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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MARY HOWARD, as Trustee,
etc.,

Plaintiff and Appellant,

v.

LESTER GJETLEY et al.,

Defendants and Respondents.

B268254

(Los Angeles County
Super. Ct. No. BC529427)

APPEAL from the judgment of the Superior Court of Los Angeles County. Gregory Keosian, Judge. Reversed and remanded.

Blumberg Law Corporation and Ave Buchwald for Plaintiff and Appellant.

Chad Hughes for Defendants and Respondents.

* * * * *

Plaintiff and appellant Mary Howard was the live-in partner of decedent Robert Gjetley,¹ who passed away in 2011, leaving his entire estate to plaintiff. Defendants and respondents Lester Gjetley and Kathryn Morrison, the adult children of Robert, filed a petition in the probate court challenging the validity of Robert's trust agreement and will. The probate court ruled in plaintiff's favor, and plaintiff subsequently filed this malicious prosecution action against Lester and Kathryn. Lester failed to appear and a default was entered against him. Kathryn appeared in the action and the case proceeded to a bench trial in June 2015. The trial court entered a judgment, following trial, in favor of both Lester and Kathryn from which plaintiff appeals.

We reverse, and remand for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

Robert's divorce from Lester and Kathryn's mother became final in June 1992.

Plaintiff met Robert in 1996 while they were both working as longshore workers. They became good friends, and eventually their relationship became romantic. Although they owned separate residences, they lived together as a couple from 2003 until Robert's death in 2011. In addition to working as a longshore worker, plaintiff had a real estate license and, over the years, she assisted Robert with several real estate transactions.

In May 2002, Robert executed a trust and a will, prepared by his attorney Norman Rasmussen, leaving his entire estate to his brother Donald Gjetley. The trust agreement included a provision titled "No Contest Clause" which stated, in relevant part, that Robert had "intentionally made no provision herein for

¹ Because of the common surname, we use first names for clarity.

his son [Lester] or his daughter [Kathryn]" and that Robert "affirms he has made provision herein for all his relatives and legal heirs for whom he desires to make provision."

During the eight years plaintiff and Robert lived together, plaintiff never met Lester. Robert had had a "falling out" with Lester over an incident involving fireworks a number of years earlier. Kathryn came over to the house once but it was a short visit. About 10 minutes after Kathryn arrived, she and Robert got into a fight about a computer and she left. Robert's estrangement from his daughter related to his dislike of the man she was dating. Kathryn had lived with Robert briefly in 2002. She conceded however that she had not visited him from at least 2006 until the time of his death in 2011 because she did not know "where he was." Robert did not even consider his two children "family." He considered his brother Donald to be his only blood family (in addition to Donald, Robert had another brother, Leland).

In 2009, Robert, who was suffering from bladder cancer, was hospitalized for a couple of weeks. Plaintiff does not believe Lester or Kathryn visited Robert or phoned him while he was in the hospital. For a brief period while he was hospitalized, sometime around Thanksgiving, Robert seemed disoriented and not himself, but it did not last long. Plaintiff reported Robert's confusion to the nurses, and it was resolved by his doctors. Plaintiff understood it to be the result of a "reaction" to something. The medical records indicated Robert experienced some disorientation on November 25 and November 26, 2009. By the time Robert was released from the hospital and returned home, his mental state was "back to normal."

Plaintiff was not married to Robert and never represented to anyone that she was Robert's wife. However, they made a commitment to one another "for better or for worse," so when he

got sick, she stayed by him and took care of him. Plaintiff denied being just a “caregiver.” She and Robert remained affectionate with one another even while he was sick. They kissed each other good night and held hands and “spent every minute together” until he passed. Plaintiff had no idea why there were some references in Robert’s medical records to plaintiff being his wife, but supposed that the medical staff just made that assumption.

Donald stated in a declaration that Robert and his son had a falling out some time after June 1989 because Robert believed Lester had gotten him in trouble with law enforcement over the sale of illegal fireworks. Donald said that, as a result, Robert told him that he had left his entire estate to Donald. Donald also said that he visited Robert in the hospital sometime in late November or early December 2009. Donald attested that Robert “had the same normal mental status he had always had before he was admitted to the hospital. At all of [his] visits to the hospital, Robert knew who he was, knew who [Donald] was, knew that he was in a bed at the City of Hope hospital and knew the date and time. At no time during those visits was [Robert] either confused or disoriented.” During one of those visits, Robert told Donald that he was planning to change his estate plan to leave everything to plaintiff, and Donald said that was fine as he had “plenty.”

On December 18, 2009, Robert executed a new pour-over will and a first amendment to his trust, leaving his entire estate to plaintiff. The amended documents were again prepared by Robert’s longtime attorney, Norman Rasmussen. The amended trust agreement identifies Donald as the successor trustee in the event plaintiff predeceased Robert, and also expressly incorporates the “No Contest Clause” provision of the original trust agreement.

Robert was discharged from the hospital on December 21, 2009.

During the Christmas holidays in 2009, Robert told plaintiff he had changed his estate plan and was leaving his entire estate to her. Sometime in 2009, Robert also gave plaintiff and one of his longtime friends, Kenneth Rush, powers of attorney for healthcare decisions.

Over a year later, in February 2011, Robert was readmitted to the hospital and passed away on February 13, 2011. Plaintiff did not call Lester or Kathryn to come to the hospital before Robert passed, because Robert had instructed her not to do so, only to call his brothers. Plaintiff did not even have phone numbers for Lester or Kathryn. Robert made it clear that he did not want to see his children before he passed.

William Todd, a longtime friend of Robert's, attested to the fact that Robert had consistently expressed his desire that neither of his children inherit anything from his estate.

After Robert's death, Lester and Kathryn, in propria persona, filed a petition in the probate court seeking to invalidate Robert's estate plan. The petition named plaintiff, the successor trustee of Robert's trust, as the respondent. The petition alleged that Robert's original trust, executed in 2002, as well as the 2009 amendment to the trust, were invalid because they were "unfunded," specifically they failed to contain an adequate description of the real property to be placed in the trust. The second ground for the petition was that Robert lacked capacity in December 2009 when he executed the first amended trust and will. The third cause of action alleged the 2009 amended trust and will were invalid due to undue influence exerted by plaintiff over Robert. The petition sought to invalidate the original 2002 trust documents as well as the 2009 first amended trust documents and pour-over will, and that Robert's estate "devolve

by intestate succession to his heirs at law, his biological children,” Lester and Kathryn.

Plaintiff opposed the petition. After a contested hearing, judgment was entered against Lester and Kathryn in the probate action on January 18, 2012. The court denied their petition in its entirety, ruling that Robert’s 2002 trust agreement, and the 2009 amendments to his trust and will were valid, and that Lester and Kathryn were “not entitled to any of the relief sought by their petition.” The judgment awarded costs to plaintiff as the prevailing party.

Plaintiff then filed this action for malicious prosecution against Lester and Kathryn. Kathryn filed an answer to the complaint, admitting some allegations, denying the balance, and stating no affirmative defenses. After being served with process and a statement of damages seeking \$200,000, Lester failed to appear in the action and a default was entered against him on February 10, 2014.

The case proceeded to a bench trial in June 2015. After hearing testimony and argument, the court issued a written statement of decision. The court found that the facts were largely undisputed, including that plaintiff had obtained a favorable termination in the underlying probate action. On the element of probable cause, however, the court found the probate petition was not “completely meritless.” The court concluded it need not resolve whether the element of malice had been established. The court found in favor of “defendants” on plaintiff’s cause of action for malicious prosecution and entered judgment in favor of both defendants.

This appeal followed.

DISCUSSION

1. Kathryn (Gjetley) Morrison

To prevail at trial on her malicious prosecution claim against Kathryn, plaintiff had to demonstrate that the underlying probate action was commenced by or at the direction of Kathryn and was pursued to a legal termination favorable to plaintiff, and was brought without probable cause and with malice. (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 871 (*Sheldon Appel*).)

It is undisputed plaintiff obtained a favorable termination in the probate action commenced by Lester and Kathryn. Plaintiff contends the trial court erred in concluding she had not established the second required element of her claim, i.e., that the probate action lacked probable cause. We agree.

Because we are reviewing a judgment arising from a bench trial in which the court acted as the trier of fact and resolved questions of law, our standard of review involves both the substantial evidence test and de novo review. (5 Witkin, Sum. Cal. Law (10th ed. 2005) Torts, § 506, pp. 744-745.)

The parties presented disputed evidence to the court on the issue of probable cause which the court resolved in defendants' favor. We will review the facts underlying the probable cause determination for substantial evidence, according to the familiar standard. (See, e.g., 9 Witkin, Cal. Proc. (5th ed. 2008) Appeal, §§ 365-368, pp. 421-426 [appellate court reviews the entire record, considering the evidence in the light most favorable to the judgment].)

However, we independently review whether that evidence, judged by an objective standard, demonstrates the existence of probable cause. The "existence or absence of probable cause has traditionally been viewed as a question of law to be determined by the court." (*Sheldon Appel, supra*, 47 Cal.3d at p. 875.) "The

question is whether, as an objective matter, ‘any reasonable attorney would have thought the claim tenable.’ [Citation.]” (5 Witkin, *supra*, Torts, § 506, p. 744; accord, *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292 (*Soukup*).)

“Probable cause, moreover, must exist for *every cause of action* advanced in the underlying action. ‘[A]n action for malicious prosecution lies when but one of alternate theories of recovery is maliciously asserted’ [Citations.]” (*Soukup, supra*, 39 Cal.4th at p. 292, italics added; accord, *Bertero v. National General Corporation* (1974) 13 Cal.3d 43, 57, fn. 5; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 695.)

The probate petition presented three separate grounds for relief: (1) the original trust and amended trust were not properly funded; (2) the 2009 amended trust was invalid due to Robert’s lack of capacity; and (3) the 2009 amended trust was invalid due to plaintiff’s undue influence over Robert.

The record contains no evidence whatsoever that either the original 2002 trust agreement or the 2009 amendment to the trust left the trust legally “unfunded.” The original trust agreement described the property of the trust to include a parcel of real property (Robert’s then-residence on Harrisburg Road in Los Alamitos), as well as all tangible personal property. The trust allowed the trustee to transfer additional properties to the trust estate, which Robert apparently did at various points up through the date of his death. No persuasive argument is advanced demonstrating how the first cause of action in the probate petition was legally tenable.

As to the second and third causes of action in the probate petition (lack of capacity/undue influence as to the 2009 amendments), the trial court explained its ruling as follows: “plaintiff moved in with [Robert] and a romantic relationship ensued; after becoming ill and while plaintiff became his

caregiver, Robert amended his trust to leave his estate to plaintiff; medical records . . . indicate that [Robert] was medicated, medical records indicated that plaintiff was referred to as Robert's wife. Looking at the facts objectively, the court cannot conclude that the underlying action was completely meritless."

We find the evidence of alleged lack of capacity and undue influence to be insubstantial, even when judged in the light most favorable to the judgment. A testator is "presumed sane and competent and the burden rests on the contestant to overcome this presumption." (*Estate of Fritschi* (1963) 60 Cal.2d 367, 372.) The relevant time to determine competency is at the time of execution. (*Ibid.*)

Here, there was no evidence plaintiff knew of Robert's change of his estate plan until after it was accomplished or that she exerted or tried to exert any influence over Robert in that regard. There was some evidence that Robert had moments of confusion or disorientation on November 25 and 26, 2009 while in the hospital receiving treatment for cancer. It is undisputed there is no other affirmative evidence of any mental disorientation or lack of capacity at any other time. Testimony from plaintiff and Robert's brother Donald established that Robert was "himself" and oriented to time and place at all other times they interacted with him at the hospital. The amendments were not executed by Robert until December 18, 2009, just two days before he was discharged to go home. Speculation about whether any unidentified medication he may have received while in the hospital impacted his legal capacity to make decisions is not sufficient to overcome the presumption of competency. Speculation that plaintiff allowed some hospital staff to believe she was Robert's wife is also insufficient and irrelevant.

“ ‘It is well established that “old age or forgetfulness, eccentricities or mental feebleness or confusion at various times of a party making a will are not enough in themselves to warrant a holding that the testator lacked testamentary capacity.’ [Citation.]” (*Andersen v. Hunt* (2011) 196 Cal.App.4th 722, 727.) Even a testator suffering from a mental disorder that results in periods of confusion interspersed with moments of lucidity will be presumed to have executed estate documents during a period of lucidity, absent evidence to the contrary. (*Ibid.*)

The evidence was wholly insufficient to support a finding that the second and third causes of action were legally tenable from an objective standpoint. (*Soukup, supra*, 39 Cal.4th at p. 292.) Moreover, there is no evidence that Robert lacked testamentary capacity or was under undue influence at the time he executed the *original 2002 trust documents* which specifically stated Robert had intentionally made no provision for Lester or Kathryn. Even if the 2009 amendments were invalid, the original 2002 trust agreement would operate, leaving the entire estate to Donald. Under no scenario would Robert’s estate pass by intestate succession. Lester and Kathryn would take nothing from the estate under the 2002 trust and pour-over will and had no beneficial interest or standing to pursue the second and third causes of action challenging *only* the 2009 amendments. No reasonable lawyer would have concluded otherwise.

Thus, all three causes of action in the probate petition lacked probable cause as a matter of law. The judgment in favor of defendants must be reversed. A new trial is warranted in which plaintiff has an opportunity to demonstrate the element of malice as against Kathryn, and establish her damages. As we discuss below, any such trial shall not include Lester as a defendant in light of the entry of default against him.

2. Lester Gjetley

Plaintiff contends the court erred in entering judgment in favor of Lester because Lester was in default, thus entitling plaintiff to present evidence of her damages and obtain entry of a default judgment against him, irrespective of whatever showing Kathryn made at trial.

It is undisputed that Lester failed to appear below and that a default was duly entered against him on February 10, 2014. In the respondent's brief, counsel does not make any substantive argument supporting the trial court's erroneous entry of judgment in favor of Lester. Instead, counsel speculates the trial court merely made a typographical error in the rendition of judgment, using the plural "defendants" instead of the singular "defendant" for Kathryn only. Counsel states the trial court has the authority to correct a clerical error in its judgment at any time, and therefore, there is no need for this court to reverse and remand.

We conclude that reversal of the judgment in favor of Lester is warranted. By defaulting in the action, Lester admitted all of the well-pled allegations in plaintiff's complaint. (See, e.g., *Bristol Convalescent Hospital v. Stone* (1968) 258 Cal.App.2d 848, 859.) Plaintiff's complaint states a viable cause of action for malicious prosecution. Lester was served with process, including a statement of damages, failed to appear, and a default was entered against him. Lester did not move to set aside the default. Kathryn did not assert any affirmative defenses in her answer that would inure to his benefit as a defaulted defendant. By statute, plaintiff was therefore entitled to prove up her damages and obtain entry of a default judgment against Lester. (Code Civ. Proc., § 585, subd. (b) [after entry of default, the plaintiff "may apply to the court for the relief demanded in the complaint. The court shall hear the evidence offered by the plaintiff, and shall

render judgment in the plaintiff's favor for that relief, not exceeding the amount stated in the complaint" or the statement of damages].)

On remand, plaintiff shall be entitled to proceed with a default prove-up hearing against Lester to establish her entitlement to damages.

DISPOSITION

The September 10, 2015 judgment in favor of defendants and respondents Lester Gjetley and Kathryn Morrison is reversed. The action is remanded to the superior court for further proceedings consistent with this opinion, including, a new trial on plaintiff's malicious prosecution claim as to Kathryn Morrison, and a default prove-up hearing on the issue of damages as to Lester Gjetley.

Plaintiff and appellant Mary Howard shall recover costs of appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.