2016 IL App (4th) 150880-U

NO. 4-15-0880

FILED
August 30, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: Estate of ORIN CHASTAIN, Deceased, KEVIN L. VARNER, Petitioner-Appellant, v. MARINE BANK, Executor of the Estate of Orin Chastain, Deceased, and as Trustee of Orin Chastain's Living Trust; and CONNIE JO BAPTIST and VICKIE BOUNDS, Respondents-Appellees.	))))))))))	Appeal from Circuit Court of Sangamon County No. 11P503 Honorable Patrick W. Kelley, Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Knecht and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's judgment granting the motions for summary judgment where there was no (1) genuine issue of material fact regarding decedent's testamentary capacity to amend his will, and (2) evidence of undue influence.

¶ 2 In August 2011, decedent, Orin Chastain, passed away, leaving a living-trust declaration and last will and testament dated January 2, 2003, as amended and modified on July 27, 2010, November 9, 2010, and December 15, 2010. The third amendment to the will expressly named respondents Connie Jo Baptist and Vickie Bounds, decedent's daughters, as the beneficiaries of the estate. In December 2011, petitioner, Kevin L. Varner, filed a petition alleging he was decedent's son and seeking to amend or correct the order of heirship naming Baptist and Bounds decedent's only heirs. Ultimately, Varner sought to challenge the validity of

the second and third amendments to the will. In April 2015, Baptist and Bounds filed a motion for summary judgment, alleging no genuine issue of material fact existed regarding decedent's testamentary capacity to execute the third amendment to the will. In May 2015, respondent Marine Bank, as executor of decedent's estate, filed a motion for summary judgment and adopted the arguments set forth by Baptist and Bounds. In October 2015, the trial court granted respondents' motions for summary judgment.

¶ 3 On appeal, petitioner argues the trial court erred in granting respondents' motions for summary judgment. We affirm.

¶ 4 I. BACKGROUND

¶ 5 A. Decedent's Estate Plan

¶ 6 In January 2003, decedent executed a living-trust declaration and last will and testament (the will). The will placed decedent's real and personal property and assets into a living trust, and article two named the following trustees, to serve in the order listed: (1) decedent, with right of selection; (2) Baptist and Bounds; and (3) Guarantee Trust Company. Article nine of the will governed the use and disposition of the trust property following decedent's death. All personal property valued less than $10,000 was to pass to Baptist and Bounds, with the residue of the estate passing "*per stirpes* to [decedent's] lineal descendants then living." In July 2010, decedent amended article two, removing Baptist and Bounds as successor trustees and naming Marine Bank as the alternative trustee.

¶ 7 B. Guardianship Proceedings

¶ 8 In April 2010, Baptist and Bounds sought appointment as guardians of decedent's person and estate. The petition alleged decedent left a senior living facility to move in with "a friend" and was unable to care for himself or his finances. That same month, attorney Daniel

Kepner was appointed as guardian *ad litem* (GAL) for decedent. In May 2010, the trial court appointed Baptist and Bounds temporary guardians of decedent. However, in September 2010, the court entered an agreed order, providing decedent was "not in need of a [g]uardian of his [e]state at this time." At the same time, the order placed restrictions on decedent's ability to withdraw or transfer sums of money in excess of $100,000.

¶ 9 In November 2010, decedent amended article nine of the will to provide that the residue of his estate would be divided, with Baptist and Bounds each receiving 35% of the residue and Sharon McCollum receiving 30% of the residue. Based on this amendment and other incidents not relevant to this appeal, McCollum was eventually charged with a felony count of financial exploitation pursuant to section 16-1.3(a) of the Criminal Code of 1961 (720 ILCS 5/16-1.3(a) (West 2010)).

¶ 10 On December 15, 2010, decedent again amended article nine of the will to provide the residue pass, *per stirpes*, to Baptist and Bounds, with each receiving 50% of the residue. That same month, Baptist and Bounds again filed a petition for their appointment as temporary guardians of decedent, alleging he was "physically unable to care for himself" and was "also unable to take care of his financial matters." On December 22, 2010, the trial court, based on the agreement of the parties and on its finding that guardianship was necessary for the welfare and protection of decedent, entered an order appointing Baptist and Bounds decedent's temporary guardians.

¶ 11 In early 2011, proceedings to appoint a permanent guardian began. The record does not contain the amended petition for plenary guardianship; however, the record does contain decedent's answer, which admitted all allegations in the petition and further stated decedent's "inability to care for his person and estate is because of his physical illness, and that

when he recovers, he should be able to resume management of his own affairs." In February 2011, the GAL filed a report indicating decedent had no objection to Baptist and Bounds acting as guardians of his person and estate. The report noted decedent was "alert and well aware of his surrounding[s] and his situation." That same month, the court appointed Baptist and Bounds permanent guardians of decedent's person and estate.

¶ 12 C. Probate Proceedings

¶ 13 In August 2011, decedent passed away. In September 2011, Marine Bank, as executor, filed a petition for probate of decedent's will. The petition named Baptist and Bounds as decedent's only heirs and legatees. That same month, the trial court entered an order declaring Baptist and Bounds decedent's only heirs at law.

¶ 14 In December 2011, Varner filed a petition alleging he was decedent's son and seeking to amend or correct the order of heirship. In March 2012, Varner filed a petition to assert a claim as pretermitted heir and to contest the validity of the second and third amendments to the will. In November 2014, Varner, Marine Bank, Baptist, and Bounds stipulated to the entry of summary judgment declaring Varner to be decedent's son.

¶ 15 1. *Respondents' Motions for Summary Judgment*

¶ 16 In April 2015, Baptist and Bounds filed a motion for summary judgment, alleging no genuine issue of material fact existed regarding (1) decedent's testamentary capacity to execute the third amendment to the will, and (2) undue influence. In May 2015, respondent Marine Bank filed a motion for summary judgment and adopted the arguments set forth by Baptist and Bounds. In support of their motion, Baptist and Bounds filed a sworn discovery deposition given by attorney Mark Rabin.

¶ 17 2. *Rabin's Deposition*

¶ 18 According to Rabin, he first met decedent in November 1965, when he rented an apartment in a building decedent owned. Decedent became Rabin's first client in April 1966, and Rabin did legal work for decedent for more than 40 years. Rabin stated his relationship with decedent was friendly and "a visit to [his] office involved [a] discussion of whatever the legal matter was and then a discussion of just [']how are you, what's going on in the world, and how's life.['] "

¶ 19 Over the years, Rabin represented decedent in real-estate and transactional matters. Rabin also represented decedent in his divorce from his wife, Baptist's and Bounds's mother. In 1999, Rabin prepared a will for decedent, and in 2003 Rabin prepared the trust and will at issue in the instant cause. Decedent never mentioned any children other than Baptist and Bounds.

¶ 20 Rabin identified the first and second amendments to decedent's 2003 will and acknowledged he understood a different attorney prepared those amendments. According to Rabin, in September or October through December 2010, he spoke to decedent two or three times on the phone and saw decedent twice. Decedent was alone when he spoke with him on the phone. During a December 4, 2010, phone call, decedent "made it clear he wanted to change things around." On December 7, 2010, Rabin visited decedent in a Missouri nursing home to discuss the changes decedent wished to make. On December 7, 2010, decedent was weak and had just had a partial amputation of his leg. On that date, decedent was alert, knew Rabin, knew his children (Baptist and Bounds), knew what his estate was worth, and "knew where every penny was." Following this meeting, Rabin prepared the third amendment to decedent's will.

¶ 21 On December 15, 2010, Rabin again traveled to Missouri to meet with decedent in the hospital. According to Rabin, he spoke with decedent alone for an hour to ascertain

whether decedent was competent. At that time, decedent knew his daughters, sons-in-law, and grandchildren. In Rabin's opinion, decedent was aware of his surroundings, knew the objects of his bounty, and knew the nature of his property. During this conversation, decedent specifically mentioned transferring title of a new Cadillac to McCollum and his real-estate investments in farmland.

¶ 22 According to Rabin, decedent was upset about transferring money to an account with McCollum's name and transferring the Cadillac's title to her. Rabin said there was no indication Baptist or Bounds told decedent to execute the third amendment. Rabin stated, "I did everything I could to satisfy myself that it was *** his desire to do this." Once Rabin was satisfied decedent was competent, he and Belinda Hall witnessed decedent's execution of the third amendment.

¶ 23 3. *Varner's Filings*

¶ 24 On May 26, 2015, counsel for Varner filed: (1) two motions to strike the respondents' motions for summary judgment, and (2) a motion for an extension of time should the court deny the motions to strike. Also on May 26, 2015, Varner filed *pro se* the following: (1) "response to [respondents'] motion for summary judgment and memorandum of law in support of [petitioner's] motion to deny [respondents'] motion for summary judgment," (2) "response to motion for summary judgment on testamentary capacity undue influence [*sic*]," (3) "[petitioner's] motion to deny [respondents'] motion for summary judgment on testamentary capacity and undue influence," and (4) a letter to the court. None of these filings included affidavits, sworn statements, deposition transcripts, or certified copies of any relevant documents. In June 2015, counsel filed a motion for leave to withdraw as counsel for Varner, which the court granted.

¶ 25 Marine Bank filed a reply to Varner's response to the motion for summary judgment, which included attorney Rabin's sworn affidavit. Varner then responded to this filing and also filed (1) memoranda of law in support of various motions filed by previous counsel, and (2) a motion for summary judgment. None of these filings included pertinent affidavits, sworn statements, deposition transcripts, or certified copies of any relevant documents.

¶ 26 On October 19, 2015, Baptist and Bounds filed a response to Varner's motion for summary judgment and an "omnibus response" to Varner's various pleadings. Included with these filings was the GAL's sworn affidavit. The affidavit states Kepner was appointed as GAL on April 7, 2010. Between that date and February 4, 2011, Kepner had several in-person conversations with decedent. The affidavit included the following statement:

> "Based upon those interactions and discussion with [decedent], I believed he had the mental capacity to execute a [w]ill in that he appeared to know the natural objects of his bounty, *i.e.*, his relatives, and he was aware, in general, of the nature and extent of his property and had the ability to make a disposition of his property in accordance with some plan formulated in his mind."

¶ 27 D. Trial Court's Ruling on Summary Judgment

¶ 28 Following an October 21, 2015, hearing, the trial court granted respondents' motions for summary judgment while denying petitioner's motion for summary judgment. The court acknowledged respondents' motions for summary judgment were filed in response to Varner's petition, which asserted: (1) a claim as pretermitted heir, (2) lack of testamentary capacity, and (3) undue influence. As to the testamentary-capacity claim, the court found decedent was competent at the time he requested the third amendment to be prepared and at the

time of its execution. The court based this finding on the "undisputed" evidence from Rabin's deposition testimony, Rabin's affidavit, and the GAL's affidavit. The court further found no evidence was presented to show decedent's free will was impaired at the time he executed the third amendment. The court concluded Varner "failed to sustain his burden in showing [decedent] did not have the requisite mental capacity or that he was unduly influenced, [and] the Third Amendment stands as a valid amendment." Accordingly, the court granted respondents' motions for summary judgment.

¶ 29 This appeal followed.

¶ 30 II. ANALYSIS

¶ 31 On appeal, we discern the following claims raised by Varner: (1) the trial court erred in finding no genuine issue of material fact existed as to decedent's testamentary capacity and the undue-influence claim; (2) the third amendment was a transfer of money in violation of the September 2010 agreed order; (3) the third amendment was invalid under Missouri law; and (4) a conflict of interest existed regarding Marine Bank and counsel for Marine Bank. Respondents argue the court properly granted summary judgment where there was no (1) genuine issue of material fact regarding decedent's testamentary capacity to execute the third amendment and (2) evidence of undue influence. We first review the court's grant of summary judgment.

¶ 32 A. Summary Judgment

¶ 33 "Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to a judgment as a matter of law." *In re Estate of Harn*, 2012 IL App (3d)

110826, ¶ 25, 972 N.E.2d 1227. Summary judgment is a drastic measure, to be granted only where the right of the moving party is clear. *Id.* We review summary-judgment rulings *de novo*. *Id.*

¶ 34 1. *Evidence Before the Trial Court*

¶ 35 Varner contends the affidavits and deposition on which the trial court relied contain conclusions and hearsay, which are inadmissible under Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013). Our review of the record reveals Varner never raised this claim before the trial court. "It is well-settled law in Illinois that issues, theories, or arguments not raised in the trial court are forfeited and may not be raised for the first time on appeal." *In re Estate of Chaney*, 2013 IL App (3d) 120565, ¶ 8, 1 N.E.3d 1231. Although Varner, in his various filings, asserted Rabin testified falsely during his deposition, Varner never contended the deposition contained inadmissible hearsay or conclusory statements. Therefore, Varner has forfeited this claim on appeal.

¶ 36 We do note, however, it is appropriate for the trial court to consider sworn deposition testimony in ruling on a motion for summary judgment. *Cnota v. Palatine Area Football Ass'n*, 227 Ill. App. 3d 640, 652, 592 N.E.2d 196, 204 (1992). Respondents' motions for summary judgment were supported by Rabin's sworn deposition testimony and Rabin's and Kepner's affidavits. In contrast, none of Varner's filings contained any relevant affidavits, sworn statements, deposition transcripts, or certified copies of any relevant documents. "Generally, an averment made in an affidavit or deposition in support of a motion for summary judgment that is not controverted by a counteraffidavit or counterdeposition will be taken as true, notwithstanding the opposing party's contrary allegations in his complaint or answer that merely purport to establish *bona fide* issues of fact." *In re Estate of Allen*, 365 Ill. App. 3d 378, 387, 848 N.E.2d

202, 212 (2006). Therefore, taking the unrebutted evidence from the deposition and affidavits as true, we turn now to the question of decedent's testamentary capacity.

¶ 37 2. *Testamentary Capacity*

¶ 38 "Every person who has attained the age of 18 years and is of sound mind and memory has power to bequeath by will the real and personal estate which he has at the time of his death." 755 ILCS 5/4-1 (West 2010). To set aside a will based on lack of testamentary capacity, the petitioner must prove that, at the time of execution of the will, the testator did not possess the ability to know and understand the natural objects of one's bounty, the nature and extent of one's property, and to dispose of that property according to some plan formed in one's own mind. *Harn*, 2012 IL App (3d) 110826, ¶ 26, 972 N.E.2d 1227. A witness may give his or her opinion regarding the soundness of the testator's mind, provided that the witness had the opportunity to converse or transact with the testator to form that opinion. *Id.*

¶ 39 Here, Rabin's deposition testimony established he spoke with decedent on the phone two or three times and met with him in person twice. According to Rabin, he traveled to Missouri on December 7, 2010, to discuss the changes decedent wished to make. At that time, decedent was alert, knew Rabin, knew his children (Baptist and Bounds), and knew what his estate was worth. Following this meeting, Rabin drafted the third amendment to the will. Rabin again traveled to Missouri on December 15, 2010, and spoke with decedent until Rabin was satisfied decedent had the capacity to validly execute the third amendment.

¶ 40 Varner argues this testimony does not establish that decedent knew the objects of his bounty because decedent identified only Baptist and Bounds as his children. However, we are unconvinced that decedent's failure to mention Varner shows his incapability to know the natural objects of his bounty. See *George v. Moorhead*, 399 Ill. 497, 503, 78 N.E.2d 216, 219

(1948) ("To make a valid will it is not necessary that the testator actually knew, or recalled, the natural object of his bounty, but, as we have stated, whether he had the capacity to know it."). Rabin's testimony clearly shows decedent had the *capacity* to know the objects of his natural bounty. Decedent's failure to mention Varner speaks to nothing more than his intention to leave his estate solely to Baptist and Bounds, effectively disinheriting Varner. This intention and his acknowledgment of Baptist and Bounds as the children to whom he wished to leave his estate was consistent with every discussion Rabin had with decedent regarding his estate planning.

¶ 41 Even though Varner failed to support his opposition to the motions for summary judgment with affidavits, depositions, or any relevant sworn documents, we do acknowledge guardianship proceedings were instituted around the time of the execution of the third amendment. However, given Rabin's uncontradicted deposition testimony, we do not think the mere existence of guardianship proceedings is enough to preclude summary judgment on this issue. This is particularly true in light of the fact the guardianship proceedings were clearly premised on decedent's *physical* inability to care for his person or financial issues. As noted, decedent had recently had part of his leg amputated and was indisputably in weak physical condition. A testator's physical condition is not the same as a testator's mental capacity, and Rabin's deposition testimony establishes decedent possessed the requisite mental capacity to execute the third amendment. See *In re Estate of Osborn*, 234 Ill. App. 3d 651, 658, 599 N.E.2d 1329, 1333 (1992). Additionally, the GAL's affidavit also contained his opinion that decedent was alert, knew the objects of his bounty, understood the nature of his estate, and was capable of making a disposition of his property. The undisputed evidence properly submitted in support of the motions for summary judgment clearly shows decedent had the requisite mental capacity to

execute the third amendment to the will. Accordingly, the court properly entered summary judgment in favor of respondents.

¶ 42 3. *Undue Influence*

¶ 43 Varner alleges multiple claims regarding undue influence, pointing to a conspiracy between Rabin, Baptist, and Bounds to disinherit him and pointing to the evidence gathered in the criminal case against McCollum.

¶ 44 What constitutes undue influence depends upon the specific circumstances of each case. *In re Estate of Hoover*, 155 Ill. 2d 402, 411, 615 N.E.2d 736, 740 (1993). "The exercise of undue influence may be inferred in cases where the power of another has been so exercised upon the mind of the testator as to have induced him to make a devise or confer a benefit contrary to his deliberate judgment and reason." *Id.*

¶ 45 We agree with the trial court that no evidence in the record shows any sort of collusion or undue influence by Rabin, Baptist, or Bounds. Varner also argues Baptist and Bounds had powers of attorney and control of decedent's estate and therefore somehow exercised undue influence such that decedent's free will was overborn when he signed the third amendment. The record clearly shows neither Rabin, Baptist, nor Bounds had ever heard of Varner until he sought to contest the will following decedent's death in 2011. Moreover, Rabin's deposition testimony clearly shows he spoke to decedent by phone only after Baptist and Bounds left the room and he was alone with decedent during both of their in-person meetings regarding the third amendment. Varner makes much of the fact that either Baptist or Bounds would answer the phone when Rabin called before putting decedent on the line and exiting the room. This is insufficient to rise to the level of undue influence. See *In re Estate of Letsche*, 73 Ill. App. 3d 643, 646, 392 N.E.2d 612, 614 (1979) (no undue influence where conservator of testator's estate

did not participate in the preparation of the will). Absent any evidence of a conspiracy, Varner has failed to present a question of material fact regarding Baptist and Bounds having exerted undue influence on decedent.

¶ 46 Varner also argues the documentation of the criminal charges brought against McCollum for financial exploitation of decedent somehow translates into inferential or circumstantial evidence of undue influence. We see absolutely no relevance of this evidence with respect to the claim of undue influence regarding the third amendment to the will.

¶ 47 Our review of the record reveals no evidence that decedent's free will was impaired at the time he executed the third amendment. Accordingly, we affirm the trial court's order granting summary judgment in favor of respondents.

¶ 48 B. Transfer Under the September 2010 Agreed Order

¶ 49 Varner argues the third amendment to the will in effect resulted in a "transfer" of money in excess of $100,000, in violation of the September 2010 agreed order. Varner cites no authority to support this position. Litigants proceeding *pro se* are not excused from the requirements of appellate practice. *Lewis v. Heartland Food Corp.*, 2014 IL App (1st) 123303, ¶ 5, 17 N.E.3d 219. Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016) requires an appellant's brief to include "the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Thus, Varner has forfeited this claim. *Lewis*, 2014 IL App (1st) 123303, ¶ 6, 17 N.E.3d 219.

¶ 50 C. Validity Under Missouri Law

¶ 51 Varner finally contends the third amendment was executed in Missouri and, therefore, Missouri law regarding additions to trusts applies. In support of this argument, Varner relies on *Rose v. St. Louis Union Trust Co.*, 43 Ill. 2d 312, 253 N.E.2d 417 (1969). We do not

find *Rose* persuasive as the parties in *Rose* did not dispute that Missouri law applied in that case. Varner cites no other authority for this position. However, we conclude Missouri law regarding additions to trusts has no relevance regarding whether decedent validly executed the third amendment to the will (*i.e.*, whether decedent had the requisite testamentary capacity and was free from undue influence). Accordingly, we decline to address Varner's arguments regarding Missouri law.

¶ 52 D. Conflict of Interest

¶ 53 Varner alleges a conflict of interest exists because the director of Marine Bank and the managing partner of the law firm hired to represent Marine Bank are the same person. However, Varner cites no authority to support this position. Accordingly, we find this claim has been forfeited on appeal. *Lewis*, 2014 IL App (1st) 123303, ¶ 6, 17 N.E.3d 219.

¶ 54 Varner also contends Marine Bank breached its fiduciary duty as trustee when it joined the motion for summary judgment filed by Baptist and Bounds. We note Marine Bank filed an independent motion for summary judgment and merely adopted the memorandum in support thereof filed by Baptist and Bounds. According to Varner, this action breached a fiduciary duty to "deal impartially with all beneficiaries [of a trust]." *Bangert v. Northern Trust Co.*, 362 Ill. App. 3d 402, 407, 839 N.E.2d 640, 645 (2005). However, as Marine Bank correctly points out, Varner is not a beneficiary under the third amendment to the will. Moreover, Marine Bank, as executor, must "defend the terms of the will and the best interests of the estate." *In re Estate of Kirk*, 292 Ill. App. 3d 914, 919, 686 N.E.2d 1246, 1249 (1997). There was nothing improper about Marine Bank agreeing with the position taken by Baptist and Bounds in their memorandum in support of the motion for summary judgment. Therefore, we conclude this claim is without merit.

¶ 55 III. CONCLUSION

¶ 56 For the reasons stated, we affirm the trial court's judgment.

¶ 57 Affirmed.