

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

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IN THE MATTER OF	:	C.A. CASE NO. 2008-CA-57
THE ESTATE OF	:	
MARY E. KIRKLAND	:	T.C. CASE NO. 2006-0206
	:	(Civil Appeal From
	:	Common Pleas Court,
	:	Probate Division)

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O P I N I O N

Rendered on the 31st day of July, 2009.

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GRADY, J.

{¶ 1} Estella F. Young appeals from an order of the probate court denying Young's motions to vacate the court's prior order approving and settling an account filed by the administrator of the estate of Mary E. Kirkland.

{¶ 2} The underlying controversy involves a bank account

jointly owned by Young and Kirkland. The administrator asked the probate court to declare that the funds remaining in the account are the property of Kirkland's estate. The probate court so found, and it ordered Young to pay the balance to the administrator. On appeal, we affirmed the probate court's order. *In re Estate of Kirkland*, 175 Ohio App.3d 73, 2008-Ohio-421.

{¶3} While the prior appeal was pending, the administrator of Kirkland's estate filed a fiduciary's account pursuant to R.C. 2109.30. That account included the disputed funds in the bank account among the assets of the estate. On March 29, 2007, the probate court journalized a judgment pursuant to R.C. 2109.35(A) that approved and settled the account the administrator had filed.

{¶4} On June 5, 2008, Young filed a petition pursuant to R.C. 2109.35(A) and Civ.R. 60(B), asking the court to vacate the court's order of March 29, 2007, approving and settling the account the administrator filed. R.C. 2109.35(A) authorizes the probate court to vacate its order settling an account, for fraud, upon a motion filed within one year following discovery of the fraud. The motion did not specify the particular grounds for relief on which Young's Civ.R. 60(B) motion was predicated.

{¶ 5} Young's petition argued that the administrator had perpetrated a fraud on the court by failing to properly investigate matters relating to Young's right to the funds in the joint account. The motion alleged that the administrator could and should have brought certain unspecified matters to the court's attention from his access to Kirkland's medical records. The allegation referenced statements in an attached affidavit of Young's physician, Richard Darr, M.D.

{¶ 6} Dr. Darr's affidavit states that he was Kirkland's physician for eight years preceding her death, and that:

{¶ 7} "3. During his treatment of Mrs. Kirkland, she confided in him as to her wants and wishes with regard to any real property and financial interests she may have;

{¶ 8} "4. Mrs. Kirkland stated she I (sic) was going to the bank to ensure that her money did not transfer to any relatives.

{¶ 9} "5. Affiant states that Mrs. Kirkland repeatedly referred to Estella Young as her second daughter and Estella Young accompanied Mrs. Kirkland to each and every appointment and acted in a capacity fitting of the title.

{¶ 10} "6. Prior to his passing, Mr. Kirkland also indicated to the Affiant that he wanted all of his financial interest to be handled by Estella Young for the benefit of

Mrs. Kirkland until such time as she passed.

{¶ 11} "7. Affiant states that he has never been contacted by the Executor of the Estate to discuss with him any issues revolving around the Decedent and that his first communication with the Executor was on Monday, February 25, 2008, whereby he passed on the information contained in this Affidavit to the Executor.

{¶ 12} "8. In the Affiant's professional medical opinion, Mrs. Kirkland was of sound mind up until immediately preceding her death and at all times relevant to her statements to the Affiant she was of sound mind."

{¶ 13} On June 9, 2008, the probate court dismissed Young's petition, without a hearing. The court stated that while Dr. Darr's affidavit "might present some evidence concerning the intentions of Mary Kirkland, the court fails to see how the same has established the commission of fraud in this case."

{¶ 14} Young filed a notice of appeal from the June 9, 2008 order of dismissal.

FIRST ASSIGNMENT OF ERROR

{¶ 15} "AS A MATTER OF LAW, THE TRIAL COURT ERRED BY DENYING THE DEFENDANT-APPELLANT A RIGHT TO A FORMAL HEARING."

{¶ 16} Young argues that the probate court erred when it overruled her Civ.R. 60(B) motion without a hearing.

{¶ 17} “[A] movant has no automatic right to a hearing on a motion for relief from judgment.” *Hrabak v. Collins* (1995), 108 Ohio App.3d 117, 121. “It is an abuse of discretion for a trial court to overrule a Civ.R. 60(B) motion for relief from judgment without first holding an evidentiary hearing only if the motion or supportive affidavits contain allegations of operative facts which would warrant relief under Civ.R. 60(B).” *Boster v. C&M Serv., Inc.* (1994), 93 Ohio App.3d 523, 526 (emphasis in original).

{¶ 18} In her brief on appeal, Young cites and relies on Civ.R. 60(B)(5), though her petition did not identify any particular section of Civ.R. 60(B) on which she relied. The petition alleged fraud as grounds for relief. Civ.R. 60(B)(3) permits a court to vacate a final judgment for fraud, but only if the motion to vacate is filed within one year after the judgment was entered.

{¶ 19} The order approving and settling the administrator’s account was entered on March 29, 2007. Young’s petition to vacate was filed on June 5, 2008, and was therefore untimely for purposes of Civ.R. 60(B)(3). Young’s reliance on Civ.R. 60(B)(5), which is not subject to the one-year limitation, and instead allows relief for “any other reason justifying relief from judgment,” is misplaced. Civ.R. 60(B)(5) is not

applicable when one of the other more specific Civ.R. 60(B) grounds applies. *Strack v. Pelton*, 70 Ohio St.3d 172, 1994-Ohio-107.

{¶ 20} Nevertheless, we find no abuse of discretion in the probate court's order of dismissal. Young's petition alleged that the account the administrator filed, because it included the monies in the joint bank account as an asset of Kirkland's estate, fraudulently misrepresented that Mary Kirkland did not intend to create an ownership interest in Young when she opened the joint account. The elements of a fraudulent misrepresentation are:

{¶ 21} "1. A false representation; actual or implied, or the concealment of a matter of fact, material to the transaction; made falsely.

{¶ 22} "2. Knowledge of the falsity - or statements made with such utter disregard and recklessness that knowledge is inferred.

{¶ 23} "3. Intent to mislead another into relying on the representation.

{¶ 24} "4. Reliance - with a right to rely.

{¶ 25} "5. Injury as a consequence of that reliance. All of these elements must be present if actionable fraud is to be found. The absence of one element is fatal to recovery."

{¶ 26} *Manning v. Len Immke Buick, Inc.* (1971), 28 Ohio App.2d 203, 205 citation omitted.

{¶ 27} The representations in the physician's affidavit demonstrate, at most, Kirkland's high regard for Young and Kirkland's reliance on her. Those representations do not support a conclusion that Kirkland intended to benefit Young by giving her an interest in the funds in the joint account. The administrator's failure to meet with Kirkland's physician in order to learn those facts presents no basis to find that the account the administrator filed was fraudulent, that he knew it to be false with respect to Young's alleged interest in the bank account, or that the administrator acted with an utter recklessness from which such knowledge may be inferred. Therefore, the probate court did not abuse its discretion when it denied without a hearing the Civ.R. 60(B) relief Young's petition requested.

{¶ 28} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 29} "THE TRIAL COURT ERRED BY FAILING TO FOLLOW ITS OWN LOCAL RULES SETTING THE PROCEDURES FOR HANDLING THE APPELLANT'S OBJECTION TO THE ACCOUNT."

{¶ 30} Clark County Probate Court Local Rule 78.1(C)(6)(a) provides:

{¶ 31} "Objections are scheduled for a pre-trial conference within 30 days after filing. At the pre trial conference the issues are narrowed, a time table for discovery is agreed upon and the hearing date is scheduled."

{¶ 32} Clark Prob.R. 78.1 sets out case management plans for certain civil actions. Section (C)(6)(a) applies to exceptions filed pursuant to R.C. 2109.33 to accounts filed by fiduciaries. R.C. 2109.35(A) permits the court to vacate its prior order approving and settling an account a fiduciary files. Proceedings commenced pursuant to R.C. 2109.35(A) are not governed by Clark Prob.R. 78.1(6)(a).

{¶ 33} The second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 34} "THE TRIAL COURT ERRED BY USING AN IMPROPER STANDARD IN RULING UPON THE APPELLANT'S 60(B) MOTION FOR RELIEF FROM JUDGMENT."

{¶ 35} "A motion for relief from judgment under Civ.R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion." *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983),

5 Ohio St.3d 217, 219 (citations omitted).

{¶ 36} To prevail on a motion for relief from judgment, the movant must show that: (1) he has a meritorious defense or claim to present if relief were granted; (2) he is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1)-(5); and (3) his motion is timely. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, at paragraph two of the syllabus.

{¶ 37} Young argues that the court "never ruled on her Motion for Relief from Judgment under Civ.R. 60(B)(5)" because that motion was "based on the previous decision of the court being unjust and/or unreasonable" and "the failure of the Appellant to show fraud" which the court cited. (Brief, P. 14).

{¶ 38} Young's petition never cited Civ.R. 60(B)(5) as grounds for relief. Rather, the petition alleged fraud as the grounds for relief sought, and the probate court properly rejected the Civ.R. 60(B) relief the petition sought on findings that the petition and the affidavit attached to it failed to allege fraud. Furthermore, as we pointed out, Civ.R. 60(B)(5) relief is unavailable on a claim of fraud. Therefore, a claim of fraud cannot support a motion filed pursuant to Civ.R. 60(B)(5) seeking to vacate a judgment

because it is "unjust and/or unreasonable."

{¶ 39} The third assignment of error is overruled. The judgment of the probate court will be affirmed.

DONOVAN, P.J. and FROELICH, J., concur.

Copies mailed to:

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Hon. Richard P. Carey