COURT OF APPEALS
DECISION
DATED AND FILED

June 18, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

Appeal Nos. 2012AP644
2012AP1093
2012AP1829

Cir. Ct. No. 2007PR2

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN RE THE ESTATE OF LOUISE SELENSKE:

RICHARD SELENSKE,

APPELLANT,

V.

THE ESTATE OF LOUISE SELENSKE, BY ROBERT SELENSKE AND WILLIAM SELENSKE, CO-PERSONAL REPRESENTATIVES,

RESPONDENT.

APPEALS from a judgment and orders of the circuit court for Langlade County: LEON D. STENZ, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. In these consolidated appeals, Richard Selenske argues the circuit court improperly granted summary judgment dismissing his amended claim against his mother's estate. He also contends the court erred by approving the sale by the Estate of 212 acres of farmland, and by denying his applications for access to the Estate's records. We affirm.

¶2 These are the sixth, seventh and eighth appeals brought by Selenske involving his mother's estate. Louise Selenske died on January 30, 2007. At the time of her death, she possessed no property and had been the recipient of public assistance during the last several years of her life.[1]

¶3 In 2003, however, Louise was the sole owner of Peter Selenske Farms, Inc., which owned eight parcels of real estate and an operational dairy farm. She was also the sole owner of other parcels of non-farm real estate, including rental properties in Langlade County.

¶4 In 2003 and 2004, Louise conveyed to Richard the stock in Selenske Farms, and her solely owned property. Richard then transferred title to RnS Farms, LLC, which he structured to be owned by his fifteen-year-old son but was managed by Richard.

¶5 On April 9, 2004, Richard filed a petition for bankruptcy. He received a Chapter 7 "no-asset" bankruptcy discharge on August 24, 2004. In the bankruptcy proceeding, Richard failed to disclose the stock and real estate

[1] On June 24, 1999, Louise Selenske executed a will which provides that one-half of her estate be given to Richard.

transfers. He listed his occupation as "farm hand" and his income as "$400 per month."

¶6 In 2006, a guardianship was established for Louise and the guardian commenced an action seeking to set aside the 2003 and 2004 transfers on the grounds of undue influence.[2] A jury found undue influence and the transactions were set aside. Three appeals were filed. The first two appeals were dismissed on procedural grounds. In the third appeal, we affirmed the jury verdict finding undue influence.

¶7 On October 20, 2008, Richard filed a claim against Louise's Estate for $760,000, based upon alleged management fees and wages for a twenty-four-year period. The Estate moved for summary judgment, alleging that Richard's claim was barred by the two-year statute of limitations for unpaid wage claims, among other things. On November 16, 2009, the circuit court agreed. The court also denied a motion for reconsideration. We summarily affirmed the summary judgment on appeal.

¶8 The Estate commenced a small claims eviction action seeking to remove Richard from the real estate. The circuit court granted judgment for eviction and dismissed Richard's counterclaim seeking a constructive trust, among other things. Richard filed an appeal from the small claims judgment, which was dismissed as untimely filed. Our supreme court denied a petition for review.

[2] After Louise's death, the claim was continued by Richard's brothers William and Robert, who were appointed special administrators.

¶9 In April 2010, the co-personal representatives of the Estate entered into a lease, including an option to purchase, with a neighboring farm operation concerning the 212 acres of real estate.

¶10 On April 11, 2011, Richard filed an amended claim against the Estate seeking $720,000, based upon "breach of constructive trust." He alleged the claim related back to April 6, 2009, the deadline to file claims. The court granted the Estate summary judgment, and Richard now appeals.

¶11 Further hearings were held in the circuit court concerning Richard's objections to the exercise of the option to purchase the 212 acres of real estate. The court approved the sale, and Richard also appeals from that order.

¶12 On July 27, 2012, the circuit court denied Richard's application under WIS. STAT. § 879.61[3] for subpoenas duces tecum to obtain estate documents. The denial of that order is also the subject of appeal.

¶13 We independently review summary judgment, using the same methodology as the circuit court. ***Turner v. Taylor***, 2003 WI App 256, ¶7, 268 Wis. 2d 628, 673 N.W.2d 716. Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). "Notwithstanding a dispute on the merits, a defendant may be entitled to summary judgment by establishing that the action was not filed within the limitations period set forth in the statute of limitations." ***Paul v. Skemp***, 2001 WI 42, ¶9, 242 Wis. 2d 507, 625 N.W.2d 860.

[3] All references to the Wisconsin Statutes are to the 2011-12 version.

¶14 In Richard's prior appeal of the summary judgment dismissing his claim for wages and management fees, he conceded the two-year limitation in WIS. STAT. § 893.44(1) barred his claim. However, he argued the circuit court should have construed his response to the summary judgment motion as an amended claim stating a new theory of relief—constructive trust. He asserted that the two-year statute of limitations would not apply to a constructive trust. In our decision summarily affirming the summary judgment, we stated:

> The problem with Richard's argument is that he never actually amended his claim, or even sought permission to amend. As the circuit court noted, Richard's summary judgment response "doesn't create a claim. Basically [it is] an affidavit in support of a brief … in opposition to a summary judgment motion. It is not an amended claim." In the absence of an amended claim, the circuit court properly looked to the original claim, which clearly sought wages and management fees, and determined the claim was barred by the statute of limitations.

¶15 Following our decision, Richard amended his claim. Richard now seeks payment from the Estate in the amount of $720,000, to be secured through a "lien on the farm in the amount awarded by the Circuit Court." Richard insists:

> The rest of the family wasn't there those 24 years when Richard did all the work. It was understood Richard was to receive the farm. Now the estate wants to take the farm away from him. To avoid unjust enrichment Richard P. Selenske seeks an equitable lien against the farm.

¶16 The circuit court found the amended claim was still a claim for wages and management fees. As the court stated:

> I didn't read the Court of Appeals' decision as an instruction to [Richard's counsel] that everything would have been fine had he filed an amended claim. ... As a matter of fact, he's used the same affidavits in support of his objection to the summary judgment. If it's the same issue and the same affidavit to support it, it's already been

> determined by the Court of Appeals that my decision that it is not timely filed is correct. You don't get to dress this up in a different pair of pants and say, well there, now it's a different claim.

¶17 Significantly, the circuit court also found there was no factual basis for a constructive trust. The court stated:

> [T]here is no basis for his claim simply because he's changed it to an amended claim. There is a filing deadline with respect to these issues, and I think that was the basis for the statute of limitations previously. In essence he's arguing the same thing: I worked for my mother, therefore all money generated by the farm which my mother owned and when she was my employer belongs to me and I get to claim all the proceeds of that labor. ... [L]ike I said, it's frivolous. It wasn't his money, so I don't believe the money was invested, that it was his, but the claims are still the same. He was asking for management fees, and I believe the same argument was made at the first hearing. I worked, that money that was generated was mine, I'm entitled to reimbursement for that. And he's not, it's the exact same issues. And he's not seeking title to property, he's seeking money.

¶18 Contrary to Richard's perception, there is no factual issue concerning farm ownership. Richard may not seek title to the real estate, as that matter has been litigated. A jury found undue influence and we upheld that finding on appeal. We also rejected Richard's attempt to construe his response to the previous summary judgment as a new claim for constructive trust. Richard also unsuccessfully attempted to defend the eviction action by claiming a constructive trust. Quite simply, no matter how artfully he rephrases his current amended claim, it remains one for wages and management fees, and he cannot

avoid the two-year statute of limitations. Richard's amended claim, filed several years after the deadline to file claims, is untimely.[4]

¶19 Richard also argues the circuit court erroneously approved the option to purchase the 212 acres of farm land. Assuming for the sake of argument that court approval was necessary under WIS. STAT. § 860.01, the court's findings that the personal representatives acted in a commercially reasonable manner are supported by the record. The court noted the property was sold for a price in excess of appraised value. The lessee was given the option to purchase the property at $2,400 per acre. An appraised per-acre value of the real estate was approximately $2,100. We note the court also stated it was clear that:

> [A]s a result of [Richard's] conduct in this case that certain [attorney] fees have skyrocketed and the estate needs to have money to pay them. Therefore, they had to sell the property basically at that time.
>
> The court could have, perhaps, even justified a lower price per acre based upon the nature of the predicament that the estate found itself in. They needed to sell the property, had to pay expenses. They had to pay taxes. Despite that they still got a value for the property in excess of the appraised value at this time.

The court properly exercised its discretion by approving the sale of the real estate.[5]

[4] The parties also discuss issues based on the doctrine of judicial estoppel, due to Richard's inconsistent positions in prior proceedings. Because we conclude the statute of limitations barred Richard's amended claim, we do not address judicial estoppel, nor do we address every argument raised by Richard on appeal. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (only dispositive issues need be addressed).

¶20 Finally, Richard insists the circuit court misapplied WIS. STAT. § 862.01(4), by denying his requests for the issuance of subpoenas duces tecum to the co-personal representatives, seeking to inspect Estate documents. The Estate responds that Richard raises this statute for the first time on appeal. Richard does not specifically refute this argument, other than stating, "This is not true." Regardless, our review of the record reveals the court understood Richard's argument as being made under § 862.01(4).

¶21 We discern Richard's argument on appeal to be premised on the contention that his subpoenas were based upon "the common law right of every beneficiary to inspect the records of the fiduciary for any reason." In this regard, Richard relies upon ***In re Will of Leonard***, 202 Wis. 117, 126, 230 N.W. 715 (1930).

¶22 Richard's reliance upon ***Leonard*** is unavailing. That case involved a trust, where the trustee had failed to file annual accountings for many years. *See*

[5] Richard also alleges the option was not exercised within "a 30 day purchase window." Richard insists the lease contained a provision that an "authorized sale must be based upon acceptance of the option to purchase within thirty days after the pending appeal in Case Number [2006-CV-81] is concluded." According to Richard, that appeal "would be final for all purposes when the remittitur was filed in Antigo on June 21, 2010. The thirty day window would close July 21, 2010." Richard fails to provide appropriate citations to the record to support these representations, and we shall therefore not further consider the argument. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Indeed, both parties make various assertions unsupported by citations to the record on appeal. It should be clear to all lawyers that appellate briefs must give references to pages of the record on appeal for each statement and proposition made in appellate briefs. *See* WIS. STAT. RULE 809.19(1)(c), (d), and (e). Our review of this case has been unnecessarily complicated by the parties' lack of citation to the record, citations that do not always support the allegations of fact made in the briefs, and the continuation of self-serving arguments that have unnecessarily caused both this court and the circuit court delay and frustration. Both parties are admonished that future violations of the rules of appellate procedure may result in sanctions.

id. at 123-25. The court stated the "*cestuis que trust*, as the true owners of the fund, have the right to the production and inspection of all the documents and papers relating to it." ***Id.*** ***Leonard*** does not support the premise that Richard has the right in the present case to inspect records at any time for any reason as a matter of law.

¶23 WISCONSIN STAT. § 862.01 provides that a personal representative shall file an accounting when a petition for final settlement is filed, upon the revocation of the personal representative's letters, or when the personal representative resigns. *See* WIS. STAT. §§ 862.01(1)-(3). In addition, subsection (4) permits an interim accounting "[a]t any other time when directed by the court either on its own motion or on the application of any person interested." Here, the circuit court in its discretion declined to direct an interim accounting, stating as follows:

> At this point the court does not believe it's necessary, nor do I believe it's … a good use of [the] Court's time to be deciding some of these issues when the same issues are going to be resolved upon the presentation of the final account. At that point there will be a more complete understanding as to the accounting of the estate. And I agree that sometimes it's important when you have errors and are wondering what's going on. This case has been dragging on forever. As to what the status of the situation is, it's not a bad idea for the personal representative to keep them advised and to provide some sort of accounting or even a statement. If [counsel] wants to provide it, I think he can. I think sometimes it's a good idea that the heirs know what is going on, but I'm not going to require at this point additional fees to be expended to prepare an account only to have to redo it when the estate is terminated, so [Richard's] demand for accounting is denied.

¶24 The circuit court's decision employed a process of reasoning based upon the facts of record and reached a conclusion based on a logical rationale. The court's decision was an appropriate exercise of discretion.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.