

Court of Appeals, State of Michigan

ORDER

In Re The Estate of Calvin C. Graves

Docket No. 286674

LC No. 2003-287878-CY

Alton T. Davis
Presiding Judge

William C. Whitbeck

Douglas B. Shapiro
Judges

The Court orders that the October 27, 2009, opinion is hereby VACATED, and a new opinion is attached.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

DEC 03 2009
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of THE ESTATE OF CALVIN
GRAVES, a Protected Individual.

THE ESTATE OF CALVIN GRAVES,

Plaintiff-Appellee,

v

COMERICA BANK,

Defendant/Cross-Plaintiff-Appellee,

v

PRESHUS GRAVES,

Defendant,

and

WILLIAM R. FORD,

Defendant/Cross-Defendant-
Appellant.

FOR PUBLICATION

December 3, 2009

9:00 a.m.

No. 286674

Oakland Probate Court

LC No. 2003-287878-CY

Before: Davis, P.J., and Whitbeck and Shapiro, JJ.

DAVIS, J.

Defendant William R. Ford appeals as of right an order granting summary disposition in favor of the Estate of Calvin Graves, brought by the court-appointed special fiduciary, surcharging Ford personally for monies that Ford failed to ensure were properly deposited in a fiduciary account for Calvin Graves' benefit. We affirm.

Calvin Graves, born on March 5, 1997, was injured in an automobile accident on January 20, 2000. Preshus Graves, Calvin Graves' mother and next friend, commenced a civil action arising out of that accident, apparently on both of their behalfs. Preshus Graves filed a petition with the probate court to be appointed as conservator for Calvin Graves. Defendant Ford was

Preshus Graves' attorney. The probate court issued letters of conservatorship to Preshus Graves containing the following restriction:

Funds to be received may not be used without prior written authority of this Court. Funds are to be deposited in an account; certificate of deposit; money market certificate; or a combination of these, in a bank; credit union; or savings and loan association insured by an instrumentality of the federal government which accepts these conditions: The funds may not be withdrawn from the depository until further order of this Court. Ownership of the funds must be in the conservator as fiduciary for the minor. The depository must complete a form entitled "Verification of Deposit in Fiduciary Account" and "Agreement on Withdrawal of Funds" and mail this form to this Court within five days from initial receipt of funds. The depository will thereafter, at least annually and as requested, furnish this Court a Verification of Funds on Deposit form. No real estate asset of the estate may be sold without further order of the Court.

Preshus Graves, through Ford as her attorney, filed an acceptance of appointment and bond of fiduciary, and Preshus Graves was appointed as Calvin Graves' conservator. Ford received a "Notice to Attorney of Duties Under Conservatorship of a Minor" that included the following instructions:

Upon receipt of funds, you must accompany the fiduciary of the estate to the bank, credit union, or savings and loan association of their choice to deposit the funds in an insured account or certificate of deposit which identifies the account as being a fiduciary account. You are to see that the fiduciary furnishes the depository a copy of the Letters of Authority setting forth any limitations of powers and that the depository understands and accepts the funds with these limitations. You are further to see that the representative of the depository executes a Verification of Deposit in Fiduciary Account Form, which must be returned to this Court within 5 days from the deposit.

Preshus Graves also received a "notice to fiduciary of duties" that similarly specified that "ownership of the funds must be in the conservator as fiduciary for the minor."

Preshus Graves subsequently petitioned the probate court, through Ford as her attorney, to approve a settlement in the underlying personal injury lawsuit. The probate court approved the settlement in the amount of \$3,300.00 for a PIP claim and \$6,000.00 for a third party claim, minus \$3,177.30 for attorney fees and costs, for a total of \$6,122.70. On the same day, Ford issued two checks from his client trust account, for \$2,200.00 and \$3,922.70, payable directly to Preshus Graves individually. Preshus Graves cashed both checks at Comerica Bank. Neither check was ever deposited into any sort of restricted account or any other sort of account for Calvin Graves' benefit. Ford contends that he told Preshus Graves that the money was to be kept in a separate account, but he did not accompany Preshus Graves to the bank or communicate with the bank in any way. Preshus Graves admitted that Ford gave her a Verification of Deposit form, but she did not complete or return it. The probate court, after sending Ford and Preshus Graves repeated notices that they had failed to file an inventory and failed to file a verification of funds, removed Preshus Graves as Calvin Graves' conservator.

The probate court appointed Richard J. Siriani as special fiduciary. Siriani immediately filed a “petition to surcharge Preshus Graves and William R Ford” for \$6,000.00 plus fees, costs, and interest.¹ Ford’s response was essentially to blame Preshus Graves: he denied any wrongdoing, and he stated that he told her “that the money would have to be separately maintained and accounted for,” that “upon learning of this situation” he told her to return the documents showing proof of deposit, that she promised to do so, and that “since that time, despite numerous calls or letters Ms. Graves has not responded.”

The trial court held a hearing on May 12, 2004. Ford alleges that he and his client, Preshus Graves, arrived at the probate court fully prepared to participate in the hearing, but Ford told Siriani prior to the hearing – off the record – that he had made Preshus Graves aware of her duties, whereupon Siriani told Ford that Ford would be released. Ford then chose to leave rather than accompany Preshus Graves to the hearing. At the hearing, Siriani told the probate court that he had “released Mr. Ford,” and Preshus Graves agreed to sign a promissory note to repay the money. The trial court did not enter any order pertaining to Ford.

Preshus Graves did not actually sign the promissory note. The trial court issued at least one show cause order and eventually issued a bench warrant for Preshus Graves’ arrest. The record suggests that Preshus Graves’ whereabouts may have become unknown.

In any event, more than half a year later, Siriani filed a notice of deficiency stating that the estate had not received any assets. On September 7, 2005, Siriani filed a motion to compel Ford to produce copies of the checks that he issued to Preshus Graves, “to determine whether or not there is any liability of individuals or institutions to reimburse the Estate for the net settlement.” The trial court issued an order compelling production of the checks, which Ford protested but with which he eventually complied. Siriani then filed a new petition to surcharge Comerica Bank,² Preshus Graves, and Ford. The claims against Ford were similar to the claims made in the 2004 petition: generally, that Ford failed to take appropriate and necessary measures to ensure that the checks were deposited into a properly restricted account.

The parties all filed motions for summary disposition against each other. In relevant part, Ford asserted that the claims against him were barred pursuant to the doctrine of res judicata because he had been released on May 12, 2004. Ford also asserted that the probate court lacked jurisdiction, arguing that the only possible basis for the claims against him sounded in professional negligence and that “there was never any basis to surcharge” him in the first place. On March 31, 2008, in a thorough opinion, the probate court rejected Ford’s arguments and entered summary disposition in favor of Siriani against Ford and denied Ford’s motion. The probate court then dismissed the bench warrant for Preshus Graves. Ford moved for reconsideration, which the probate court denied, observing that “the facts still remain that on May 28, 2003, even though the Letters of Conservatorship were restricted, Mr. Ford issued two checks to Preshus Graves, individually,” and those checks were never properly deposited.

¹ As noted, the settlement checks at issue actually totaled \$6,122.70.

² The claims against Comerica Bank are irrelevant to this appeal and will not be discussed.

Ford now appeals. This Court’s review of motions for summary disposition is de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Ford first argues that the trial court lacked subject matter jurisdiction. Specifically, Ford argues that the trial court could only have held him liable on the basis of professional negligence, which he asserts is outside the probate court’s jurisdiction. We disagree.

The probate court’s jurisdiction is determined by the pleadings. *In re Hatcher*, 443 Mich 426, 437-438; 505 NW2d 834 (1993). By statute, the probate court has exclusive subject matter jurisdiction over “a proceeding that concerns a guardianship, conservatorship, or protective proceeding.” MCL 700.1302(c). Additionally, the probate court has concurrent subject matter jurisdiction in cases involving protected individuals to “hear and decide a claim by or against a fiduciary or trustee for the return of property;” and “hear and decide a contract proceeding or action by or against an estate, trust, or ward.” MCL 700.1303(1)(h-i). The purpose of the concurrent jurisdiction is “to simplify the disposition of an action or proceeding involving a decedent’s, a protected individual’s, a ward’s, or a trust estate by consolidating the probate and other related actions or proceedings in the probate court.” MCL 700.1303(3). This is a case that concerns a conservatorship and in which the probate court is hearing and deciding an action by the estate for the return of property, and it is within the context of an already-existing probate case that is more efficiently and simply resolved by keeping it in the probate court.³

Ford next argues that the claims against him are barred by res judicata. We disagree.

“For the doctrine [of res judicata] to apply (1) the former suit must have been decided on the merits, (2) the issues in the second action were or could have been resolved in the former one, and (3) both actions must involve the same parties or their privies.” *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 215-216; 561 NW2d 854 (1997). Here, there was no decision on the merits in any prior action. The May 12, 2004, hearing that Ford relies on did not culminate in any order addressing Ford in any way. Ford’s liability was simply not addressed by the court at all, and if Ford did not attend the hearing, it was solely because he chose not to. Furthermore, whatever transpired at the May 12, 2004, hearing was part of the same, ongoing action regarding the administration of Calvin Graves’ estate, and res judicata is not applicable within the same action. *Harvey v Harvey*, 237 Mich App 432, 437; 603 NW2d 302 (1999); *Vandenberg v Vandenberg*, 253 Mich App 658, 663; 660 NW2d 341 (2002). Finally, the first petition was based only on the known fact that Calvin Graves’ settlement proceeds had not been properly deposited. Because Ford did not disclose significant facts pertaining to the checks he

³ “An attorney may receive property that belongs to his or her client or a third party. In such cases, the attorney has a duty to notify all interested parties, safeguard the property, and promptly distribute the property to the rightful owners. See MRPC 1.15.” *Kasben v Hoffman*, 278 Mich App 466, 472; 751 NW2d 520 (2008). The “rightful owner” here was Calvin Graves, not his mother. As we discuss, by making the checks payable to Preshus Graves, personally instead of as Calvin’s conservator, Ford *gave the money to the wrong person*. Nevertheless, as we discuss *infra*, in our view, Ford’s liability here was not premised on professional negligence.

issued to Preshus Graves,⁴ *res judicata* would be inapplicable because of a change in the known facts. *Labor Council, Michigan Fraternal Order of Police v City of Detroit*, 207 Mich App 606, 608; 525 NW2d 509 (1994).

Finally, Ford argues that there exists no authority under which the probate court could sanction him because he did not violate any order, statute, rule or other law.⁵ We disagree in part.

We do agree that Ford did not violate any court order that we can identify. The “notice to attorney of duties” is a clear directive from the court, unambiguously explaining what responsibilities it expected the recipient to carry out. However, it is a notice, not an *order*. We find it inconceivable that Ford would have been unaware of the probate court’s expectations. However, because the document is a notice and not clearly a court order, Ford’s failure to carry out his responsibilities thereunder does not constitute violation of a court order.

Ford was Preshus Graves’ attorney, MCR 5.117(A), but because Preshus Graves was a personal representative, Ford’s “client” also *effectively* includes the estate, not just the fiduciary thereof in her personal capacity. See MCL 700.3715; *Steinway v Bolden*, 185 Mich App 234, 237-238; 460 NW2d 306 (1990). As a consequence, the attorney would be subject to a proceeding to surcharge pursuant to MCR 8.122 by a replacement fiduciary. *Id.*, 236-238. A conservator is also a fiduciary of an estate, subject to the same obligations and standards as a trustee. MCL 700.1104(e); MCL 700.5416. The court is not permitted to impose a surcharge on a personal representative for any acts that were authorized at the time they were carried out. MCL 700.3703(2). By implication, the court *is* permitted to impose a surcharge for unauthorized acts. And the fulcrum of Ford’s liability is that he engaged in an unauthorized act by issuing Calvin Graves’ money to a person other than Calvin Graves or Calvin Graves’ conservator. Notwithstanding the fact that Preshus Graves was Calvin Graves’ conservator at the time, the checks were not made out to her *in that capacity*. Therefore, they were simply made out to an unauthorized third party, resulting in Calvin Graves’ estate losing the money altogether.

⁴ Specifically, that the checks had not even been properly made out: as noted, instead of making them payable to Preshus Graves as Calvin Graves’s conservator, Ford made them payable to Preshus Graves *personally*. The trial court reasonably found that Ford’s failure to disclose this fact constituted a failure to fully inform the court and was misleading to the court. However, the probate court did not, as Ford appears to believe, ever suggest that it found Ford to have engaged in any *intentional* deception.

⁵ Ford additionally argues that Siriani was responsible for Ford not being dismissed at the May 12, 2004, hearing. Apparently, Ford met Siriani outside the courtroom prior to the hearing, and, despite being fully prepared to participate in the hearing – in which his client *did* participate and signed the promissory note – allegedly entered into some agreement, *off the record*, to the effect that Siriani “released” him. Ford concludes that Siriani precluded him from making a record or asking the trial court to dismiss him. However, it is clear that he voluntarily chose not to participate in the hearing.

In summary, there was no genuine question of material fact that Ford gave Calvin Graves' settlement money to the wrong person, that he failed to execute his duty to refrain from disgorging Calvin Graves' money to unauthorized third parties, and that as a consequence the money was never received into Calvin Graves' estate. The probate court's conclusion that Ford was liable for the surcharge against him was correct.

Affirmed.

/s/ Alton T. Davis

/s/ William C. Whitbeck

/s/ Douglas B. Shapiro