2017 IL App (3d) 160574-U

Order filed November 15, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

In re ESTATE OF EVERETT E. JIBBEN, Deceased	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Tazewell County, Illinois.
(Dawn Marie Severns,	)	
Petitioner-Appellant,	)	Appeal Nos. 3-16-0574, 3-16-0575 Circuit Nos. 90-P-241 and 95-P-142
and	)	
Charlotte E. Jibben,	)	The Honorable James A. Mack,
Respondent-Appellee).	)	Judge, presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's dismissal of petitioner's petition for postjudgment relief and reopening of the estate was not error.

¶ 2 Petitioner Dawn Severns brought a claim against the estates of Everett E. Jibben (Everett Sr.), who died testate in 1990, and Mable Jibben, who was the mother of Everett Sr. and who died testate in 1995. By 1996, both estates had been entered into probate and thereafter closed. In

May 2016, petitioner filed two petitions for postjudgment relief and reopening of the estates of Everett Sr. and Mable. In count I, petitioner alleged she had a meritorious claim to the estates as heir and devisee. Petitioner also contended that her petition was not subject to the two-year limitations period because her heirship had been fraudulently concealed until she learned from two individuals in 2015 that Everett was her father. In count II, petitioner requests the court to reopen the estates because she was allegedly entitled to an unsettled portion of real estate as an heir. The trial court dismissed both counts of petitioner's petitions, determining that, in the case of both estates, count I was time-barred and could not maintain count II because she was not an interested person pursuant to section 24-9 of the Probate Act of 1975. Petitioner appealed. We affirm.

¶ 3 FACTS

¶ 4 Petitioner Dawn Severns brought this action against the estates of Everett Sr. and Mable to establish heirship and claim an unsettled portion of the estates. In June 1990, Everett Sr. passed away and a petition for probate of will as filed in July. The third paragraph of his will stated:

> "I hereby give and devise all my real property, wherever situated, to my wife, Mona Lee Jibben, for her life. Subject to the life estate in my wife Mona Lee Jibben, I give and devise such property to my descendants living at the time of my death, per stirpes."

¶ 5 The court entered an order admitting the will into probate, listing all the heirs, legatees, and devisees as Mona L. Jibben and Everett John Jibben (Everett Jr.), who passed away in 2006. Everett Jr. signed the affidavit of heirship affirming that "Everett E. Jibben had one child born to

him during his lifetime and no others and adopted none, the one child being Everett John Jibben." In March 1991, the estate was closed.

¶ 6 In April 1995, Mable passed away and a petition for probate of will was filed in May. The third paragraph of her will stated:

> "I hereby give, devise and bequeath all the rest, residue and remainder of my property, real and personal, wherever situated, which I might own at the time of my death, in equal shares to my children, Everett E. Jibben, Venola J. Martin, and Ronald E. Jibben. In the event of death of any of my children prior to my death, the share of such deceased child shall pass to his or her descendants, per stirpes."

¶ 7 The court entered an order admitting the will into probate, naming all the heirs, legatees, and devisees as Everett Jr., Venola J. Martin, and Ronald Jibben. Martin signed the affidavit of heirship, averring that one of Mable's children, Everett Sr. fathered one child, Everett Jr. In February 1996, the estate was closed.

¶ 8 In May 2016, petitioner filed two petitions against the estates of Everett Sr. and Mable seeking postjudgment relief and reopening of the estate in each. The petitions made similar allegations. In count I, petitioner alleges she had a meritorious claim to the estates as heir and devisee. Petitioner also contended that her heirship had been fraudulently concealed until she learned from two individuals in 2015 that Everett Sr. was her father. In count II, petitioner requested the court to reopen the estates because she was an heir entitled to an unsettled portion of real estate.

¶ 9 Petitioner attached two affidavits to each petition. Petitioner's affidavit and supplemental affidavit stated several factual contentions. Petitioner was born in September 1969 to Sue Lynn Drake. Her birth certificate did not state a father's name but listed the father's age as 35. Everett Sr. was 55 years old when petitioner was born and a member of her extended family. When petitioner was seven years old she asked Everett Sr. if he was her dad and he asked her mother "why would you tell her that?" Petitioner's mother died when she was 14 years old, and she was made a ward of the state. Her mother had never disclosed to her the name of her father. At that time, petitioner called Everett Sr. and asked him again if he was her father and he denied it. In 2009, petitioner was introduced to Charlotte Jibben, who was the widow of Everett Jr. She had never previously met Charlotte but knew she was a member of her extended family. Charlotte and petitioner were sitting together in a church pew when Charlotte stated "I knew why you came to Evetett [*sic*] John's visitation. It was to view your half-brother." She told me that her husband, Everett John Jibben, knew that I was his father's daughter. She also told me that he didn't want to believe that about his dad. Petitioner did not know whether she believed the information at the time.

¶ 10 In December 2015, William Jibben told petitioner that her mother told him that she was Everett Sr.'s daughter. This confirmed the conversation she had with Charlotte six years earlier. Petitioner's cousin informed her that cases regarding the estates were pending in Tazewell County. These cases are presumed to be a pending consolidated partition action (joint case Nos. 15-CH-146 and 15-CH-147).

¶ 11 In Paula Farlin's affidavit, she stated that she was petitioner's cousin and that petitioner's mother had told her that Everett Sr. was petitioner's father. In 2015, Farlin shared this information with petitioner.

¶ 12 Charlotte, on behalf of both estates, filed two motions to dismiss. Petitioner responded to the motions. Charlotte's affidavit in opposition to petitioner's motion was attached to the response. In it, Charlotte denied telling petitioner that she knew petitioner was the Everett Sr.'s daughter and having any knowledge of any facts that would support that allegation. The trial court dismissed both counts of both petitions, determining that, in each case, count I was time-barred and, in count II, plaintiff was not an interested person pursuant to section 24-9 of the Probate Act of 1975 (755 ILCS 5/24-9 (West 2016)). Petitioner appealed.

¶ 13 ANALYSIS

¶ 14 Petitioner disputes the trial court's grant of respondent's motion to dismiss brought pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure. 735 ILCS 5/2-615 (West 2016); 735 ILCS 5/2-619 (West 2016). Sections 2-615 and 2-619 allow for dismissal under different legal theories. *Zahl v. Krupa*, 365 Ill. App. 3d 653, 657 (2006). A section 2-615 motion attacks the legal sufficiency of the plaintiff's claims, while a section 2-619 motion admits the legal sufficiency of the claims but raises defects, defenses, or other affirmative matter, appearing on the face of the complaint or established by external submissions, that defeat the action. *Id.* at 657-58. The question presented on review of a dismissal pursuant to section 2-615 is whether the complaint contains sufficient facts, if established, to entitle the plaintiff to relief. *Id.* at 658 (citing *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 488 (1994)). Where a claim has been dismissed pursuant to section 2-619, however, the question is whether there is a genuine issue of material fact and, if not, whether the defendant is entitled to judgment as a matter of law. *Id.* When reviewing a trial court's disposition of a motion to dismiss filed under either section 2-615 or section 2-619, the reviewing court accepts all well-pleaded facts as true and makes all

reasonable inferences therefrom. *Id.* A dismissal under either section 2-615 or section 2-619 is reviewed *de novo. Id.*

¶ 15 I. Statute of Limitations

¶ 16 Petitioner alleges that the trial court erred when it dismissed count I in each petition as time-barred under 2-1401(c) of the Code of Civil Procedure because the limitations period was tolled due to fraudulent concealment. 735 ILCS 5/2-1401(c) (West 2016). In particular, petitioner argues that her claim was not time-barred because (1) Everett Sr., her putative father, falsely stated that he was not her father when he had a duty to support her when her mother died; (2) her mother concealed who her father was when she (a) falsely identified her father's age as 35 on her birth certificate and (b) refused to name him; and (3) Everett Jr., who allegedly told his wife that petitioner was Everett Sr.'s daughter, concealed Everett Sr.'s paternity when he signed the affidavit of heirship, listing himself as the only child of Everett Sr. As a result, petitioner claims she relied on this information and did not realize she had a possible interest in the estates until she was told by William Jibben and Paula Farlin in December 2015 that Everett Sr. was her father.

¶ 17 "[A] section 2-1401 petition is generally used to correct errors of fact unknown to the petitioner and the court when judgment was entered, which, if then known, would have precluded its entry." *People v. Haynes*, 192 Ill. 2d 437, 461 (2000). To seek relief under section 2-1401, petitioner must show: "(1) the existence of a meritorious defense or claim, that is, facts that would have prevented the rendition of the original judgment if they had been of record when the judgment was entered, (2) due diligence in pursuing that claim or defense before judgment, that is, that the failure to discover and present those facts before the judgment was not the fault

of the petitioner, and (3) diligence in pursuing the claim or defense after judgment." *OneWest Bank, FSB v. Hawthorne*, 2013 IL App (5th) 110475, ¶ 21.

¶ 18 A section 2-1401 petition must be filed within two years of entry of the relevant final judgment, but time during which the ground for relief is fraudulently concealed is excluded from the two-year period. 735 ILCS 5/2-1401(c) (West 2016). To prove fraudulent concealment in a section 2-1401 petition, the petitioner must prove by clear and convincing evidence that the respondent intentionally misstated or concealed a material fact that the respondent had a duty to disclose and that the petitioner detrimentally relied on the respondent's statement or conduct. *Cavitt v. Repel*, 2015 IL App (1st) 133382, ¶ 46. A duty to disclose a material fact may arise out of several situations. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 500 (1996). First, if plaintiff and defendant are in a fiduciary or confidential relationship, then defendant is under a duty to disclose all material facts. *Id.* Second, a duty to disclose material facts may arise out of a situation where plaintiff places trust and confidence in defendant, thereby placing defendant in a position of influence and superiority over plaintiff. *Id.* This position of superiority may arise by reason of friendship, agency, or experience. *Id.* Silence alone does not ordinarily constitute fraudulent concealment, unless the person occupies a fiduciary relationship to plaintiff. *Hagney v. Lopeman*, 147 Ill. 2d 458, 463 (1992).

¶ 19 The parties dispute whether *Cavitt v. Repel*, 2015 IL App (1st) 133382, is applicable in this case. Petitioner argues respondent's reliance on *Cavitt* is misplaced because the case is partially distinguishable. In particular, petitioner contends that the court in *Cavitt* easily found plaintiff was aware of a possible claim because she had filed a prior pleading alleging the same fraud claim that she pled in her section 2-1401 petition. Petitioner further alleged that, in this

case, her awareness was unclear and disputed by Charlotte's affidavit, and therefore, the court must apply the discovery rule.

¶ 20 In *Cavitt*, plaintiff filed a section 2-1401 petition seeking to vacate a 1997 judgment. *Id.* ¶ 47. Defendant filed a motion to dismiss, arguing that the petitioner's claim was time-barred because her allegation of tolling based on fraudulent concealment was defeated by her awareness of the alleged fraud more than two years before filing the section 2-1401 petition. *Id.* ¶ 48. The First District found that plaintiff was aware of a "possible claim" or "possible basis" for three reasons: (1) plaintiff's 2011 admission that she had previously accused defendant of fraud, (2) the discrepancy between defendant's financial disclosure statement and his father's deposition testimony taken more than two years before she filed her petition, and (3) multiple documents in the record providing evidence of alleged fraudulent concealment dated more than two years before she filed her petition. *Id.* ¶¶ 50-52. Therefore, the court concluded plaintiff's petition was time-barred. *Id.* ¶ 52.

¶ 21 *Cavitt* provides guidance in this case because it is factually and legally congruent. Also, plaintiff did not cite, nor does there appear to be any case law that applies a different discovery rule when the facts that give rise to a possible claim or basis are neither clear nor undisputed. Indeed, the cases that plaintiff cites in support of her contention do not discuss or appropriately generalize to the statute of limitations applicable to section 2-1401. Therefore, we find *Cavitt* is applicable to this case.

¶ 22 Even if this court determined Everett Sr.'s paternity was fraudulently concealed from petitioner, she was aware of a possible claim in 2009. The estates were closed by February 1996. Petitioner filed her section 2-1401 petitions 20 years later, arguing that her claim was not time-barred because Everett Sr.'s paternity was fraudulently concealed. In petitioner's affidavit, she

stated she had learned from Charlotte in 2009 that Everett, Jr. knew Everett Sr. was her father. At this point, she became aware that her suspicion of Everett Sr.'s paternity might have some basis in fact. She then had a duty to investigate and had two years to bring a claim. However, petitioner waited six years before she filed her petitions. Therefore, we find count I is time-barred.

¶ 23 Petitioner contends that the 2009 statement did not make her aware of a possible claim and end the period of tolling because she did not know whether to believe Charlotte, whom she just met for the first time. Rather, petitioner claims she only became aware in 2015 when she was told by two individuals whom she actually knew that her deceased mother had acknowledged to them that Everett Sr. was petitioner's father. They also told her at that time about the partition action.

¶ 24 Petitioner's argument is unpersuasive. We see no factual difference between learning of unverified second-hand information from an extended family member in 2009 and subsequently learning of unverified second-hand information from two different extended family members in 2015. Furthermore, the court in *Cavitt* did not find plaintiff was aware of a possible claim when she discovered a pending lawsuit; rather, the court held plaintiff became aware of a possible claim when documentation in the record provided plaintiff with evidence of fraudulent concealment. Here, petitioner's affidavit reveals she was aware as early as 2009 that her family had possibly concealed Everett's paternity. It was at that time that the two-year statute of limitations began to run, barring her claim in 201l.

¶ 25 II. Evidentiary Hearing

¶ 26 In the alternative, petitioner argues that, under *In re Marriage of Buck*, 318 Ill. App. 3d 489 (2000), she was entitled to an evidentiary hearing before the trial court ruled on the motion

to dismiss. Relying on *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986), respondent contends that petitioner waived her right to an evidentiary hearing because she did not request one in court.

¶ 27 In *Smith*, petitioner filed a 2-1401 petition to vacate a default judgment. *Id.* at 216. At the hearing, no evidence outside of the petition and its attachments was presented and the parties made their arguments before the court. *Id.* at 220. Subsequently, the trial court denied the petition. *Id.* Our supreme court held that where "the facts sufficient to support the grant of relief under section 2-1401 are challenged by the respondent, a full and fair evidentiary hearing must be held." *Id.* at 223. However, the court then found that petitioner had waived his right to an evidentiary hearing. *Id.*

¶ 28 In *In re Marriage of Buck*, petitioner filed a 2-1401 petition, arguing that respondent fraudulently concealed information, and respondent filed a 2-619 motion to dismiss. *Buck*, 318 Ill. App. 3d at 492. Before the trial court's ruling, "[p]etitioner here consistently requested that an evidentiary hearing be conducted." *Id.* at 498. The First District stated that when a petition, taken as true, sufficiently states a claim for fraudulent concealment then the court must conduct an evidentiary hearing. *Id.* at 497. The First District found that there was a contested issue of fact and that an evidentiary hearing—which had been sought— was necessary before ruling on the motion to dismiss. *Id.* at 498.

¶ 29 Here, respondents state, and petitioner does not dispute, that petitioner did not request an evidentiary hearing. Therefore, as in *Smith*, petitioner waived the issue on appeal. *Moehle v. Chrysler Motors Corp.*, 93 Ill. 2d 299, 303 (1982) (issues raised for the first time cannot be considered on appeal).

¶ 30 Petitioner argues that the *Smith* case is not applicable here because the court did not address a fraudulent concealment issue. Nothing in *Smith* suggests that its ruling is inapplicable

to claims outside the subject of its appeal. Indeed, the general issue in both cases was whether the petitioner was entitled to an evidentiary hearing prior to the trial court's dismissal of a section 2-1401 petition. The fact that the court in *Smith* addressed petitioner's alleged failure to exercise due diligence to discover a default judgment and the court in *Buck* reviewed petitioner's alleged failure to exercise due diligence to discover evidence petitioner claims was fraudulently concealed is irrelevant.

¶ 31 III. Reopening of the Estate

¶ 32 Petitioner alleges that the trial court erred when it dismissed count II. In particular, she alleges that she is an interested person and that the real estate is an unsettled portion of the estates pursuant to section 24-9 of the Probate Act of 1975 (Act) (755 ILCS 5/24-9 (West 2016)) because no receipts were filed for the real estate and the final report does not list the real estate.

¶ 33 Section 24-9 states: "If a decedent's estate has been closed and the representative discharged, it may be reopened to permit the administration of a newly discovered asset or of an unsettled portion of the estate on the petition of any interested person." Section 1-2.11 of the Act (755 ILCS 5/1-2.11 (West 2014)) defines the phrase "interested person" as "one who has or represents a financial interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved, including without limitation an heir, legatee, creditor, person entitled to a spouse's or child's award and the representative."

¶ 34 Petitioner argues she is an interested person because she has an interest in the real estate as a putative child of Everett Sr. and putative granddaughter of Mable. However, we have already found that petitioner is time-barred from every proving her claims of heirship. Petitioner is also not listed as a surviving heir in either estate's order finding heirship. In order for petitioner to establish heirship, she would have to seek the amendment of the order, which

cannot be done pursuant to section 24-9. See *Estate of Knoes*, 114 Ill. App. 3d 257, 261 (1983) ("The amendment of the heirship table does not fall within the purview of section 24-9, and the court is not authorized to reopen the estate under that section to entertain the claims of newly discovered heirs."). The trial court is not allowed to reopen the estate in this case, and therefore, we determine it did not err when it denied count II of the petition. Accordingly, we find the trial court properly dismissed the petition.

¶ 35 CONCLUSION

¶ 36 The judgment of the circuit court of Tazewell County is affirmed.

¶ 37 Affirmed.