

CAPTION: Rosemary E. Nickischer
Vs.
Robert Borso

DOCKET NO.: 1998-C-1584

JUDGE: McFadden

DECISION DATE: July 28, 1999

ATTORNEYS: J. Amacher
E. McLain

DISPOSITION: Granted

NATURE OF ACTION: Summary Judgment

DIGEST TOPIC: 20 Pa.C.S..A. § 908
Wills

KEY NO.: Wills 289, 364

DESCRIPTION OF DECISION

Plaintiff instituted the present cause of action fifteen (15) months after the probate of Mother's Will, claiming that Defendant acted to unduly influence Mother and that Defendant fraudulently secured Mother's assets. Because said claims could have been raised at the time that the will was probated, and the filing of the Complaint in the instant action was done outside the one-year period for the appeal of the probate of a will, the action is time-barred.

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA
CIVIL DIVISION-LAW

ROSEMARY E. NICKISCHER : NO. 1998-C-1584
 :
 Plaintiff, :
 :
 v. :
 :
 ROBERT BORSO :
 :
 Defendant :

ORDER OF COURT

AND NOW, this day of July, 1999, Robert Borso's
(hereinafter Defendant's) Motion for Summary Judgment is hereby
GRANTED.

STATEMENT OF REASONS

1. This matter arises out of a dispute regarding the
Estate of Helen Borso (hereinafter "Mother"), mother of
Plaintiff and Defendant herein. Following the death of her
husband, Geza Borso, on March 19, 1984, Mother resided with her
daughter, Rosemary Nickischer (hereinafter "Plaintiff"), and her
family. At that time, Mother executed a Will naming Plaintiff
as Executrix of her estate and giving Plaintiff Power of

Attorney over her affairs. Mother resided with Plaintiff until December of 1994, at which time she took up residence with her son, Robert Borso (hereinafter "Defendant"). Not long after Mother moved in with Defendant, Mother executed a new Will naming Defendant as Executor of her Estate.

2. In October, 1985, Mother left Defendant's home and took up residence in the Rooney Building in Bethlehem, Pennsylvania, and then moved to the Blough Nursing Home and St. Luke's Hospital, where she remained until her death on November 8, 1995.

3. Mother's Will was probated in Northampton County, Pennsylvania, on December 10, 1996, wherein Defendant was appointed Executor of Mother's Estate. Said Will provided that the residue of Mother's Estate was to be divided equally between Plaintiff and Defendant.

4. Plaintiff filed a Complaint against Defendant on March 4, 1998, alleging that she received distribution of Mother's Estate in the amount of only \$4,000, and that the Defendant acted to unduly influence Mother to transfer all of her assets to his accounts. Additionally, Plaintiff argues that

Defendant misrepresented to Mother the state of her affairs and fraudulently induced Mother to transfer her assets to him.

5. Thereafter, on April 24, 1998, Defendant filed an Answer, New Matter and Counterclaim, wherein Defendant joined: (1) Defendant's wife, Ann Borso, as a counterclaim Plaintiff; (2) Plaintiff's son, Brent Nickischer (hereinafter "Brent Nickischer"), as a counterclaim Defendant; and (3) Plaintiff's husband, Ronald Nickischer (hereinafter "Ronald Nickischer"), as a counterclaim Defendant.

6. On July 27, 1998, Plaintiff filed Preliminary Objections to Defendant's Counterclaim, arguing that Defendant improperly joined Plaintiff's husband and son as Additional Defendants to the within lawsuit. On July 30, 1998, Defendant filed an Amended Answer, New Matter and Counterclaim, eliminating Ann Borso as an Additional Plaintiff and Brent Nickischer and Ronald Nickischer as Additional Defendants. Thereafter, on September 30, 1998, Plaintiff filed a Reply to New Matter and Counterclaim.

7. On May 17, 1999, following the close of discovery, Defendant filed a Motion for Summary Judgment. In support

thereof, Defendant argues that: (1) Plaintiff's action is barred by res judicata; (2) Plaintiff's action is in violation of the one year statute of limitations for the challenge of the probate of the will; (3) Plaintiff has failed to present any material evidence to establish that Defendant utilized undue influence or fraud to gain control of Mother's Estate; and (4) Plaintiff's filing suit against Defendant herein constitutes bad faith such that Plaintiff should be required to pay Defendant's attorney's fees and costs of litigation. To the contrary, Plaintiff avers that: (1) the matters alleged in Plaintiff's Complaint are not of the nature raised in a probate proceeding and are not barred by the statute of limitations or by res judicata; (2) Plaintiff has established evidence with respect to the confidential relationship between Defendant and Mother, Mother's mental and physical conditions and the undue influence he exerted upon her; and (3) Plaintiff's Complaint was filed in good faith.

8. Summary Judgment shall be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.2. The party moving for summary judgment has the

initial burden to show that no material issue of fact exists. Butterfield v. Giuntoli, 670 A.2d 646 (Pa.Super. 1995). In ruling on a Motion for Summary Judgment, the court must accept as true all well pleaded facts, giving the non-moving party the benefit of all reasonable inferences drawn therefrom. Keenheel v. Com., Pennsylvania Securities Com'n, 579 A.2d 1358 (Pa.Cmwlth. 1990). Once the moving party has met its burden, the non-moving party must produce sufficient evidence regarding material issues of his case and on which he bears the burden of proof such that a jury could return a verdict in his favor. Failure to show such evidence establishes that the moving party is entitled to judgment as a matter of law. Ertel v. Patriot-News Co., 674 A.2d 1038, 1042 (Pa. 1996).

9. In summary judgment proceedings, it is not the court's function to determine the facts, but only to determine if an issue of material fact exists. Fogle v. Malvern Courts, Inc., 701 A.2d 265 (Pa.Super. 1997). Rule 1035 also provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for

trial. Sovich v. Shaughnessy, 705 A.2d 942 (Pa.Cmwlth. 1998). Summary judgment is properly granted if, after the completion of discovery relevant to the motion, . . . an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. Costa v. Roxborough Memorial Hosp., 708 A.2d 490 (Pa.Super. 1998).

10. 20 Pa.C.S.A. § 908 provides that "[A]ny party in interest who is aggrieved by a decree of the register, or a fiduciary whose estate or trust is so aggrieved by a decree of the register, or a fiduciary whose estate or trust is so aggrieved, may appeal therefrom to the court within one year of decree. . . ." 20 Pa.C.S.A. § 908.

11. The presumption of the validity of a will arises once a will is probated. Estate of Pew, 655 A.2d 521, 547 (Pa.Super. 1994) citing Burns v. Kabboul, 595 A.2d 1153, 1162 (Pa.Super. 1991). It has been held that:

"When a last will has been admitted to probate, the legal presumption at once arises that the will so probated is a last will, and is the free and voluntary expression of a testator, of sound and disposing mind and understanding, as to the disposition the testator desired to make of his property upon his death. Where

the decree of the register is unappealed from within the period allowed for such appeal, the legal presumption becomes conclusive, and it makes an end to questions passed upon, or within the jurisdictional power of the register to consider, touching the validity of the will.”

Estate of Pew, 655 A.2d at 547 citing Bunce v. Galbrath, 112 A. 143 (Pa. 1920). Probate, however, is not conclusive as to extraneous matters or matters outside the record, nor is it conclusive as to matters not involved in or properly determinable upon probate. Estate of Pew, 655 A.2d at 547 citing In re Hickman’s Estate, 162 A. 168, 170 (Pa. 1932).

12. Furthermore, the one year period in which an appeal from the probate of a will can be taken is mandatory and cannot be set aside to entertain a claim of undue influence. Dempsey v. Figura, 542 A.2d 1388, 1390-91 (Pa.Super. 1988). The only situation permitting us to set aside the statutory period for filing such an appeal occurs in cases where there has been a fraud on the court or the Register of Wills. Id.

13. In the case before us, Mother died on November 8, 1995. According to the allegations contained within the Complaint, Mother’s Will was probated on December 10, 1996.

Plaintiff instituted this action by filing a Complaint on March 4, 1998, fifteen (15) months after the probate of Mother's Will.¹ Therein, Plaintiff claims that the Defendant acted to unduly influence Mother and that he fraudulently secured Mother's assets. These claims could have been raised at the time that the Will was probated.

¹We note that Defendant avers that the filing of the Complaint by Plaintiff was done in excess of two years following the probate of Mother's estate. However, based upon the dates pled by the parties herein, we calculate a lapse of fifteen (15) months between the probate of Mother's Will and the filing of the within Complaint.

14. As noted, Rule 1035 provides that “[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Sovich, 705 A.2d 942. In response to Defendant’s Motion for Summary Judgment, the only information provided to this court by Plaintiff is Plaintiff’s Affidavit in opposition to the Motion for Summary Judgment. However, within said Affidavit, Plaintiff fails to set forth specific fact showing that there is a genuine issue for trial. Plaintiff merely restates those facts already contained within the pleadings, and does not provide any basis upon which we can excuse the late filing of this action.

15. As the purpose of the Statute of Limitations is to set a specific limit on claims such as undue influence in order to assure a personal representative of an estate of finality and to encourage the timely, orderly and efficient administration of estates, we find that the delay in raising the aforementioned issues with regard to undue influence and fraud to be without justification.

Dempsey, 542 A.2d at 1391. Accordingly, we hold that the filing of an action on November 8, 1995 is time-barred by the Statute of Limitations. Id.

BY THE COURT:

_____, J
F.P. KIMBERLY McFADDEN, Judge