

RENDERED: FEBRUARY 28, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000709-MR

GERALDINE H. ALLEN

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. McDONALD-BURKMAN, JUDGE
ACTION NO. 11-CI-000290

EMILY M. CONNER (now deceased) and
OHIO CASUALTY INSURANCE COMPANY

APPELLEES

OPINION AND ORDER

AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, COMBS, AND NICKELL, JUDGES.

COMBS, JUDGE: Geraldine H. Allen appeals the April 8, 2013, order of the Jefferson Circuit Court dismissing her personal injury action against her alleged tortfeasor, Emily M. Conner, for failure to revive it within one year of Conner's death. After our review, we affirm.

While driving along U.S. Highway 42 in Prospect, Kentucky, on August 27, 2009, Allen and Conner collided. Allen alleged that she was injured by Conner's negligence and filed an action to recover damages on January 13, 2011. Conner was duly served with a summons and a copy of the complaint on January 28, 2011. Conner advised her insurer, Ohio Casualty Insurance Company, of the pending action. Laura Harp-Biven, a senior casualty specialist with Liberty Mutual Group, was assigned to act as the claim adjuster. Allen's counsel communicated directly with Harp-Biven and gave an open extension of time within which Conner could file an answer and respond to the written discovery requests that accompanied the complaint. Harp-Biven understood that she was to await Allen's demand package.

Conner died on August 13, 2011, while the litigation was pending. Commonwealth Bank & Trust was appointed executor of Conner's estate by order of the Jefferson District Court on September 13, 2011. Conner had changed automobile liability carriers in June 2011, but neither Ohio Casualty nor Harp-Biven was aware that Conner had died. Ohio Casualty had not yet retained an attorney to represent Conner in the litigation.

On October 30, 2012, Harp-Biven received a demand package from Allen's attorney, and on November 1, 2012, she retained the services of Attorney David Sage to defend Conner in the proceedings. On November 14, 2012, while trying to retrieve relevant contact information for the insured from Commonwealth Bank & Trust Company, Sage and Harp-Biven learned for the first time that

Conner had died more than a year before. Harp-Biven advised Allen's attorney that Conner was deceased.

On December 20, 2012, Attorney Sage answered Allen's complaint and asserted that her claim was barred by the provisions of Kentucky Revised Statute[s] (KRS) 395.278, since an application to revive the action had not been made within one year of Conner's death. On January 10, 2013, Allen filed a motion to revive the action and requested leave to file an amended complaint that included allegations against Ohio Casualty for unfair claims settlement practices and violations of Kentucky's Consumer Protection Act.

In response, Attorney Sage filed a motion to dismiss. In the accompanying memorandum, counsel explained that the action against Conner had ceased to exist upon her death and that Allen had failed to revive the action within the mandatory limitations period. Counsel alleged that there was no longer anything left to revive or to amend. Attached to the motion and supporting memorandum were affidavits of Christopher Nunnelley, Senior Vice-President at Commonwealth Bank & Trust Company, and Laura Harp-Biven, the claims adjuster; a copy of the petition for probate of the will and appointment of an executor; and the resulting court order.

Ohio Casualty also responded to Allen's motion to revive and request to amend the complaint, arguing that Allen could not show the reckless or intentional behavior necessary to support a bad faith claim. Ohio Casualty noted that its representative had no knowledge of Conner's death until after the

limitations period had run. Furthermore, because coverage had ceased, there could be no bad faith as a matter of law. Finally, Ohio Casualty contended that an action under the provisions of the Consumer Protection Act could only be brought by the purchaser of the insurance – not by a third party.

After a hearing, the court denied Allen’s motion to revive the action and granted the motion to dismiss. The court found that neither the insurance adjuster nor counsel had knowledge of Conner’s death before the expiration of the limitations period. Therefore, there was no basis to raise estoppel from asserting limitations as a defense. Nor was there any inkling of a fraudulent concealment or false representation by the insurance company’s representative. Citing the provisions of KRS 395.278, the court ordered the action dismissed. This appeal followed.

When a party to litigation pending in a Kentucky court dies, the action is abated – unless and until the action is revived by substituting the decedent’s representative. The provisions of KRS 395.278 direct that the “application to revive an action . . . *shall be made* within one (1) year after the death of a deceased party.” (Emphasis added.) KRS 395.278 is “a statute of limitation, rather than a statute relating to pleading, practice or procedure, and the time limit within this section is mandatory and not discretionary....” Therefore, neither a court nor a party may extend the one-year statute of limitations. *Snyder v. Snyder*, 769 S.W.2d 70, 72 (Ky.App. 1989). If an action is not revived against the administrator of the

decendent's estate and the administrator substituted as the real party in interest within one year of a defendant's death, the action must be dismissed. *Id.*

Whether an action has been timely revived is a matter of law. Since Conner died on August 13, 2011, the deadline for reviving the action was August 13, 2012. In this case, an executor for Conner's estate was duly appointed and the estate was admitted to probate. However, timely application to revive the civil action against Conner's representative was not filed. As stated in the trial court's order, "[a]bsent the showing of some act or conduct which misleads or deceives the plaintiff . . . the action must be dismissed. *Munday v. Mayfair Diagnostic Laboratory*, 831 S.W.2d 912, 914 (Ky. 1992)."

Allen contends dismissal was inappropriate, alleging that misrepresentations by Ohio Casualty prevented revival of the case within one year of Conner's death. She claims that the limitations period was tolled when Harp-Biven corresponded with her attorney on several occasions and referenced in the subject line of the correspondence, "Insured Name: Conner, Emily." She claims further that representations indicating that "either a settlement or answer would be filed led [her] to believe that the adjuster was in contact with Conner and legal counsel." Brief at 9. Allen contends that these affirmative acts "deceived [her] into believing that Conner was alive." Brief at 10. Additionally, Allen contends that Ohio Casualty and Attorney Sage were under an obligation to disclose to her that Conner had died.

In response, Ohio Casualty and Attorney Sage deny that Harp-Biven made any false representations. And they contend that Allen essentially conceded this point before the circuit court. They argue further that Harp-Bevin had no knowledge at all of the fact of Conner's death prior to the expiration of the limitations period. Thus, her disclosure of this fact was not merely moot but rather an impossibility.

The attachment of affidavits converted the motion to dismiss to one for summary judgment. *See Hoke v. Cullinan*, 914 S.W.2d 335 (Ky. 1995). Consequently, we must decide whether judgment was proper as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996); CR 56.03. Since factual findings are not at issue, we may not defer to the trial court. *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378 (Ky. 1992). We must view the evidence in the light most favorable to Allen and resolve all doubts in her favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). However, Allen cannot defeat the motion "without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482.

The essential elements of equitable estoppel are:

(1) conduct which amounts to a false representation or concealment of material facts . . . ; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements: (1) lack of

knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

28 Am.Jur.2d Estoppel and Waiver § 35. See also *Smith v. Howard*, 407 S.W.2d 139 (Ky. 1966).

Allen did not make the required showing. She did not demonstrate that either Ohio Casualty or its counsel knew and concealed the truth from anyone. On the contrary, the record reveals that Harp-Bevin and Attorney Sage first learned of Conner's death on November 14, 2012, and that they promptly shared that information with opposing counsel and the court. Without doubt or dispute, counsel fulfilled his ethical obligation. *Harris v. Jackson*, 192 S.W.3d 297, 305 (Ky. 2006). Furthermore, nothing in the correspondence or representations made by Harp-Bevin suggests that she intended to lull Allen into inaction. Harp-Bevin had no reason to check – and was certainly under no duty to investigate – whether Conner remained alive from day to day. Despite Allen's contentions, Harp-Bevin had no obligation to Allen that entailed any legal or ethical consequence. *Gailor v. Alsabi*, 990 S.W.2d 597 (Ky. 1999).

Contrary to Allen's assertions, the trial court correctly applied the court's holding in *Burke v. Blair*, 349 S.W.2d 836 (Ky. 1961). *Burke* holds that a party who has induced another party not to act "by his false representations or

fraudulent concealment[.]” cannot assert the statute of limitations. *Id. Burke*

continues:

However, the fraudulent action must be of a character to prevent inquiry or elude an investigation or otherwise mislead the party having cause of action, and such party is under the duty to exercise reasonable care and diligence. See 53 C.J.S. Limitations of Actions § 25. *Id.*

Harp-Biven did absolutely nothing that would rise to the level of fraud or that would have prevented Allen from investigating whether her civil action remained viable from year to year.

Summary judgment is appropriate when a movant shows that the adverse party cannot prevail under any set of circumstances. *Steelvest, supra*, 807 S.W.2d at 480; *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985). By this stringent standard, dismissal of the action was not only proper under the circumstances; it was required by the applicable statute.

In a motion passed to the panel, Attorney Sage argues that portions of Allen’s reply brief should be stricken because the issues presented were never addressed to the trial court for consideration but were presented to this Court for the first time in her reply. We hereby DENY the motion to strike the brief since the arguments in reply are futile. Regardless of how the dispositive motion was captioned or treated by the parties, dismissal of Allen’s civil action was required by the provisions of KRS 395.278.

The order of the Jefferson Circuit Court dismissing the action is affirmed.

ALL CONCUR.

ENTERED: _____

JUDGE. KENTUCKY COURT OF APPEALS

BRIEF FOR APPELLANT:

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Jeffrey G. Stovall
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BRIEF FOR APPELLEE EMILY M.
CONNER (now deceased):

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BRIEF FOR APPELLEE OHIO
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