[Cite as *Bartlett v. SunAmerica Life Ins. Co.*, 2010-Ohio-1884.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Judith A. Bartlett

Appellee

v.

SunAmerica Life Insurance Company

Defendant

[William C. Bartlett, Linda Jo Coss (aka Cross), Leanna D. DeGroff, Loretta L. Harris--

Appellants]

Court of Appeals No. L-09-1124

Trial Court No. CI0200804030

DECISION AND JUDGMENT

Decided: April 30, 2010

* * * * *

Jennifer J. Antonini, for appellee.

Kevin M. Ferguson, for appellants.

* * * * *

SINGER, J.

{¶ 1} This is an appeal from the Lucas County Court of Common Pleas wherein the court granted appellee, Judith Bartlett's, motion for summary judgment and denied

appellants', Linda Jo Bartlett Coss, Loretta Bartlett Harris, Leanna De Bartlett DeGroff, and William C. Bartlett's, motion for summary judgment. For the reasons that follow, we affirm.

{¶ 2} Appellee married William R. Bartlett ("Bartlett") on November 18, 1983. During the marriage, Bartlett named appellee as the primary beneficiary of his life insurance policy issued by SunAmerica Life Insurance Company. He also named her as the primary beneficiary on his individual retirement account (IRA) held by the Securian Investment Company.

{¶ 3} In 2007, Bartlett filed for divorce from appellee (Case No. DR2007-0296). On March 21, 2007, the Domestic Relations Court, pursuant to Loc.R. 8.01, issued a temporary injunction which prohibited the parties from changing beneficiaries on insurance policies and retirement accounts during the pendency of their divorce.

{¶ 4} On December 9, 2007, Bartlett removed appellee as the primary beneficiary on his insurance policy and replaced her with appellants, his children from a previous marriage. On February 5, 2008, Bartlett removed appellee as the primary beneficiary on his IRA and replaced her with appellants.

{¶ 5} On March 17, 2008, Bartlett filed a voluntary dismissal of his divorce action. That same day, appellee filed for divorce from appellant (Case no. DR2008-0299). A temporary injunction regarding property transfers was also issued at the same time.

{¶ 6} Bartlett died on May 1, 2008, while the second divorce action was still pending. On May 13, 2008, appellee filed suit against appellants seeking to preclude them from receiving the proceeds from the life insurance policy and the IRA. She alleged claims for promissory estoppel, unjust enrichment, constructive trust, injunctive relief and declaratory judgment. On September 25, 2008, appellee filed a motion for summary judgment. On April 1, 2009, the court granted appellee's motion and ordered the Clerk of Courts to pay appellee the insurance proceeds. The court further ordered appellants to hold the IRA in constructive trust and to convey the IRA to appellee. Appellants now appeal setting forth the following assignments of error:

{¶ 7} "I. That the trial court erred in granting the appellee's motion for summary judgment awarding her the proceeds from the AIG Sun America life insurance policy and in denying the appellants' counter-motion for summary judgment by failing to find that the injunctions issued by the Domestic Relations Court in the original divorce proceedings became null and void and of no force and effect upon the dismissal of the case. *Michelson v. Michelson*, 2006 WL 1667744, Ohio App. 6 Dist. (June 16, 2006)."

{¶ 8} "II. That the trial court erred in granting the appellee's motion for summary judgment awarding her the proceeds from the Morgan Stanley IRA account and in denying the appellants' counter -motion for summary judgment by finding that the Lucas County Domestic Relations Court's temporary injunction issued in the second divorce proceedings was effective and enforceable despite the absence of proper service having been perfected in that refiled case."

{¶ 9} Appellate review of a summary judgment is de novo. *Hillyer v. State Farm Mut. Auto. Ins. Co*. (1999), 131 Ohio App.3d 172, 175; *Brown v. Scioto Bd of Commrs*. (1993), 87 Ohio App.3d 704, 711. Summary judgment is proper only when, looking at the evidence as a whole: (1) there is no genuine issue of material fact; (2) reasonable minds can come to only one conclusion, that is adverse to the party against whom the motion for summary judgment is made, and; (3) the moving party is entitled to judgment as a matter of law. Civ.R. 56(C); *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146. All issues that are in doubt must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95.

{¶ 10} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleading, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery* (1984), 11 Ohio St.3d 75, 79. A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc*. (1999), 135 Ohio App.3d 301, 304; *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 826, citing *Anderson v. Liberty Lobby, Inc*. (1986), 477 U.S. 242, 248.

{¶ 11} In their first assignment of error, appellants argue that Bartlett's action in voluntarily dismissing his divorce complaint in March 2008 rendered the March 21, 2007 injunction issued in Domestic Relations Court invalid. Appellants argue that the dismissal of a case effectively removes all claims raised therein from the court's jurisdiction and places the parties in a position as if no suit had ever been brought. Thus, if Case No. DR2007-0296, was never brought, there never was a March 21, 2007 injunction preventing Bartlett from changing his beneficiaries in December 2007 and February 2008.

{¶ 12} In support, appellants have relied heavily on this court's case of *Michelson v. McMillan,* 6th Dist. No. WM-05-018, 2006-Ohio-3063. In *Michelson*, a husband died while his wife's petition for divorce was pending. His life insurance proceeds were paid to his cohabitant and adult daughter. The wife brought action against husband's estate and the cohabitant seeking judgment in the amount of the life insurance proceeds. This court ruled against the wife stating:

{¶ 13} "It is well-settled that '[a]n attempt to change the named beneficiary under a life insurance policy cannot be held to defeat the original beneficiary's interest upon the insured's death, when, at the time of the attempted change, a temporary restraining order prevented the insured from affecting in any manner the interests in his assets, *and that judicial prohibition remained in effect at the time of the insured's death.*' *Mack v. Allstate Life Ins. Co*. (1987), 42 Ohio App.3d 101, at the syllabus (emphasis added). However, the dismissal of a case effectively removes all claims raised therein from the court's

jurisdiction and places the parties in a position as if no suit had ever been brought. *Denham v. New Carlisle* (1999), 86 Ohio St.3d 594, 596, citing *DeVille Photography, Inc. v. Bowers* (1959), 169 Ohio St. 267, 272. Accordingly, in cases such as this one, where, the underlying action has been dismissed 'without prejudice,' a temporary order imposed therein no longer has any effect. See, e.g., *Lilly v. Lilly* (1985), 26 Ohio App.3d 192, (Temporary child support orders no longer in effect after the underlying domestic relations case is dismissed)." *Michelson* at ¶ 13.

{¶ 14} Appellants' reliance on *Michelson*, however, is misplaced. Unlike the facts in this case, the deceased in *Michelson* removed his wife as the primary beneficiary on his life insurance policy and replaced her with his cohabitant and adult daughter *before* any temporary injunction had been issued restricting the deceased from transferring property.

{¶ 15} Although an insured generally has the right to select a beneficiary of his choice, the purpose of the temporary restraining order was to maintain the status quo, thus preserving the rights and liabilities of the respective parties pending adjudication of the merits of the case. The effect of the trial court's temporary restraining order was to preserve the action, an issue wholly separate and apart from the issue of jurisdiction. *Concepcion v. Concepcion* (1999), 131 Ohio App.3d 271. Appellants are correct in asserting that a voluntary dismissal divests a trial court of jurisdiction over an action, and a claim so dismissed is treated as if it had never been filed. *Zimmie v. Zimmie* (1984), 11 Ohio St.3d 94, 95. Moreover, a voluntary dismissal without prejudice dissolves

interlocutory orders made by the court in that action. *Capitol Mtge. Serv., Inc. v. Hummel*, 10th Dist.No. 01AP-1104, 2002-Ohio-4301.

{¶ 16} It follows that the March 21, 2007 temporary restraining order was dissolved upon Bartlett filing a voluntary dismissal on March 17, 2008. However, this does not change the fact that in December of 2007 and February of 2008 there was a valid court order in effect preventing Bartlett from removing his wife as beneficiary on his life insurance policy and his IRA, a valid court order which Bartlett blatantly disregarded. Accordingly, we find that the trial court did not err in awarding appellee the proceeds from SunAmerica life insurance policy. Appellants' first assignment of error is found not well-taken.

{¶ 17} In their second assignment of error, appellants contend that the court had no basis to impose a constructive trust.

{¶ 18} It is well established that where unjust enrichment is found, it may serve as the basis for the operation of a constructive trust. *Ferguson v. Owens* (1984), 9 Ohio St.3d 223, 226. Unjust enrichment occurs when a party retains money or benefits that in justice and equity belong to someone else. *Liberty Mut. Ins. Co. v. Indus. Comm.* (1988), 40 Ohio St.3d 109, 110-111. The constructive trust is a remedial technique utilized by courts of equity to do justice. *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161. In Ohio, a party seeking to enforce a constructive trust must establish the facts that give rise to such a trust by clear and convincing evidence. *Hill v. Irons* (1953), 160 Ohio St. 21, *Concepcion v. Concepcion*, supra.

{¶ 19} In this case, Bartlett knowingly removed his wife as beneficiary from his IRA in contravention of the March 21, 2007 temporary restraining order. As discussed above, his voluntary dismissal dissolved the March 21, 2007 order. After appellee filed for divorce (Case No. DR2008-0299) following Bartlett's dismissal, the trial court issued a restraining order which prohibited the parties from changing beneficiaries on insurance policies and retirement accounts during the pendency of their divorce.

{¶ 20} On March 26, 2008, Bartlett had the Securian IRA transferred to a Morgan Stanley account. Appellants contend that he was not in violation of the protection order issued in Case No. DR2008-0299 because he was never properly served with the divorce complaint and thus he had no notice of the restraining order. While it is undisputed that Bartlett was never properly served before he died, appellants' argument is without merit as Civ.R. 75(I) clearly allows courts to impose restraining orders without notice.

{¶ 21} In the present case, Bartlett not once but twice attempted to prevent appellee from receiving the proceeds from his IRA account in contravention of two separate and valid court orders. Pursuant to the foregoing, we find that appellee has set forth sufficient facts to meet the clear and convincing standard of proof needed for the imposition of a constructive trust. Therefore, we find that imposition of a constructive trust was an appropriate remedy. Appellants' second assignment of error is found not well-taken.

{¶ 22} On consideration whereof, the court finds that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellants are ordered to pay costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE