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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-944

Filed 01 August 2023

Carteret County, No. 20CVS21

JOSEPH OLSCHNER, Plaintiff,

v.

M. DOUGLAS GOINES, as Executor of the Estate of Evelyn Lilley Olschner (nominal party only), and BARBARA OLSCHNER, Defendants.

Appeal by defendant Barbara Olschner from order entered 26 April 2022 by Judge Clinton Rowe in Carteret County Superior Court. Heard in the Court of Appeals 10 May 2023.

Ward & Smith, P.A., by Christopher S. Edwards and Josey L. Newman, for defendant-appellant.

Harvell & Collins, PA, by Wesley A. Collins, for plaintiff-appellee.

White & Allen, PA, by John P. Marshall, for defendant-executor-appellee.

GORE, Judge.

Defendant, Barbara Olschner (“defendant”), appeals the final order in favor of plaintiff. Defendant, M. Douglas Goines, as Executor of the Estate of Evelyn Lilley Olschner (“Goines”), exists only as a nominal party in this action and does not raise any claims on appeal. Defendant attacks subject matter jurisdiction and plaintiff,

Joseph Olschner's, standing to bring claims against her at the trial level. Upon review of the parties' briefs and the record, we affirm.

I.

Prior to the decedent Evelyn Lilley Olschner's death, defendant entered into the following loans with decedent: (1) a promissory note in the amount of \$4,000.00; (2) a promissory note in the amount of \$28,000.00, (3) a loan in the amount of \$2,222.39; (4) a promissory note in the amount of \$20,000.00; and (5) an agreement to offset advances in the amount of \$212,050.00 (collectively the "notes"). Plaintiff alleges decedent handed him the originals of these notes, which he presented to the court. The decedent died on 16 August 2018 and left a Last Will and Testament, in which she named M. Douglas Goines as Executor of her Estate. Within the Will, decedent equally devised the Estate between her children, plaintiff and defendant. On 8 January 2019 and 14 January 2019, plaintiff, through his attorney, sent demand letters to Goines to enforce the notes. Goines reviewed the notes, determined the demand was both "frivolous" and "barred by the statute of limitations," and refused to collect on the purported debts.

Plaintiff filed a lawsuit on 22 April 2019, but soon after filed a voluntary dismissal without prejudice on 23 August 2019. Within December 2019, Goines distributed \$96,243.74 to defendant. On 8 January 2020, plaintiff filed another lawsuit against defendant and Goines to collect on the notes. Plaintiff sought the following claims for relief: (1) that the trial court "declare that the writings executed

by [defendant] to be valid debts due to the [Estate]; (2) that the trial court “enter a Declaratory Judgment directing [Goines] to enforce and collect on the debt due to [the Estate] by offsetting any inheritance that would be received by [defendant] against the debt owed by [defendant], effectively distributing Decedent’s entire Estate to Plaintiff”; (3) that the trial court “enter Judgment against [defendant] in favor of [the Estate] in an amount to be proven at trial”; (4) “That, following entry of said judgment, [the Estate] have and recover post-judgment interest at the legal rate of Eight Percent (8.00%) per annum until paid in full”; (5) that “[i]n the alternative, based on breach of contract, [the Estate] have and recover of [defendant] a judgment in an amount to be proven at trial”; and (6) that attorneys’ fees, court costs and any further relief the trial court determined appropriate be granted.

Goines and defendant filed answers and motions to dismiss; but later, on 27 August 2021, 14 September 2021, and 17 September 2021, all parties filed cross motions for summary judgment. On 27 September 2021, the trial court heard only the motions of plaintiff and Goines, because defendant did not attend the hearing. The trial court granted Goines’ motion for summary judgment and denied plaintiff’s motion but failed to rule upon defendant’s motion. On 4 December 2021, defendant filed a motion to continue and dismiss the trial for this case by arguing the prior order granting Goines’ motion was a final order. Defendant also filed a “Motion for Final Summary Judgment” but later withdrew the motion claiming the trial court lacked subject matter jurisdiction. On 29 March 2022, the trial court entered a “Scheduling

Order and Notice” that stated the trial court did not rule upon defendant’s motion for summary judgment, recognized its failure to do so created the appearance of “rendering it ‘moot’ by way of dismissal of [Goines],” and went on to set the case for trial on 25 April 2022 because plaintiff refused a “WEBEX hearing.” Defendant filed further motions objecting to the trial and seeking dismissal for lack of subject matter jurisdiction. The trial court heard the case on 26 April 2022 and only plaintiff appeared at the hearing, thus plaintiff waived the jury trial and proceeded with a bench trial. The trial court entered a final order on 26 April 2022 in which it concluded the notes were enforceable and entered judgments for each note with interest. Defendant filed a notice of appeal on 25 May 2022.

II.

Defendant appeals of right pursuant to section 7A-27(b)(1). Defendant argues three issues on appeal that are all founded on the premise plaintiff lacked standing to litigate any claims against defendant. Defendant argues (1) the trial court lacked subject matter jurisdiction because plaintiff lacked standing under *Spivey v. Godfrey*; (2) the trial court’s jurisdiction extinguished upon it entering summary judgment in favor of Goines; and (3) the final judgment is void.

Central to this appeal is defendant’s perception of standing and her perception the trial court’s summary judgment was a final order. We consider challenges to standing and subject matter jurisdiction de novo. *Violette v. Town of Cornelius*, 283 N.C. App. 565, 569, 874 S.E.2d 217, 220 (2022), *rev. denied*, __ N.C. __, 883 S.E.2d

606 (2023) (Mem); *Willowmere Cmty. Ass’n, Inc. v. City of Charlotte*, 370 N.C. 553, 556, 809 S.E.2d 558, 560 (2018).

North Carolina law limits the standing of next of kin and creditors in estate claims. It is well established that a decedent’s property vests in the administrator or executor, and only the administrator or executor has the right to collect on a debt or bring a lawsuit to enforce a debt. *Spivey v. Godfrey*, 258 N.C. 676, 677, 129 S.E.2d 253, 254 (1963); see N.C. Gen. Stat. § 28A-13-3(a)(1), (15) (2022) (“To take possession, custody or control of the personal property of the decedent. . . . [t]o compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate.”). However, like many laws, our Courts have previously listed exceptions to this general rule. As stated in *Holt* and similarly in *Spivey*,

[t]he legatees or distributees may sue, however, to recover personal assets of an estate when fraud, collusion, or a refusal to sue on the part of the personal representative renders such action necessary for the protection of ultimate rights accruing to them under a will or the statute of distribution.

Holt v. Holt, 232 N.C. 497, 502, 61 S.E.2d 448, 452 (1950); *Spivey*, 258 N.C. at 677, 129 S.E.2d at 254. Accordingly, in such situations the beneficiary may sue, but must include the executor as a party to the lawsuit. *Spivey*, 258 N.C. at 677, 129 S.E.2d at 254.

In the present case, defendant argues plaintiff lacked standing to bring a claim against her for outstanding loans to Goines because *Spivey* only provides standing to

bring a claim in exceptional circumstances. We are unaware of any similar case in which a plaintiff first demanded the executor collect the debt and upon refusal filed suit as is the present appeal. In *Spivey*, the plaintiff did not sue on the basis of one of the three stated exceptions, but instead, the plaintiff merely named the estate as a party to the lawsuit prior to filing. *Id.* The plaintiff believed another beneficiary was “wrongfully withholding” a “distributive share of decedent’s money” and sought to collect on a debt through the courts. *Id.* Our Supreme Court determined the plaintiff was attempting to “by-pass” the administration of the estate and stated, “In the absence of allegations bringing the suit within one of the exceptions, this has never been permitted.” *Id.* at 678, 129 S.E.2d at 255. The Court recognized if the plaintiff’s complaints were accurate, “clearly a request to sue and a refusal would be conditions precedent.” *Id.* at 679, 129 S.E.2d at 256.

Defendant appears to conflate peculiar circumstances with the demand exception and settles upon an exception that requires “wrongful” or exceptional circumstances surrounding a demand and refusal of the executor. However, a review of *Spivey*, dispels this argument. The plain language within the case only requires the beneficiary to make a demand and be refused; additionally, it only highlights the demand and refusal as “conditions precedent.” *Id.* The plaintiff in *Spivey* failed to meet these conditions precedent, but in the present case plaintiff sent two letters, which included the alleged promissory notes and advancement, demanding Goines collect on the outstanding debts. Goines decided the promissory notes were

uncollectable and refused plaintiff's demand; as the saying goes, reasonable minds may differ. However, at this point in the juncture, if plaintiff disagreed with Goines's analysis, under defendant's interpretation of *Spivey*, plaintiff would be left without a remedy. Therefore, judicial intervention must be an available mechanism through the listed exceptions to pursue these outstanding debts. Accordingly, because plaintiff's claims fell within one of the exceptions, plaintiff had standing to bring this action now on appeal.

Finally, defendant argues in the alternative, that even if the exception under *Spivey* were good law, the enactment of section 28A-13-3(a) abrogated that exception of *Spivey*. Defendant specifies subsection (a)(7) and (a)(15) as proof the executor has "discretion over whether he should collect a debt." These sections give the executor power:

(7) To abandon or relinquish all rights in any property when, in the opinion of the personal representative acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in such condition that it is of no benefit to the estate.

...

(15) To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate.

N.C. Gen. Stat. § 28A-13-3(a)(7), (15) (2022). We fail to see how these subsections abrogate the exceptions noted by our Supreme Court in both *Holt* and *Spivey*. Instead, we read these subsections as complementary to prior precedent. To be sure, an executor may decline in his discretion to collect on a debt under this statute, but

this discretion does not equate to an absolute bar for beneficiaries to pursue a remedy when they believe the executor decides incorrectly. Under such reasoning, this would also negate the exceptions for collusion and peculiar circumstances, which would result in an injustice to both the beneficiaries and the estate. Subsequent case law relies upon the exception for collusion; therefore, we decline to interpret section 28A-13-3 as an abrogation of the *Spivey* demand and refusal exception. *See Jenkins v. Wheeler*, 69 N.C. App. 140, 146, 316 S.E.2d 354, 358 (1984) (allowing the sole heir standing to proceed on claims against administrator for possible collusion because she “complied with all the prerequisites of *Spivey*”).

Next, defendant argues summary judgment entered in Goines’s favor was a final order and disposed of the case. Under this theory she asserts the trial court lacked subject matter jurisdiction to enter the final order on 26 April 2022. We disagree. “[S]ubject-matter jurisdiction may be challenged at any stage of the proceedings.” *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

Although defendant asserts the summary judgment entered on 20 October 2021 was final, the trial court entered another order on 29 March 2022, stating Goines’s summary judgment did not rule upon defendant’s motion for summary judgment. Further, the trial court discussed within the order its attempts to communicate and clarify the summary judgment, hold a WEBEX hearing to address defendant’s outstanding motion, and set a trial for the outstanding claims. An order for summary judgment that “does not dispose of the case, but leaves it for further

action by the trial court in order to settle and determine the entire controversy” is an interlocutory order. *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Because the trial court did not rule on defendant’s motion and set the case for trial, Goines’s summary judgment was an interlocutory order rather than a final order and the trial court was not divested of jurisdiction.

Defendant asserts the trial court’s summary judgment in favor of Goines had the legal effect of resolving the claims in her favor because the claims are derivative. Defendant argues the trial court’s interlocutory judgment determined: (1) Goines lacked claims against defendant and lacked reason to offset defendant’s inheritance; (2) plaintiff could not assert a claim against defendant; (3) the debts were unenforceable; (4) plaintiff’s claims failed on the merits; and (5) defendant’s motion for summary judgment was moot. In making these arguments, defendant relies upon Goines’s brief in support of his motion for summary judgment.

Defendant asserts the trial court relied upon Goines’s brief in making its determination and therefore, on this basis, the trial court determined plaintiff’s demands were “frivolous,” “barred by the statute of limitations,” barred by the “doctrine of advancements,” and therefore the debts were unenforceable. However, we are limited to the record before us, which does not include the trial court’s reasoning for its ruling in favor of Goines, nor is the summary judgment hearing transcript available. While defendant makes a rational argument, reliance upon this argument would require us to speculate the trial court’s ruling, which would be in

contradiction to the latter scheduling order included in the record.

Further, defendant misapplies the purpose and function of a derivative claim. This lawsuit is only considered derivative from a definitional standpoint, as an estate differs from a corporation in which a traditional derivative claim is brought. *See Anderson v. SeaScape at Holden Plantation, LLC*, 241 N.C. App. 191, 204, 773 S.E.2d 78, 87 (2015) (alteration in original) (citation omitted) (“[Derivative suits] are one of the remedies which equity designed for those situations where the management through fraud, neglect of duty or other cause *declines to take the proper and necessary steps to assert the rights which the corporation has.*”). However, within this frame of reference, a corporation is named nominally as a party defendant for the purpose of bringing claims officers and/or directors refuse to bring when shareholders sue for a beneficial outcome to the corporation. *Swenson v. Thibaut*, 39 N.C. App. 77, 99–100, 250 S.E.2d 279, 293–94 (1978). In situations when the corporation has an “interest[] adverse to those of the nominal plaintiffs bringing the action derivatively” such as in a matter “to enjoin the performance of a contract by the corporation,” the corporation is a party defendant and not just a nominal defendant. *Id.* at 100, 250 S.E.2d at 294.

Applying these distinctions to the case at hand, Goines was a party defendant because plaintiff included a claim for relief that the trial court “enter a Declaratory Judgment directing [Goines], to enforce and collect on the debt due to Decedent’s Estate by offsetting any inheritance that would be received by [defendant] against the debt owed by [defendant], effectively distributing Decedent’s entire estate to

Plaintiff.” Once this claim was resolved during summary judgment, Goines remained only as a nominal defendant so plaintiff could legally reach defendant to enforce the remaining claims brought against defendant. Therefore, defendant’s assertion that Goines’s summary judgment mooted defendant’s motion is incorrect. Most of plaintiff’s claims for relief asked the court to compel defendant to pay the estate. The trial court did not err in proceeding to trial after resolving the one claim against Goines.

Finally, defendant does not challenge the findings of fact or conclusions of law in the final order, but instead argues it is void. As we have determined the summary judgment was interlocutory and the trial court retained jurisdiction, the trial court had subject matter jurisdiction to enter the final order. Because only the final order’s validity is challenged and the findings and conclusions are unchallenged, we do not consider whether the trial court erred in its final ruling.

III.

For the foregoing reasons, we affirm the trial court’s judgment.

AFFIRMED.

Judge MURPHY concurs in result only.

Judge FLOOD concurs.

Report per Rule 30(e).