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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CONSTANCE JEWETT CORY, Plaintiff-Appellant, vs. JEWETT LUMBER COMPANY, GERALD A. JEWETT, JR., and BANKERS TRUST COMPANY, EXECUTOR OF THE ESTATE OF GERALD A. JEWETT, SR., Defendants-Appellees.	)	Filed May 30, 1980 0-69 2-63799

Appeal from Polk District Court - Ray Hanrahan, Judge.

Plaintiff appeals trial court's ruling sustaining special appearances of defendants in an action for specific performance of a stock transfer agreement alleging trial court erred in determining it did not have jurisdiction of the action. REVERSED.

Christopher W. Tompkins and David W. Belin of Belin, Harris, Helmick & Lovrien, Des Moines, Iowa, attorneys for plaintiff-appellant.

Lorna L. Williams and Bruce I. Campbell of Davis, Hockenberg, Wine, Brown & Koehn, Des Moines, Iowa, attorney for Jewett Lumber Company and Gerald A. Jewett, Jr.

Craig F. Graziano and L. Call Dickinson, Jr., of Dickinson, Throckmorton, Parker, Mannheimer & Raife, Des Moines, Iowa, attorneys for Bankers Trust Company as executor of the Estate of Gerald A. Jewett, Sr.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

JOHNSON, J.

Plaintiff, Constance Jewett Cory, appeals trial court's ruling sustaining special appearances of defendants, Jewett Lumber Company, Gerald A. Jewett, Jr., and executor, Bankers Trust Company, in an action for specific performance to transfer stock. She asserts trial court erred in sustaining defendants' special appearances. We reverse.

The action arises out of a December 16, 1977 agreement among plaintiff,[1] Bertha S. Jewett,[2] and defendant, Gerald A. Jewett, Jr.,[3] and Bankers Trust Company, serving as executor for the estate of Gerald A. Jewett, Sr. The agreement provided plaintiff and defendant, Gerald A. Jewett, Jr., were to become the assignees of Bertha S. Jewett's "remaining entitlement in any shares of the Company [defendant Jewett Lumber Company] owned by the estate [of Gerald A. Jewett, Sr.] . . . ."

In connection with the federal estate tax proceedings of the estate of Gerald A. Jewett, Sr., defendant Jewett Lumber Company redeemed several shares of stock owned by decedent, Gerald A. Jewett, Sr., in the Jewett Lumber Company. An audit of the estate by federal tax commissioners revealed, however, 7.22 excess shares were redeemed. Accordingly, on November 10, 1978, defendant-executor, Bankers Trust Company, formally requested defendants, Jewett Lumber Company and Gerald A. Jewett, Jr., prepare two certificates of stock for 3.61 shares each to be registered in the name of defendant-executor to facilitate the transfer of 3.61 shares each to plaintiff and defendant, Gerald A. Jewett, Jr. Notwithstanding that request, defendants Jewett Lumber Company and Gerald A. Jewett, Jr., failed to deliver these certificates of stock. On March 27, 1979, plaintiff filed an objection to the closing of the estate of Gerald A. Jewett, Sr., asserting the December 16, 1977 agreement required transfer of 3.61 shares of Jewett Lumber Company stock to her but transfer had not been effected. She also asserted she had repeatedly requested an audited final report of the company for the calendar year 1977, but had not received it. Plaintiff later filed an amendment to the objection and additional objections to the closing of the estate.

On April 17, 1979, trial court entered an order requiring plaintiff to show cause why the court should not enter an order overruling the objections filed to the final

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[1] Daughter of Gerald A. Jewett, Sr.

[2] Widow of Gerald A. Jewett, Sr.

[3] Son of Gerald A. Jewett, Sr.

report of the executor. The order required the executor to serve a copy of the order jointly on Gerald A. Jewett, Jr., and the Jewett Lumber Company by certified mail. The record does not indicate trial court's ruling on the objection.

Plaintiff, on May 10, 1979, consequently brought an action for specific performance to compel transfer of the 3.61 shares of stock to her. In her petition, she alleged all defendants had agreed to circumvent the December 16, 1977 agreement and deprive her of the stock certificates. Defendants, in response, filed special appearances challenging jurisdiction of the district court's equity division on the grounds the probate division of the district court had previously acquired jurisdiction of the issues raised by plaintiff. On May 29, 1979, plaintiff resisted arguing, since Jewett Lumber Company was not a party to the probate proceeding, the parties in the two suits were not the same. Trial court concluded plaintiff's petition raised the issue of the proper distribution of shares of stock in the estate of Gerald A. Jewett, Sr., which was the identical issue pending before the probate division of the court, and thus was an improper attempt to bring the same matter simultaneously before the equity division of the court. Trial court, therefore, sustained defendants' special appearances on June 12, 1979.

I. Scope of Review. Our review of a trial court ruling on a special appearance is on errors assigned, not **de novo**. N.F.O. Members' Custodial Account v. Beneficiaries, 255 N.W.2d 162, 164 (Iowa 1977); Bennett v. Ida County, 203 N.W.2d 228, 234 (Iowa 1972). Trial court's fact findings are binding if supported by substantial evidence. DeCook v. Environmental Security, Corp., 258 N.W.2d 721, 726 (Iowa 1977). We are not bound, however, by trial court's legal conclusions or by its application of legal principles. Berkley International Company v. Devine, 289 N.W.2d 600, 602 (Iowa 1980); N.F.O., 255 N.W.2d at 164.

II. Ruling on Special Appearances. Plaintiff argues the equity division of trial court erred in sustaining defendants' special appearances because 1) both personal and subject matter jurisdiction over the parties existed and 2) the relief sought in this action was neither pled nor available from the probate division.

A. It is well-settled in Iowa a special appearance may be used to challenge either the in personam or the subject matter jurisdiction of a court before which an action has been brought. Rothe v. City of Des Moines, 249 N.W.2d 849, 850 (Iowa 1977). In personam jurisdiction exists when a defendant has been properly served by original notice. Id. Trial court acquires subject matter jurisdiction over an action when the court has ". . . the power to hear and determine cases of the general class to which the proceedings belong." Pierce v. Pierce, 287 N.W.2d 789, 881 (Iowa 1980); Wederath v. Brant, 287 N.W.2d 591, 594 (Iowa 1980); In re Marriage of Helm, 271 N.W.2d 725, 727 (Iowa 1978). "It [subject matter jurisdiction] can be neither conferred on a court nor denied to a court by acts of the parties or the procedures they employ." Helm, 271 N.W.2d at 727 (citing State ex rel Iowa State Highway Commission v. Read, 228 N.W.2d 199, 202 (Iowa 1975)).

Applying these standards to the facts in the record, we find defendants did not raise any issue in their special appearances challenging service of the original notice. Further, an action for specific performance of a contract is the type of action the equity division of trial court has the power to hear and decide. McCarty v. Jeffers, 261 Iowa 470, 473, 154 N.W.2d 718, 721 (1967); Quint-Cities Petroleum Co. v. Maas, 259 Iowa 122, 126, 143 N.W.2d 345, 347 (1966). We therefore conclude both in personam and subject matter jurisdiction of the action existed in the equity division of trial court.

B. Section 633.10, The Code 1979, provides the district court, sitting in probate, has jurisdiction over distribution of decedents' estates. Appellees urge, and trial court found, the issue presented in this case is whether the distribution of the assets proposed by the executor is proper. Assuming this to be an accurate characterization of the issue, it does not defeat the jurisdiction of the court to hear an equity action seeking enforcement of a contract made by the executor during the pendency of the estate. Such authority is conferred by section 633.81, The Code, which relates to all fiduciaries, including the executors of decedents' estates. We have serious doubts the same issues raised in the equity action had also been raised in the objections lodged to the executor's final report or that the same parties were before the court in both the probate and equity proceeding. But even if there was identity of parties and issues, this does not create a lack of subject matter jurisdiction to consider the equity action. Under the unified trial court, which exists by virtue of section 602.1, The Code, this would simply involve two identical actions pending in the same court. The court has jurisdiction to hear either or both but, in the interest of sound administration, a plea in abatement may lie in one of the proceedings. See Wray v. Wray, 159 Iowa 230, 232, 140 N.W. 414, 415 (1913); 1 Am. Jur. 2d, Abatement, Survival and Revival, § 8 at 46-47. The special appearances should not have been sustained.

Due to the foregoing reasons, judgment of trial court accordingly is reversed and the case remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.