2013 IL App (4th) 121122-U

NOS. 4-12-1122, 4-12-1123 cons.

FILED
August 26, 2013
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Estate of SUSAN K. BATTS O'BRIEN, Deceased, KARA M. BATTS, Not Individually But As Executor of the Estate of SUSAN K. BATTS O'BRIEN, Petitioner-Appellee, v. (No. 4-12-1122) LEWIS O'BRIEN, Respondent-Appellant.	)	Appeal from Circuit Court of Douglas County No. 12LM16
In re: the Estate of SUSAN K. BATTS O'BRIEN, Deceased, KARA M. BATTS, Executor of the Estate of SUSAN K. BATTS O'BRIEN, Petitioner-Appellee, v. (No. 4-12-1123) LEWIS O'BRIEN, Respondent-Appellant.	)	No. 12P11
	)	Honorable Michael G. Carroll, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Steigmann and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's judgment in a case under the Forcible Entry and Detainer Act (735 ILCS 5/9-101 to 9-321 (West 2012)) is affirmed because the judgment is not against the manifest weight of the evidence. Nevertheless, because the potential for appellate review was not yet exhausted in the forcible-entry case, the trial court erred by concluding that the judgment in the forcible-entry case collaterally estopped respondent in a probate case.

¶ 2 Respondent, Lewis O'Brien, is the surviving spouse of Susan K. Batts

O'Brien. Petitioner, Kara M. Batts, is the decedent's daughter and the executor of her will.

¶ 3 Respondent appeals in two cases, and on his motion we have consolidated the two appeals. One of the cases, Douglas County case No. 12-LM-16, arises under the Forcible Entry and Detainer Act. In that case, on the basis of a premarital agreement between respondent and the decedent, petitioner obtained a judgment entitling her, as executor, to take possession of the decedent's house, which respondent had continued occupying after the decedent's death.

¶ 4 The other case, Douglas County case No. 12-P-11, is the case in which the decedent's will was probated. In that case, petitioner obtained a judgment that the premarital agreement—which, given the judgment in the forcible-entry case, the trial court held respondent to be collaterally estopped from challenging— barred respondent from taking any share of the estate.

¶ 5 We do not find the judgment in the forcible-entry case to be against the manifest weight of the evidence. Nevertheless, because the potential for appellate review was not yet exhausted in the forcible-entry case (and, even now, still is not exhausted, because respondent could petition for leave to appeal to the supreme court), we disagree with the trial court that the judgment in the forcible-entry case collaterally estopped respondent in the probate case from challenging the premarital agreement and from asserting an ownership interest in the estate. Therefore, we affirm the trial court's judgment in the forcible-entry case but reverse the trial court's judgment in the probate case and remand the probate case for further proceedings.

¶ 6 I. BACKGROUND

¶ 7 On February 23, 2012, respondent and Susan K. Batts married. They had been living together in her house, 804 Eastline Road in Tuscola.

¶ 8 On February 27, 2012, Susan K. Batts O'Brien died, leaving a will dated August 8, 2007. In her will, she gave certain personal property to her mother and her two children and gave the residue of her estate, including all her real estate, to her two children. The will left nothing to respondent.

¶ 9 On March 22, 2012, petitioner filed a petition to admit the will to probate and to be appointed independent executor. She also filed an affidavit of heirship asserting that, under a premarital agreement, respondent had no interest in the estate.

¶ 10 On March 26, 2012, the trial court entered an "Order Declaring Heirship," in which the court found that respondent, as the surviving spouse, was an heir of the decedent.

¶ 11 That same day, the trial court entered an order admitting the will to probate and appointing petitioner as the independent executor.

¶ 12 After the trial court admitted the will to probate, respondent filed three documents: (1) a petition to terminate independent administration, (2) a renunciation of the will, and (3) a petition for a surviving spouse's award.

¶ 13 On April 24, 2012, petitioner responded with a motion to bar respondent from "participating in the estate." In her motion, she alleged that before respondent and the decedent married, they entered into a premarital agreement, whereby respondent waived any interest in the decedent's estate, including a surviving spouse's award and a statutory share of the estate.

¶ 14 On May 17, 2012, petitioner filed the forcible-entry action, in which she

sought to obtain possession of 804 Eastline Road, which respondent still was occupying as his residence.

¶ 15 On July 10, 2012, the trial court held a trial in the forcible-entry action. Respondent appeared *pro se* in the trial.

¶ 16 He testified he had been living at 804 Eastline Road for approximately seven years. He denied that he and the decedent had entered into a premarital agreement. He admitted he had signed a document, and he admitted that before the decedent died, they discussed entering into a premarital agreement, by which he was supposed to prove his unconditional love for her. But he testified that the 3 1/2-page premarital agreement was left at the house and never was signed and that, instead, he had signed an agreement that the decedent's will would be changed—an agreement that never was performed.

¶ 17 No agreement to change the will was presented as documentary evidence in the trial.

¶ 18 Respondent offered in evidence, however, a report that Curtis Baggett had written. Baggett, an expert document examiner, had examined the premarital agreement as well as documents bearing the signatures of respondent and the decedent. In his report, Baggett concluded that the decedent's signature on the premarital agreement was forged. The trial court granted petitioner's hearsay objection to Baggett's report and excluded the report.

¶ 19 Respondent then moved for a continuance of the trial so that Baggett could travel from Texas and testify. The trial court denied his motion for a continuance.

¶ 20 Marta Slaughter, the notary public who had notarized the signatures on the premarital agreement, testified she was the secretary of James D. Lee, who was the

decedent's attorney. She remembered the decedent's coming into Lee's office on February 21, 2012, and signing the premarital agreement in her presence. She also remembered respondent's coming into Lee's office a day later, accompanied by the decedent's son, and signing the premarital agreement in her presence. She had offered to give respondent a copy of the premarital agreement, but he never took his copy with him.

¶ 21 At the conclusion of the evidence in the forcible-entry trial, the trial court found that respondent and the decedent had indeed signed the premarital agreement and that because respondent, in the agreement, had waived any interest in the decedent's estate, he had to vacate the house by 5 p.m. on August 10, 2012.

¶ 22 On August 10, 2012, respondent filed a motion to stay the eviction and a motion for reconsideration. The trial court held a hearing on these motions on September 18, 2012, at which time the court stayed the removal of respondent's personal property from the house and took the motion for reconsideration under advisement until September 28, 2012, when a hearing was scheduled to occur in the probate case on various pending matters, *i.e.*, respondent's renunciation of the will, his petition for a surviving spouse's award, his petition to terminate independent administration, and petitioner's motion to bar him from receiving any share of the estate.

¶ 23 On September 27, 2012, in the probate case, petitioner filed a motion for judgment on the pleadings as well as an affirmative defense. The affirmative defense was that respondent was "collaterally estopped from relitigating the existence and validity of the [premarital agreement]." In her motion for judgment on the pleadings, petitioner argued that because the trial court had found, in the forcible-entry case, that the premarital agreement

was genuine and valid, respondent was collaterally estopped, in the probate case, from challenging the authenticity and validity of the premarital agreement, which, by its terms, barred him from taking any share of the decedent's estate.

¶ 24 On November 7, 2012, the trial court entered an order in both the forcible-entry case and the probate case, finding that the judgment in the forcible-entry case collaterally estopped respondent, in the probate case, from challenging the authenticity and validity of the premarital agreement. Accordingly, the court granted petitioner's motion for judgment on the pleadings in the probate case and also lifted the stay and denied respondent's motion for reconsideration in the forcible-entry case.

¶ 25 II. ANALYSIS

¶ 26 A. Our Review of the Judgment in the Forcible-Entry Case

¶ 27 Under sections 9-102(a)(1) and (a)(2) of the Forcible Entry and Detainer Act (735 ILCS 5/9-102(a)(1), (a)(2) (West 2012)), a plaintiff "entitled to the possession of land[]" may—by judicial means and not by force (735 ILCS 5/9-101 (West 2012))—reacquire possession of the land if the defendant made a "forcible entry" onto the land or, alternatively, if the defendant originally made a lawful and peaceful entry but now "unlawfully withh[o]ld[s]" possession of the land or, in other words, "detains" the land.

¶ 28 In the present case, the land is the decedent's house, 804 Eastline Road. In petitioner's action under the Forcible Entry and Detainer Act, her theory was that respondent originally moved into the house lawfully and peacefully, at the decedent's invitation, but that after the decedent died, he unlawfully withheld possession of the house from petitioner, the executor.

¶ 29 Respondent argued, however, that under section 20-1 of the Probate Act of 1975 (755 ILCS 5/20-1 (West 2012)), his detention of the house was not "unlawful[]" (735 ILCS 5/9-102(a)(2) (West 2012)), considering that, as the surviving spouse, he had renounced the decedent's will (see 755 ILCS 5/2-8 (West 2012)) and that, consequently, he was an "heir" within the meaning of section 20-1(b) (755 ILCS 5/20-1(b) (West 2012)).

¶ 30 Section 20-1 provides:

> "§ 20-1. Administration and possession of decedent's real estate. (a) Except as otherwise provided by subsection (b) of this Section or by decedent's will, every representative shall take possession, subject to the exempt estate of homestead, of all real estate of the decedent during the period of administration and, while retaining possession, (1) shall collect the rents and earnings therefrom, (2) shall keep in tenantable repair the buildings and fixtures, (3) shall pay the taxes, mortgages and other liens thereon in accordance with their terms, (4) may protect the real estate by insurance, (5) may employ agents and custodians and (6) may make all reasonable expenditures necessary to preserve the real estate. He may maintain an action for the possession of or to determine the title to real estate, except that no action to determine the title to real estate may be commenced without authorization of the court which issued his letters.
>
> (b) The representative may not take possession of real estate

or the portion thereof occupied by the heir or legatee thereof as his residence unless otherwise provided by the decedent's will or unless the court at any time finds that possession is necessary for the payment of claims, expenses of administration, estate or inheritance taxes or legacies, the preservation of the real estate, or any part thereof, or the proper distribution of the estate.

(c) Upon petition of any interested person, the court may grant possession of real estate on such terms as it deems appropriate to the heir or legatee thereof, if it appears that the real estate or income therefrom will not be needed for the payment of claims, expenses of administration, estate or inheritance taxes or legacies. An order granting possession of real estate does not constitute a determination of title to the real estate.

(d) Nothing in this Section affects the power of the representative to sell or mortgage any real estate of the decedent under this Act." 755 ILCS 5/20-1 (West 2012).

¶ 31 Thus, during the period of administration, the representative shall take possession of the decedent's real estate, "[e]xcept as otherwise provided by subsection (b) [(755 ILCS 5/20-1(b) (West 2012))]." 755 ILCS 5/20-1(a) (West 2012). Subsection (b) forbids the representative, during the period of administration, to take possession of any real estate "occupied by the heir or legatee thereof as his residence," unless (1) the decedent's will says the representative may take possession of the real estate or (2) the trial court finds it is

necessary for the representative to take possession of the real estate so as to pay claims, expenses of administration, estate or inheritance taxes, or legacies; to preserve the real estate; or to properly distribute the estate. 755 ILCS 5/20-1(b) (West 2012).

¶ 32 Respondent was not a "legatee" within the meaning of section 20-1(b): the will left him nothing. *Id.* And it is questionable whether the term "heir" has any relevance when there is a will. *Id.* An "heir" is a "person *** appointed by law to succeed to the estate *in case of intestacy*." (Emphasis added.) *Lee v. Roberson*, 297 Ill. 321, 329 (1921). When a surviving spouse renounces the will, "[t]he will is not destroyed nor is any part of the estate rendered intestate." *McGee v. Vandeventer*, 326 Ill. 425, 433 (1927). But *cf. Petta v. Host*, 1 Ill. 2d 293, 300 (1953) (referring to "the share of a surviving spouse as heir upon renunciation of a will").

¶ 33 In any event, one thing is clear: section 20-1(b) allowed respondent to continue occupying the house during the period of administration only if he had an interest in the decedent's estate. And if the signatures on the premarital agreement were genuine and the agreement were enforceable, respondent would have no such interest.

¶ 34 In the forcible-entry trial, the trial court found the notarized signatures on the premarital agreement to be genuine. That finding is not against the manifest weight of the evidence. See *S & D Service, Inc. v. 915-925 W. Schubert Condominium Ass'n*, 132 Ill. App. 3d 1019, 1021 (1985) (the standard of review in a forcible-entry action generally is whether the judgment is against the manifest weight of the evidence); *Butler v. Encyclopedia Brittanica, Inc.*, 41 F.3d 285, 294-95 (7th Cir. 1994) (citing authorities to the effect that a notary public's certificate of acknowledgment, regular on its face, carries a strong

presumption of validity, which can be overcome only by clear and convincing evidence from disinterested witnesses).

¶ 35 Respondent had the burden of proving that, despite his signature on it, the premarital agreement was unenforceable on either of the grounds in section 7(a) of the Illinois Uniform Premarital Agreement Act (750 ILCS 10/7(a) (West 2012)). Section 7(a) provides:

> "§ 7. Enforcement. (a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:
>
> (1) that party did not execute the agreement voluntarily; or
>
> (2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:
>
> (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
>
> (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party

> beyond the disclosure provided; and
>
> (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party." *Id.*

In the forcible-entry trial, respondent offered no evidence in support of either of the propositions in section 7(a). Instead, he took the sole position that there was no premarital agreement because the notarized signatures were forged, a position the trial court reasonably found to be untenable. We uphold that finding and affirm the judgment in the forcible-entry case.

¶ 36 B. Our Review of the Judgment in the Probate Case

¶ 37 In the probate case, the trial court agreed with petitioner's argument that the judgment in the forcible-entry case collaterally estopped respondent from challenging the enforceability of the premarital agreement. Accordingly, the court granted petitioner's motion for judgment on the pleadings in the probate case.

¶ 38 A motion for judgment on the pleadings resembles a motion for summary judgment in that both motions require the trial court to determine whether there is a genuine issue of material fact and if there is no such issue, whether the movant is entitled to judgment as a matter of law. *State Farm Fire & Casualty Co. v. Kleckner*, 194 Ill. App. 3d 371, 375 (1990). The two motions differ in that when ruling on a motion for judgment on the pleadings, the court looks only at the pleadings, whereas when ruling on a motion for summary judgment, the court also may look at affidavits, the transcripts of sworn testimony, and other evidentiary documents. *Id.*

¶ 39 Petitioner's motion for judgment on the pleadings is actually a motion for summary judgment (735 ILCS 5/2-1005 (West 2012)), because to determine whether the judgment in the forcible-entry case collaterally estopped respondent in the probate case, one would have to look beyond the pleadings in the probate case; one would have to look at the record in the forcible-entry case to determine whether the collaterally estopping proposition actually was litigated in the forcible-entry case and whether it was essential to the judgment in that case. See *American Family Mutual Insurance Co. v. Savickas*, 193 Ill. 2d 378, 387 (2000); *Terry v. Watts Copy Systems, Inc.*, 329 Ill. App. 3d 382, 389 (2002).

¶ 40 The standard of review and the basic analysis are the same with both motions. We review the ruling *de novo*. *State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶ 65. That means we ask the questions a trial court would ask, namely, was there a genuine issue of material fact, and if there was no such issue, was the movant entitled to judgment as a matter of law? *Kleckner*, 194 Ill. App. 3d at 375.

¶ 41 The law of collateral estoppel is this. "Collateral estoppel bars a claim when (1) the issue decided in the first proceeding is identical with the one presented in the current action; (2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom estoppel is asserted was a party to, or in privity with a party to, the prior adjudication. [Citation.] A tribunal's finding collaterally estops a litigant in a subsequent proceeding only if the finding in the initial proceeding was necessary or essential to the tribunal's decision. [Citation.]" *Terry*, 329 Ill. App. 3d at 389. Under the supreme court's decision in *Ballweg v. City of Springfield*, 114 Ill. 2d 107, 113 (1986), a judgment is not "final," for purposes of collateral estoppel, "until the potential for appellate review has been

exhausted." *Terry*, 329 Ill. App. 3d at 391 (citing *Ballweg*).

¶ 42 In his special concurrence in *Terry*, Justice Cook suggested that the supreme court abandon the *Ballweg* rule and adopt the position of the Restatement (Second) of Judgments § 13, which states, in comment f: "The better view is that a judgment otherwise final remains so despite the taking of an appeal ***" (Restatement (Second) of Judgments § 13, comment f (1982)). *Terry*, 329 Ill. App. 3d at 391-92 (Cook, J., concurring). The supreme court has not followed his suggestion. *Ballweg* is still the law. The potential for appellate review of the forcible-entry case was not yet exhausted when the trial court held that the judgment in that case collaterally estopped respondent from challenging the premarital agreement in the probate case. Therefore, while affirming the trial court's judgment in the forcible-entry case, we reverse the trial court's judgment in the probate case and remand that case for further proceedings.

¶ 43 III. CONCLUSION

¶ 44 For the foregoing reasons, we affirm the trial court's judgment in Douglas County case No. 12-LM-16, but we reverse the trial court's judgment in Douglas County case No. 12-P-11 and remand that case for further proceedings.

¶ 45 Affirmed in part and reversed in part; cause remanded.