2014 IL App (1st) 131732-U

SECOND DIVISION
December 16, 2014

No. 1-13-1732

THE ESTATE OF KATHARINA KERSCHNER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant	)	Cook County
	)	
v.	)	No. 12 P 6036
	)	
GERTRUDE KERSCHNER,	)	Honorable
	)	James G. Riley,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Simon and Justice Neville concurred in the judgment.

ORDER

¶ 1 *Held*: The Estate could not have been held judicially estopped from asserting that Katharina held a 25% interest in the land trust at the time of her death. The court improperly granted Gertrude's section 2-619 motion to dismiss when there was a disputed issue of material fact.

¶ 2 The Estate of Katharina Kerschner (Estate) appeals from an order of the circuit court granting Gertrude Kerschner's section 2-619 motion to dismiss, denying the Estate's petition to declare an ownership interest in a land trust known as Chicago Title Land Trust No. 33003, dated November 1, 1977 (land trust), and making other factual findings. On appeal, the Estate argues:

(1) the trial court erred by using the doctrine of judicial estoppel to rule that the Estate was bound by an incorrect admission made in a previous lawsuit; (2) Gertrude's 2-619 motion to dismiss should have been denied where the Estate's ownership interest in the land trust was a disputed question of material fact; (3) the court relied upon inadmissible statements in the affidavits to reach an incorrect ruling; and (4) the court improperly concluded that Katharina's interest in the land trust had been gifted. For the following reasons, we reverse and remand this cause to the trial court.

¶ 3 BACKGROUND

¶ 4 Katharina Kerschner died on January 26, 2012, leaving a last will and testament dated February 16, 2010. Katharina, a widow, left two heirs: John Kerschner Jr. and Gertrude Kerschner. On October 18, 2012, the circuit court admitted the will of Katharina and appointed John as the independent executor of the Estate. On December 31, 2012, John as Executor filed a petition requesting a determination that a 25% interest in the land trust that Katharina owned at the time of her death was personal property and became an asset of her probate estate.

¶ 5 The property held in the land trust is a substantial asset and consists of a total of eight multi-family apartment buildings with over 90 apartments. The property was originally purchased by John Kerschner Sr., now deceased, and Katharina and transferred into the land trust. John Sr. and Katharina executed an assignment of beneficial interest, assigning and transferring the beneficial interest in the land trust to John Sr., Katharina, John, and Gertrude. As a result, John Sr., Katharina, John, and Gertrude each owned 25% of the beneficial interest in the land trust as tenants in common.

¶ 6 John Sr.'s will and trust provided that, immediately following his death, his 25% interest was to be held in his testamentary residuary trust and while Katharina was still alive, she was entitled to receive the income from the 25% beneficial interest held in her husband's testamentary residuary trust. John Sr.'s will and trust further provided that his 25% interest in the land trust would pass to John and Gertrude upon Katharina's death.

¶ 7 After John Sr.'s death, Katharina began receiving the income from John Sr.'s 25% interest and this income was reported to her on a Schedule K-1 form prepared under the John Kerschner residuary trust tax return each year. According to the Estate, Katharina continued to hold her own 25% interest in the land trust individually until she died on January 26, 2012.

¶ 8 Gertrude initially filed a response in opposition to the Estate's petition and a cross petition to declare Katharina's ownership interest in the land trust. After filing the aforementioned responsive pleading, on February 21, 2013 Gertrude filed a 2-619 motion to dismiss the Estate's petition. In the motion to dismiss, Gertrude asserted that the Estate's claim was barred because Katharina did not have an ownership interest in the land trust at the time of her death because she and John each owned 50%. Specifically, Gertrude argued that while she was alive Katharina gifted her interest to her and John because Katharina permitted John and Gertrude to receive the income from her individually held 25% interest in the land trust. This was not disputed. Gertrude further argued that not only did she and John receive the income from Katharina's 25% share, but also that Katharina gave her 25% ownership to them as a gift. In addition, Gertrude argued that the Estate's petition should be dismissed because of judicial estoppel. Gertrude alleged that John and Katharina had admitted in another action before the chancery court that John and Gertrude each had a 37.5% interest in the land trust. *Gertrude*

Kerschner v. John Kerschner, Katharina Kerschner, and Chicago Title and Trust u/t/n 33003; Case No. 2008 CH 47942 (chancery lawsuit). In the chancery lawsuit, John and Katharina filed an answer to the complaint that included a global admission of paragraphs 1-8 of the complaint, where one of the counts alleged that Gertrude and John each owned 37.5% of the beneficial interest in the land trust.

¶ 9 Gertrude's motion to dismiss contained an affidavit from attorney Arthur Evans. Evans stated that after John Sr. died, Katharina instructed him to begin a transfer of her 25% beneficial interest in the land trust equally to John and Gertrude. Furthermore, Evans stated that he thereafter prepared yearly tax returns reflecting that, John and Gertrude would receive an additional 1% of the income each year until Katharina's entire 25% interest was "transferred." Additionally, Evans stated that he "prepared yearly partnership tax returns for the trust property." No partnership tax returns were ever produced in this litigation. The Estate filed a motion to strike Evans' testimony on the basis that it contained unsupported conclusions and the alleged tax returns he described no longer existed and were not produced. The trial court entered an order striking paragraphs 14 and 15 of Evans' affidavit.

¶ 10 Gertrude also attached her own affidavit in support of her motion to dismiss. She agreed that, because of the 1977 assignment, she, John, John Sr., and Katharina each owned 25% of the land trust and that when her father died, his 25% interest in the land trust passed to his residuary trust. She stated that after John Sr. died, Katharina "began transferring her 25% beneficial interest in the land trust, equally to me and 1% of her interest per year to my brother John." In support, she referred to Evans' affidavit and to the tax returns he referred to. Gertrude also attached to her affidavit a copy of an order entered in the chancery lawsuit. That order provided

that John and Gertrude would thenceforth receive 37.5% of the income from the land trust, and that Katharina would receive 25%. The Estate filed a motion to strike Gertrude's affidavit, arguing that it contained unsupported conclusions and hearsay. The trial court struck several paragraphs of Gertrude's affidavit.

¶ 11 The Estate filed its response to Gertrude's motion to dismiss, and supported its response with an affidavit from John and the affidavits of attorney Paul Franciszkowicz, Barry Swartz expert Certified Public Accountant (CPA), and Margaret Drinkwater, CPA. Drinkwater was the CPA who had been involved in preparing estate tax returns for the Estate of Katharina.

¶ 12 In his affidavit, CPA Swartz stated that no partnership return was ever filed in connection with the property held in the land trust. Furthermore, Swartz stated that the property was not held by a partnership. Swartz also stated that, based on his review of Evans' affidavit and other documents, there was no evidence that the income derived from the land trust was at any time reported to the IRS as derived from a partnership. Finally, Swartz stated that a taxpayer's mere reporting of income in her tax return does not establish ownership. Gertrude filed a motion to strike Swartz's amended affidavit, but the trial court did not rule on that motion.

¶ 13 CPA Drinkwater stated that she had prepared the tax return for the Estate. Drinkwater stated that the IRS had no record of any gift tax returns ever having been filed for the Estate. Finally she stated that, based on the information given to her, the Estate owned Katharina's 25% interest in the land trust.

¶ 14 Attorney Franciszkowicz, an experienced probate practitioner stated in his affidavit that based on his review of the documents, Katharina never transferred her 25% beneficial interest in the land trust. Rather, it was an asset of her estate when she died. In reaching his conclusion,

Franciszkowicz emphasized several critical provisions of the land trust agreement: the land trust agreement stated that "in the case of death of a beneficiary hereunder during the existence of this Trust, his or her right and interest hereunder shall, except as herein otherwise specifically provided, pass to his or her executor or administrator, and not to his heirs at law." The agreement also stated that "[n]o assignment of any beneficial interest hereunder shall be binding on the trustee until the original or duplicate of the assignment in form satisfactory to the trustee is lodged with the trustee, and every assignment of any beneficial interest hereunder, the original or duplicate of which shall not have been lodged with the trustee, shall be void as to all subsequent assignees of purchasers without notice." Franciskowicz noted that no transfer documents were submitted to the trustee as required by the trust terms relating to any alleged transfer by Katharina of any part of her beneficial interest.

¶ 15 In his affidavit, John denied that he had ever admitted or intended to admit in the chancery lawsuit that he and Gertrude each owned 37.5% of the Land Trust. John stated that his mother's answer to the chancery complaint was incorrect in that it wrongly admitted to an allegation that he and Gertrude each owned 37.5% of the land trust. He stated that he and Gertrude did have the right to receive 37.5% each of the income because that is what Katharina had wanted, but they did not own 37.5%. He also stated that he has never received real estate income from any partnership or Subchapter S corporation.

¶ 16 After the trial court heard argument on Gertrude's motion to dismiss, it entered an order on May 14, 2013: (1) granting Gertrude's motion to dismiss; (2) denying the Estate's petition; (3) finding that Katharina "had no ownership interest in the Land Trust at the time of her death;" and (4) finding that the land trust was owned 50% by John and 50% by Gertrude. The trial court also

made the following factual findings orally: (1) based on the pleadings filed in the chancery lawsuit by John and Katharina, there was an admission that John and Gertrude each owned 37.5% of the land trust that was controlling in this case; and (2) Katharina held no ownership interest in the land trust when she died. It is from the May 14, 2013 order that the Estate now appeals.

¶ 17 ANALYSIS

¶ 18 The Estate argues that the probate court erred in applying the doctrine of judicial estoppel ruling that the Estate was bound by an incorrect admission made in the prior chancery lawsuit without holding an evidentiary hearing. Gertrude responds that this court should not review the issue of judicial estoppel because this appeal "involves the application of judicial admissions; not judicial estoppel" and the "probate court's application of judicial admissions as one of the factors in the Motion to Dismiss is reviewable by this Court under an abuse of discretion."

¶ 19 Contrary to Gertrude's contentions here, we believe that the question presented here is whether judicial estoppel is applicable and whether a judicial admission was made in another case. As this issue is presented in the context of a section 2-619 motion to dismiss, we review the issue *de novo*. *Nelson v. Kendall County*, 2014 IL 116303, ¶ 22.

¶ 20 In order for the doctrine of judicial estoppel to apply, it must be established that the party to be estopped had: (1) taken two positions, (2) that are factually inconsistent; (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged; and (5) have succeeded in the first proceeding and received some benefit from it. *Libertyville Toyota v. U.S. Bank*, 371 Ill. App. 3d 1009 (2007). Judicial estoppel

applies to statements of fact and not to legal opinions or conclusions. *Maniez v. Citibank*, 404 Ill. App. 3d 941 (2010).

¶ 21 The doctrine of judicial estoppel bars witnesses from explaining or controverting judicial admissions. *De Witt County Public Building Comm'n v. County of De Witt*, 128 Ill. App. 3d 11, (1984). Judicial admissions do not include admissions made during the course of other court proceedings. *Firstmark Standard Life Insurance Co. v. Superior Bank FSB*, 271 Ill. App. 3d 435, (1995). Instead, statements made in other court proceedings constitute evidentiary admissions. A*nfinsen Plastic Molding Co. v. Konen*, 68 Ill. App. 3d 355 (1979). Evidentiary admissions may be controverted or explained. *Williams Nationalease, Ltd. v. Motter*, 271 Ill. App. 3d 594 (1995).

¶ 22 In this case, the court relied on John and Katharina's response in a pleading in a separate chancery proceeding that John and Gertrude each owned 37.5% of the land trust as a basis for granting Gertrude's 2-619 motion to dismiss, finding that the land trust "is now owned 50%" by Gertrude and "50%" by John. In doing so, the court construed John and Katharina's pleadings in the chancery court as a judicial admission that could not be explained or controverted in this lawsuit. However, the court erred when it characterized this pleading as a judicial admission. Given that this purported admission occurred in another court, their response should have been considered as an evidentiary admission that could be controverted or explained. *Green by Fritz v. Jackson*, 289 Ill. App. 3d 1001 (1997). As such, we find that the trial court erred in finding that John and Katharina's pleadings filed in the chancery lawsuit constituted a judicial admission that invoked the doctrine of judicial estoppel.

¶ 23 The estate next argues that without the purported admissions in the chancery lawsuit, the probate court should have denied Gertrude's motion to dismiss because issues of material fact

existed where there were conflicting affidavits submitted.

¶ 24 A section 2-619 motion to dismiss admits the legal sufficiency of the complaint, but raises defects, defenses, or other affirmative matter appearing on the face of the complaint or established by external submissions which defeat the action. *Jenkins v. Concorde Acceptance Corp.*, 345 Ill. App. 3d 669 (2003). A section 2–619 motion admits as true all well-pleaded facts, as well as all reasonable inferences that may arise there from" and "when ruling on a section 2–619 motion, a court must interpret all pleadings and supporting documents in favor of the nonmoving party." *Bjork v. O'Meara*, 2013 IL 114044. "The question on appeal from an order granting dismissal under section 2–619 is 'whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' [Citation.]" *Doyle v. Holy Cross Hospital*, 186 Ill.2d 104, 109–10 (1999). We review a ruling on a 2-619 motion to dismiss *de novo*. *Nelson v. Kendall County*, 2014 IL 116303, ¶ 22.

¶ 25 In this case, the trial court was presented with affidavits from the parties. The opposing affidavits offered conflicting testimony on material facts. Evans' affidavit, submitted on Gertrude's behalf, stated that Katharina instructed him to begin a transfer of her 25% beneficial interest in the land trust equally to John and Gertrude and that thereafter, he prepared yearly tax returns reflecting that John and Gertrude would receive an additional 1% of the income each year until Katharina's entire 25% interest was "transferred." Evans' affidavit was contradicted by the affidavits of Franciszkowicz and Swartz, filed on behalf of the Estate. Specifically, Franciszkowicz stated that no gift transfer could ever have occurred. Franciszkowicz stated that there were no legal documents evidencing such a transfer by way of gift or otherwise to the

siblings. Swartz corroborated this and stated that two of the tax returns prepared by Evans report John and Gertrude's income from the property being owned personally and not by partnership, as Evans contended. There was no direct evidence offered by either party of any legal transfer of property interests from Katharina to either John or Gertrude. Because the Estate's ownership interests in the land trust was a disputed question of material fact, Gertrude's 2-619 motion to dismiss should have been denied. See *Buczak v. Central Savings & Loan Association*, 230 Ill. App. 3d 490 (1992) (when genuine issues of material fact exist as to ownership, a motion to dismiss should be denied.)

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, we reverse the court's ruling granting Gertrude's 2-619 motion to dismiss and remand this cause to the trial court. Given our disposition, we need not address the remaining issues.

¶ 28 Reversed and remanded.