IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

IVAN M. LEFKOWITZ, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF USHER L. BROWN, SUFL CHARTERED D/B/A FORSTER, BOUGHMAN & LEFKOWITZ, BLU UTAH, LLC AND THE BROWN UTAH FAMILY TRUST,

Appellants,

v. Case No. 5D18-4007

ARLENE SCHWARTZ,

Appellee.

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Opinion filed June 12, 2020

Appeal from the Circuit Court
for Orange County,
Bob LeBlanc, Judge.

Shannon McLin Carlyle, Coyla J. O'Connor and William D. Palmer, of Florida Appeals, Orlando, for Appellant Ivan M. Lefkowitz, Individually and as Personal Representative of the Estate of Usher L. Brown.

James E. Shepherd, of Forster, Boughman, Lefkowitz & Lowe, Maitland, for Appellant SUFL Chartered, d/b/a Forster, Boughman & Lefkowitz.

No Appearance for other Appellants.

David Schwartz, Gainesville, for Appellee.

SASSO, J.

Appellants, Ivan M. Lefkowitz, ("Lefkowitz") individually and as personal representative of the estate of Usher L. Brown ("Decedent"), and SUFL Chartered ("SUFL"), the estate's law firm, challenge an order of final summary judgment entered in favor of Appellee, Arlene Schwartz ("Schwartz"), in an independent action she brought to establish her claim against Decedent's estate. Appellants argue that the trial court erred by imposing a constructive trust over assets that were appropriately part of Decedent's estate. We agree and reverse.

FACTS

In 2011, during the course of Decedent's marriage to Schwartz's daughter Lauren, Schwartz loaned Decedent and Lauren $260,000 for the purchase of a condominium in Utah. Decedent formed Blu Utah, LLC ("Blu Utah") for the primary purpose of owning and managing the property, ultimately purchasing the condo in his name and transferring ownership to Blu Utah. In 2014, Decedent and Lauren divorced. Pursuant to a marital settlement agreement ("MSA"), Lauren, individually and as Schwartz's agent through a power of attorney, agreed to relinquish her half interest in the property to Decedent. In return, he promised to repay Schwartz. Under the MSA, he promised to execute a note and quitclaim deed, which would be held in escrow, and to pay Schwartz $2,500.00 per month until the loan was repaid. The MSA also provided that, if Decedent sold the condo, he would pay off the loan at closing. However, Decedent never executed a note, and a mortgage on the property was never recorded.

In 2016, unbeknownst to Schwartz and her daughter, Decedent sold the property, netting $404,229.70 in sale proceeds. He deposited the sale proceeds in Blu Utah's bank

account. Two months later, Decedent contracted to purchase another condominium in Utah, using $110,000 of the sale proceeds as a down payment. Meanwhile, he continued to make monthly payments to Schwartz without telling her about the sale. On September 3, 2016, before closing on the new property, Decedent passed away.

After Decedent's death, Lauren, unaware he had sold the property, emailed Lefkowitz, an attorney and Decedent's estate planner, to ask about Schwartz's future payments. Lefkowitz told her he would determine the exact amount Decedent owed Schwartz and make a lump-sum payment. On September 15, 2016, Lauren, on her own, discovered Decedent had sold the property.

A few days later, the probate court appointed Lefkowitz as personal representative ("PR") of Decedent's estate. Lefkowitz retained SUFL, his law firm, to serve as attorneys for the estate. As part of the administration, Lefkowitz: (1) transferred the sale proceeds from Blu Utah's account into the estate's checking account; (2) successfully retrieved $54,800 of Decedent's $110,000 down payment and placed it in SUFL's escrow account; and (3) notified Decedent's creditors about the estate, including the IRS, who claimed $305,896.81 in unpaid taxes.

Schwartz filed a claim for the proceeds in the probate proceeding, defining her claim as "unfulfilled obligations of Usher L. Brown to the Claimant based upon loans made in 2011 to the Decedent." Schwartz sought $192,413, the outstanding principal on the note, plus interest, attorney's fees, and damages for the breach of the loan agreement and MSA. She acknowledged her claim was unsecured. Because Lefkowitz objected to the claim, Schwartz then brought an independent action in circuit court under section 733.705(5), Florida Statutes (2017), and after amending her complaint, alleged four

counts. Count 1 alleged breach of contract and "adjudication of a probate claim that was objected to by the PR." Claiming she was the "beneficial owner of condominium sale proceeds," Schwartz asked the trial court to place the sale proceeds in a constructive trust. The remaining counts were for (2) unjust enrichment; (3) declaratory judgment; and (4) breach of fiduciary duties.

Ultimately, the court entered a final judgment, granting Schwartz summary relief only as to her breach of contract claim. In doing so, the court specifically noted that "the Plaintiff's Motion did not seek judgment for breach of contract by any party other than the Decedent." The court determined that judgment on breach of contract by the other defendants was not necessary.

The court found the elements justifying a constructive trust were met based on Decedent's actions.[1] Specifically, the court stated: "The Decedent's act of secretly selling the Utah Condominium and not repaying the loan from Arlene Schwartz constituted fraud, a violation of a marital settlement agreement, or a clear mistake, any of which warrant the remedy of constructive trust in this case."

The court next found that the estate, Lefkowitz, and SUFL received funds and took payments with knowledge of the facts and therefore were not bona fide purchasers. Thus,

[1] The court found:

> Decedent promised to repay the loan from [Schwartz]; [Schwartz] loaned the money to the Decedent in reliance thereon; a confidential relation existed between the Decedent and [Schwartz] by the nature and manner of their family relationship, attorney-client relationship, and in . . . Schwartz reposing her trust and confidence in her son-in-law by lending him $260,000.00 for the purchase of the Utah condominium; [and] the loan was induced by the confidential relation between Decedent and [Schwartz] . . . .

the court stated the estate, Lefkowitz, and SUFL received the funds "subject to a constructive trust for the benefit of Arlene Schwartz" and with full awareness of the risk they might have to return the money.

STANDARD OF REVIEW

Because this case involves the resolution of legal issues, our review is de novo. *Hill v. Davis*, 70 So. 3d 572, 575 (Fla. 2011).

ANALYSIS

Applicable Law

Florida's Probate Code, codified at chapter 733, Florida Statutes, constitutes "a unified statutory scheme intended to govern all probate matters." *Hill*, 70 So. 3d at 577; *see also* § 731.102, Fla. Stat. (2017). Chapter 733 sets out comprehensive requirements for pursuing claims[2] against an estate. Relevant to this case, section 733.703, Florida Statutes (2017), provides the sole form and manner of presenting a claim against an estate: by filing a written statement of claim in the probate action. If a claim filed against the estate is objected to, section 733.705, Florida Statutes (2017), details the procedure for resolving the objection. Section 733.705 also contemplates the procedure applicable to unmatured claims, empowering the probate court, for example, to require that the claim be adequately secured by a mortgage, pledge, bond, trust, guaranty, or other security, as may be determined by the court, or, in the case of an insolvent estate, directing a proportionate amount to be reserved. Section 733.702, Florida Statutes (2017), provides

[2] "Claim" is defined as "a liability of the decedent, whether arising in contract, tort, or otherwise, and funeral expense." § 731.201, Fla. Stat. (2017).

the time limitations for filing claims and specifically notes that actions founded upon "fraud or other wrongful act or omission" are subject to the section's requirements.

Eradication of Trust Exception

Prior to the adoption of the Florida Probate Code, Florida common law generally recognized an exception to the requirement that creditors file claims in the probate proceeding, known as the "trust exception." *Scott v. Reyes*, 913 So. 2d 13, 17 (Fla. 2d DCA 2005). The underlying basis for the exception was that trust property is not considered a part of the decedent's estate. *Sewell v. Sewell Props., Inc.*, 30 So. 2d 361 (Fla. 1947). This exception was applied in cases where claimants asserted an equitable basis for ownership, including those claims seeking to impose constructive trusts. *Scott*, 913 So. 2d 13 at 17 (citing *Hodges v. Logan*, 82 So. 2d 885 (Fla. 1955) (resulting trust); *Fisher v. Creamer*, 332 So. 2d 50 (Fla. 3d DCA 1976) (constructive trust)).

Since the adoption of the Probate Code, however, courts have called into question the applicability of the trust exception. *See, e.g.*, *Scott*, 913 So. 2d at 18 (noting "the repeal of the former Florida Probate Law and the adoption of the Code call into question the continued viability of some of the earlier decisions that have applied the trust exception to exclude certain types of claims from the operation of the statute"). Most recently, the Fourth District addressed the vitality of the trust exception in *Johnson v. Townsend*, 259 So. 3d 851, 858 (Fla. 4th DCA 2018), *review denied*, SC19-102, 2019 WL 6248012 (Fla. Nov. 22, 2019). The *Townsend* court explained that the trust exception is now limited "to those situations where the decedent clearly held the property on behalf of the actual owner either by way of an express trust or some other clearly defined means." 259 So. 3d at 858 (quoting *Scott*, 913 So. 2d at 18). In other words, the

"exception" is simply another way of stating that property owned by another should not be made part of the estate and is not subject to administration. *See, e.g.*, § 731.201, Fla. Stat. (2017) (defining estate in part as "property of a decedent"). However, claims based on constructive trusts are not subsumed by this exemption. *Scott*, 913 So. 2d at 18 ("[P]rior decisions applying the trust exception to claims involving resulting trusts and constructive trusts lack continuing vitality.").

Application to this Case

In resolving the issue presented by this appeal, we must address two overarching questions. First, should the condominium sale proceeds have become property of the estate? If so, the next question is whether the trial court could impose a constructive trust over the proceeds, thereby removing the assets from the estate and prioritizing Schwartz's claim above all others.

First, we address whether the condominium proceeds should have become part of the estate. Schwartz asserts on appeal, as she did below, that the condominium sale proceeds should have never become part of the estate, and as such, she is a "stranger" to the estate. Accordingly, she asserts that the dispute here was only over ownership. In support, Schwartz primarily relies on *Logie v. J.P. Morgan*, 716 So. 2d 319, 320 (Fla. 4th DCA 1998) (holding allegations that bank failed to title account as survivorship account as instructed by depositor, and, consequently, assets improperly came under control of depositor's PR instead of under control of intended beneficiaries, sufficiently pled elements of constructive trust).

Contrary to Schwartz's assertion, her claim is not exempted from the Probate Code's reach. In this regard, the Second District's decision in *Scott* is instructive.

In *Scott*, the decedent and Scott established two joint accounts that became the subject of contested proceedings in the probate court. 913 So. 2d at 14. Before his death, the decedent withdrew funds from one shared account and deposited the proceeds in a new bank account titled solely in his name. *Id.* at 15. He also submitted allegedly fraudulent paperwork to cause another account to be re-titled in his name alone. *Id.* Seeking to establish ownership of the accounts, Scott filed a claim in the probate action. *Id.* She conceded that she had not filed a claim within the claims period but argued that it was not necessary for her to file a claim to assert her ownership interest in the two accounts, citing the trust exception in support. *Id.* at 16-17.

Noting the limited applicability of the common law trust exception, the court concluded that Scott was required to file a claim in the estate unless the decedent held the accounts on her behalf "either by way of an express trust or some other clearly defined means." *Id.* at 18.

Under that framework, the Second District noted Scott did not allege the existence of an express trust or any other clearly defined means by which the decedent held the accounts on her behalf. *Id.* The court also noted that Scott could not evade the requirements of the Probate Code by presenting her creditor's claim as a request to have the probate court determine the ownership of the accounts. *Id.* at 19. The court recognized that the decedent's alleged actions in that case could be described as an unauthorized taking and retention of Scott's "property." *Id.* But the court held: "assuming the truth of her petitions' allegations, Mrs. Scott was a creditor of the [d]ecedent as a result of actions that he took before his death. Once the [d]ecedent died, Mrs. Scott had a claim against

the [d]ecedent's estate that became barred when she failed to timely file a statement of claim." *Id.*

Although the *Scott* court focused on whether Scott's claim was timely filed, the analysis demonstrates why Schwartz's claim is similarly subject to the probate code's requirements. There is no question that Schwartz is pursuing a liability of Decedent that arose during his lifetime, as contemplated by section 731.201. Schwartz's claim is for a debt owed. Indeed, Schwartz's actions in this case reflect that reality. Her statement of claim requested payment of "unfulfilled obligations of Usher L. Brown to the Claimant." And, it was not until her Amended Complaint in the independent action that she requested the imposition of a constructive trust. In other words, Schwartz claimed that Decedent promised to pay her a set amount of money and did not. As such, and like Scott, Schwartz was just another creditor of Decedent's estate. Consequently, Schwartz cannot subvert a legislatively-imposed distribution scheme by recasting her probate claim for a debt owed as a dispute over ownership. The trial court here erred in holding otherwise.[3]

Second, having concluded that the condominium sale proceeds were an estate asset, and Schwartz was required to file an estate claim, we now consider whether the trial court erred in imposing a constructive trust and entering an executable final judgment in the context of Schwartz's independent action. This again was error.

While section 733.705, Florida Statutes, specifically contemplates that objections to claims against the estate will be resolved by way of "independent action upon the claim,

[3] The trial court's reliance on cases like *Blaney v. McClusky*, 529 So. 2d 314 (Fla. 1st DCA 1988), was misplaced because "proceeds of life insurance, payable to an individual beneficiary, do not pass through the estate of the deceased." *See Gartley v. Gartley*, 622 So. 2d 77, 78 (Fla. 2d DCA 1993) (citing §§ 222.13, 733.808(4), Fla. Stat.).

or a declaratory action to establish the validity," the reach of the court adjudicating the independent action is limited. *See, e.g.*, *Poncier v. State Dep't of Health and Rehabilitative Servs., Div. of Fam. Servs.*, 284 So. 2d 463 (Fla. 3d DCA 1973) (holding that power to extend time for filing of suits following service of administratrix's objection to claim against estate rests in judge of probate cause and not in trial judge). For example, section 733.705(5) provides, "a judgment establishing the claim shall give it no priority over claims of the same class to which it belongs." In addition, section 733.706, Florida Statutes (2017), expressly provides that only in the "estate administration proceeding" may a court enter an order "approving execution or other process to be levied against property of the estate."

Read in whole, section 733.705(5) effectively limits the relief available in independent actions. But instead of establishing the validity and amount of Schwartz's claim against the estate as contemplated by section 733.705, the court here went much further. By imposing a constructive trust in a post-petition action, based on conduct that occurred during Decedent's lifetime, the court removed assets from the estate, gave Schwartz's claim priority over all other creditors of the estate, and entered a final judgment authorizing levy against estate property. The court exceeded its statutory mandate and thus erred in imposing a constructive trust.

CONCLUSION

Because Schwartz's claim is one for liability owed, and not a true dispute over ownership, she was required to pursue her claim within the Probate Code's constraints. As such, we reverse the judgment on appeal and remand for additional proceedings consistent with this opinion.

REVERSED AND REMANDED.

GROSSHANS and TRAVER, JJ., concur.