2016 IL App (2d) 151285-U
No. 2-15-1285
Order filed November 8, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re ESTATE OF AUGUSTA GERSHMAN,	)	Appeal from the Circuit Court of Lake County.
Deceased	)	
	)	No. 13-P-41
	)	
(David Gershman and Elayne Dagelewicz, Petitioners-Appellees v. Annette Sarrazine, Respondent- Appellant).	)	Honorable Nancy S. Waites, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted partial summary judgment and a directed finding in favor of petitioners; affirmed.

¶ 2 This appeal arises from the probate estate of decedent, August Gershman. All of the parties are children of decedent. Petitioners, David Gershman and Elayne Dagelewicz, filed a citation to recover assets of the estate transferred to their sister, respondent Annette Sarrazine, during decedent's lifetime. Petitioners alleged that respondent was a fiduciary for decedent and that she breached her fiduciary duty by profiting from specific transactions she entered into with decedent. The court granted partial summary judgment, finding a fiduciary relationship existed between decedent and respondent as a matter of law. This shifted the burden of proof at trial to

respondent to prove by clear and convincing evidence that the disputed transactions were not fraudulent. Following respondent's case-in-chief, the trial court granted petitioners' motion for a directed finding, holding that respondent failed to rebut the presumption. Respondent raises two issues on appeal concerning the orders of the trial court granting partial summary judgment and directing a finding in favor of petitioners. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In August 2007, decedent and her husband moved into the Sunrise Assisted Living Facility in Gurnee, Illinois. In order to reside at Sunrise, it required that decedent provide a power of attorney. Respondent personally prepared one by downloading a form from the internet, which was executed by decedent, and "it was then presented" to the facility as requested. The power of attorney named respondent as agent. After the death of decedent's husband, decedent executed a number of documents conveying decedent's assets to respondent either immediately or upon decedent's death. Decedent died on September 16, 2009, leaving no will.

¶ 5 Following decedent's death, petitioners were named as co-administrators of decedent's probate estate on February 25, 2013. On March 28, 2013, petitioners filed a citation to recover assets, alleging that respondent was a fiduciary for decedent and that she breached her fiduciary duty by profiting from transactions she entered into with decedent. The citation alleged that, as fiduciary for decedent, the disputed conveyances were presumed to be fraudulent and respondent bore the burden of proving that the conveyances were not the result of undue influence or fraud but rather were defendant's voluntary, knowing, and deliberate desire. The parties stipulated to certain facts regarding the disputed transactions between decedent and respondent, along with a time line of important events.

¶ 6 A. Motion for Partial Summary Judgment

¶ 7 Prior to trial, petitioners filed a motion for partial summary judgment, seeking a judgment that (1) respondent was a fiduciary at law for decedent; (2) certain challenged transactions occurred during the term of that fiduciary relationship; (3) the transactions were within the scope of the fiduciary relationship; (4) the transactions benefitted respondent; and (5) a presumption of fraud and undue influence therefore applied to the transactions. Petitioners attached exhibits, which set forth all relevant, undisputed facts in support of their motion. Petitioners' motion stated a brief summary of the following facts. On August 14, 2007, decedent executed a power of attorney for finances, naming respondent as her agent. Respondent prepared the power of attorney for decedent's signature using an internet form and therefore, respondent was aware of the power of attorney at the time of its creation and facilitated decedent's execution of the document. After decedent executed the power of attorney naming respondent as agent, respondent contacted counsel to prepare two deeds on decedent's behalf. Decedent did, in fact, execute those deeds, each of which benefited respondent. Also, after decedent executed the power of attorney and after respondent contacted counsel to prepare deeds on decedent's behalf, respondent was named death beneficiary on certain of decedent's IRAs and respondent was named as a joint tenant with right of survivorship on another of decedent's accounts. In response to the motion, respondent admitted that she printed the power of attorney from the internet and decedent signed it, but Sunrise required that decedent provide one as a condition for gaining admittance to the facility.

¶ 8 On August 24, 2015, the trial court granted the motion for partial summary judgment, finding that respondent was a fiduciary at law for decedent, and as such, there was a presumption of fraud as to any transaction that respondent had with decedent that benefited respondent

beginning August 14, 2007, going forward. The court determined that the burden at trial shifted to respondent to prove by clear and convincing evidence that the disputed transactions benefitting respondent after August 14, 2007, were not the product of undue influence and were done with decedent's full knowledge of the nature and effect of the transactions and were her deliberate, voluntary, and knowing desire.

¶ 9 B. Trial and Directed Verdict

¶ 10 At the bench trial, the parties stipulated to the admission into evidence of numerous facts and documents, including the deposition testimony of decedent's personal physician, Dr. Andrew Savin. Dr. Savin's medical records showed that decedent suffered from "severe dementia" at all relevant times, and he testified that decedent did not have sufficient mental capacity to enter into financial transactions. Respondent testified and acknowledged that decedent did not consult an attorney, financial advisor, or other professional prior to entering into any of the transactions at issue. Respondent further testified that she used her own financial advisor to conduct certain transactions and that this advisor did not meet or speak to decedent.

¶ 11 In addition to her own testimony, respondent called several other witnesses at trial. However, in the statement of facts, respondent fails to cite to the specific pages in the record where these witnesses testified or what their testimony consisted of.

¶ 12 At the close of respondent's case, petitioners filed a motion for a directed verdict. Petitioners argued that respondent failed to offer any evidence to rebut the presumption of fraud. The trial court agreed, finding that respondent had failed to prove by clear and convincing evidence that the disputed transactions were decedent's deliberate, knowing, and voluntary desire. The court ordered respondent to return to the estate the property she obtained through the disputed transactions for distribution to decedent's heirs. Respondent timely appeals.

¶ 13 II. ANALYSIS

¶ 14 A. Partial Summary Judgment

¶ 15 Respondent contends that the trial court improperly granted partial summary judgment. Respondent challenges the trial court's order, finding that a fiduciary relationship existed as a matter of law between respondent and decedent as early as August 14, 2007, when a power of attorney was signed by decedent. Respondent maintains the court's finding "is against the manifest weight of the evidence."

¶ 16 An appeal from the granting of a summary judgment is reviewed on a *de novo* basis. *Seymour v. Collins*, 2015 IL 118432, ¶ 42. That is because the purpose of a summary judgment is not to try a question of fact, which necessarily requires review under the manifest weight of the evidence standard, but rather to determine whether a genuine issue of material fact exists. *Adam v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012).

¶ 17 Generally, a presumption of fraud or undue influence exists " 'where there is a fiduciary relationship between the parties and the fiduciary has benefitted by virtue of his fiduciary status.' " *In re Estate of Stahling*, 2013 IL App (4th) 120271, ¶ 18 (quoting *In re Estate of DeJarnette*, 286 Ill. App. 3d 1082, 1088 (1997)). "A confidential or fiduciary relationship exists in all cases where trust and confidence are reposed in another who thereby gains a resulting influence and superiority." *Apple v. Apple*, 407 Ill. 464, 468-69 (1950). Fiduciary relationships may be shown to exist either as a matter of law or as a matter of fact. *In re Estate of Long*, 311

Ill. App. 3d 959, 963 (2000). To prove the existence of a fiduciary relationship as a matter of law, a complaining party need only show that the parties at issue shared a relationship legally recognized as fiduciary in nature, such as an attorney-client relationship. *In re Estate of Elias*, 408 Ill. App. 3d 301, 319 (2011). "[I]t is well established that a power of attorney gives rise to a general fiduciary relationship as a matter of law." *Id*. at 320; *White v. Raines*, 215 Ill. App. 3d 49, 59 (1991). "If a petitioner shows that a fiduciary relationship exists, any transaction between parties in which the agent profits is typically presumed to be fraudulent and the agent has the burden of proving by clear and convincing evidence that the transaction was fair and equitable and did not result from the agent's undue influence over the principal." (Internal quotation marks omitted.) *Janowiak v. Tiesi*, 402 Ill. App. 3d 997, 1005 (2010) (quoting *In re Estate of Miller*, 334 Ill. App. 3d 692, 698 (2002), citing *In re Estate of Teall*, 329 Ill. App. 3d 83, 87 (2002)).

¶ 18 The trial court correctly determined that the power of attorney created a fiduciary relationship as a matter of law. The undisputed facts established that on August 14, 2007, decedent executed a power of attorney for finances, naming respondent as her agent. Respondent downloaded a power of attorney from the internet, completed the form, naming herself as agent and decedent as principal, and decedent signed the document. The document states that it "shall become effective immediately and shall survive and continue during my disability, incompetence, incapacity, or partial disability." Thus, the power of attorney became effective upon execution. The document was then delivered to Sunrise to gain admission for decedent. Respondent therefore became the agent for decedent under decedent's power of attorney. As such, decedent and respondent shared a principal-agent relationship as a matter of law. See *Elias*, 408 Ill. App. 3d at 320; *White*, 215 Ill. App. 3d at 59.

¶ 19 Respondent argues that the trial court's ruling was erroneous because she never operated under the power of attorney or used it to perform any transactions on behalf of decedent. Respondent cites *Stahling* for the proposition that she must have actually accepted the power of attorney for it to create a fiduciary relationship as a matter of law.

¶ 20 In *Stahling*, the decedent's daughter, as co-administrator of the estate, petitioned to expend estate funds to investigate the decedent's execution of deed that transferred land to himself and his son as joint tenants with rights of survivorship. The trial court certified for review, pursuant to Illinois Supreme Court Rule 308(a) (eff. Jan. 1, 2015), the question as to whether the existence of a health care power of attorney created a fiduciary relationship which raised a presumption of undue influence in the execution of the deed. The Appellate Court, Fourth District, held, in part, that the scope of the fiduciary relationship was solely limited to the principal's health care and it gave the agent no authority to manage or control the principal's property or financial matters. *Stahling*, 2013 IL App (4th) 120271, ¶ 26.

¶ 21 *Stahling* is distinguishable from the present case because it involved a health care power of attorney, alone, and whether such a document could create a presumption of undue influence in property and financial transactions between the power's principal and agent. Here, however, there is a power of attorney that clearly gave respondent authority over decedent's financial affairs. See *Stahling*, 2013 IL App (4th) 120271, ¶ 19 (wherein the court notes that relevant case law concerns only powers of attorney dealing with property and financial matters and their effect on property and financial transactions between the parties).

¶ 22 We find the present case is closer to the facts in *Elias*. In that case, the petitioner, executor of the decedent, filed a petition for recovery of assets against the respondent to recover personal property and cash which was transferred from the decedent's brokerage account to the

respondent pursuant to a transfer-on-death beneficiary form the decedent executed while the respondent was acting under a power of attorney. *Elias*, 408 Ill. App. 3d at 302. The respondent argued she did not "activate" the power of attorney until the decedent broke her hip. The appellate court rejected the argument, holding that the decedent's execution of the general power of attorney gave rise to the fiduciary relationship, not when the agent activated the power of attorney. *Id*. at 320.

¶ 23 *Stahling* does state that an agent must accept the powers delegated by a power of attorney in order to create a fiduciary relationship, which seems to contradict the general statement of law set forth in *Elias* and *White* that the execution of a durable power of attorney creates a fiduciary relationship as a matter of law. However, even if we were to follow *Stahling*, according to the statement of facts attached to the summary judgment motion, respondent admitted to performing acts that showed she had "accepted" the powers delegated to her by the instrument before the disputed transactions occurred. In order to reside at Sunrise, it required that decedent provide a power of attorney. Respondent personally prepared one by downloading the form from the internet, which was executed by decedent, and "it was then presented" to the facility as requested. Moreover, respondent contacted counsel to draft deeds to transfer a condominium and timeshare from decedent to her. This evidence established that respondent accepted and was operating under the power of attorney. Thus, the evidence, when viewed in the light most favorable to the nonmoving party, showed that there was no genuine issue of material fact that the power of attorney created a fiduciary relationship between respondent and decedent, and petitioners were entitled to judgment as a matter of law.

¶ 24 B. Directed Finding

¶ 25 Respondent initially argues that the trial court erred by placing the burden on her to prove by clear and convincing evidence that the transactions were not fraudulent. We previously held that the trial court properly determined that respondent was a fiduciary for decedent. When a petitioner shows that a fiduciary relationship exists, any transaction between parties in which the agent profits is typically presumed to be fraudulent and the agent has the burden of proving by clear and convincing evidence that the transaction was fair and equitable and did not result from the agent's undue influence over the principal. *Janowiak*, 402 Ill. App. 3d at 1005. Therefore, it was proper for the court to shift the burden of proof to respondent at trial.

¶ 26 Respondent argues alternatively that, even assuming the burden of proof was properly placed on her, the evidence showed that the disputed transactions were entered into without fraud or undue influence, and therefore, the trial court erred in granting petitioners' motion for a directed finding.

¶ 27 In a nonjury case, a court uses a two-step analysis when ruling on a motion for a directed finding by first determining as a matter of law whether a *prima facie* case is presented and, if so, then considering and weighing the totality of the evidence presented, including evidence which is favorable to the moving party. 735 ILCS 5/2-1110 (West 2012); *Hedrich v. Mack*, 2015 IL App (2d) 141126, ¶ 8. Because the trial court weighed all the evidence in entering judgment in favor of petitioners, the trial court had proceeded to the second step of the two-step analysis, in which we apply a manifest weight of the evidence standard. See *Barnes v. Michalski*, 399 Ill. App. 3d 254, 264 (2010). The ruling is against the manifest weight of the evidence only if it is unreasonable, arbitrary, or not based on any evidence or only if the opposite conclusion is clearly evident from the evidence in the record. *Id*. at 264-65.

¶ 28 In determining whether the presumption of fraud has been rebutted, the question is whether the transaction was entered into with full knowledge of its nature and effect and because of the principal's deliberate, voluntary, and intelligent desire. If so, the existence of a fiduciary relationship does not invalidate the transaction. *Clark v. Clark*, 398 Ill. 592, 602 (1947). Courts have held that proof of the principal's mental capacity is *not sufficient* to overcome the presumption of fraud. See, *e.g.*, *Pottinger v. Pottinger*, 238 Ill. App. 3d 908, 919-20 (1992). Because of the heightened potential for fraud, the court must give strict scrutiny to the self-serving testimony of the fiduciary presented to rebut the presumption. See *Hinthorn's Estate v. Hinthorn*, 116 Ill. App. 3d 37, 43 (1983).

¶ 29 Respondent identifies the questioned transactions and argues that "[t]hrough the testimony of [respondent] and her witnesses there is not one statement that could be construed as [respondent] committed [*sic*] fraud or unduly influencing [decedent]. Rather the testimony supported the fact that all of the transactions entered into between [respondent] and [decedent] were all completed without fraud or undue influence occurring." Respondent fails to provide us with a cohesive legal argument; she fails to explain what the witnesses stated and how their testimony established that decedent had entered into the transactions in question with full knowledge of their nature and effect and because of her deliberate, voluntary, and intelligent desire. Furthermore, respondent continuously fails to cite to the record in violation of Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016) (argument portion of the brief shall contain the contentions of the appellant and the reasons therefore, with citation of the authorities and the pages of the record relied on, and points not argued are forfeited). It is the appellant's burden to provide appropriate argument and research to this court. *Elder v. Bryant*, 324 Ill. App. 3d 526, 532 (2001).

¶ 30 Regardless of forfeiture, given the lack of evidence supporting respondent's position, we find the trial court's decision was not against the manifest weight of the evidence. The evidence showed that, after decedent executed the power of attorney, respondent orchestrated all the transactions that benefitted her and her husband, essentially disinheriting petitioners. This all occurred at times when, as decedent's doctor testified, decedent was suffering from severe dementia. Accordingly, the trial court properly entered a directed verdict in favor of petitioners.

¶ 31 As a final matter, respondent argues for the first time in her reply brief that the power of attorney became effective once guardianship proceedings for decedent became "necessary or desirable." We granted petitioners' motion for leave to file a surreply brief. In the surreply brief, petitioners correctly argue that respondent has forfeited this guardianship argument as she did not raise it before the trial court or in the appellant's brief. Illinois Supreme Court Rule 341(j) (eff. Jan. 1, 2016) requires that a reply brief "shall be confined strictly to replying to arguments presented in the brief of the appellee." Moreover, this court has previously stated its position that issues raised for the first time in the reply brief do not merit consideration on appeal. *Tivoli Enterprises, Inc. v. Brunswick Bowling and Billiards Corp.*, 269 Ill. App. 3d 638, 642 (1995), *Britamco Underwriters, Inc. v. J.O.C. Enterprises, Inc.*, 252 Ill. App. 3d 96, 98 (1993). Accordingly, we decline to consider respondent's additional guardianship argument.

¶ 32 III. CONCLUSION

¶ 33 Based on the preceding, the judgment of the Circuit Court of Lake County is affirmed.

¶ 34 Affirmed.