

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE CIRCUIT COURT

CASE NO. 2022-CP-40-05570

ALISHA BAITY, AARON BAITY)
and AMBROSE NOLAN BAITY,)
APPELLANTS)
v.)
GERALDINE VANESSA)
MYERS-MOORE,)
RESPONDENT.)
RE: ISAAC ELDRIDGE JULIAN,)
DECEDENT)

ORDER
AFFIRMING PROBATE COURT ORDERS

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SC Court of Appeals

This matter came before the Court on June 30, 2023, for a hearing on an appeal from the Richland County Probate Court, Case No. 2021-ES-40-0640. Having reviewed the Record on Appeal, the briefs filed on behalf of Appellants Alisha Baity, et. al, and Respondent Geraldine Vanessa Myers-Moore, and having heard the arguments of counsel, I find and conclude that the Order of the Richland County Probate Court filed on September 26, 2022, and the Order Denying the Motion for Reconsideration filed on October 14, 2022, should be AFFIRMED. The basis for this conclusion is set forth below.

BACKGROUND

The facts of this case are undisputed. Isaac Eldridge Julian (Decedent) died on February 6, 2021. On March 26, 2021, Respondent Geraldine Vanessa Myers-Moore (Respondent) applied for Informal Appointment and Probate of Decedent’s will, executed on June 13, 2014 (2014 Will). The Probate Court appointed Respondent as Personal Representative on April 19, 2021.

Thereafter, counsel for Appellant Alisha Baity made five (5) successive attempts to properly serve the Respondent. By cover letters dated April 22, 2021, April 28, 2021, and May 5, 2021, Appellant’s counsel mailed to the Probate Court for filing her ‘Answer to Informal

Petition for Appointment of Geraldine Vanessa Myers-Moore and Summons and Petition to Challenge Validity of the Will and for Appointment of Special Administrator' (the Petition). Each time he mailed the Petition to the Court, Appellant's counsel simultaneously mailed an unfiled copy to Respondent's counsel by regular U.S. mail. However, Appellant's counsel failed to serve Respondent or her counsel with a copy of the filed Petition.

On or about June 10, 2021, Respondent filed and properly served a motion to dismiss the Petition pursuant to S.C. Rules of Civ. P. 12(b)(4), insufficiency of process; Rule 12(b)(5), insufficiency of service of process; and, Rule 12(b)(6), failure to state facts sufficient to constitute a cause of action. Respondent filed an Amended Motion to Dismiss on July 19, 2021.

On July 22, 2021, Appellant's counsel made a fourth attempt to properly serve the Respondent. This time, Appellant's counsel sent a filed copy of a 'Summons and Petition to Challenge Validity of Will and For Appointment of Special Administrator and Answer to Petition for Appointment of Geraldine Vanessa Myers-Moore' (Summons and Petition) to Respondent's counsel via certified mail. Appellant's counsel did not restrict delivery to the addressee, did not obtain the consent of Respondent's counsel to accept service on Respondent's behalf, and failed to mail or deliver the filed pleadings to the Respondent directly. Respondent served a Motion to Dismiss the Summons and Petition on August 23, 2021 pursuant to Rules 12(b)(5) insufficiency of service of process, and, 12(b)(6) failure to state facts sufficient to constitute a cause of action.

Appellant's counsel made a fifth attempt to serve Respondent on or about September 7, 2021. Appellant's process server delivered a filed copy of the Summons and Petition to Respondent's counsel. Appellant's counsel did not obtain consent from Respondent's counsel to serve Respondent through counsel and failed to serve Respondent directly.

The Probate Court heard Respondent's motion to dismiss on September 22, 2021. By order dated and filed October 27, 2021, the Probate Court granted Appellant's motion to dismiss the Petition without prejudice pursuant to Rule 12(b)(5), SCRCP, insufficiency of service of process, and Rule 12(b)(6), SCRCP, failure to state facts sufficient to constitute a cause of action.

Appellant Alisha Beatty and her siblings (Appellants) subsequently made a sixth attempt to challenge Respondent's appointment and the validity of the 2014 will. By cover letter dated January 24, 2022, Appellants mailed to the Probate Court for filing their 'Summons and Petition to Challenge Validity of Will and for Appointment of Special Administrator and Answer to Petition for Appointment of Geraldine Vanessa Myers-Moore' (2022 Summons and Petition). Appellants attached to the unfiled 2022 Summons and Petition their sworn Proof of Delivery attesting that three days prior, on January 21, 2022, they served a copy of the unfiled 2022 Summons and Petition upon Respondent's counsel by certified mail and upon Respondent by personal delivery. The Probate Court clerk filed the mailed 2022 Summons and Petition on January 28, 2022, as indicated by the date-stamp thereon. The affidavit of Appellants' process server attested that he personally delivered the copy of the unfiled 2022 Summons and Petition to Respondent on or about January 31, 2022.¹ Appellants never served a copy of the filed, date-stamped 2022 Summons and Petition upon Respondent or Respondent's counsel.

Respondent moved to dismiss the 2022 Summons and Petition pursuant to S.C. R. Civ. P. 12(b)(4), insufficient process, 12(b)(5), insufficient service of process, and 12(b)(6), failure to state facts sufficient to constitute a cause of action. The Probate Court heard Respondent's motion to dismiss on August 17, 2022. On September 26, 2022, the Probate Court issued its order granting Respondent's motion to dismiss, finding and concluding that "Appellant failed to serve

¹ Appellant's counsel acknowledged at the hearing that he furnished a copy of the unfiled Petition to the process server for personal delivery to Respondent.

Respondent with a true copy of the filed 2022 Summons [and Petition] and thereby failed to properly commence this action before the expiration of the statute of limitations or within 120 days of filing the Summons and Petition...Further, since the time to bring a new proceeding has expired, this action must be dismissed with prejudice.”²

Appellants filed a Motion to Reconsider on October 6, 2022. The Probate Court denied Appellant’s Motion to Reconsider by order filed on October 14, 2022, holding that “[s]erving the Respondent with an unfiled copy of the Summons and Petition is not sufficient service. A Party must file the Summons and Petition with the Court and then serve filed copies of the Summons and Petition. This is the only way a party being served can know that the lawsuit has been commenced and is an active lawsuit to respond to.”

Appellants filed their Notice of Appeal to this court on October 24, 2022.

STANDARD OF REVIEW

“An appellate court’s determination of the standard of review for matters originating in the probate court is controlled by whether the cause of action is at law or in equity.” *In re Estate of Rider v. Estate of Rider*, 407 S.C. 386, 391, 756 S.E.2d 136, 139 (2014). “An action to construe a will is an action at law.” *Epworth Children’s Home v. Beasley*, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005) (applying the same standard of review to the construction of a trust). “When a probate court proceeding is an action at law, the circuit court and the appellate court may not disturb the probate court’s findings of fact unless a review of the record discloses there is no evidence to support them.” *In re Estate of Rider*, 407 S.C. at 392, 756 S.E.2d at 140. Where, however, as is the case here, the appellant “has admitted that no facts are in dispute in this case, this court can

² Based upon the dismissal pursuant to Rules 12(b)(4) and 12(b)(5), the Probate Court did not reach Respondent’s remaining argument that Appellants failed to state a cause of action pursuant to Rule 12(b)(6), SCRCP.

review conclusions of law based on those facts.” *Holcombe-Burdette v. Bank of Am.*, 371 S.C. 648, 654, 640 S.E.2d 480, 483 (Ct. App. 2006).

LAW / ANALYSIS

On appeal to this court, Appellants contend that the Probate Court erred in dismissing their action because the South Carolina Rules of Civil Procedure do not require that a filed copy of the Summons and Complaint must be served on a defendant. Rather the Rules only require that the Summons and Complaint contain the case number and be filed before service. Since the Clerk filed the Summons and Complaint three days before the process server delivered the unfiled copy to Respondent and the unfiled copy contained the case number from the Probate Court action, Appellants fully complied with the Rules of Procedure and this Court should reverse the Probate Court’s decision.

Contrarily, Respondent maintained that the Probate Court did not err in dismissing the action with prejudice, and correctly held that Appellants failed to properly commence this action because (1) Appellants served the 2022 Summons and Petition before filing according to the sworn Proof of Delivery of Appellant’s counsel, and Appellants failed to subsequently serve a true copy of the filed 2022 Summons and Petition; and, (2) Appellants failed to serve a true copy of the filed 2022 Summons and Petition before the expiration of the statute of limitations.

A Rule 12(b)(4) motion constitutes an objection to the form of process or the content of the summons rather than the method of its delivery. A "Rule 12(b)(5) motion challenges the mode of delivery or the lack of delivery of the summons and complaint." 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* 3d § 1353).

In probate court, “[f]ormal proceedings means actions commenced by the filing of a summons and petition with the probate court and service of the summons and petition upon the

interested persons. Formal proceedings are governed by and subject to the rules of civil procedure adopted for circuit courts and other rules of procedure in this title.” SC Code Ann. §62-1-201(17). “A formal proceeding is a "civil action" as defined in Rule 2, SCRPC, and must be commenced as provided in Rule 3, SCRPC.” SC Code Ann. §62-1-304.

Rule 3, SCRPC, provides that “[a] civil action is commenced when the summons and complaint are filed with the clerk of court if: (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

Rule 5(d), SCRPC, provides that “[t]he summons and complaint shall be filed before service...Upon failure to serve the summons and complaint, the action may be dismissed by the court on the court's own initiative or upon application of any party.

The South Carolina Supreme Court addressed a similar issue regarding the applicability of Rule 5(d) in *McLain v. Ingram*, 314 S.C. 359, 360, 444 S.E.2d 512, 513 (1994). In that case, the plaintiff mailed a copy of the summons and complaint to the court for filing and simultaneously mailed unfiled copies to the defendants by certified mail. Thereafter, when the plaintiff received the filed pleadings from the court, she served the filed pleadings on the defendants. In the interim between plaintiff's service of the unfiled and filed copies, the statute of limitations expired. The Supreme Court affirmed the Circuit Court's order granting summary judgment and dismissing the action, holding that “[t]he adoption of the SCRPC in 1985 heralded a new era in South Carolina's civil practice, modernizing and streamlining our system. Among the changes made by these rules was a new procedure for commencing a civil action. Rule 3(a), SCRPC, provides "A civil action is commenced by the filing and service of a summons and complaint." Prior to the

adoption of the SCRCF, a civil action was commenced by service of the summons. See S.C. Code Ann. §15-3-10 (1976) repealed 1985 Act No. 100. A further change was made by Rule 5(d), SCRCF, which reads: "The summons and complaint shall be filed before service." (emphasis added). This change in practice made by the SCRCF is highlighted by the Reporter's Note to Rule 3: "This Rule 3(a) ... preserves the new requirement for prior filing (of the summons and complaint) with the clerk of court". See also Rule 4(b), SCRCF ("The summons shall... contain ... the file number of the action...").

The language of Rule 5(d) is clear: the summons and complaint must be filed prior to **their** service. Here, service preceded filing and thus this action was not properly commenced before expiration of the statute of limitations. We recognize the harsh result reached in this case, and take this opportunity to remind practitioners that the interrelationships between various court rules are not always readily apparent." 314 S.C. at 360, 444 S.E.2d at 513. (Emphasis added.).

The Supreme Court's holding in *McClain* that the summons and complaint must be filed prior to 'their' service clearly refers to the filed summons and complaint, and supports Respondent's position that a plaintiff must serve a copy of the filed summons and complaint to properly commence an action in compliance with Rule 5(d). As stated by the Probate Court judge in denying Appellants' motion for reconsideration, "[t]his is the only way a party being served can know that the lawsuit has been commenced and is an active lawsuit to respond to." Thus, to properly commence a formal proceeding in probate court, as in the circuit court, the plaintiff must first file the summons and complaint with the court **and** must also serve a copy of the filed pleadings on the defendant.

Here, Appellants' counsel mailed the unfiled 2022 Summons and Petition along with his sworn Proof of Delivery to the court and Respondent's counsel on January 21, 2022, and

simultaneously furnished an unfiled copy of the 2022 Summons and Petition to Appellants' process server for delivery to Respondent. The Proof of Delivery attested that he served the unfiled Summons and Complaint on January 21, 2022. The probate court clerk filed the Summons and Petition and sworn Proof of Delivery on January 24, 2022. According to the affidavit of Appellants' process server, he delivered the unfiled copy of the 2022 Summons and Petition to Respondent on January 27, 2022, three (3) days after the probate court clerk filed the Summons and Petition. Appellants' counsel never served Respondent or Respondent's counsel with a copy of the filed and date-stamped 2022 Summons and Petition.

Appellants failed to serve a true and authentic copy of the filed 2022 Summons and Petition and therefore failed to properly commence the action. Moreover, the time for Appellants to bring a proceeding to contest the will expired on February 6, 2022, without Appellants having served a filed copy of the 2022 Summons and Petition. See, S.C. Code Ann. 62-3-108(3) (“[A] proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful may be commenced within the later of eight months from the informal probate or one year from the decedent’s death.”).

Appellants argued for the first time in their motion for reconsideration that their case is distinguishable from *McClain* because here, unlike in *McClain*, Appellants' Summons contained all the information required by Rule 4(b), including the case number. This issue is not preserved for review by this Court because it was neither raised to nor ruled upon by the Probate Court. See *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (“It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.”) However, even if the issue was

properly before this Court, it would have no bearing on this Court's decision affirming the Order of the Probate Court.

CONCLUSION

Based on the foregoing, the Order of the Richland County Probate Court entered on September 26, 2022 and the Order denying Appellants' Motion for Reconsideration filed on October 14, 2022, are AFFIRMED.

AND IT IS SO ORDERED.

Maite Murphy
At Large Circuit Court Judge

Dated: _____, 2023
Columbia, South Carolina



Richland Common Pleas

Case Caption: Alisha Baity , plaintiff, et al VS Geraldine Vanessa Myers Moore
Case Number: 2022CP4005570
Type: Order/Other

So Ordered

s/ Maite Murphy 2166

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