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THIRD DIVISION  
September 29, 2016

No. 1-16-0435

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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PETER J. POPP, )  
 )  
 Plaintiff-Appellant, ) Appeal from the Circuit court of  
 ) Cook County, Illinois,  
 v. ) Municipal Department.  
 )  
 LEANE RODGERS, ) No. 2015 M1 500765  
 )  
 )  
 Defendant-Appellee. ) The Honorable  
 ) Daniel J. Kubasiak,  
 ) Judge Presiding.

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PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Lavin and Cobbs concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court properly denied the plaintiff's order for replevin where the plaintiff failed in his burden of proof to establish a *prima facie* case of his superior right of possession to the subject property.

¶ 2 This is an appeal from the circuit court of Cook County, denying the request of the plaintiff, Peter J. Popp, that an order of replevin issue against the defendant, the plaintiff's niece, Leane Rodgers, for the return of a certain framed photograph of the plaintiff's father. The plaintiff

argues that the trial court erred in refusing to issue an order of replevin granting possession of the photograph to him. The plaintiff asserts that his complaint and his subsequent testimony before the trial court, neither of which were disputed by the defendant, should have been sufficient to permit him to proceed with his replevin action. For the reasons that follow, we affirm.

¶ 3

### I. BACKGROUND

¶ 4

The record below reveals the following undisputed facts and procedural history. On November 12, 2015, the plaintiff filed his verified complaint for replevin (735 ILCS 5/19-101 *et seq.* (West 2012)) against the defendant, alleging that he was the owner of a certain framed photograph of his father, Peter P. Popp, wearing a World War II naval uniform. The photograph and frame were described as being approximately thirty by eighteen inches, with the value estimated at \$15,000. The plaintiff, however, explained that the property had more sentimental than monetary value to him.

¶ 5

According to the plaintiff's complaint, the defendant currently has possession of the said photograph and frame, and is wrongfully detaining it. The plaintiff alleged that he demanded that the defendant deliver or surrender possession of the framed photograph but that she has wrongfully refused and still refuses to do so. In support, the plaintiff attached a letter from his attorney to the defendant, demanding that she return the photograph she "more, or less, stole," within ten days, if she wished to avoid litigation.

¶ 6

The complaint further alleged that the framed photograph had not been taken for any tax, assessment, or fine levied by virtue of any State law, against the property or against the plaintiff individually, nor seized under any lawful process against the property or held by virtue of any order of replevin against the plaintiff.

¶ 7

In addition, the complaint alleged that as of the drafting of the instant complaint, the plaintiff

had incurred \$544.20 in attorneys' fees.

¶ 8 Accordingly, the complaint sought an order of replevin granting possession of the photograph to him. In the alternative, he sought judgment against the defendant in the sum of \$15,000 for the value of the said photograph. The plaintiff further sought an award of \$544.20 for attorney's fees, and any additional costs incurred in this action.

¶ 9 On November 12, 2015, a notice of hearing of the issuance of an order of replevin was entered and a summons was issued against the defendant. An amended notice of hearing was entered on November 20, 2015. On November 25, 2015, the defendant was personally served with the complaint and summons in this cause. The defendant did not answer or otherwise plead.

¶ 10 On December 14, 2015, the trial court held a hearing to determine whether or not it should issue an order for replevin to grant possession of the photograph to the plaintiff. See 735 ILCS 5/19-107 (West 2012). Although the common law record does not contain an appearance by the defendant or her counsel, the trial court's order for that date notes that an attorney was present on the defendant's behalf at this hearing. While we are without a transcript of the hearing, pursuant to Illinois Supreme Court Rule 232(c) (eff. Dec. 13, 2015), and upon the plaintiff's motion, the trial court has subsequently approved and certified the plaintiff's proposed report of proceedings. That report reveals the following pertinent and undisputed facts.

¶ 11 At the December 14, 2015, hearing, the plaintiff stated that two weeks prior to his father's death on November 24, 1969, the plaintiff's sister, Patrician Bergemann (hereinafter Patricia) unlawfully removed the subject photograph and frame from the plaintiff's mother's home. The plaintiff averred that from that time until his mother's death on November 13, 1993, his mother and sister "argued and bickered at every family holiday, baptism, communion, and the like gathering wherein [his] mother demanded" that his sister return the photograph. The plaintiff

further stated that prior to her death on June 27, 2014, the plaintiff's sister gave the framed photograph to her daughter (the plaintiff's niece), the defendant in this cause. The plaintiff stated that he was his father's only living descendant and that neither his mother or father left a will regarding their property. The plaintiff further stated that there was never any probate estate commenced for either of his parents.

¶ 12 According to the certified report of proceedings, the defendant did not speak during the hearing. Nor are there any comments referenced in the report of the proceedings regarding whether the defendant's counsel made any arguments.

¶ 13 Instead, the certified report of the proceedings, merely lays out the plaintiff's counsel's arguments. Specifically, counsel for the plaintiff argued that because the plaintiff's sister had unlawfully removed the photograph from the plaintiff's mother's home in late 1969, she never obtained legal title to the photograph, and therefore could not convey title to it to her daughter, the instant defendant. Counsel further argued that the only rightful title holder of the photograph was the plaintiff, and therefore an order of replevin for the return of the photograph to him should be issued.

¶ 14 On December 14, 2015, the trial court denied the plaintiff's order for replevin. The plaintiff filed a motion to reconsider on January 11, 2016, which was denied on January 25, 2016. The plaintiff now appeals.

¶ 15 II. ANALYSIS

¶ 16 We begin by noting that the defendant here has not filed an appellee's brief. Nevertheless, because the record is simple and the issues straightforward, we will consider the merits of the plaintiff's claim pursuant to the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976) (holding that "if the record is simple and the

claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits on appeal").

¶ 17 On appeal, the plaintiff argues that the trial court's order denying the issuance of replevin was against the manifest weight of the evidence,<sup>1</sup> where the undisputed evidence established that the plaintiff's sister unlawfully removed the photograph from the plaintiff's mother's home and never obtained legal title to it so as to be able to convey it to the defendant. We disagree.

¶ 18 In Illinois "[r]eplevin is a strict statutory proceeding, and the statute must be followed precisely." *Carroll v. Curry*, 292 Ill. App. 3d 511, 513-14 (2009) (citing *Universal Credit Co. v. Antonsen*, 374 Ill. 194, 200 (1940) and *Jim's Furniture Mart, Inc. v. Harris*, 42 Ill. App.3d 488, 490 (1976)); see also *Gunn v. Sobucki*, 216 Ill. 2d 602, 613 (2005); 735 ILCS 5/19-101 *et seq.* (West 2012). The purpose of replevin is to test the right of possession of personal property and

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<sup>1</sup> We note some confusion in the plaintiff's arguments. While in one portion of his brief, the plaintiff argues that the trial court's finding was "against the manifest weight of the evidence," in another, without much explanation, he seeks *de novo* review. Since the present case involved an evidentiary hearing, where the plaintiff offered live testimony before the trial judge, our review will be for manifest weight of the evidence. See *e.g.*, *Madison Miracle Productions, L.L.C. v. MGM Distribution Co.*, 2012 IL App (1st) 112334, ¶ 35 ("As any number of decisions have held over the years, a manifest weight of the evidence standard has historically been applied by appellate courts when the trial court conducts \*\*\* an evidentiary hearing and hears testimony \*\*\*.") see also *Abbington Trace Condominium Ass'n v. McKeller*, 2016 IL App (2d) 150913, ¶ 10 ("[W]hen, as in the case care, an evidentiary hearing has been held, we will review whether the trial court's findings were against the manifest weight of the evidence.").

place the successful party in possession of the property. *Carroll*, 292 Ill. App. 3d at 514; see also *S.T. Enterprises, Inc. v. Brunswick Corp.*, 57 Ill. 2d 461, 469 (1974). "One who has no right to possess the property cannot maintain replevin." *Gunn*, 216 Ill. 2d at 613; see 735 ILCS 5/19-101 (West 2012).

¶ 19 To that effect, section 19-101 of the Illinois Code of Civil Procedure (the Code), provides: "Whenever any goods or chattels have been wrongfully distrained, or otherwise wrongfully taken or are wrongfully detained, an action for replevin may be brought for the recovery of such goods or chattels, by the owner or person entitled to their possession." 735 ILCS 5/19-101 (West 2012).

¶ 20 A plaintiff commences an action in replevin by filing a verified complaint "which describes the property to be replevied and states that the plaintiff in such action is the owner of the property so described, or that he or she is then lawfully entitled to its possession thereof, and that property is wrongfully detained by the defendant." 735 ILCS 5/19-104 (West 2006). The trial court then conducts a hearing to review the basis for the plaintiff's alleged claim to possession. 735 ILCS 5/19-107 (West 2012). Following the hearing, an order of replevin shall issue "[i]f the plaintiff establishes a *prima facie* case to a superior right of possession of the disputed property, and if the plaintiff also demonstrates to the court the probability that the plaintiff will ultimately prevail on the underlying claim to possession." 735 ILCS 5/19-107 (West 2012). Therefore, in a replevin action, the plaintiff bears the burden of "alleg[ing] and prov[ing] that he [or she] is lawfully entitled to possession of the property, that the defendant wrongfully detains the property and refuses to deliver the possession of the property to the plaintiff." *International Harvester Credit Corp. v. Helland*, 130 Ill. App. 3d 836, 838 (1985) (citing *Hanaman v. Davis*, 20 Ill. App. 2d 111 (1959)).

¶ 21 In the present case, the evidence presented by the plaintiff at the hearing, albeit unchallenged and undisputed, was insufficient to establish a *prima facie* case of the plaintiff's superior right of possession to the photograph. Although the plaintiff testified that after his father's death, his sister took the photograph unlawfully from the plaintiff's mother, and that the plaintiff's mother continued to request the return of that photograph, he also admitted that his mother did not leave a will. Under Illinois law, if a person dies intestate, with no living spouse, the decedent's property is divided among the decedent's descendants per stirpes. See 755 ILCS 5/2-1 (West 2012). In the present case, the plaintiff presented insufficient evidence to permit the trial court to determine how many of her children (and other descendants) survived the plaintiff's mother. There was no testimony by the plaintiff as to whether the plaintiff's mother had only two children, the plaintiff, and his sister, Patricia, who had allegedly unlawfully taken the photograph, or if there were more surviving, and/or nonsurviving children. Even assuming that the plaintiff's mother had only two children, the plaintiff and his sister, Patricia, upon the plaintiff's mother's death, under Illinois law, all of the mother's property would have been distributed per stirpes to the plaintiff and his sister (*i.e.*, each would have been entitled to half). As such, his sister, would have had both possession and title to half the property. As such, the plaintiff has failed in his burden to establish a *prima facie* case of a superior right of possession. See 735 ILCS 5/19–107 (West 2012); see also *Carroll*, 392 Ill. App. 3d at 514; see also *Gunn*, 216 Ill. 2d at 613 ("One who has no right to possess the property cannot maintain replevin.").

¶ 22 What is more, the evidence offered by the plaintiff at the hearing demonstrated that his action for replevin was time-barred. Pursuant to section 13-205 of the Code (735 ILCS 5/13-205 (West 2012)), any action "to recover damages for an injury done to property, real or person, or to recover the possession of personal property or damages for the detention or conversion

thereof," must be "commenced within 5 years next after the cause of action accrued." In the present case, the plaintiff's right accrued when he first had the right to demand possession, which was no later than when his mother died in 1993, since as a direct descendant he presumably would have been entitled to possession of at least some share of her real and personal property. In addition, by his own admission during the hearing, since the plaintiff's mother continued to request the photograph be returned to her, upon his mother's death, the plaintiff should reasonably have known of his right to at least demand possession of the photograph so as to timely initiate his replevin action against his sister. See *Hitt v. Stephens*, 285 Ill. App. 3d 713, 717 (1997) (holding that the discovery rule that tolls the accrual of a statute of limitations applies to replevin actions). Instead, the plaintiff waited over 20 years, and the death of his sister, to institute this cause of action against the defendant. As such, his claim is barred by the statute of limitations. See 735 ILCS 5/13-205 (West 2012); see also *Meeker v. Summers*, 70 Ill. App. 3d 528, 529 (1979) (holding that where a former owner had a right to recover personal property but "fail[ed] to initiate a replevin action within 5 years after that right accrue[d], the statute of limitation barr[ed] any later action.").

¶ 23

### III. CONCLUSION

¶ 24

For the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 25

Affirmed.