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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In the Matter of THE FREDERIC L.
HESS, JR. AND RITA R. HESS LIVING
TRUST.

B237674

(Los Angeles County
Super. Ct. No. BP105687)

ELLEN HESS,

Petitioner and Appellant,

v.

ALFRED BEARMAN,

Objector and Respondent.

APPEAL from an order of the Superior Court of Los Angeles County, Reva G.
Goetz, Judge. Affirmed.

Freeman, Freeman & Smiley, Stephen M. Lowe and Thomas C. Aikin for
Petitioner and Appellant.

Hinojosa & Wallet, Lynard C. Hinojosa and Kelly L. Hinojosa for Objector and
Respondent.

INTRODUCTION

Appellant Ellen Hess appeals from an order denying her petition to determine the validity of the exercise of powers of appointment under The Frederic L. Hess, Jr. and Rita R. Hess Living Trust. The denial of her petition followed the trial court's granting of respondent and trustee Alfred Bearman's motion for summary judgment on the ground appellant's trust contest was barred by the statute of limitations set forth in Probate Code section 16061.8. We affirm.

FACTS

Frederic Hess (Frederic) and his wife, Rita Hess (Rita), created the Frederic Hess and Rita Hess Declaration of Trust on October 13, 1989. On May 5, 2001, Frederic executed the Restatement of The Frederic L. Hess, Jr. and Rita R. Hess Living Trust (Trust). Rita died on September 13, 2001. Thereafter, on October 9, 2001, Frederic executed a trustee's designation of successor trustees naming respondent successor trustee of the Trust after Frederic's death.

Over the next five years, Frederic executed the first amendment to the survivor's trust under the Trust, another trustee's designation of co-trustee and successor trustee, and six testamentary powers of appointment. The fifth exercise of testamentary powers of appointment by Frederic was executed on February 20, 2005. The sixth exercise of testamentary powers of appointment by Frederic was signed thereafter, and Frederic died on March 15, 2007.

Frederic's and Rita's daughters, appellant and Emily Hess, are beneficiaries under the Trust. On or about March 17, 2007, respondent gave appellant a copy of the Trust. On March 21, 2007, respondent, as trustee, personally served appellant with a notification by trustee pursuant to Probate Code section 16061.7 (Trustee Notification) along with an additional copy of the Trust. Appellant signed and dated a receipt acknowledging the

Trustee Notification on March 21, 2007. Appellant had 120 days—until July 19, 2007—to file a trust contest.

Appellant sought to challenge the validity of various documents including the sixth power of appointment on the grounds of Frederic's lack of capacity and undue influence. On July 18, 2007, appellant filed a safe harbor petition with the court under former Probate Code section 21320, to determine if her proposed petition for orders 1) determining validity of purported testamentary power of appointment, and 2) for an accounting, would violate the no contest provision of the Trust. The trial court ruled that the proposed petition was not a violation of the Trust's no contest clause on December 21, 2007.

Respondent filed a notice of appeal on February 21, 2008. On February 25, 2009, we filed our opinion affirming the trial court's ruling. (*Hess v. Bearman* (Feb. 25, 2009, B206007) [nonpub. opn.].) A remittitur was issued on May 5, 2009, and mailed to the parties pursuant to California Rules of Court, rule 8.272. Appellant's counsel received a copy of the remittitur on Friday, May 8, 2009. Appellant's counsel filed a petition for orders determining validity of purported testamentary powers of appointment (Contest) on May 11, 2009. In the Contest, appellant challenged the validity of the exercise of the fifth and sixth powers of appointment.

On July 11, 2011, respondent filed a motion for summary judgment on the ground the Contest was barred by the statute of limitations set forth in Probate Code section 16061.8 because it was filed more than 120 days after the Trustee Notification was personally served on appellant. Appellant filed her opposition to the motion for summary judgment on September 14, 2011. On September 28, 2011, the trial court heard oral argument and took the matter under submission. On October 3, 2011, the trial court issued a minute order granting the motion for summary judgment on the grounds that the Contest was barred by Probate Code section 16061.8 because the remittitur was issued and jurisdiction transferred back to the trial court on May 5, 2009, and Code of Civil Procedure section 1013, subdivision (a), cannot be used to increase jurisdictional limits or statutes of limitations.

DISCUSSION

The issue in the case is whether Code of Civil Procedure section 1013, subdivision (a), extends the statute of limitations by five days when the notice of remittitur is mailed. We find that it does not and affirm the order granting respondent's summary judgment motion and denying appellant's petition.

Summary Judgment

Summary judgment properly is granted if there is no question of fact and the issues raised by the pleadings may be decided as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) To secure summary judgment, a moving defendant may show that one or more elements of the cause of action cannot be established or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, at p. 849.) We review a grant of summary judgment de novo to determine whether triable issues of material fact exist. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.)

Probate Code section 16061.8 provides that a beneficiary of a trust may not contest a trust more than 120 days from the date of receiving proper notification pursuant to section 16061.7. The 2007 version of Probate Code section 16061.8, applicable in the instant case, provided as follows: "No person upon whom the notification by the trustee is served pursuant to this chapter may bring an action to contest the trust more than 120 days from the date the notification by the trustee is served upon him or her, or 60 days from the day on which a copy of the terms of the trust is mailed or personally delivered to him or her during that 120-day period, whichever is later."

Summary judgment was appropriate here, because it is clear that appellant's contest was filed more than 120 days from the date the Trustee Notification was personally served on appellant, and there are no disputed issues of fact. As a matter of law, the contest was untimely.

When appellant filed her safe harbor petition on July 18, 2007, she had one day remaining on the 120-day statute of limitations period in which to file an action contesting the Trust. Probate Code section 21308 tolled the statute of limitations period from the time the safe harbor petition was filed until our decision concerning the petition was final. Our decision on the safe harbor petition became final for purposes of Probate Code section 21308 upon the issuance of the remittitur on May 5, 2009. Appellant only had one day remaining on the 120-day statute of limitations period when the remittitur was issued on May 5, 2009. She therefore had until May 6, 2009 to file the action contesting the Trust. The Contest was filed on May 11, 2009.

Rare Coin Galleries, Inc. v. A-Mark Coin Co., Inc. (1988) 202 Cal.App.3d 330 is illustrative of the effect of the remittitur. In *Rare Coin*, one dealer in coins sued another for interference with contractual relations and with advantageous business relationship. The trial court denied all relief, the judgment was affirmed on appeal, and the Supreme Court denied a petition for review. The Court of Appeal issued a remittitur and the dealer who had been unsuccessfully sued subsequently filed an action for malicious prosecution and abuse of process. A summary judgment was granted on the ground the action was time-barred by a one-year statute of limitations, which was tolled only until the Supreme Court denied the petition for review. (*Id.* at pp. 333-334.) The plaintiff appealed and the Court of Appeal reversed, holding the tolling period for the malicious prosecution action ends with the issuance of a remittitur by the Court of Appeal in the underlying action and not with the Supreme Court's denial of review. (*Id.* at p. 338.) A remittitur is deemed issued when the appellate court clerk enters it in the record of the case. (Cal. Rules of Court, rule 8.272(d)(1).)

The case of *Bellows v. Aliquot Associates, Inc.* (1994) 25 Cal.App.4th 426 similarly involved motions for summary judgment in a malicious prosecution action where the court held that the applicable statute of limitations barred the action. The Court of Appeal affirmed the trial court's judgment and held that the appellate process ended, the trial court regained jurisdiction and the statute of limitations on the malicious

prosecution action restarted upon the appellate clerk's issuance of the remittitur. (*Id.* at pp. 430-434.)

Code of Civil Procedure Section 1013, Subdivision (a)¹

Appellant claims the statute of limitations is extended by Code of Civil Procedure section 1013, subdivision (a), because California Rules of Court, rule 8.272(d)(1), requires service of the remittitur. This rule provides “[t]he clerk must immediately send the parties notice of issuance of the remittitur, showing the date of entry.” Contrary to appellant’s claim, rule 8.272(d)(1) does not require service of the notice of the issuance of the remittitur. There is no reference to the term “service” in the rule.

Code of Civil Procedure section 1013, subdivision (a), provides that “any period of notice and any right or duty to do any act or make any response within any period or on a date certain after service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail.” California Rules of Court, rule 8.272(d)(1) does not prescribe a time period or date by which notice of the issuance of the remittitur is to be made. Thus, by its terms, Code of Civil Procedure section 1013, subdivision (a), has no application to mailing of notice of the issuance of a remittitur.

Appellant, both in opposing the motion for summary judgment and in her appeal, relies in part on *Triumph Precision Products, Inc. v. Insurance Co. of North America* (1979) 91 Cal.App.3d 362. The reliance is misplaced. In *Triumph*, after a trial court made an order granting a party’s motion for a new trial, the court clerk mailed a notice of

¹ Code of Civil Procedure section 1013, subdivision (a), provides, in pertinent part, as follows: “In case of service by mail, . . . [s]ervice is complete at the time of the deposit, but any period of notice and any right or duty to do any act or make any response within any period or on a date certain after service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail, if the place of address and the place of mailing is within the State of California”

entry of the order to the opposing party's attorney. While the envelope containing the notice was addressed to the attorney at his correct street address, the address omitted the name of his law firm. The notice was returned to the court as undeliverable and the attorney did not become aware of the entry of the order until after the time for filing a notice of appeal had expired. When the attorney learned of the entry of the order, the clerk mailed a second notice to which the attorney responded by filing a notice of appeal from the order. The Court of Appeal noted that the name of the attorney's law firm was designated on all documents filed in the case. It held that the address on the envelope containing the first mailed notice should have included the firm name and was not effective because of the omission and determined the notice of appeal was timely filed. (*Id.* at pp. 364-365.)

Triumph is distinguishable. Code of Civil Procedure section 1013, subdivision (a), applies to the mailing of a notice of an order granting a new trial because some action is required to be taken within a prescribed time period after service of the notice. The notice of appeal must be filed within 30 days after the date of mailing of the notice of entry of judgment. (*Triumph Precision Products, Inc. v. Insurance Co. of North America, supra*, 91 Cal.App.3d at p. 364.) In the instant case, the mailing of a notice of issuance of a remittitur did not commence any prescribed statutory time period within which an action must be taken. The issuance of a remittitur simply returns jurisdiction to the trial court from the appellate court.

Moreover, Code of Civil Procedure section 1013, subdivision (a), does not extend jurisdictional limits or statutes of limitation. (*County of Los Angeles v. Surety Ins. Co.* (1984) 162 Cal.App.3d 58, 64 [inapplicable to extend 90-day period for entry of summary judgment against surety for amount due on a bail bond forfeiture]; *Fritts v. County of Kern* (1982) 135 Cal.App.3d 303, 307-308 [inapplicable to extend the 30-day period to file a complaint against a public entity after the trial court waived the claim filing requirement]; *Smith v. City and County of San Francisco* (1977) 68 Cal.App.3d 227, 231-232 [inapplicable to extend the six-month period set forth in Gov. Code, § 945.6, subd. (a)(1), to file an action against a public entity]; *Meskeil v. Culver City*

Unified School Dist. (1970) 12 Cal.App.3d 815, 823 [inapplicable to extend the 60 days provided for a trial court to grant a motion for a new trial].)

The case of *Tielsch v. City of Anaheim* (1984) 160 Cal.App.3d 576, on which the trial court here relied, is instructive. In *Tielsch*, a former police chief of the City of Anaheim petitioned the superior court for a writ of mandate after the city denied his application for disability retirement. The trial court denied his petition on the basis that it was filed after the 90-day statute of limitations period had run. (*Id.* at p. 577.) Tielsch argued that Code of Civil Procedure section 1013, subdivision (a), “extended the period within which he could petition for [a] writ of mandate by five days.” (*Tielsch, supra*, at p. 578.) The appellate court held that Code of Civil Procedure section 1013 was not applicable because the Code of Civil Procedure section 1094.6 time period for filing a writ of mandate petition was a procedural statute of limitations which could not be extended. (*Tielsch, supra*, at p. 578.) The *Tielsch* court stated: “Harsh as the result may be, the conclusion that [Code of Civil Procedure] section 1013 does not apply in this situation is, in our view, inescapable. [Code of Civil Procedure s]ection 1094.6 simply does not lend itself to the interpretation urged by Tielsch. Although the bench and bar would undoubtedly welcome a statute that would universally extend time whenever notices are mailed in place of the dangerous duality of the current system, that change must come from the Legislature, not the courts.” (*Tielsch, supra*, at p. 580.)

While appellant attempts to distinguish *Tielsch* because the statute at issue in *Tielsch* set forth a jurisdictional time limit and did not require a mailed notice, the statute at issue here is analogous. Probate Code section 16061.8 sets forth a procedural statute of limitations which is jurisdictional, limiting the power of the court to proceed with a trust contest that is filed after the prescribed time, 120 days after a notification by the trustee is delivered. Code of Civil Procedure section 1013 did not extend the statute of limitations in *Tielsch* and it is not applicable to extend the statute of limitations in this case. As the trial court noted in the instant case, “I think this is a rather harsh place to be, but I spent quite a bit of time working on this motion. From every authority that I looked at, the date on which the tolling of the matter ends is the date on which the remittitur is

issued. So it doesn't leave me any room, although the result may not be what you want, but I think I have to grant the motion for summary judgment."

Code of Civil Procedure section 1013, subdivision (a), simply extends statutory deadlines and time periods which are initiated by a document served by mail. When the time limit begins to run from the service by mail of a document to which a response or other action is required, Code of Civil Procedure section 1013, subdivision (a), extends the time for the response or action. In the instant case, the prescribed 120-day time period to file an action contesting the Trust was not commenced by the service of a document by mail. The personal delivery of the Trustee Notification started the 120-day statute of limitations period for petitioner to contest the Trust pursuant to Probate Code section 16061.8. It was not the mailing of notice of the remittitur.

The issuance of the remittitur transferred jurisdiction from the Court of Appeal back to the trial court. It clearly did not trigger a time period for an action to be commenced or taken. Appellant had only one day to file a trust contest after the issuance of the remittitur because she waited 119 days after service of the Trustee Notification to file a safe harbor petition. While, as in the *Tielsch* case, the result may be harsh, Code of Civil Procedure section 1013, subdivision (a), simply does not provide any basis for extending the 120-day period in which to file a trust contest.

The Petition Was Not Constructively Filed

Appellant contends that the petition should be deemed constructively filed for purposes of Probate Code section 16061.8 as of the date she filed her safe harbor petition. While appellant did file her safe harbor petition within the 120-day time period, albeit on the 119th day, the fact that the safe harbor petition identified the essential claims of lack of capacity and undue influence does not satisfy the statutory requirement of Probate Code section 16061.8.

The case of *Estate of Stoker* (2011) 193 Cal.App.4th 236 cited by appellant is not persuasive. In *Stoker*, the trustee of the decedent's trust filed a petition for probate of a 1997 will which gave the residue of the estate to the trust. The trustee served a trustee

notification under Probate Code sections 16061.7 and 16061.8 to the decedent's children, stating they had 120 days to bring an action to contest the trust. (*Stoker, supra*, at p. 239.) Within 120 days of the service of the trustee notification, the decedent's children filed a petition to probate a 2005 handwritten will which revoked the trust. (*Id.* at pp. 239-240.) The trustee argued that no trust contest was timely filed and relief was barred by the limitation period set forth in Probate Code section 16061.8. (*Stoker, supra*, at p. 240.) The trial court disagreed and admitted the 2005 will which revoked the trust. The Court of Appeal held that the petition for probate of the 2005 will was “in practical effect” an action to contest the trust because the 2005 will revoked the trust. Therefore, the trust contest was filed within the 120-day limitation period. (*Id.* at p. 241.)

Appellant submits that since the safe harbor petition was filed within the 120-day statute of limitations period in the instant case, the Contest should also be deemed to have been constructively filed on the same date because it was attached as an exhibit to the safe harbor petition. Appellant relies on the “in practical effect” language in *Stoker*.

Stoker is distinguishable. In *Stoker*, the petition for probate filed was an independent pleading with a hearing date and notice of the hearing. In the instant case, the proposed petition was simply attached as an exhibit to the safe harbor petition and not a separate pleading. Appellant's “in practical effect” argument is weakened by the fact that the Contest was separately filed. In addition, the proposed petition sought to invalidate the sixth power of appointment while the Contest filed after the 120-day statute of limitations sought to invalidate the fifth and sixth power of appointments. It is clear that the safe harbor petition was not intended to have the same effect as a trust contest.²

² The fact that appellant timely filed her safe harbor petition and prevailed on appeal of the safe harbor petition is not relevant to the current appeal.

DISPOSITION

The order is affirmed.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.