

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:08-bk-07002-KRM
Chapter 15

In re:

ESTATE OF A. CARY HARRISON, III,

Debtor in a Foreign Proceeding.

Adv. Pro. No. 08-0624

S.J. WILLIAMS, TRUSTEE,

Plaintiff,

vs.

RANDOLPH C. HARRISON,

Defendant.

**ORDER GRANTING
DEFENDANT'S AMENDED
MOTION FOR SUMMARY JUDGMENT**

This adversary proceeding came on for hearing on September 24, 2009, and November 16, 2009, upon the Defendant's Amended Motion for Summary Judgment (Doc. 24 – the "Motion") and the Plaintiff's Response thereto (Doc. 27, 28). At the conclusion of the hearing, the Court granted the Plaintiff leave to file a supplemental response which was filed by the Plaintiff and has been considered by the Court as well (Doc. 29). On November 16, 2009, the Court conducted a hearing for the purpose of announcing its ruling on the Motion. Consistent with the reasons stated orally and recorded in open court, the Court finds that there is no genuine issue as to any material fact and that the Defendant is entitled to judgment as a matter of law on all remaining counts of the Amended Complaint (Doc. 26).

The Amended Complaint in this proceeding contains five counts: (I) Turnover; (II) Equitable Lien; (III) Breach of Fiduciary Duty; (IV) Fraud; and (V) Fraudulent Transfer. Count I (Turnover) has previously been dismissed (Doc. 9). Defendant's Motion is directed to the remaining four counts. The gravamen of the Amended Complaint is that the Defendant (personal representative of the deceased debtor's probate estate) had an affirmative duty to advise his father's creditors in England (the "English Creditors"), including The Society of Lloyd's

("Lloyds"), that they needed to open a probate in Florida and file a claim within two years of Cary Harrison's death. The Defendant asserts as a matter of law that he had no such duty and that there is nothing fraudulent or wrongful for a beneficiary/named personal representative to wait beyond the two-year period in the Florida non-claim statute before opening a probate. In short, the English Creditors had every opportunity to open a probate case in Florida. Accordingly, the Plaintiff, English bankruptcy trustee for the English Creditors, has no valid claim against the Defendant, Randolph C. Harrison.

The Plaintiff has taken issue with the Court's staying of discovery and noted that no formal discovery has been taken or permitted in this proceeding. The Court does not believe that any such discovery could change the outcome in this case. The principal matter to be discovered would be what representations, letters, oral statements, or verbalized statements were made to the English Creditors to defraud them. However, the English Creditors for whom the Plaintiff acts would be in the position to know that information and would not need formal discovery to discover what was said to them. In fact, the Plaintiff's complaints and summary judgment papers do not allege any specific misrepresentation made to the Plaintiff, S.J. Williams, or to any of the English Creditors. The relief sought is premised on the Defendant's failure or omission relating to his alleged intentional delay in opening the Florida probate; not any affirmative misrepresentation.

Moreover, the undisputed facts in this case indicate that *before the expiration* of the two-year non-claim period under Florida law (a) a letter was written to the probate manager in the United Kingdom indicating that Cary Harrison had assets in the United States; and (b) Lloyds became aware that Cary Harrison owned real estate in Florida. These undisputed facts make it clear that the English Creditors had the opportunity to open a probate in Florida before the expiration of the two-year period.

Summary judgment is appropriate because the relevant facts set forth below are not disputed. The deceased debtor, Cary Harrison, who was at all relevant times, a United States citizen carrying a United States passport, and owning some assets in Florida and some in the United Kingdom, died on April 18, 2003. In February 2005, Cary Harrison's counsel sent a letter to Lloyds disclosing real estate located in Florida. On or about April 19, 2005, immediately after the expiration of the two-year non-claim period under Florida Statute 733.710, the Defendant filed to open a probate in Pinellas County, Florida. Pursuant to Cary Harrison's will, the Defendant was appointed personal representative of

his father's estate. Letters of administration were entered by the Florida probate court on May 18, 2005. On or about June 23, 2006, Lloyds became aware of the Florida probate. On or about April 3, 2007, nearly four years after Cary Harrison died, Lloyds filed an involuntary bankruptcy in England against Cary Harrison. Meanwhile, in August 2007, the Florida probate court entered an Order Determining Homestead Status of Real Property with respect to the Treasure Island house referenced in the Amended Complaint. The Treasure Island house was ultimately transferred to the Defendant as beneficiary consistent with such order. In September 2007, Cary Harrison was declared "bankrupt" under English law and, in November 2007, the Plaintiff was appointed bankruptcy trustee in the English bankruptcy case. This Chapter 15 case was filed in May 2008, more than five years after Cary Harrison's death. This adversary proceeding followed.

The unique legal context we find ourselves in is that the English Creditors, not having opened a probate in Florida and not having filed a probate claim within the two-year period, which they had every right to do, are now barred from making claims against the Florida probate assets. The English Creditors are jurisdictionally time barred. There were two principal assets in the Florida probate case: (1) the Treasure Island house; and (2) a strip shopping center in Pasco County. The Plaintiff alleges in this proceeding, as he must if the Florida assets are to be reached, that the Defendant engaged in fraud and breach of fiduciary duty by not opening the probate case within the two-year period, and by not notifying the English Creditors within the two-year period that they could open a probate and file claims. Plaintiff also alleges that the Treasure Island house was "fraudulently transferred" under Chapter 726, Florida Statutes.

As a matter of law, Randolph Harrison, as the beneficiary and named personal representative, had no affirmative or fiduciary duty *before* his appointment as personal representative. Florida Statute 733.601 is clear that a personal representative's duties commence upon appointment. Prior to his official appointment, Randolph Harrison had no affirmative duty as a fiduciary; he had no fiduciary relationship with the English Creditors; and he had no duty to notify them of the Florida legal structure or their opportunity to open a probate estate or file a claim. The only allegation against Randolph Harrison is that he kept his silence for two years and a day. The Court holds as a matter of law that that is not a breach of any duty. Additionally, his silence about Florida law is not fraud. There is no statutory or common law requirement to urge a creditor, who obviously knew about the death of its obligor and who apparently knew about assets in Florida, to open

a probate in Florida. The undisputed facts in this case establish that the existence of a Florida asset was disclosed *before* the expiration of the two-year period. It was incumbent upon the English Creditors to familiarize themselves with Florida law, open a probate and file a claim. For whatever reason, the English Creditors elected not to do so.

There was simply no fraud in Randolph Harrison waiting to open the Florida probate. There is absolutely no requirement under probate law that creditors of a decedent be paid before beneficiaries receive anything. In fact, the statutory scheme suggests the opposite. The whole substance of having a non-claims bar like Section 733.710 is to allow a beneficiary to receive assets free of creditor claims after the two-year period. For a beneficiary to take advantage of that legal structure is not fraud.

As to the claim for fraudulent transfer, the Court is being asked to rule in favor of a claim against a decedent's probated assets by creditors who are otherwise time barred under Florida probate law. It is essentially a collateral attack on the probate case and the probate court's homestead order in the face of the probate exception to jurisdiction. In any event, the debtor/decedent, Cary Harrison, did not make the subject transfer. The transfer was made by the personal representative pursuant to a probate proceeding and court order and therefore was not a transfer within the purview of Chapter 726. Moreover, there could be no fraudulent intent by the decedent, Cary Harrison, who was dead at the time of the transfer, and no fraudulent intent by the Defendant, Randolph Harrison, who acted pursuant to the Florida probate proceeding.

In conclusion, the Court finds as a matter of law no fraud, no breach of fiduciary duty, no basis for equitable lien on the transferred homestead property, and no cause of action under Chapter 726, Florida Statutes. Additionally, I adopt as supplemental reasoning the Defendant's Motion and the arguments and citations made on his behalf. Accordingly, it is –

ORDERED as follows:

1. The Motion is granted.
2. The Court will enter a separate final summary judgment in the Defendant's favor.

DONE AND ORDERED at Tampa, Florida on January 29, 2010.

/s/ K. Rodney May
K. Rodney May
United States Bankruptcy Judge