 S.W.2d 971 (Tex. 1941), the Supreme Court had before it an appeal in a proceeding "to set aside a sale of land and other property on the ground that same was made to defraud creditors." *Markward*, 138 Tex. at 36, 156 S.W.2d at 972. The creditors who initiated the suit held notes executed by

the debtor, Murrah. *Id.* at 36, 156 S.W.2d at 972-73. Those notes matured in August of 1932. *Id.* About a year and a half after that indebtedness became due and payable, Murrah and his wife transferred all their property to their children. *Id.* Ten days later, Murrah died intestate, and, allegedly, insolvent. *Id.* No administration was taken out on his estate at the time. Instead, the note holders (or their representatives) sued the children to set aside the earlier conveyance from their parents. Those suits were commenced in December of 1936 and subsequently dismissed by the trial court because the creditors had not previously presented their claims to an administrator of Murrah's estate. *Id.* That decision resulted in Markward and the others initiating an administration of Murrah's estate, and they presented their claims for payment to its administrator in June of 1938. *Id.* Eventually, the probate court disallowed the claims because the applicable statute of limitations had lapsed. *Id.* The decisions of both the trial and probate courts underwent review by the Supreme Court.

In conducting its review, the Supreme Court agreed that the lapse of the four year period of limitations had barred enforcement of the claims against Murrah's estate. *Id.* at 38, 156 S.W.2d at 973. Yet, it did not agree that because they were unenforceable against the estate they could not serve as a basis for avoiding Murrah's conveyance to the children. According to the court, it was "true that it was necessary for such creditors to allege and prove a valid claim against the alleged fraudulent grantor as a basis for their suit to set aside said conveyance." *Id.* at 38, 156 S.W.2d at 974. So too did the court say that it "was incumbent on them [*i.e.* Markward and the other note holders] to show that their claims were not barred by limitation *at the time they filed their suit*." *Id.* (emphasis added). But, because they filed the action to set aside a fraudulent

conveyance within the four year limitations period, the "debts" or claims were not barred for purposes of prosecuting that action. *Id.*

The Supreme Court also held that it was unnecessary for the note holders to file their claims with the administrator of Murrah's estate as a condition precedent to prosecuting the fraudulent conveyance. *Id*. This was so because the property they pursued was not part of the decedent's estate. *Id.* Murrah had parted with title to it before death, and, therefore, the administrator had no interest in the property. *Id.* at 38-39, 156 S.W.2d at 974.

That said and concluded in *Markward* is no less appropriate here. Diane commenced her suit against Andrew on July 21, 2014. That date fell within 90 days from the May 1st date on which the administrator of James' estate denied her claim. Thus, the claim had not been rendered unenforceable by the expiration of the 90 days limitations period specified in § 9353(a) of the California Probate Code. Nor had it grown stale under § 366.2(a) of the California Code of Civil Procedure; the one year period had been tolled by § 9353(a), as conceded by Andrew below.

Nor does the limitation period in § 366.3(a) pose an obstacle. According to its expressed language, it encompasses promises or agreements with a decedent "to distribution from an estate or trust or under another agreement." CAL. CODE CIV. P. § 366.3(a). That verbiage has been construed as encompassing actions predicated upon 1) a decedent's agreement to distribute estate or trust property in a specified way or 2) an agreement to make a will. *McMackin v. Ehrheart*, 194 Cal. App. 4th 128, 122 Cal. Rptr. 3d 902, 909 (Ct. App. 2011). Neither of those is involved here. The promise Diane seeks to enforce via her suit against Andrew arises from a settlement agreement

incorporated into a divorce decree. Its terms say nothing about payment from some specific property or source such as an estate or trust; it simply requires payment. Thus, § 366.3(a) has no application to the claim at bar.

Simply put, Diane's claim underlying her suit to avoid a fraudulent conveyance need not have been presented to, much less approved or rejected by, the administrator of James' estate, according to *Markward*. Nor was it not barred by the aforementioned statutes of limitation when it was commenced; again, the limitation periods had yet to lapse. Thus, her situation was like that of the creditors in *Markward*, and her claim could be the substance of a fraudulent conveyance action. And, in granting Andrew the summary judgment he requested on the grounds he proffered, the trial court erred.

Finally, the opinions of *Levine v. Levine*, 102 Cal. App. 4th 1256, 126 Cal. Rptr. 2d 255 (Cal. App. 2d Dist. 2002) and *Embrey v. Embrey*, 125 Cal. App. 4th 487 (Cal. App. 2d Dist. 2004) cited to us by Andrew do not affect our decision. In the former, limitations had actually lapsed before the plaintiffs filed suit to recover the property wrongfully taken from them. *Levine v. Levine*, 102 Cal. App. 4th at 1258 (involving § 366.2(a) and stating that Derek and Danielle Levine filed a complaint against the decedent's widow "[m]ore than a year after his death"). Furthermore, the cause of action involved does not appear to be one arising under a fraudulent conveyance statute. The same is no less true in *Embrey*. The cause of action involved does not appear to arise under a fraudulent conveyance statute. Additionally, the complainant's suit to recover the property allegedly due her was filed more than a year after the decedent had died. *Embrey v. Embrey*, 125 Cal. App. 4th at 496-97 (stating that "to protect her right to satisfy her judgment with property distributed to Alvin's beneficiaries,

Joanne had to file her claim against the beneficiaries within one year of Alvin's death. Because she did not file her claim until nineteen months after Alvin's death, the property distributed to his beneficiaries may not be used to satisfy her judgment."). Diane sued Andrew before limitations expired. So, both *Levine* and *Embrey* are distinguishable and inapposite.

We sustain Diane Dealey Montgomery's first issue, reverse the final summary judgment of the trial court, and remand the cause for further proceedings.

Brian Quinn
Chief Justice