

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2913-14T3

EMMALINE O'HARA,

Plaintiff-Respondent,

v.

JOHN B. O'HARA, JR., Deceased,

Defendant-Respondent,

and

THE ESTATE OF JOHN B.
O'HARA, JR.,

Defendant-Appellant.

Argued January 11, 2016 – Decided February 25, 2016

Before Judges Simonelli and Carroll.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FM-13-844-13.

Gregory J. Castano, Jr., argued the cause for appellant (Castano Quigley, LLC, attorneys; Mr. Castano, on the briefs).

Barbara L. Birdsall argued the cause for respondent Emmaline O'Hara (Birdsall & Laughlin, LLC, attorneys; Ms. Birdsall, on the brief).

LaRocca Hornik Rosen Greenberg & Patti LLC and Dunne & Associates, LLC, attorneys for respondent Emmaline O'Hara, join in the brief submitted by Birdsall & Laughlin, LLC.

The Menna Law Firm LLC and Dennis A. Durkin, Sr., attorneys for respondent John B. O'Hara, Jr., Deceased, have not filed briefs.

PER CURIAM

Defendant Estate of John B. O'Hara, Jr. (Estate) appeals from the January 2, 2015 Family Part order, denying the Estate's motion to dismiss the amended complaint, which joined the Estate as a defendant in the matrimonial action between respondent Emmaline O'Hara (Emmaline) and the decedent, John B. O'Hara, Jr. (John), and added a claim for a constructive trust. The Estate also appeals from the January 12, 2015 amended order, which corrected the amount of attorney's fees awarded to Emmaline. For the following reasons, we affirm.

We derive the following facts from the record. Emmaline and John were married in 1955. They had two children, Robin, who is deceased, and Kevin, from whom John was estranged for many years. John acquired substantial assets during the marriage, alleged to be valued at approximately \$6 million. He and Emmaline lived separate and apart for many years, but he provided for her care and support.

On November 13, 2012, Emmaline filed a complaint for divorce. She was approximately eighty years old at the time, and John believed her mental status had significantly deteriorated and she lacked the ability to manage her own

affairs. He also believed that the complaint was not a product of her intent, but rather, was a sham that Kevin construed and orchestrated in order to have his father's assets transferred to his mother so he could have control over and access to them.

On August 16, 2013, the Family Part judge appointed a guardian ad litem for Emmaline, who later initiated a separate competency proceeding in the Probate Part. In September 2013, John filed an order to show cause (OTSC) challenging the guardian's appointment and requesting dismissal of the matrimonial matter, among other things. On September 25, 2013, the Family Part judge denied the OTSC. Thereafter, on October 22, 2013, a psychologist concluded that Emmaline had severe cognitive deficits, was suffering from "Major Neurocognitive Disorder (likely Dementia, Alzheimer's Type)," and lacked the capacity to govern herself, manage her affairs, and understand or participate in the divorce proceedings.

On January 22, 2014, John filed an answer in the matrimonial matter and a counterclaim to adjudge Emmaline mentally incompetent and appoint him as her guardian. John also filed a third-party complaint on his and Emmaline's behalf against Kevin, asserting claims of conspiracy, fraud, abuse of process, invasion of privacy, and intentional infliction of emotional distress.

On January 23, 2014, John executed a Last Will and Testament (the Will). The Will left Emmaline no property interest in the marital assets. Instead, the Will created marital deduction trusts that only entitled Emmaline to income from the trusts during her lifetime, and permitted, but did not require, the trustee to pay "as much or all of the principal as may appear necessary from time to time" for her support, maintenance and medical care, and permitted the trustee to "consider other financial resources available to [Emmaline] for such needs."

The Will also created a family trust for Emmaline's benefit, which also permitted, but did not require, the trustee to distribute as much of the trust principal and income as the trustee "in the reasonable exercise of discretion" determined was necessary for her health, support or maintenance. John named his granddaughter as a contingent beneficiary, and named his three nephews as contingent beneficiaries if she did not survive. John specifically disinherited Kevin and explained why he did so.

During the course of the matrimonial litigation, Emmaline repeatedly asserted that John had not been forthright regarding the value of the marital assets. In addition, the court entered numerous orders compelling discovery, awarding pendente lite

support and counsel fees to Emmaline, and imposing sanctions against John for non-compliance. John died unexpectedly on April 27, 2014. At the time of his death, a request for a bench warrant was pending for his arrest.¹

Emmaline filed a motion to stay dismissal of the matrimonial matter. In a June 30, 2014 order and written opinion, Judge Mara Zazzali-Hogan permitted Emmaline to file an amended complaint joining the Estate as a defendant and asserting a claim for a constructive trust. Relying on Carr v. Carr, 120 N.J. 336 (1990), the judge found that although the Will provided for Emmaline, it did not guarantee her the rights she would have been afforded under the alimony and equitable distribution statutes. The judge also found it was unclear whether the trusts could be funded and whether Emmaline would ultimately receive distribution of the income or principal from the trusts, in part, because the trustee had discretion to distribute the assets. The judge concluded that "[u]ltimately, the matter involve[d] the division of [John's] [E]state and whether [Emmaline] receives an equitable share she would have received had [John] not died."

¹ Following John's death, Emmaline's guardian ad litem dismissed the competency proceeding. On May 13, 2014, John's Will was admitted to probate, and an executor and trustee were appointed.

On July 15, 2014, Emmaline filed an amended complaint. The Estate filed a motion to dismiss pursuant to Rule 4:6-2(e) for failure to state a claim upon which relief can be granted.² The Estate argued, in part, that a constructive trust was not proper because Emmaline was not disinherited; rather, she was the sole beneficiary of the trusts and there were no exceptional circumstances justifying equitable relief. Emmaline filed a cross-motion, raising a myriad of claims for relief.

In a January 2, 2015 order and opinion, Judge Zazzali-Hogan denied the motion to dismiss, essentially for the same reasons expressed in her June 30, 2014 opinion. The judge added the following:

Throughout this litigation, [Emmaline] has asserted that [John] had not been forthright regarding the value of the marital estate and had, over the course of the litigation, refused to pay her court-ordered attorneys' fees and pendente lite support. One must only review the prior [o]rders in this case. Moreover, as noted during oral argument, it is not sufficient that a trust has been established on [Emmaline's] behalf by [the] Estate. She has not been given unfettered access to the monies from the Estate. Rather, said funds shall be distributed according to the Trustee of the Estate. Moreover, despite the Estate's assertion to the contrary, [Emmaline] is "not being taken care of" by the Estate. There are hundreds of thousands of dollars owed to her and her

² The Estate also sought dismissal on other grounds not pertinent to this appeal.

attorney from prior orders. Therefore, the [c]ourt chooses not to alter its decision regarding the constructive trust and [the] Estate's [m]otion to [d]ismiss the amended complaint for failing to state a claim for which relief can be granted under R. 4:6-2(e) is **denied**.

The judge concluded that "[w]ithout allowing the matrimonial matter to proceed to determine the value of the parties' assets and what is available per equitable distribution, it will never be clear whether [Emmaline] received everything under the trust to which she is entitled, via equitable distribution."

Judge Zazzali-Hogan did not grant Emmaline a constructive trust; rather, she ordered the parties to proceed with discovery to determine whether to impose this equitable remedy. The judge also awarded attorney's fees to Emmaline, among other things. In a January 12, 2015 order, the judge amended the amount of the attorney's fee award. On February 27, 2015, we granted the Estate's motion for leave to appeal.

On appeal, the Estate contends that Judge Zazzali-Hogan erred in denying its motion to dismiss. The Estate argues that Carr does not apply because Emmaline was not disinherited. We disagree.

Our review of a dismissal for failure to state a claim pursuant to Rule 4:6-2(e) is de novo, following the same standard as that of the trial court. Banner v. Hoffman-La Roche

Inc., 383 N.J. Super. 364, 373-74 (App. Div. 2006), certif. denied, 190 N.J. 393 (2007). "Thus, like the trial court, [we] must accept as true the facts alleged in the complaint, and credit all reasonable inferences of fact therefrom, to ascertain whether there is a claim upon which relief can be granted." Malik v. Ruttenberg, 398 N.J. Super. 489, 494 (App. Div. 2008).

In evaluating a motion to dismiss for failure to state a claim, we must search the complaint "in depth and with liberality to determine if there is any 'cause of action suggested by the facts.' The inquiry is limited to 'examining the legal sufficiency of the facts alleged on the face of the complaint.'" State v. Cherry Hill Mitsubishi, 439 N.J. Super. 462, 467 (App. Div. 2015) (quoting Printing-Mart Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). "Dismissal is the appropriate remedy where the pleading does not establish a colorable claim and discovery would not develop one." Ibid. (citation omitted). Applying these standards, we conclude that Judge Zazzali-Hogan properly denied the motion to dismiss.

Equitable distribution is a statutory remedy that is available following the entry of "a judgment of divorce, dissolution of civil union, divorce from bed and board or legal separation from a partner in a civil union[.]" N.J.S.A. 2A:34-23(h). "[O]rdinarily, equitable distribution of marital assets

arises only with the adjudication of divorce." Carr, supra, 120 N.J. at 343. "[W]hen one spouse dies during the pendency of an action for divorce, the action is abated and statutory equitable distribution is unavailable." Kay v. Kay, 405 N.J. Super. 278, 283 (App. Div. 2009), aff'd, 200 N.J. 551, (2010) (citation omitted).

However, in exceptional circumstances, equitable relief may be available in divorce actions following a spouse's death prior to the entry of a final judgment. Equitable remedies, including constructive trusts, may be imposed by a court to prevent unjust enrichment or fraud. Carr, supra, 120 N.J. at 352. "[A]ssuming the truth of the . . . allegations, a constructive trust imposed to address the alleged fraud on the marital estate would prevent unjust enrichment." Kay, supra, 405 N.J. Super. at 286.

Here, once Emmaline filed her complaint for divorce, she was entitled to equitable distribution of marital assets. John's death did not diminish that right. See Carr, supra, 120 N.J. at 350. Thus, the court must determine the value of the marital assets, the appropriate equitable distribution, and whether the Estate would be unjustly enriched if it retained full interest in the marital assets. At this stage of the litigation, Emmaline has pled a cause of action for a constructive trust, and we must accept as true and give all

reasonable inferences to her allegations that John had not been forthright about the value of the marital assets and the Will effectively disinherited her and extinguished her interest in the marital assets, thus unjustly enriching the Estate. Without discovery and a hearing, it cannot be determined whether a constructive trust is the appropriate equitable remedy.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.



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