Circuit Court for Howard County
Case Nos. 13-C-15-106043 & 13-C-107124

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1070

September Term, 2019

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BETTY LOUISE LOVELESS, *et al.*

v.

J & A CONSTRUCTION SERVICES, INC., *et al.*

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Berger,
Arthur,
Wilner, Alan M. (Senior Judge),
Specially Assigned,

JJ.

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Opinion by Wilner, J.

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Filed: October 20, 2020

Appellants are upset because they did not receive part of the proceeds from the sale of valuable property once owned by Joseph Loveless Sr., who was the father-in-law of one of them (Betty Loveless) and the grandfather of the others. Sorting through the procedural history of the case, which arose from separate probate proceedings in the orphans' and Circuit Court for Howard County, is somewhat tedious, but, in the end, the legal issues are clear and straightforward. The principal appellants are Betty and Brent Loveless, and the estates involved were those of Joseph Loveless Sr. and his son, Joseph Loveless Jr. Because there are so many Loveless family members in the case, we shall refer to Betty and Brent Loveless by their first names and the testators as Joseph Sr. and Joseph Jr., strictly for convenience and clarity, without any demeaning intent.

## BACKGROUND

Joseph Sr. owned a 5.48-acre tract of land in Howard County that throughout this case was referred to as Whiskey Bottom, apparently because it was on Whiskey Bottom Road, near Laurel, Maryland. When he died in November 1989, he left behind three children – Flavey, Libby, and Joseph Jr. In his Will, he bequeathed $5,000 each to Flavey and Libby. In Item Fourth of the Will, he "g[a]ve, devise[d], and bequeath[ed]" to Joseph Jr. the Whiskey Bottom property. Immediately following that bequest, he added:

> "It is my desire and request to my son, JOSEPH LOVELESS, JR., that he sell said property as soon as practicable and that he retain one-half of the net process [*sic*] of said sale and the remaining one-half (1/2) of the net

> proceeds of the sale of said property be divided between my four grandchildren, namely: BRENT LOVELESS and CINDY LOVELESS, the children of FLAVEY WILLIE LOVELESS; and GREGORY DALTON and JEOFFREY DALTON, the children of LIBBY DALTON."

The residue of the Estate was left to Flavey, Joseph Jr., and Libby in equal shares.

The first and final account in Joseph Sr.'s estate (No. 7758) was approved without objection on November 7, 1990, and, with one exception, the probate property was distributed at that time. The one exception was the Whiskey Bottom property. Notwithstanding Joseph Sr.'s request, that property appeared to remain in the estate until July 28, 1999, when Joseph Jr., as personal representative of the estate, conveyed the 5.48-acre tract to himself personally, in execution of Item Fourth of the Will. Appellee Malcolm Kane, as Joseph Jr.'s attorney, drafted the deed.

On May 3, 2001, Joseph Jr. sold 4.3 acres of the tract to SDC Group, Inc., for $240,000, retaining 1.37 acres. Appellee Kane drafted the deed. In an affidavit attached to an answer to a motion for summary judgment, Brent acknowledged that, upon that sale, Joseph Jr. gave him a check for $40,950 and a paper stating that that amount constituted his share of the net proceeds of sale. Brent does not concede that that was the proper amount, but he does not contest receiving it. Indeed, it seems to be uncontested that the other three grandchildren of Joseph Sr. got their share of the proceeds at the same time.

Nothing of consequence occurred thereafter until November 2014, when Joseph Jr. was 87 years old and may have been suffering from the onset of dementia, complications

from which he died six months later. On November 10, 2014, he executed a Durable Power of Attorney that was drafted by Kane and that appointed Kane as his attorney-in-fact, with general authority to deal with Joseph Jr.'s property.[1] At the time, Joseph Jr. was residing in an assisted living facility and was under assessment for his mental condition. The assessment indicated that he was "anxious" but "probably can make limited decisions that require simple understanding." It noted occasional anxiety, agitation, and disruptive behavior as well as continuous impaired recall.

Three months later, on February 28, 2015, Joseph Jr. executed a new Will that lies at the heart of this case. Betty, Joseph Jr.'s widow, claims that this Will replaced an earlier one that could not be located that left all or most of the estate to her. The 2015 Will appointed Christopher Scovitch, identified as a "friend," as personal representative. It created a trust for Betty's "lifelong care and sustenance" as part of the residuary estate but leaves nothing else to her other than as required by Md. Code, § 3-204 of the Estates and Trusts Article. Presumably as a reason for that, the Will states that "[e]ither Betty

[1] We note that the version of the document contained in the record extract, though signed by Joseph Jr., contains several blanks. The document recognized that Joseph Jr. either was or may become disabled. Its penultimate paragraph, in capital letters, stated: "THIS POWER OF ATTORNEY SHALL NOT BE AFFECTED BY THE DISABILITY OF THE PRINCIPAL **JOSEPH E. LOVELESS**, AND THE RIGHTS, POWERS, AND AUTHORITY OF SAID ATTORNEY(S) IN FACT SHALL BE EXERCISABLE NOTWITHSTANDING DISABILITY OF THE SAID **JOSEPH E. LOVELESS**."

has left me intentionally or has been spirited away by her relatives for their own selfish reasons."[2]

The Will left the entire net estate to Christopher Scovitch and his wife Eileen and explained "[i]n my last few years when my ability to take care of myself had seriously waned, my lifelong friend, Christopher Scovitch, Sr. and his wife, Eileen, have taken care of me, seen to my needs, cared for my property and at one point probably preserved my life."

Joseph Jr. died from medical complications of dementia/Alzheimer's four months later, on June 26, 2015. On July 17, 2015, the 2015 Will was admitted to probate and notice was mailed to interested parties (Estate No. 26348). The Notice advised that objections to the Will had to be filed by January 17, 2016. *See* Md. Code, § 5-207(a)(1) of the Estates and Trusts Article ("a verified petition to caveat a will may be filed at any time before the expiration of 6 months following the first appointment of a personal representative under a will." The Notice to Betty was sent to her in Kentucky, at the address noted on the list of interested parties. On July 27, Betty's sister, Jean Osborne, signed the return receipt of the Notice to Betty. Neither Betty, nor Brent, nor any of the other appellants filed any caveat or other claim in Joseph Jr.'s estate within the time allowed.

[2] We are not privy to the basis for that belief but do note from other evidence that, at the time of Joseph Jr.'s death, Betty was living in Kentucky with her sister, Jean Osborne.

On August 18, 2015, Scovitch, as personal representative, sold the remaining 1.37-acre parcel of the Whiskey Bottom tract to Kings Arms LLC for $365,000. Appellee Lakeside Title handled the settlement; appellees Security Development Corp. (SDC), Kings Arms, and Steven K. Breeden were involved in creating the deed or in facilitating the settlement. In July 2017, Kings Arms resold the property to appellee Burkard Homes for $600,000.

The litigation now before us commenced after Scovitch's sale of the 1.37-acre parcel to Kings Arms. There were three separate actions, two by Brent and one by Betty, initially in the Orphans' Court that later landed in the Circuit Court.

## Betty's Case – Orphans' Court

Betty's case involves an attack on the Will and estate of Joseph Jr. On May 25, 2016 – four months after the deadline for filing claims against that Will or estate – Betty filed a request in the Orphans' Court for an extension of time to file a caveat against the Will. She claimed that the Notice to her was delivered to the wrong address, that the Will was procured by undue influence and fraud, and that Joseph Jr. was not competent to execute the Will. On those allegations, the Orphans' Court initially granted an extension to June 22, 2016. On June 29, the personal representative moved to reconsider that extension. Betty missed the June 22 extension deadline. On July 21, 2016, she filed a caveat repeating what she had alleged in her request for extension.

After a hearing, the Orphans' Court, on August 24, 2016, entered two orders. One determined that Betty had received the Register of Wills' Notice and rescinded the extension of time to file a caveat; the other, which does not appear in the record extract, denied Betty's exceptions to the first interim Administration Account. Betty appealed those decisions to the Circuit Court which, on February 8, 2017, affirmed them both. Undaunted, Betty sought *in banc* review. On July 26, 2017, the *in banc* panel affirmed those rulings.

**Brent's Case – Orphans' Court**

On November 7, 1990, the final account in Joseph Sr.'s estate was approved without objection, the estate was closed, and, except for the Whiskey Bottom property, the assets were distributed. As noted *supra*, Joseph Jr., as personal representative of that estate, distributed the Whiskey Bottom property to himself on July 28, 1999. On September 22, 2015, Brent filed an application (which is not included in the record extract) to reopen Joseph Sr.'s estate for the purpose of appointing a personal representative due to an alleged wrongful distribution of property.

The gist of the request, which we glean from other documents, is that, although Joseph Jr., as personal representative of the estate, had disposed of part of the Whiskey Bottom property (4.3 acres) and distributed the proceeds from that sale pursuant to Item Fourth in Joseph Sr.'s Will, he had failed to dispose of the remaining 1.37 acres. On September 30, 2015, the Orphans' Court denied the request as untimely. The Court noted

that the first and final account had been filed and approved in November 1990, that notice of the final account had been sent to all interested parties, including the four grandchildren, and no appeal had been taken from the approval of that account.

On September 18, 2015, Brent filed a claim in Joseph Jr.'s estate (also not included in the record extract) repeating the complaint that Joseph Jr. had failed to fulfill his statutory duties as personal representative and that "any property on Whiskey Bottom Road near Laurel claimed to be owned by the estate of Joseph E. Loveless, Jr. deceased 06/26/2015, Estate 26348, does not belong to the deceased nor does it belong in Estate #26348."[3] As with the untimely claim in Joseph Sr.'s estate, that contention was based on the premise that Item Fourth in Joseph Sr.'s Will imposed a duty on Joseph Jr. to sell all of the Whiskey Bottom property and distribute half of the proceeds to the four grandchildren. On October 15, 2015, after a hearing, the personal representative determined that the language in question was precatory in nature and did not impose any duty on Joseph Jr. and therefore disallowed the claim. That decision was upheld by the Orphans' Court on February 3, 2016. Brent filed an appeal to the Circuit Court.

## Circuit Court Proceedings

[3] Like most of the other documents filed in the Orphans' Court, Brent's claim is not in the record extract. At a later argument on the motion for summary judgment, his attorney stated that his challenge was to inclusion of the 1.37-acre parcel in the inventory.

The Circuit Court, initially, had before it Betty's appeal (Case No. 13-C-16-108992), which it resolved as noted above, and Brent's appeal (Case No. 13-C-16-107124). Brent then filed a separate action against Scovitch for declaratory judgment, appointment of a trustee, and recovery of the property (Case No. 13-C-15-106043). Brent's two cases were consolidated under No. 13-CV-16-107124.

Brent's first two cases were dismissed with leave to amend, which resulted in what is now before us – a four-count Second Amended Complaint by Brent, Betty, and the four grandchildren against Scovitch, Kane, the estate of Joseph Jr., the ultimate recipients of the Whiskey Bottom property, and everyone involved in facilitating the transfers of that property. Count 1, titled Fraudulent Transfer of Assets, charges, on information and belief, that Joseph Jr.'s Will of February 28, 2015 was procured by undue influence and fraud and was not executed when he was of sound and disposing mind and that the conveyance by Scovitch to Kings Arms contained typographical errors. Brent sought a declaration that Joseph Jr.'s Will be declared invalid and that he be found to have died intestate, that Letters of Administration be granted to Betty, that the deed to Kings Arms be declared void, and that compensatory and punitive damages be awarded. Count 2 sought a declaration of the rights of the parties with respect to the Whiskey Bottom property; Count 3 asked the court to appoint Betty as trustee of the property; and Count 4 asked that the court grant Betty, as trustee, possession of the property.

All of the defendants filed motions to dismiss. On January 12, 2018, the court denied the motions by Scovitch and Kane. After a brief hearing, the court granted the

other motions with prejudice. The order granting those motions did not give reasons, but, from the transcript of the arguments, it appears that it was based on the lack of sufficient allegations in the complaint of actionable wrongdoing by those defendants. In March, Scovitch and Kane moved for summary judgment which, after a hearing, the court granted. That is the ruling that forms the basis of this appeal, although appellants also complain about the dismissal of the other appellees.

## DISCUSSION

### Motions to Dismiss

The allegations in the Second Amended Complaint regarding the collateral defendants S.D.C., S.D.C. Properties, Kings Arms, Benchmark Engineering, Burkhard Homes, and J & A Construction Services are woefully deficient. Brent claimed that those defendants "are believed to be responsible for wrongs inflicted on the real property and chattels of the plaintiffs." He claimed that Lakeside Title Company "is believed to be negligent in performing services related to" the August 18, 2015 deed but doesn't say in what manner. That is true as well with the claim against R & P Settlement Group. The only specific complaint was that the deed prepared by some of them contained an "OBVIOUS typographical error."

At oral argument in this Court, counsel focused his argument on the dismissal with prejudice – not allowing Brent to amend to provide greater detail. Although "liberal amendment of pleadings is the policy in Maryland," there are limits. *Bord v. Baltimore*

*Co.*, 220 Md. App. 529, 566 (2014). The determination to grant or deny leave to amend when a complaint is dismissed "is within the sound discretion of the trial judge. . . Only upon a clear abuse of discretion will a trial court's rulings in this area be overturned." *Schmerling v. Injured Workers' Ins. Fund*, 368 Md. 434, 444 (2002); *Pines Point v. Rahak*, 406 Md. 613, 641, n. 10 (2008).

The Circuit Court was dealing with a Second Amended Complaint regarding transactions that had been before the Orphans' Court and the Circuit Court several times before even the first complaint had been filed, seeking, in part, to upset the administration of an estate that was closed in 1990 and a sale that occurred in 2015. Neither at the hearing before the Circuit Court, nor in his brief in this Court, nor at oral argument in this Court did Brent indicate what additional averments he intended to make. There was no abuse of discretion in putting an end to those amorphous claims.

**Motion for Summary Judgment**

The motion for summary judgment treated Count 1 of the Second Amended Complaint (Fraudulent Transfer of Assets), which appellants recognize in their brief as the "gravamen" of the complaint, as the equivalent of a caveat to Joseph Jr.'s Will. The contention was that Scovitch had no right as personal representative of Joseph Jr.'s estate to convey the 1.37-acre parcel to Kings Arms because the Will that appointed him as personal representative was invalid due to its procurement by undue influence and fraud

perpetrated on Joseph Jr. while he was incompetent. The relief sought under that Count was to declare Joseph Jr.'s Will invalid and of no legal effect.

Scovitch and Kane argued (1) that the doctrine of *res judicata* barred Betty from making that claim because it had been made and disposed of by both the Orphans' Court and, more importantly, by the Circuit Court in its 2017 *in banc* affirmance of the Orphans' Court ruling, and (2) that Brent and the other grandchildren had no standing to complain about the Will because, even if the Will were declared invalid and Joseph Jr. were found to have died intestate, under Md. Code, § 3-102(e) of the Estates and Trusts Article, Betty would have been the sole beneficiary.[4]

Count 2, seeking declaratory relief, alleged a dispute between the parties concerning their rights and duties with respect to the property that "remained titled in the name of Joseph Sr. until the death of Joseph Jr." The plaintiffs claimed that they owned the property and asked for the appointment of a trustee to effectuate Item Fourth of Joseph Sr.'s Will. Scovitch and Kane argued that no property remained titled in the name of Joseph Sr., who had died in 1989. The only property that remained in dispute was the 1.37-acre balance of the Whiskey Bottom property that Scovitch had conveyed to Kings Arms, and the validity of that conveyance had been resolved by the court's

[4] In their brief, appellants contend that Kane did not join the motion for summary judgment. The motion itself was filed by counsel for Scovitch and Joseph Jr.'s estate. Kane is not mentioned as a co-movant. In a supplemental response to appellants' opposition to the motion, however, Kane expressly joined in the motion, and, in deciding the motion, the court acknowledged that he had done so.

dismissal of the claim against Kings Arms. That same argument was made with respect to Count 3, which sought the appointment of a trustee for that property, and Count 4, which they viewed as a defensive response to a possible claim of adverse possession.

The court dealt with the four counts in the Second Amended Complaint seriatim. With respect to Count 1, appellants contended that *res judicata* was inapplicable. Their point was that, even if Count 1 was the equivalent of a caveat to Joseph Jr.'s Will, that claim had not been resolved on its merits in the prior proceedings. Betty's caveat was denied because it was untimely, not because it had no merit. The court rejected that argument, holding that the decision did go to the merits, the merits being the conclusion that Betty had no right to file the caveat.

As noted, Brent never filed an objection to the final account and distribution of property in Joseph Sr.'s estate and never filed a caveat to Joseph, Jr's Will. The court therefore determined that he was barred from reopening the father's estate and from challenging the validity of Joseph Jr.'s Will.

The court then turned to Counts 2, 3, and 4. Brent's claim in the Orphans' Court was that the 1.37-acre remainder of the Whiskey Bottom property did not belong in the inventory of Joseph Jr.'s estate because Joseph Jr. was duty-bound under his father's Will to sell that property and distribute half the proceeds to the grandchildren, as he had done with the 4.3-acre part. Apart from concluding that Brent was barred from making that claim, the court alternatively disposed of it on the ground that the language in Item Fourth of Joseph Sr.'s Will relied on by Brent was precatory in nature and did not create

any duty on Joseph Jr. to distribute the proceeds from the sale of the 1.37-acre parcel. Notwithstanding that he had complied with his father's request with respect to the 4.3-acre parcel, the court held that there was no property left to return to Brent or to appoint a trustee for, and that Brent had never requested damages as a remedy.

The near totality of appellants' argument in this Court is wrapped up in their insistence that (1) the summary judgment should not have applied to Kane because he never joined the motion seeking that relief, and (2) the fraud on Kane's and Scovitch's part commenced before Joseph Jr. executed his February 2015 Will and was not, therefore, barred merely because Betty's caveat was untimely or because Brent failed to file a caveat. We find no merit in those arguments. We have already pointed out that Kane **did** join the motion for summary judgment, a fact clearly known to appellants.

With respect to the applicability of *res judicata*, both sides omit to note our decision in *North American v. Boston Medical*, 170 Md. App. 128 (2006), in which we dealt specifically with this issue. In that case, the plaintiff sued the defendant to collect money allegedly due. The court dismissed the complaint without leave to amend on the sole ground that the claim was barred by limitations. Two months later, the plaintiff filed an identical suit to collect the same amount based on the same facts. The defendant moved to dismiss on the ground of *res judicata*, which the plaintiff resisted on the ground that *res judicata* did not apply to a prior dismissal on procedural grounds.

We examined the relevant cases and agreed that, when the procedural ground for the first dismissal was not one that precluded the plaintiff from amending the complaint

or otherwise correcting the problem (suing in the wrong court, failing to include a necessary party, misjoinder, failure to give statutory notice, for example) *res judicata* would not apply to foreclose a second action. On the other hand, we said, dismissal based on an affirmative defense, such as sovereign immunity, precludes the plaintiff "from ever prosecuting that claim." We added, at 142:

> "We believe that the affirmative defense of the statute of limitations falls in that latter category. In dismissing a complaint that, on its face, is barred by the statute of limitations, the court is deciding that the plaintiff can never maintain that cause of action. Consequently, when a circuit court in Maryland grants a motion to dismiss on the grounds that the complaint, on its face, is barred by the statute of limitations, such dismissal is an adjudication on the merits for *res judicata* purposes."

That principle makes sense and controls this case. As we pointed out in *Durham v. Walters*, 59 Md. App. 1, 9 (1984), § 5-207 of the Estates and Trusts Article is unambiguous and "precludes the consideration of a belated caveat after a fixed lapse of time." It is not a statute of limitations in the usual sense of the term that can be waived but "divests the Orphans' Court of its jurisdiction to entertain a caveat filed after more than six months from the first appointment of a personal representative." *See* also *Meyer v. Henderson*, 88 Md. 585, 593 (1899), motion for re-argument denied, 88 Md. 591 (1899) and *Schlossberg v. Schlossberg*, 275 Md. 600, 625 (1975). The Circuit Court was correct here in ruling that its earlier judgment that the Orphans' Court correctly denied Betty's untimely caveat petition (and Brent's failure even to file one) precluded them from challenging the validity of Joseph Jr.'s Will years later.

With that ruling and the holding that Joseph Sr.'s request in Item Fourth of his Will that Joseph. Jr. sell the Whiskey Bottom property and distribute half the proceeds to the grandchildren was precatory in nature and imposed no duty, appellants' case collapses. Any fraud or impropriety on Kane's part with respect to Joseph Jr's Will or the earlier Durable Power of Attorney is relevant only to the administration of Joseph Sr.'s estate and the validity of Joseph Jr.'s Will, from which all else flowed.

**JUDGMENT AFFIRMED; APPELLANTS TO PAY THE COSTS.**