

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Larry E. Wickline et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 11AP-694
Mary Lou Hoyer,	:	(C.P.C. No. 10CVH08-11843)
Defendant-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on March 8, 2012

Manos, Martin, Pergram & Dietz Co., LPA, and Dennis L. Pergram, for appellants.

Mularski, Bonham, Dittmer & Phillips, LLC, Mark E. Phillips and Raymond J. Mularski, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Plaintiffs-appellants appeal the decision of the Franklin County Court of Common Pleas, General Division. The common pleas court granted defendant- appellee's motion for summary judgment.

{¶ 2} Plaintiffs-appellants bring the following assignment of error:

The trial court committed prejudicial error in granting summary judgment in favor of Defendant/Appellee and against Plaintiffs/Appellants.

{¶ 3} Appellants Larry E. Wickline and Judith A. Bowman (hereinafter "appellants") and appellee Mary Lou Hoyer (hereinafter "appellee") are all siblings and children of Ruth B. Wickline ("Ms. Wickline").

{¶ 4} On September 7, 2001, Ms. Wickline executed her last will and testament bequeathing all her property equally among her three children. On September 3, 2001, Ms. Wickline had executed a power of attorney appointing appellee as her attorney-in-fact.

{¶ 5} On April 18, 2007, Ms. Wickline opened a joint and survivorship bank account with appellee and transferred \$85,331.41 from a personal bank account to the new account. On July 13, 2007, Ms. Wickline withdrew the sum of \$75,000 from a different personal account and also deposited the funds in the new joint account. Appellee maintains that she exerted no influence over her mother of any kind with respect to the withdrawals from her personal accounts and the deposits into the joint account. Appellants argue otherwise.

{¶ 6} On October 31, 2006, before these withdrawals, Ms. Wickline, then 90 years old, was seen by her personal physician. Her physician noted that Ms. Wickline was experiencing some confusion and memory loss. After a subsequent examination on September 27, 2007, Ms. Wickline's physician noted that her memory had decreased and that her psychiatric state was "demented." This examination was after the withdrawals.

{¶ 7} On December 10, 2007, appellee transferred the funds from the joint checking account to a money market account with a higher interest rate that was solely in her name. Ms. Wickline was seen again by her personal physician on January 25, 2008 when her physician noted that her memory loss was worsening.

{¶ 8} Ms. Wickline died on February 28, 2010. An estate was opened with the probate court. Appellee acknowledges that all the funds formerly in the joint account were contributed solely by Ms. Wickline and that no portion of the funds were given to appellee as a gift or as compensation for services rendered.

{¶ 9} On August 11, 2010, appellants filed a claim for intentional interference with expectancy of inheritance (hereinafter "IIEI claim") in the Franklin County Court of Common Pleas, General Division. Appellee filed a motion for summary judgment arguing

that appellants' claims should be decided in probate court. On July 22, 2011, the court of common pleas issued its decision granting appellee's motion and dismissing the action otherwise than on the merits. The court of common pleas stated this dispute can be heard and relief provided through probate court proceedings under R.C. 2107.46 or R.C. 2109.50 and that a plaintiff must first exhaust all appropriate probate procedures before pursuing an IIEI claim. Appellants timely appealed the common pleas court's decision.

{¶ 10} Appellants' assignment of error asserts the court of common pleas erred in granting summary judgment and in finding that appellants had to exhaust probate procedures under R.C. 2107.46 or R.C. 2109.50.

{¶ 11} Civ.R. 56(C) states that summary judgment shall be rendered forthwith if:

[T]he pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

{¶ 12} Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629 (1992), citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 65-66 (1978). Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59 (1992). De novo review is well established as the standard of review for summary judgment. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996).

{¶ 13} The Ohio Supreme Court set forth the elements of an IIEI claim in *Firestone v. Galbreath*, 67 Ohio St.3d 87, 88 (1993):

(1) an existence of an expectancy of inheritance in the plaintiff; (2) an intentional interference by a defendant(s) with that expectancy of inheritance; (3) conduct by the defendant involving the interference which is tortious, such as

fraud, duress or undue influence, in nature; (4) a reasonable certainty that the expectancy of inheritance would have been realized, but for the interference by the defendant; and (5) damage resulting from the interference.

{¶ 14} This court has found that before pursuing an HIEI claim, a plaintiff must first exhaust all appropriate remedies in the probate court. *Firestone v. Galbreath*, 10th Dist. No. 92AP-159 (Oct. 6, 1992). An exception to the rule allows a plaintiff to bypass probate court if no remedy is available in the probate court or if that remedy would be inadequate. *Firestone v. Galbreath*, 895 F.Supp. 917, 926 (S.D. Ohio 1995). Thus, "[c]ourts must look to whether the probate court can provide the plaintiff with adequate relief in the form of the actual damages which would be recovered in the tort action; punitive damages awards are not considered a valid expectation in this context." *Id.* See also *Cunningham v. Cunningham*, 10th Dist. No. 08AP-1049, 2009-Ohio-4698, ¶ 19.

{¶ 15} We agree with the common pleas court's analysis that the correct inquiry is whether there are any available remedies attainable through the probate court for the alleged wrongs committed by appellee. Appellants allege that appellee, through the singular use or combination of fraud, embezzlement, undue influence, or breach of fiduciary duty, acquired over \$150,000 of decedent's money that would have otherwise been a part of the estate. If appellants' allegations are found to be true, the probate court can order the funds to be restored to the estate.

{¶ 16} The common pleas court cited two statutes in its decision, R.C. 2109.50 and R.C. 2107.46, under which appellants could bring an action against appellee in probate court to recover monies to the estate of Ms. Wickline. R.C. 2109.50 provides:

Upon complaint made to the probate court * * * against any person suspected of having concealed, embezzled, or conveyed away or of being or having been in the possession of any moneys, personal property, or choses in action of the estate, testamentary trust, or guardianship, the court shall by citation or other judicial order compel the person or persons suspected to appear before it to be examined, on oath, touching the matter of the complaint.

{¶ 17} R.C. 2109.50 has since been amended on January 13, 2012 but the amendment does not affect this case. R.C. 2107.46 provides:

Any fiduciary may file an action in the probate court against creditors, legatees, distributees, or other parties, and ask the direction or judgment of the court in any matter respecting the trust, estate, or property to be administered, and the rights of the parties in interest.

If any fiduciary fails for thirty days to file an action under this section after a written request from a party in interest, the party making the request may file the action.

{¶ 18} It is clear that appellants' accusations of fraud, embezzlement, undue influence, and breach of fiduciary duty can be brought in probate court under R.C. 2107.46 and R.C. 2109.50. The question then remains whether this relief, that could be granted in probate court, is adequate. Only if the relief is inadequate could appellants avoid exhausting all appropriate probate procedures. The common pleas court did not find the probate court remedies to be inadequate.

{¶ 19} The fifth element of an IIEI claim requires the existence of damage resulting from the interference. *Firestone*, 67 Ohio St.3d at 88. In this case, we cannot find there are any damages that appellants could recover in a tort case that are separate from damages that could be recovered in probate court. Appellants have an appropriate probate procedure for which they can receive remedy for this issue and full restoration of the funds.

{¶ 20} Appellants' assignment of error is overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and DORRIAN, JJ., concur.
