Circuit Court for Talbot County

Case No. 20-C-15-009303

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1857

September Term, 2016

FREDERICK W. HEROLD, JR.

v.

KRISTINA C. HEROLD

Meredith,
Wright,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: December 11, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

This appeal arises from the Circuit Court for Talbot County, after three years of litigation between two beneficiaries of the Estate of Fredrick W. Herold, Sr. (the "Estate"), who died on January 11, 2014. The appellee, Kristina C. Herold (Mrs. Herold), is the Decedent's widow and wife of more than twenty years before his death in 2014. Mrs. Herold was also the co-owner or beneficiary of the Decedent's non-probate assets, which are at issue in this appeal (the "Non-Probate Assets"). [1]

The appellant, Fredrick W. Herold Jr. ("Mr. Herold"), is one of the Decedent's five children from a prior marriage. Mr. Herold and his siblings were neither prior beneficiaries nor prior co-owners of the Decedent's Non-Probate Assets. Mr. Herold alleged that Mrs. Herold forged or fabricated documents directing the disposition of the Decedent's Non-Probate Assets. At a hearing on October 11, 2016, after Mrs. Herold filed a motion for summary judgment, the circuit court dismissed Mr. Herold's complaint in its entirety, and this appeal followed.

Appellant asks this Court multiple questions about the circuit court's ruling on summary judgment, of which, we have reworded and consolidated into one question: [2]

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[1] The Non-Probate Assets consisted of Merrill Lynch retirement accounts, bank accounts jointly titled to the Decedent and Mrs. Herold, three improved parcels of real property titled to Mrs. Herold and the Decedent as tenants by the entirety, one property titled to the Decedent and third parties as tenants in common, and two parcels titled solely to the Decedent.

[2] Appellant presented his questions as follows:

1. Did the trial court err by granting Summary Judgment *sua sponte* on Appellant's Amended Complaint (amended 9/1/2016) without a motion before it?

> Was the circuit court legally correct when it granted summary judgment in favor of the appellee?

For the reasons below, we affirm the decision of the circuit court.

BACKGROUND

On December 27, 2013, the Decedent suffered a massive heart attack while walking into a local restaurant. The Decedent was immediately transported to Easton Memorial Hospital and, thereafter, Peninsula Regional Medical Center ("PRMC") in Salisbury, Maryland, where he remained in a coma and on life support. While the Decedent was at PRMC, the Decedent's physicians advised that the coma was irreversible, and PRMC requested that Mrs. Herold provide a copy of the Decedent's "living will." Mrs. Herold provided PRMC with Decedent's Living Will Declaration ("Living Will") and Health Care Power of Attorney (the "HCPOA").

> 2. Did the trial court err by granting Summary Judgment without a required hearing regarding the Amended Complaint under Maryland Rule 2-311(f)?
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> 3. Did the trial court err by concluding that there are no material facts to be argued before the jury?
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> 4. Did the trial court rule on the appellee's Motion for Dismissal/Summary Judgment in a light most favorable to the opposing party, as required by Maryland Rule 2-501(f) and 2-519(b)?
>
> 5. Did the trial court err by basing its decision to grant Summary Judgment on the nonexistent doctrine of "Potential Jurisdiction?"
>
> 6. Did the trial court err by denying Appellant's Motion for Reconsideration?
>
> 7. Was the trial court's Order to grant Summary Judgment legally sound?

In the HCPOA, the Decedent states: "I appoint my wife, KRISTINA C. HEROLD [Mrs. Herold], to be my Agent, to act for me, in my name, and in my place." Decedent's Living Will further stated that in the event of a "terminal condition" where "life-sustaining procedures would only prolong the dying process" that "procedures be withheld or withdrawn" so the Decedent "be permitted to die naturally." In accordance with the HCPOA and the Living Will, and after two of the Decedent's PRMC physicians certified that the Decedent was suffering from a "terminal condition" from which he would not recover, Mrs. Herold, acting as the Decedent's agent, terminated the Decedent's life support.

After the Decedent's death, Mrs. Herold filed to open the Decedent's estate in order to probate the Decedent's Last Will and Testament dated August 28, 2002 ("the 2002 Will"). Each of the first four pages of the 2002 Will were the originals, which Decedent initialed, except the original signature page, which was a photocopy. The 2002 Will stated:

> I give, devise and bequeath the residual remainder of my property and estate, of whatever kind and wherever situated, and to which I may in any manner be entitled at the time of my death, including any property to which I may have any power, or appointment to my wife, KRISTINA C. HEROLD, provided she survives me.

The 2002 Will also stated, "I direct my personal representative to disburse, upon my death, and as soon as practical the sum of $10,000 to each of my surviving children, per capita." The 2002 Will was offered for judicial probate pursuant to Md. Code (1974,

2011 Repl. Vol.) § 5-802 of the Estates & Trust Article ("E&T").[3] Mr. Herold and his siblings opposed the admission of the 2002 Will to probate, and they alleged that the 2002 Will was forged or fabricated by Mrs. Herold ("2002 Will Litigation").[4]

In light of Mr. Herold and his siblings' opposition to the request to probate the 2002 Will, Mrs. Herold requested that the matter be removed from the Orphans Court of Talbot County to the Circuit Court of Talbot County.[5] During discovery in the 2002 Will Litigation, Mr. Herold learned that the Non-Probate Assets were not part of the Decedent's estate and would pass to Mrs. Herold by operation of law. During discovery,

[3] E&T § 5-802 states:

> A petition for admission of a copy of a will may be filed with the court at any time before administrative or judicial probate if:
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> (1) The original executed will is alleged to be lost or destroyed;
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> (2) A duplicate reproduction of the original executed will, evidencing a copy of the original signatures of the decedent and the witnesses, is offered for admission; and
>
> (3) All the heirs at law and legatees named in the offered will execute a consent in the manner set forth in § 5-803 of this subtitle.

[4] The 2002 Will stated:

> "Should any person entitled to a share in my estate either as an heir at law or as a legatee or devisee under the Will contest or seek to set aside this Will, or establish any legal rights to share in my estate other than as herein approved and provide, I hereby give and bequeath the sum of one dollar ($1.00) only and expressly direct that person shall receive no other or further share in my estate."

[5] Mrs. Herold elected to voluntarily dismiss the 2002 Will Litigation and take her statutory share from the Decedent's estate, pursuant to Title 3 of E&T.

and after learning of the Non-Probate Assets that were not at issue in the 2002 Will Litigation, Mr. Herold filed an Emergency Complaint.

Mr. Herold's Emergency Complaint expanded on his previous forgery allegations and alleged that Mrs. Herold also forged various documents entitling her to receive the Non-Probate Assets and the Living Will or the HCPOA, which gave Mrs. Herold the authority to discontinue Decedent's life support.

In response to the Emergency Complaint, Mrs. Herold filed a motion seeking dismissal or summary judgment. On March 29, 2016, after a hearing, the circuit court granted summary judgment on Counts I and II and dismissed Count III of the Emergency Complaint, leaving only Count IV ("Theft and Conversion Fraud") remaining.

On July 19, 2016, after the circuit court ruled on Mrs. Herold's motion, the Orphan's Court appointed Carla Lynn Knight, Esq., as the Estate's Personal Representative (the "Personal Representative"). With the Personal Representative in place, on July 27, 2016, Mrs. Herold filed a second motion seeking dismissal of Count IV of Mr. Herold's Emergency Complaint on the grounds that Mr. Herold lacked standing to maintain his action. On August 9, 2016, Mr. Herold opposed the motion, and thereafter filed his Amended Complaint on September 1, 2016. On September 15, 2016, Mrs. Herold filed a supplement to her second motion seeking summary judgment on Count IV of Mr. Herold's Emergency Complaint and all the counts in the Amended Complaint. Mr. Herold did not oppose or respond to Mrs. Herold's supplement.

On October 11, 2016, the circuit court granted Mrs. Herold's request for summary judgment. At the end of the hearing, the circuit court explained that it agreed with Mrs.

Herold's contention that Mr. Herold failed to present admissible, affidavit quality evidence of forgery or conversion nor tied any of the alleged misconduct to Mrs. Herold. The court also found that Mr. Herold did not have standing because he did not have anything to gain legally from the suit because, if he prevailed, the proceeds from the Non-Probate Assets by default would go to the Decedent's estate.

Additional facts are included as they become relevant to our discussion.

STANDARD OF REVIEW

"We review a circuit court's entry of summary judgment *de novo*." *John B. Parsons Home, LLC, v. John B. Parsons Found.*, 217 Md. App. 39, 53 (2014). "If no material facts are in dispute, we must determine whether summary judgment was correctly entered as a matter of law." *Prop. & Cas. Ins. Guar. Corp. v. Yanni*, 397 Md. 474, 480 (2007) (citations omitted). "A material fact is one that will alter the outcome of the case, depending upon how the fact-finder resolves the disputes." *Injured Workers' Ins. Fund v. Orient Express Delivery Serv., Inc.,* 190 Md. App. 438, 451 (2010) (citations and quotations omitted). "Mere general allegations of conclusory assertions will not suffice." *Id*. (citations omitted). Additionally, "a mere *scintilla* of evidence in support of the non-moving party's claim is insufficient to avoid the grant of summary judgment." *Danielewicz v. Arnold*, 137 Md. App. 601, 613 (2001) (citations and quotations omitted) (emphasis added).

We are "obliged to conduct an independent review of the record to determine if there is a dispute of material fact." *Injured Workers' Ins. Fund,* 190 Md. App. at 450-51. During our review, we do not try the case or decide the factual disputes; rather, we

determine whether there is an issue of fact that is sufficiently material to be tried. *Castruccio v. Estate of Castruccio*, 456 Md. 1, 16 (2017), *reconsideration denied* (Oct. 19, 2017).

DISCUSSION

"Standing is a threshold issue; a party may proceed only if he demonstrates that he or she has a real and justiciable interest that is capable of being resolved through litigation." *Norman v. Borison*, 192 Md. App. 405, 420 (2010). Therefore, before reaching the merits of Mr. Herold's suit we must determine if he is the proper party to raise such a claim. "In order to have standing, a party must demonstrate an injury-in-fact, or an actual legal stake in the matter being adjudicated." *Id.* (citation and internal quotations omitted).

Mrs. Herold avers that Mr. Herold does not have standing because Maryland law states that ownership, or title "shall pass directly to the personal representative" of the decedent's estate "upon the [decedent's] death." E&T § 1-301. Consequently, Mrs. Herold posits that because Mr. Herold is not the personal representative he does not have standing because only a personal representative is authorized to "prosecute, defend or submit to arbitration actions, claims, or proceeding in any appropriate jurisdiction for the protection and benefit of the estate." E&T § 7-401(y).

Mr. Herold avers that he does have standing to sue because he is not suing on behalf of the estate; rather, he asserts he "has claims directly against Appellee [Mrs. Herold] to recover personal losses as a result of her alleged misconduct of signing a lease with a tenant for the property at 3872 Harrison Circle. Mr. Herold contends that this

misconduct resulted in "loss earnings due to his loss investment opportunity in the current bull market." Setting aside the merits of Mr. Herold's claim, if there are any losses the law is clear that the Personal Representative of the estate must pursue those claims, and the proceeds from such losses would go to the Decedent's estate and not directly to Mr. Herold. If there were a claim to be had, the Decedent would have to be the one to make such claims, but upon death, "the only person who may prosecute an action on the decedent's behalf is the personal representative." *Rosebrock v. Eastern Shore Emergency Physicians, LLC*, 221 Md. App. 1, 12 (2015), *cert. denied sub nom*., *Rosebrock v. Mem'l Hosp. in Easton*, 442 Md. 517 (2015). Mr. Herold is alleging that Mrs. Herold committed a tort against the Decedent. If the Decedent were alive, Mr. Herold would not have standing to raise a tort claim of fraud or conversion on the Decedent's behalf. Conversely, upon death, Mr. Herold still lacks the authority to raise such claim, because that authority is vested in the Personal Representative pursuant to E&T § 7-401(y).[6]

Mr. Herold is asking us to assign him a property interest in a Non-Probate Asset where no property interest ever existed so he can pursue a claim against Mrs. Herold. We decline do so. Mr. Herold does correctly note that "[t]he doctrine of standing is an

[6] A potential heir may note an appeal in their individual capacity. *Alston v. Gray*, 303 Md. 163, 169 (1985). As there may be an appeal by a legatee where their legacies would be reduced by an order. *Frater v. Paris*, 156 Md. App. 716, 720-23 (2004). However, Mr. Herold makes it clear in his appeal that "[a]ppellant [Mr. Herold], has not sued the [a]ppellee [Mrs. Herold] on behalf of the estate . . ." Additionally, In Mr. Herold's Opposition to Motion to Dismiss he also stated, "Plaintiff has not sued on behalf of the Decedent or his Estate. This case is captioned, '*Fredrick W. Herold Jr. v. Kristina C. Herold*'."

element of the larger question of justiciability and is designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is capable of judicial resolution." *Hand v. Mfrs. & Traders Trust Co.,* 405 Md. 375, 399 (2008) (citations and quotations omitted). Yet "[s]tanding rests on a legal interest such as one of property, one arising out of a contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Long Green Valley Ass'n v. Bellevale Farms, Inc.*, 205 Md. App. 636, 652 (2012) (citations and quotations omitted).

Mr. Herold avers that he has a tort claim of theft or conversion fraud, but that argument falls short of the necessary mark.

> "[T]he gist of a conversion is not the acquisition of the property by the wrongdoer, but the wrongful deprivation of a person of property to the possession of which he is entitled."

Darcars Motors of Silver Spring, Inc. v. Borzym, 379 Md. 249, 262 (2004).

Mr. Herold never possessed a legal interest in the Non-Probate Assets, and his argument failed to establish that he is not entitled to possession of the property. Moreover, the 2002 Will expressly states that Mr. Herold would receive $10,000 and the residual of the estate would go in an irrevocable trust to benefit Mrs. Herold and the Decedent's grandchildren. Therefore, even if Mr. Herold were successful, the proceeds from the property and accounts would go to a trust that does not benefit Mr. Herold, so we see no cognizable stake in the outcome.

Next, turning to the merits of the dispute, we find no error in the circuit court's finding that Mr. Herold's affidavit's quality was insufficient to overcome Mrs. Herold's

motion for summary judgment. The purpose of the summary judgment procedure is not to try the case or to decide the factual disputes, but to decide whether there is an issue of fact that is sufficiently material to be tried. *Coffey v. Derby Steel Co., Inc.,* 291 Md. 241, 247 (1981). When a court determines whether any factual issues exist, it must resolve all inferences against the moving party. *Danielewicz*, *supra*, 137 Md. App. at 612. "The plaintiff, however, must submit some evidence in which the jury could reasonably find for the plaintiff in order to defeat the motion." *Id*. Specifically, when opposing a summary judgment motion that is supported by an affidavit based on the affiants' personal knowledge, the non-movant "shall support the response by an affidavit or other written statement under oath." *Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 737 (1993) (citing Md. Rule 2-501).

In this case, Mrs. Herold submitted an affidavit, based on her personal knowledge, where she contended, under oath, that she did not forge any of the documents related to the accounts with Merrill Lynch or Talbot Bank. Mrs. Herold's affidavit that the Merrill Lynch documents were documents that she and the Decedent "executed together, each in the presence of others." Mrs. Herold's affidavit further states that both she and the Decedent opened accounts at Talbot Bank together and "named each other as the pay-on-death beneficiary" for their accounts. With respect to the leases and the property, Mrs. Herold's affidavit stated that she and the Decedent jointly owned the properties as tenants by the entireties.[7]

[7] "Maryland retains the estate of tenancy by the entirety in its traditional form. By common law, a conveyance to husband and wife does not make them joint tenants, nor

Mr. Herold argued that he submitted clear and convincing evidence to the circuit court, but none of the evidence can overcome Mrs. Herold's motion for summary judgment because none of the evidence alleges any claims of forgery or fraud "based on personal knowledge" of an affiant. Md. Rule 2-501(c).[8] Mr. Herold presented no evidence that he had personal knowledge of Mrs. Herold's alleged theft or conversion fraud. Mr. Herold's affidavit only stated, "I am a victim of the defendant's criminal activities, and have suffered damages as a result." Mr. Herold's response to Mrs. Herold's motion provides no support for this claim based on personal knowledge to refute Mrs. Herold's affidavit. During the motions hearing in court, when Mr. Herold was asked who forged the documents, he replied, "we can only **assume** the one who benefitted from them." (Emphasis added). When the court asked, "are they [Mr. Herold's affidavits] based on personal knowledge," he responded that they are based on a "document examination report." Mr. Herold's hand writing expert also had no personal knowledge that Mrs. Herold forged any of the documents in question. It is settled law that '"conclusory denials or bald allegations will not defeat a motion for summary

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are they tenants in common; they are in the contemplation of the law but one person, and hence they take, not by moieties, but by the entirety. Neither can alienate without the consent of the other, and the survivor takes the whole." *Beall v. Beall*, 291 Md. 224, 234 (1981) (citations omitted).

[8] Md. Rule 2-501(c) states:

> Form of Affidavit. An affidavit supporting or opposing a motion for summary judgment shall be made upon personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.

judgment.'" *Danielewicz*, *supra*, 137 Md. App. at 13 (citation omitted). As such, we see no error in the circuit court's ruling.

JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.