Third District Court of Appeal

State of Florida

Opinion filed May 6, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1271
Lower Tribunal No. 16-4198

Thomas O. Katz and Katz Baskies & Wolf, PLLC,
Petitioners,

vs.

Laurie Riemer and Joanne Rosen,
Respondents.

On Petition for Writ of Certiorari from the Circuit Court for Miami-Dade County, Beatrice Butchko, Judge.

Cole, Scott & Kissane, P.A., and Mark D. Tinker (Tampa), for petitioners.

Hall, Lamb, Hall & Leto, P.A., and Andrew C. Hall and Adam J. Lamb and Colleen L. Smeryage, for respondents.

Before HENDON, MILLER and LOBREE, JJ.

LOBREE, J.

Thomas O. Katz and his law firm, Katz Baskies & Wolf, PLLC (the "attorneys"), seek certiorari review of the trial court's order denying their motion to compel financial disclosures from Laurie Riemer and Joanne Rosen (the "beneficiaries"). Because the petition fails to show irreparable harm, we dismiss the petition.

Factual and Procedural Background

The beneficiaries' mother and stepfather executed a post-nuptial agreement, entitling the beneficiaries to inherit 30% of their stepfather's net estate upon his death. It relevantly reads:

> 4. Notwithstanding any other provision of this agreement, [stepfather] agrees that he will make the following provisions if the parties are married at the time of the death of the first of them to die:
>
> . . . .
>
> (b) [Stepfather] will provide for the disposition of his assets so that, after the death of both parties, at least 30% of his Net Estate . . . will pass to or in trust for [mother's] descendants, provided that if [mother] survives [stepfather] there will be no distribution to her descendants until after her death.

However, the agreement also provides that:

> 3. Except as provided in this agreement, each party shall retain sole ownership, control, and enjoyment of his or her property, and he or she may buy, sell, give, devise, use, consume, encumber, create a security interest in or otherwise dispose of or deal with such property at any time and in any manner free from any and all claims and rights

> of the other party as if no marriage had been consummated.
>
> . . . .
>
> 6. Unless specifically otherwise stated, the word "property" . . . shall mean all earnings and property, of every kind, that a party to this agreement now owns or acquires in any manner at any time in the future.

The beneficiaries' mother died in 2006. Despite surviving her, the stepfather engaged in a series of actions—with the purported advice of the attorneys—that diverted or effectively depleted his assets, transferring them to his natural children instead. Upon his death, his net estate had nothing of substance to convey to the beneficiaries, whereas the assets had before been in the millions of dollars.

The beneficiaries sued the attorneys for malpractice, aiding and abetting breach of fiduciary duties, tortious interference with an expectancy of inheritance, and undue influence. The attorneys, in turn, sought the beneficiaries' financial disclosure of the funds that they had inherited from their mother's estate, alleging that this would allow them to raise the legal defense that the agreement's purpose of ensuring the beneficiaries' financial health had already been accomplished, rendering the defeat of the 30% gift nugatory. The trial court denied the discovery, finding the beneficiaries' finances irrelevant to their entitlement to the agreement's gift.

Analysis

A non-final, non-appealable order may be reviewed by petition for a writ of certiorari where the petitioner shows: "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case[,] (3) that cannot be corrected on post-judgment appeal." Bd. of Trs. of Internal Improvement Tr. Fund v. Am. Educ. Enters., LLC, 99 So. 3d 450, 454 (Fla. 2012) (quoting Reeves v. Fleetwood Homes of Fla., Inc., 889 So. 2d 812, 822 (Fla. 2004)). Moreover, "'[a] postnuptial agreement is subject to interpretation like any other contract,' and a court's interpretation of a contract is subject to de novo review." Macleod v. Macleod, 82 So. 3d 147, 149 (Fla. 4th DCA 2012) (quoting Chipman v. Chipman, 975 So. 2d 603, 607 (Fla. 4th DCA 2008)).

"A finding that the petitioning party has 'suffered an irreparable harm that cannot be remedied on direct appeal' is a 'condition precedent to invoking a district court's certiorari jurisdiction.'" Bd. of Trs., 99 So. 3d at 454-55 (quoting Jaye v. Royal Saxon, Inc., 720 So. 2d 214, 215 (Fla. 1998)). Irreparable injury can rarely be shown where discovery is denied, as any error is generally reviewable on appeal. See Owusu v. City of Miami, No. 3D19-2385, 2020 WL 1870348 (Fla. 3d DCA Apr. 15, 2020) (citing Damsky v. Univ. of Miami, 152 So. 3d 789, 792 (Fla. 3d DCA 2014)). The attorneys allege that the trial court's denial of the discovery sought will preclude them from later presenting evidence at trial about the beneficiaries' inheritance from their mother's estate, which goes to their affirmative defense that

the stepfather's actions diverting his assets were in conformity with the parties' intent in making the agreement. However, only where the requested discovery "is relevant or is reasonably calculated to lead to the discovery of admissible evidence and the order denying that discovery effectively eviscerates a party's claim, defense, or counterclaim," is relief by writ of certiorari appropriate. Giacalone v. Helen Ellis Mem'l Hosp. Found., Inc., 8 So. 3d 1232, 1234 (Fla. 2d DCA 2009).

In determining whether a defense has been "eviscerated," courts must look at the legal elements of the petitioner's defenses, compare them with the discovery the trial court has granted, see CQB, 2010, LLC v. Bank of N.Y. Mellon, 177 So. 3d 644, 646 (Fla. 1st DCA 2015), and also review the complaint, see Kauffman v. Duran, 165 So. 3d 805, 807 (Fla. 3d DCA 2015). Further, the discovery sought must be "relevant to the issues as framed by the pleadings." Elsner v. E-Commerce Coffee Club, 126 So. 3d 1261, 1264 (Fla. 4th DCA 2013). Both showings must be made for certiorari to lie. See Jerry's S., Inc. v. Morran, 582 So. 2d 803, 805 (Fla. 1st DCA 1991) (denying certiorari where discovery was "not related to any pending claim or defense, nor was the information shown to be reasonably calculated to lead to the discovery of admissible evidence").

Here, the attorneys' legal defenses are not eviscerated by the discovery ruling. All causes of action alleged by the complaint relate to whether the beneficiaries were entitled to 30% of their stepfather's net estate upon his death, and whether they

actually received it. Therefore, all duties and breaches attributed to the attorneys ultimately arise and are with reference to the face of the agreement. The argument that, despite a clear and unambiguous agreement, the parties actually intended that the stepfather could later defeat the gift made therein, is not a defense against the causes of action alleged. Nothing in the elements of those claims bears any relation to the beneficiaries' present economic status.

Moreover, an affirmative defense is any matter that avoids the action and that the defendant must affirmatively establish. See Langford v. McCormick, 552 So. 2d 964, 967 (Fla. 1st DCA 1989). If it is not specifically and affirmatively raised or tried by consent, it is waived. Id. Although our record curiously lacks a copy of the attorneys' answer and affirmative defenses, the transcript of the discovery proceedings reveals that they did not raise the specific defense that, despite the agreement's language, the parties intended that the stepfather could "change . . . his mind whenever he wanted." Not having been raised as a defense to begin with, the trial court's denial of the order could not have subsequently "eviscerated" it.

The attorneys' contention that they are "entitled to discover evidence tending to show that [the stepfather's] lifetime planning," to establish that their representation of him was in accordance with, or not contrary to, the agreement's intent that the beneficiaries be economically protected is unavailing. As noted by the lower court, the intent that controls is that expressed within the four corners of

the agreement, which is clear and unambiguous, rather than the subjective intent of the parties to "economically protect" the beneficiaries in a way contrary to the 30% gift provision. [1]

Further, the financial information sought is not relevant to the issues as framed by the pleadings. To be "framed" by the pleadings, an issue attacked by an affirmative defense must be either "alleged" or "referenced" in the complaint itself. See Diaz-Verson v. Walbridge Aldinger Co., 54 So. 3d 1010, 1010-11 (Fla. 2d DCA 2010). Contrary to the attorneys' assertion, the complaint's allegations about the parties' intent in making the agreement do not reference any intent foreign to its text. Count I refers to the mother's "wishes" as set forth in the agreement. Count II charges the stepfather's failure to pay the value of the assets transferred according to the terms of the agreement. Count III again refers to the parties' join intent "based

[1] Despite the agreement's language allowing the stepfather to retain "sole ownership, control, and enjoyment of his or her property" and "dispose of . . . such property at any time and in any manner," the preceding clause reads "[e]xcept as provided in this agreement," and qualifies any retention of ownership. The first clause in the section making the gift also provides an identical caveat, reading that "[n]otwithstanding any other provision of this agreement, [stepfather] agrees that he will . . . provide for the disposition of his assets so that, after the death of both parties, at least 30% of his Net Estate . . . will pass to or in trust for [mother's] descendants." The intent of the parties was to limit their ability to use their property before death by their commitment to the gifts exchanged, not the other way around. If the attorneys' interpretation carries the day, the agreement would have been one to do nothing. Accordingly, discovery of evidence of how the beneficiaries were protected by other instruments or provisions is irrelevant to whether they were, in fact, protected by and entitled to the 30% gift provision.

upon the agreement to entitle the beneficiaries to 30% of the stepfather's estate." Count IV alleges the agreement's "intent[ion] to protect and benefit" the beneficiaries. All allegations of malpractice against the attorneys exclusively pertain to their "avoid[ing] compliance with," "not . . . honor[ing]," and "failing to adequately advise [the mother]" with regard to "the . . . agreement." Count V alleges that the attorneys caused or aided the stepfather in breaching the agreement. Count VI alleges the beneficiaries' 30% gift.

Thus, every count makes issue only of the agreement's gift of 30% of the stepfather's net estate, the stepfather's actions in transferring his assets to his natural children before his death in an attempt to defeat the agreement, and the attorneys' alleged participation in those actions. The beneficiaries' inheritance from their mother and their present economic health are not issues framed by the complaint. "In the absence of allegations of this nature," the attorneys here "cannot establish" that the beneficiaries' "personal financial information is relevant to the issues framed by the pleadings." Diaz-Verson, 54 So. 3d at 1011. Accordingly, the petition fails to demonstrate irreparable harm, and this cause must be dismissed.

Dismissed.