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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000065-MR

ARCHIE RAGER
AND MICHAEL ISAACS — APPELLANTS

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE, JUDGE
ACTION NO. 15-CI-00504

STEVE HARRISON, PERSONAL
REPRESENTATIVE OF THE ESTATE
OF HERBERT WAYNE HARRISON, SR.;
THE ESTATE OF HERBERT WAYNE
HARRISON, SR.; JIMMY DALE WILLIAMS; AND
DONALD E. JAYNES — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

ACREE, JUDGE: Appellants Archie Rager and Michael Isaacs appeal the Madison Circuit Court's order dismissing their various claims against Appellees Jimmy Dale Williams and Donald Jaynes. Finding no error, we affirm.

BACKGROUND

This case arises from the probate of the Estate of Herbert Wayne Harrison, Sr., who passed away in January 2014. Steve Harrison, Herbert's nephew, served the estate as executor. The estate was a complex one and Steve found need to hire Donald Jaynes, a Certified Public Accountant (CPA), to assist in the preparation of the tax return and other accounting needs. Additionally, Steve hired Jimmy Dale Williams, as legal counsel, to represent him in his role as executor, and to represent the estate itself.

Real and personal property valued at approximately $2 million dollars made up a part of the estate. Herbert also left $2,970,000 in various certificates of deposits to his sisters, nieces, nephews, great nephews, and first cousins, all payable on death (POD). The estate determined that all POD accounts transferred outside the will were not considered part of the probated estate.

At the heart of this case is this question: who is responsible to pay any state tax that might be attributable to the conveyance of the POD accounts? To answer that question, Appellee Jaynes contacted Pamela Stone, an employee of the Kentucky Department of Revenue, Miscellaneous Tax Branch, Financial Tax

Section. Based on those communications, Appellees formed a belief, correct or not, that state inheritance tax was owed and payable by the recipients of the accounts.

On June 18, 2014, Appellees sent separate but accompanying letters to the POD account recipients, including Appellants, explaining the circumstances. The letters told each recipient what they were to receive and that they were obligated to pay an inheritance tax. Enclosed with the letters was a power of attorney that, when executed by the recipient, would allow Steve to cash the POD accounts, deduct and pay the tax, and send the net amount to the recipient. This approach prompted at least three different responses.

Appellant Isaacs complied as requested. Appellant Rager declined to execute the power of attorney and cashed the POD account himself; however, he paid to the state the amount of inheritance tax Appellee Jaynes had stated in his letter was owed.

A third recipient not a party to this action, but to another action involving the same issue in the same division of the Madison Circuit Court, responded differently than did Appellants. The third recipient is Anna Francis Davidson. (Record (R.) at 119). She did as Appellee Williams' letter suggested and had his "letter and the enclosed documents reviewed by an attorney, a CPA or any other professional upon whose advice you would rely." (R. at 97). Then she

refused to sign the power of attorney and refused to pay the tax. (R. at 119, 149-50). Steve brought an action to compel Davidson's payment of the tax. *Harrison v. Davidson*, No. 15-CI-00122 (Madison Cir. Ct. Feb. 27, 2015) (Complaint).

Sometime after January 1, 2015, Davidson contacted Appellants and suggested they were not responsible for the tax and should have received the full amount of their respective POD account. (R. at 119). Davidson's attorney offered his services (R. at 149-50), but ultimately Appellants engaged other counsel.

On September 22, 2015, Appellants filed an action against: (1) Herbert's estate; (2) Steve, as the executor; (3) Donald Jaynes, as the CPA; and (4) Jimmy Dale Williams, as attorney to the estate. Appellants asserted numerous claims, including allegations that Appellees misled each recipient as to their responsibility for tax liability.

Appellee Williams moved to dismiss on the pleadings arguing any claims against him arose in the course of professional representation of Steve and the estate and not Appellants but, regardless, such claims were barred by the statute of limitations governing actions for professional service malpractice, as stated in KRS[1] 413.245. Appellee Jaynes soon joined in that motion.

Appellants responded by arguing Kentucky law holds professionals liable to third parties when they are the intended beneficiaries of the professionals'

[1] Kentucky Revised Statutes.

work. Regarding Appellees' limitations argument, Appellants noted that KRS 413.245 includes a discovery provision allowing suit to be brought within one (1) year of when the cause of action reasonably should have been discovered. Claiming the action was brought within that time, Appellants argued for denial of the motion to dismiss.[2]

After hearing the parties' arguments, the trial court entered an order of dismissal stating: "the court hereby GRANTS the Motion to Dismiss, and it is hereby ORDERD [sic] that the claims of [Appellants] against [Appellees] be and the same are DISMISSED." (R. at 156). Otherwise, the lawsuit proceeded.

Appellants then filed a CR[3] 52.04 motion, requesting the trial court to make additional written findings to support its order of dismissal. The trial court denied the motion. This appeal followed.

STANDARD OF REVIEW

When, upon a motion for judgment on the pleadings, it appears a trial court considered matters outside the pleadings in arriving at its decision to dismiss

[2] Appellants do not argue the inapplicability of this statute on grounds that they were not being represented by the professionals. To the contrary, they have argued privity and the right to rely on the professional opinions about tax liability of both Appellees. We review the appeal with that as a presumed fact, not an actual fact, because it was alleged in the complaint and, therefore, presumed true for purposes of reviewing the dismissal. This opinion should not be interpreted as establishing or confirming the right of a third party to bring an action against a professional for work performed for others.

[3] Kentucky Rules of Civil Procedure.

an appellant's claim, we must treat the motion as one for summary judgment and review it as though summary judgment was granted. *Waddle v. Galen of Kentucky, Inc.*, 131 S.W.3d 361, 364 (Ky. App. 2004) (citations omitted). "The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

Summary judgment "should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.'" *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)). We review *de novo* the trial court's grant or denial of a motion for summary judgment. *Community Financial Services Bank v. Stamper*, 586 S.W.3d 737, 741 (Ky. 2019).

ANALYSIS

First, we note the trial court did not err by failing to supplement the record with additional findings. Findings of fact are required "[i]n all actions tried upon the facts without a jury or with an advisory jury . . . ." CR 52.01. "[F]indings of fact are not necessary in summary judgments . . . ." *Pence Mortg.*

Co. v. Stokes, 559 S.W.2d 500, 504 (Ky. App. 1977) (citation omitted); *see also CLK Multifamily Management, LLC v. Greenscapes Lawn & Landscaping, Inc.*, 563 S.W.3d 706, 711 (Ky. App. 2018) ("Findings, while they may be helpful, are not mandatory." (citing *Pence Mortg.*, 559 S.W.2d at 504)). Our concern is whether there were unresolved genuine issues of fact and whether Appellees were entitled to judgment as a matter of law. Denying the motion for additional findings was not error.

Moving on to Appellants' argument that their complaint should not have been dismissed, we begin by identifying the material facts necessary to our review. Some of those facts are found in the complaint itself; other facts are elsewhere in the record.

Our review presumes the truth of all material facts alleged in the complaint. The complaint alleges the following material facts:

1. "[T]he core of [the Appellants'] claims originated from Mr. Williams' office in Richmond, Kentucky." [Complaint, Paragraph 6].

2. "[Appellees] drafted and mailed a letter and power of attorney which informed each of the recipients of payable on death accounts that they were liable for the inheritance taxes on the gifts." [Complaint, Paragraph 16].

3. "[T]he advice in the letter is incorrect . . . ." [Complaint, Paragraph 19].

4. "[Appellants] followed the directives of the letter and signed the Power of Attorney that accompanied the letter. Subsequently

mailing the documents back to [Appellee] Williams." [Complaint, Paragraph 20].

5. "The Power of Attorney signed by [Appellants] created a fiduciary duty owed by [Appellees] to [Appellants]." [Complaint, Paragraph 21].

6. Appellees used the authority granted in the powers of attorney to pay taxes from the POD accounts and not from estate assets. [Complaint, Paragraph 22].

The complaint gives no dates for these events. The dates are found elsewhere in the record, as follows.

The letter (or letters, in fact, one from each of the Appellees) referred to at paragraph 16 of the complaint is dated June 18, 2014. (R. at 147). The latest date on which the Appellants either closed his respective POD account and paid the tax (Appellant Rager), or cashed the net, after-tax check from the estate, was July 9, 2014. (R. at 134). The lawsuit was filed on September 22, 2015.

Appellees asserted at the trial court, and again in this Court, that none of the Appellants' claims were timely. They cite KRS 413.245 which states:

> Notwithstanding any other prescribed limitation of actions which might otherwise appear applicable, except those provided in KRS 413.140, a civil action, whether brought in tort or contract, arising out of any act or omission in rendering, or failing to render, professional services for others shall be brought within one (1) year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured. Time shall not commence against a party under legal disability until removal of the disability.

KRS 413.245. Appellees argue the cause of action accrued no later than July 9, 2014, when the last check was cashed so that the limitations period expired not later than July 9, 2015. They note that the Appellants filed their lawsuit on September 22, 2015, and argue that was after the period of limitations.

Appellants respond that a discovery rule is incorporated as part of the statute and applies here. In substance, they contend they could not have discovered their cause of action from the letter of June 18, 2014, and there was no injury until they were deprived of the gross proceeds of the POD accounts sometime after that.

When, according to Appellants, was the cause of action reasonably discoverable? Appellants "contend the discovery rule would have tolled the statute of limitations until when [sic] the Appellants were informed of Appellees [sic] negligence for the first time by Anna Francis Davidson in 2015." (Appellants' brief, p. 12). According to Davidson's affidavit, she spoke with Appellants "some time in 2015 but it was certainly after January 1st, 2015." (R. at 149).

We are not persuaded that Appellants could not have reasonably known of their cause of action before Davidson told them. It begs the question, "Who told Davidson?" Her circumstances did not differ from Appellants and yet she immediately disputed Appellees' claim that she owed taxes from the POD account Herbert Harrison left to her. Unlike Appellants, she consulted her own attorney and refused to pay the tax. (R. at 119). Steve, obviously still relying on

Appellees' advice, and through Appellee Williams as his lawyer, sued Davidson to pay the tax. This action was brought in the same division of the Madison Circuit Court as the instant action and adjudicated by the same jurist. *Harrison v. Davidson*, *supra*.

Working back from the date Appellants filed the complaint on September 22, 2015, we must ask whether Appellants' claims were reasonably discoverable before September 22, 2014, more than three months after they received the June 18, 2014 letters and well after they accepted net amounts from the POD accounts. We conclude Appellants' claims were reasonably discoverable well before September 22, 2014.

Appellants' claims assert a right to rely on Appellees' advice. But Appellees also advised Appellants (and Davidson) to seek independent counsel. The record does not show if Anna Davidson immediately followed that advice, but it does show her quick response in rejecting the June 18, 2014 letters proposing she accept less than the full POD account. She suspected *something* whether it was simple error or a more actionable problem. We cannot conclude that Appellants' causes of action were less reasonably or less immediately discoverable than Davidson's near immediate suspicions and reaction to Appellees' letters.

We conclude that the June 18, 2014 letters constituted the "occurrence" identified in KRS 413.245 that marked the beginning of the one (1)

year limitations period and that appellants' injury was manifest not later than July 9, 2014, when they received less than the full amount Herbert Harrison deposited in their respective POD accounts. Because the complaint asserting claims against the Appellees as professionals was filed outside the limitations period established by KRS 413.245, dismissal was proper. There was no genuine issue regarding the material facts necessary to a determination that the claims were barred by the statute of limitations. Therefore, we affirm.

However, we also note, in dicta, that Appellants are not without relief. The circuit court in this case ruled on March 2, 2016, that the estate and not the POD recipients is responsible for the applicable inheritance taxes, and that the amount Appellants are due from the estate is to be determined. The estate challenged that order in this Court, but the appeal was dismissed as interlocutory. *Estate of Harrison, et al v. Rager*, No. 2016-CA-000333-MR (Ky. App. June 2, 2016) (Order Dismissing). Nothing in this opinion affects that circuit court ruling.

CONCLUSION

For the foregoing reasons, the Madison Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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BRIEF FOR APPELLEE JIMMY DALE WILLIAMS:

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