

15-405

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

FILED 2-4-05
Kimberly Anderson
Deputy Clerk of Court
Calcasieu Parish, Louisiana

04-323

SCANNED FEB 10 2005

ANCILLARY SUCCESSION OF

~~H.J. LUTCHER STARK~~

Judgment rendered September 29, 2004
Applications for rehearing may be filed
- within the delays allowed by La. Code Civ. P.
art. 2166 and La Code Crim. P. art. 922.

APPEAL FROM THE
FOURTEENTH JUDICIAL DISTRICT COURT
PARISH OF CALCASIEU NO. ~~15-405~~
HONORABLE ROBERT WYATT, DISTRICT JUDGE

OSWALD A. DECUIR
JUDGE

OFFICE OF CLERK OF COURT
2005 FEB -4 PM 4:07
CALCASIEU PARISH, LOUISIANA

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WEST*

Court composed of Ulysses Gene Thibodeaux, Chief Judge, Billie Colombaro Woodard and Oswald A. Decuir, Judges.

BCW Woodard, J., concurs in the result.

AFFIRMED.

J. Michael Veron
Russell J. Stutes, Jr.
J. Chris Guillet
Scofield, Gerard, Veron,
Singletary & Pohorelsky
P. O. Box 3028
Lake Charles, LA 70602-3028
(337) 433-9436
Counsel for Appellee:
H.J. Lutch Stark Foundation

Allen L. Smith Jr.
Plauche, Smith & Nieset
P. O. Box 1705
Lake Charles, LA 70602
(337) 436-0522

Counsel for Appellees:

Roy Wingate
Walter G. Riedel, III
Eunice Benckenstein
H.J. Lutcher Stark Foundation

H. Aubrey White, III
Stockwell, Sievert, Viccellio,
Clements & Shaddock, L.L.P.
P. O. Box 2900
Lake Charles, LA 70602-2900
(337) 436-9491

Counsel for Appellees:

Rebecca Stark Nugent
Homer Stark

L. Clayton Burgess
Attorney at Law
P. O. Drawer 5250
Lafayette, LA 70502-5250
(337) 234-7573

Counsel for Appellants:

William Stark
Lynn Stark Barras
Randall Stark
Ida Marie Stark

DECUIR, Judge.

This appeal arises from an ancillary succession proceeding filed by the executrix of the H. J. Lutchter Stark Estate. Certain heirs of Lutchter Stark petitioned for an administration of the ancillary succession, requesting a sworn detailed descriptive list, a full and final accounting, and recovery of succession assets. They also sought to annul the judgment of possession, which was obtained ex parte by the executrix, Nelda Stark. The succession, through its universal legatee, the Nelda C. and H. J. Lutchter Stark Foundation, and the succession's current co-executors, Eunice R. Benckenstein, Walter Riedel III, and Roy Wingate, excepted to the heirs' petitions based on res judicata, prescription, no cause of action, and no right of action. After a hearing, the trial court maintained the exceptions of prescription and no cause or right of action and dismissed the heirs' suit. For the following reasons, we affirm.

Lutchter Stark, a domiciliary of Orange, Texas, died in 1965. He had two sons, Bill and Homer, both adopted with his first wife, Nita, who died in 1939. Lutchter had no children by his second wife, who also predeceased him. Lutchter then married Nelda in 1945 and had no children with her. In his 1961 will, he left one million dollars each to his two sons. He left his personal property to Nelda and named her the universal legatee of one-half of his remaining estate. The other half was left to the Nelda C. and H.J. Lutchter Stark Foundation. The bulk of Lutchter Stark's sizeable estate involved property located in Texas, and his will was probated there in the years following his death. Bill and Homer received their bequests in 1969 and signed releases acknowledging payment and relinquishing any further claims to their father's estate.

In 1972, Nelda filed the instant ancillary succession proceeding in Calcasieu Parish. She asserted ownership by the estate of forty-two acres of land in Calcasieu Parish and numerous mineral interests in Calcasieu and Caddo Parishes. The

Louisiana property was valued at \$40,950.00. Nelda alleged that the portion of the Louisiana property required to go to Bill and Homer as forced heirs was more than fully satisfied by the bequests disbursed to them in 1969. She also offered proof of the Foundation's waiver of its right to claim the Louisiana property. Consequently, Nelda alone was put into possession of all Louisiana property owned by Lutchter at the time of his death. In 1982, Nelda filed a petition to amend the detailed descriptive list and judgment of possession in the ancillary succession, having discovered an additional mineral interest owned by Lutchter in Caddo Parish. The judgment of possession was amended and named Nelda owner of the newly discovered mineral interest.

Bill Stark died in 1979. His heirs and his brother, Homer, filed suit in Texas in 1988, seeking additional money from the estate and from the Foundation. They alleged fraud and mismanagement in the handling of Lutchter's estate, as well as in the handling of Nita's estate, and the embezzlement and concealment of assets belonging to the succession. Their claims were ultimately settled in 1991, with Bill's family and Homer each receiving \$2.5 million from the estate and the Foundation. The settlement documents described the compromise as a full and final settlement of any and all claims of fraud, mismanagement, heirship, inheritance rights, and forced heirship against the estate and the executrix.

In 1999, Nelda Stark died. In a Texas suit filed shortly thereafter, Homer and Bill's heirs contended that following her death, certain employees of the Foundation or Foundation-owned enterprises, such as the Stark Art Museum, approached family members and told them Nelda had hidden property from them and had instructed them to burn documents evidencing certain assets. Summary judgment was rendered in favor of Nelda's estate and the Foundation, with the court upholding the validity of the 1991 settlement and release of any further claims.

In similar pleadings filed in the instant action, the plaintiffs contend that Nelda failed to disclose to the Louisiana court thousands of acres of land owned by Lutchter at the time of his death as well as numerous mineral leases and other income-producing property located in Louisiana. The plaintiffs prayed for the appointment of Randy Stark (Lutchter's grandson) as executor of Lutchter's estate, a detailed descriptive list and final accounting of Louisiana assets from a representative of the Estate of Nelda Stark, possession of all property concealed by Nelda, and collation of any assets advanced to Nelda during Lutchter's lifetime. The plaintiffs then filed an amended petition seeking to nullify the original and amended judgments of possession. After hearing lengthy argument by counsel on the exceptions raised by the defendants, the trial court granted the exceptions of prescription, no cause of action, and no right of action and overruled the exception of res judicata. The plaintiffs have appealed.

Our review of the record reveals no error in the judgment of the trial court. The plaintiffs' cause of action for nullity has prescribed, and their causes of action asserted under Louisiana succession law have likewise prescribed. Article 2004(B) of the Code of Civil Procedure provides that a nullity action based on fraud or ill practice must be brought within one year of the discovery of the fraud or ill practice. The plaintiffs herein asserted claims of fraud in 1988 and compromised those claims, with a waiver of future claims, in 1991. The petition asserted in 2000 is therefore untimely.

The plaintiffs' succession law claims are similarly stale. The unspecified claim for collation, as well as the present demand for a descriptive list and final accounting in the original 1972 ancillary succession proceeding, are personal actions, subject to a liberative prescriptive period of ten years as provided in article 3499 of the Civil Code. The trial court characterized the plaintiffs' suit for nullity as an action for

reduction of an excessive donation, a claim which prescribes five years from the date a will is filed for probate. La.Civ.Code art. 3497; *In re Andrus*, 221 La. 996, 60 So.2d 899 (1952). Thus, the claims asserted under Louisiana succession law are prescribed.

The trial court implicitly rejected the argument that prescription was interrupted or began to run anew when the Foundation's employees suggested Nelda had concealed property and assets from Lutchter's descendants. The argument was rejected because the plaintiffs had previously presented a claim of fraud to the Texas court, *twice*. The question of fraud was at issue for more than ten years. **The parties reached a full and final compromise on the issue. Then, a Texas court examined the issue and determined it had previously been resolved. New suggestions of misdeeds the plaintiffs already knew about, sued upon, and accepted a settlement on do not create a new cause of action or resurrect one that has prescribed.** The prescriptive period for a claim for reduction, or in this case, for nullity, begins to run on the date the plaintiff first discovers the existence of facts giving rise to the cause of action: *See Manion v. Pollingue*, 524 So.2d 25 (La.App. 3 Cir.), *writ denied*, 530 So.2d 572 (La.1988). The plaintiffs first raised allegations of fraud in the 1980s. The present variations on those original claims are not subject to a new prescriptive period.

Finding no error in the judgment maintaining the defendants' exception of prescription, we need not address the remaining assignments of error raised by the plaintiffs. The judgment of dismissal is hereby affirmed, at plaintiffs' cost.

AFFIRMED.

This opinion is NOT DESIGNATED FOR PUBLICATION. Rule 2-16.3, Uniform Rules, Courts of Appeal.

A TRUE COPY
Lake Charles, La.

SEP 29 2004
Charles K. McNeely
Clerk, Court of Appeal, Third Circuit