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IN THE COMMON PLEAS COURT OF LUCAS COUNTY, OHIO

Estate of Allison Roebke,

Plaintiff,

v.

ADCO Firearms, et al.,

Defendants.

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Case No. G-4801-CI-0202202926

Judge Navarre



PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Defendants, on March 17, 2023, filed a Motion to Dismiss this case. The Motion is based on the erroneous and mistaken closure of The Estate of Allison Roebke in Lucas County Probate Court. Yet this procedural error has been fixed as the Probate Court issued *a nunc pro tunc* order on March 28, 2023, reopened the Estate, and reappointed E. Elaine Roebke as Administrator. So Defendants' Motion to Dismiss is now moot and should be denied.

I. BACKGROUND

This is a wrongful death case stemming from Defendants' sale of a firearm to an obvious straw purchaser. The Estate's decedent, Allison Roebke, shot and killed herself using that firearm at 37 years old on July 2, 2020.

On October 14, 2021, Allison Roebke's mother, E. Elaine Roebke, applied to Lucas County Probate Court to be appointed as the Administrator of the Estate of Allison Roebke. Lucas County Probate Court appointed E. Elaine Roebke as Administrator. Plaintiff the Estate of Allison Roebke filed this action against Defendants on July 6, 2022.

The parties have been litigating this case ever since. Both Plaintiff and Defendants have engaged in written discovery. Plaintiff deposed the straw purchaser, Jerry Zohn, and Defendants took the depositions of Allison's parents, Paul and Elaine Roebke. The parties are also in the

process of scheduling the deposition of Steven Thompson, who owns Defendant ADCO Firearms.¹ Despite this litigation activity, on September 9, 2022, a separate law firm moved to close the Estate of Allison Roebke, erroneously stating that the Estate was no longer pursuing a personal injury claim. That same day, the Probate Court entered an order closing the Estate and discharging the Administrator from any further responsibility or authority.

Neither Plaintiff nor undersigned counsel were aware the Probate Court closed the Estate. Defendants apparently became aware of this error recently. But instead of contacting undersigned counsel to raise this inaccuracy, defense counsel filed a Motion For Leave to File Amended Answer and a Motion to Dismiss.

In its Motion to Dismiss, Defendants argue, without an Administrator of The Estate of Allison Roebke, no party has authority to sue or prosecute this action because that authority comes from the grant of letters of authority by the Probate Court. (Defs' Mot. at p. 2.)

That issue is now fixed. Contrary to Defendants' inaccurate assertion that Plaintiff has made "no effort to reopen the Estate," (*id.*), as soon as Plaintiff's counsel became aware of the error, on March 9, 2023, probate counsel Karen D. Weis, esq., filed an Application to Reopen Estate and Appoint Fiduciary. Attorney Weis also submitted a proposed Entry granting the Application, proposed letters of authority for the Probate Court's consideration, and a cover letter explaining that there was a change in litigation counsel and that the Estate was closed in error since there is litigation pending before this Court.

On March 28, 2023, Lucas County Probate Court issued an Order Reopening Estate, Requalifying Fiduciary and Reissuing Letters of Authority Nunc Pro Tunc to September 9, 2022. (See Probate Court of Lucas County, Ohio, Case No. 2021 EST 2295, Mar. 28, 2023 Order.)

¹ Plaintiff's counsel has repeatedly requested dates for Mr. Thompson's deposition but has been told they will not provide dates due to the pending Motion to Dismiss.

Specifically, the Probate Court: reopened the Estate for wrongful death purposes only; requalified the previous fiduciary E. Elaine Roebke; and reissued Letters of Authority to E. Elaine Roebke, Administrator. (*Id.*) The Probate Court “further ordered that the reopening, requalify[ing] and reissuing of the Letters of Authority shall be *nunc pro tunc* to September 9, 2022 since the litigation remained pending.” (*Id.*)

II. LAW AND ARGUMENT

There is zero basis for Defendants’ Motion to Dismiss. Accordingly, Defendants’ Motion should be denied as moot. Indeed, the basis for Defendants’ Motion is that the Estate was closed, and there is no Administrator to prosecute this matter. (*See generally* Defs’ Mot. to Dismiss.) As of the date of this filing, the Estate is open, and E. Elaine Roebke is Administrator. And the Probate Court issued a *nunc pro tunc* order relating back the reopening, requalifying, and reissuing of the Letters of Authority to September 9, 2022 when the Estate was first opened.

A *nunc pro tunc* order “is an order issued now, which has the same legal force and effect as if it had been issued at an earlier time, when it ought to have been issued.” *Vo v. Gorski*, 8th Dist. Cuyahoga, 2021-Ohio-1957, ¶32, quoting *Alden v. FirstEnergy Corp.*, 8th Dist. Cuyahoga, 2014-Ohio-3235, ¶10. In other words, the record has been corrected to clarify that the Estate should not have been closed because, as the Probate Court recognized, “the litigation remained pending.” (*See* Probate Court of Lucas County, Ohio, Case No. 2021 EST 2295, Mar. 28, 2023 Order.) Accordingly, there is “no actual genuine, live controversy” for this Court to resolve, making Defendants’ Motion to Dismiss moot. *See City of Grandview Heights v. B.S.H.*, 10th Dist. Franklin, 2023-Ohio-940, ¶12, quoting *Grove City v. Clark*, 10th Dist. Franklin, 2002-Ohio-4549, ¶11, and collecting authorities stating that courts do not have jurisdiction over moot questions.

The Probate Court's *nunc pro tunc* order also obviates Defendants' statute of limitations argument. Defendants contend in their Motion to Dismiss that it is too late to reopen the Estate to pursue a wrongful death claim because the two-year wrongful death statute of limitations has run. (Defendants' Mot. at p. 2.) Again, however, a *nunc pro tunc* order "is an order issued now, which has the same legal force and effect as if it had been issued at an earlier time, when it ought to have been issued." *Gorski*, 2021-Ohio-1957, ¶32. And because the Probate Court, in its *nunc pro tunc* order, backdated the reopening of the Estate and reappointing of the Administrator to September 9, 2022, when the Estate was first opened, it is as if the Estate has never been mistakenly closed. And there is no dispute that this lawsuit was filed within the statute of limitations.

Finally, it is worth noting that errors like the one that occurred with The Estate of Allison Roebke, do not warrant dismissal. Indeed, Ohio Supreme Court caselaw establishes, in these situations where the cause of action remains unchanged, and the error with the estate has been corrected, the complaint relates back to the date of the filing of the original complaint. *Ramsey v. Neiman*, 69 Ohio St. 3d 508, 512, 634 N.E.2d 211, 214 (1994), citing *Kyes v. Penn. Rd. Co.* (1952), 158 Ohio St. 362, 49 O.O. 239, 109 N.E.2d 503, and *Douglas v. Daniels Bros. Coal Co.* (1939), 135 Ohio St. 641, 15 O.O. 12, 22 N.E.2d 195.

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendants' Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Response to Defendants' Motion to Dismiss was filed electronically and served on the following counsel of record, by email transmission, this 31st day of March, 2023:

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