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IN THE
COURT OF APPEALS OF INDIANA

BETTY NOLOT,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 22A01-1012-PL-643
	)	
RICHARD A. NOLOT, Individually and as Personal Representative of the Estate of Bernard F. Nolot, Deceased,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE FLOYD CIRCUIT COURT
The Honorable J. Terrence Cody, Judge
Cause No. 22C01-1008-PL-1488

July 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Betty Nolot ("Betty"), the widow of Bernard F. Nolot ("Bernard"), sought replevin of personal property taken into possession by Bernard's son, Richard A. Nolot ("Richard") as personal representative of Bernard's will, absent any payment of a statutory survivor's allowance. She also filed tort and equitable claims. The Circuit Court of Floyd County granted summary judgment to Richard on claims for replevin, trespass, conversion and unjust enrichment but denied summary judgment on the invasion of privacy claim. Betty appeals the grant of summary judgment on the former claims and Richard cross-appeals the denial of summary judgment on the latter claim. We affirm in part, reverse in part, and remand with instructions.

Issue

Betty claims that summary judgment was improvidently granted upon the replevin, trespass, conversion and unjust enrichment claims. On cross-appeal, Richard claims that he is also entitled to summary judgment on the invasion of privacy claim. Thus, we are presented with the consolidated issue of whether Richard was entitled to summary judgment upon each of Betty's claims.[1]

Facts and Procedural History

On April 19, 1979, Bernard executed his Last Will and Testament devising the entirety of his estate to Richard. On June 24, 1980, Bernard and Betty executed an Ante-

[1] Richard also seeks appellate attorney's fees, arguing that Betty has filed a frivolous appeal. Inasmuch as Betty has substantially prevailed on appeal, we do not award attorney's fees to Richard.

Nuptial Agreement, whereby each disclaimed an interest in property of the other "to the extent that it was owned prior to the parties' marriage" ("the Prenuptial Agreement.") (App. 22.) They married on June 27, 1980.

During their twenty-nine year marriage, Bernard and Betty resided at the Daisy Lane, New Albany house Bernard had owned prior to the marriage. Also during the marriage, some personal property was acquired, including automobiles and Ford stock to which Bernard took title in his individual name. Bernard, age seventy-eight, died on November 3, 2009.

On November 13, 2009, Bernard's will, with a copy of the Prenuptial Agreement attached, was admitted to probate. Without reference to an estate "heir," Richard represented to the court he was the sole "legatee and devisee."[2] (App. 7.) Betty filed no specific claim or election against the will.

After the time period for contesting the will had passed, Richard ejected Betty from the marital residence and took possession of personal property, giving rise to litigation in the Floyd County Circuit Court. In a June 28, 2010 order upon an ejectment action, Cause Number 22C01-1004-PL-00777, the trial court declined to address Betty's claim that she was entitled to a portion of property titled in Bernard's name, observing that "the time period for contesting the will of Bernard F. Nolot has expired under I.C. § 29-1-7-17, and the time

[2] Consequently, it appears that Betty received no contemporaneous notice of the opening of the estate other than by publication. Indiana Code Section 29-1-7-7(c) provides: "The notice required under subsection (1) shall be served by first class postage prepaid mail on each heir, devisee, legatee, and known creditor whose name and address is set forth in the petition for probate or letters, except as otherwise ordered by the court. The personal representative shall furnish sufficient copies of the notice, prepared for mailing, and the clerk of the court shall mail the notice upon the issuance of letters." (emphasis added.)

period for bringing claims against the estate of Bernard F. Nolot has expired under I.C. § 29-1-14-1." (App. 93.) However, in an apparent reference to an Indiana Trial Rule 60(B) motion to set aside a judgment, the trial court instructed, "If Defendant wishes to pursue these claims, she should file them as a separate action." (App. 93.)

On August 6, 2010, Betty filed her "Complaint for Damages." (App. 15.) Richard filed for summary judgment upon all claims, contending that he, in his capacity as personal representative of Bernard's estate, had the right to take possession of all Bernard's property, real and personal, and that the time for making claims against the estate had expired. Betty opposed summary judgment, in part contending that she was not filing a "claim" against the estate but rather was alleging "a claim that defendant has not administered the estate properly" and that he had "engaged in conduct that amounted to intimidation, harassment, coercion, conversion and invasion of privacy." (App. 71, 73-4.)

No hearing was conducted. On November 24, 2010, the trial court entered summary judgment in favor of Richard upon all claims except invasion of privacy. Finding no just reason for delay, the trial court directed the entry of final judgment pursuant to Indiana Trial Rule 54(B). This appeal ensued.

Discussion and Decision

I. Standard of Review

Summary judgment is appropriate only if the pleadings and designated materials considered by the trial court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Yates v. Johnson County Bd.

of Comm'rs, 888 N.E.2d 842, 846 (Ind. Ct. App. 2008). We must construe all evidence in favor of the party opposing summary judgment, and all doubts as to the existence of a material issue must be resolved against the moving party. Id. at 847. We carefully review a grant of summary judgment in order to ensure that a party was not improperly denied his or her day in court. Reeder v. Harper, 788 N.E.2d 1236, 1240 (Ind. 2003).

A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue. Huntington v. Riggs, 862 N.E.2d 1263, 1266 (Ind. Ct. App. 2007), trans. denied. Questions of law are reviewed de novo and we owe no deference to the trial court's legal conclusions. In re Guardianship of Philips, 926 N.E.2d 1103, 1106 (Ind. Ct. App. 2010). The appellant bears the burden of persuading us that the grant or denial of summary judgment was erroneous. Insuremax Ins. Co. v. Bice, 879 N.E.2d 1187, 1190 (Ind. Ct. App. 2008), trans. denied.

Neither the trial court nor the reviewing court may look beyond the evidence specifically designated to the trial court. Best Homes, Inc. v. Rainwater, 714 N.E.2d 702, 705 (Ind. Ct. App. 1999). Here, Richard contends that extraneous materials were included in the Appendix and that the argument portion of Betty's brief and portions of the Appendix should be stricken to avoid confusion and consideration of matters outside the summary judgment record. The parties' summary judgment designations to the trial court included the following materials:

The pleadings in the instant cause;
Ante-Nuptial Agreement;

Last Will & Testament of Bernard Nolot;
Affidavit of Record Title;
Orders in Cause No. 22C01-0911-EU-167 (formerly Cause No. 22C01-0911-ES-167) (including order probating will, order appointing personal representative, and order for supervised administration);
Affidavit of Publication;
Petition for Probate of Will;
Chronological Case Summary in Cause No. 22C01-0911-ES-00167;
Order entered June 28, 2010 in Cause No. 22C01-1004-PL-00777.

(App. 30, 79.) This comprises the summary judgment record for our consideration on appeal. We will not review extraneous materials.[3] Best Homes, 714 N.E.2d at 705.

II. Analysis

Betty's complaint stated a variety of claims against Richard, individually and as the personal representative of Bernard's estate. These included replevin (a statutory remedy designed to allow one to recover possession of property wrongfully held or detained as well as incidental damages[4]), conversion (which requires a showing that one knowingly or intentionally exerted unauthorized control over the property of another[5]), trespass (the establishment of which requires a plaintiff to show that he possessed the land and that the trespassing defendant entered the land without a legal right to do so[6]), invasion of privacy by intrusion (the establishment of which requires a plaintiff to demonstrate that there was an intrusion upon his or her physical solitude or seclusion, as by invading his or her home or

[3] We decline to strike the argument portion of Betty's appellate brief.

[4] United Farm Family Mut. Ins. Co. v. Michalski, 814 N.E.2d 1060, 1065 (Ind. Ct. App. 2004).

[5] Ind. Code § 35-43-4-3.

[6] See KB Home Indiana Inc. v. Rockville TBD Corp., 928 N.E.2d 297, 308 (Ind. Ct. App. 2010).

conducting an illegal search[7]), and unjust enrichment (a legal fiction which permits a claimant to prevail upon establishing that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust.[8]). Richard contends that he is entitled to summary judgment because he negated an element of each claim.

Betty alleged that Richard took stock certificates and automobiles. Richard does not deny the allegation. In his motion for summary judgment, Richard argued that he was entitled to all property to which Bernard held title at the time of his death, and Richard had a right (individually and as personal representative) to enter the premises of the former marital residence and take possession of all estate property. Accordingly, Richard contended that he could not be liable for trespass or conversion vis-à-vis his own property. He did not directly address the elements of the claim of unjust enrichment. The trial court's grant of partial summary judgment rested upon the premise that Betty had filed no timely "claim," perfected no interest in the estate of the decedent, and thus had no right to any property seized by Richard. (App. 2.)

Betty has not directly disputed Richard's entitlement to the deed to the real property, but has claimed that she is a "statutory heir" and is entitled to some portion of assets acquired during the twenty-nine year marriage. Appellant's Brief at 8. She contends that, after she declined to file an election against Bernard's will in deference to the Prenuptial Agreement,

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[7] See Newman v. Jewish Community Center Ass'n of Indianapolis, 875 N.E.2d 729, 736 (Ind. Ct. App. 2007), trans. denied.

[8] Zoeller v. East Chicago Second Century, Inc., 904 N.E.2d 213, 219 (Ind. 2009).

she was blindsided by Richard's acquisition of all vehicles and stock certificates in her possession. Betty seeks the replevin of stock certificates and automobiles sufficient to satisfy her claimed statutory and contractual rights. She also seeks tort damages and equitable relief.

Neither Richard nor Betty dispute the validity of the Prenuptial Agreement. With regard to property acquired after the marriage, the Prenuptial Agreement provides as follows:

> It is further agreed, that notwithstanding any of the other provisions set forth in this agreement, should the parties hereto acquire title to any other property as tenants by the entireties, or as joint tenants with right of survivorship, the entire title to such property shall immediately vest in the survivor upon the death of either party hereto; and <u>in the event that either party hereto acquires title to any property individually</u> or as tenants in common subsequent to the parties' marriage, or, in the event the parties hereto suffer simultaneous deaths, then the title to such property shall vest in accordance with the laws of descent of the State of Indiana.

(App. 11.) (emphasis added.) It is undisputed that Bernard acquired title to certain property individually after the marriage. Consistent with the Prenuptial Agreement, we turn to "the laws of descent of the State of Indiana."

The Indiana Probate Code provides that, upon the decedent's death:

> His real and personal property passes to persons to whom it is devised by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as his heirs; but it shall be subject to the possession of the personal representative and to the election of the surviving spouse and shall be chargeable with the expenses of administering the estate[.]

Ind. Code § 29-1-7-23. The Probate Code also includes a provision for a survivor's allowance:

> The surviving spouse of a decedent who was domiciled in Indiana at the decedent's death <u>is entitled</u> from the estate to an allowance of twenty-five thousand dollars ($25,000). If there is no surviving spouse, the decedent's

> children who are under eighteen (18) years of age at the time of the decedent's death <u>are entitled</u> to the same allowance to be divided equally among them.

Ind. Code § 29-1-4-1(a) (emphasis added.) Subsection (b) provides that the allowance may be claimed against:

> (1) The personal property of the decedent's estate;
> (2) The real property that is part of the decedent's estate; or
> (3) A combination of personal property under subdivision (1) and real property under subdivision (2).

If an election is not filed within ninety days after the order commencing the estate administration, the allowance must be satisfied first from the intangible personal property of the estate, second, from the tangible personal property of the estate, and third, from the real property that is part of the estate. Ind. Code § 29-1-4-1(b). Richard does not dispute Betty's entitlement to a survivor's allowance. He asserts that she has failed to make a "claim" for such. Appellee's Brief at 15. However, no "claim" against an estate needs to be filed before a surviving spouse or minor children can obtain the statutory allowance. <u>Kitchen v. Estate of Blue</u>, 498 N.E.2d 41, 47 (Ind. Ct. App. 1986).

The <u>Kitchen</u> Court described the statutory right and discussed its position with the Probate Code:

> By enacting the survivor's allowance the legislature has effectively written into every Indiana will, not containing clear contrary intent, an $8,500.00 [now $25,000.00] bequest over and above any other provision in the will. This is a strong expression of legislative intent that provision be made for surviving spouses and minor children. Ind. Code § 29-1-4-1 is not principally intended to create a debt that an estate owes; rather it defines a statutory right which can only be denied if the estate's assets are insufficient to first pay the administration and funeral expenses.

> The purpose of the five month or one year time limit is to facilitate the orderly administration of estates, by establishing a time when the executor can be absolutely certain that all of the estate's debts have been identified. This purpose does not apply to the survivor's allowance, because the executor knows that if there is a surviving spouse or minor children, and the will does not clearly provide otherwise, then payment of the allowance is due.

Id. at 46-47. The lack of a need for a specific demand was also recognized in Rush v. Kelley, 34 Ind. App. 449, 73 N.E. 130, 132 (1905), wherein the Court held that the widow's right to such payment was not a claim against the decedent and "she had no reason to expect that the administrator would neglect his prescribed duty to pay her allowance before proceeding to final settlement of his trust."

More recently, in Estate of Kappel v. Kappel, 946 N.E.2d 58 (Ind. Ct. App. 2011), a panel of this Court considered whether a demand for payment of a spousal allowance filed five years after an estate was opened represented a claim filed outside the statutory period for filing of claims against an estate. We acknowledged that a "claim," defined in the Probate Code to include "liabilities of a decedent which survive, whether arising in contract or in tort or otherwise, funeral expenses, the expense of a tombstone, expenses of administration, and all taxes imposed by reason of the person's death," must be filed within nine months after the date of death. Kappel, 946 N.E.2d at 60 (citing Indiana Code §§ 29-1-1-3(a)(2), 29-1-14-1(d)). However, a "claim" contemplated by 29-1-14-1 is '"a debt or demand of a pecuniary nature which could have been enforced against the decedent in his lifetime."' Id. (quoting Matter of Williams' Estate, 398 N.E.2d 1368, 1370 (Ind. Ct. App. 1980)). The Kappel Court held "if a surviving spouse need not file a demand for payment of the survivor's allowance at all, the spouse need not do so within the nine-month period of time prescribed by Indiana

Code Section 29-1-14-1(d)." Id. at 61. Accordingly, Betty did not lack an interest in the estate property because of neglect to file a "claim."

Pursuant to Indiana Code Section 29-1-13-1, the personal representative has a right to take possession of the real and personal property of the decedent.[9] Thus, Richard entered upon the land at Daisy Lane with a legal right to do so. An element of Betty's trespass claim having been negated, Richard is entitled to summary judgment on this claim.

Richard also claimed that he cannot be liable for conversion because he did not exert "unauthorized control" over personal property. Richard had a duty as personal representative to gather the property of the decedent. His designated materials disclose that he exercised this duty. Nonetheless, his duty did not encompass taking personal property that belonged to Betty. His designated materials do not indicate what specific items he took. Because there exists a factual dispute as to whether Richard took personal property belonging to Betty, we cannot say that Richard negated an element of the conversion claim.

Richard did not have the right to ignore his duty to pay the survivor's allowance before proceeding to final settlement. Presumably, Richard was aware of the existence of his father's wife of twenty-nine years. Notwithstanding his knowledge, and no election having been made within ninety days as to whether Betty's allowance would be satisfied from real or personal property, or a combination thereof, Richard set aside none for her benefit. With assistance of law enforcement officers, Richard commandeered the real and personal

[9] Indiana Code Section 29-1-13-1 provides in relevant part: "Every personal representative shall have a right to take, and shall take, possession of all the real and personal property of the estate."

property without regard to Betty's residential tenancy or statutory rights. Betty has a right of replevin to the extent necessary to satisfy her survivor's allowance.

Moreover, the claims and allegations of Betty's complaint were not limited to Richard's taking of property. She also alleged injuries arising from the manner in which the taking was conducted. Construing the designated materials in the light most favorable to the non-movant, Richard took possession in an invasive and threatening manner, removed license plates from vehicles, searched through Betty's residence, and photographed the contents. The trial court properly found that the invasion of privacy claim should survive the motion for summary judgment.

Finally, Richard made no specific argument or designation of evidence as to the elements of Betty's unjust enrichment claim. Accordingly, Betty had no obligation to come forward with designated evidence to withstand the motion for summary judgment. A party seeking summary judgment bears the burden to make a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. Jackson v. Wrigley, 921 N.E.2d 508, 512 (Ind. Ct. App. 2010). It is only when the moving party satisfies this burden that the nonmoving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial. Id. Summary judgment was improvidently granted on this claim.

Conclusion

We affirm the denial of summary judgment as to the invasion of privacy claim. We also affirm the grant of summary judgment on the trespass claim. We reverse the grant of

summary judgment on the conversion, unjust enrichment and replevin claims. As Bernard left a solvent estate, Betty is entitled from the estate to $25,000.00 as a matter of law. This is in addition to any property or damages she may ultimately recover on her other claims.

We remand for further proceedings consistent with this opinion, including the order for the payment from Bernard's estate of a $25,000.00 survivor's allowance to Betty.

Affirmed in part, reversed in part, and remanded.

FRIEDLANDER, J., and BROWN, J., concur.