SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2862-14T1

ELISSA RUBENSTEIN,

Plaintiff-Appellant,

and

STEVEN RUBENSTEIN and JOAN B. RUBENSTEIN,

Plaintiffs,

v.

ESTATE OF HENRY D. RUBENSTEIN, ALEXANDER RUBENSTEIN, CAROLE RUBENSTEIN, Individually and as Executrix of the Estate of Henry D. Rubenstein, and BRUCE KASPAR,

Defendants-Respondents.

Argued September 12, 2016 – Decided September 21, 2016

Before Judges Sabatino and Currier.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1641-13.

Elissa Rubenstein, appellant, argued the cause pro se.

James M. McCreedy argued the cause for respondents (Wiley Malehorn Sirota & Raynes,

attorneys; Mr. McCreedy, of counsel and on the brief; Meri J. Van Blarcom-Gupko, on the brief).

PER CURIAM

Plaintiff[1] Elissa Rubenstein, pro se, seeks review of various determinations by the trial court denying her relief in this probate action. For the reasons that follow, we vacate the trial court's orders dated May 29, 2014 and January 2, 2015, with respect to plaintiff, and remand for further proceedings consistent with this opinion.

I.

This probate case involves a decedent, Henry D. Rubenstein, a retired physician who left his insolvent estate to his second wife, defendant Carole Rubenstein, and Carole's[2] nephew, defendant Bruce Kaspar. The decedent and Carole also had a son together, Alexander Rubenstein, to whom the decedent explicitly did not make a direct bequest in his will. The decedent passed away in 2012 after battling significant health issues for approximately twenty years. According to defendants, but disputed by plaintiff, the

[1] The complaint named three plaintiffs: appellant Elissa Rubenstein, her brother Steven Rubenstein, and their mother Joan B. Rubenstein. Since the other two plaintiffs have not appealed, we use the term "plaintiff" to refer solely to Elissa Rubenstein, unless otherwise indicated.

[2] Because most of the individuals involved have the same last name, we will refer at times to each by their first name, intending no disrespect.

decedent's health problems and resulting circumstances depleted whatever wealth he had accumulated over his lifetime.

The decedent was previously married to plaintiff Joan B. Rubenstein, and had two children with her, plaintiffs Elissa and Steven Rubenstein. The couple divorced in the early seventies. According to a property settlement agreement ("PSA")[3] between the parties, the decedent was to leave individual bequests to Elissa and Steven equal to any bequest he left for any subsequent children, or, alternatively, one-eighth of the gross estate if the decedent had no subsequent children. The PSA also required the decedent to maintain a $100,000 life insurance policy for Joan's benefit. None of the plaintiffs received anything from the estate, since the decedent had disinherited Alexander, Elissa and Steven in his October 20, 2006 will, the estate allegedly had no net assets, and no insurance policy existed at the time of the decedent's death. Plaintiff contends that the decedent was motivated to disinherit Alexander in his will, at least, in part, to avoid leaving anything to her and Steven.

Plaintiffs sued the estate and the individual defendants for breach of the PSA, intentional interference of a contract, and a violation of the Uniform Fraudulent Transfer Act ("UFTA"),

[3] The parties did not provide a copy of the PSA in their appendices, but do not appear to dispute the key provisions relating to this litigation.

N.J.S.A. 25:2-20 to -34. Plaintiffs' core theory was that the decedent intentionally and wrongfully rendered his estate insolvent through inter vivos transfers to the individually-named defendants, and that those defendants knew of and cooperated with his plan. The complaint also alleged that the decedent's father, William Rubenstein — who had died over two decades ago — had left $15,000 each to Elissa and Steven, but that the decedent intentionally withheld from plaintiffs the fact of William's death and the bequests made by William to prevent them from taking those sums.

At the conclusion of the discovery period, defendants moved for summary judgment. Plaintiffs, then represented by counsel, filed extensive submissions in opposition to the motion. Plaintiffs also cross-moved to extend discovery, despite a trial date having already been fixed.

The trial court granted defendants' motion in part, dismissing all but one of the counts of the complaint because, in the court's view, plaintiffs failed to present any competent evidence of inter vivos transfers. The remaining count, which only involved and requested relief for Joan concerning the $100,000 in life insurance coverage, was not dismissed, because it was a breach of contract claim that did not rely on proving improper

asset transfers. The trial court also denied plaintiffs' cross-motion seeking to extend discovery.

The trial court's May 29, 2014 oral decision on the record, which was issued immediately after hearing oral argument from counsel for both sides, was not extensively detailed. The summary judgment ruling consists of the following three transcribed paragraphs:

> THE COURT: Okay. Looking at what was actually submitted to me, I really don't see any kind of a paper trail or any solid evidence of distributions during the decedent's, Dr. Rubenstein's, lifetime. May be that there were, but there's no evidence presented by the Court for any.
>
> The only thing that I really have is the fact that -- I think it's very conceded there was no maintenance of the life insurance policy. And I don't think that there was any legal obligation of the first wife to maintain it. But, you know, pay it herself and then seek the reimbursement. Because for all practical purposes she was entitled to have it maintained and . . . still remains entitled to receive at least a judgment of $100,000 against the estate.
>
> But without any evidence of actual transfers other than that I really have no evidence to deny the [defendants' summary judgment] motion. I will grant the motion except as to the claim for $100,000 -- for the life insurance policy for $100,000 against the estate. Because I think that does have to remain, whether there are assets to back that up or not. Otherwise the motion will be granted.

The portion of the court's oral decision denying plaintiff's cross-motion for discovery was not lengthy, and did not mention the applicable standard for discovery extensions set forth in the Rules of Court:

> THE COURT: Okay. And I will -- I will just state that at this late date I'm not going to be granting an extension of discovery. If one was applied for it should have been applied for, I think, back in January [2014].
>
> [DEFENSE COUNSEL]: I think the initial application was filed in February [2014], Your Honor.
>
> THE COURT: Okay. But it should have been applied then. The case does have a trial date. If anyone wants to do anything about that you'd have to go to Criminal Case Management -- not Criminal, Civil Case Management.
>
> [PLAINTIFFS' COUNSEL]: Right.
>
> THE COURT: And then they'd take it up with the proper authorities.

Plaintiffs' counsel apparently did not pursue any further steps with "the proper authorities" to pursue a discovery extension.[4]

[4] We suspect that the motion judge might have been referring to the vicinage's Presiding Judge of the Civil Division, if the vicinage was then utilizing a centralized civil calendaring system. In making that observation, we do not mean to suggest that there is anything at all improper in vicinages centralizing case management and routine discovery extension applications to the Presiding Judge or some other designated judge for sake of efficiency and consistency.

The trial court entered a consent order on July 3, 2014 awarding Joan the $100,000 for her insurance-related claim. Plaintiff subsequently filed a motion in the trial court to vacate that consent order and reopen the case.

The motion to vacate, which was considered by a different judge than the one who ruled on summary judgment, was denied by the trial court in an order filed on January 2, 2015. In her handwritten statement of reasons set forth on the order, the motion judge observed that the trial court "lost jurisdiction when the [consent] judgment was entered."

Plaintiff now seeks review of both the trial court's May 29, 2014 order, as well as the trial court's subsequent January 2, 2015 order denying post-judgment relief. The other two plaintiffs have not joined in the appeal. Defendants contend that this court lacks jurisdiction to review the May 29, 2014 order because plaintiff never filed a notice of appeal of that order, after having been afforded an opportunity by this court to do so in an order dated October 7, 2014. Defendants further contend that, if this court disagrees that plaintiff's attempt to overturn the May 29, 2014 order is not procedurally barred, her arguments for reversal lack merit and that the trial court properly denied her relief on May 9, 2014 and again on January 2, 2015.

II.

A.

We first consider whether this court should exercise jurisdiction over the substance of the issues raised by plaintiff. Defendants urge that we treat plaintiff's efforts to seek review of the trial court's May 29, 2014 dispositive order as a nullity, because she did not ultimately convert her motion for leave to appeal that order, when the trial court litigation became final, into a plenary notice of appeal. We decline to follow such a rigid approach.

Representing herself[5] at that point, plaintiff sought appellate review of the May 29, 2014 order on June 12, 2014, well within the forty-five days prescribed by Rule 2:4-1. At the time she did so, the court's ruling was interlocutory because it did not resolve all claims as to all parties, there being open issues concerning Joan's life insurance coverage. R. 2:2-3(a). Thereafter, the consent order resolving Joan's life insurance

[5] The record indicates that plaintiff had long-standing disagreements with plaintiffs' attorney, which led to his discontinuation of her representation after the summary judgment ruling was made, although a substitution of attorney was not filed immediately.

coverage was entered on July 3, 2014, apparently against plaintiff's wishes,[6] and the matter became final in its entirety.

Defendants have pointed to no substantive difference between the summary judgment and discovery issues that plaintiff set forth in her then-interlocutory appeal and what would have been set forth in a plenary notice of appeal. Nor is there any discernible prejudice to defendants related to the labeling of plaintiff's appellate papers.

We are mindful that plaintiff, who was by that point representing herself and apparently confused by the procedural events, did not supersede her motion for an interlocutory appeal with a notice of appeal within the fifteen days afforded by this court's October 7, 2014 order. Instead, she improvidently filed a motion for relief in the trial court, which declined jurisdiction because there was nothing left to adjudicate there.

Under these nuanced circumstances, in the interests of justice, we shall deem plaintiff's original motion for leave to appeal as a timely notice of appeal and therefore shall reach the merits of the trial court's May 29, 2014 decision. The trial

[6] Despite her disagreements with counsel about the consent order, plaintiff does not identify any resultant prejudice or harm flowing to her, and she does not oppose her mother Joan recovering on the $100,000 insurance-related claim. In any event, according to plaintiff's brief, the agreed-upon $100,000 has not been paid to Joan, and defendants do not dispute that assertion.

court's subsequent order of January 2, 2015 is accordingly vacated without prejudice, subject to the forthcoming terms of this opinion, described infra.

B.

We turn to the trial court's grant of summary judgment to defendants, dismissing all of plaintiff's claims with prejudice and without a trial. In doing so, we apply well-settled principles. Courts reviewing summary judgment motions must "consider 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." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); see also R. 4:46-2(c). If there are materially disputed facts, the motion for summary judgment should be denied. Brill, supra, 142 N.J. at 540. On appeal, we accord no special deference to a trial judge's assessment of the documentary record, and instead review the summary judgment ruling de novo as a question of law. W.J.A. v. D.A., 210 N.J. 229, 237-38 (2012); Manalapan Realty, L.P. v. Twp. Comm. of the Twp. of Manalapan, 140 N.J. 366, 378 (1995) (noting that no "special deference" applies to a trial court's legal determinations).

Applying these standards here, it is not presently clear from the record and the abbreviated oral ruling of the motion judge that there were no genuine issues of material fact whatsoever or that defendants were entitled to the dismissal of plaintiff's claims in their entirety. Without addressing those claims exhaustively here, we make note of several matters that were either not discussed explicitly in the trial court's opinion, or as to which there are points of law or fact that warrant deeper and more detailed examination.

The motion judge observed, without elaboration, that he did not "see any kind of a paper trail or any solid evidence of distributions during the decedent's, Dr. Rubenstein's, lifetime." The judge then acknowledged the possibility of such transfers, stating "maybe" they did occur, but perceived no evidence in the summary judgment record to substantiate them. Plaintiff, however, has included in her copious appendices on appeal various documents that she contends present at least tenable factual issues as to whether such transfers, allegedly motivated to disinherit plaintiff and her brother and mother notwithstanding the terms of the PSA took place.

Among other things, plaintiff's appendices contain certifications (which may or may not be on personal knowledge in compliance with Rule 1:6-6) and numerous handwritten notes

asserted to have been written by either decedent or by his estate planning attorney, as well as several beneficiary designation forms for life insurance policies and retirement accounts that allegedly reflect the decedent's actual intentions. Plaintiff further contends that the decedent's transfer of the marital residence to Carole and his issuance of a promissory note to Alexander are consistent with her theory of improper evasion of the PSA, although defendants present benign competing explanations of those transactions. She also argues that documents in the record refer to real property and a family business that may have been funded during the decedent's lifetime with his assets, in an alleged further effort to deprive plaintiffs of their rights under the PSA.

Plaintiff additionally highlights a February 17, 1999 letter from decedent to his estate planning attorney, explaining that he was changing his will to remove the specific bequest to Alexander because, among other things, "Alex[ander] has already gotten a significant sum from me," and "this will eliminate any problems with reference to my divorce settlement." Plaintiff contends that this correspondence creates a factual issue as to whether transactions that took place during decedent's life and the ultimate elimination of the bequest to Alexander were undertaken in derogation of plaintiffs' rights under the PSA. The motion

judge did not comment on this correspondence in his oral ruling. We have no idea whether the judge regarded the correspondence as inconsequential and, if so, why. We also note that the parties dispute the significance of the deposition testimony on these matters provided by the decedent's former estate planning attorney. That testimony likewise was not addressed in the trial court's decision.

Defendants contend plaintiff's assertions of improper transfer are legally inconsequential under the UFTA, which is pled in count six of the complaint, because defendants construe the UFTA to only apply to commercial transactions. The UFTA is not, however, limited to commercial transactions, even though that may be its primary focus. In fact, the Act more broadly defines a "debtor" as "a person who is liable on a claim" and more broadly a "creditor" as "a person who has a claim." N.J.S.A. 25:2-21 (emphasis added). It further defines a "person" as including an "individual, . . . estate, trust, or any other legal or commercial entity." N.J.S.A. 25:2-22 (emphasis added).

As plaintiff also has emphasized, the trial court did not address her discrete claim that she has been wrongfully deprived of the $15,000 bequest made to her in the will of her paternal grandfather, William. Defendants suggest that this claim is time-barred, and that it should have been brought in the Florida courts

where the grandfather's will apparently was probated. However, the trial court did not address this claim in his ruling, and the record and briefing we have been supplied with are inadequate to resolve these issues for the first time on appeal. For one thing, we do not have any factual determination as to when plaintiff first discovered, or reasonably could have discovered, that her right to payment of her grandfather's bequest had been denied, or which person(s) were responsible for that denial. See Lopez v. Swyer, 62 N.J. 267 (1973). The reasonableness of any efforts to locate plaintiff after her grandfather passed and left the inheritance also were not expressly adjudicated by the motion judge. Given the present posture of this case, we cannot state, with confidence, that plaintiff's claim to the unpaid $15,000 bequest is utterly deficient and does not pose genuine issues for trial.

In sum, there are numerous discrete issues that were not specifically addressed in the trial court's dispositive oral ruling. Given the complexity of those issues and the court's general obligation to examine the record on summary judgment in a light most favorable to the non-moving party, it is best that those substantive issues be remanded to the trial court for further consideration.

The trial court shall examine in greater detail all of plaintiff's claims[7] and reconsider whether there are no genuine issues of material fact presented, in light of the applicable law and the record as a whole construed in a light most favorable to plaintiff. If any issues remain for trial after such careful reconsideration, the trial should be conducted as soon as practicable, with appropriate credibility findings. The court shall set forth its reasons in a reasonably detailed manner, so as to enable further appellate review if sought by either or both parties.

C.

We lastly consider, for sake of completeness, the denial of plaintiffs' cross-motion to extend discovery. It is undisputed that at the time plaintiffs' counsel moved for additional discovery, the existing Discovery End Date had passed and a trial date had been fixed. Under the applicable case law, a party seeking an extension to conduct additional discovery must establish "exceptional circumstances." See R. 4:24-1(c); Rivers v. LSC P'ship, 378 N.J. Super. 68, 79 (App. Div. 2005), certif.

[7] Toward that end, the trial court shall afford the parties an opportunity to re-file and amplify their summary judgment submissions with all pertinent supporting material. Defendants' motion papers shall include the detailed statement of material fact required by Rule 4:46-2(a), and plaintiff likewise shall submit the detailed response required by Rule 4:46-2(b).

denied, 185 N.J. 296 (2005). The trial court's oral opinion never addresses this standard, but did suggest that the discovery request, although denied by the motion judge, could be pursued through other means in the vicinage.

Plaintiff's self-represented briefs on appeal are somewhat confusing about whether there is any additional discovery that she wishes to pursue to have the merits of her claims judicially reviewed. Her initial brief argued that the trial court "refuse[d] to allow discussion of any discovery of the Plaintiff's side," but her reply brief appears to concede that the discovery extension was properly denied. Because the trial court's discovery ruling was part-and-parcel of the May 29, 2014 decision and might bear upon the scope of the record for summary judgment practice, see R. 4:46-5(a), we remand this issue to the trial court for a case management conference to confirm that no further discovery is sought or warranted, explicitly applying the "exceptional circumstances" standard if it is sought.

For these reasons, we vacate the trial court's May 29, 2014 and January 2, 2015 orders and remand for further proceedings in the trial court.

Vacated and remanded. We do not retain jurisdiction.