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STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF GREENWOOD

EIGHTH JUDICIAL CIRCUIT

KAREN PETIT,
Plaintiff,

Case No.: 2017-CP-24-01343

-v-

PHYLLIS VAN SWOL *f/k/a/* PHYLLIS
KROHN et al.,
Defendants.

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SC Court of Appeals

ORDER

Hocker, J.

This Matter Came Before the Court for a hearing on the Defendant Phyllis Van Swol's Motion for Summary Judgment. Heard by the Court sitting in Laurens County, Jane H. Merrill, Esq., appeared for the Plaintiff, and Joshua S. Nasrollahi, Esq., and William S. Brown, Esq., appeared for the Mrs. Van Swol and Defendants USAA Federal Savings Bank, and USAA Investment Management Co. respectively. On review of the file, and the motions and related documents submitted, and after considering the applicable law, I grant Mrs. Van Swol's motion and grant summary judgment in her favor.

FACTS

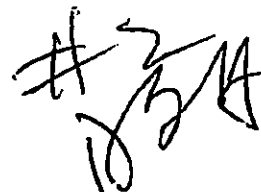
The Plaintiff is the daughter of the decedent Dr. Edward Petit. The Defendant Phyllis Van Swol (F/K/A/ Phyllis Krohn") was a "companion" of the decedent. On or around January 15, 2007, the decedent executed a form with the Defendant USAA Investment Management Co. (hereinafter "USAA") declaring his daughters as the primary beneficiaries of his IRA. Subsequently, in 2009, the decedent executed a form

USAA power attorney in favor of the Defendant, which was never used by the Defendant. In 2012, the decedent changed the primary beneficiaries for his IRA to his grandchildren. The form in question was allegedly completed by the Defendant but signed by the decedent. That same year, the decedent granted Henry Dorn a durable general power of attorney, the validity of which was upheld by the Greenwood County Probate Court during capacity proceedings involving the decedent in 2014. The Defendant never executed any documents pursuant to the USAA powers of attorney, though she admitted that she completed the 2012 form except for the signature line.

Sometime in mid-2014, Mr. Dorn transferred the funds from the USAA IRA into an IRA he established with Wells Fargo, N.A. When Mr. Dorn set up the new IRA, he left the beneficiaries as the decedent had declared them in his 2012 declaration. The Defendant had no involvement with the establishment of the Wells Fargo IRA or the transfer of funds from USAA to Wells Fargo. The decedent passed away in 2015, at which point Peter Manning was appointed as the personal representative of the decedent's estate. Pursuant to the beneficiary designation established by Mr. Dorn, Wells Fargo distributed the funds held by it to the decedent's granddaughters. This lawsuit followed several years later.

LEGAL STANDARD

Summary judgment is appropriate only where there is no genuine issue of material fact and it is clear the moving party, who bears the burden of proof, is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from

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the evidence must be viewed in the light most favorable to the nonmoving party. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011).

“[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Our Supreme Court has stated that great care should be used in the consideration of summary judgment motions. “Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues.” *Carolina All. for Fair Emp’t v. S.C. Dep’t of Labor, Licensing, & Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct. App. 1999) (citing *Etheredge v. Richland Sch. Dist. I*, 330 S.C. 447, 499 S.E.2d 238 (Ct. App. 1998)).

“Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.” *Id.* at 485, 523 S.E.2d at 799 (citing *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577 (1990)). Our courts recognize that “questions of credibility make summary judgment inappropriate.” *Hansen v. DHL Labs., Inc.*, 316 S.C. 505, 513, 450 S.E.2d 624, 628 (Ct. App. 1994), *decision aff’d*, 319 S.C. 79, 459 S.E. 2d 850 (1995).

ANALYSIS

The Plaintiff asserts four causes of action against the Defendant: tortious interference with a contract, breach of fiduciary duty, negligence, and undue influence. The Defendant’s request for summary judgment as to each count is addressed below.

I. Tortious Interference with a Contract

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The Plaintiff first asserts a cause of action for tortious interference with a contract. “The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages.” Camp v. Springs Mortgage Corp., 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993). “[A]n action for tortious interference protects the property rights of *the parties to a contract against unlawful interference by third parties.*” Threlkeld v. Christoph, 280 S.C. 225, 227, 312 S.E.2d 14, 15 (Ct.App.1984)(emphasis supplied). “Thus, ‘[t]he actions of a principal's agent are afforded a qualified privilege from liability for tortious interference with the principal's contract.’” Dutch Fork Dev. Grp. II, LLC v. SEL Properties, LLC, 406 S.C. 596, 605, 753 S.E.2d 840, 844 (2012)(quoting CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc., 357 F.3d 375, 385 (3d Cir. 2004))(alterations in the original). Moreover, as the contract at issue is an IRA case, even as a designated beneficiary, the Plaintiff has only an “expectancy in the benefits” which do not fully vest until the decedent passes away. Waller v. Pope, 715 So. 2d 958, 960 (Fla. Dist. Ct. App. 1998)(citing Cooper v. Muccitelli, 661 So.2d 52, 53 (Fla. 2d DCA 1995), *aff'd*, 682 So.2d 77 (Fla.1996)). Compare Babb v. Paul Revere Life Ins. Co., 224 S.C. 1, 9, 77 S.E.2d 267, 271 (1953)(quoting 45 C.J.S. Insurance § 465(b)) (“An action for damages for wrongful cancellation or repudiation of an insurance policy may be maintained by either insured or the beneficiary during the lifetime of insured, but the beneficiary cannot maintain the action during insured's lifetime if he does not have a vested interest in the policy, or if his interest is in the nature of a mere expectancy and does not become absolute and indefeasible until the death of insured . . . After the death

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of insured, the action may be maintained by the beneficiary.”) and Waters v. S. Farm Bureau Life Ins. Co., 365 S.C. 519, 523, 617 S.E.2d 385, 387 (Ct. App. 2005)(quoting Antley v. New York Life Ins. Co., 139 S.C. 23, 27, 137 S.E. 199, 200 (1927)) (“When an insurance policy does not reserve to the insured the right to change the beneficiary, ‘the beneficiary, upon the issuance of the policy, acquires a vested interest in the proceeds of the insurance when available according to the terms of the policy, which cannot be divested by any act of the insured.’”). However, there are instances in which a beneficiary’s rights may be vested before the death of the accountholder. A beneficiary’s rights are not vested unless or until (1) the accountholder lacks the ability to freely change the beneficiaries, or (2) the accountholder’s death. Stribling v. Stribling, 369 S.C. 400, 406, 632 S.E.2d 291, 294 (Ct. App. 2006).

While there existed two legal contracts in this case—between the decedent and USAA and then later between the decedent and Wells Fargo—the Plaintiff was not a party to either contracts. The Plaintiff’s previous status as a beneficiary to the decedent’s account does create in her a vested interest. See Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005)(citing Touchberry v. City of Florence, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988)) (“A third-party beneficiary is a party that the contracting parties intend to directly benefit.”); Luszcz v. Lavoie, 787 So. 2d 245, 248 (Fla. Dist. Ct. App. 2001) (“[A] beneficiary’s rights to proceeds [of an IRA] do not attach until the IRA owner’s death. Until then, the beneficiary merely has an expectancy in the IRA because until the owner’s death, the owner can do with the IRA as desired, including changing the beneficiary designation or cashing out the account altogether.”) Because the Plaintiff was not a party to the USAA contract, she cannot

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assert or recover on a tortious interference cause of action. Cf. Ross v. Life Ins. Co. of Virginia, 273 S.C. 764, 766, 259 S.E.2d 814, 815 (1979)(citing Smith v. Citizens & Southern National Bank of S.C., 241 S.C. 285, 128 S.E.2d 112 (1962); Keels v. Powell, 207 S.C. 97, 34 S.E.2d 482 (1945)) (“Moreover, the South Carolina cases recognizing a cause of action for tortious interference with a contract have been limited to situations where an action was brought against third persons rather than parties to the contract.”). Plaintiff argued that she had a vested interest in the IRA because her father, Dr. Petit, lacked the ability to freely change beneficiaries on January 23, 2012, therefore the Plaintiff has a vested interest, requiring Defendant’s motions to be denied. The Plaintiff claimed the decedent’s health issues rendered him unable to change his beneficiary designation. In support of this claim, the Plaintiff argued that the decedent had dementia, heart problems, and glaucoma that made him unable to read. Additionally, the Plaintiff presented evidence that a short time prior to the beneficiary change the decedent lost consciousness of a cruise and underwent a heart catheterization as a result. Still, while the evidence may demonstrate that the decedent was in poor health at the time the beneficiaries were changed, no evidence was presented demonstrating that the decedent was incompetent to execute the change. As such, Defendant’s motion for summary judgment on this cause of action is granted.

II. Breach of Fiduciary Duty

Next, the Plaintiff alleges that the Defendant breached her fiduciary duty to the decedent by changing the beneficiaries of the decedent’s former IRA. “To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages

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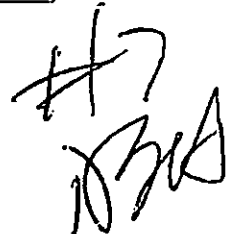
proximately resulting from the wrongful conduct of the defendant.” RFT Mgmt. Co. v. Tinsley & Adams, 399 S.C. 322, 335-336, 732 S.E.2d 166 (2012)(citing Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct.App.2004); Spence v. Wingate, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011)).

It is clear from the evidence submitted that Mrs. Van Swol owed the decedent as fiduciary duty when she given a power attorney by him. The Plaintiff argued that Mrs. Van Swol acted under her fiduciary duty when she filled out the 2012 form.

Plaintiff presents no legal principle, however, that this fiduciary duty extends to her as a beneficiary of the account, though she argued her interest was vested because her father, Dr. Petit, lacked the ability to freely change beneficiaries on January 23, 2012. Even if the Defendant breached a fiduciary duty owed to the decedent (which she does not concede), this is a breach of a duty owed by the Defendant to the *decedent* and not the Plaintiff. In this way, any resulting injury from such a breach would be to the decedent’s estate, not to the Plaintiff personally. Plaintiff did not present more than a scintilla of evidence. Summary judgment as to the Plaintiff’s second cause of action against Mrs. Van Swol must be granted in favor of Mrs. Van Swol.

III. Negligence

Thereafter, the Plaintiff asserts that Mrs. Van Swol’s conduct in this case arises to the level of negligence. This claim must also fail because the Plaintiff cannot show that any of her resulting damages are non-economic. However, Plaintiff testified that she suffered emotional damages and nightmares defeats this assertion. The South Carolina Supreme Court has long held that “tort liability only lies where the damage done is to other property or is personal injury.” Kennedy v. Columbia Lumber & Mfg. Co., Inc.,



299 S.C. 335, 341, 384 S.E. 2d. 730 (1989). This rule, known as the economic loss rule, finds its bedrock in products liability law but the principles which underpin its application are particularly prescient here. In Sapp v. Ford Motor Co., 687 S.E. 2d 47 (2009), the Supreme Court expressed that it was “cautious in permitting negligence actions where there is neither personal injury nor property damage.” Id. at 149. The Court explained in Sapp,

[t]he purpose of the economic loss rule is to define the line between recovery in tort and recovery in contract. Contract law seeks to protect the expectancy interests of the parties. Tort law, on the other hand, seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property.

This statement of public policy is abundantly applicable here. This is not a matter of personal injury or damage to property. Rather, it is a claim arising out of the Plaintiff’s expectations—reasonable or not—under the IRAs here at issue. Any such claim is one in contract, not in tort.

At the same time, the Plaintiff cannot recover under a negligence theory because the Plaintiff cannot demonstrate that there was any duty to her by the Defendant with regard to the decedent’s IRA, despite the Plaintiff’s claims that she had a vested interest in the account. As already set forth in the section above, the Plaintiff is not a third-party beneficiary and therefore the Plaintiff would not have standing to seek damages from the Defendant *even if* South Carolina recognized a cause of action for breach of duty to a third-party beneficiary sounding in negligence. Moreover, it would be absurd to allow the Plaintiff to recover damages in a third-party negligence case where she could not recover damages in a third-party contract case.

IV. Undue Influence

Lastly, the Plaintiff accuses the Defendant exercising undue influence on the decedent, causing him to change the beneficiaries. The Plaintiff alleges that the Defendant improperly and unduly influenced the decedent because she “exercised complete control over [the decedent’s life] . . . from what he ate to where he went, to what he wore. Sometimes, even when [the Plaintiff] could see him.” In this regard, the Supreme Court’s decision in Calhoun v. Calhoun, 277 S.C. 527, 290 S.E.2d 415 (1982), is instructive. Calhoun concerned itself with undue influence in the making of a will. The pertinent facts in Calhoun were succinctly stated by the Court:

[t]he respondents attempted to prove that appellant Virginia Calhoun unduly influenced the testator to leave her the greatest portion of his estate. Their evidence consisted of the following: the testator was physically feeble; he was temporarily confused during a period of hospitalization one year before he executed the will; approximately two months after he executed the will, he was disoriented; appellant Virginia Calhoun visited the testator in the nursing home almost everyday; the testator sometimes would "fuss" at her when he was frustrated; the testator once was overheard to say that appellant Virginia Calhoun wanted it all; she asked Dr. Wilson to examine the testator before he made some changes in his will; and she drove the testator to his attorney's office to prepare the will. However, appellant Virginia Calhoun was not present during any of the testator's conferences with his attorney nor was she physically present when the will was executed. She did not have possession of the will after its execution; instead, testator's accountant, close friend, and a subscribing witness, Mr. Holbert, kept it in his possession. Mr. Holbert testified that on the date of the execution the testator was rational, was not rushed into signing the will, and seemed satisfied with it.

Id. at 532-33. Rejecting the respondents’ claims of influence, the Court held that “the issue of undue influence should be resolved in the light of proposition that a sane testator has the right to dispose of his property as he chooses.” Id. at 532 (citing Harris v. Berry, 231 S.C. 201, 98 S.E.2d 251 (1957)). Moreover, the Court reasoned “where the testator has had the unhampered opportunity to revoke his will subsequent to the operation of any undue influence upon him, but makes no changes in it, the court generally considers

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the effect of the testimony bearing upon undue influence in a large measure destroyed.”
Calhoun, 277 at 533.

Plaintiff argued the *Calhoun* case is distinguishable. In *Calhoun*, the decedent was physically feeble, temporarily confused one year prior to executing the will, and disoriented about two months after signing the will. *Id.* at 532-33, 415 S.E.2d at 418. In the present matter, the decedent was an 87-year-old man with dementia hospitalized in the intensive or critical care unit for weeks, after undergoing two surgical procedures, and was taking pain medication when he signed the change of beneficiary designation. (Van Swol Depo. 33:8-12, 34:2-15, 34:20-25, 35:1-13, 37:18-24, 40:22-24, 46:5-7, 46:11-15, 48:19). This is far more evidence than that presented in *Calhoun*.

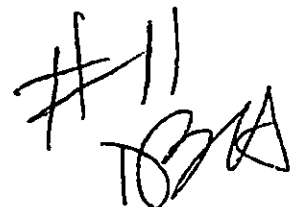
Plaintiff argued that our supreme court has recognized that “by the very nature of the case, the evidence of undue influence will be mainly circumstantial. It is not usually exercised openly so it can be directly proved.” *Hembree v. Estate of Hembree*, 311 S.C. 192, 196, 428 S.E.2d 3, 5 (Ct. App. 1993) (citing *Byrd v. Byrd*, 279 S.C. 425, 427, 308 S.E.2d 788, 789 (1983)). “In cases where allegations of undue influence have been successful, there has been evidence of threats, force, restricted visitation, or an existing fiduciary relationship at the time of or before the will's execution.” *Id.* at 196, 428 S.E.2d at 5 (citing *Byrd v. Byrd*, 279 S.C. 425, 308 S.E.2d 788 (1983) and *Moorer v. Bull*, 212 S.C. 146, 46 S.E.2d 681 (1948)).

Here, the court finds Plaintiff's evidence is not sufficient to defeat Defendant's motion for summary judgment. Evidence presented by Mrs. Van Swol demonstrates that the decedent was certainly competent enough to execute other legal binding documents prior to the 2014 finding of incapacity. In fact, he was found by the Probate Court to have

been perfectly capable of executing a power of attorney in favor of Mr. Dorn. In this way, the decedent was perfectly capable of making subsequent changes to his designation of beneficiaries. Even more remarkable is the fact that the Defendant had a power of attorney allowing her to make changes to the IRA, meaning that the application of any undue influence was completely unnecessary. Finally, the beneficiaries in question were the decedent's grandchildren, not the decedent or anyone closely associated with the decedent. It begs the question as to why the Defendant would exert such overbearing influence on the decedent for literally no gain whatsoever. As such, summary judgment in favor of Mrs. Van Swol must be granted as to this count as well.

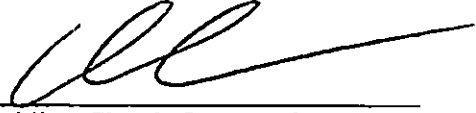
Finally, it is significantly important to point out that the IRA which ultimately paid the beneficiaries in question—wrongfully or not—is not the IRA account established with USAA to which Mrs. Van Swol had access. This is a critical point germane to each of the counts leveled by the Plaintiff against Mrs. Van Swol. Rather, the IRA which is truly at issue in this litigation is one established with Wells Fargo, N.A., by the decedent's legal attorney in fact, Henry Dorn. There is no dispute in this case as to this fact or to the fact that Mr. Dorn was legally authorized to establish the said IRA. Moreover, there is no factual to dispute as to the Defendant's involvement in the establishment of this IRA—that is to say, none. So, even if, viewed in the light most favorable to her, the Plaintiff were able to show that Mrs. Van Swol had tortuously interfered with the Plaintiff's vested rights under the decedent's IRA with USAA, that plan had long been unfunded by Mr. Dorn by the time the decedent had passed away.

CONCLUSION



For the reasons cited herein, the Defendant Phyllis Van Swol's Motion for Summary Judgment is GRANTED.

It Is So Ordered.



Presiding Circuit Court Judge
Eighth Judicial Circuit

On 1-15, 2019 ~~20~~
At Laurens, S.C.

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