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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-227

No. COA21-543

Filed 5 April 2022

Dare County, No. 16 E 160

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF ALTON GARD, JR.

Appeal by caveators from order entered 20 May 2021 by Judge Alma L. Hinton in Dare County Superior Court. Heard in the Court of Appeals 22 February 2022.

Sharp Graham Baker & Varnell, by Casey Varnell and Katherine S. Harrell, for caveators-appellants.

Law Office of Matthew J. Spencer, P.C., by Matthew J. Spencer, for propounder-appellee Warren.

Roberson Haworth & Reese, PLLC, by Alan B. Powell and Andrew D. Irby, for propounder-appellee Parks.

ARROWOOD, Judge.

¶ 1 Wardell King ("Mr. King") and Dolores King ("Ms. King") (collectively, "caveators") appeal the trial court's order granting motions for judgment on the pleadings in favor of Wilma Parks ("Parks") and Kathleen Warren ("Warren") (collectively, "propounders"). Caveators contend the trial court erred in holding the evidence was insufficient to support a finding of extrinsic fraud and that there were no genuine issues of material fact as set forth in the pleadings. For the following

reasons, we affirm the trial court.

I. Background

¶ 2 Alton Elroy Gard, Jr. ("Gard"), passed away on 21 April 2016. On 3 May 2016, a paper writing purporting to be Gard's Last Will and Testament was probated by Parks in Dare County Superior Court. The will, dated 9 September 2015, divided Gard's estate into two equal shares per stirpes for Parks and Warren, and appointed Parks and Warren, his daughters, as executrixes. The will excepted Gard's other daughter, Cheryl, "for reasons of which she is well aware[,]" and specifically limited Gard's wife Teresita Gard ("Mrs. Gard") to her elective share. Parks qualified as Executrix of Gard's estate.

¶ 3 On 24 August 2016, Warren filed an affidavit (signing as "Kathleen Lydia Gard") requesting that Gard's stock be liquidated so that all parties involved could receive their shares. Warren also requested, "per [her] Father's wishes while he lived[,]" that the Dare County Clerk of Court award a van owned by Gard to Mr. King, as well as "lifetime rights on the property at parcel # 017605-000[.]" Warren further requested that Mrs. Gard be banned from any and all property owned by Gard, and sought to reinstate her right to qualify as executor due to her opinion "that [Parks] has failed in her duties as executor to see that [her] father's will be executed in the manner he intended and has pushed her own agenda that ultimately benefits her [and Mrs. Gard]."

¶ 4 On 10 September 2018, Parks filed a final account with the Dare County Clerk of Court. The final account was audited and approved by Assistant Clerk of Court Katie Harrell prior to formally closing Gard's estate.

¶ 5 On 14 February 2020, a Petition and Order to reopen Gard's estate was entered due to a "[r]ecently discovered Last Will and Testament . . . that is more current than the probated Will." On 17 February 2020, caveators filed a Petition to Caveat, alleging the probated will was superseded by a post-dated holographic will. Caveators alleged that multiple acknowledgments had been made "that [Gard]'s intent was not accurately represented" in the probated will, and that Gard's "wishes are accurately represented in the" holographic will. The holographic will, dated 31 March 2016, included several specific bequests that were absent from the probated will, including a parcel to Gard's sister Rachel Twiddy ("Twiddy"), several parcels to caveators, "10 thousand each from my stocks and bank" to his grandchildren, and other specific bequests of personal property.

¶ 6 The Petition to Caveat was amended on 30 June 2020 to add a previously unknown address for one interested party. On 7 July 2020, the Dare County Clerk of Court entered an order transferring the matter to Dare County Superior Court for adjudication. On 15 October 2020, Judge Jerry R. Tillett entered an order to align the parties.

¶ 7 On 4 November 2020, Warren filed a response to the amended Petition to

Caveat, moving to dismiss the Petition pursuant to North Carolina Rules of Civil Procedure 12(b)(6) "and/or" 12(c), on the grounds that caveators failed to file the Petition within the three-year limitation period prescribed by N.C. Gen. Stat. § 31-32. On 9 November 2020, Parks filed a Motion to Dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(6), arguing that the Petition was time-barred and further asserting that the holographic will was a forgery. Parks also entered a Motion for Judgment on the Pleadings pursuant to Rule 12(c), file stamped 16 November 2020.

¶ 8 Caveators entered several affidavits on behalf of themselves and Twiddy. Ms. King's affidavit alleged that she gained possession of Gard's wallet for safekeeping shortly before he died and was also in possession of other items and important documents belonging to Gard. Ms. King alleged that, after Gard's death, she informed propounders that she and Mr. King were in possession of the wallet and other items and that she "had not inventoried the items because Mr. Gard had not asked [them] to before his unexpected death." Ms. King alleged that propounders "refused to retrieve the items . . . despite the fact they were part of his estate. [Warren] specifically refused to take his wallet . . . . She retrieved a gas card from the wallet but refused to inventory it or take it into her possession."

¶ 9 Ms. King stated that the holographic will was contained inside the wallet and "therefore was not discovered" by propounders due to their refusal to inventory the

wallet. Ms. King alleged that she became aware the property was conveyed to propounders when she received a letter from Parks's attorney in June 2019. According to Ms. King, she did not inspect the contents of the wallet "until it became known that [propounders] were claiming ownership over the property that was promised to [caveators] by [Gard]" because she did not think it was her place to go through Gard's belongings nor was she instructed to do so.

¶ 10 Affidavits for Mr. King and Twiddy set forth the same material allegations as Ms. King's affidavit.

¶ 11 On 5 April 2021, caveators filed a reply to propounders' responses and motions, arguing the statute of limitations was tolled by extrinsic fraud. In the supporting brief, caveators argued that multiple acknowledgments and affirmations by Warren "served as a mechanism to delay their efforts" in attacking the will, and that Parks's failure "to exercise traditional and fundamental obligations of an Executrix prevented discovery of the Will subject of this Caveat, thereby preventing the presentation of the Caveators' rights to the Court."

¶ 12 Propounders' motions to dismiss were heard on 19 April 2021 in Dare County Superior Court, Judge Hinton presiding. On 20 May 2021, the trial court entered an order granting the motions to dismiss pursuant to Rule 12(c) and dismissing the underlying action. Caveators filed notice of appeal on 18 June 2021.

II. Discussion

¶ 13 Caveators contend the trial court erred in granting propounders' motions on the grounds that there was sufficient evidence to support a finding of extrinsic fraud and that there were genuine issues as to material facts set forth in the pleadings.

A. Standard of Review

¶ 14 We review a trial court's ruling for a motion for judgment on the pleadings de novo. *Barnard v. Johnston Health Servs. Corp.*, 270 N.C. App. 1, 4, 839 S.E.2d 869, 871 (citation omitted), *disc. review denied*, 376 N.C. 535, 851 S.E.2d 621 (2020).

B. Extrinsic Fraud

¶ 15 Pursuant to N.C. Gen. Stat. § 31-32, any party with an interest in an estate may enter a caveat to the probate of any will at any time within three years of either "the time of application for probate of any will, and the probate thereof in common form[.]" N.C. Gen. Stat. § 31-32(a) (2021). The limitation period "will not be tolled by fraud other than extrinsic fraud which would vitiate the probate proceeding." *In re Will of Evans*, 46 N.C. App. 72, 75, 264 S.E.2d 387, 389 (1980). Extrinsic fraud "relates to the manner in which the judgment is procured. It must relate to matters not in issue and prevent a real contest in the trial." *Id.* at 75-76, 264 S.E.2d at 389 (citation omitted). Extrinsic fraud is "practiced directly on the party seeking relief from the probate judgment which prevented [them] from presenting [their] case to the court . . . ." *Id.* at 76, 264 S.E.2d at 389 (citation omitted).

¶ 16 Intrinsic fraud, on the other hand, "arises within the proceeding itself and concerns some matter involved in the determination of the cause on its merits[,]" and may include "the question of fraud in obtaining the execution of the will, undue influence, forgery, and the like . . . ." *Id.* at 75, 264 S.E.2d at 389 (citation omitted). Intrinsic fraud does not toll the time limitation. *Id.* (citation omitted).

¶ 17 Caveators contend that propounders' alleged failure to properly inventory and inspect Gard's wallet amounts to extrinsic fraud. We disagree.

¶ 18 It is well established in the pleadings and record that caveators gained possession of Gard's wallet shortly before his death and maintained possession of the wallet for the duration of probate. This wallet, which allegedly contained the holographic will when caveators gained possession, remained in caveators' possession for the entire period while the statute of limitation was running. Caveators allege they did not know the holographic will was contained inside the wallet until early 2020; however, they did acknowledge that they were aware of some of the contents, specifically a gas card removed by Warren. Based upon the pleadings, it is undisputed that caveators had possession of the wallet where the holographic will was found for the entire period while the statute of limitations was running.

¶ 19 Although caveators assert they did not inventory the wallet because they were not asked to, they had years of opportunity to look inside and find the holographic will. Alternatively, they could have turned possession of the wallet over to

propounders to ensure the wallet was inventoried and included in the original probate. Caveators made no allegations in the pleadings that they were prevented from discovering the holographic will. Instead, caveators waited until after the limitation period expired and now claim that propounders have prevented caveators from presenting their case to the court. Simply put, caveators have failed to present sufficient evidence of extrinsic fraud. The discovery of the holographic will was entirely within caveators' control, and propounders' alleged failure to inventory the wallet and discover the will does not amount to extrinsic fraud.

C. Judgment on the Pleadings

¶ 20 We first address caveators' argument regarding propounders' responsive pleadings. Caveators contend that a material dispute of fact exists "as to whether or not extrinsic fraud exists in this case to toll the statute of limitations[,]" because propounders' responsive pleadings neither admitted nor denied the allegations and instead "relied on a theory of logical or factual impossibility."

¶ 21 "Judgment on the pleadings, pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Carpenter v. Carpenter*, 189 N.C. App. 755, 757, 659 S.E.2d 762, 764-65 (2008) (citation and quotation marks omitted). "Judgments on the pleadings are disfavored in law, and the trial court must view the facts and permissible inferences in the light most favorable to the non-moving party." *Id.* at 757, 659 S.E.2d at 765

(citation and quotation marks omitted). "All well[-]pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *Barnard*, 270 N.C. App. at 4, 839 S.E.2d at 871 (citation and quotation marks omitted) (alteration in original). "When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate." *Id.* (citation and quotation marks omitted).

¶ 22 In their brief, caveators state that propounders neither admitted nor denied the allegations "contained therein on the record" and instead relied on a theory of logical or factual impossibility. Caveators cite to the transcript of the hearing, specifically statements made by propounders' trial counsel.

¶ 23 These portions of the transcript reveal that propounders' trial attorneys were responding to the affidavits filed by caveators and their aligned parties. Warren's attorney noted that "Gard apparently never said anything to [Ms. King] about the wallet. I think that would be in the pleadings if it had happened. But he never mentioned anything [along the lines of] there is a holographic will in my wallet." Warren's attorney further stated that Warren's removal of a gas card from the wallet "certainly didn't prevent [caveators] from discovering a document that, according to them, was already in their possession." Parks's attorney argued similarly, describing the contents of Ms. King's affidavit as "factual impossibility[,]" because caveators

"point blank admitted that [propounders] did not know about it. They did not discover it because they refused to take the wallet."

¶ 24 Although caveators argue that these statements create a material dispute of fact as to whether or not extrinsic fraud exists in this case, we disagree. Propounders' attorneys' statements at the hearing were consistent with propounders' responsive pleadings, which denied that propounders had any knowledge of the holographic will. As propounders' attorneys noted, the wallet was in caveators' possession for the entire period while the statute of limitations was running. None of the parties dispute who had possession of the wallet. Viewing the facts and possible inferences in the most favorable light to caveators, the material allegations of fact, specifically who possessed the wallet and holographic will, were admitted in the pleadings. Propounders' attorneys' statements did not create a material dispute of fact.

¶ 25 Caveators alternatively note a memorandum Gard drafted in support of the holographic will, arguing that if the trial court did not consider this memorandum as part of the pleadings, the motion for judgment on the pleadings would be converted to a motion for summary judgment. Parks argues, however, that the memorandum was not filed as part of the caveat, and furthermore does not contain any information, facts, or allegations relating to extrinsic fraud.

¶ 26 On a motion for judgment on the pleadings, if the trial court receives "matters outside the pleadings" and does not exclude them, "the motion shall be treated as one

for summary judgment and disposed of as provided in Rule 56," with all parties given reasonable opportunity to present pertinent material in support of such a motion. N.C. Gen. Stat. § 1A-1, Rule 12(c) (2021).

¶ 27 However, "the trial court [is] not required to convert a motion to dismiss into one for summary judgment simply because additional documents [are] submitted[.]" *Pinney v. State Farm Mut. Ins. Co.*, 146 N.C. App. 248, 252, 552 S.E.2d 186, 189 (2001) (citation omitted). " 'Memoranda of points and authorities as well as briefs and oral arguments . . . are not considered matters outside the pleading for purposes' of converting a Rule 12 motion into a Rule 56 motion." *Privette v. Univ. of N.C. at Chapel Hill*, 96 N.C. App. 124, 132, 385 S.E.2d 185, 189 (1989) (citation omitted) (alteration in original). "Where it is clear from the record, namely from the order itself, that the additional materials were not considered by the trial court, the 12(b)(6) motion is not converted into a Rule 56 motion." *Est. of Belk by & through Belk v. Boise Cascade Wood Prod., L.L.C.*, 263 N.C. App. 597, 599, 824 S.E.2d 180, 183 (2019) (citation omitted).

¶ 28 Here, Gard's memorandum, which contains additional descriptive details underlying the holographic will, was filed on 28 February 2020, shortly after the initial petition to caveat was filed. Caveators' trial counsel referenced the memorandum at the hearing, describing it as "stating that [Gard] didn't get along with everybody. He was distrustful of them."

¶ 29 Caveators' argument, however, fails for two reasons. First, the trial court's order notes "additional pleadings considered by the Court[,]" specifically caveators' motion for leave to reply and the attached affidavits. The order does not include any reference to Gard's memorandum. Accordingly, the order indicates that the memorandum was not considered as part of the trial court's order.

¶ 30 Second, and more importantly, Gard's memorandum does not amount to "matters outside the pleadings" with respect to caveators' petition. Although the memorandum, as caveators' attorney noted, provides apparent insight into Gard's opinions regarding his family, the memorandum contains no reference to the wallet where the holographic will was found, nor any allegation that propounders would seek to prevent caveators from finding or probating the holographic will. Therefore, the memorandum does not relate to caveators' claim of extrinsic fraud, and the trial court was not required to convert the motion for judgment on the pleadings into a motion for summary judgment.

III. Conclusion

¶ 31 For the foregoing reasons, we hold that there was insufficient evidence of extrinsic fraud and that there were no disputes of material fact. We affirm the trial court's order.

AFFIRMED.

Chief Judge STROUD and Judge WOOD concur.

Report per Rule 30(e).