

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

KATHERINE ANNE SMITH,
Appellant/Cross-Appellee,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

v.

CASE NO. 1D16-2409

DOUGLAS W. SMITH AND E.
DREW MITCHELL, AS CO-
PERSONAL
REPRESENTATIVES OF THE
ESTATE OF ROBERT H.
SMITH. IN RE: ESTATE OF
ROBERT H. SMITH,

Appellees/Cross-Appellants.

Opinion filed November 27, 2017.

An appeal from the Circuit Court for Leon County.
Stewart E. Parsons, Judge.

F. Wallace Pope, Jr., Brandon D. Bellew, and Caitlein J. Jammo of Johnson, Pope,
Bokor, Ruppel & Burns, LLP, Clearwater, for Appellant/Cross-Appellee.

Dubose Ausley and Kevin A. Forsthoefel of Ausley McMullen, Tallahassee; James
P. Judkins and Larry D. Simpson of Judkins, Simpson & Schulte, Tallahassee, for
Appellees/Cross-Appellants.

JAY, J.

This is an appeal and cross-appeal from an order ruling on Appellees' motion
to dismiss various counts of a petition filed by Appellant in the probate of her

husband's estate. We affirm in all respects and write only to address Appellant's contention that the trial court erred in dismissing with prejudice her claim seeking removal of Appellees as co-personal representatives of the estate.

On May 28, 2013, Appellant's husband died, survived by Appellant and two adult children. The decedent's last will and testament and the first codicil to the will designated Appellees as co-personal representatives and co-trustees of testamentary trusts funded with assets from the residue of the estate. One of these trusts—the marital trust—provided income to Appellant during her lifetime. The trial court entered an order admitting the will and codicil to probate and appointing Appellees as co-personal representatives of the estate.

On September 11, 2013, Appellant filed a claim against the estate pursuant to a premarital agreement dated March 5, 2009, which provided for the cash purchase of the marital home by the estate from Appellant and the lump-sum payment to Appellant of \$500,000.00. In exchange, Appellant and her husband agreed “to refrain from any action or proceeding to void or nullify to any extent the probate of or the terms of any last will and testament or trust or testamentary substitute created by the other so long as the rights of the surviving party under the terms of this Agreement are not abridged by any such instrument.” Pursuant to this agreement, the estate made the lump-sum payment and purchased Appellant's interest in the marital home.

On November 2, 2015, Appellant filed an amended petition seeking, among other things, Appellees' removal as co-personal representatives due to alleged breaches of fiduciary duty with regard to the marital trust. In particular, the amended petition alleged that Appellant entered into the premarital agreement on March 5, 2009, and that the waiver of rights provision contained therein did not apply to any rights Appellant later acquired through her husband's subsequently executed will and codicil. In response, Appellees filed a motion to dismiss in which they asserted, among other things, that Appellant waived any interest in her husband's estate by entering into the premarital agreement. The trial court granted Appellees' motion to dismiss with leave to amend.

On January 28, 2016, Appellant filed a second amended petition, which again sought removal of the co-personal representatives *but omitted all reference to the premarital agreement*. In response, Appellees filed another motion to dismiss as well as a motion to strike, which asserted that the removal of the reference to the premarital agreement constituted a sham to avoid a subsequent dismissal. The trial court entered an order both striking and dismissing with prejudice Appellant's claim seeking removal of the co-personal representatives. This appeal followed.

Appellant asserts that the trial court erred in dismissing her claim seeking removal of the co-personal representatives upon concluding that she waived any interest she had in her husband's estate by entering into the premarital agreement.

Although it is undisputed that Appellant and her husband executed a premarital agreement, Appellant asserts that the waiver provisions of the premarital agreement did not extend to the interest she acquired in her husband's estate when she was named an income beneficiary of the marital trust created under the terms of his last will executed after the marital agreement.

“A trial court's interpretation of a prenuptial agreement is reviewed de novo, as such agreements are governed by the law of contracts.” Hahamovitch v. Hahamovitch, 174 So. 3d 983, 986 (Fla. 2015) (quoting Taylor v. Taylor, 1 So. 3d 348, 350 (Fla. 1st DCA 2009)). “Contract interpretation begins with a review of the plain language of the agreement because the contract language is the best evidence of the parties' intent at the time of the execution of the contract.” Taylor, 1 So. 3d at 350. “Where a contract is clear and unambiguous, it must be enforced pursuant to its plain language.” Hahamovitch, 174 So. 3d at 986.

Here, the premarital agreement expressly provided that the parties would “refrain from any action or proceeding to void or nullify to any extent . . . the terms of any last will and testament or trust or testamentary substitute,” which clearly contemplated all wills and testamentary trusts regardless of whether they were executed before or after the premarital agreement. Accordingly, the premarital agreement prevented Appellant from nullifying the terms of her husband's last will by seeking the removal of the co-personal representatives named in the will.

In addition to dismissing Appellant’s claim seeking removal of the co-personal representatives, the trial court also granted Appellees’ motion to strike that claim as a sham because the second amended petition deliberately omitted facts alleged in the amended petition—specifically, the execution of the premarital agreement—for the purpose of avoiding a dismissal. Appellant did not challenge this ruling in her initial brief and cannot challenge it for the first time in her reply brief. See Land v. Fla. Dep’t of Corr., 181 So. 3d 1252, 1254 (Fla. 1st DCA 2015) (holding that it is well-settled that an issue not raised in the initial brief is deemed abandoned and may not be raised for the first time in the reply brief).

Even if the ruling was properly before this court, the trial court did not err in striking Appellant’s claim as a sham. On a motion to strike a sham pleading, the trial court applies the same standard applicable to motions for summary judgment—i.e., the court may grant the motion “only if the material facts are not in dispute and only if the pleading is not supported by the facts.” Philip J. Padovano, Florida Civil Practice, §7:12 (2016-2017 ed.); accord Slatko v. Virgin, 328 So. 2d 499, 500 (Fla. 3d DCA 1976) (“A hearing on a motion to strike is not a hearing to try the issues but to determine whether there are any genuine issues to be tried.”). “If the pleading is supported by any version of the evidence or by at least some evidence, then the motion to strike must be denied.” Padovano, supra, § 7:12. All doubt is resolved in favor of the pleading. Id.; see also Parrish & Yarnell, P.A. v. Spruce River

Ventures, LLC, 180 So. 3d 1198, 1200 (Fla. 2d DCA 2015) (“[T]he trial court must resolve all doubts in favor of the pleading and keep in mind that striking a pleading is an extreme measure that is disfavored.”).

In this case, it is undisputed that Appellant’s second amended complaint removed all references to the premarital agreement—an agreement that was the basis for the trial court’s prior dismissal of Appellant’s claim seeking removal of the co-personal representatives. The clear language of that agreement prevented Appellant from invalidating the terms of her husband’s last will by seeking the removal of the co-personal representatives named in the will. Consequently, it was appropriate for the trial court to strike Appellant’s claim insofar as the claim was negated by the premarital agreement. See Schaal v. Race, 135 So. 2d 252, 254 (Fla. 2d DCA 1961) (holding that the trial court properly dismissed the amended complaint as a sham where the plaintiff amended the original complaint to omit factual allegations that resulted in the dismissal of the original complaint); see also City of Miami v. Urban League of Miami, Inc., 849 So. 2d 1095, 1098-99 (Fla. 3d DCA 2003) (holding that the trial court properly struck allegations regarding a specific parcel and rightly dissolved the corresponding lis pendens because the uncontroverted evidence established that the City had released its lien); Yunger v. Oliver, 803 So. 2d 884, 887-88 (Fla. 5th DCA 2002) (holding that the trial court properly dismissed the

tenants' counterclaims as sham pleadings where the tenants had been previously ordered to turn over possession of the premises).

AFFIRMED.

WINOKUR and M.K. THOMAS, JJ., CONCUR.