

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

Estate of HAROLD KRAMER, Deceased.

B175770

(Los Angeles County
Super. Ct. No. BP072650)

MILTON KRAMER,

Petitioner and Appellant,

v.

WARREN D. KRAMER,

Objector and Respondent.

APPEAL from an order of the Superior Court of Los Angeles County, Stuart M. Rice, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Alex R. Borden and Erika W. Senter for Petitioner and Appellant.

Scherer, Bradford & Lyster, Christopher T. Bradford; Orren & Orren, Tyna Thall Orren for Objector and Respondent.

Plaintiff, Milton Kramer, appeals from the ruling denying his petition to revoke an order admitting a will to probate on Probate Code section 8270, subdivision (a) statute of limitation grounds. Plaintiff sought to vacate the order admitting the will to probate so he could pursue a will contest. Plaintiff contended that the expiration of the Probate Code section 8270, subdivision (a) 120-day statute of limitations did not bar the commencement of a will contest because of extrinsic fraud practiced by the executor, Warren D. Kramer. The executor contended and the trial court found plaintiff did not act with reasonable diligence. Because there is substantial evidence plaintiff did not act with sufficient diligence in raising his extrinsic fraud claim, we affirm the order under review.

Probate Code section 8007, subdivision (b)(1) permits a party to attack an order admitting a will to probate in the face of extrinsic fraud. A party asserting extrinsic fraud must act with diligence. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 983; *Stiles v. Wallis* (1983) 147 Cal.App.3d 1143, 1149; 8 Witkin, Cal. Procedure, “Attack on Judgment in Trial Court” (4th ed. 1997) § 238, p. 752.) We review the trial court’s finding that plaintiff did not act with sufficient diligence for substantial evidence. (*In re Marriage of Bonds* (2000) 24 Cal.4th 1, 31; *In re Estate of Carter* (2003) 111 Cal.App.4th 1139, 1154.) In conducting our review of the testimony and documents considered by the trial court, we may not reweigh the facts. (*In re Marriage of Bonds, supra*, 24 Cal.4th at p. 31; see *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal. 4th 559, 571.)

When we apply the substantial evidence standard of review, the following are the controlling facts. The decedent was injured in a fall. Plaintiff learned of the fall in October, 2001. Later, plaintiff spoke by telephone with the decedent. Plaintiff believed the decedent sounded “very weak.” The decedent executed his will on November 13, 2001. On February 19, 2002, the decedent died. On February 20, 2002, plaintiff told the executor: “I have a pretty good idea as to the value of my brother’s estate. . . . I hope its all there.” On March 1, 2002, plaintiff was mailed the will which indicates the entire estate is bequeathed to the executor. Plaintiff read the will. Plaintiff was concerned

about several aspects of the will and concluded in his words, “Something is wrong here.” Plaintiff then spoke to the executor’s attorney. Plaintiff was advised that the executor was to receive all of the decedent’s assets.

The decedent’s will was admitted to probate on May 15, 2002. On May 24, 2002, the executor was appointed and letters testamentary were issued. Despite his express misgivings, plaintiff did nothing until July 2003 when he requested a copy of the inventory and appraisal. The will contest petition was not filed until July 18, 2003. The will contest petition was filed only after the executor had spent an enormous amount of effort marshaling the estate’s assets.

The forgoing constituted substantial evidence that plaintiff was guilty of inexcusable neglect. There is evidence plaintiff knew: of the decedent’s weakened condition at the time the form will was executed; on February 20, 2002, of the extent of the decedent’s estate; and in March 2002 of the will’s provisions. After speaking to the executor, the executor’s attorney, and reading the will, plaintiff thought something was wrong. Before plaintiff’s petition to revoke the order admitting the will to probate was filed on July 18, 2003, the executor expended considerable efforts marshaling the estate’s assets. Substantial evidence supports the trial court’s explicit finding plaintiff did not act with sufficient diligence in filing his petition to revoke the order admitting the will to probate; i.e., to conduct a will contest. (*Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868, 875; *Lazzarone v. Bank of America* (1986) 181 Cal.App.3d 581, 597.) We need not discuss the parties’ remaining contentions.

The order under review is affirmed. Warren Kramer, as the executor of the estate of Harold Kramer, shall recover his costs incurred on appeal from plaintiff, Milton Kramer.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.