

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-0378-16T3
A-0515-16T3

IN THE MATTER OF INTER VIVOS
TRUST, FLORENCE FISHER,
Grantor (10-15-07).

IN THE MATTER OF THE ESTATE
OF FLORENCE FISHER, Deceased.

Submitted September 26, 2017 – Decided November 28, 2017

Before Judges Sumners and Moynihan.

On appeal from Superior Court of New Jersey,
Chancery Division, Bergen County, Docket Nos.
P-000325-15 and P-000324-15.

Meredith A. Fisher, appellant pro se.

Sills Cummis & Gross, PC, attorneys for
respondent Allan C. Bell (Thomas S. Novak, of
counsel and on the brief; Gregory E. Mulroy,
on the brief).

PER CURIAM

These consolidated matters involve the efforts of plaintiff
Meredith A. Fisher to void estate planning decisions made by her
mother, the late Florence Fisher.

In A-0378-16 (the trust action), plaintiff sought to remove defendant Allan C. Bell as trustee of an inter vivos trust created by Florence¹ for plaintiff's benefit, alleging he breached his fiduciary duty of loyalty. The trial court granted defendant's motion for summary judgment to dismiss plaintiff's complaint and denied plaintiff's cross-motion of summary judgment, finding plaintiff presented no proof of defendant's improper administration of the trust.

In A-0515-16 (the will action), plaintiff alleged undue influence exerted by defendant, plaintiff's sister, Judith, and her husband, in the preparation of Florence's will, warranting removal of defendant as executor, revocation of the letters testamentary, and voidance of will provisions that reduced plaintiff's share. The court granted defendant's motion for summary judgment and denied plaintiff's cross-motion of summary judgment, finding plaintiff's complaint was untimely filed and without good cause for an extension of time under Rule 4:48-2. The court also determined that, as to the merits, plaintiff presented no evidence undue influence had been exercised over Florence to warrant the relief plaintiff requested.

¹ We use her first name out of convenience because she and plaintiff have the same last name; we mean no disrespect.

While we disagree with the court that plaintiff's complaint in the will action should have been dismissed as untimely filed, we conclude plaintiff's appeals of the court's summary judgment orders are without merit for the reasons expressed by the court that plaintiff had not provided factual support to void her mother's estate planning decisions.

I.

Florence began planning her estate many years ago. In 1997 and 1999, she executed wills that evenly divided her estate among her three daughters. In 2007, she established separate trusts for her daughters with the assistance of defendant, an estate attorney. Because plaintiff contracted Lyme disease and suffered from its ill effects, Florence designated defendant as the sole trustee to administer her trust. Her sisters, however, were named as co-trustees with defendant in their respective trusts.

In November 2008, Florence executed a new will, which reflected that plaintiff's share of her estate be reduced by loans Florence had given to plaintiff for various investments and expenses. Six months later, Florence further modified her will through a codicil, which, relevant to this appeal, divided plaintiff's share into halves: one half would be placed into plaintiff's trust, and the other half would be put into trust for

the benefit of plaintiff's daughter who is also Florence's granddaughter.

In 2011, Florence's health worsened and plaintiff's sisters were appointed Florence's co-guardians. The appointment also directed the co-guardians to pay plaintiff's reasonable daily living expenses, which would be considered advancements of plaintiff's share of Florence's estate.

About four years later, Florence passed away. On January 30, 2015, her will was admitted to probate and letters testamentary were issued to defendant. Over six months later, on August 21, plaintiff, a New York resident, filed two separate verified complaints - the will action and the trust action. Both actions were dismissed on September 1, 2016, when the trial court issued orders and a single written opinion granting defendant's summary judgment motions and denying plaintiff's cross-motions for summary judgment. This appeal ensued.

II.

Before addressing the specific arguments raised by plaintiff, we briefly discuss the principles guiding our review of the trial court's summary judgment decisions.

Appellate review of a ruling on a motion for summary judgment is de novo, applying the same standard governing the trial court. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014).

Thus, we consider, as the motion judge did, "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 406 (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) (quoting R. 4:46-2(c)).

In evaluating a motion for summary judgment to determine the presence of a genuine issue of material fact, the court must consider both the allocation of the burden of persuasion, and the standard of proof. "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). A court must be "guided by the same evidentiary standard of proof – by a preponderance of the evidence or clear

and convincing evidence – that would apply at the trial on the merits." Brill, supra, 142 N.J. at 533. "[C]onclusory and self-serving assertions by one of the parties are insufficient to overcome the motion." Puder v. Buechel, 183 N.J. 428, 440-41 (2005) (citations omitted). We accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013) (citing Zabilowicz v. Kelsey, 200 N.J. 507, 512-13 (2009)).

Measured against this standard, we are convinced the court correctly granted summary judgment to defendant and denied summary judgment to plaintiff in both actions.

A.

In the trust action, plaintiff essentially sought removal of defendant as trustee under N.J.S.A. 3B:14-21(c), which provides a fiduciary may be removed if he or she "[e]mbezzles, wastes, or misapplies any part of the estate for which the fiduciary is responsible, or abuses the trust and confidence reposed in the fiduciary." She claimed that due to defendant's choices in administering other unrelated trusts, he was unable to properly administer her trust.

Courts are reluctant to remove a fiduciary appointed by a grantor absent specific proof of fraud, gross carelessness or indifference. See Braman v. Central Hanover Bank & Trust Co., 138 N.J. Eq. 165, 196-97 (Ch. 1946). Not only should the court be

reluctant to remove a fiduciary, but "so long as an executor or trustee acts in good faith, with ordinary discretion and within the scope of his powers, his acts cannot be successfully assailed." Connelly v. Weisfeld, 142 N.J. Eq. 406, 411 (E. & A. 1948). Disagreement between a beneficiary and a fiduciary is not cause for removal. In re Koretzky, 8 N.J. 506, 531 (1951). "[T]here must be a demonstration that the relationship will interfere materially with the administration of the trust or is likely to do so." Wolosoff v. Csi Liquidating Tr., 205 N.J. Super. 349, 360-61 (App. Div. 1985). Indeed, to remove a trustee there must be facts to warrant such action. See Matter of Konigsberg, 125 N.J. Eq. 216, 219 (Prerog. Ct. 1939).

Based upon the record, we agree with the trial court that plaintiff failed to demonstrate defendant acted improvidently in managing plaintiff's trusts. Confronted with defendant's certification that the trust's assets have been properly managed, plaintiff presented no evidence of fraud, indifference, bad faith, or carelessness by defendant. There is also no merit to her assertion that the trust is in future jeopardy unless defendant is removed as trustee. R. 2:11-3(e)(1)(E).

B.

In the will action, we agree with plaintiff that the trial court should not have granted summary judgment to defendant under

Rule 4:85-1, because as a non-state resident, she did not file her complaint within six months of the issuance of testamentary letters to defendant. We therefore conclude the court mistakenly applied its discretion by not allowing plaintiff a thirty-day filing extension for good cause under Rule 4:48-2.

The record shows that within six months of defendant's appointment as executor, plaintiff attempted to file a pro se complaint making the same allegations and seeking the same relief set forth in the two complaints she later filed that are the subject of this appeal. However, a court clerk did not accept her filing; instead advising her that she had to file two separate complaints. Plaintiff contended her preparation of the two complaints was delayed when she became ill. She also argued she had to represent herself because her sisters delayed payment of her trust funds in order to prevent her from hiring a lawyer to contest the will.

We agree with the court that plaintiff's inability to afford counsel is not a basis for a good cause finding. In re Estate of Schiffner, 385 N.J. Super. 37, 44 (App. Div.), certif. denied, 188 N.J. 356 (2006). We also take no issue with the court's finding that there was no specific support for plaintiff's claim that her illness prevented her from meeting the filing deadline. Nevertheless, we conclude the court should have recognized

plaintiff's specific and non-speculative allegation that her filing would have been timely but for the court clerk's action. Under our summary judgment guidelines, these factual allegations should have been viewed in the light most favorable to plaintiff in her opposition to defendant's summary judgment motion. While her initially submitted complaint may have required a subsequent amendment to conform to the court rules, it should have been considered timely filed.

Notwithstanding this conclusion, we see no reason to reverse the court's summary judgment dismissal of the will action because the court properly assessed the merits of plaintiff's complaint in finding there was no proof that Florence's will was the product of undue influence. The following principles guide our analysis.

It is well settled that "it is generally presumed that the testator [is] of sound mind" to execute a will. Haynes v. First Nat'l State Bank, 87 N.J. 163, 175-76 (1981) (citation omitted). That presumption can be overcome, however, upon a showing of undue influence. See id. at 176. "[U]ndue influence is a mental, moral, or physical exertion of a kind and quality that destroys the free will of the testator by preventing that person from following the dictates of his or her own mind as it relates to the disposition of assets[.]" In re Estate of Folcher, 224 N.J. 496, 512 (2016)

(alteration in original) (quoting In re Estate of Stockdale, 196 N.J. 275, 302-03 (2008)).

To be entitled to a presumption of undue influence, the party challenging the will must show two elements: a confidential relationship between the testator and beneficiary, and "the presence of suspicious circumstances." Matter of Will of Liebl, 260 N.J. Super. 519, 528 (App. Div. 1992) (citing Haynes, supra, 87 N.J. at 176), certif. denied, 133 N.J. 432 (1993)). Since the parties do not dispute that defendant, Judith and her husband, had a confidential relationship with Florence, we focus on whether suspicious circumstances existed. "Suspicious circumstances" are those circumstances that "require explanation." Haynes, supra, 87 N.J. at 176 (citation omitted). Further, "[s]uch circumstances need be no more than 'slight.'" Ibid. (citation omitted).

Plaintiff alleges defendant, Judith and her husband, exerted undue influence on Florence by having Florence execute provisions in her will that: (1) deducted loans, interest and legal fees on Florence's loans to Meredith from her inheritance; (2) established a trust to pay for the remaining college expenses of plaintiff's daughter to be funded out of plaintiff's inheritance; (3) appointed defendant as sole trustee of plaintiff's trust; and (4) barred plaintiff or her issue from ever serving as trustee of plaintiff's trust. Plaintiff contends Florence was susceptible to their undue

influence because Florence executed the will when she was eighty-three years old, suffering from dementia, insecure due to the loss of her financial advisor, and extremely stressed due to her concern about plaintiff and plaintiff's daughter. Plaintiff also complained that Judith admitted she influenced Florence to place plaintiff's share of Florence's estate assets in trust, and took Florence to sign the will. Plaintiff maintains defendant did not provide "truly independent advice" to her mother.

We agree with the trial court that these allegations are not supported by competent evidence in the record. Hence, the court properly determined plaintiff did not demonstrate suspicious circumstances sufficient to entitle her to a presumption of undue influence by defendant, Judith and her husband.

Finally, we address plaintiff's assertion that defendant should be removed as executor because he breached his fiduciary duties. Defendant contends the issue is moot due to his filing of his final account for approval and distribution. We agree. Furthermore, based upon the same legal standard we applied above to reject plaintiff's claim that defendant should be removed as trustee of her trust, we also conclude plaintiff presented no evidence that defendant did not properly administer his duties as executor of her mother's estate.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

