IN THE COURT OF APPEALS OF IOWA

FILED
DEC 2 7 1999
CLERK SUPREME COURT

No. 9-689 / 97-2070
Filed December 27, 1999

RICHARD DAMMANN, GERI SPIES, NANCY MCCORD and SANDRA HASS,
Plaintiffs-Appellees,

vs.

LEROY H. DAMMANN and FREDA DAMMANN,
Defendants-Appellants.

Appeal from the Iowa District Court for Carroll County, Gary L. McMinimee, Judge.

LeRoy and Freda Dammann appeal from judgment against them on a promissory note. **REVERSED AND REMANDED.**

Dee Ann Wunschel and Russell S. Wunschel of Wunschel Law Firm, Carroll, for appellants.

Robert Kohorst of Kohorst Law Firm, Harlan, for appellees.

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

HUITINK, P.J.

I. Background Facts and Proceedings.

In this case Richard Dammann, Geri Spies, Nancy McCord, and Sandra Hass, plaintiffs, sued LeRoy Dammann and Freda Dammann, defendants, for the unpaid balance of an October 1, 1980, promissory note payable to Lester K. Dammann. The original principal, $57,500, represented a portion of the purchase price of farm machinery LeRoy bought from Lester.

Lester died on July 7, 1986. LeRoy and Sandra were appointed executors of Lester's estate. Lester's wife, Ruby, was the principal beneficiary of Lester's estate. Although the unpaid balance of LeRoy's note was $32,500 when Lester died, neither this obligation or the balance of a $33,000 loan Lester made to LeRoy in 1976 were included as assets in Lester's estate. Lester's estate was closed on August 3, 1987. Ruby died on March 8, 1989. LeRoy offered Ruby's April 20, 1988, will naming him as executor and beneficiary for probate. The plaintiffs, citing LeRoy's undue influence over Ruby, successfully contested her April 20, 1988, will. LeRoy was subsequently removed as executor of Ruby's estate, and attorney Arthur Neu was appointed as his successor.

On July 18, 1990, Sandra filed a separate lawsuit to reopen Lester's estate alleging the 1980 promissory note and 1976 loan were newly discovered assets of Lester's estate. The district court found Ruby, as the beneficiary of Lester's estate, would have inherited these assets, and her executors, not Sandra, were the real parties

in interest entitled to seek the relief requested. Sandra's action was accordingly dismissed. A second action filed by the plaintiffs on September 13, 1991, to reopen Lester's estate was dismissed for the same reason. On appeal we affirmed the district court's decision dismissing the September 1991 action. Like the district court, we determined the executor of Ruby's estate was the real party in interest to any action to reopen Lester's estate. Plaintiffs' application for further review of our decision was denied.

In a June 1, 1992, report to the court Neu addressed the plaintiffs' continuing allegations of LeRoy's fraudulent concealment of the 1980 promissory note and resulting necessity to reopen Lester's estate. Neu stated:

> This executor has investigated the circumstances surrounding the aforesaid promissory note and concluded that a note was executed by LeRoy H. and Freda Dammann to the decedent, Lester K. Dammann, on October 1, 1980, attached hereto as Exhibit A. Executor believes principal balance due on the note is $32,000.00, plus any accrued interest. However, based on an affidavit executed by Robert A. Feldmann and on testimony by one Sandra Hass, daughter of Lester K. Dammann, copies of which are marked Exhibit B and C and attached hereto, this executor has concluded that the promissory note has been forgiven.
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> In addition, Section 633.487, *Code of Iowa*, provides that parties who have been served with Notice of Hearing on the Final Report and Accounting of a personal representative, or who have waived such notice, shall have no right to contest in any proceedings, other than by appeal, the correctness of the inventory, accounting, distribution or other acts of the personal representative, except for fraud committed by the personal representative. Petitioners were noticed of the Final Report in the Lester Dammann Estate. The undersigned concludes that any action to reopen the Estate of Lester K. Dammann is therefore barred by §633.487, unless fraud can be established.

> The undersigned has been unable to determine if fraud on the part of the former personal representative occurred so as to void the forgiveness of the note and avoid the limitations in §633.487. This executor does not have authority to take testimony under oath or to subpoena witnesses. The Court should, therefore, set this matter for hearing to determine if fraud did exist.

Following the requested hearing at which both plaintiffs and defendants presented evidence concerning the issues raised in Neu's report the court made these findings of fact and order:

> With respect to fraudulent concealment, it is the plaintiffs' theory that LeRoy Dammann failed to include either of the above items [1976 loan and 1980 note] in the inventory in the Lester Dammann Estate; moreover, with respect to the machinery contract, plaintiffs claim that even if it had been forgiven shortly before Lester's death, it still should have been shown in the inventory as a gift in contemplation of death.
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> With respect to the machinery note, Ruby Dammann told Sandra Hass in November of 1987 that Lester Dammann had told her that the note had been forgiven.
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> * * *
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> In short, there appears to be substantial evidence that Ruby Dammann had knowledge of both of the alleged debts at the time of the August 3, 1987, Order on Final Report. It is therefore unlikely that the executor could successfully re-open the Lester Dammann Estate on the theory of fraudulent concealment. Moreover, it does not appear to this Court that further investigation would provide substantially more evidence on the subject.
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> IT IS THEREFORE ORDERED that unless the executor becomes aware of new and further information regarding this matter, he is not authorized to attempt to re-open the Lester Dammann Estate.

In an unpublished opinion filed August 5, 1994, we affirmed the district court. We said:

> This appeal concerns a trial court order entered following an application for direction filed by Art Neu. Neu was appointed as successor executor to LeRoy and Freda property. [sic] The allegedly newly discovered property was personal property, and, if it had been included as an asset in Lester's estate, it would have passed to Ruby. Ruby was alive when Lester's estate was closed. She had notice of the closing of the estate and made no objection. There was evidence Ruby was aware of both the 1976 check and the 1980 note. Ruby told Sandra in November 1987 that Leroy's failure to re-pay the $33,000 bothered her and, at the same time, she told Sandra that Lester told her before he died the note given in 1980 had been forgiven. The trial court found there was substantial evidence Ruby knew about both transactions. We have reviewed the facts and find no reason to disagree with this assessment.
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> Ruby, having been given notice of the final report, therefore, was bound by the provisions of it as she would be bound by an other final judgment. *See* Iowa Code § 633.36; *see also Ritz v. Selma United Methodist Church*, 467 N.W.2d 266, 270 n. 2 (Iowa 1991).

In a petition filed in this case on September 2, 1996, the plaintiffs claimed ownership of the 1990 note as Ruby's heirs at law and successors in interest. They renewed earlier made allegations that the note was in default and demanded judgment for the unpaid balance of principal and interest.

The defendants denied liability on the note and affirmatively alleged:

> The Court has entered an Order affirming the reports, including the Final Report of Arthur N. Neu, and all the rights of the Plaintiffs to bring any cause of action is barred by Chapter 633.487 of the Code of Iowa.

In a motion for adjudication of law points, defendants asserted the preclusive effect of orders approving the final reports of the personal representatives in both Lester's and Ruby's estates. The district court rejected defendant's claims, stating:

A previous summary judgment ruling by Judge Gary L. McMinimee appropriately stated:

> It seems to this Court that the Order closing the Estate should be appropriate binding among the Personal Representatives of the decedent, the beneficiaries, and the creditors of the Estate, but that there is no reason that a debtor of the Estate should be permitted to take advantage of that Order. Debtors are protected by statutes of limitations. this Court sees no reasons for providing them with greater protections.
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> If the obligation of LeRoy Dammann and Freda Dammann has been forgiven by Lester Dammann or Ruby Dammann it would have no value and would not be an asset in which the Plaintiffs have an interest. All defenses including the appropriate statute of limitations will be raised in the above lawsuit.
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> * * *
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> The above-named Plaintiffs are not estopped from pursuing a potential claim by issue preclusion, collateral estoppel, and res judicata and the question of whether or not a claim exists by the Plaintiffs against the Defendants was not litigated nor administered in the Estate of Lester Dammann and Ruby Dammann.

The matter proceeded to trial wit . a resulting jury verdict and judgment against the defendants for $43,160.

Defendants appeal. They contend the court erred in (1) determining plaintiffs' claims were not precluded by final settlement of the Lester and Ruby Dammann estates; (2) excluding testimony of the former executor of their mother's estate regarding his conclusions that LeRoy had not committed fraud; (3) allowing testimony regarding undue influence exerted on Ruby; (4) taking judicial notice of a prior jury verdict; and (5) giving erroneous jury instructions.

II. Standard of Review.

Our review is for errors of law. Iowa R. App. P. 4.

III. Preclusive Effect of Prior Probate Orders.

Generally, probate orders adjudicating a claim or other matter at issue is conclusive and final as to those persons having notice, or who appear without notice at the relevant proceedings. *See In re Estate of Bruene*, 350 N.W.2d 209, 213 (Iowa App. 1984); *In re Jarvis' Estate*, 185 N.W.2d 753, 756 (Iowa 1971); *In re Hartstack's Estate*, 250 Iowa 510, 518, 94 N.W.2d 744, 749 (Iowa 1959). We have also held an order approving a final report was not preclusive where the record failed to show the subject matter of subsequent litigation was not a claim or issue addressed in the final report or order approving it. *See In re Prehoda's Estate*, 309 N.W.2d 516, 519 (Iowa App. 1981).

Here, Neu's report expressly addressed the parties' conflicting claims concerning the 1980 promissory note. All of the parties to this action received notice of the hearing on Neu's report. The record in this case also indicates evidence supporting defendants' claim that the note was forgiven was offered at the hearing on Neu's report and that plaintiffs were heard on this issue. Neu's conclusion that the available evidence indicated the note had been forgiven controlled both his recommendation to proceed no further on plaintiffs' claims and the district court's order adopting this recommendation. Because the issue of whether the note was forgiven was fully and fairly investigated and decided in an adversarial proceeding

including the plaintiffs, we hold the plaintiffs are precluded from relitigating the same issue in this case. *See Jarvis*, 185 N.W.2d at 756. The district court erred by concluding otherwise, and the resulting judgment against the plaintiffs must be reversed.

Our decision to reverse on the foregoing issue is dispositive, and there is no need to address the remaining issues raised on appeal. The judgment of the district court is reversed, and this case is remanded for an appropriate order of dismissal.

REVERSED AND REMANDED.