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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2627-15T2

IN THE MATTER OF THE ESTATE
OF ARTHUR J. ZITO, SR.,
deceased.

Telephonically argued March 3, 2017 –
Decided April 19, 2017

Before Judges Lihotz and Whipple.

On appeal from Superior Court of New Jersey,
Chancery Division, Probate Part, Cape May
County, Docket No. P-48-15.

Kenneth E. Raynor argued the cause for
appellant Laura Zito (Simeone & Raynor,
L.L.C., attorneys; Mr. Raynor, of counsel and
on the briefs; Bryan T. Eggert, on the
briefs).

Jeffrey H. Sutherland argued the cause for
respondents Arthur J. Zito, Jr. and David
Zito.

PER CURIAM

Defendant Laura J. Zito appeals from an October 15, 2015
order admitting a copy of her father's 1998 will into probate and
a January 20, 2016 order denying her motion for reconsideration.

We remand this matter to the trial court for the reasons that follow.

Arthur J. Zito, Sr. (decedent) passed away on June 12, 2015. He left behind four children: Laura J. Zito, Stephen Zito, Arthur J. Zito, Jr., and David S. Zito. Decedent executed a will on or about December 11, 1998, naming plaintiffs, Arthur J. Zito, Jr., and David S. Zito, the executors of his estate and granting both sons power of attorney. Decedent had a prior will, dated February 29, 1988, which also appointed plaintiffs as the co-executors. Decedent wrote Arthur Jr. a letter, dated December 23, 1998, in which he stated he named plaintiffs as the co-executors of his estate. The letter also states decedent was arranging for plaintiffs to have power of attorney.

In January 2013, decedent's physical and mental health began to deteriorate, and plaintiffs filed a complaint for guardianship. The trial judge considered the testimony of all four siblings and found all four were willing to be decedent's guardian, but only defendant presented an understanding of the responsibilities of the role. On June 4, 2014, after oral argument, the trial judge found the decedent was legally incapacitated and appointed defendant his guardian.

On June 19, 2014, plaintiffs moved to reopen the record and the June 4, 2014 judgment was stayed. The trial judge denied

plaintiffs' motion for reconsideration on October 15, 2014. Plaintiffs appealed and the June 4, 2014 guardianship order was stayed pending the resolution of plaintiffs' appeal.

Following decedent's death, on June 22, 2015, defendant filed a caveat with the Cape May County Surrogate, protesting the probate of any purported will. Plaintiffs filed an order to show cause and verified complaint on July 16, 2015, seeking to dismiss the caveat and admit a copy of the December 11, 1998 will into probate. Plaintiffs asserted they could not locate a will with original signatures but presented the December 3, 1998 letter signed by decedent as a holographic codicil. Defendant filed an answer and motion for leave to file a counterclaim on August 10, 2015, asserting decedent died intestate because plaintiffs could not produce an original will and thus, revocation is presumed. Defendant asserted she should be appointed as administrator of the estate because she had been named as guardian and because her brothers unlawfully converted decedent's assets and unjustly enriched themselves.

At a hearing on August 14, 2015, plaintiffs argued they believed defendant destroyed the original copy of the will, which was designed to treat all beneficiaries equally, and plaintiffs would not receive a commission. At the end of the hearing, the judge reserved decision. On October 15, 2015, without testimony

or a trial on the merits, the trial judge entered an order admitting the December 1998 will to probate, finding defendant's caveat invalid, and denying leave to file a counterclaim.

Defendant filed a motion for reconsideration on November 5, 2015. At the end of a December 11, 2015 hearing on defendant's motion for reconsideration, the trial judge reserved decision. After the hearing, plaintiffs submitted certifications to the court averring they searched their father's homes and did not locate any other will. On January 18, 2016, defendant objected to the two certifications submitted. The following day, the trial judge issued an order denying defendant's motion for reconsideration. This appeal followed.

On appeal, defendant argues plaintiffs did not prove by clear and convincing evidence the 1998 will was not revoked, and the trial judge should have allowed discovery to resolve factual disputes. Because the judge did not make findings of fact or state reasons for the entry of the orders, we are constrained to vacate the October 15, 2015 and January 19, 2016 orders and remand.

New Jersey courts have said if a will was last seen in the possession of the decedent and cannot be found upon the decedent's death, there is a presumption he or she destroyed the will with the intent to revoke it. In re Davis' Will, 127 N.J. Eq. 55, 57 (E. & A. 1940). The presumption is rebuttable; however, by

evidence "clear, satisfactory and convincing and the burden is on the proponents." In re Bryan's Will, 125 N.J. Eq. 471, 474 (E. & A. 1939). The evidence "must be sufficient to exclude every possibility of a destruction of the will by" the decedent. Ibid.

A presumption the will was destroyed with intent to revoke applies in the present case. The original 1998 will was never found. However, the trial judge made no oral or written findings on the record that plaintiffs had overcome their burden of rebutting the presumption with clear and convincing evidence. We note the judge expressed familiarity with the parties, their personal animosity, and their previous efforts to resolve the issues regarding the care of an aging father. The extent to which the court relied on prior knowledge in reaching its determination regarding the will is unclear.

A trial judge must put forth factual findings on the record that correlate to the judge's legal conclusions, as set forth in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). Great Atl & Pac. Tea Co. v. Checchio, 335 N.J. Super. 495, 498 (App. Div. 2000). The failure of the trial judge to set forth these findings and provide the reasons for his decision "necessitates a remand." Allstate Ins. Co v. Fisher, 408 N.J. Super. 289, 303 (App. Div. 2009). Without the judge's reasoning in this matter, we are unable to determine whether plaintiffs met

their burden or if the judge appropriately denied defendant's caveat. See R. 1:7-4.

Defendant also argues plaintiffs should not have been appointed executors because the judge knew of the animosity between the siblings and should have known this would lead to improper administration of the decedent's estate. Plaintiffs argue the record indicates the trial judge was aware "of the cost and difficulties of obtaining a bond, the cost of appointing an independent executor, any additional legal fees incurred through protracted litigation, and the estates pending tax obligations." Nothing in the record demonstrates the trial judge based his findings on those facts. While the presumption should be against intestacy, Herbert v. Cent. Hanover Bank & Tr. Co., 131 N.J. Eq. 330, 341 (N.J. Ch. 1942), the record lacks findings upon which this court can rely to support the determinations to probate the 1998 will naming plaintiffs co-executors.

Next, defendant argues the trial judge erred by denying her motion to file a counterclaim. Defendant's counterclaim sought a declaration of intestacy, appointment of herself as administrator, discovery to ascertain whether decedent executed a will subsequent to 1998, and plaintiffs to account for their actions as attorneys-in-fact for decedent. She argues she should have been granted

leave to file her counterclaim pursuant to the entire controversy doctrine.

At the August 14, 2015 hearing, the trial judge found it was plaintiff's burden to prove decedent did not revoke the 1998 will, thus, a counterclaim was redundant. The judge did not address defendant's other counterclaims. Without more sufficient findings of fact and conclusions of law, this court cannot adequately review the propriety of the denial of defendant's motion to file a counterclaim. See R. 1:7-4.


Last, defendant argues the judge erred by not awarding her attorney's fees pursuant to Rule 4:42-9(a)(3). The Rule provides, "In a probate action, if . . . probate is granted, and it shall appear that the contestant had reasonable cause for contesting the validity of the will or codicil, the court may make an allowance to the proponent and the contestant, to be paid out of the estate." Defendant argues she had reasonable cause to contest the validity of the copy of the 1998 will as it had been seventeen years since the decedent's execution of the will and the original has not been found. Plaintiffs argued defendant presented no evidence of the decedent's intent to destroy his will; however, this is not the legal standard governing the decision to admit the will to probate. Because the trial judge did not provide a statement of reasons for why he denied the request for attorney's fees, this court cannot

properly review whether the trial judge properly denied her request. See R. 1:7-4.

We remand to the trial judge to determine the propriety of the admission of the 1998 will into probate; whether the legal presumption of revocation applies; whether defendant's caveat was void; whether leave to file a counterclaim was properly denied; whether defendant's motion for reconsideration was properly denied; and whether defendant should have been awarded attorney's fees.

Vacated and remanded in accordance with this opinion. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION