

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

No. 20120371

IN THE MATTER OF THE EMELIA HIRSCH, JUNE 9, 1994 IRREVOCABLE TRUST

Appeal from August 10, 2012 Order
Civil No. 03-C-02228
County of Burleigh, South Central Judicial District
Honorable Judge Gail Hagerty, Presiding

**BRIEF OF CO-TRUSTEES / APPELLEES
CAROLYN TWITE AND DUANE HIRSCH**

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STATEMENT OF ISSUES

- (1.) Whether Timothy Betz's appeal of the District Court's August 10, 2012 Order denying Betz's July 12, 2012 Motion and Petition to Vacate the July 16, 2008 Reformation Order is barred by North Dakota Rules of Civil Procedure Rule 60(c)?
- (2.) Whether Betz's appeal is barred by the principles of res judicata and collateral estoppel?
- (3.) Whether Appellees are entitled to recover attorney fees and costs in this matter?

STATEMENT OF THE CASE

(4.) Appellees Carolyn Twite and Duane Hirsch, co-trustees of the Emelia Hirsch Trust dated June 9, 1994 (collectively referred to as "Hirsch"), submit this brief in response to the November 5, 2012 Brief of Appellant Timothy R. Betz (hereinafter "Betz"). Betz is appealing an order from the district court dated August 10, 2012 ("August 2012 order"), which denies Betz's July 23, 2012 motion and petition to vacate the District Court's July 16, 2008 Order ("July 2008 Order"). The July 2008 order reformed the Emelia Hirsch Trust June 9, 1994, from an irrevocable trust to a revocable trust.

(5.) This matter was previously before the ND Supreme Court in March 2009 on Betz's first appeal of the district court's July 16, 2008 Order, In the Matter of the Emelia Hirsch, June 9, 1994, Irrevocable Trust, 2009 ND 135, 770 N.W.2d 225. The Supreme Court affirmed the District Court's July 16, 2008 Order entering its *Opinion* and *Judgment* was entered on July 16, 2009. The Supreme Court then rendered a decision on August 24, 2009 denying Betz's petition for reconsideration of the Supreme Court's *Opinion*.

(6.) Betz's July 23, 2012 action is one of several continuing attempts to vacate the District Court's July 2008 Order. As with every other action brought by Betz, the issues and arguments remain the same. There is no newly discovered evidence that could not have been discovered before final judgment was entered. There has been no mistake of fact or law and no error made by the District Court in denying Betz's July 23, 2012 motion and petition to vacate the July 2008 Order.

STATEMENT OF FACTS

(7.) In 1994, the "Emelia Hirsch June 9, 1994, Irrevocable Trust" was created by Emelia Hirsch, who is now deceased. On July 16, 2008, the District Court entered an Order reforming the Emelia Hirsch June 9, 1994, Irrevocable Trust to a revocable trust. The trust instrument, entitled the Emelia Hirsch Trust, Dated June 9, 1994 was approved by the District Court along with all terms and provisions therein. Betz filed an appeal, which the North Dakota Supreme Court denied in The Matter of the Emelia Hirsch June 9, 1994 Irrevocable Trust, 2009 ND 135, 770 N.W.2d 225. This Court issued its *Opinion* and *Judgment* on July 16, 2009. Betz filed a Petition for Rehearing, which the Court denied on August 24, 2009.

(8.) Subsequent to entry of the Supreme Court's August 24, 2009 *Judgment*, Betz filed several motions and petitions requesting the District Court reopen the reformation case to reconsider and / or vacate the July 16, 2008 reformation Order. All actions and motions of Betz have been denied by the District Court and are shown on the Court's Docket Sheet as: (a) 02/11/2011 *Motion to Reopen Case*, Denied in *Order* at 04/13/2011; (b) 05/18/2011 Appeal of Order w-attachments followed with (c) 05/23/2011 *Pleading/Motion to Reconsider* the April 12, 2011 Order , Denied at 06/14/2011; (d)

12/28/2011 *Request Letter* from Timothy R. Betz dated December 21, 2011 to Reopen Case, (e) followed with 01/12/2012 *Brief in Support of Motion to Vacate the July 16, 2008 Reformation Order*, Denied in Order at 02/27/2012; (f) 03/07/2012 *Notice - Appeal of the District Courts February 27, 2012 Order* and motion for a Ruling on the January 12, 2012 Motion to Vacate the July 16, 2008 Reformation Order followed with (g) 05/04/2012 *Letter to Judge Hagerty from Timothy Betz* Dated May 2, 2012; 05/08/2012 District Court enters Order denying all pending motions, pleadings and requests to vacate or reconsider reformation Order; (h) 07/25/2012 *Motion–Brief in Support of Motion and Petition to Vacate the July 16, 2008 Reformation Order* of the Emelia Hirsch June 9, 1994 Irrevocable Trust, Denied in August 10, 2012 Order entered on docket 08/13/2012; (i) 10/03/2012 *Notice of Appeal* of August 10, 2012 Order, now pending before Supreme Court. (App. pg 10, 11, 12 and 14). The District Court has also determined Betz’s actions to be “frivolous and motivated by a desire to continue to harass the trustees” and awarded attorney fees to the co-trustees.

(9.) As stated in the District Court’s August 10, 2012 Order, Betz is attempting to appeal an order entered July 16, 2008, which he previously appealed and lost. Betz brings no new evidence or issues before the District Court or Supreme Court. Betz is attempting to re-litigate the case in an attempt to seek an award favorable to him and to deplete the assets of the trust. As such, attorney fees and costs should be awarded to the co-trustees.

LAW AND ARGUMENT

I. Timothy Betz's appeal of the District Court's August 10, 2012 Order denying Betz's July 12, 2012 Motion and Petition to Vacate the July 16, 2008 Reformation Order is barred by North Dakota Rules of Civil Procedure Rule 60(c).

(10.) Betz's July 23, 2012 motion is procedurally flawed and barred by Rule 60(c) of the North Dakota Rules of Civil Procedure. Betz is inappropriately requesting the District Court vacate a final judgment, which would be governed by Rule 60 of the North Dakota Rules of Civil Procedure. Rule 60 of the North Dakota Rules of Civil Procedure states, in part:

(b) Grounds for Relief from a Final Judgment or Order. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;
(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time, and for reasons (1),(2) and (3) *no more than a year after notice of entry of the judgment or order* in the action or proceeding if the opposing party appeared, but not more than one year after a default judgment has been entered.

(emphasis added).

(11.) In his motion, Betz claims the July 16, 2008 reformation Order is a "mistake" caused by the District Court's misunderstanding of the definitions "terms of trust vs. trust instrument". There was no mistake made by the Court's interpretation of North Dakota

statutes. In the Matter of the Emelia Hirsch, June 9, 1994, Irrevocable Trust, the North Dakota Supreme Court found the District Court's reformation Order proper, referencing N.D.C.C. § 59-12-15 and stating, "a court may reform the terms of a trust to conform to the settlor's intention 'if it is proved by clear and convincing evidence that both the settlor's intent and terms of the trust were affected by a mistake of fact or law, whether in expression or inducement'." Id.

(12.) The July 2008 Order follows the law and clearly reforms the irrevocable trust to a revocable trust, with all terms and provisions therein. Betz had an opportunity to review the trust instrument and its terms prior to entry of the July 2008 Order. He never objected to either. Regardless, if Betz truly believed there was a "mistake" he should have filed a motion and request under Rule 60(b) of the North Dakota Rules of Civil Procedure. The rule dictates that a motion made under Rule 60(b) must be made within a reasonable time, which is no more than one year after notice of entry of order. Notice of Entry of Order was docketed on July 16, 2008. The Supreme Court's Opinion upholding the District Court's Order and its Judgment were docketed September 8, 2009. Betz presented the issue in his July 23, 2012 motion and petition, four years after entry of the notice of final judgment. Accordingly, Betz's motion should be barred and the district court was correct in denying the motion.

II. Betz's appeal is barred by the principle of res judicata.

(13.) Betz's action must be dismissed under the theory of res judicata. "Res judicata means that a valid, existing final judgment from a court of competent jurisdiction is conclusive, with regard to the issues raised, or those that could have been raised, and determined therein, as to the parties and their privies in all other actions." Ohio Cas. Ins.

Co. v. Clark, 1998 ND 153, 583 N.W.2d 377, 382-83. “The applicability of res judicata ... is a question of law, fully reviewable on appeal.” Mills v. City of Grand Forks, 2012 ND 56, 813 N.W.2d 574, 577, reh'g denied (Apr. 10, 2012).

(14.) “Res judicata applies even if subsequent claims are based upon a different legal theory.” Specialized Contracting, Inc. v. St. Paul Fire & Marine Ins. Co., 2012 ND 259. “Under res judicata principles, it is inappropriate to rehash issues which were tried or could have been tried by the court in prior proceedings.” Wetch v. Wetch, 539 N.W.2d 309, 311 (N.D. 1995)

(15.) Here, the District Court has entered a final judgment, which was affirmed by the North Dakota Supreme Court. The issues presented in Betz’s motion and petition and appeal brief were previously raised (or should have been previously raised) and were ultimately decided. Accordingly, Betz’s continued efforts to litigate this case, based upon theories that should have been presented at the lower court, but were not, is barred by res judicata.

III. The Emelia Hirsch Trust, Dated June 9, 1994, and its co-trustees, Carolyn Twite and Duane Hirsch, are entitled to Attorney Fees and Costs on Appeal.

(16.) Appellees are entitled to their attorney fees and costs. North Dakota law clearly prohibits filing of frivolous appeals and allows for an award of attorney fees and costs in matters such as this appeal filed by Appellant. Rule 38 of N.D.R.App.P. and Rule 39 of N.D.R.App.P. address the matter of damages and costs with respect to frivolous appeals and dilatory prosecution of appeals and states, “If the Court determines that an appeal is frivolous, or that any party has been dilatory in prosecuting the appeal, it may award just damages and single or double costs, including reasonable attorney’s fees”.

(17.) The North Dakota Supreme Court In re Reimer vs. O'Halloran, 2004 ND 79, 678 N.W.2d 547, evidences the strict reliance upon Rule 38, N.D.R.App.P., which authorizes an award of costs, including reasonable attorney fees, for a frivolous appeal which contains unsupported assertions and arguments so factually and legally devoid of merit that Appellant should have been aware of the impossibility of success on appeal. In Reimer, the Court defines an appeal as frivolous "if it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which could be seen as evidence of bad faith". Reimer vs. O'Halloran, Id.

(18.) It must be noted that the District Court in its April 12, 2011 Order and June 14, 2011 Order found Betz's action to be frivolous and motivated by a desire to continue to harass the trustees and awarded attorney fees. (App. at 10 and 11). Appellees have spent substantial time and incurred expenses in responding to Betz's unjustified claims and the issues presented in this present frivolous appeal. As such, they are entitled to an award of attorney fees and costs.

CONCLUSION

(19.) For the foregoing reasons, Appellants respectfully request this Court affirm the District Court's August 10, 2012 *Order* denying Timothy R. Betz's *Motion and Petition to Vacate the July 16, 2008 Reformation Order*, and grant the Appellants attorney fees and costs.

Dated this 7th day of January, 2013.

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CERTIFICATE OF SERVICE

(20.) I hereby certify that a true and correct copy of the foregoing corrected brief was on the 7th day of January, 2013 electronically filed with the Clerk of the North Dakota Supreme Court and e-mailed to the following:

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