

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

**DARROLD LIDGETT, Personal
Representative of the Estate of Marjorie
Lidgett, Deceased,**

Plaintiff,

vs.

KENNETH LIDGETT,

Defendant.

Case No. CI99-159

JUDGMENT

DATE OF TRIAL: February 7, 2001.
DATE OF RENDITION: February 8, 2001.
DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).
APPEARANCES:
For plaintiff: Lynn D. Hutton, Jr. with plaintiff.
For defendant: Rodney W. Smith with defendant.
PROCEEDINGS: At the trial, these proceedings occurred:

The matter came on for trial to the court in equity, and trial to the court without a jury, a jury being expressly waived, on the issue of the statute of limitations. There were no preliminary matters. Opening statements were presented by counsel for plaintiff and counsel for defendant. The plaintiff requested leave to submit a trial brief out-of-time, and defendant’s counsel waived any objection, and the trial brief was submitted. Evidence was adduced for the plaintiff. Boyd W. Strobe and Darrold Lidgett were sworn and testified. The trial recessed for lunch. Following the lunch recess, with all counsel and parties present, Darrold Lidgett was recalled and testified further. Barbara Svatos and Kenneth Lidgett were sworn and testified. The plaintiff rested. After a brief recess, the defendant moved to dismiss the plaintiff’s petition. Arguments of counsel were heard on the motion. The motion was sustained as to the claims asserted by paragraphs 7A, 7B, and 7C of the plaintiff’s petition, but denied as to the claim asserted by paragraph 7D of the petition. Evidence was adduced for the defendant. Linda Peer was sworn and testified. Kenneth Lidgett and Darrold Lidgett were recalled and testified further. The defendant rested. The plaintiff rested

on rebuttal without any rebuttal evidence. Closing arguments were presented by counsel for plaintiff and counsel for defendant. The matter was taken under advisement.

FINDINGS:

The court finds and concludes that:

1. An action for declaratory judgment is sui generis, and whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *Main Street Movies v. Wellman*, 257 Neb. 559, 598 N.W.2d 754 (1999). The plaintiff's petition asserts an equitable claim for an accounting. The defense of the statute of limitations may require a jury trial on that issue. NEB. REV. STAT. § 25-221 (Cum. Supp. 2000). However, both parties expressly waived a jury on that issue.

2. A motion to dismiss in a nonjury trial is equivalent to a motion for directed verdict in a jury trial. *R.J. Miller, Inc. v. Harrington*, 260 Neb. 471, ___ N.W.2d ___ (2000). When considering a motion to dismiss in a nonjury trial, a court must resolve every controverted fact in the nonmoving party's favor and give that party the benefit of every reasonable inference to be drawn therefrom. *Id.* When a trial court sustains a motion to dismiss, it resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw only one conclusion. *Id.*

3. The court granted the defendant's motion to dismiss at the close of the plaintiff's evidence as to three of the four areas of accounting sought by the plaintiff, presented by paragraphs 7A, 7B, and 7C of the petition. As to all of these claims, the plaintiff successfully showed the existence of a fiduciary relationship between the plaintiff's decedent and the defendant. The evidence shows, without dispute, the existence of a durable power of attorney conferring power and authority from plaintiff's decedent upon the defendant. Viewed in the light most favorable to plaintiff, the court determines the existence of that relationship throughout the period in question. However, the law also imposes a burden on the person seeking an accounting to show that there is something due him or her. *Cimino v. W.A. Piel, Inc.*, 227 Neb. 196, 416 N.W.2d 505 (1987).

4. As to paragraph 7A, the claim relating to the Lukowicz contract, the evidence shows without any dispute that the decedent's contract rights were assigned to the defendant in 1983 during the existence of the power of attorney. However, the evidence also shows without dispute that in 1991, the decedent was represented by independent counsel of her choice. She initiated a proceeding for the establishment of a conservatorship for herself. Prior to the appointment of a conservator, she and the

defendant entered into a written agreement. The 1991 agreement expressly confirmed the 1983 assignment, waived all claims relating to the assignment, and required the defendant to pay the decedent \$400.00 per month for the rest of the decedent's natural life. The plaintiff did not claim that the 1991 contract was procured by any fraud or undue influence. Indeed, plaintiff's counsel forthrightly conceded during argument on the motion that the 1991 agreement was binding. The court sustained the motion as to paragraph 7A because the evidence shows without any dispute that the plaintiff's decedent had no ownership interest in the Lukowicz contract or its proceeds, and the performance of the 1991 agreement was encompassed in paragraph 7D.

5. As to paragraphs 7B and 7C, there was a total failure of any proof by the plaintiff that there was anything owed to plaintiff's decedent relating to either matter. There was no evidence at all regarding paragraph 7B. As to paragraph 7C, the sale of the Chambers lots, the only evidence is a copy of the deed by plaintiff's decedent and her husband (who predeceased plaintiff's decedent) to defendant in 1983. There was no evidence of any fraud or undue influence exercised by anyone in procuring the 1983 deed. The deed was signed directly by the grantors, and not by the defendant pursuant to the power of attorney. Indeed, there is no evidence that the defendant ever actually exercised the power of attorney.

6. As to paragraph 7D, which encompasses the plaintiff's claim regarding the failure to pay the monthly payments required by the 1991 agreement, the court denied the motion to dismiss. The plaintiff adduced evidence tending to show that there were amounts due to the plaintiff's decedent on the 1991 agreement because the defendant paid monies toward the obligation by checks drawn on a commercial bank only for a brief period of time. As to that claim, the plaintiff met his initial burden of proof. Thereafter, the defendant had the burden of proof to account. *Walker Land and Cattle Co. v. Daub*, 223 Neb. 343, 389 N.W.2d 560 (1986).

7. There was no evidence that defendant had access to or exercised control over any funds in the decedent's checking account or any cash paid over to her. In other words, there is no evidence showing that defendant exercised the power of attorney over the decedent's monies. The question presented by the evidence regards the defendant's performance of the monthly payment obligation imposed by the 1991 agreement. Except as it bears on the issue of performance of that requirement, evidence of payment to others or to himself from Lukowicz contract proceeds must be disregarded. In other words,

because the parties conceded the validity of the 1991 contract, the total amount to be accounted for by the defendant is \$22,000.00. This represents the \$400.00 monthly payment over the 55 months of the decedent's life (September of 1991 through March of 1996) after formation of the 1991 contract.

8. The plaintiff adduced evidence of certain payments made by check to or for the benefit of the decedent totaling \$2,094.16. As to those payments, the defendant's burden of proof is satisfied. Credit against the \$22,000.00 obligation is established to that extent.

9. This court found the testimony of Linda Peer to be very persuasive and credible. She testified very carefully, stating those matters of which she had direct personal knowledge and disclaiming knowledge as to matters where such personal knowledge was absent. She clearly controlled the cash fund from which cash amounts were withdrawn and accounting made for the purpose of each withdrawal. Exhibits 11-14, 45, 46. Her testimony persuades the court that each amount withdrawn from the cash envelopes for the expressed purpose of a payment to the decedent was indeed withdrawn upon an expression to Linda Peer by the defendant of the intention to use the funds for that purpose. However, the defendant bears the burden of proving not only that cash was removed from the envelopes with the expressed intention, but also that the intention was carried out.

10. Linda Peer testified to direct personal knowledge of delivery of the cash, where she actually observed the passage of the cash from the defendant to the decedent of \$200.00 on July 3, 1994. The court finds that testimony satisfies the defendant's burden of proof of payment of that amount, and grants credit therefor against the \$22,000.00 obligation.

11. Linda Peer also testified that, in something over one-half of the other instances recorded, while she did not observe the actual cash transfer, she observed the defendant and the decedent in such circumstances immediately following the particular withdrawal of cash from the envelope as to persuade the court that Linda Peer witnessed the payments of such amounts. As might be expected and supportive of her credibility, Linda Peer could not specifically recall which of the itemized transaction she personally witnessed under such circumstances and those she did not observe.

12. Over the period in question, the following cash withdrawals, in chronological order, were documented from the envelopes received as Exhibits 11-14, 45, and 46:

200.00	100.00	100.00	100.00	200.00	100.00
200.00	100.00	200.00	100.00	100.00	200.00

200.00	200.00	200.00	200.00	300.00	200.00
200.00	200.00	200.00	200.00	150.00	200.00
100.00	200.00	200.00	250.00	250.00	150.00
200.00	200.00	200.00	200.00	50.00	200.00
100.00	200.00	200.00	250.00	200.00	150.00
100.00	150.00	200.00	200.00	100.00	250.00
200.00	200.00	200.00	250.00	250.00	150.00
200.00	150.00	200.00	250.00	200.00	250.00
200.00	200.00	300.00	200.00	250.00	300.00
200.00	50.00	300.00	50.00	100.00	250.00
200.00	250.00	200.00	100.00	250.00	250.00
100.00	50.00	200.00	250.00	150.00	250.00
100.00	200.00	200.00	200.00	250.00	250.00
200.00	200.00	250.00	250.00	150.00	200.00
100.00	200.00	200.00	200.00	200.00	100.00
200.00	200.00	250.00	200.00	50.00	
100.00	200.00	200.00	200.00	200.00	

13. The July 3, 1994, \$200.00 payment is listed but disregarded below.

14. There are, of course, a variety of methods which might be used to determine the appropriate amount of credit based upon Linda Peer's testimony. After consideration thereof, the court concludes that a credit of \$10,150.00 is supported by the evidence, and that the defendant has satisfied his burden of proof as to such amount.

15. The court recognizes that an inference arises in support of credit for the remaining withdrawals. However, that inference is more than offset by opposing inferences arising from the absence of cash receipts and the manner of payments alleged. If established facts give equal support to two inconsistent inferences, then the judgment must go against the party having the burden of proof. *In re Estate of Severns*, 217 Neb. 803, 352 N.W.2d 865 (1984).

16. Notwithstanding the defendant's testimony regarding the decedent's concerns about collateral effects of payments by check, the defendant was certainly aware of his responsibilities under the 1991 contract and the arms-length nature of that transaction. The 1991 agreement resulted from negotiations between independent legal counsel for the defendant and the decedent. This was not purely an intra-family in which some informality might be expected. In view of the nature of the transaction and the defendant's status as a fiduciary, the law requires more than his self-serving testimony of payment.

17. Although the defendant testified regarding premiums paid for nursing home insurance and Medicare supplement insurance paid by him on his mother's behalf, except as included within the checks for which credit was given above, the defendant failed to prove the amount of such premiums paid on his mother's behalf. As the court concludes that the defendant failed to prove such amounts, the court need not consider whether such amounts constituted payments to his mother within the meaning of Section I of the 1991 agreement. Exhibit 10.

18. Thus, the defendant met his burden of proof for credits against the 1991 contract totaling \$12,444.16. Conversely, the defendant failed to meet his burden of proof as to credits totaling \$9,555.84. The plaintiff is entitled to judgment against the defendant for \$9,555.84 and the costs of the action, with interest from the date of judgment.

19. After again reviewing the allegations of the plaintiff's petition, it is possible to read the claim for the \$400.00 monthly proceeds as falling under either paragraph 7A or 7D or both. When the court granted the motion to dismiss in part, the court made it clear that the claim not being dismissed related to the accounting for the \$400.00 monthly payments. Thus, if the court erroneously considered the matter as arising under paragraph 7D rather than paragraph 7A, such error is immaterial and harmless because the record clearly shows that the parties understood the issue remaining for trial after the ruling on the motion. Thus, the plaintiff's judgment, whether arising under paragraph 7A or 7D of the petition, results from the defendant's failure to meet his burden of proof to account for payments in satisfaction of the 1991 agreement.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. JUDGMENT is entered in favor of the plaintiff, Darrold Lidgett, in his fiduciary capacity as personal representative of the Estate of Marjorie Lidgett, deceased, in the amount of \$9,555.84, together with the costs of the action taxed in the amount of \$58.00. The judgment shall bear interest at 7.052% per annum from date of judgment until paid.

2. JUDGMENT is further entered dismissing all other claims of the plaintiff against the defendant with prejudice to future action.

Signed at O'Neill, Nebraska, on February 8, 2001.
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

BY THE COURT:

- Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 20__ by ____.
- Enter judgment on the judgment record.
Done on _____, 20__ by ____.
- Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 20__ by ____.
- Note the decision on the trial docket as: Signed "Judgment" entered.
Done on _____, 20__ by ____.

Mailed to:

William B. Cassel
District Judge