

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RICHARD STALLWORTHY,)	NO. 66793-9-1
)	
Appellant,)	DIVISION ONE
)	
v.)	
)	
JUDITH DYKES,)	UNPUBLISHED OPINION
)	
Respondent.)	FILED: September 24, 2012
)	

Lau, J. — Judith Dykes, the personal representative (PR) of Larry Dykes’s estate, denied Richard Stallworthy’s creditor claims. Stallworthy then filed this action against the PR. The trial court entered summary judgment in favor of the PR, concluding that Stallworthy’s creditor claims were untimely under RCW 11.40.051(1)(b)(i) and that he had not properly served the summons and complaint in the action based on those claims. Because either ground independently warrants summary judgment, we affirm

FACTS

Richard Stallworthy became ill in 2007. At some point, under circumstances not explained in the record, Stallworthy gave Larry Dykes a power of attorney. In October

2007, Stallworthy lapsed into a coma and did not regain consciousness until about March 2008. Upon recovery, Stallworthy married his girl friend, Linda Norton, who died a short time later. Dykes was named personal representative under the terms of Norton's will.

Dykes died in August 2009, and his wife Judith was named personal representative of his estate. She reviewed Dykes's correspondence and financial records and did not identify Stallworthy as a creditor of the estate. The PR published notices to creditors beginning on October 9, 2009.

On March 4, 2010, Stallworthy filed creditor claims against Dykes's estate, alleging that when exercising the power of attorney, Dykes had authorized certain payments from Stallworthy's accounts that were of questionable benefit. In particular, he identified payments for Norton's legal expenses and for repairs on Stallworthy's condominium. Stallworthy also alleged that Dykes provided incorrect advice about the continuation of Norton's health care benefits following the marriage. On March 18, 2010, the PR denied Stallworthy's claims.

On April 19, 2010, Stallworthy filed this action against the PR. The PR moved for summary judgment, contending that Stallworthy had failed to file his creditor claims within four months of the first publication of notice to creditors as required under RCW 11.40.051(1)(b)(i) and that Stallworthy had failed to properly serve the summons and complaint. The trial court agreed and entered summary judgment dismissing Stallworthy's claims. The court denied Stallworthy's motion for reconsideration on February 4, 2011.

DECISION

Standard of Review

Stallworthy's contention that the trial court erred by not entering findings of fact rests on a misunderstanding of the nature of summary judgment. Generally, findings of fact are not appropriate on summary judgment "and, if made, are superfluous and will not be considered by the appellate court." Donald v. City of Vancouver, 43 Wn. App. 880, 883, 719 P.2d 966 (1986); CR 52(a)(5)(B).

Rather, in ruling on a summary judgment motion, the trial court determines whether there is a material factual dispute that warrants a trial. Summary judgment is appropriate "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 the moving party is entitled to a judgment as a matter of law." CR 56(c); White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). When reviewing a grant of summary judgment, an appellate court undertakes the same inquiry as the trial court. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). We consider the evidence and the reasonable inferences therefrom in the light most favorable to the nonmoving party. Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995).

Summary Judgment Order

Stallworthy contends the summary judgment order failed to designate all of the materials that the trial court considered. See CR 56(h). But the summary judgment order recites that the court considered the parties' oral arguments and the "Defendant's

motion, memorandum and attachments, and Plaintiff's Response with attachments." Stallworthy has not identified any other materials that the trial court considered. Nor has he suggested that all of the relevant materials are not part of the record on appeal. He has therefore failed to demonstrate any prejudicial error. W.R. Grace & Co.--Conn v. Dep't of Revenue, 137 Wn.2d 580, 591, 973 P.2d 1011 (1999) (any error in failing to designate materials in summary judgment order is harmless where materials are included in the record on appeal).

Stallworthy further contends the trial court erred in accepting the PR's corrected affidavit, which was filed two days before the summary judgment hearing. But the trial court has discretion to accept late filed materials in a summary judgment proceeding. See O'Neill v. Farmers Ins. Co., 124 Wn. App. 516, 521, 125 P.3d 134 (2004). Here, the PR's affidavit merely corrected the apparent inadvertent omission of certain pages when the document was first filed. Stallworthy filed two responses in the two months between the trial court's oral decision and the entry of the summary judgment order, but he made no attempt to rebut the substance of the PR's affidavit. The trial court did not abuse its discretion in accepting the corrected affidavit.

Untimely Creditor Claims

Stallworthy contends the trial court erred in concluding that his creditor claims were untimely under the four-month period set forth in RCW 11.40.051. He argues that because he was a "reasonably ascertainable" creditor under RCW 11.40.040, he had two years in which to file his claims against the estate.

Under RCW 11.40.051(1)(b)(i), a creditor who is "not reasonably ascertainable"

must present any claims against the estate “within four months after the date of first publication of notice.” For purposes of RCW 11.40.051, a “reasonably ascertainable” creditor “is one that the personal representative would discover upon exercise of reasonable diligence.” RCW 11.40.040(1). A creditor who is “reasonably ascertainable” may file claims within two years of the decedent’s death. RCW 11.40.051(1)(b)(ii). There is no dispute that Stallworthy failed to file his claims within four weeks of the first publication of the creditor notices.

In support of the summary judgment motion, the PR submitted an affidavit stating that she had reviewed Dykes’s correspondence, financial records, and bank documents and “was unable to ascertain any inkling that Mr. Stallworthy could be or would be a creditor of the Estate.” Under RCW 11.50.040(2), the affidavit established a presumption that the PR exercised reasonable diligence in ascertaining creditors of the estate and that Stallworthy was not a “reasonably ascertainable creditor.” The burden then shifted to Stallworthy to rebut the presumption by “clear, cogent, and convincing evidence.” RCW 11.40.040(2).

But Stallworthy submitted no evidence in response to the summary judgment motion. Nor did he identify any evidence in the record suggesting that he was a creditor of the estate or that the PR had failed to exercise reasonable diligence in reviewing the estate’s financial records. Rather, he relied primarily on factual allegations about matters outside the record, including Norton’s alleged actions before her death.

Where, as here, the moving party has met its initial burden of demonstrating the

absence of a material factual issue, the nonmoving party “may not rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists. Additionally, any such affidavit must be based on personal knowledge admissible at trial and not merely on conclusory allegations, speculative statements or argumentative assertions.” Las v. Yellow Front Stores, Inc., 66 Wn. App. 196, 198, 831 P.2d 744 (1992) (footnotes omitted). Because Stallworthy failed to make any showing that he was a reasonably ascertainable creditor, he was required to file his creditor claims within four months of the first publication of the creditor’s notice. His claims are therefore “forever barred,” and the trial court properly entered summary judgment in favor of the PR. RCW 11.40.051(1).

In support of his motion for reconsideration, Stallworthy submitted a copy of a check for \$5,500 that Dykes had signed using the power of attorney. He argued that the check, apparently made out to a New Jersey law firm, demonstrated that he was a reasonably ascertainable creditor. But Stallworthy makes no showing that the evidence was not available at the time the trial court made its summary judgment decision. See Wagner Dev., Inc. v. Fid. & Deposit Co. of Md., 95 Wn. App. 896, 907, 977 P.2d 639 (1999) (court not required to consider evidence in support of motion for reconsideration that was available at time of summary judgment decision). Consequently, the trial court did not abuse its discretion in denying reconsideration on that basis. See Drake v. Smersh, 122 Wn. App. 147, 151, 89 P.3d 726 (2004).

Moreover, Stallworthy makes no showing that the check was among the financial records that the PR should have reviewed in her search for creditors. And even if the

check had been among the estate's financial records, Stallworthy fails to explain how it would have alerted the PR to the claims he is now raising.

Stallworthy's assertion that his name and address on the check was sufficient to make him a reasonably ascertainable creditor is without merit. A creditor is "a person having a claim against the decedent." RCW 11.40.051(1). Consequently, the existence of a creditor necessarily rests on some evidence identifying some type of claim. For purposes of due process, not "everyone who may conceivably have a claim [is] properly considered a creditor entitled to actual notice." Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 490, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988). Because Stallworthy failed to identify any documents in the estate's records suggesting that he had a claim against the decedent, he was not a reasonably ascertainable creditor.

Service of Process

Summary judgment was also proper because Stallworthy failed to properly commence his action based on the creditor claims. Once the PR rejected his claims, Stallworthy was required to bring suit within 30 days after notification. RCW 11.40.100.

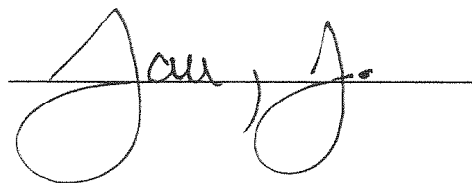
Stallworthy concedes that he never personally served the PR. He claims, however, that service of process was valid under CR 5(b)(1) because he mailed the summons and complaint to the PR's attorney. But the provisions of CR 5(b) permitting service on a party's attorney are limited "to those instances where a party seeks to serve a pleading subsequent to the complaint." Hastings v. Grooters, 144 Wn. App. 121, 131, 182 P.3d 447 (2008); CR 5(a). Under the circumstances of this case,

Stallworthy was therefore required to personally serve the summons and complaint on the PR. CR 4(d)(2); RCW 4.28.080(15). Because he did not do so within 90 days of filing the summons and complaint, he did not timely commence this action for purposes of tolling a statute of limitations. RCW 4.16.170. Accordingly, the action was untimely under RCW 11.40.100. The trial court properly granted summary judgment based on insufficient service of process.

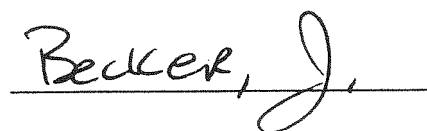
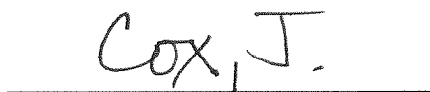
Attorney Fees

The PR requests an award of attorney fees on appeal. RCW 11.96A.150 provides that this court “may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to [the personal representative].” Stallworthy’s failure to support his appeal with any relevant legal argument or to identify any supporting evidence in the record has resulted in unnecessary expenses for the PR. We therefore exercise our discretion and award the PR her attorney fees and costs incurred in responding to Stallworthy’s appeal, subject to compliance with RAP 18.1(d).

Affirmed.



WE CONCUR:



66793-9-1/9