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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

NORMAN JAMES BELISLE,

Plaintiff and Appellant,

v.

DAVID A. SHERMAN et al.,

Defendants and Respondents.

A132258

(San Francisco County
Super. Ct. No. CGC-10-495870)

Plaintiff Norman James Belisle (Belisle) sued defendants David A. Sherman (Sherman), Wells Fargo & Company (Wells Fargo), and Minnesota Life Insurance Company (Minnesota Life) for damages arising from payment to Sherman of the proceeds of a policy of life insurance on the life of Dennis M. Belisle (Decedent). Belisle maintains that he, not Sherman, was the beneficiary of the insurance. The trial court disagreed and granted defendants' motions for summary judgment. The court's ruling was correct, and we affirm the judgments for defendants.

I. BACKGROUND

Decedent died on January 7, 2008 from liver failure. He was in the hospital for six weeks before his death, and had been placed on medical leave from his job with Wells Fargo in December 2007. Belisle, a first cousin of Decedent, visited him many times at the hospital and observed his "deteriorating health condition." He was "physically weak, fatigued, bed-ridden, and distraught once it became apparent [that he] would not receive a liver transplant."

On January 6, 2008, the day before he died, Decedent executed a will disinheriting Sherman, who had been his registered domestic partner since 2000. The will bequeathed Decedent's real property, and specified categories of his personal property, to Belisle.

Decedent became a Wells Fargo employee upon Wells Fargo's acquisition of his previous employer, Greater Bay Bank, on October 1, 2007. Effective January 1, 2008, he became eligible for death benefits under Wells Fargo's group life insurance coverage issued by Minnesota Life. The life insurance certificate provided that if the insured named no beneficiary, the death benefit would be paid first to "your lawful spouse, domestic partner or same-sex spouse, if living" The certificate defined a "domestic partner" in relevant part as "one who is in a qualified domestic partnership, which consists of you and one other person of the same or opposite sex who are able to provide a domestic partnership certificate from a city, county or state which offers the ability to register a domestic partnership." The certificate stipulated: "A request to add or change a beneficiary must be made in writing and sent to your employer or us. A change will take effect as of the date it is signed, but will not affect any payment we make or action we take before your notice is received."

Decedent did not designate any beneficiary for the life insurance in the manner required by the certificate. Belisle testified in deposition that Decedent asked him for help in preparing the January 6 will, but never mentioned that he had life insurance through Greater Bay Bank or Wells Fargo. Belisle testified and Sherman declared that, before Decedent's death, neither of them knew of any life insurance. But a January 10, 2008 email between Wells Fargo personnel stated that Sherman had called on "Tuesday 12/8/08"¹ and "was interested in getting beneficiary information re [Decedent's] insurance."

On January 28, 2008, Decedent's friend Carolyn Wilcoxon faxed a copy of the January 6 will to Wells Fargo with a cover note stating that Sherman had been disinherited, and that "all benefits should be paid to [Decedent's] estate via [Belisle]."

¹ This presumably refers to January 8, 2008, a Tuesday.

According to Wilcoxon's declaration, the January 6 will provided: "I give, devise and bequeath all of the residue and remainder of my Estate, after payment of all my just debts, expenses, taxes, administration costs and individual devises and bequests, if any, *to [Belisle] and to designate the same as beneficiary of any and all Life Insurance or retirement accounts. Superseding any pre-designations now existing.*" (Italics added.) Reinetta Moore, the Wells Fargo employee to whom the January 28 fax was addressed, declared that the will Wells Fargo received did not include the italicized language.

On March 3, 2008, Moore wrote Sherman a letter stating that because Decedent had not designated a beneficiary for his life insurance, the proceeds were payable to: "1. Surviving Spouse; [¶] 2. Same Sex Partner; [¶] 3. Domestic Partner" The letter advised Sherman that he needed to submit a beneficiary's affidavit to request payment.

On March 12, Minnesota Life sent Decedent a letter saying, "Congratulations! You are now insured with Minnesota Life" Enclosed with the letter was the life insurance certificate explaining how Decedent could designate a beneficiary.

On March 25, Wells Fargo received a beneficiary's affidavit from Sherman, along with a declaration of domestic partnership for Sherman and Decedent filed in July 2000. Moore wrote Sherman the next day stating that he was entitled to death benefits totaling \$370,000.64. On April 18, Moore advised Minnesota Life of Decedent's death and Sherman's entitlement to the policy benefits. Minnesota Life paid the benefits to Sherman on May 23.

Belisle filed suit in January 2010. The court granted the motions of Sherman, and of Wells Fargo and Minnesota Life, for summary judgment in orders filed on May 24, 2011. Belisle filed a notice of appeal on May 26, 2011. Judgments were entered for Sherman on August 30, 2011, and for Wells Fargo and Minnesota Life on October 26, 2011.

II. DISCUSSION

A. Appealability

The appeal was purportedly taken from orders granting summary judgment, which are not appealable. (*Kasparian v. AvalonBay Communities, Inc.* (2007) 156 Cal.App.4th 11, 14, fn. 1.) We construe the appeal to be from the resulting judgments. (*Ibid.*)

B. Scope of Review

“The rules of review are well established. If no triable issue as to any material fact exists, the defendant is entitled to a judgment as a matter of law. [Citations.] In ruling on the motion, the court must view the evidence in the light most favorable to the opposing party. [Citation.] We review the record and the determination of the trial court de novo. [Citations.]” (*Shin v. Ahn* (2007) 42 Cal.4th 482, 499 (*Shin*).

Sherman contends that abuse of discretion is the proper standard of review because the court granted summary judgment based on an equitable determination. However, it is questionable whether abuse of discretion review is appropriate simply because a summary judgment involves an equitable issue. (See Eisenberg, *et al.*, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) ¶ 8:167.1, pp. 8-131 to 8-132 (rev. #1, 2011) [discussing *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 67–68, and *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1137].) We will give Belisle the benefit of the doubt on this point, and assume without deciding that our standard of review is de novo.

C. Merits

As explained in *Cook v. Cook* (1941) 17 Cal.2d 639 (*Cook*), a provision in a will is generally ineffective to change the beneficiary designation under a life insurance policy: “ ‘[A] will cannot take effect until after the death of the testator and, of course upon property only belonging to him, and therefore, since, in a case where, as here, no change of beneficiaries has been made according to the laws of the society, or permitted by an informal method under a waiver of said laws, the interest of the beneficiary designated in the certificate in the benefit fund becomes vested, *eo instanti*, upon the death of the assured. . . . [A]ny provision in the last will . . . purporting or attempting to make a

different disposal of the fund would be as ineffectual for the purpose for which it was intended as would be a provision attempting thus to dispose of property which the testator never owned or had any interest in. [¶] Nor can the document be upheld as a direction to the association to make the change [if] the desired change was never in any manner communicated to the association during the lifetime of the assured’ ” (*Id.* at p. 647; italics omitted.)

Moreover, as a general rule, the insured must adhere to the contract of insurance when designating a beneficiary. (*Pimentel v. Conselho Supremo, Etc.* (1936) 6 Cal.2d 182, 187 (*Pimentel*.) There are three exceptions to this rule where the insured can be deemed to have substantially complied with the contract: “(1) If the society has waived a strict compliance with its own rules, and in pursuance of a request of the insured to change his beneficiary, has issued a new certificate, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued; (2) If it is beyond the power of the insured to comply literally with the regulations a court of equity will treat the change as having been made; and (3) If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but before the new certificate is actually issued he dies, a court of equity will treat such certificate as having been made.” (*Id.* at pp. 187–188.)

The *Cook* court wrote: “Obviously, the making of his will, the only thing done by decedent, does not come within any of those exceptions.” (*Cook, supra*, 17 Cal.2d at p. 649.) But Belisle argues that the second exception applies here, and that “material issues of fact exist concerning whether it was beyond Decedent’s power to comply literally with the terms of the life insurance policies.” Belisle says that Decedent “effectuated a designation of the beneficiary to any and all life insurance policies to the best of his ability, given he was confined to his hospital bed, terminally ill, and emotionally distraught.” Belisle observes that Minnesota Life did not send Decedent notice of the insurance and the requirements for designating beneficiaries until after he had died. Belisle’s briefs state that decedent did not know of the life insurance before he died, and, confusingly, that he was unaware of the insurance “until just seven (7) days

before he passed away” — an apparent reference to the time within which the insurance was in effect. At oral argument, Belisle’s counsel stated that Decedent was in fact aware of the policy for a week before his death.

The trial court found that Belisle’s “argument of substantial compliance fails. Decedent had three months before his death to change beneficiaries. He was able to change his will just prior to death, yet took no action to change the beneficiary designation on his policy.” Examining the matter de novo, we agree that the claim of substantial compliance raises no triable issue of material fact.

Sherman alleges that the beneficiary designation in the will was a fraud, inserted only after his counsel pointed out that the will contained no residual bequest. Belisle responds that Sherman is “feebly and belatedly seek[ing] to contest the validity of the probated will,” and that his fraud allegation is barred by the doctrines of estoppel and res judicata. We need not reach Belisle’s estoppel or res judicata arguments because the alleged fraud at most raises a disputed issue of fact as to whether the will actually designated Belisle as Decedent’s insurance beneficiary, an issue that must be resolved in Belisle’s favor for purposes of summary judgment. (*Shin, supra*, 42 Cal.4th at p. 499.)

As for whether Decedent was unaware that he had life insurance until a week before his death, Sherman’s brief asserts that Belisle “conveniently ignores the fact that Decedent held these insurance policies for several years through his employment at Greater Bay Bank before it was acquired by Wells Fargo.” This fact would make Decedent’s alleged ignorance of the insurance very implausible, but Sherman cites no evidence of this fact in the record and we have found none.² While it seems unlikely that Decedent would have been unaware of this substantial asset, there is no definitive proof to the contrary. Viewing the evidence in the light most favorable to Belisle, we must presume that Decedent was in fact ignorant of the insurance until the week before his death. (*Shin, supra*, 42 Cal.4th at p. 499.)

² At oral argument, Sherman’s counsel stated that such evidence could be found at page 456 of the clerk’s transcript and page eight of the reporter’s transcript, but it is not there.

Nonetheless, it was not “beyond [Decedent’s] power” (*Pimentel, supra*, 6 Cal.2d at p. 188) to designate a beneficiary during that week. Decedent’s ability to execute a will on the eve of his death showed that he had the capacity to execute a beneficiary designation up to the end of his life. Moreover, he could have asked Wells Fargo about the existence of the insurance and the means for designating a beneficiary during the three months in 2007 he was in its employ, and thus, as the trial court pointed out, he effectively had that time to specify a beneficiary. The exception excusing fulfillment of the insurer’s requirements when “it is beyond the power of the insured to comply” with them applies by its terms only when compliance is essentially impossible. Here, the evidence showed at most that compliance would have been difficult, not impossible.

Our conclusion is consistent with the weight of authority. Although a claim of substantial compliance succeeded in *Pimentel*, such claims have failed in later cases where wills purported to change beneficiaries. (Compare *Pimentel, supra*, 6 Cal.2d at p. 189 [executed and acknowledged change of beneficiaries was effective even though agents who were directed to carry out remaining steps failed to do so]; with *Cook, supra*, 17 Cal.2d at p. 649 [will was ineffective]; *Moss v. Warren* (1974) 43 Cal.App.3d 651, 655–656 [change was ineffective although intent was clear from will and statements by the insured]; *Cripps v. Life Ins. Co. of North America* (9th Cir. 1992) 980 F.2d 1261, 1267–1268 [will was ineffective].)

An argument for substantial compliance under *Pimentel* was rejected in *BankAmerica Pension Plan v. McMath* (9th Cir. 2000) 206 F.3d 821, 823 (*McMath*), a case involving benefits under a 401(k) pension plan. The plan accepted an unsigned change of beneficiary form from the employee, failing to notice that it had not been signed. (*Id.* at pp. 823–824.) Substantial compliance was lacking, even though the plan was at fault, because the employee was “[a]t best . . . careless when he failed to sign the beneficiary designation form. He did not do all that he could have done.” (*Id.* at p. 831.) Similarly here, even if Wells Fargo and Minnesota Life were derelict in failing to advise Decedent of the life insurance before his death, he did not lack the power to discover its existence and did not do all that he could have done to properly designate a beneficiary.

As the concurring opinion in *McMath* persuasively explained: “California law properly recognizes that transfers of wealth at death should be done with a significant degree of formality and should not be left to the vagaries of the testimony of the indicated beneficiary and other claimants arising out of kinship or the murkiness of certain testimonial provisions. Thus, California law properly requires more than a clear manifestation of the intent of the decedent. It requires, to repeat, that the decedent make every reasonable effort under the circumstances to effect that change. This is a heavy burden to meet and, in most instances, will not be met short of the decedent actually having signed the beneficiary designation form if such signature is required to effect the change.” (*McMath, supra*, at pp. 831–832, conc. opn. of Sneed, J.)

Belisle could not be found to have carried his heavy burden of establishing substantial compliance with the insurance contract in this case.

III. DISPOSITION

The judgments for defendants are affirmed.

Siggins, J.

We concur:

McGuinness, P.J.

Pollak, J.