STATE OF MICHIGAN

COURT OF APPEALS

GREGORY J. ZACK,

Plaintiff/Counter-Defendant-Appellant,

v

MARY A. ZIELINSKI,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
March 28, 2013

No. 307284
Macomb Probate Court
LC No. 2010-200019-CZ

Before: CAVANAGH, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Gregory Zack appeals the trial court's final order in this action involving the estate of the decedent, Nina Zack. For the reasons set forth below, we affirm.

I. FACTS

Approximately four years before her death, the decedent executed a will naming her son, Zack, as her sole heir. The will entitled Zack to all of the decedent's estate, after the payment of funeral expenses, administrative costs, and taxes. The decedent named her sister-in-law and close friend, Mary Zielinski , as personal representative of her estate. Neither party contests the will's validity or the decedent's capacity when she executed it. On June 16, 2004, two weeks after she executed her will, the decedent made Zielinski a payable on death (POD) beneficiary of two Warren Bank accounts (the POD accounts), worth approximately $185,000. Zack maintains that he is entitled to the $185,000, not Zielinski.

II. ANALYSIS

A. SUMMARY DISPOSITION

Zack argues that the trial court erred by granting summary disposition to Zielinski on his breach of contract claim.

We review de novo questions regarding the existence and interpretation of a contract, the application of our court rules, and the trial court's grant of summary disposition. *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452, 456; 733 NW2d 766 (2006); *Cedroni Assoc v*

Tomblinson, Harburn Assoc, 492 Mich 40, 45; 821 NW2d 1 (2012). When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, and other evidence in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A trial court should grant summary disposition "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*.[1]

Zack claims he and Zielinski made an agreement that he would receive the funds from the POD accounts. The trial court correctly ruled that MCR 2.507(G) applies to the purported agreement in this case, and that the requirements of the court rule were not met. MCR 2.507(G) provides:

> **(G) Agreements to be in Writing.** An agreement or consent between the parties or their attorneys respecting the proceedings in an action, *subsequently denied by either party*, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney. [Emphasized language was omitted from rule, effective September 1, 2011.]

MCR 2.507(G) applies to the alleged agreement because a probate action was pending, the agreement concerned "the proceedings in an action," and the agreement was "subsequently denied" by Zielinski. According to Zack, the agreement stated that he would not petition to remove Zielinski as personal representative of the estate if Zielinski included the POD accounts as part of the estate. Thus, Zack agreed to forego a right he had in the probate action, and he would have filed a petition to remove Zielinski as personal representative in that action. See MCL 700.1302(a) (conferring exclusive jurisdiction on the probate court in cases involving the administration and internal affairs of an estate); MCL 700.3611(1) ("[a]n interested person may petition for removal of a personal representative for cause at any time"). Zack also argued that the POD account funds were part of the estate, so they rightfully belonged to him. The probate court has exclusive jurisdiction over matters relating to the distribution of an estate. MCL 700.1302(a). Thus, an agreement to distribute potential estate assets concerns "the proceedings in" the probate action. See MCR 2.507(G).

We reject Zack's claim that the alleged agreement was not "subsequently denied" by Zielinski. In his amended complaint, Zack asserted that the parties had an agreement that the

[1] We note that Zack cites to trial testimony in support of his arguments on this issue. The trial court granted Zielinski's motion for summary disposition before trial, so trial testimony did not exist when the judge made her decision. Accordingly, we will not consider it in deciding whether the trial court correctly granted the motion. We also note that both parties cite to evidence that does not appear in the lower court file. This Court cannot look to that evidence when reviewing the trial court's order granting Zielinski's motion. See *Calhoun Co v Blue Cross Blue Shield Mich*, 297 Mich App 1, 5; 824 NW2d 202 (2012); see also *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

POD account funds would be used to pay administrative expenses of the estate and the remaining funds would be disbursed to Zack. In her answer, Zielinski denied the allegations of that paragraph as untrue. Thus, from the outset, Zielinski has denied that an agreement exists.

Because MCR 2.507(G) applies to the purported agreement, to be enforceable, the agreement had to either be made in open court or be in writing and "subscribed by" Zielinski. See MCR 2.507(G). The word "subscribed" is not defined in MCR 2.507(G); this Court has used the dictionary definition to determine the word's meaning with respect to this court rule. See *Kloian*, 273 Mich App at 459. Subscribe means "to amend, as one's signature, *at the bottom of a document* or the like; sign." Random House Webster's College Dictionary (2001) (emphasis added); see also *Kloian*, 273 Mich App at 459. Here, the alleged agreement was not made in open court and there is no evidence of a written agreement signed by Zielinski. In claiming that an agreement existed, Zack relied on several letters written by his attorney, Malach. However, none of these letters were signed by Zielinski. Thus any alleged "agreement" does not comply with the requirements of MCR 2.507(G), and is unenforceable. See *Kloian*, 273 Mich App at 460. Therefore, the trial court correctly granted summary disposition in favor of Zielinski on Zack's breach of contract claim.

B. TRIAL

Zack claims the court should have required the presence of Zielinski's former attorney, Peter Tranchida, at trial. He asserts that Tranchida would have testified about the decedent's intent with respect to the distribution of the POD accounts. However, if Tranchida testified, his testimony would have no bearing on the issues Zack raises on appeal. Zack does not appeal the trial court's dismissal of his conversion claim, and the court decided the breach of contract claim before trial. Zack appeals the trial court's ruling that the estate must reimburse Zielinski for administrative expenses she paid using the POD account funds, but Zack does not claim that Tranchida's testimony would shed any light on this issue.

Further, Zack admits that he never served Tranchida with a subpoena to appear at trial, and it is axiomatic that a party must secure his own witnesses. Zielinski subpoenaed Tranchida, but when he notified Zielinski that he was unable to attend the second day of trial, Zielinski excused him from appearing, as permitted by MCR 2.506(C)(3).

Zack claims the trial court should have granted him an adjournment so he could secure Tranchida as a witness. "An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence." MCR 2.503(C)(2). Zack did not make *any* effort to produce Tranchida before trial. He tried to subpoena Tranchida after trial began, but was unable to serve the subpoena. The trial court did not err in denying the adjournment.

Zack argues the court should have admitted Tranchida's deposition testimony. Prior testimony of an unavailable witness is not excluded by the hearsay rule. MRE 804(b)(1). A declarant is unavailable when he or she:

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> (3) has a lack of memory of the subject matter of the declarant's statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown. [MRE 804(a).]

The only situation potentially applicable here is (5), which applies when the declarant is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means. See MRE 804(a)(5). However, Zack did not take any steps before trial to secure Tranchida's appearance. Although he tried to serve Tranchida with a subpoena after trial began, Zack's counsel admitted that he was not able to actually serve the subpoena on Tranchida. Therefore, this exception does not apply and Tranchida's deposition testimony would have been inadmissible hearsay. See MRE 801; 802.

C. REIMBURSEMENT FOR ESTATE EXPENSES

Zack disputes the trial court's ruling that the estate must reimburse Zielinski for the estate expenses she paid with funds from the POD accounts. The trial court made this ruling after the bench trial, and without a request by Zielinski. In a bench trial, "[n]o exception need be taken to a finding or decision." MCR 2.517(A)(7). "The granting of equitable relief is ordinarily a matter of grace, and whether a court of equity will exercise its jurisdiction, and the propriety of affording equitable relief, rests in the sound discretion of the court, to be exercised according to the circumstances and exigencies of each particular case." *Tkachik v Mandeville*, 487 Mich 38, 45; 790 NW2d 260 (2010) (internal quotations omitted).

Zack argues that the order should be barred by equitable estoppel. "An equitable estoppel arises where (1) a party by representation, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on this belief, and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts." *Hughes v Almena Twp*, 284 Mich App 50, 78; 771 NW2d 453 (2009). There is no evidence that Zielinski intentionally or negligently induced Zack to rely and act on her testimony that her payment of estate expenses from the POD funds was a gift. Again, Zielinski did not ask for reimbursement; the trial court sua sponte ordered it. Thus, the issue is whether the trial court had the authority to order this remedy.

Under MCL 700.1302, the probate court has "exclusive legal and equitable jurisdiction" over:

> (a) A matter that relates to the settlement of a deceased individual's estate, whether testate or intestate . . . including, but not limited to, all of the following proceedings:
>
> (*i*) The internal affairs of the estate.
>
> (*ii*) Estate administration, settlement, and distribution.

Pursuant to the statute, the probate court's authority is broad with respect to the administration and internal affairs of an estate. See MCL 700.1302. The court ruled that the POD accounts transferred to Zielinski immediately upon the decedent's death, and were never part of the estate. Generally, an estate's administrative costs are paid from the estate. See MCL 700.3101; MCL 700.3805(1)(a). Accordingly, the trial court had the authority to order the estate to reimburse Zielinski for the estate expenses she paid with funds from the POD accounts.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad

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SHAPIRO, J. (*dissenting*).

I respectfully dissent.

The primary dispute in this case was whether defendant was entitled to the bank account opened by decedent before her death, on which defendant was listed as the "payable on death" beneficiary. Central to this determination was the testimony of Peter Tranchida, the attorney who prepared the decedent's will and who, during the critical events following decedent's death, represented defendant as the personal representative of the estate until his role as a witness required him to withdraw as counsel. In his deposition Tranchida testified in some detail as to the intent of the decedent that her son receive all her assets upon her death and that certain critical documents such as a power of attorney and the bank account change were executed in favor of the defendant without his knowledge although he was counsel for the decedent.

Defendant's trial attorney subpoenaed Tranchida and he was present for the first day of trial. Plaintiff intended to call Tranchida the following day as part of his case-in-chief. However, the witness did not appear on the second day of trial despite the subpoena. Plaintiff's counsel learned that morning that the defense had released the witness from its subpoena and the witness had left town for the rest of the week. I agree that the trial court did not err in refusing to enforce the subpoena as the attorney that signed it did in fact release the witness.

However, I conclude that the trial court erred in its refusal to grant the alternative forms of relief requested by plaintiff. Plaintiff asked that the trial court adjourn the case to allow Tranchida to testify or, in the alternative, to allow plaintiff to present the testimony obtained at Tranchida's de bene esse deposition. Defendant opposed plaintiff's requests and noted that

although the deposition had been noticed as a de bene esse deposition, she had objected to that status at the outset of the deposition. This is correct. However, the reason she gave for objecting to the deposition being de bene esse was that "we have no reason to believe he wouldn't be available at trial." In fact, however, the witness was not available at trial and the reason was that plaintiff's counsel mistakenly relied on the subpoena issued by defense counsel. Given the strong relevancy of this witness's testimony to the matters at issue and given that this was a bench trial, I would conclude that denying both alternatives, i.e., adjournment and admission of the deposition testimony, was an abuse of discretion and so reverse and remand.

/s/ Douglas B. Shapiro