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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

In the Matter of the ESTATE OF Alexander **HERENCHAK**, Deceased.

Argued Dec. 16, 2014.
|
Decided June 8, 2015.

On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Monmouth County, Docket No. P–210–12.

Attorneys and Law Firms

Lawrence C. Wohl argued the cause for appellant Lyudmyla **Herenchak** (Archer & Greiner PC, attorneys; Mr. Wohl, on the brief).

Neal S. Solomon argued the cause for respondents Leonard J. Coates and Mark Andrew (Pellettieri Rabstein and Altman, attorneys; Mr. Solomon and Elyse Herman, on the brief).

Jordan S. Weitberg argued the cause for respondent Valerie **Herenchak** (Bressler Amery & Ross, attorneys; Mr. Weitberg, on the brief).

Hartmann Doherty Rosa Berman & Bulbulia, attorneys for respondent Gregory **Herenchak**, join in the brief of respondent Valerie **Herenchak**.

Before Judges KOBLITZ and HIGBEE.

Opinion

PER CURIAM.

***1** Plaintiff Lyudmyla [1] **Herenchak** appeals from an order granting summary judgment and dismissing with prejudice her complaint claiming a right to half of the proceeds from the post-marital sale of the development rights of certain property that was owned by her husband, Alexander **Herenchak**, (decedent) before his marriage to plaintiff. We affirm for the reasons that follow.

On July 5, 2012, plaintiff filed an order to show cause and verified complaint against decedent's estate (Estate), seeking to obtain one-half of the proceeds from the sale of development rights to a property owned by decedent. The Estate, in response, filed a motion for summary judgment. Two of the children of decedent, Valerie **Herenchak** and Gregory **Herenchak**, filed a motion to dismiss for failure to state a claim. Under the terms of decedent's last will and testament (Will) plaintiff was given a life estate in the marital residence and $250,000 in a trust. Plaintiff did not challenge the Will. The two children of decedent involved in this litigation inherited the remainder of the Estate, including the marital residence when plaintiff died, or otherwise forfeited her life estate.

Before their marriage on July 30, 2005, the parties entered into a pre-nuptial agreement to each maintain sole ownership of all their respective property. They also waived their right to an elective share of the deceased spouse's estate, pursuant to *N.J.S.A.* 37:2–34(e). However, the agreement did allow for transfers of property during the marriage.

Plaintiff and decedent lived together in Allentown, New Jersey. Decedent died on April 12, 2010, at the age of eighty-four. Before marrying plaintiff, decedent was married for forty-one years to Madelaine **Herenchak**, who died in 1999. After Madelaine's death, decedent became the sole owner of the property that had been owned by both of them.

Prior to marrying plaintiff, decedent, on or about February 4, 2004, submitted an application for the sale of a development easement to the New Jersey State Agriculture Development Committee (Committee). The substantial acreage was one large parcel of farmland on which the marital residence was located. The actual area where the home was located was not included in the easement. Decedent accepted the Committee's offer on November 27, 2004. On June 15, 2005, shortly before the marriage, decedent entered into an "Agreement to Sell Development Easement" with the State of New Jersey for $20,000 per acre. The final total price for the purchase of the development rights was in excess of $2.7 million. Plaintiff was never a party to the application for sale of the development rights, the acceptance letter, or the agreement of sale. The Committee required title insurance before the closing. New Jersey State Agriculture Development Committee (Committee) obtained a title insurance policy commitment from First American Title Insurance Company. The title insurance commitment required that the spouse sign

the deed for conveyance of the development rights and the affidavit of title because the property was the principal marital residence, notwithstanding that the residence itself was not being sold. Pursuant to *N.J.S.A.* 3B:28–3, plaintiff had a right of joint possession to the marital home as long as both parties were alive. *N.J.S.A.* 3B:28–3 reads:

> ***2** a. During life every married individual shall be entitled to joint possession with his spouse of any real property which they occupy jointly as their principal matrimonial residence and to which neither dower nor curtesy applies. One who acquires an estate or interest in real property from an individual whose spouse is entitled to joint possession thereof does so subject to such right of possession, unless such right of possession has been released, extinguished or subordinated by such spouse or has been terminated by order or judgment of a court of competent jurisdiction or otherwise.

While the statute gives right to possession of the marital residence, it does not give ownership rights. Still, there existed an unusual factual scenario since the marital residence was located on 6.1 acres of the approximately 142–acre plot of farmland that the State was acquiring the development rights to with the sale. The residence and other acreage were all one parcel of land contained in one deed, although the developmental easement carved out and exempted the residence and approximately six acres of the property. The title insurance commitment stated in pertinent part:

> The following requirements must be met:
>
> 3. Documents satisfactory to us creating the interest in the land and/or mortgage to be insured must be signed, delivered and recorded:
>
> Deed From:
>
> ALEXANDER **HERENCHAK**, as surviving tenant by the entireties, and spouse, if any ...
>
> ....
>
> 5. Receipt of Affidavit of Title from the Grantor(s).
>
> IF APPLICABLE, we require the affidavit to make:
>
> (a) An affirmative statement that the property does not constitute the principal marital residence should the spouse not join in the conveyance;

Plaintiff alleges that decedent gave her an interest in the property, which was the subject of the sale, and promised her one-half of the proceeds. Plaintiff's claim of right to the proceeds of the sale of the property stems from what she asserts was an oral promise to her by decedent, which is evidenced by her participation in the signing of several closing documents required by the title commitment. Plaintiff points to the following to demonstrate her ownership rights: (1) the deed of easement for the sale of the development rights provided that the deed was between decedent and plaintiff, as grantor, and the Committee, as grantee; (2) the deed of easement was signed by decedent and plaintiff; (3) the seller's residency certification/exemption for the sale of the development rights was signed by decedent and plaintiff; (4) a seller certification and disclosure of political contributions was completed by plaintiff, identifying her as a seller; and (5) the affidavit of title, prepared for the sale of the development rights, was signed by decedent and plaintiff as husband and wife.

However, decedent alone executed the HUD–1 closing statement, and on that form the seller is listed as "Alexander **Herenchak**" and only his signature is on the document. The proceeds from the sale were paid entirely to decedent and were deposited in a bank account in his name only. Plaintiff claims he told her the proceeds would be deposited in a joint account, but acknowledges that this did not occur.

***3** Although plaintiff argued initially that the decedent gave her ownership of the property before the sale, any argument that there was a transfer of the ownership of the property was withdrawn at oral argument. It was conceded that there was no deed or other writing transferring any ownership interest in the real property to plaintiff as required by *N.J.S.A.* 25:1–11 and 25:1–13. Plaintiff's counsel acknowledged that *N.J.S.A.* 3B:28–3 gave her no ownership rights.

When plaintiff's counsel was asked by the court if the issue before the court related to a gift of the sale proceeds from decedent to the plaintiff, the answer was "yes." Therefore, plaintiff, having conceded that her claim was based in part on a claim of a gift, was required to demonstrate the elements of an enforceable gift.

Plaintiff maintained that decedent gave her a gift of one-half of the sale proceeds. The elements needed to prove a gift from a decedent are clear: "(1) an unequivocal donative intent on the part of the donor; (2) an actual or symbolical delivery of the subject matter of the gift; and (3) an absolute and irrevocable relinquishment by the donor of ownership and dominion [over the subject matter of the gift]." *Lebitz–Freeman v. Lebitz,* 353 *N.J.Super.* 432, 437, 803 A.2d 156 (App.Div.2002) (quoting *In re Dodge,* 50 *N .J.* 192, 216, 234 A.2d 65 (1967)). "The proof of these elements must be 'clear, cogent, and persuasive.' " *Id.* (quoting *Czoch v. Freeman,* 317 *N.J.Super.* 273, 284, 721 A.2d 1019 (App.Div.), *certif. denied,* 161 *N.J.* 149 (1999)). "The burden of proving an *inter vivos* gift is on the party who asserts the claim." *Id.* at 283.

Here, plaintiff failed to establish that the sale proceeds were a gift. Plaintiff conceded that approximately $2.7 million from the sale was deposited exclusively into the decedent's bank account, which was in his name alone. There was no delivery of the alleged gift of one-half the proceeds from the sale to plaintiff. Specifically, plaintiff's attorney stated, "[t]here was a promise, it should have been delivered, and it wasn't." The court echoed the point saying, "[h]e just didn't deliver." This conclusion is unrefuted and is reached by viewing the facts in a light most favorable to plaintiff.

In the decision granting summary judgment, the court noted "beginning the analysis you have to start with the fact that at no time was the property ever held in the name of Lyudmyla **Herenchak** as an owner. There is no deed, there is no written document conveying that property to her." The court further found that plaintiff had not demonstrated that there were material facts in dispute because counsel acknowledged she never had an ownership interest in decedent's property until she was given a life estate in the residence in the Will. She could not prove a gift because she was unable to prove that decedent either delivered half of the proceeds to her as a gift, or relinquished ownership of any of the proceeds to her.

***4** Summary judgment must be granted if there is no genuine issue as to any material fact, and the moving party is entitled to a judgment or order as a matter of law. *Town of Kearny v. Brandt,* 214 *N.J .* 76, 91 (2013), *R.* 4:46–2(c). Thus, we consider, as the court did, whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Ibid.* (quoting *Brill v. Guardian Life Ins. Co. of Am.,* 142 *N.J.* 520, 540, 666 A.2d 146 (1995)).

If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." *Massachi v. AHL Servs., Inc.,* 396 *N.J.Super.* 486, 494, 935 A.2d 769 (App.Div.2007), *certif. denied,* 195 *N.J.* 419, 949 A.2d 847 (2008) (citation omitted). We accord no deference to the trial judge's conclusions on issues of law and review issues of law de novo. *Nicholas v. Mynster,* 213 *N.J.* 463, 477–78 (2013). We find based on our own review of the law and the record that the court correctly applied the law to the undisputed facts, and we find plaintiff has no legal claim to the proceeds of the sale.

Plaintiff raises two points of argument on appeal besides the fundamental issue of the correctness of the substantive ruling by the judge. The first point is that the summary judgement order must be reversed and remanded because the court did not entertain oral argument before granting summary judgment on the Estate's motion for summary judgment. Plaintiff points to the transcript of the oral argument to attempt to support her claim that the remainder beneficiaries' motion to dismiss was argued, but the summary judgement motion that was granted by the court was not argued. Plaintiff argues that the court told plaintiff's counsel that oral argument would be heard at a later date.

A careful review of the record shows that there were two motions before the court. Both had been briefed before oral argument was scheduled for both motions, together, on September 21, 2012. The first was the motion to dismiss under *Rule* 4:6–2, and the other was the motion for summary judgment under *Rule* 4:46. All counsel were prepared to present arguments on both motions. The court reviewed the motions and both were addressed. Even though the court said it was hearing argument on the motion to dismiss, both motions raised the same issue, that is, whether there was any material issue of fact in dispute as to whether plaintiff had a viable claim to half of the sale proceeds. The motion to dismiss raised time bars, but the primary focus of the oral argument was the merits of the claim, and plaintiff's counsel was given more than adequate opportunity to argue.

The motion to dismiss is governed by *Rule* 4:6–2. Counsel presented and argued from materials outside of the pleadings, so both motions before the court were properly treated as summary judgment motions. The court might have wavered initially as to whether there would be arguments on the

defendant's motion for summary judgment, but this was further clarified by the court at the end of the argument:

> ***5** [T]he bottom line is, I'm going to figure out if this can qualify as a gift. That's all I'm going to do on your motion. If I can figure out that it doesn't, then we're done. If it does, then we go to summary judgment.

Thus, plaintiff was put on notice that additional argument might not be necessary. In fact, during the argument counsel was questioned by the court about the title commitment which was attached to the second motion. Counsel for plaintiff was able to make all of his arguments, as did counsel for the beneficiaries. The only one deprived of a chance to argue was counsel for the Estate who filed the second motion. Even now on appeal, plaintiff presents no argument that would sustain her claim in light of the basic unrefuted facts. We find plaintiff did receive oral argument on the issues raised in the motion decided by the court.

The last point raised by plaintiff is that we should rule on whether the discovery rule, which tolls the statute of limitations in tort or fraud cases, should be applied in a probate dispute. *See Szczuvelek v. Harborside Healthcare,* 182 *N.J.* 275, 281, 865 A.2d 636 (2005) (holding that a cause of action does not accrue until the injured party discovers or should have discovered that the party had a basis for a claim). Plaintiff alleges that decedent created a joint account to deposit the proceeds of the sale, and that she did not discover that he had not deposited the proceeds into this account until three years after the sale, in 2009, and by then he was too sick to remedy the situation. He died in 2010 and she chose not to contest the Will, although she admittedly knew at that time that she had not received any portion of the sale of the development rights. Therefore, the facts do not present an appropriate vehicle to consider whether the discovery rule should be applied in a probate setting. In any event, even if plaintiff were given the benefit of the discovery rule, she would be unable to surmount the difficulties in proof outlined above with regard to proving the existence of a gift.

We thus affirm the dismissal with prejudice of plaintiff's complaint.

Affirmed. [2]

All Citations

Not Reported in A.3d, 2014 WL 9868901

Footnotes

1 Plaintiff's name is spelled several ways in the record.

2 The motion order in M–4362–13 which seeks to strike portions of appellant's brief and appendix is denied.