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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

RUSSELL T. DALY, Plaintiff and Respondent, v. JAY R. DALY et al., Defendants and Appellants.	B246424 (Los Angeles County Super. Ct. No. YC 064644)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cary H. Nishimoto, Judge. Conditionally reversed and remanded.

John Guy for Defendants and Appellants.

Law Offices of Jay S. Belshaw and Jay S. Belshaw for Plaintiff and Respondent.

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This case involves a dispute between two brothers over the ownership of their family home. In a complaint for quiet title, Russell T. Daly (respondent) alleged that a deed granting joint tenancy to Jay R. Daly (Russell's brother) and Donna Daly (Jay's wife) was procured by undue influence and was a forgery. Russell also alleged his mother Mary Daly lacked the capacity to sign the deed granting Jay and Donna a joint tenancy. The trial court found in favor of Russell, and this appeal followed.

We reject Jay and Donna's argument that the record lacks sufficient evidence to support the judgment. We find persuasive their argument that Russell was required to provide the affidavit required by Code of Civil Procedure section 377.32 to pursue this lawsuit. That statute requires him to show he was Mary's successor in interest and could pursue the claims in order to return title of the house to Mary's estate. We conditionally reverse and remand the case to the trial court to permit Russell an opportunity to file the required affidavit. We reject Russell's argument that the appeal is frivolous and deny his motion for sanctions.

FACTS AND PROCEDURE

Mary Daly owned a house located at 1049 Palos Verdes Boulevard in the City of Redondo Beach (the house). The record shows Mary has four living sons: Russell, Dan, Jack, and Jay. Russell represents that Paul Daly is also a son to Mary. Jay and Donna lived with Mary in the house for approximately 36 years.[1]

Mary died on March 16, 2003. She knew she was dying three days earlier on March 13 when she purportedly or actually signed a deed granting Jay and Donna an ownership interest in the House as her joint tenants. Mary was heavily medicated on March 13, and she drank a beer in the afternoon.

The parties disputed whether the joint tenancy deed was actually signed by Mary. In addition to Russell, Jack, Dan, and a handwriting expert testified that the signature on

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[1] In his respondent's brief, Russell represented that Donna has died during the pendency of the appeal. We received no confirmation of Donna's death and no request to effect a substitution and therefore retain the original title of the case. (*Konig v. Fair Employment & Housing Com.* (2002) 28 Cal.4th 743, 745-746, fn. 3.)

the deed did not belong to Mary. In contrast, the notary who notarized the deed testified that Mary signed the deed, and Jay and Donna both testified it was Mary's signature.

The parties also disputed whether Mary was conscious when she signed the deed, and the record contains conflicting evidence on that point. Russell and Jack testified that Mary was in and out of consciousness. Jay testified Mary was alert and understood what was happening. The notary testified she would not have allowed Mary to sign the deed if it did not appear Mary understood what she was signing. Mary's physician testified Mary was on numerous medications that could cause an inability to process information but he did not testify whether Mary actually experienced a lack of consciousness.

Finally, the parties disputed Mary's intended division of property. Russell testified that Mary intended to leave the house to all of her children, provided Jay and Donna be allowed to live in the house during their lifetimes. Dan's ex-wife Cheryl Daly had the same understanding. Jack and Dan testified Mary did not want Jay to profit from the house and did not want Jay's daughter to receive any proceeds from the house. Not surprisingly, both Jay and Donna testified that Mary intended to leave the house to them. According to Jay, Mary could not leave it to him and Donna earlier because he owned a repossession business and because the Internal Revenue Service audited his taxes.

In its statement of decision, the trial court found all of the following: Jay and Donna's evidence of Mary's consciousness on the day of signing the deed was not "credible or convincing." "The testimony of defendants' witnesses who testified to Mary Daly's state of mind was superficial and conclusory." "It is clear that if Mary Daly signed the deed, she did not have the mental capacity to understand the circumstances or the nature of what she was signing." "Mary Daly was dying and heavily medicated." Jay's explanation why Mary did not put the property in his name prior to March 2003 was not persuasive because Jay no longer owned the repossession business in 1994 and because his tax deficiency was resolved by 2001. "At best the credible evidence indicate[d] that Mary Daly wanted a place for defendants . . . to live until their death and thereafter to distribute the property among the remaining siblings." The court found the

deed was contrary to Mary's wishes, procured by undue influence, and signed at a time Mary lacked mental capacity to know what she was signing.

The court entered judgment in favor of Russell. The judgment provided that the joint tenancy grant deed recorded on June 11, 2003, as document No. 03-1665255 was null and void. The subsequent documents concerning ownership of the house recorded by Jay and Donna were also deemed null and void. The house was restored to Mary's sole possession.

DISCUSSION

Jay argues that Russell could not pursue the litigation because he was not Mary's successor in interest and that the judgment was not supported by substantial evidence. Russell argues that the appeal is frivolous. We conclude that Russell was required to show he was a successor in interest in order to pursue the lawsuit to return the House to Mary's estate. The parties' remaining arguments are not persuasive.

1. Russell Failed to Comply with the Procedural Requirements for Pursuing a Lawsuit on Behalf of a Deceased Plaintiff

In the trial court, Jay and Donna moved for judgment on the pleadings, arguing that Russell lacked standing to bring the lawsuit because Russell did not comply with Code of Civil Procedure section 377.32.[2] Russell responded that he was not required to

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[2] Undesignated statutory citations are to the Code of Civil Procedure. Section 377.32 provides:

"(a) The person who seeks to commence an action or proceeding or to continue a pending action or proceeding as the decedent's successor in interest under this article, shall execute and file an affidavit or a declaration under penalty of perjury under the laws of this state stating all of the following:

"(1) The decedent's name.

"(2) The date and place of the decedent's death.

"(3) 'No proceeding is now pending in California for administration of the decedent's estate.'

"(4) If the decedent's estate was administered, a copy of the final order showing the distribution of the decedent's cause of action to the successor in interest.

comply with that section because he was pursuing the lawsuit in his individual capacity as a "potential successor to the property" and heir to Mary. Russell subsequently argued that he had standing because "[i]f the Joint Tenancy Grant Deed is invalidated, the Palos Verdes Drive property would be owned by Mary Daly at her death and would pass to her intestate estate, and Russell T. Daly would be one of the heirs of the estate." Russell's assertions make clear that his interest in the litigation stems from his claimed right to inherit from Mary's estate.

If Mary were alive she could sue to set aside the deed. A deed procured by undue influence is voidable by the grantor. (*Fallon v. Triangle Management Services, Inc.* (1985) 169 Cal.App.3d 1103, 1106; see also *O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 150-156 [grantor sued to void deed allegedly procured by undue influence].) A deed is void if forged or if the grantor was unaware of what he or she was signing. (*La Jolla Group II v. Bruce* (2012) 211 Cal.App.4th 461, 477.)

An heir to an estate may sue to set aside a deed. (*Page v. Garver* (1905) 146 Cal. 577, 577-580.) But, under current law, the heir must satisfy procedural requirements in

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"(5) Either of the following, as appropriate, with facts in support thereof:

"(A) 'The affiant or declarant is the decedent's successor in interest (as defined in Section 377.11 of the California Code of Civil Procedure) and succeeds to the decedent's interest in the action or proceeding.'

"(B) 'The affiant or declarant is authorized to act on behalf of the decedent's successor in interest (as defined in Section 377.11 of the California Code of Civil Procedure) with respect to the decedent's interest in the action or proceeding.'

"(6) 'No other person has a superior right to commence the action or proceeding or to be substituted for the decedent in the pending action or proceeding.'

"(7) 'The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct.'

"(b) Where more than one person executes the affidavit or declaration under this section, the statements required by subdivision (a) shall be modified as appropriate to reflect that fact.

"(c) A certified copy of the decedent's death certificate shall be attached to the affidavit or declaration."

order to pursue the litigation on behalf of a deceased person. The heir must be a personal representative or successor in interest in order to pursue the litigation on behalf of the estate. (§ 377.30.) Successor in interest is defined as the "beneficiary of the decedent's estate or other successor in interest who succeeds to a cause of action or to a particular item of the property that is the subject of a cause of action." (§ 377.11.) A party seeking to obtain standing as a successor in interest must file a declaration pursuant to section 377.32. Because Russell sought to bring this lawsuit as a beneficiary of Mary's estate, Russell was required to show that he qualified as a successor in interest and was required to comply with section 377.32. (*In re A.C.* (2000) 80 Cal.App.4th 994, 1002-1003 [successor in interest *shall* execute affidavit].)

The remaining question concerns the consequence of Russell's failure to comply with section 377.32, which among other things required Russell to show he was Mary's successor in interest. The failure to comply with section 377.32 is a plea in abatement. (*Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1524.) The trial court should have stayed the action pending the filing of the required affidavit. (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 458.) Because Russell should have been given an opportunity to cure, we remand the case to the trial court to allow Russell an opportunity to file the required affidavit. (See *Parsons v. Tickner, supra,* at p. 1524, fn. 4 [granting party opportunity to comply with § 377.32].)

2. Substantial Evidence Supports the Judgment

"It is settled that appellate review of the sufficiency of the evidence is governed by the substantial evidence rule. [Citation.] This court views the entire record in the light most favorable to the prevailing party to determine whether there is substantial evidence to support the trial court's findings. [Citation.] We must resolve all conflicts in the evidence and draw all reasonable inferences in favor of the findings. [Citation.]" (*In re Marriage of Duffy* (2001) 91 Cal.App.4th 923, 931, abrogated on another ground as explained in *In re Marriage of Leni* (2006) 144 Cal.App.4th 1087, 1094, fn. 3.)

The standard of review is dispositive, and Jay and Donna's efforts to reargue the facts are not persuasive. Interpreting the evidence in the light most favorable to the

judgment, the judgment was amply supported. There was testimony that the signature on the deed was not Mary's, that Mary was not conscious at the time she signed the deed, and that the deed was not consistent with Mary's wishes. Under the appropriate standard of review, we are required to resolve all conflicts in the evidence in favor of the trial court's findings. Moreover, the trial court expressly found that Jay's testimony lacked credibility.

3. The Appeal Is Not Frivolous

Russell filed a motion requesting sanctions for a frivolous appeal. Appellate sanctions are appropriate "only when [the appeal] is prosecuted for an improper motive – to harass the respondent or delay the effect of an adverse judgment – or when it indisputably has no merit – when any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Russell argues that the appeal is indisputably without merit and brought for the purpose of delay. Given that the appeal raises a meritorious contention that Russell failed to follow procedural requirements in bringing the lawsuit, we disagree that it is indisputably without merit or that it is solely for the purpose of delay. Sanctions are not warranted. (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 421.) Finally, Jay and Donna's request for sanctions for responding to Russell's sanction motion also is denied.

DISPOSITION

We conditionally reverse the judgment and remand this case with directions to the trial court to ensure compliance with section 377.32. If Russell complies with section 377.32 the trial court shall reinstate the original judgment. Russell's motion for sanctions is denied. Each party shall bear his or her own costs on appeal.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J. GRIMES, J.