2016 IL App (2d) 151178-U
No. 2-15-1178
Order filed August 17, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BENTON DARDA,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 14-MR-1365
	)	
JAMES HURIS,	)	Honorable
	)	Terence M. Sheen,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting defendant's motion for summary judgment on each of the counts in plaintiff's complaint. We reversed the trial court's ruling and remanded the cause for further proceedings.

¶ 2 Plaintiff Benton Darda brought a complaint seeking to void two beneficiary changes made by his mother near the end of her life: one involving a land trust and the other involving a retirement account. Defendant James Huris became the sole beneficiary in both instances. In addition to seeking declaratory judgments, plaintiff's complaint includes counts alleging lack of capacity, undue influence, and intentional interference with inheritance expectancy. The trial court granted defendant's motion for summary judgment on each of the counts in plaintiff's

complaint. We reverse the trial court's ruling and remand the cause for further proceedings consistent with this disposition.

¶ 3 I. BACKGROUND

¶ 4 The pleadings and exhibits reflect that plaintiff's mother, Alice Darda, began living with defendant in 1995. Although Alice and defendant were never married, they entered into a partnership agreement and land trust in 1996. They shared ownership of a Darien home pursuant to the partnership agreement and the land trust held title to the property. The land trust originally provided that, upon Alice's death, her undivided one-half share would vest in plaintiff, subject to a life estate in the surviving cotenant, *i.e.*, defendant. Alice also held a retirement account which originally provided a "transfer on death" designation to plaintiff. As of June 2012, the account held assets valued at over $300,000.

¶ 5 In October 2009, Alice executed a durable power of attorney designating defendant as her attorney-in-fact over her assets and income. Alice amended the land trust and the retirement account in 2013, naming defendant as the sole beneficiary in both instances. Alice died in June 2014 at the age of 93. Plaintiff is Alice's only child.

¶ 6 In his third amended complaint, plaintiff alleged that Alice was diagnosed with dementia sometime in 2009. Thereafter, plaintiff noticed "substantial worsening signs" of Alice's declining mental condition. As alleged by plaintiff, Alice confused people and events, called plaintiff names associated with her deceased husband, and repeatedly asked the same question during conversations. Alice also became incapable of writing letters, unable to dress or bathe herself, and unable to operate the telephone independently. Regarding defendant's control over Alice, plaintiff alleged that defendant began isolating Alice from plaintiff and his family shortly after Alice designated defendant as her attorney-in-fact. This included refusing to take Alice to

family gatherings, removing pictures of Alice's family from the Darien home, preventing plaintiff and his family from talking to Alice on the telephone, and lying to Alice by telling her that her family members had not visited her. Finally, plaintiff alleged that defendant procured the documents necessary for the changes to the land trust and retirement account and directed Alice to take all other steps necessary to make him the beneficiary.

¶ 7 Defendant filed a motion to dismiss the third amended verified complaint pursuant to section 2-615 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-615 (West 2014)), for failure to state a cause of action. In the alternative, defendant's motion sought summary judgment pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2014)).

¶ 8 In support of his motion for summary judgment, defendant attached an affidavit from attorney Stanley Loula. According to the affidavit, Loula met with Alice for approximately 90 minutes on July 3, 2013. Alice's financial advisor, Joseph Supina, was also present. The purpose of the meeting was to discuss changes that Alice wanted to make to the beneficial interests in the land trust and retirement account. Defendant was not present at the meeting. Loula attested that, during the meeting, Alice said she wanted her share of the land trust to pass to defendant. Loula also saw Supina present Alice with a document which purportedly related to Alice's retirement account. Loula saw Alice sign the form, but he did not receive or read a copy of the form. Loula attested that Alice was "alert, oriented, and engaged throughout the meeting." Loula also claimed that Alice "understood the natural objects of her bounty," and that she "knew the character and extent of her property."

¶ 9 In his response to defendant's motion for summary judgment, plaintiff noted that he had not yet had the benefit of conducting any discovery. However, plaintiff attached an exhibit consisting of an affidavit and 11 pages of medical records. The affidavit was signed by Jaime

Stephens, who attested that she was custodian of records for the Du Page Medical Group. Stephens further attested that the accompanying documents were Alice's medical records, which were made during the regular course of business. The documents themselves contain notations from dates ranging between October 9, 2012, and November 15, 2013. The notations indicate that Alice was consistently diagnosed with dementia throughout this period. One notation states that Alice was "confused and unable to provide any meaningful history," while another states that Alice was "confused as usual." On one occasion, Alice thought she was living in the 1940's.

¶ 10 The trial court entered a 9-page written order in which it denied defendant's motion to dismiss, determining that the facts alleged by plaintiff were sufficient to state each of his alleged causes of action. However, in considering defendant's motion for summary judgment, the trial court commented that plaintiff had "failed to provide any affidavit or evidence interpreting [Alice's] medical records to show that Alice lacked testamentary capacity." The trial court went on to find in pertinent part:

> "Plaintiff has failed to provide any evidence which shows that at the time Alice made these changes she lacked testamentary capacity. At best, Plaintiff has shown that Alice was confused at times, but this is insufficient to provide any counter to the sworn affidavit of Attorney Loula. * * * This Court cannot rely on the interpretations of the Plaintiff of Alice's medical records to conclude that Alice lacked testamentary capacity. Further, Plaintiff has provided no evidence that Defendant exerted undue influence over Alice beyond general allegations and no facts connecting these general allegations to what prompted Alice to make changes to the Retirement Account and the Trust.

> Therefore, while Plaintiff's Third Amended Complaint meets the lower threshold to state a cause of action, taking all the information available to the Court, it does not survive a motion for summary judgment as there is no dispute as to material facts."

¶ 11 Accordingly, the trial court granted defendant's motion for summary judgment on each of the counts in plaintiff's complaint. Plaintiff timely appeals.

¶ 12 II. ANALYSIS

¶ 13 The sole issue in this appeal is whether the trial court erred in granting defendant's motion for summary judgment. Plaintiff's overarching argument is that his allegations and Alice's medical records combine to raise genuine issues of material fact as to whether Alice had the requisite mental capacity at the time she made the beneficiary changes, and whether defendant exerted undue influence over Alice in procuring the changes. Defendant counters that the trial court correctly concluded that attorney Loula's affidavit was sufficient to remove any such issues of material fact. For the following reasons, we agree with plaintiff.

¶ 14 "The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists." *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact, and that the moving party is clearly entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014). "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 162-63 (2007). Summary judgment is inappropriate where the material facts are disputed, or where reasonable

persons might draw different inferences from the undisputed facts. *Id*. "Although summary judgment can aid in the expeditious disposition of a lawsuit, it remains a drastic means of disposing of litigation and, therefore, should be allowed only where the right of the moving party is clear and free from doubt." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). In appeals from summary judgment rulings, the standard of review is *de novo*. *Adams*, 211 Ill.2d at 43.

¶ 15 Plaintiff notes that defendant bore the initial burden of production in his motion for summary judgment. Defendant could have met this burden by either: (1) presenting evidence that, if left unrebutted, would entitle him to judgment as a matter of law; or (2) demonstrating that plaintiff would be unable to prove an element of his cause of action. If defendant presented facts demonstrating his entitlement to judgment as a matter of law, the burden would then shift to plaintiff to present some evidence establishing the existence of a material fact to be determined at trial. See *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682, 688-89 (2000). Here, the evidence that defendant presented in support of his motion for summary judgment was Loula's affidavit. The evidence that plaintiff presented in response was the Stephens affidavit and accompanying 11 pages of Alice's medical records. Because both of these submissions are relevant primarily for determining the issue of Alice's mental capacity, we will begin our analysis by considering whether a genuine issue of material fact exists regarding plaintiff's claims that Alice lacked the requisite capacity to make the beneficiary changes.

¶ 16 We observe at the outset that the land trust and Alice's retirement account were both will substitutes. See *Handelsman v. Handelsman*, 366 Ill. App. 3d 1122, 1130 (2006) (defining a will substitute as "an arrangement respecting property or contract rights that is established during the donor's life, under which (1) the right to possession or enjoyment of the property or to a contractual payment shifts outside of probate to the donee at the donor's death; and (2)

substantial lifetime rights of dominion, control, possession, or enjoyment are retained by the donor."). Will substitutes are construed according to the rules used to construe wills. *Id*.

¶ 17 A will can be invalidated by establishing that the donor lacked testamentary capacity. *In re Estate of Elias*, 408 Ill. App. 3d 301, 316 (2011). To set aside a will on the grounds of lack of testamentary capacity, a plaintiff must demonstrate that, at the time the will was executed, the testator lacked sufficient mental ability to: (1) know that she was making a will; (2) know and remember the natural objects of her bounty; (3) comprehend the character and extent of her property; and (4) make disposition of her property according to a plan formed in her own mind. *In re Estate of Harn*, 2012 IL App (3d) 110826, ¶ 26. A lack of testamentary capacity should be found if any one of these requirements is absent. *DeHart v. DeHart*, 2013 IL 114137, ¶ 20.

¶ 18 Here, the trial court found that Alice's medical records were insufficient to counter Loula's affidavit. The trial court reasoned that plaintiff needed to have a professional analyze or interpret the medical records, and that plaintiff's own interpretation of the records would not suffice. We disagree.

¶ 19 Loula attested that he had known Alice for over 40 years, that he had assisted her with banking matters from time to time, and that he had interacted with her many times during the 1960's and 1970's. Thus, Loula's opinion that Alice was of sound mind at the time she made the beneficiary changes is relevant proof of Alice's testamentary capacity. See *Harn*, 2012 IL App (3d) 110826, ¶ 26 (noting that a lay witness may render an opinion as to the soundness of the testator's mind if the witness had a sufficient opportunity to form that opinion, and that proof of testamentary capacity must pertain to at or near the time the will was made). However, "[i]t is well recognized that evidence of the mental condition of the testator within a reasonable time before or after the making of a will is relevant to show his mental condition at the time of the

execution of the will." *In re Estate of Roeseler*, 287 Ill. App. 3d 1003, 1013-14 (1997). The Stephens affidavit stated that the medical records provided by plaintiff were kept during the course of regular business at the time or very near to the time that Alice was seen by her doctors. It is therefore undisputed that medical professionals consistently diagnosed Alice with dementia and described her as being confused between October 9, 2012, and November 15, 2013. Furthermore, it is undisputed that Alice signed the amendment to the land trust on August 6, 2013. Although the record is unclear as to when Alice amended her retirement account, Loula's affidavit indicates that this occurred during his meeting with Alice and Supina on July 3, 2013.

¶ 20 As noted above, summary judgment should not be granted if reasonable persons might draw different inferences from the undisputed facts. *Harn*, 2012 IL App (3d) 110826, ¶ 25. Here, Loula's affidavit notwithstanding, we believe a reasonable person could infer from Alice's medical records that she lacked testamentary capacity at the time she made the beneficiary changes. We therefore conclude that triable issues exist which preclude summary judgment on plaintiff's counts of lack of capacity.

¶ 21 We next turn to plaintiff's claims of undue influence. Just as by showing that the donor lacked testamentary capacity, a will can be invalidated by establishing undue influence. *Elias*, 408 Ill. App. 3d at 316. Proof of undue influence may be wholly circumstantial, and the exercise of undue influence may be inferred where a testator is induced to confer a benefit contrary to her deliberate judgment and reason. *In re Estate of Hoover*, 155 Ill.2d 402, 411-12 (1993). Here, plaintiff notes that defendant profited from beneficiary changes that were made at a time when defendant had a fiduciary relationship with Alice. See *White v. Raines*, 215 Ill. App. 3d 49, 59 (1991) (noting that a power of attorney "gives rise to a general fiduciary relationship between the grantor of the power and the grantee as a matter of law"). Thus, plaintiff argues, the trial court

should have recognized a presumption of undue influence. See *Matter of Estate of DeJarnette*, 286 Ill. App. 3d 1082, 1088 (1997) (observing that a presumption of fraud or undue influence arises where there is a fiduciary relationship between the parties and the fiduciary "has benefitted by virtue of his fiduciary status"). We note, however, our supreme court's conclusion in *DeHart* that a presumption of undue influence cannot be determined until after the close of the plaintiff's case. *DeHart*, 2013 IL 114137, ¶ 29. If the plaintiff establishes the *prima facie* elements of a cause of action for undue influence, the defendant would then have the burden of rebutting the presumption with evidence in contradiction. *Id.* ¶ 30. Hence, we agree with defendant that it would have been premature for the trial court to determine a presumption of undue influence in this case at the summary judgment phase.

¶ 22 Plaintiff argues in the alternative that, even if there is no presumption of undue influence, his allegations and evidence combine to create genuine issues of material fact. We agree.

¶ 23 "The *prima facie* elements of a cause of action for undue influence are: (1) a fiduciary relationship between the testator and a comparatively disproportionate beneficiary under the will; (2) a testator who was in a dependent situation where the beneficiary is in a dominant role; (3) a testator who placed trust and confidence in the beneficiary; and (4) a will that was prepared or executed in circumstances where the beneficiary was instrumental or participated." *In re Estate of Baumgarten*, 2012 IL App (1st) 112155, ¶ 14. Defendant does not contest the sufficiency of the allegations and evidence pertaining to the first three elements, but argues that the statements in Loula's affidavit were sufficient to remove any issue of material fact as to whether defendant participated in procuring Alice's beneficiary changes. We find guidance in resolving this issue from *Hoover*, which our supreme court has referenced as the "leading case in Illinois addressing undue influence." *DeHart*, 2013 IL 114137, ¶ 27.

¶ 24 Similar to this case, the trial court in *Hoover* granted the defendants' motion for summary judgment. *Hoover,* 155 Ill. 2d at 408. It was undisputed in *Hoover* that the testator's disinheritance of the plaintiffs coincided with his receipt of letters and visits from the defendants, who were the newly designated beneficiaries. The defendants argued, however, that summary judgment was proper because the plaintiffs had failed to provide any evidence that their influence was directed toward procuring a will in their favor. Our supreme court found this argument to be "misguided," recognizing that a testator may act as if guided by his or her own agency, even though that agency was overpowered by "secret influences." The plaintiffs in *Hoover* alleged a "subtle, invidious kind of undue influence" in which the testator's will had been overbourne by a series of misrepresentations. Our supreme court upheld the appellate court's reversal of the trial court's ruling, holding that the plaintiffs' allegations and the circumstantial evidence combined to create genuine issues of material fact as to whether the testator was unduly influenced by the defendants to disinherit the plaintiffs. *Id*. at 413-15.

¶ 25 Here, plaintiff alleged that defendant isolated Alice from her family by removing family pictures, preventing Alice's family from visiting her, falsely informing Alice that her family members had not visited her while she was hospitalized, and screening Alice's phone calls in an effort to prevent her from speaking with her family. Additionally, plaintiff alleged that defendant originated and orchestrated the idea to have himself made the sole beneficiary of Alice's retirement account and the land trust. Specifically, plaintiff alleged that defendant conducted all communications necessary to procure the documents in question, arranged the meeting with Loula and Supina, and directed Alice to take all steps necessary to make the beneficiary changes. Similar to *Hoover*, we believe that these allegations of a subtle, invidious

kind of undue influence combine with the circumstantial evidence to create genuine issues of material fact.

¶ 26 We acknowledge that plaintiff's circumstantial evidence in this case may not be as strong as the plaintiffs' circumstantial evidence in *Hoover*, which included letters and a diary entry. *Hoover*, 155 Ill. 2d at 412-13. However, "the more enfeebled the mind of the testator, the less evidence is required to establish the existence of undue influence." *Roeseler*, 287 Ill. App. 3d at 1018. As we have discussed, it is undisputed that Alice made the beneficiary changes at a time when she was 92 years' old and medical professionals had consistently diagnosed her with dementia. The medical professionals further noted that Alice was "confused and unable to provide any meaningful history," and that Alice believed she was living in the 1940's during one of her visits. Defendant argues that the trial court correctly found that the attestations in Loula's affidavit were sufficient to counter these undisputed facts. However, as we have also discussed, Loula's affidavit is relevant primarily for establishing whether Alice had the requisite testamentary capacity at the time she made the beneficiary changes. Regarding undue influence, Loula attested that defendant did not attend the July 3 meeting, and that Alice "did not appear to be in duress or under any undue influence" at any point during the meeting. Loula further attested that defendant "did not procure or prepare the amendment to the land trust or to the change in beneficiary form prepared by [Supina]." Finally, Loula attested he was retained by Alice, and not by defendant, for the purpose of drafting the amendment to the land trust.

¶ 27 Conspicuously absent from Loula's affidavit, however, is any mention of who contacted him to arrange the July 3 meeting. This is noteworthy given defendant's allegation that Alice could not operate a telephone independently. Regardless of this deficiency in Loula's affidavit, we disagree with the trial court and defendant that the affidavit is sufficient to remove any

genuine issues of material fact as to whether the beneficiary changes were prepared or executed in circumstances where the defendant was instrumental or participated. See *In re Estate of Baumgarten*, 2012 IL App (1st) 112155, ¶ 14.

¶ 28 We finally address plaintiff's allegations of intentional interference with inheritance expectancy. Unlike claims of lack of capacity and undue influence, which question the validity of a will, intentional interference with inheritance expectancy is a tort action against an individual who by fraud, duress, or other tortious means intentionally prevents another from receiving an inheritance or gift. *Ellis*, 236 Ill. 2d at 52. To state such a claim, a plaintiff must establish: (1) the existence of an expectancy; (2) defendant's intentional interference with the expectancy; (3) tortious conduct such as fraud, duress, or undue influence; (4) a reasonable certainty that the expectancy would have been realized but for the interference; and (5) damages. *DeHart*, 2013 IL 114137, ¶ 39. The alleged misrepresentations or false statements must be shown to have caused the testator to execute the contested will. *Id*.

¶ 29 Here, in denying defendant's section 2-615 motion to dismiss, the trial court found that plaintiff had alleged facts adequate to show that defendant took affirmative action to interfere with his expectancy, and that there was a connection between these actions and the beneficiary changes. As discussed above, we disagree with the trial court as to the significance of Loula's affidavit, and we believe genuine issues of material fact exist regarding defendant's purported undue influence. For these reasons, we conclude that genuine issues of material fact similarly exist regarding plaintiff's claims of intentional interference with inheritance expectancy. We note, however, that if plaintiff is ultimately successful on his claims contesting the beneficiary changes, the dismissal of his tort counts would be appropriate because the adequacy of his relief would be undisputed, and as a consequence, no damages in tort would be available. If plaintiff

fails in his claims contesting the beneficiary changes on remand, he would then be able to proceed against defendant on his tort claims. See *DeHart*, 2013 IL 114137, ¶ 41.

¶ 30 In sum, we have repeatedly cautioned that summary judgment is inappropriate where the inferences sought to be drawn deal with questions of motive, intent, and subjective feelings and reactions. *Borchers v. Franciscan Tertiary Province of Sacred Heart, Inc.*, 2011 IL App (2d) 101257, ¶ 30; *Schroeder v. Winyard*, 375 Ill. App. 3d 358, 369 (2007); *Farmers Automobile Insurance Association v. Williams*, 321 Ill. App. 3d 310, 314 (2001); *In re Estate of Jessman*, 197 Ill. App. 3d 414, 421 (1990). We believe that this is such a case, and we believe that the trial court incorrectly weighed the evidence set forth in the parties' opposing affidavits at the summary judgment phase. See *In re Estate of Ciesiolkiewicz*, 243 Ill. App. 3d 506, 510-11 (1993). We therefore reverse the trial court's ruling and reinstate plaintiff's third amended complaint in its entirety, including the counts seeking declaratory judgment. We offer no opinion as to the merits of plaintiff's complaint beyond our conclusion that the allegations and evidence were sufficient to survive summary judgment.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we reverse the ruling of the circuit court of Du Page County on defendant's motion for summary judgment and we remand the cause for further proceedings.

¶ 33 Reversed and remanded.