

0/a 5-7-86

IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 67,643

BARNETT BANK OF PALM
BEACH COUNTY,

Petitioner,

vs.

THE ESTATE OF LEON HENRY
READ, JR., Deceased,

Respondent.

C
pb

PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF THE FACTS

The first sentence of the factual statement of Respondent's brief is a denial by Mr. Richard F. Ralph that he was the lawyer for the estate when he first visited the bank and told the bank not to file a claim in the estate. Mr. Ralph appeared in the trial court as the personal representative and the lawyer, and his letter confirming his own instructions to the bank not to file a claim was written on letterhead stationery from his law office (R. 48). The record before this Court shows Mr. Ralph was the estate lawyer and he signed the Respondent's brief as counsel.

It frankly does not make a great deal of difference whether Mr. Ralph was only acting as the personal representative and not the lawyer, or whether he was acting as both the lawyer and the personal representative when he told the bank officials that he would recognize and pay the claim and that the bank should not file a formal claim in the estate. In any event, the estate is estopped because of Mr. Ralph's statements.

ARGUMENT

POINT I

THE FOURTH DISTRICT ERRED IN REVERSING THE CIRCUIT COURT'S ORDER DIRECTING PAYMENT OF THE CLAIM AGAINST THE ESTATE WHERE THE PERSONAL REPRESENTATIVE FILED NO OBJECTION TO THE CLAIM OR PETITION AND THE CREDITOR PROVED THAT THE FULL AMOUNT OF THE CLAIM WAS DUE AND OWING.

Respondent claims Twomey v. Clausohm, 234 So.2d 338 (Fla. 1970), is the sole controlling case. The Twomey case is inapplicable. The issue in that case was not when claims must be filed, but to whom they must be presented. There, various creditors never filed their claims against the estate in the probate court, but instead presented them to the personal representative. On review, this court noted that the early statute required creditors to present their claims to the personal representative. A later revision of the statute required that claims be filed in the office of the county judge. Finally, Sec. 733.16, Florida Statutes, provided that an unfiled claim was void even though the personal representative recognized such claim by paying a portion of it. This court concluded that all claims must "be filed in the court and filing cannot be waived by the personal representative." 234 So.2d at 340.

The instant case is different from Twomey because here Barnett Bank did file a claim against the estate. Also, the

statute now in effect, Sec. 733.702, does not say that untimely filed claims are void, but rather that they are not binding on the estate. Barnett Bank's claim was not automatically barred as untimely.

At page 6, Respondent argues that there was no Florida Rule of Probate and Guardianship Procedure requiring the personal representative to object to a late claim. The Respondent has intentionally chosen not to recognize the existence of Rule 5.040(a)(1) which was specifically argued in Petitioner's brief on the merits. In addition to filing a claim against the estate, the bank filed a Petition under the formal notice provisions of the rules. The applicable version of Rule 5.040(a)(1) provided:

"When formal notice is required, the petitioner shall serve a copy of the petition or other pleading shall be served on any interested person together with a notice requiring the person served to file his written defenses to that petition within 20 days...and notifying the person served that failure to file and serve written defenses within the time required may result in a judgment or order being entered in due course."

Mr. Ralph was served with the formal notice and with the Petition and knew full well that he had to respond within 20 days. He chose to do absolutely nothing, and thereafter the hearing was held and the relief requested by the petitioner granted. Respondent is in substantial error

in advising this Court that there was no rule in existence requiring him to defend this action.

POINT II

PETITIONER WAS ENTITLED TO AN EVIDENTIARY HEARING ON THE ISSUE OF WHETHER THE PERSONAL REPRESENTATIVE WAS ESTOPPED TO ASSERT THE STATUTE OF LIMITATIONS.

Respondent relies upon Miller v. Nolte, 453 So.2d 397 (Fla. 1984), at page 6 of his brief. The Miller opinion is directly against Respondent's position. Miller holds that the sixty-day limitation on filing a tax suit is a statute of limitations. The Miller opinion expressly recedes from numerous prior decisions to the contrary and expressly holds the sixty-day time limitation not to be a jurisdictional non-claims statute. All of the rationale expressed in the Miller decision supports the Petitioner's arguments here. Judge Hurley cited Miller v. Nolte in his dissent.

At page 7, it is argued that the personal representative's actions in this case "amount to no more than the protected activity of the statute". The activity in question was Mr. Ralph going to the bank and telling the bank officers not to file a claim against the estate because he was going to pay the note. This is not merely a

situation where a personal representative paid a portion of a claim. Partial payment of a claim does not work an estoppel, but telling the creditor not to file a claim and having the creditor rely upon it, to its injury, is the basis for estoppel. Harbour House Properties, Inc., v. Estate of Stone, 443 So.2d 136 (Fla. 3rd DCA 1983). If Respondent here is right and the statute protects such activity, then every personal representative/lawyer should attempt to convince all creditors not to file claims and then deny them when filed late. Neither the legislature nor the Fourth District Court of Appeal could conceivably have meant this to be the law.

Respondent also argues that claims "cannot be revived by a later acknowledgement." We agree with this. This is not a revival situation. Here the personal representative /lawyer went to the bank immediately after the decedent's death and told the bank not to file the claim because he intended to pay the note. Petitioner does not rely on Mr. Ralph's letter as the point in time when the estoppel occurred. The letter merely confirmed the much earlier statements which resulted in the bank refraining from filing the claim.

The Respondent has chosen not to discuss most of the cases cited by Petitioner. Specifically, there is no mention of Harbour House Properties, Inc., v. Estate of Stone, 443 So.2d 136 (Fla. 3d DCA 1983); In Re Estate of Peterson, 433 So.2d 1358 (Fla. 4th DCA 1983); Stern v. First National Bank of South Miami, 275 So.2d 58 (Fla. 3d DCA 1973); and Phillips v. Ostrer, 418 So.2d 1104 (Fla. 3d DCA 1982), rev. denied, 429 So.2d 6 (Fla. 1983). All of these cases are specifically on point and hold that estoppel applies so as to excuse the late filing of a claim. The only case relied on by Respondent to the contrary is Twomey v. Clausohm, supra, which is clearly distinguishable as based on a different statute. Alternatively, if Twomey does stand for the proposition that Sec.733.702 is a jurisdictional statute of non-claim rather than a statute of limitations, this Court should recede from that language, just as was done in Miller v. Nolte, supra.

At page 9, Respondent argues that the correct procedure was for the bank to have anticipated the defense of lateness and plead an avoidance of this defense when it filed the claim and when it filed the separate Petition. We wonder what Respondent's position would be if the bank had filed such a pleading. Would the personal representative then have answered it? If this is the personal representative's

position, then late filed claims which contain an allegation of avoidance must be answered and defended. This would, indeed, be a strange practice to engraft onto probate procedure. Anticipating defenses has been generally rejected as a requirement of affirmative pleadings. Simonin v. Sims, 456 So.2d 499 (Fla. 4th DCA 1984).

At pages 9 and 10, Respondent makes an argument about attorney's fees in the nature of a cross-appeal. Respondent urges that the Circuit Court erred in awarding attorney's fees. This cross-appeal is not authorized. Respondent never made this argument in the trial court and the District Court of Appeal did not rule on it. The argument should be disregarded. See In re Beverly, 342 So.2d 481, 489 (Fla. 1977) (Florida Supreme Court should decline to review questions which the trial court did not have full and adequate opportunity to consider).

CONCLUSION

The decision of the Fourth District Court of Appeal should be quashed and the Order of the Circuit Court reinstated, or in the alternative, the cause should be remanded to the Circuit Court for an evidentiary hearing on

the issue of estoppel.


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By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, this 8th day of April, 1986 to:
RODERICK F. COLEMAN, 1030 Ingraham Building, 25 S.E. Second Avenue, Miami, Florida 33131.


JOHN R. BERANEK