

THIRD DIVISION
September 29, 2017

No. 1-16-2971

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RAQUEL MARRERA,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 14 CH 9343
)	
JOSEPH GIRALAMO, individually and as Trustee)	
under the Ralph Marrera Testamentary Trust, and)	
FILMAR INC. OF CHICAGO, an Illinois corporation,)	Honorable
)	Celia G. Gamrath,
Defendants-Appellees.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Cobbs and Justice Fitzgerald Smith concurred in the judgment.

ORDER

- ¶ 1 *Held:* The judgment of the circuit court of Cook County is affirmed; the court did not err in granting summary judgment against the plaintiff because there was no genuine issue of material fact.
- ¶ 2 Plaintiff, Raquel Marrera, filed a complaint in the circuit court of Cook County alleging defendant, Joseph Giralamo, breached his fiduciary duty as trustee of the Ralph Marrera

Testamentary Trust (Trust), and also requesting an accounting for defendant's actions while acting as trustee. Following cross-motions for summary judgment, the trial court granted summary judgment to defendant on the count of breach of fiduciary duty and dismissed plaintiff's second count as moot because defendant agreed to provide plaintiff with an accounting of his actions as trustee. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4 The Trust was created by a testamentary gift from Ralph Marrera's (Ralph) brother, Phillip Marrera (Phillip). The Trust is for Ralph's benefit, and when Ralph passes away the remainder of the Trust will be devised to Phillip's surviving descendant, as per intestacy. Plaintiff is Ralph's daughter, and is Phillip's surviving heir after Ralph. In 2010, Ralph filed a complaint against plaintiff, alleging misconduct on her part while she was acting as trustee. While the litigation was ongoing, plaintiff and Ralph approached defendant requesting he be named a co-trustee of the Trust. In November 2011, the litigation was resolved short of trial, plaintiff resigned as trustee, and defendant was appointed sole trustee of the Trust. Filmar Inc. of Chicago is a corporate entity solely owned by the Trust. Defendant is the president and registered agent for Filmar Inc.

¶ 5 In June 2014, plaintiff filed a two count complaint alleging defendant breached his fiduciary duty as trustee of the Trust and demanding an accounting of the Trust. In June 2015 plaintiff filed a petition for preliminary injunction seeking removal of defendant as trustee. The trial court held a hearing in July 2015 on this petition and denied it. Plaintiff proceeded *pro se*, and at the hearing defendant presented his case first.

¶ 6 Defendant testified and offered evidence explaining his uses of Trust assets. He testified the Trust had insufficient liquid assets to pay its obligations, leaving him to choose which

obligations to pay and which to delay payment. Plaintiff argued defendant breached his fiduciary duty by paying certain parties prior to paying taxes on the properties owned by the Trust, and alleged defendant paid parties who were not owed money. However, defendant testified he determined the obligations were legitimate by checking with Ralph before making payments, and that the Trust lacked sufficient liquid assets to pay the taxes on Trust properties for the four preceding years.

¶ 7 Plaintiff argued defendant engaged in self-dealing by making payments to himself from the Trust. Defendant testified he disbursed Trust funds to himself in part for his reasonable compensation as a trustee. Defendant testified that when he agreed to become trustee and met with plaintiff and Ralph, he drafted an engagement letter he sent to both plaintiff and Ralph. Defendant agreed to a rate of compensation lower than what he usually charges for trust administration. Defendant additionally testified he made a loan to the Trust to make a timely tax payment, and that he repaid his loan from Trust assets.

¶ 8 Plaintiff also argued defendant breached his fiduciary duty by failing to appeal tax assessments. However, defendant testified he had hired a tax attorney to appeal tax assessments on Trust properties. Defendant also testified he was unaware of the existence of a tax rebate, but that upon becoming aware he applied for and received the tax rebate for the Trust.

¶ 9 Defendant testified about rental income from Trust properties. Plaintiff questioned whether defendant was collecting rents from tenants occupying a Trust property. Defendant stated Ralph collected the rental income, Ralph informed defendant of his monthly collections, and any net revenue from the rent either went to repairs on the property or for Ralph's comfort.

¶ 10 Defendant further testified about the sale of certain Trust assets. One property was sold for substantially less than it was purchased for. Plaintiff questioned whether defendant received any offers to purchase the property for more than the purchase price and defendant answered he

had. Defendant then explained that while he received a number of offers on the property, when those prospective buyers examined the property they rescinded their offers. Due to zoning restrictions, the property was unproductive and defendant eventually sold the property to a buyer who desired to demolish the structure and make a parking lot.

¶ 11 Plaintiff, representing herself, questioned defendant concerning his actions. Plaintiff failed to provide the court with evidence contradicting defendant's explanations for his management of the Trust. The court found defendant's testimony credible, found defendant's decisions concerning disbursements and sales of Trust assets fell under the business judgment rule, and denied plaintiff's petition.

¶ 12 Defendants filed a motion for summary judgment in February 2016, and plaintiff filed her own motion for partial summary judgment in April 2016. The court held a hearing on July 21, 2016 on the summary judgment motions, granted defendant's motion in part, and dismissed the second count of plaintiff's complaint as moot. No court reporter was present for the July 21 hearing. The court issued a written ruling on July 22, 2016 memorializing its oral ruling. On August 17, 2016, plaintiff filed three motions: one to vacate the July 22 order, one to amend/alter the July 22 order, and one to reconsider the July 22 order. The court denied plaintiff's motion to vacate judgment on October 6, 2016. On November 3, 2016, the court denied plaintiff's other two motions to reconsider the order, and to amend or alter the order. Plaintiff filed her notice of appeal on November 10, 2016.

¶ 13 ANALYSIS

¶ 14 Plaintiff maintains on appeal that there remain contested issues of material fact as to whether defendant breached his fiduciary duty. Plaintiff additionally argues the trial court erred by dismissing her request for an accounting of the Trust as moot, even though defendant agreed to furnish her with such an accounting.

¶ 15

Jurisdiction

¶ 16 We first address the issue of our jurisdiction over this case. Defendants argue we do not have jurisdiction because on October 6, 2016 the trial court denied the motion to vacate the judgment. Defendant argues that successive posttrial motions do not stay the time to file an appeal and that the notice of appeal filed by plaintiff on November 10, 2016 was untimely. However the trial court did not issue a ruling on plaintiff's two other timely filed postjudgment motions. Illinois Supreme Court Rule 303(a) provides that a party's

“notice of appeal must be filed *** within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order, irrespective of whether the circuit court had entered a series of final orders that were modified pursuant to postjudgment motions.” Ill. S. Ct. R. 303(a) (eff. July 1, 2017).

Under a plain reading of Rule 303(a) the appellate court has jurisdiction over this appeal because the trial court's order became final and appealable on November 3, 2016 when the last of the three timely filed postjudgment motions was ruled upon. Rule 303(a) makes clear:

“no request for reconsideration of a ruling on a postjudgment motion will toll the running of the time within which a notice of appeal must be filed under this rule.”

Id.

The rule does not prohibit a party from filing multiple postjudgment motions within 30 days of the trial court's order. “Implicit in the decision is the court's retention of complete jurisdiction until after the disposition of the last timely post-trial motion. As long as any party's timely post-trial motion remains undisposed, the underlying judgment is not final, notice of appeal is premature and complete jurisdiction remains in the circuit court.” *In re Marriage of Uphoff*, 99 Ill. 2d 90, 95 (1983). The trial court's October 6, 2016 order did not dispose of all posttrial

motions, it only disposed of one of plaintiff's three motions. The trial court denied those latter two motions in its November 3, 2016 order. The trial court hence retained jurisdiction over the matter until its November 3 order. Therefore, plaintiff's appeal from the November 3 order was timely filed on November 10, 2016.

¶ 17 Standard of Review

¶ 18 Plaintiff appeals the trial court's order granting summary judgment in favor of defendants. We review *de novo* appeals from summary judgment rulings. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163 (2007). "Summary judgment is appropriate where 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002) (quoting 735 ILCS 5/2-1005(c) (West 1998)). For a plaintiff to survive a motion for summary judgment, the "nonmoving party must present a factual basis that would arguably entitle the party to a judgment." *Id.*

¶ 19 Breach of Fiduciary Duty

¶ 20 Plaintiff alleged defendant breached his fiduciary duty as trustee of the Trust, raising a number of complaints with defendant's management. At the hearing on plaintiff's motion for injunctive relief defendant provided evidence explaining his use of Trust funds. Plaintiff posited defendant improperly gave preference to certain creditors by making payments to them over obligations to pay taxes. However, plaintiff failed to provide any evidence defendant's actions fell outside the scope of the business judgment rule. The trial court found credible defendant's explanation that he verified the legitimacy of the obligations and the Trust lacked sufficient liquid assets to pay all obligations, necessitating paying certain obligations and delaying payment of other obligations. Plaintiff failed to present evidence defendant made illegitimate payments.

¶ 21 Plaintiff also failed to provide a factual basis for her allegation defendant engaged in self-dealing. The trial court found the engagement agreement along with the testimony presented at the injunction hearing explained defendant's rate of compensation for acting as a trustee and that this compensation was reasonable. Defendant also accounted for a payment to himself as a repayment for a loan he made to the Trust. Plaintiff failed to provide evidence defendant paid himself from Trust assets outside the scope of his reasonable compensation.

¶ 22 Plaintiff additionally did not provide evidence to refute defendant's testimony he hired a tax attorney and received a tax rebate. Plaintiff alleged defendant failed in his duty as trustee by not appealing tax assessments and by not reclaiming a tax rebate. However, defendant provided evidence he had done both tasks. Plaintiff has not provided a factual basis refuting defendant.

¶ 23 Although plaintiff alleged defendant failed to collect rental income for Trust properties, plaintiff failed to controvert defendant's testimony he was not to act as property manager. Defendant testified Ralph collected rents on one property and that after paying for renovations the little remaining profit was kept by Ralph. Plaintiff did not provide evidence tenants were staying rent free.

¶ 24 Defendant also testified about his management of unproductive Trust assets. One Trust property had to be sold for significantly less than it was purchased for. Plaintiff asked defendant whether he received offers on the property that exceeded the purchase price. Defendant answered he had, but that those offers were all rescinded upon inspection of the property. Due to the property's prior use and zoning laws, the property was unproductive until defendant sold it. Plaintiff did not give any evidence that defendant could have sold the property for a greater amount or that the property could have been put to some other productive use.

¶ 25 Plaintiff did not show defendant committed any fraud, illegal act, or had a conflict of interest. The business judgment rule shields defendant from liability for any honest errors or

mistakes in judgment when plaintiff fails to prove “any wrongdoing bordering on fraud, illegality, or conflict of interest.” *Stamp v. Touche Ross & Co.*, 263 Ill. App. 3d 1010, 1014 (1993). Plaintiff therefore failed to provide a material basis sustaining her allegation defendant breached his fiduciary duty when acting as trustee of the Trust.

¶ 26 Plaintiff’s Request for an Accounting of Trustee’s Actions

¶ 27 The trial court dismissed count II of plaintiff’s complaint as moot because defendant agreed to provide plaintiff the relief requested. “An issue is moot if no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief.” *Wheatley v. Board of Education of Township High School District 205*, 99 Ill. 2d 481, 484-85 (1984) (finding issue moot where the plaintiff already received the relief demanded). Here plaintiff requested defendant provide her with records accounting for defendant’s actions as trustee. Defendant agreed to plaintiff’s demands in open court. Therefore, there was no remaining controversy as to plaintiff’s second count and the trial court did not err in dismissing this claim as moot.

¶ 28 After defendant provided evidence for why he did not breach his fiduciary duty in managing the Trust, plaintiff failed to provide any evidence to the contrary. Plaintiff failed to provide a factual basis that would arguably entitle her a judgment in her favor, as she was obligated to do so to survive a motion for summary judgment. *Robidoux*, 201 Ill. 2d at 335. We therefore affirm the circuit court’s order granting summary judgment in favor of defendant and dismissing plaintiff’s demand for an accounting as moot.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

¶ 31 Affirmed.