

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MARTIN J. MUSSER,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
GREGG TOWNSHIP SUPERVISORS,	:	
CHRISTOPHER KUNES, CHRISTOPHER	:	
KUNES GENERAL CONTRACTOR, L.P.,	:	
AND RICK BROOKS, Trustee,	:	
	:	
Appellees	:	No. 1690 MDA 2013

Appeal from the Order entered on September 10, 2013
in the Court of Common Pleas of Centre County,
Civil Division, No. CP-14-CV-4845-2011

BEFORE: LAZARUS, WECHT and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

FILED JULY 25, 2014

Martin J. Musser ("Musser") appeals from the Order denying his Post-Trial Motion to Remove Nonsuit, and dismissing, with prejudice, Musser's claims against Gregg Township Supervisors, Christopher Kunes, Christopher Kunes General Contractor, L.P., and Rick Brooks ("Trustee") (collectively referred to as "Defendants"). We affirm.

Musser was in a near-fatal accident as a teenager, and suffered head trauma as a result. In order to provide for his needs, his mother, Amy Musser ("Amy"), included special provisions in her will, directing her estate to be held in trust for Musser. The relevant language is as follows:

I direct that [Trustee] permit my son, Martin Musser, to reside in and utilize my barn/home and land for as long as he is able. If he is no longer able to maintain the property, or does

not desire to live there, the Trust is to terminate and the property is to be transferred by my Trustee to the Supervisors of Gregg Township for the use and benefit of citizens of Gregg Township in any manner they deem appropriate and in their absolute and unfettered discretion.

Last Will and Testament of Amy Musser, 7/24/01, at 2. Amy died in 2001, at which point Musser's interest in the property took effect.

The trial court set forth what occurred next:

By deed dated August 14, 2002, [Trustee] conveyed [Amy's] property to Gregg Township Supervisors, reserving a conditional life estate for [Musser], after determining that [Musser] did not desire to live there and advising [Musser] of his intentions. [Musser] did not object. No member of [Musser's] family objected. Trustee transferred the property in order to reduce the taxes that were being paid out of the trust. Trustee maintained the residue of the estate for [Musser's] benefit, and accounted for all trust funds. Gregg Township continued to allow [Musser] to use the property, though [Musser] has never lived there. In 2011, after speaking to [Musser] and [Musser's] family, the Supervisors of Gregg Township advertised the property for sale, and the successful bidder was [] C. Wayne Company[, L.P.].

[Musser] filed his Complaint—Petition in Equity on December 19, 2011, seeking the following relief: (1) an accounting; (2) declaration that the deed dated August 14, 2002[,] be declared null and void because of the breach of fiduciary duty by the Trustee; (3) imposition of a constructive trust and appointment of a new trustee; (4) injunctive relief barring the Supervisors of Gregg Township from completing the sale to C. Wayne Company, L.P.; and (5) imposition of a resulting trust.

A non-jury trial was held before [the trial court] on April 10, 2013. At the conclusion of [Musser's] case, [] Defendants moved for a demurrer without presenting witnesses or evidence. The [c]ourt granted the demurrer because it found that Trustee followed the directions in [Amy's] Will. The [c]ourt found that Trustee had properly exercised his authority to transfer the

property. An Order was entered on April 18, 2013, dismissing all claims and parties.

Trial Court Opinion, 9/10/13, at 2-3.

Thereafter, Musser was granted leave to file post-trial motions *nunc pro tunc*. Musser filed a Motion for Post-Trial Relief, which the trial court denied. Musser filed a Notice of Appeal.

On appeal, Musser raises the following questions for our review:

- I. [Did t]he trial court [abuse] its discretion and/or [commit] an error of law in granting the nonsuit[?]
- II. [Did the trial court use] the wrong standard in reviewing the evidence[?]
- III. [Did the trial court use] inconsistent evidentiary standards[?]

Brief for Appellant at 2.¹

[T]he trial court, on the oral motion of a party, may enter a nonsuit if the plaintiff has failed to establish a right to relief. Pa.R.C.P. 230.1, 42 Pa.C.S.A. In evaluating the trial court's grant of a nonsuit, "we must view the evidence adduced on behalf of the [plaintiff] as true, reading it in the light most favorable to [him]; giving [him] the benefit of every reasonable inference that a jury might derive from the evidence and resolving all doubts, if any, in [his] favor." ***Sinclair by Sinclair v. Block***, 534 Pa. 563, 568, 633 A.2d 1137, 1139 (1993). ***Accord Taliferro v. Johns-Manville Corp.***, 421 Pa. Super. 204, 208, 617 A.2d 769, 799 (1992). Additionally, a compulsory nonsuit may be entered only in cases where it is clear that the plaintiff has not established a cause of action.... When so viewed, a nonsuit is properly entered if the plaintiff has not established a cause of action.... ***Taliferro***[], 421 Pa. Super. at 208, 617 A.2d at 799. With respect to the trial court's evidentiary rulings, "[q]uestions concerning the admission and exclusion of evidence are within the sound discretion of the trial

¹ We note that Musser also set forth an additional question that is duplicative of the first question. We will address these questions together.

court and will not be reversed on appeal absent an abuse of discretion. The basic requisite for the admissibility of any evidence in a case is that it be competent and relevant.” **Moran v. G. & W.H. Corson, Inc.**, 402 Pa. Super. 101, 125, 586 A.2d 416, 428 (1991), *allocatur denied*, 529 Pa. 650, 602 A.2d 860 (1992).

In re Estate of Boardman, 80 A.3d 820, 822 (Pa. Super. 2013).

In his first claim, Musser contends that the trial court abused its discretion by granting the non-suit. Brief for Appellant at 10, 13-17. Musser claims that he established that the Trustee had breached his fiduciary duty by refusing to distribute the net income from the Trust, and that instead, the Trustee improperly used that income to insure the property after it had been transferred to Gregg Township. ***Id.*** at 10-11, 15. Musser argues that he provided sufficient evidence of a breach of fiduciary duty to warrant a hearing. ***Id.*** at 11. Musser also contends that the trial court should have declared a constructive Trust for the property. ***Id.*** Further, Musser claims that he is due injunctive relief because a monetary award would not compensate him for his losses as the Trust’s beneficiary. ***Id.*** at 12.

Here, Musser did not raise any of these claims until nine years after the Trustee had transferred the property. ***See*** Trial Court Opinion, 9/10/13, at 2. The trial court set forth the relevant law and facts, and determined that Musser failed to prove the liability of Trustee. ***See id.*** at 3-4. We adopt the trial court’s reasoning on this issue for the purposes of this appeal. ***See id.*** Further, because Musser failed to establish the liability of

Defendants, his claims requesting equitable relief in the form of a constructive trust and injunctive relief are without merit.

In his second claim, Musser contends that the trial court incorrectly applied a clear and convincing evidence standard of review. Brief for Appellant at 12. Specifically, Musser argues that the trial court did not construe the evidence in the light most favorable to him, as the non-moving party, in determining whether there was a minimal amount of evidence, which, if proved, would entitle him to relief. ***Id.***

As noted above, the trial court reviewed the evidence in the light most favorable to Musser, and determined that he failed to present sufficient evidence to maintain a cause of action against any of the Defendants. ***See*** Trial Court Opinion, 9/10/13, at 3 (wherein the trial court set forth the correct standard of review when a nonsuit is entered). We agree with and adopt the reasoning of the trial court. ***See id.*** at 3-4. Thus, this claim is without merit.

In Musser's final claim, he avers that the trial court used inconsistent evidentiary standards when it granted an objection to a question that called for a legal conclusion, but overruled a similar objection later in the trial. Brief for Appellant at 13.

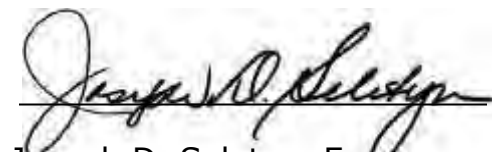
Here, aside from citing to the relevant objections in the record, Musser has failed to set forth any analysis or demonstrate how the trial court's decision whether to overrule an objection during trial would have prejudiced

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his case. **See** Pa.R.A.P. 2119(a) (stating that an argument must include discussion and citation of pertinent authorities). We decline to act as Musser's counsel in this regard. Accordingly, we cannot grant Musser relief on this claim.

Order affirmed. Motion to Suppress Supplemental Reproduced Record denied.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/25/2014

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA *J-18011-14*
CIVIL ACTION

MARTIN J. MUSSER,
Plaintiff

v.

RICK BROOKS, TRUSTEE,
GREGG TOWNSHIP SUPERVISORS,
CHRISTOPHER KUNES, AND
CHRISTOPHER KUNES, L.P.,
Defendants

v.

RICK BROOKS, EXECUTOR,
TOWNSHIP OF GREGG, AND
C. WAYNE COMPANY, L.P.,
Additional Defendants

No. 2011-4845

FILED FOR RECORD
2013 SEP 10 PM 1:30
DEBRA C. IMMEL
PROTHONOTARY
CENTRE COUNTY, PA

Attorney for Plaintiff:
Attorney for Defendant Rick Brooks:
Attorney for Defendants Gregg Township and
Gregg Township Supervisors:
Attorney for Defendant C. Wayne Co., L.P.:

Joseph C. Korsak, Esq.
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Robert C. Rayman, Esq.
Alan F. Kirk, Esq.

OPINION and ORDER

Ruest, J.

Presently before the Court is a Motion to Reconsider filed by Plaintiff, Martin J. Musser, pursuant to Pa.R.C.P. 227(a)(1) on June 7, 2013. Plaintiff asks the Court to grant him a new trial or to reconsider the verdict. A hearing was held on June 26, 2013. Plaintiff filed a brief in support of his motion on July 9, 2013. Defendants Gregg Township and Gregg Township Supervisors filed an opposition brief on July 29, 2013. Defendant C. Wayne Company, L.P. and Defendant Rick Brooks submitted opposition briefs on August 5, 2013. After consideration of the record, the briefs submitted, and the arguments of counsel, the Court finds as follows:

Background

Amy Musser died testate on July 27, 2001, leaving a will that directed that her estate be held in trust for the use and benefit of her son, Plaintiff. Defendant Rick Brooks was designated as trustee and executor. In her will, Ms. Musser directed that:

I direct that [the trustee] permit my son, Martin Musser, to reside in and utilize my barn/home for as long as he is able. If he is no longer able to maintain the property, or does not desire to live there, the Trust is to terminate and the property is to be transferred by my Trustee to the Supervisors of Gregg Township for the use and benefit of citizens of Gregg Township in any manner they deem appropriate and in their absolute and unfettered discretion.

By deed dated August 14, 2002, Defendant Rick Brooks (Trustee) conveyed Ms. Musser's property to the Gregg Township Supervisors, reserving a conditional life estate for Plaintiff, after determining that Plaintiff did not desire to live there and advising Plaintiff of his intentions. Plaintiff did not object. No member of Plaintiff's family objected. Trustee transferred the property in order to reduce the taxes that were being paid out of the trust. Trustee maintained the residue of the estate for Plaintiff's benefit, and accounted for all trust funds. Gregg Township continued to allow Plaintiff to use the property, though Plaintiff has never lived there. In 2011, after speaking to Plaintiff and Plaintiff's family, the Supervisors of Gregg Township advertised the property for sale, and the successful bidder was Defendant C. Wayne Company.

Plaintiff filed his Complaint—Petition in Equity on December 19, 2011, seeking the following relief: (1) an accounting; (2) declaration that the deed dated August 14, 2002 be declared null and void because of the breach of fiduciary duty by the Trustee; (3) imposition of a constructive trust and appointment of a new trustee; (4) injunctive relief barring the Supervisors of Gregg Township from completing the sale to C. Wayne Company, L.P.; and (5) imposition of a resulting trust.

A non-jury trial was held before this Court on April 10, 2013. At the conclusion of Plaintiff's case, all Defendants moved for a demurrer without presenting witnesses or evidence. The Court granted the demurrer because it found that Trustee followed the directions in Ms.

Musser's Will. The Court found that Trustee had properly exercised his authority to transfer the property. An Order was entered on April 18, 2013, dismissing all claims and parties. On May 14, 2013, Plaintiff filed an Application to Obtain Determination of Finality. On May 31, 2013, the Court issued an Order clarifying that its Order of April 18, 2013 was a Final Order, and granting Plaintiff leave to file post-trial motions *nunc pro tunc*. Plaintiff then timely filed his Motion to Reconsider. Plaintiff asks the Court for a new trial or to reconsider the verdict.

Discussion

Plaintiff asks this Court to reconsider the demurrer under Pa.R.C.P. 227.1(a)(1). When the Court granted a demurrer, it entered a compulsory nonsuit. A compulsory nonsuit is properly entered where, viewing the evidence in the light most favorable to the plaintiff, the facts and circumstances compel the conclusion that the defendants are not liable upon the cause of action pleaded by the plaintiff. Pa.R.C.P. 230.1; *Hong v. Pelagatti*, 2000 PA Super. 373, 765 A.2d 1117, 1121. A trial court's entry of a nonsuit should be reversed only upon a finding of an abuse of discretion or error of law. *Alfonsi v. Huntingdon Hospital, Inc.*, 2002 PA Super. 126, 798 A.2d 216, 218. Here, the Court properly found at the conclusion of Plaintiff's case that Plaintiff had failed to prove the liability of any of the defendants.

I. Defendant Rick Brooks, Trustee and Executor

"The primary duty of a trustee is the preservation of the assets of the trust and the safety of the trust principal." *Estate of Pew*, 440 Pa.Super. 195, 655 A.2d 521 (1994). A trustee may do anything regarding real estate which is "commercially reasonable or customary under the circumstances." 20 Pa.C.S.A. § 7780.6(a)(17). "The standard of care imposed on a trustee is that which a man of ordinary prudence would practice in the care of his own estate." *Estate of Pew*, 655 A.2d at 542.

The Will granted a life estate in the property to Plaintiff with the following conditions: (1) if he is no longer able to maintain the property; or (2) if he does not desire to live there. Plaintiff presented testimony showing that he did not want to live there, never lived there, and resided

elsewhere with his wife. Trustee decided to transfer the property to Gregg Township after he determined that one of the conditions of the life estate had been met; namely, Plaintiff did not desire to live at the property. Trustee notified Plaintiff of Trustee's decision to transfer the property, and did so without objection. Trustee transferred the property in order to prevent attrition of the trust's small corpus through the payment of real estate taxes. When he transferred the property, Trustee ensured that Plaintiff's interests in the property were preserved. Trustee continued to maintain insurance on the property for Plaintiff's benefit using funds from the trust and periodically distributed funds to meet Plaintiff's needs. Plaintiff regularly cut the grass at the property, and stored his tools there.

Plaintiff presented the foregoing at trial. These facts compel the conclusion that Trustee is not liable upon the cause of action pleaded by Plaintiff, because Trustee exercised the standard of care that a man of ordinary prudence would practice in the care of his own estate. Accordingly, the Court properly granted Defendant Rick Brooks' demurrer.

II. Defendants Gregg Township and Gregg Township Supervisors

Plaintiff presented no testimony tending to show that Defendants Gregg Township and Gregg Township Supervisors took any improper action when they purchased the property or later transferred the property. The Court therefore properly granted Defendants Gregg Township and Gregg Township Supervisors' demurrers.

III. Defendant C. Wayne Company, L.P.

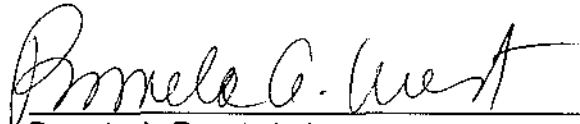
Plaintiff presented no testimony tending to show that Defendant C. Wayne Company, L.P., took any improper action. The only testimony that Plaintiff presented regarding Defendant C. Wayne Company, L.P., was that Defendant C. Wayne Company, L.P., was the highest bidder and the successful bidder when Defendant Gregg Township advertised the property for sale. The Court therefore properly granted Defendant C. Wayne Company L.P.'s demurrer.

Plaintiff's Motion for Reconsideration is therefore **DENIED**. The following Order is entered:

ORDER

AND NOW, on this 10th day of September, 2013, Plaintiff's Motion for Post Trial Relief is **DENIED**. The property was transferred to C. Wayne Company, L.P., on October 13, 2011 after Gregg Township Supervisors advertised the property for sale and C. Wayne Company, L.P. was the highest bidder. Plaintiff, who has not desired to live in the property since at least 2002, no longer maintains any interest in the property.

BY THE COURT:



Pamela A. Ruest, Judge