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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000923-MR

KIM JEWELL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 09-CI-004606

MICHAEL ZAHER

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, KRAMER, AND VANMETER, JUDGES.

CLAYTON, JUDGE: This is an appeal of the Jefferson Circuit Court's decision dismissing the Appellant's case when she did not revive her action after the death of the Appellee. Based upon the following, we affirm the dismissal.

BACKGROUND INFORMATION

Appellant, Kim Jewell, and Appellee, Michael Zaher, were involved in an automobile accident in Jefferson County, Kentucky on May 12, 2007. After the accident, Jewell brought an action for negligence against Zaher in Jefferson Circuit Court. On or about February 20, 2014, Zaher's counsel informed Jewell's counsel that he believed Zaher may have died on March 7, 2013. Counsel for Zaher followed this conversation with a letter in which he asked for a deposition to be scheduled with Jewell where she could examine the photograph accompanying the obituary to determine whether the decedent was Zaher. Counsel for Zaher also stated in his correspondence that he wished to schedule the deposition with Jewell prior to the one year anniversary of Zaher's death.

The deposition was held on March 4, 2014. At the deposition, the obituary and accompanying photo of Zaher was shown to Jewell and she identified the individual as the defendant. On March 25, 2014, counsel for Zaher moved the court for summary judgment. Counsel for Jewell petitioned the court on April 23, 2014, for the appointment of the Public Administrator to represent the estate of Zaher. On April 30, 2014, the circuit court granted Jewell's motion. On May 5, 2014, counsel for Jewell moved the court to revive the action and substitute the Public Administrator as well as to amend the original complaint to reflect the substitution. The trial court denied these motions and granted counsel for Zaher's motion for summary judgment. Jewell then brought this appeal.

STANDARD OF REVIEW

In reviewing the granting of summary judgment by the trial court, an appellate court must determine whether the trial court correctly found “that there [were] no genuine issues as to any material fact and that the moving party [was] entitled to judgment as a matter of law.” Kentucky Rules of Civil Procedure (CR) 56.03.

[A] trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only [when] it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. [While] [t]he moving party bears the initial burden of [proving] that no genuine issue of material fact exists, . . . the burden shifts to the party opposing summary judgment to present ‘at least some affirmative evidence showing that there is a genuine issue of material fact for trial.’

Community Trust Bancorp, Inc. v. Mussetter, 242 S.W.3d 690, 692 (Ky. App. 2007).

Since summary judgment deals only with legal questions as there are no genuine issues of material fact, we need not defer to the trial court’s decision and must review the issue *de novo*. *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

ANALYSIS

CR 25.01(1) provides that “[i]f a party dies during the defense of an action and the claim is not thereby extinguished, the court, within the period allowed by law, may order substitution of the proper parties. If substitution is not so made the action may be dismissed as to the deceased party.” The “period

allowed by law” is found in KRS 395.278 which provides that “[a]n application to revive an action...against the representative or successor of a defendant, shall be made within one (1) year after the death of a deceased party.” KRS 395.278 is a revivor statute and is, therefore, a statute of limitations. *See Harris v. Jackson*, 192 S.W.3d 297, 204 (Ky. 2006). Since it is a statute of limitations, its time limit is not discretionary.

Jewell argues that the trial court erred when it failed to construe the mandatory notice requirement of CR 25.01 as a prerequisite to the one year limitation of KRS 395.278. Specifically, she points to the following amendment to the rule in 2006 (effective 2007):

Upon becoming aware of a party’s death, the attorney(s) of record for that party, as soon as practicable shall file a notice of such death on the record and serve a copy of such notice in the same manner provided herein for service of the motion for substitution.

Jewell argues that the limitations period did not start to run until she received notice of Zaher’s death.

In *Hammons v. Tremco, Inc.*, 887 S.W.2d 336, 338 (Ky. 1994), the Kentucky Supreme Court held that “KRS 395.278...is limited to one year. [T]he period...is mandatory and not subject to enlargement. If a motion to revive the action...is not made within the prescribed time, the action may be dismissed as to the deceased party. The word ‘may’ as it appears in CR 25.01(1), does not allow for discretionary dismissal but provides for an exception in those instances in which the right to have the action dismissed has been lost, such as by waiver,

estoppel, or consent.” The Court went on to opine that the rule and the statute together require the revival of the action within one year. *Id.*

As to Jewell’s argument that notice was required to start the running of the limitations period, in *Harris*, 192 S.W.3d at 304-05 (Ky. 2006), the Kentucky Supreme Court held that notice was not required. Jewell argues that the *Harris* case was prior to amendment of CR 25.01, which became effective in 2007. While this is true, the amendment requires counsel for the deceased to notify the court of his or her death. It did not change the beginning of the running of the limitations period.

In this case, Jewell was made aware of the possibility of Zaher’s death in February and had a month in which to revive the action before the one-year statute of limitations ran. She did not revive the action within this time frame and the circuit court, therefore, appropriately granted summary judgment dismissing the action. We affirm the decision of the trial court.

ALL CONCUR.

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