2012 IL App (2d) 101174-U
No. 2-10-1174
Order filed July 23, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re ESTATE OF MARGARET H. MYERS, Deceased,	)	Appeal from the Circuit Court of McHenry County.
	)	No. 10-PR-210
(Lydia E. Donoghue, Petitioner-Appellant, v. Howard Myers, Respondent-Appellee).	)	Honorable Michael J. Sullivan, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

Held: The trial court properly dismissed, on the basis of laches, petitioner's petition to probate a will: based on only a subjective assumption that she or the estate was being represented by counsel, petitioner did not file her petition for more than two years after the decedent's death, during which time respondent, without knowledge of that will, probated a different will and sold the bulk of the estate in reliance thereon; thus, petitioner's lack of due diligence changed the parties' relationship and the subject matter so as to render it inequitable to grant her relief.

¶ 1 Petitioner, Lydia E. Donoghue, appeals the trial court's order dismissing her petition seeking to probate a will, on the basis of *laches*. We affirm.

¶ 2 I. BACKGROUND

¶ 3 On December 9, 2007, Margaret Myers died while she was a resident at an independent living facility in Illinois. Her death certificate listed her as a resident of Virginia and she owned a residence and other assets there. Her assets in Illinois consisted of clothing, personal and household effects, furniture, and a cabinet containing a collection of figurines.

¶ 4 On March 11, 2008, Myers' son, Howard Myers, filed a will for probate in Virginia, under which he was the sole heir. That will, which was dated November 24, 1999, was admitted to probate and, on March 31, 2008, the Virginia residence was sold and the proceeds were distributed to Howard.

¶ 5 On July 20, 2010, Lydia Donoghue, Myers' sister-in-law, filed a petition to probate a different will in Illinois. That will was dated September 19, 2007, and bequeathed a portion of Myers' estate to Donoghue, along with portions to Howard and his sons.

¶ 6 On September 7, 2010, Howard filed a motion to dismiss the petition on multiple grounds, including that it should be barred by the doctrine of *latches*.

¶ 7 On November 2, 2010, a hearing was held, during which affidavits were filed. Among those were an affidavit showing that Myers moved to Illinois to be closer to Howard, who could better care for her there. Several people averred that she considered Virginia her home. Howard averred that he had no knowledge of the 2007 will.

¶ 8 An affidavit from Donoghue stated that, in late December 2007, attorney Thomas Cohen informed her that he had filed Myers' 2007 will with the clerk of the circuit court and he provided Donoghue with the name of Thomas Cowlin as an potential attorney to represent her. Donoghue called Cowlin in January 2008 and asked him to represent her. Without providing details, Donoghue averred that her "understanding" was that Cowlin would represent her. However, she did not hear

further from him and, in August 2008, she sent a letter to Cohen asking for more information. Cohen did not respond, and Donoghue assumed that the probate of the will was continuing in Illinois. She did not have any conversations with Howard about proceedings in Virginia or the sale of Myers' house. On February 1, 2010, Donoghue sent a letter to Cowlin about the status of the will. Cowlin responded that the Virginia property may have been sold and, in May 2010, he advised Donoghue to hire a Virginia attorney. Donoghue hired an attorney in late May 2010. She averred that she had assumed that Cohen and Cowlin were handling the Illinois probate process and, because the will was filed with the clerk of the court and was a public record, she had no reason to disclose its existence to Howard or his sons.

¶ 9 Cohen averred that Donoghue paid his fee to prepare the 2007 will. He filed the will with the clerk of the court after Myers' death and provided Donoghue with the names of two attorneys who might represent her. Cowlin confirmed that Donoghue called him in January 2008, but averred that he told her at that time that he would not represent her or act as the attorney for the estate.

¶ 10 The court found that *laches* applied and it dismissed the petition. Donoghue appeals.

¶ 11 II. ANALYSIS

¶ 12 Donoghue argues that the trial court incorrectly determined that her petition was barred by the doctrine of *laches*. In particular, she argues that her pleadings showed a reasonable reason for the delay in filing her petition.

¶ 13 Although Donoghue refers in her brief to a dismissal under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)), the trial court and parties properly treated Howard's motion as a motion to dismiss under section 2-619 of the Code (735 ILCS 5/2-619 (West 2008)).

¶ 14 Section 2-619(a)(9) of the Code allows the dismissal of a complaint if it is barred by an "affirmative matter" that defeats the claim or avoids its legal effect. 735 ILCS 5/2-619(a)(9) (West 2008). The purpose of such a motion is to dispose of issues of law and easily proved issues of fact at the outset of a case, reserving disputed factual issues for a trial. *People v. Philip Morris, Inc.*, 198 Ill. 2d 87, 94 (2001).

¶ 15 "In ruling on a motion to dismiss under section 2-619, the trial court may consider pleadings, depositions, and affidavits." *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 262 (2004). "When supporting affidavits have not been challenged or contradicted by counteraffidavits or other appropriate means, the facts stated therein are deemed admitted." *Id.*

¶ 16 "An appeal from a section 2-619 dismissal is similar to an appeal following a grant of summary judgment, and both are subject to *de novo* review." *Id.* at 254. "In both cases, the reviewing court must determine whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether the dismissal is proper as a matter of law." *Id.*

¶ 17 "*Laches* is an equitable doctrine that flows from a judicial reluctance to give aid to one who has knowingly slept on her rights." *Renth v. Krausz*, 219 Ill. App. 3d 120, 121 (1991). "If lack of due diligence has caused prejudice to an opponent, *laches* may be imposed." *Id.* The imposition of *laches* depends upon the facts of each case and a court may impose *laches* if it finds that a party unreasonably delayed asserting a known right and that the delay unduly prejudiced the opposing party. *Id.* at 121-22.

¶ 18 "[T]he existence of prejudice is so critical that in some instances, a court may impose *laches* on a claim brought before the statute of limitations has expired." *Id.* at 122. Thus, the question of

laches does not turn merely upon the passage of time. *Miller v. Siwicki*, 8 Ill. 2d 362, 365 (1956). Instead, it depends upon whether, under all of the circumstances of the particular case, the plaintiff is chargeable with a want of due diligence in failing to institute the proceeding earlier. *Id*. "Whenever there is such a change in the relations of the parties or the subject matter as to render it inequitable to grant relief, it will be refused without reference to the statutory period of limitations." *Id*.

¶ 19 Here, Donoghue's lack of due diligence altered the parties' relationship and the estate property and caused prejudice to Howard. It was uncontradicted that Donoghue knew of the 2007 will but did not reasonably pursue any action on it. Instead, she did nothing for more than two years, based only on her subjective assumption that Cohen and Cowlin were representing her. Meanwhile, the Virginia residence was sold, changing the parties' relationship and the subject matter of the proceedings and causing prejudice to Howard, who had relied on the original will, sold the property based on that, and was later subjected to the current legal action.

¶ 20 Donoghue argues that it does not matter that the property was sold and that there might not be any assets remaining, since Howard was not entitled to the property and knew or should have known that. But the test is not whether Howard actually was entitled to the property. Instead, it is whether there was a change in the relations of the parties or the subject matter as to render it inequitable to grant relief. Here, Howard averred that he had no knowledge of the 2007 will, and Donoghue admitted that she did not have conversations with Howard about the proceedings in Virginia or the sale of the property, which could have prevented the problem. Howard could not reasonably be expected to know of a different will filed elsewhere when he had not been told about

it. Thus, there is no support for her contention that Howard did not suffer prejudice because he should have known about the 2007 will.

¶ 21 Donoghue also argues that there is an issue of fact whether Cowlin agreed to represent her. But, even if it could be deemed an issue of fact, which we determine is not the case, Donoghue still acted unreasonably when she did nothing for more than two years while the property was sold, making it inequitable to grant her relief. Accordingly, the trial court correctly determined that there was no issue of material fact that *laches* applied.

¶ 22 III. CONCLUSION

¶ 23 The trial court correctly dismissed the petition. Accordingly, the judgment of the circuit court of McHenry County is affirmed.

¶ 24 Affirmed.