

2011 IL App (1st) 101518-U
No. 1-10-1518

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(3)(1).

Third Division
August 10, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ESTATE OF MARGARET N. ANDREASEN, a/k/a)	Appeal from the
MARGARET E. ANDREASEN, Deceased.)	Circuit Court of
)	Cook County.
JOSEPH EBERLIN and CYNTHIA EBERLIN,)	
)	
Plaintiffs-Appellants,)	
)	07 P 002462
v.)	
)	
DENNIS GULINO, SHARON GULINO, JPMORGAN)	
CHASE BANK, N.A., Successor to BANK ONE TRUST)	
COMPANY, as Trustee of Margaret Andreasen Trust,)	Honorable
)	Henry A. Budzinski,
Defendants-Appellees.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Murphy and Steele concurred in the judgment.

ORDER

HELD: Where arguments are raised for the first time in a motion to reconsider, the arguments are forfeited and the circuit court does not abuse its discretion when it denies the motion to reconsider.

¶ 1 After the appellate court affirmed the trial court in Joseph and Cynthia Eberlins' first

appeal (*In re Estate of Andreasen*, No. 1-08-1218 (2009) (unpublished order under Supreme Court Rule 23)), Dennis and Sharon Gulino and J.P. Morgan Chase Bank (Chase Bank) filed a petition for the distribution and release of funds from Margaret Andreasen’s trust. When Joseph and Cynthia Eberlin did not answer or file a response to the petition, the circuit court held a hearing and granted the petition. The Eberlins filed a motion to reconsider the circuit court’s order and argued that (1) equitable estoppel precluded the enforcement of the “in terrorem” provisions in the decedent’s 2001 will and trust due to the Gulinos’ misrepresentations and concealment of material matters; (2) the Restatement (Second) of Property, sec. 9.1, which discusses the probable cause exception, precludes application of the no contest clause in the 2001 will and in the trust; and (3) the Gulinos’ statement in their petition that “no public policy or rule of law exists to preclude enforcement of the no contest clause” was conclusory. Following a hearing, the circuit court denied the Eberlins’ motion to reconsider, and the Eberlins filed the instant appeal.

¶ 2 We find that the Eberlins’ three arguments were raised for the first time in a motion to reconsider and are therefore forfeited. We also find that the circuit court did not abuse its discretion when it denied the Eberlins’ motion to reconsider. Therefore, we affirm the circuit court’s order.

¶ 3 BACKGROUND

¶ 4 Declaration of Trust

¶ 5 On September 27, 1991, Margaret Andreasen (Andreasen) executed a Declaration of Trust (trust) in which the trustee was directed to distribute the principal of the trust to Andreasen’s

four nieces and nephews in equal shares. One of those nieces, Cynthia Eberlin, was the niece of Andreasen's deceased husband. On May 30, 2003, in Andreasen's fifth and final amendment to the trust, the trustee was directed to distribute \$25,000 to each of the four named nieces and nephews. The remainder of the property in the trust was to be distributed to the Gulinos.

¶ 6 Last Will and Testament and Codicil

¶ 7 On January 30, 1997, Andreasen executed a last will and testament. On February 16, 2001, Andreasen executed another will which revoked all prior wills, appointed Dennis Gulino as executor and directed the Estate to be independently administered. Pursuant to article eleven of the will, all of Andreasen's property was poured into the trust and Dennis Gulino was named as trustee. On August 7, 2001, Andreasen executed a codicil to her will which revoked article eleven but still poured all of her property into the trust and named Bank One Trust Company, N.A. (Bank One) as trustee. Andreasen died on February 22, 2005.

¶ 8 Cynthia Eberlin's Declaratory Judgment Action

¶ 9 On June 14, 2005, Cynthia Eberlin filed a declaratory judgment action against Bank One requesting a full and complete copy of Andreasen's trust documents. On April 17, 2006, a judge in the Chancery Division of the circuit court granted Cynthia Eberlin's motion for summary judgment and ordered Bank One to allow Cynthia Eberlin to view the trust documents within 21 days.

¶ 10 Petitions to Probate the Andreasen's Wills

¶ 11 On April 5, 2007, the Eberlins filed a petition for the probate of Andreasen's January 30,

1997, will. On May 10, 2007, the Gulinos filed a cross petition for the probate of Andreasen's February 16, 2001, will and August 7, 2001, codicil. The circuit court granted the Gulinos' cross petition and ordered the February 16, 2001, will and the August 7, 2001, codicil admitted to probate. The circuit court also appointed Dennis Gulino as the independent executor of the Estate.

¶ 12 The Petition to Terminate Independent Administration and

¶ 13 The Petition to Contest Andreasen's 2001 Will and Trust

¶ 14 On July 2, 2007, Cynthia Eberlin filed a petition to terminate Dennis Gulino's independent administration of the Estate. The circuit court granted Dennis Gulino's motion to dismiss Cynthia Eberlin's petition, and she filed a motion to reconsider the circuit court's order.

¶ 15 On December 21, 2007, the Eberlins filed a petition to contest Andreasen's 2001 will and trust. The Eberlins alleged undue influence and conflict of interest against the Gulinos and negligence and conflict of interest against Bank One. Dennis Gulino filed a motion to dismiss the Eberlins' petition to contest the 2001 will and trust as untimely.

¶ 16 On April 7, 2008, after a hearing on both motions, the circuit court denied Cynthia Eberlin's motion to reconsider the order which denied her petition to terminate the independent administration of Dennis Gulino. The court also denied the Eberlins' petition to contest Andreasen's 2001 will and trust as being untimely filed pursuant to sections 8-1(a) and (f) of the Probate Act (755 ILCS 5/8-1(a) and (f)(West 2006)), and granted Dennis Gulino's motion to dismiss.

¶ 17 The Eberlins appealed the circuit court's order. On December 10, 2009, the appellate court

affirmed the circuit court. *In re Estate of Andreasen*, No. 1-08-1218 (2009) (unpublished order under Supreme Court Rule 23).

¶ 18 The Petition for Distribution and Release of Funds

¶ 19 On January 20, 2010, the Gulinos and Chase Bank filed a petition for distribution and release of funds, which is the subject of this appeal. They argued that due to the Eberlins' commencement of and prolonged participation in proceedings to contest Andreasen's 2001 will, they violated the "in terrorem" provisions (the no contest clause) of section 3.4 of the 2001 will and article eleven of the trust. The in terrorem provisions provided that if any beneficiary contested the will or trust, the Estate was to be administered and distributed as if that beneficiary predeceased Andreasen.

¶ 20 The Eberlins did not file an answer or a response to the petition for distribution and release of funds. On February 5, 2010, following a hearing, the circuit court granted the petition. The record does not contain a report of proceedings from the hearing.

¶ 21 On February 26, 2010, the Eberlins filed a motion to reconsider the circuit court's order granting the petition for the distribution and release of funds. For the first time, the Eberlins raised the affirmative defense of equitable estoppel. The Eberlins argued that (1) equitable estoppel precludes enforcement of the in terrorem provisions due to the defendants' misrepresentations and concealment of material matters; (2) the probable cause exception precludes application of the in terrorem provisions; and (3) the allegation in the defendants' petition that no public policy or rule of law exists to preclude enforcement of the in terrorem provisions is conclusory. Following a hearing, the circuit court entered an order denying the

Eberlins' motion to reconsider and the Eberlins filed the instant appeal.

¶ 22 On appeal, the Eberlins maintain that (1) the circuit court erred when it denied their motion to reconsider the February 5, 2010, order, by failing to apply the doctrine of equitable estoppel to prevent the enforcement of the in terrorem provisions in the Andreasen's 2001 will and trust; (2) they acted in good faith in contesting the 2001 will and trust and had probable cause for the challenge; and (3) the facts alleged in the petition for the distribution and release of funds were conclusory.

¶ 23

ANALYSIS

¶ 24

Standard of Review

¶ 25

The Eberlins argue that the circuit court erred when it denied their motion to reconsider. The purpose of a motion to reconsider is to bring to the court's attention (1) a change in the law, (2) an error in the court's previous application of existing law, or (3) newly discovered evidence that was not available at the time of the hearing. *RBS Citizens, Nat. Ass'n v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183, 193 (2011). When presented with a motion to reconsider based upon the submission of new matters, such as additional facts or new arguments not previously presented during the course of the proceedings leading to the order being challenged, we employ an abuse of discretion standard of review. *RiverVillage I, LLC v. Central Ins. Companies*, 396 Ill. App. 3d 480, 492 (2009), *appeal denied* 236 Ill. 2d 545 (2010), citing *Delgatto v. Brandon Associates, Ltd.*, 131 Ill. 2d 183, 195 (1989). In their motion to reconsider, the Eberlins asked the circuit court to consider new legal theories,

equitable estoppel and the probable cause exception, and new arguments, that the facts in the petition were conclusory, which were not presented, based on the record, when the circuit court entered the order which granted the petition for distribution and release of funds. Therefore, we employ an abuse of discretion standard of review.

¶ 26 Equitable Estoppel

¶ 27 The Eberlins argue that the doctrine of equitable estoppel bars enforcement of the in terrorem provisions in the Andreasen's 2001 will and trust. The Eberlins' raised the affirmative defense of equitable estoppel for the first time in their motion for reconsideration.

¶ 28 Section 2-613(d) of the Code of Civil Procedure requires affirmative defenses, like equitable estoppel, to be plainly set forth in the answer. 735 ILCS 5/2-613(d) (West 2006); *R and B Kapital Development, LLC v. North Shore Community Bank and Trust Co.*, 358 Ill. App. 3d 912, 921 (2005) (equitable estoppel is an affirmative defense which must be affirmatively pled or it is waived). Case law makes it clear that affirmative defenses raised for the first time in a motion for reconsideration are forfeited. *RBS Citizens*, 407 Ill. App. 3d at 188-89; *Enterprise Recovery Systems Inc. v. Salmeron*, 401 Ill. App. 3d 65, 75-76 (2010). Therefore, we find that the Eberlins' equitable estoppel argument is forfeited because it was raised for the first time in their motion for reconsideration.

¶ 29 Forfeiture aside, we note that a motion for reconsideration must raise newly discovered evidence that was not available at the time of the hearing. *RBS Citizens*, 407 Ill. App. 3d at 193. On appeal, the Eberlins maintain that they were not aware of the equitable estoppel

argument because counsel for the Gulinos did not disclose the trust documents until they were compelled by a court order to turn over the documents. This argument is devoid of merit. The record reveals that a court order was entered on April 7, 2006, directing Bank One to turn over the trust documents to the Eberlins within 21 days. The Eberlins were in possession of the trust documents approximately four years before the Gulinos filed their petition for the distribution and release of funds on January 20, 2010. The evidence supporting the equitable estoppel defense was not newly discovered evidence but was available at the time of the hearing on the Gulinos' petition. Therefore, the circuit court did not abuse its discretion when it denied the Eberlins' motion to reconsider based, in part, on the equitable estoppel defense.

¶ 30 The Probable Cause Exception

¶ 31 Next, the Eberlins argue that the “probable cause or good faith public policy” exception applies and bars the enforcement of the in terrorem provisions in the 2001 will and trust. The Eberlins maintain that “[i]n 2007, the Eberlins’ Contest of Will and Trust was made with probable cause, as defined by the Restatement (Second) Property Sec. 9.1 Comment j.” The Eberlins also “respectfully urge the reviewing court to examine *de novo* in light of the evidence in the record, the probable cause that Eberlin had to contest the decedent’s 2001 will and trust and find that enforcement of the in terrorem clause under the particular facts of this case would be unfair and inequitable, and should be estopped ***.”

¶ 32 The Eberlins failed to raise the probable cause exception in an answer to the Gulinos’

a beneficiary shall forfeit their interest if he or she contests the validity of the document or participates in a legal proceeding contesting the validity of the document. See *Wojtalewicz's Estate v. Woitel*, 93 Ill. App. 3d 1061, 1063 (1981) (“Generally, conditions in a clause against contesting the will or attempting to set it aside are valid.”). The facts in the petition explained why the in terrorem provisions in Andreasen’s 2001 will and trust should be enforced. Therefore, because the petition was supported by facts and was not based on legal conclusions, the circuit court did not abuse its discretion when it enforced the petition for the distribution and release of funds.

¶ 38

CONCLUSION

¶ 39

The circuit court did not abuse its discretion when it denied the Eberlins’ motion to reconsider the order which granted the petition for the distribution and release of funds because the Eberlins’ three arguments were forfeited when the arguments were raised for the first time in a motion to reconsider. Accordingly, we affirm the circuit court’s order.

¶ 40

Affirmed.