UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-3085
Summary Calendar

NADINE FRANKLIN McCRAY,

Plaintiff-Appellant,

STELLA W. WILLIAMSON,
Attorney for Nadine Franklin McCray,

Movant-Appellant,

VERSUS

RUTH VERNER MALEN, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana
(CA 90 289 A)

September 10, 1993

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Appellant, Nadine Franklin McCray ("Ms. McCray"), appeals the district court's grant of summary judgment dismissing all claims against all defendants. McCray sued her former employer the late Dr. David S. Malen ("Dr. Malen"), plan administrator and trustee of two employee benefit plans, to recover proceeds that her son, David

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

McCray ("David"), stole from her during an illness.[2] She also sued American Bank & Trust Co. ("the Bank"), which was later declared insolvent and placed in a receivership with the FDIC. The district court held that Appellant failed to create an issue of material fact that Dr. Malen was not a prudent administrator and that the suit against the Bank was time barred. We affirm.

BACKGROUND

The district court described this case as tragic and we agree. But Appellant here pursues the wrong parties. The following facts are undisputed.

Prior to June 18, 1983, Ms. McCray was an employee of Dr. David S. Malen. On that date, Ms. McCray had an allergic reaction to a wasp sting and subsequently suffered a stroke while at the hospital. She remained hospitalized, at times unconscious and much of the time unable to speak, until November 3, 1983. Ms. McCray has never fully recovered from the stroke.

While Ms. McCray was hospitalized, her son, David, returned from California and took up residence at her home. David somehow changed Ms. McCray's bank account to a joint bank account and listed himself and his mother as signatories. He took charge of her affairs and paid her bills.

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[2] Ms. McCray initially sued Dr. Malen in 1986 in state court, but dismissed this claim without prejudice with an agreement to refile the suit in federal court under ERISA. In 1989, Dr. Malen died. A year later, McCray filed suit in state court naming Ruth Verner Malen and Russell V. Malen ("the Malens") as defendants. The Malens are co-executor's of Dr. Malen's succession. Dr. Malen was sued in his capacity as trustee and plan administrator of the plans. The Malens filed a petition for removal and there was no objection by any party.

Pursuant to the Malen Employees Retirement Plan and the David S. Malen Defined Benefit Plan, Dr. Malen, as Trustee and plan administrator, issued four checks totaling $35,403.56 and made payable to Nadine McCray for her benefits due under both plans. At least $21,705.00 was deposited directly into her checking account and $10,000 was deposited into a CD in the names of Ms. McCray or David.

DISCUSSION

A. The Malen Defendants

Appellant argues at length that the district court's judgment should be vacated because it applied an arbitrary and capricious standard in evaluating the plan administrator's decision. Dr. Malen's decision to deliver Appellant's checks to her son during her illness was a decision made "in the performance of functions that are 'necessary and appropriate' to the daily routine and administration" of the benefit plans and therefore should be evaluated under an abuse of discretion standard. See Pierre v. Connecticut Gen. Life Ins. Co., 932 F.2d 1552, 1558 (1991), cert. denied, 112 S. Ct. 453 (1991). The district court's use of the terms "arbitrary and capricious" to describe the standard it used is "only a semantic, not a substantive, difference" in the label used to describe deferential review. Wilbur v. Arco Chemical Co., 974 F.2d 631, 635 n.7 (5th Cir.), modified, 979 F.2d 1013 (5th Cir. 1992). Accordingly, the district court applied the proper standard of review and correctly concluded that Appellant has failed to meet her burden of proving the existence of a genuine issue of material

fact.

Appellant repeatedly urges that Dr. Malen had notice of her son's untrustworthiness because she told him not to give her son any more checks. Appellant has failed to reasonably explain, however, inconsistencies in her sworn testimonies. She claims to have warned Dr. Malen on his visit to her in the hospital, but she wrote nothing down. She also claimed that she was paralyzed, mute, and unable to communicate during the majority of her illness. "Where the record, including affidavits, interrogatories, admissions, and depositions could not, as a whole, lead a rational trier-of-fact to find for the nonmoving party, there is no genuine issue for trial." Webb Carter Constr. Co. v. Louisiana Cent. Bank, 922 F.2d 1197, 1199 (5th Cir. 1991). The record in this case indicates there is no genuine issue for trial. Moreover, even if Appellant warned Dr. Malen, in light of Appellant's stroke, which caused paralysis and muteness, Dr. Malen's decision under the benefit plans to make checks payable to Nadine McCray and deliver them through David McCray was not an abuse of his discretion.

B. FDIC/American Bank & Trust Co.

Appellant argues that she has a claim for breach of contract against the bank because the bank paid on an unauthorized endorsement. Webb Carter Construction Co. v. Louisiana Central Bank, the case cited by Appellant for this proposition, is distinguishable. In that case, a secretary of the plaintiff-corporation without authority, endorsed several of the corporation's checks. Webb, 922 F.2d at 1199. The plaintiff,

however, had filed a signature card and corporate resolution with the bank authorizing only its president and vice president to transact business with the bank on behalf of the corporation. Id. at 1198. In the present case, an updated signature card was filed with the bank authorizing David to transact business so that the bank could not have breached any contract. Appellant has failed to establish a genuine issue of material fact for a breach of contract claim. Her allegations of fraud regarding the signature card do not change this fact because she has not set forth facts that the Bank knew or should have known that her son was committing a fraudulent activity. See La. Civ. Code Ann. art. 1956. (West 1987). Thus, Appellant's claims are delictual and are governed by the liberative prescription of one year. See La. Civ. Code Ann. art. 3492 (West Supp. 1993); Daube v. Bruno, 493 So. 2d 606 (La. 1986).

Similarly, the prescriptive period for Appellant's unauthorized check-writing claim is one year. La. Rev. Stat. Ann. app. § 10:4-406(4) (West 1993); Andrew v. Marion State Bank, 286 So. 2d 375 (La. Ct. App. 1973), writ denied, 287 So. 2d 189 (1974). Appellant had a duty to examine her bank statements and report unauthorized activity to the Bank within one year. La. Rev. Stat. Ann. § 10:4-406(4). The record indicates that the Bank mailed statements to the address designated by Appellant prior to November 19, 1985. Because the bank discharged its duty and Appellant failed to notify the Bank of any problems, the prescriptive period had run when the suit was filed.

Appellant contends that the prescriptive periods governing both the unauthorized indorsement and unauthorized check-writing claims are tolled because of the civilian doctrine contra non valentem agere nulla currit praescriptio ("prescription does not run against one unable to act"). That doctrine does not apply in this case because Appellant failed to offer sufficient evidence to create a factual issue that she did not know or could not have reasonably known that the unauthorized indorsement or unauthorized check-writing had taken place. Even accepting as true her statement in her affidavit that her son kept the bank records while living with Appellant and forwarded them when he moved,[3] Appellant has failed to show why she took no action to discover the status of her account until November 1985 even though David moved out in mid-1985. Thus, the district court correctly determined that Appellant's claims were prescribed.

CONCLUSION

For the foregoing reasons, the district court's entry of summary judgement against Appellant is AFFIRMED.

[3] Again, there exist some inconsistencies in the record. Ms. McCray testified in her deposition that she had seen some of the bank records mailed to her house.