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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000538-MR

PATRICIA A. DEPALMO KERINS AND
JEANINE DEPALMO — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 14-CI-001513

ESTATE OF ELAINE MARIE BUKOWSKI, KENNETH H. BUCK, EXECUTOR; MICHELE WOJTYNA; SUE NEW; STEVEN MARC YEATES; BETH KASPER; LAWRENCE DEPALMO; PETER DEPALMO; JEREMY DEPALMO; JOANNA SCHNELLER; SUZANNE COZZI; RICK ROWE; DANIEL ROWE; JOHN CHARLES ROWE; ARLENE YEATES; ROSANN WAS; ELIZABETH MAUTE; SANDRA DEPALMO; CHRISTOPHER DEPALMO; HENRY BUCK; THOMAS ROWE; ROBERT ROWE; JULIE DAMON; AND ANN RICHARDSON — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: D. LAMBERT, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Patricia Kerins and Jeanine DePalmo appeal from multiple orders of the Jefferson Circuit Court. Those orders granted default judgments against Appellants and in favor of Michele Wojtyna on her counterclaims and also granted summary judgment in favor of the Estate of Elaine Marie Bukowski. We find the trial court did not err in granting the default judgments, but did err in granting summary judgment.

In 2012, Elaine Bukowski passed away in Louisville, Kentucky without a will and without a spouse, children, living parents, or living siblings. A probate action was initiated in Jefferson District Court and it was estimated that her estate was worth approximately two million dollars. Ms. Bukowski had living relatives in the form of aunts, uncles, and cousins. Those relatives are heirs and are entitled to a portion of her estate.

One such uncle was Michael DePalmo; however, he predeceased Ms. Bukowski. Pursuant to Kentucky's intestate succession statutes, Kentucky Revised Statutes (KRS) 391.010 and KRS 391.030, Mr. DePalmo's children will be able to share his portion of Ms. Bukowski's estate. Three of the appellees, Ms. Wojtyna, Christopher DePalmo, and Suzanne Cozzi are Mr. DePalmo's children. This is an undisputed fact. Ms. Kerins alleges that she is also Mr. DePalmo's child.

On March 18, 2014, Ms. Kerins initiated the underlying action in which she sought a declaration that she was an heir of Mr. DePalmo and requested a portion of the Bukowski estate. Ms. Wojtyna and her two siblings contend that

Ms. Kerins is only a half-sibling, having the same mother. Ms. Wojtyna also brought a counterclaim against Ms. Kerins in which she alleged fraud, misrepresentation, and intentional infliction of emotional distress. She also sought DNA testing. Ms. Wojtyna later brought a third-party complaint against her mother, Jeanine DePalmo, alleging the same causes of action.

The trial court held a hearing on June 16, 2014. That hearing was to address the issue of DNA testing and the fact that Appellants had failed to respond to Ms. Wojtyna's counterclaim and third-party complaint. On July 2, 2014, the trial court entered an order giving Appellants until June 30, 2014, to respond to the counterclaims and ordering Ms. Kerins to undergo DNA testing.[1]

From July 2 to December 22, 2014, multiple motions for default judgment were made against Appellants for failing to answer Ms. Wojtyna's counterclaims. The trial court entered a number of orders granting default judgments against Appellants, but always vacated those orders after Appellants filed motions to reconsider. On December 15, 2014, Ms. Kerins filed a motion to set aside the default judgments. Attached to this motion was an answer to Ms. Wojtyna's counterclaim. This was the first and only response to the counterclaims. Ms. DePalmo did not respond to the counterclaim.

On December 29, 2014, Ms. Wojtyna filed a motion to reinstate the orders for default judgment. She argued that the excuses provided by Appellants, that Ms. DePalmo lived in New York, had been sick and hospitalized, and that Ms.

[1] It is unknown why the trial court did not enter the order until after the June 30, 2014 deadline to file an answer.

Kerins' work schedule and "unforeseen issues," were insufficient to vacate the default judgments. The trial court granted the motion and reinstated the default judgments on February 10, 2015.

Meanwhile, on December 5, 2014, the Bukowski estate filed a motion for summary judgment arguing that the DNA test results had been received and showed that Ms. Kerins was not a blood relative of Mr. DePalmo. Because Mr. DePalmo was deceased, the DNA testing laboratory compared Ms. Kerins' DNA to that of her siblings and a cousin. The results were: a 0.8% chance that she is a full sibling of Christopher DePalmo, a 0% chance she is a full sibling of Michele Wojtyna, and a 26.1% that she is a full sibling of Suzanne Cozzi. The February 10, 2015 order mentioned above also granted summary judgment in favor of the Bukowski estate based on the DNA results. This appeal followed.

The first issue on appeal is that the trial court erred by reinstating the default judgments. Appellants argue that the default judgments should have been set aside because they were active in the case, Ms. DePalmo had been ill, and there had been family issues in New York.

> Although default judgments are not favored, a trial court is vested with broad discretion when considering motions to set them aside, and an appellate court will not overturn the trial court's decision absent a showing that the trial court abused its discretion. A party seeking to have a default judgment set aside must show good cause; *i.e.,* the moving party must show "(1) a valid excuse for the default; (2) a meritorious defense to the claim; and (3) absence of prejudice to the non-defaulting party."

PNC Bank, N.A. v. Citizens Bank of N. Kentucky, Inc., 139 S.W.3d 527, 530-31 (Ky. App. 2003) (footnotes and citations omitted).

In the case at hand, we believe the trial court did not abuse its discretion in denying Appellants' motion to set aside the default judgments. The trial court based its judgment in part on the case of *Smith v. Flynn*, 390 S.W.3d 157 (Ky. App. 2012). In *Flynn*, a previous panel of this Court found that Alzheimer's disease was not a valid excuse for the default. Here, there is no indication as to the illness Ms. DePalmo was suffering from or how long she was hospitalized. In addition, the "family issues" in New York are vague and unspecified. If Alzheimer's disease was not a valid excuse for the default, then neither are unspecific illness and family issues. Furthermore, Ms. Wojtyna and the Bukowski estate were prejudiced in the form of attorney fees spent trying to get Appellants to file their answers to Ms. Wojtyna's claims, which should have been filed in April, 2014, at the earliest and June 30, 2014, at the latest. The default judgments against Appellants were properly entered.

Appellants' next argument on appeal is that the trial court erred in granting summary judgment. The trial court granted summary judgment to the Bukowski estate because it found the DNA results to be conclusive. We believe summary judgment was granted in error.

> The standard of review on appeal of a summary judgment is 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. . . . "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest,* 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose,* 683 S.W.2d 255 (Ky. 1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . . ." *Huddleston v. Hughes,* 843 S.W.2d 901, 903 (Ky. App. 1992)[.]

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

It is undisputed that for Ms. Kerins to be able to inherit a portion of the Bukowski estate, she must be related to her alleged father, Mr. DePalmo. KRS 391.105 states in relevant part:

> (1) For the purpose of intestate succession, if a relationship of parent and child must be established to determine succession by, through, or from a person, a person born out of wedlock is a child of the natural mother. That person is also a child of the natural father if:
> (a) The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or
> (b) In determining the right of the child or its descendants to inherit from or through the father:

> 1. There has been an adjudication of paternity before the death of the father; or
> 2. There has been an adjudication of paternity after the death of the father based upon clear and convincing proof[.]

Here, KRS 391.105(b) is not applicable because there was no adjudication as to Ms. Kerins' paternity; therefore, KRS 391.105(a) applies. The primary issue in this case is whether or not Mr. DePalmo is Ms. Kerins' "natural parent."

We believe summary judgment was improper in this case because there are still genuine issues of material fact, namely, the identity of Ms. Kerins' father. The cases cited by the trial court and Appellees regarding the conclusiveness of DNA testing are distinguishable from this case. In those cases, after the DNA results were returned, the parties either stipulated as to paternity or no rebuttal evidence was submitted. Such is not the case here. Ms. Kerins has submitted evidence that Mr. DePalmo is her father in the form of a birth certificate listing him as the father, an affidavit from Jeanine DePalmo asserting that Mr. DePalmo is the father, pictures and cards between Ms. Kerins and Mr. DePalmo suggestion a father-daughter relationship, and verified documents from the court proceedings in Mr. DePalmo's estate case indicating she is his daughter.

While DNA evidence is compelling, it is only another form of evidence to be considered. For example, even though the Uniform Act on Paternity, KRS 406, et seq., has no bearing on the laws governing intestate succession, *Ellis v. Ellis*, 752 S.W.2d 781, 782 (Ky. 1988), the Act states that DNA evidence is not always conclusive of the paternity issue and that such evidence may be rebutted. KRS

406.111. Here, when viewing the evidence in a light most favorable to Ms. Kerins, we believe she has presented evidence that creates a material question of fact; therefore, summary judgment was granted in error.

Appellants' final argument on appeal is that the trial court did not have the authority to compel DNA testing. Appellants cite to no statutory or case law which sets forth when a trial court can compel DNA testing. This appears to simply be an evidentiary issue within the discretion of the trial court. The proper standard for review of evidentiary rulings is abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Prior to DNA testing, both parties presented conflicting evidence regarding Ms. Kerins' paternity. We believe it was reasonable for the trial court to order DNA testing in this case and that the court did not abuse its discretion.

Based on the foregoing, we affirm the default judgments entered against Appellants, but reverse the summary judgment entered in favor of the Bukowski estate and remand for further proceedings.

ALL CONCUR

BRIEF AND ORAL ARGUMENT FOR APPELLANTS:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE MICHELE WOJTYNA:

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