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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

RODNEY D. SMITH,
Plaintiff and Respondent,

v.

REGINALD B. SMITH, as Trustee, etc.,
Defendant and Appellant.

A131383

(San Francisco County
Super. Ct. No. PTR05288125)

Trustee and Executor, Reginald Smith, appeals from a decision that invalidated the will and trust of his father, Verliss Smith, on the ground that his father was incompetent when he executed the will and trust the day before his death. Reginald contends the petition was time-barred and that the evidence at trial was insufficient to support the probate court's finding of incompetence. We disagree on both points, and therefore affirm.

BACKGROUND

Reginald and Rodney Smith are brothers.¹ Their father, Verliss Brown Smith, executed the living trust and will (the Will and Trust) at issue here on December 22, 2001. He died the next day. The Will and Trust named Reginald as the sole trustee and executor.

¹ We will refer to the Smith family members by their first names for the sake of clarity and do not intend any disrespect.

Five years after Verliss's death, Rodney filed a petition to declare the Will and Trust invalid, to remove Reginald as trustee and appoint a successor, and for an accounting. In relevant part, the verified petition alleged that Verliss was not of sound mind when he signed the testamentary instruments and that he lacked the mental capacity to understand what he was doing or the nature and situation of his property.²

Reginald responded to the petition and denied most of his brother's allegations. The response did not plead any affirmative defenses, but in its prayer for relief asked the court to dismiss "all causes of action and/or claims that the purported Will and Trust were void as to alleged undue influence by Respondent as untrue and barred by the applicable statute of limitations." At no time during the litigation did Reginald seek to amend his response to allege any affirmative defenses or identify the applicable statute of limitations or the limitations period.

The evidence at trial, viewed in accord with the appropriate standard of review (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712; see Prob. Code, § 17206³), was as follows. Verliss suffered from colon and liver cancer for the last four or five years of his life. During the last weeks of his life, Rodney visited his father regularly at least several times a week in November and "[t]owards December it was every day, up until his death and the day that he died." Rodney was there in late November when Verliss lost consciousness and was taken to the hospital. Verliss was discharged home the next day, but his condition deteriorated rapidly. He went from being reasonably lucid and able to communicate to being bedridden, unable to feed himself, and "almost comatose." As December progressed he became uncommunicative, could not recognize family members, and seemed to be in immense pain. Rodney later

² The petition also alleged that Reginald exercised undue influence over his father and that the trust was never funded. Those claims are not at issue in this appeal.

³ Further statutory citations are to the Probate Code unless otherwise noted.

learned from Verliss's doctor that his father had been diagnosed with dementia.⁴ Rodney was certain that his father lacked the mental capacity to understand the significance of the Will and Trust on December 22.

Rodney recounted two conversations with his father about making a trust. In August or September of 2000, when he was aware of the severity of Verliss's illness, Rodney and a college friend raised the subject of making a will and trust with him. Verliss made it clear that he was not interested. They raised the subject again when Verliss was hospitalized in November, with the same response. Around this time Verliss told Rodney and two of his brothers that he wanted his property to be sold and the proceeds divided equally between his children after he died. Nonetheless, the trust directed that the property be retained and managed for 20 years following his death, which Rodney believed to be completely contrary to his father's wishes. Verliss had a poor opinion of Reginald's ability to manage property, particularly because Reginald had already lost two homes to foreclosure and had a history of psychological problems.

Rodney thought the Will and Trust were fraudulent when Reginald presented them to the family after Verliss's death. He and their brother Reynard then discussed taking legal action, but they were concerned it might result in Reginald being prosecuted for fraud and that a legal challenge to the Will and Trust could result in expensive probate and legal fees. However, Rodney changed his mind in 2005 after discovering that Reginald had secretly taken out loans against trust assets.

Elise Smith, Rodney's wife of 21 years, also testified at trial. She, too, visited Verliss with Rodney almost every weekend in late 2000. Verliss was mentally alert a couple of days before his hospitalization, but after he came home he spent most of his time sleeping. He was jaundiced, unable to eat, and in bed. The day before he died,

⁴ No medical testimony or records were introduced. The court admitted Rodney's testimony about his conversation with the physician only for the basis of Rodney's opinion.

Verliss could not move, speak or recognize his daughter-in-law. He seemed unaware of his surroundings and would moan and groan in pain. Elise believed that Verliss could “absolutely not” understand the Will and Trust documents at that point.

Ethel Marie Hubbard, Verliss’s niece, spent several weeks with him up until three days before his death. She also confirmed that Verliss declined rapidly after he left the hospital. By the last day of her visit, Verliss could not speak comprehensibly and was unaware of his surroundings. It “was like dementia, because he wasn’t really interested in anything.” He was physically very weak and sleeping most of the time.

A month before he died, Verliss told Hubbard that he did not want Reginald to handle his property. Reginald handled money poorly and had lost two homes to foreclosure, even though Verliss made the loan payments on one of them. Hubbard did not believe that her uncle would have chosen Reginald as his trustee or that he could have understood the documents when he signed.

Reginald’s testimony presented a very different picture. He denied that his father suffered from dementia. He said the Will and Trust were prepared at his father’s request and with his input. He read the documents to Verliss on December 21st, the day before Verliss signed them and two days before he died. Verliss was not speaking, but he could understand the documents and nodded as they were read to him. Verliss wanted to sign the Will and Trust right away, but he had to wait until the following day because he needed a witness and notary.

The court determined that the Will and Trust were invalid because Verliss lacked testamentary capacity. “The Court finds the testimony of Petitioner’s witnesses regarding Mr. Smith’s mental and physical condition immediately prior to his death to be credible and compelling. Respondent failed to produce a single subscribing witness, and offered no explanation for their absence at trial.” Moreover, “Respondent failed to produce the preparer of the Trust and Will, who was also a percipient witness to Mr. Smith’s execution of these testamentary documents. The lay opinion testimony of other family

members and the totality of the circumstances support the Court's conclusion regarding Mr. Smith's lack of mental capacity at the critical time." The court also found the trust was governed by section 16061.8, "which provides that the beneficiaries have 120 days to contest the trust from the date of valid, statutorily-compliant notice. . . . Respondent does not dispute that he failed to comply with the statutory notice requirements set forth in the Probate Code. Therefore, the instant action is not barred by the applicable statute of limitations."

Reginald filed this timely appeal from the judgment entered on Rodney's petition.

DISCUSSION

I. Reginald Forfeited a Statute of Limitations Defense

Although Reginald concedes that his failure to provide the requisite notice meant the 120-day statute of limitations generally applicable to trust contests was never triggered (§§ 16061.8, 16061.7, subd.(a)(1)), he contends his brother's petition was time-barred under the three- or four-year limitations periods for claims for rescission (Code Civ. Proc., § 337) and fraud (Code Civ. Proc., § 338, subd.(d)) or under the "catch-all" limitations provision (Code Civ. Proc., § 343). Assuming arguendo that one or more of these provisions apply in addition to the specific Probate Code limitations period, Reginald waived their application by failing to plead a statute of limitations defense.

As noted, Reginald did not plead any affirmative defenses in his response to the petition. Although his prayer for relief included a request that the court dismiss "all causes of action and/or claims that the purported Will and Trust were void as to the alleged undue influence by Respondent as untrue and barred by the applicable statute of limitations," that request was directed only to the undue influence claim and not to the allegations of testamentary incompetence. Moreover, this general prayer was insufficient to plead a statute of limitations affirmative defense.

Section 458 of the Code of Civil Procedure requires that the statute of limitations be pleaded by either alleging facts showing the action is time-barred or stating the

specific statute and subdivision of the statute, if the statute is so divided, that bars it. (*Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 573, fn. 4.) “According to long-standing case law, the failure to allege the appropriate subdivision of the statute of limitation waives the defense.” (*Ibid.*; see also, e.g., *Brown v. World Church* (1969) 272 Cal.App.2d 684, 691; *DeCelle v. City of Alameda* (1963) 221 Cal.App.2d 528, 533; *Davenport v. Stratton* (1944) 24 Cal.2d 232, 246–247.) “[I]f a defendant does not timely raise a limitations defense, it is waived regardless of how long the plaintiff has delayed.” (*Hambrecht & Quist Venture Partners v. American Medical Internat., Inc.* (1995) 38 Cal.App.4th 1532, 1548.) The petition here does not satisfy these requirements.⁵ The trial court therefore properly rejected any statute of limitations claim at trial. (See *J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 15–16 [we affirm trial court order if correct on any theory].)

II. Substantial Evidence Supports the Judgment

Reginald asserts the evidence was insufficient to overcome the presumption that a testator is mentally competent (see *Estate of Mann* (1986) 184 Cal.App.3d 593, 603) because (1) there was no testimony from a health care professional; and (2) none of the trial witnesses were present the day Verliss purportedly signed the Will and Trust or testified about his mental capacity on that date. The assertion is meritless.

“The burden is on the contestant to overcome the presumption that a testator is sane and competent. [Citation.] On appeal, however, ‘ “[t]he rules of evidence, the weight to be accorded to the evidence, and the province of a reviewing court, are the same in a will contest as in any other civil case. . . . The rule as to our province is: ‘In reviewing the evidence . . . all conflicts must be resolved in favor of the respondent, and

⁵ Nor, for that matter, did Reginald invoke a limitations defense in response to an interrogatory that asked him to identify each affirmative defense and the facts supporting it. Instead, he responded merely that his “denials and affirmative defenses were asserted as a matter of course to protect Respondent’s rights and preserve issues for trial. Ongoing discovery should provide factual basis for the denials and defenses.”

all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary . . . principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.’ (Italics added.) . . .” [Citation.]’ ‘[A]ll of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact.’” (*Estate of Mann, supra*, at pp. 602–603.)

The testimony given by Rodney, Elise and Hubbard, which the trial court credited, was more than sufficient to prove the allegations and support the court’s determination. Both Rodney and his wife saw Verliss on December 21, the day before he allegedly signed the Will and Trust and the day on which Reginald testified he read the documents aloud to his father. Both of them testified Verliss was unaware and unable to move, communicate, or recognize his family members. Hubbard confirmed that on the previous day, three days before his death, Verliss was in a steep decline, unaware of his surroundings, and unable to speak comprehensibly. It “was like dementia, because he wasn’t really interested in anything.” Reginald’s contention that this does not support a finding that Verliss was incompetent when he purportedly signed the testamentary documents on December 22 defies experience and common sense. Moreover, as family members who were long and intimately acquainted with Verliss, all three witnesses were qualified to give opinion evidence as to his mental capacity. (*Estate of Clegg* (1978) 87 Cal.App.3d 594, 601, fn. 4; Evid. Code, § 870.)

Reginald’s remaining attacks on the evidence are merely thinly, if at all, veiled attempts to persuade us to reweigh the evidence, which is not a proper function of this court.

DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

McGuinness, P.J.

Jenkins, J.