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Oct 31 2022

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Master-In-Equity

Trial Court Case No. 2017CP1005427

Family Services, Inc., as Conservator for Muriel W. Clarkin, Respondent,

v.

Patricia Clarkin Smith and Wells Fargo Bank, NA., Defendants,

Of whom Patricia Clarkin Smith is the Appellant.

Appellate Case No. 2021-000793

INITIAL BRIEF OF APPELLANT SMITH

October 29, 2022

s/Patricia Clarkin Smith
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STATEMENT OF ISSUE ON APPEAL

Did the Trial Judge err in determining that a scintilla of evidence was not present upon review of the evidence that was presented or referenced by the Respondent's attorney?

STATEMENT OF THE CASE

Respondent filed the Summons and Complaint in this matter on October 20, 2017, asserting causes of action for Conversion, Unjust Enrichment, Money Had and Received, Promissory Estoppel, Quantum Meruit, Declaratory Judgment, Fraudulent Conveyance, and Quiet Title.

Appellant defers to the case history written by the Respondent's attorney.

Salient Fact

Appellant was never interviewed by the Respondent despite Appellant initiated requests beginning upon Appointment of the Respondent as Temporary Conservator.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRPC. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citation omitted). "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming*, 350 S.C. at 493–94, 567 S.E.2d at 860 (citation omitted). In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-South Mgmt Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

ARGUMENT

The Trial Judge erred in determining that a scintilla of evidence was not present upon review of the evidence that was presented or referenced by the Respondent's attorney.

Summary Judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. (Rule 56, SCRCPP)

Appellant's argument evidences a mere scintilla of evidence shown by reasonable inference that conflicting medical records exist based on Judge Tamara Curry's January 16, 2015 Order denying Appellant's January 2015 Petition For Dismissal of Temporary Guardian, which is based on Judge Curry's dilemma of medical reports provided by Dr. Michael Mikola.

. The Respondent attorney's evidence is contradictory upon review.

Appellant's argument is defensible by using the Respondent attorney's own evidence, which includes, but is not limited to the "Proposed Judgment Order" that was signed by the Trial Judge on June 21, 2022, the 51-page Probate Record that was emailed to the Masters-In-Equity Court on May 10, 2021, the transcript of the Motion for Summary Judgment Hearing that was held on May 11, 2015 denoting documents that Respondent's attorney provided or referenced, and all case records.

Summary Judgment Order Default

Appellant chose this argument given the legal complexity of an Appellate Court Brief, which is compounded by Appellant not having a Response filed and was not timely present for the hearing. Both are explained below.

Appellant did not file her response because the Probate Court ordered mediation of all issues was held the week prior to the hearing; however, Appellant was unaware that the Respondent had chosen to proceed with seeking Summary Judgment, and an end to this case was not to be mediated.

*Appellant was represented by counsel on April 28, 2021 and throughout the week as mediation was ongoing. A Petition for the Sale of Real Property was filed on May 7, 2021 by Appellant Mother's Guardian ad Litem, and it confirms that mediation had been ongoing.

On May 11, 2021, Appellant arrived too late to give the Trial Judge an Affidavit and new evidence of Mother's handwritten notes that her Temporary Guardian had reviewed with her and written additional information on the document in April 2015.

*The witness and signer of the Affidavit did call to join by phone, but

Appellant was not timely present. Appellant was on medical leave with an “Unknown Return to Work Date” since February 2021. Appellant was in the hospital following the hearing, thus unable to timely file a Motion for Reconsideration.

Clarification of Sister’s Roles

Appellant’s sister is the Petitioner in their Mother’s Probate Guardianship/Conservatorship Case.

Appellant is the Respondent on behalf of her Mother who asked for her Freedom. Attorney Toporek represented Appellant as Respondent.

Conveyance of November 17, 2014 Deed

Motion for Summary Judgment Hearing, May 11, 2021: Respondent’s attorney raised the issue of voiding Appellant’s deed to 602 Atlantic St, 29464, and it was ruled upon (granted) by the Trial Judge. Reference the signed Proposed Summary Judgment Order dated June 21, 2021.

Scintilla of Evidence

Appellate argues that the Probate Court Order signed by Probate Judge Tamara Curry on January 16, 2015 evidences conflicting medical reports must exist within the Probate Record of the first two hearings, yet the 51-page Probate Record emailed to the Trial Judge by the Respondent's attorney only contained three negative medical reports. Summary Judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify.

QUOTE Judge Tamara Curry's January 16, 2015 Probate Court Order Denying Appellant's January 2015 Petition For Dismissal of Temporary Guardian:

¶ 3 “This Court has considered the conflicting medical reports of Dr. Michael Mikola, Dr. Ruth DeHaven, and the testimony of Muriel W. Clarkin, as well as the exhibits that were attached to the Petition.”

Judge Tamara Curry explains the dilemma of the conflicting medical reports by Dr. Michael Mikola in the content of her Order, and both Respondent and Appellant have the Transcript of the January 9, 2015 Hearing Petition For Dismissal of Temporary Guardian.

QUOTE Respondent's Motion for Summary Judgment, Introduction

“This motion will be based on the pleadings of record, the recorded records of Charleston County, applicable statutory and common law, and any memorandum or exhibits plaintiffs may seek to submit to the Court prior to a hearing on the matter.”

QUOTE Respondent's Attorney to Trial Judge

(SJM Transcript page 9, lines 15-18)

"I also sent you some of the underlying Probate Court orders and petitions, but I did not want to file them just to keep them out of the public record for privacy's sake."

Email to MIE COURT from Respondent's attorney dated May 10, 2021:

"Attached please find the probate records referenced in Plaintiff's motion for Summary Judgement scheduled for tomorrow at noon. The records were not originally filed with motion to keep them out of the public records for the sake of privacy."

51-page Probate Record

The EXEMPLIFICATION form was signed in August 2019 by the Probate Clerk of Court.

This record contained the complete December 22, 2014 Emergency Petition for Guardianship and Conservatorship, including Exhibits of Dr. Michael Mikola's November 2014 Office Visit Record and the November 2014 Statement of Decision Capacity by Dr. Jacob Mintzer ; however, although the Respondent's attorney referenced Appellant's January 2015 Petition For Dismissal of Temporary Guardian, it was not included in the 51-page Probate Record provided to the Trial Judge. Only the third negative medical report, Dr. Michael Mikola's January 7, 2015 letter of support for my sister's appointment as Guardian and Conservator was included. It was reviewed by Judge Curry at the January 9, 2015 Dismissal of

Temporary Guardian Hearing. *A Successor Temporary Guardian was appointed to replace my sister. A Temporary Conservator was appointed. My sister's Petition was again denied.

Appellant questions if this exclusion of evidence is prejudicial.

State v. Taylor, 333 S.C. 159, 508 S.E.2d 870, 876 (1998).

Appellant seeks consideration that a scintilla of evidence exists in hope that the Summary Judgment Order signed June 21, 2021 is reversed, so the Trial Judge has a clear record.

SUPPLEMENTAL FACTS

Agreement and Release Dated July 22, 2021

This agreement only remains unsigned due to it's complexity; Appellant lacked legal funds for counsel while on medical leave. Appellant been released from her two-year treatment plan for multiple surgeries and grave illness, and has rejoined the workforce. Appellant remains hopeful ending this case to the benefit of Appellant's Mother, which includes saving the house that is the "subject" of this case and is in Active Foreclosure.

Recognition as Owner

The Petition for Relief to hire an attorney based is on the conveyance the partial or full interest of the real properties by Appellant's Mother. Given Respondent had communicated with Heritage Trust Loan Officer between March and May 2015 and requested the Pay Off Statement for Appellant's approved Home Loan Closing on April 8, 2015 that settled the Wells Fargo HELOC that was in the Mother's name and secured by my home where I have lived since 1995, not 2013 as stated by Respondent. The Respondent acknowledged Appellant as 100% owner of 602 Atlantic St by requesting the Pay Off Statement in April 2015. Respondent requested the Pay-Off Statement from Wells Fargo as part of an extensive research request that wasn't completed until June 1, 2015. Respondent then the mailed the Pay Off Statement, and neither Heritage Trust Federal Credit Union nor Appellant was notified. Appellant's loan application was closed on June 21, 2015.

Legal Counsel

Attorney Toporek represented me as my Mother's Respondent to my sister's December 22, 2014 Emergency Petition for Temporary Guardianship and Conservatorship of my Mother. Attorney Toporek's representation was focused to the Freedom of my Mother. He kindly represented me in 2017CP1005427.

Attorney Toporek was 100% correct in his reason for release as counsel. Proceeding in any and all of these cases stemming from my Mother's Probate Case has been deleterious to my health. Revoking the Settlement Agreement in 2019 was a grave error.

Attorney DeJong represents me as an Intervenor in Case No. 2017CP1005426, but Respondent's Motion to Disqualify Attorney DeJong was granted in 2019. Both that motion and the Motion to Enforce Settlement were filed at the same time in 2019.

Respondent rejected the Arbitration that I had arranged. A caring attorney who I have never met learned of my need of a Response to the Motion to Enforce Settlement Agreement, and he prevailed.

Respondent's Deposition

Respondent's Deposition was in July 2018. Respondent answered that information related and to the Summons and Complaint. The Texts Exhibits were solely provided by one interviewed Party who is my sister, the Petitioner.

NOTE: Respondent's attorney replaced his Complaint Texts Exhibits that were not date or time stamped with portions of Appellant's 50-page date and time stamped text thread from 2012 through 2014 obtained during Discovery.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Master-In-Equity Court.

October 29, 2022

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The Honorable H. Bruce Williams
Chief Judge

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Appellate Case No. 2021-000793

CERTIFICATE OF SERVICE

I certify that on this 31st day of October, 2022, I have served Appellant Smith's Motion for Continuance and Extended Deadline upon Respondent's attorney via USPS Certified Mail.

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Attorney for Respondent

October 31, 2022

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