2015 IL App (3d) 130880-U

Order filed February 20, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

KENNETH L. HARRISON,	)	Appeal from the Circuit Court
	)	of the 9th Judicial Circuit,
Plaintiff-Appellant,	)	Hancock County, Illinois,
	)	
	)	
v.	)	Appeal No. 3-13-0880
	)	Circuit No. 12-MR-20
	)	
DAVID E. HARRISON and PAUL E.	)	Honorable
HARRISON, individually and as	)	Richard H. Gambrell
Executors of the ESTATE OF	)	Judge, Presiding.
ERMOGENE HARRISON, Deceased,	)	
	)	
Defendants-Appellees.	)	

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: (1) trial court's interlocutory order dismissing Count I of the plaintiff's complaint, which sought a declaration that certain provisions of his mother's will were void or unenforceable, for lack of jurisdiction was not immediately appealable under Supreme Court Rule 304(b)(1) because it did not "finally determine the right or status of a party" as to an estate or any portion thereof; (2) Count I of the plaintiff's complaint was not a "will contest" because it did not challenge the will, or any part thereof, as not being the will of the decedent; and (3) the plaintiff was

not estopped from arguing that certain provisions of his mother's will were void as against public policy even though he had accepted certain benefits under the will.

¶ 2 Approximately nine months after his mother's will was admitted to probate, the plaintiff, Kenneth Harrison, filed a declaratory judgment action seeking to have certain provisions of his mother's will declared void and unenforceable. The plaintiff also asserted claims for breach of fiduciary duty and for an accounting. The defendants, David E. and Paul E. Harrison (the plaintiff's brothers and co-heirs under their mother's will) moved to dismiss the complaint under section 2-619 of the Code of Civil Procedure (Code) (55 ILCS 5/2-619 (West 2012)). The defendants argued that the trial court had no jurisdiction to decide Count I because it was an untimely will contest under Section 8-1 of the Probate Act of 1975 (Probate Act) (755 ILCS 5/8-1 (West 2012)), which requires that petitions to contest the validity of a will be filed within six months of the admission of the will to probate.

¶ 3 On December 5, 2012, the trial court issued an order granting the defendants' motion to dismiss the plaintiff's claims for declaratory judgment and breach of fiduciary duty. However, because the defendants had asked to reserve argument on the plaintiff's claim for accounting, the court did not rule on that count in its December 5, 2012 order. Approximately 10 months later, the defendants presented argument in support of their motion to dismiss that claim. Shortly thereafter, the trial court issued a "Judgment Order" granting the defendants' motion to dismiss the plaintiff's claim for an accounting and holding that the defendants were granted judgment on the pleadings on the plaintiffs' complaint. This appeal followed.

¶ 4 FACTS

¶ 5 Decedent Ermogene Harrison's will was admitted to probate in July 2011. The will disposed of personal property and certain tracts of real estate. Regarding the real estate, the will stated that "[i]t is my desire that my three (3) sons, namely: **Kenneth L. Harrison, David E.**

Harrison and Paul E. Harrison, or their successors physically partition their undivided interests in Tracts I, II, and III such that the above-described five (5) tracts of real estate will be owned as follows:" The will then provided a detailed description of the partition prescribed by the will and the land that would be owned by each of the sons under the will's partition plan. The will then stated:

> "In the event that any of my three (3) sons or their successors refuse to convey their undivided interests and complete the physical partition between them as I have hereinabove outlined, than any so refusing shall receive no interest in and to any real estate that I die owning of in which I have an interest at the time of my death, and in lieu thereof shall receive the sum of $5,000. I then give and devise all of my real estate therein to my remaining son(s) per stirpes, as their absolute property forever."

¶ 6 On April 20, 2012, more than six months after Ermogene's will was admitted to probate, the plaintiff filed a three-count complaint for declaratory and other relief in the circuit court of Hancock County. The complaint was filed as an independent action separate from the probate or estate administration proceedings. (The plaintiff subsequently amended the complaint by leave of court to add the executor of Ermogene's estate as a party.) Count I of the complaint asserted a claim for declaratory judgment asking the court to declare that: (1) the provisions of the will relating to the partition of real estate are void for public policy reasons because they "attempt a forfeiture of an interest in land that was vested by admission of Ermogene's will to probate"; and (2) the words "[i]t is my desire," which precede the provisions of the will relating to the partitioning of real estate, are "precatory words and are therefore not enforceable." Count II

asserted a claim for breach of fiduciary duty against defendant Paul Harrison, individually and as executor of Ermogene's estate, "for renting all or part of the farm land owned by the decedent to himself." Count III sought an accounting for the income on the land bequeathed to the plaintiff.

¶ 7 The defendants filed a motion to dismiss the plaintiff's complaint pursuant to section 2-619 of the Code. In their motion, the defendants argued that the trial court lacked jurisdiction to consider Count I of the complaint because the plaintiff's claim for declaratory judgment amounted to an untimely will contest under section 8-1 of the Probate Act. The defendants also argued that the plaintiff was "barred from challenging the will in any manner" because he had "received and accepted certain property of the estate" under the will. The defendants' motion as to Count I was supported by the affidavit of David Harrison which stated that the will allowed for agreement as to the distribution of certain personal items and that the plaintiff had received and taken possession of certain household goods, jewelry, utensils, and tools. This affidavit was not challenged or contradicted by the plaintiff. The defendants' motion asked that Count I be dismissed with prejudice. The defendants also moved to dismiss Count II as legally insufficient under section 2/615 of the Code.

¶ 8 In addition, the defendants moved to dismiss Count III under section 2-619 of the Code on the ground that the plaintiff had failed to comply with the will's partition requirements and had therefore forfeited any interest in the real estate. The defendants' motion to dismiss Count III was supported by the affidavit of Paul Harrison which stated that requests for the partition of the real estate pursuant to the provisions of the will were submitted to the plaintiff along with proposed deeds and that the plaintiff had failed to comply with the partition scheme established in the will. This affidavit was not challenged or contradicted by the plaintiff.

¶ 9 The parties presented oral argument as to defendants' motion to dismiss Counts I and II during a hearing on October 18, 2012. The defendants' motion to dismiss Count III was reserved and was not argued at that hearing. After hearing oral arguments, the trial court granted the defendants' motion to dismiss Count I with prejudice. In announcing its ruling from the bench, the trial court stated that Count I was a "will contest" because it "attempt[ed] to void all or part of a will." Accordingly, the court found that it was "without jurisdiction" to grant the relief sought in Count I because the plaintiff's complaint was filed more than six months after the will was probated, and was therefore untimely under section 8-1 of the Probate Act. The trial court ruled that Count II failed to plead a cause of action for breach of fiduciary duty, granted the defendants' motion to dismiss that count, and allowed the plaintiff to amend and replead that count within 28 days. The claimant never filed any such amendment, and the trial court's dismissal of Count II is not at issue in this appeal. Pursuant to the defendants' agreement to reserve argument on Count III, the trial court reserved ruling on that count.

¶ 10 On December 5, 2012, the trial court entered a written order memorializing its rulings as to Counts I, II, and III. The trial court's written order did not specify the basis for the dismissal of Count I; rather, it merely stated that the defendants' motion to dismiss Count I was "well taken and should be granted."

¶ 11 In October 2013, the parties presented oral arguments on the defendants' motion to dismiss Count III. On October 16, 2013, the trial court entered a judgment order ruling that, because the plaintiff had failed to comply with the voluntary petition prescribed by the will, the claimant had "forfeited all right to take any part of the real estate pursuant to the will" and therefore had "no right to any accounting." Accordingly, the trial court dismissed Count III of the plaintiff's complaint. The judgment order also provided that "Counts I and II having been

disposed of in defendants' favor on prior hearings, and having come within the meaning of Supreme Court 304(b)(1) and having heretofore been disposed of, the Court finds that Defendant should be granted judgment on the pleadings" as to the plaintiff's complaint. Accordingly, the court granted the defendants judgment on the pleadings as to the plaintiff's complaint.

¶ 12 ANALYSIS

¶ 13 In this appeal, the plaintiff argues that the trial court erred in dismissing Count I of his complaint because that count did not contest the validity of the plaintiff's will and therefore was not subject to the six-month filing period for "will contests" under section 8-1 of the Probate Act. In response, the appellees argue that: (1) this court has no jurisdiction to consider the plaintiff's appeal because the trial court's December 5, 2012 order dismissing Count I was a final and appealable order under Supreme Court Rule 304(b)(1) (eff. Feb. 26, 2010) and the plaintiff failed to appeal that order within 30 days, as required by that Rule; (2) even if the claimant's appeal is timely, it fails on the merits because Count I contested the validity of a portion of the will, and was therefore subject to the 6-month filing deadline for "will contests" prescribed by section 8-1 of the Probate Act; and (3) Count I fails for the independent reason that the plaintiff has received and accepted certain property from the estate and is accordingly "barred from challenging the will in any manner." We address these arguments in turn.

¶ 14 1. Whether the trial court's December 2012 order was immediately appealable

¶ 15 The defendants argue that the trial court's December 5, 2012, order dismissing Count I was a final and immediately appealable order under Rule 304(b)(1). That rule allows appeals as a matter of right from certain interlocutory orders which do not dispose of an entire proceeding without a Rule 304(a) finding that there is no just reason for delaying either enforcement or appeal of the order. Ill. S. Ct. R. 304(b)(1) (eff. Feb. 26, 2010). Specifically, Rule 304(b)(1)

allows immediate appeal of "a judgment or order entered in the administration of an estate, guardianship, or similar proceeding which *finally determines a right or status of a party*." (Emphasis added.) *Id.* The revised Committee Comments to Rule 304(b)(1) provide that "[s]ubparagraph (1) applies to orders that are final in character although entered in comprehensive proceedings that include other matters. Examples are an order admitting or refusing to admit a will to probate, appointing or removing an executor, *or allowing or disallowing a claim*." (Emphasis added.) Ill. S. Ct. R. 304(b) Committee Comments (rev. Feb. 26, 2010).

¶ 16 "Orders within the scope of Rule 304(b)(1), even though entered before the final settlement of estate proceedings, must be appealed within 30 days of entry or be barred." *In re Estate of Jackson*, 354 Ill. App. 3d 616, 628 (2004); see also *In re Estate of Thorp*, 282 Ill. App. 3d 612, 616 (1996). "A central reason behind making the time for appeal of such orders mandatory, not optional, is that certainty as to some issues is a necessity during the lengthy procedure of estate administration." *Estate of Thorp*, 282 Ill. App. 3d at 616; see also *In re Estate of Kime*, 95 Ill. App. 3d 262, 268 (1981). Rule 304(b)(1) is designed to prevent multiple lawsuits and piecemeal appeals, while encouraging efficiency and granting certainty as to specific issues during the often lengthy process of estate administration. *Estate of Thorp*, 282 Ill. App. 3d at 616; *In re Estate of Devey*, 239 Ill. App. 3d 630, 632-33 (1993). "The construction of a will is one of the specific issues in an estate administration which requires certainty." *Estate of Thorp*, 282 Ill. App. 3d at 617. "Without the Rule 304(b)(1) exception, an appeal would have to be brought after an estate was closed, the result of which may require reopening the estate and marshalling assets that have already been distributed." *Id.* at 616-17. That result would be "both impractical and inefficient" *Id.* at 617.

¶ 17 Applying these principles, our appellate court found that a trial court's order in an estate proceeding, which found that purported grantees of real property had no right to certain real property because the deed was invalid and the property rightfully belonged to the estate, was a final determination of the rights of the parties to the real property, and thus the order was appealable within 30 days of entry even though it did not dispose of the entire proceeding. *Estate of Jackson*, 354 Ill. App. 3d 616. Similarly, in *Estate of Thorp*, our appellate court found that a trial court order mandating a specific interpretation of the will and ordering the sale of the testatrix's farm according to that interpretation was final and therefore not appealable more than 30 days after the entry of the order. *Id.* at 617.

¶ 18 However, "not every order entered in an estate proceeding may be immediately appealed." *In re Estate of Vogt*, 249 Ill. App. 3d 282, 285 (1993); see also *In re Estate of Nicholson*, 268 Ill. App. 3d 689, 693 (1994). For appellate jurisdiction to attach, the order must "finally" determine the right or status of a party. *Estate of Vogt*, 249 Ill. App. 3d at 285 (holding that an interlocutory order in estate proceeding was not immediately appealable where the order "did not finally determine the right or status of [a party] in relation to the estate"); *Estate of Nicholson*, 268 Ill. App. 3d at 693 (holding that the immediate appeal of an interlocutory order dismissing seven of eight counts of the plaintiff's petition to contest admission of decedent's will to probate was "premature" because one of the counts in the plaintiff's petition remained pending and because the dismissal of the remaining counts "did not finally establish plaintiff's status in regard to the administration of the decedent's estate"); see also *Estate of Devey*, 239 Ill. App. 3d at 633; *In re Estate of Pruett*, 133 Ill. App. 2d 499, 502 (1971).

¶ 19 Assuming *arguendo* that the instant declaratory judgment proceeding is "similar" to the administration of an estate,[1] we hold that the trial court's December 5, 2012 dismissal of Count I was not immediately appealable under Rule 304(b)(1). Unlike the order at issue in *Estate of Thorp*, the December 5, 2012 order in this case did not mandate a particular construction of a will. Moreover, unlike the orders in *Estate of Thorp* and *Estate of Jackson*, the December 5, 2012, order in this case did not finally determine a party's right to any particular property under the will. Rather, it merely dismissed what the trial court interpreted as an untimely will contest under section 5/8-1 of the Probate Act.[2] At the time it dismissed Count I, the court had not yet

---

[1] Rule 304(b)(1) applies to "a judgment or order entered in the administration of an estate, guardianship, *or similar proceeding*." (Emphasis added.) Il. S. Ct. R. 304(b)(1) (eff. Feb. 26, 2010). The complaint at issue in this case was not filed in the estate proceeding but rather was filed as a separate action. However, the defendants contend the action at issue in this case was a "similar proceeding" to the estate proceeding. The plaintiff does not contest this argument. We therefore assume without deciding that the instant action is a "similar proceeding" to which Rule 304(b)(1) might apply.

[2] As noted above, the trial court did not specify the reasons for its dismissal of Count I in the December 5, 2012 written order. In announcing its ruling from the bench, the court appeared to base its ruling entirely on its conclusion that Count I was an untimely will contest. Nevertheless, even if the trial court based its ruling in part on the fact that the plaintiff waived the right to challenge the will by accepting benefits under the will, that would not change the analysis under Rule 304(b)(1) because the dismissal order would still not finally determine the plaintiff's right to any property under the will. Rather, it would merely determine that the plaintiff had forfeited the right to challenge the validity of the will.

construed the partition provisions of the will or finally determined what rights the plaintiff had (if any) to the real estate at issue under those provisions. Such construction did not occur until approximately 10 months later when the court dismissed Count III of the plaintiff's complaint.

¶ 20 Accordingly, the trial court's December 5, 2012, order dismissing Count I did not "finally determine the right or status of a party" as to an estate or any portion thereof. The order was therefore not immediately appealable under Rule 304(b)(1), and the plaintiff was not required to appeal that order within 30 days. The 30-day deadline for the plaintiff to appeal did not begin to run until the court issued its final judgment order on October 16, 2013. The plaintiff's appeal of the latter order (which included its dismissal of Count I by reference) was timely.

¶ 21 2. Whether the claim asserted in Count I was a "will contest"

¶ 22 In dismissing Count I, the trial court accepted the defendants' argument that the claim asserted in that count was a "will contest." Accordingly, the trial court determined that it lacked jurisdiction to decide the claim because it was not filed within six months of the will's admission to probate, as required by section 8-1 of the Probate Act. That section provides:

> "[w]ithin 6 months after the admission to probate of a domestic will *** any interested person may file a petition in the proceeding for the administration of the testator's estate or, if no proceeding is pending, in the court in which the will was admitted to probate, to contest the validity of the will."
>
> 755 ILCS 5/8-1(a) (West 2012).

Relying entirely on this jurisdictional limitations period, the trial court dismissed Count I as untimely. We review the trial court's dismissal order *de novo*. *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 12 (2005).

¶ 23 We hold that the trial court erred in ruling that the plaintiff's claim was a "will contest." A will contest is a "*quasi in rem* proceeding to set aside a will." *In re Estate of Ellis*, 236 Ill. 2d 35, 51 (2009). "The single issue in a will contest is whether the writing produced is the will of the testator." *Id.* Grounds for invalidating a will include fraud, lack of testamentary capacity, undue influence, revocation, and ignorance of the contests of the will. *Hall v. Eaton*, 259 Ill. App. 319, 321 (1994). A claim that a certain provision or provisions of a will are "void as against public policy" is not a "will contest" because it "[does] not challenge the will, or any part thereof, as not being the will of the decedent." *Id.* at 320, 321. For the same reason, a petition to construe a will is not a "will contest." *Id.* at 321.

¶ 24 Here, the plaintiff did not challenge the will or any part thereof as not being the will of his mother. To the contrary, he conceded that the will was genuine and authentic. In Count I, the plaintiff argued that: (1) the provisions of the will relating to the partition of real estate are "void" for public policy reasons because they "attempt a forfeiture of an interest in land that was vested by admission of Ermogene's will to probate"; and (2) the words "[i]t is my desire," which precede the provisions of the will relating to the partitioning of real estate, are "precatory words and are therefore not enforceable." In other words, the plaintiff argued that certain provisions of the will (which he admitted were actual provisions of his mother's will) were void for public policy reasons, and, in the alternative, he urged the court to construe those provisions as merely precatory. *Estate of Ellis* and *Hall* make clear that these arguments do not constitute a "will contest."

¶ 25 Thus, contrary to the trial court's conclusion, section 8-1 of the Probate Act did not apply, and the plaintiff was not required to file his claims within six months of the admission of Ermogene's will to probate. The plaintiff's claims were not untimely, and the court had jurisdiction to decide them.

¶ 26 3. The plaintiff's acceptance of benefits under the will.

¶ 27 In the alternative, the defendants argue that, even if section 8-1 of the Probate Act did not apply, dismissal of Count I was still proper because the plaintiff received and accepted certain household goods under Ermogene's will and was therefore "barred from challenging the will in any manner." We do not find this argument persuasive. Under a "well-settled equitable doctrine" in Illinois, "any person who voluntarily accepts a beneficial interest under a will is held thereby to ratify and confirm the entirety of the will which conferred the benefit." *Kyker v. Kyker*, 117 Ill. App. 3d 547, 551 (1983). "In other words, the beneficiary may not accept a bequest of the testator and at the same time set up any right or claim which would defeat or prevent the full operation of the will." *Id.* "By accepting the benefits, the legatee admits the instrument to be the will of the testator, and she cannot both take under it and make a claim against its terms." *Id.* "The result is that once a beneficiary has accepted a bequest under the will, she will be estopped from asserting any claim inconsistent with the validity of that will. *Id.*

¶ 28 However, these principles do not bar the plaintiff from asserting the claims he raised in Count I of the complaint. The estoppel applies only to claims attacking the *validity* of the will, *i.e.*, to "will contests." See, *e.g.*, *Kyker*, 117 Ill. App. 3d at 51 (by accepting benefits under a will, a legatee "admits the instrument to be the will of the testator," and is estopped from asserting any claim "inconsistent with the validity" of that will); *In re Estate of Levin*, 135 Ill. App. 3d 866 (1985) (although the plaintiff's acceptance of a bequest estopped her from

"requesting a will contest," she was not estopped from requesting a formal proof of will because such a request "is not a challenge to the will's validity"); see generally *Ruby v. Ruby*, 2012 IL App (1st) 103210, ¶ 31. As noted, the plaintiff did not assert a will contest in this case; he did not challenge the authenticity or validity of the will as a whole. Rather, he merely asked the court to construe certain provisions of the will and challenged those provisions as being against public policy. Although his public policy argument sought to invalidate certain provisions of the will, the plaintiff was not estopped from making that argument. *Kyker*, 117 Ill. App. 3d at 552 ("even though a person accepts a benefit under the will, she is not precluded from questioning the validity of any provisions that are contrary to the law or public policy").

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, the judgment of the circuit court of Hancock County is reversed, and the cause is remanded for further proceedings.

¶ 31 Reversed; cause remanded.