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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM JASPER COUNTY
Court of Common Pleas
Alison Renee Lee, Circuit Judge

Appellate Case No. 2024-000460
Court of Common Pleas Case No. 2023-CP-27-0001

MARK C. BOYLES,

Appellant,

v.

NCP BAYOU, LLC,

Respondent.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case..... 1

Standard of Review.....3

Arguments

 I. THE APPELLANT BOYLES DID NOT ALLEGE OR ASSERT A PRIVATE CAUSE OF ACTION AGAINST THE RESPONDENT NCP BAYOU LLC FOR THE “UNAUTHORIZED PRACTICE OF LAW” (UPL) AND THE DECLARATORY JUDGEMENT WAS BROUGHT BY THE APPELLANT TO STOP THE RESPONDENT’S ENFORCEMENT OF A JUDICIAL LIEN4

 II. IF THE APPELLANT BOYLES FILED HIS CASE IN THE WRONG COURT (COURT OF COMMON PLEAS VS. SOUTH CAROLINA SUPREME COURT), THE TRIAL COURT SHOULD HAVE TRANSFERRED THE CASE FROM THE COURT OF COMMON PLEAS TO THE SOUTH CAROLINA SUPREME COURT PURSUANT TO RULE 82 OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE AND NOT DISMISS THE LAWSUIT AS PROHOBITED BY THE RULE.....7

Conclusion9

TABLE OF AUTHORITIES

Cases

<u>Auto Owners Ins. v. Rollison</u> , 378 S.C. 600, 609, 663 S.E.2d. 484, 488 (2008)	8
<u>Brewer v. Brewer</u> , 242 S.C. 9, 14, 129 S.E.2d. 736,738 (1963)	8
<u>Hosey v. Quicken Loans Inc.</u> , (U.S. District Court, South Carolina 2018 WL 3216105)	6
<u>In re Deddish</u> 347 S.C. 614, 557 S.E. 2d 655 (2001)	5
<u>In re Easler</u> , 275 S.C. 400, 272 S.E. 2d 32 (1980)	5
<u>In re Helton</u> , 372 S.C. 245, 642 S.E. 2d 573 (2007),	5
<u>In Re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar</u> , 309 S.C. 304, 307, 422 S.E.2d. 123 (1992)	8
<u>K&A Acquisitions v. Pointe</u> , 383 S.C. 563, 682 S.E.2d. 252 (2009)	8
<u>Matrix Financial Services Corp. v. Frazer</u> , 394 S.C. 134, 714 S.E. 2d 532 (2011)	6
<u>Posey v. Proper Mold and Engineering Inc.</u> , 378 S.C. 210, 661 S.E.2d 395 (2008)	3
<u>State v. Buyers Service Co., Inc.</u> , 292 S.C. 426, 357 S.E. 2d 15 (1987).....	6
<u>Wachovia Bank N.A. v. Coffey</u> , 389 S.C. 68, 698 S.E.2d. 244 (2010).....	7

Statutes, Rules, and Regulations

S.C. Code Ann. § 15-53-30	8
S.C Code Ann. § 16-13-180(A)	6
S.C. R. CIV. P. Rule 82(b)	7-8
11 U.S.C. Ann. § 524(a)(3)	4

STATEMENT OF ISSUES ON APPEAL

1. Did the trial Court err in characterizing the Appellant's lawsuit as a "private cause of action" against the Respondent for the unauthorized practice of law or was the Appellant bringing his Declaratory Judgement Action against the Respondent to challenge the enforcement of a judgment lien?
2. Did the Trail Court err in dismissing the Appellant's lawsuit when Rule 82 SCRCP prohibits dismissal of the lawsuit and requires transfer to a court of competent jurisdiction?

STATEMENT OF THE CASE

The Plaintiff operated a business in and around Jasper County for many years in the corporate name of Carolina Timber, Inc. In that business, the Appellant Boyles obtained loans from Coast States Bank secured by mortgages on corporate and personally owned properties. During and after the Great Recession of 2008, the Appellant Boyles fell into default on those debts and mortgages to the bank. On December 31, 2013, the Appellant Boyles executed a Confession of Judgement to Coastal States Bank to secure the performance of a modified repayment schedule. When the Appellant subsequently defaulted in that modified agreement, the Confession of Judgement was filed in Jasper County Court of Common Pleas on March 27, 2018 (DOM Confession of Judgement).

The Confession of Judgement executed by the Appellant Boyles was subsequently assigned to the Respondent NCP. The Appellant's discovery request to produce a copy of that assignment was not answered prior to dismissal of the lawsuit. After the assignment, the Respondent NCP enforced the loans, mortgages and Confession of Judgement. By foreclosing and enforcing the mortgages or judgment liens on properties of the Appellant Boyles, the Respondent NCP recovered \$297,500.00 in one case and \$154,539.25 in another case (DOM-Deficiency Judgement #2018-CP-23-0072 and Deficiency Judgement # 2021-CP-27-00515). On August 18, 2022, the Respondent NCP obtained an Execution Against Property of the Appellant Boyles in the Respondent's continuing efforts to enforce the Confession of Judgment statutory

lien. (DOM-Execution). After foreclosure and execution against all corporate assets, and commencement of other foreclosures by the Respondent NCP, the Appellant Boyles filed a petition for relief under Chapter 7 of the United States Bankruptcy Code in the U.S. Bankruptcy Court for the District of South Carolina on September 30, 2019, Case # 19-05116-dd. (DOM-BKR Petition). In those bankruptcy proceedings, the Respondent NCP obtained relief from the automatic stay pursuant to 11 U.S. Code § 362 in order to foreclose on additional properties. (DOM-362 Order). The two parcels of land which are the subject of the underlying lawsuit in this case were not listed as assets of the Appellant Boyles. The Appellant would testify that he was unaware that he had an equitable or legal interest in this real property. The Appellant was discharged in Bankruptcy Court from any further personal liability. (DOM -Discharge).

By deed dated October 31, 2016, the Appellant Boyle's late mother Grace L. Boyles attempted to convey two parcels of timber land in Jasper County to the Appellant Boyles, reserving a life estate to herself. (DOM-Deed). That deed was drafted, witnessed, notarized and recorded in the Jasper County Register of Deeds office by a person who is not a lawyer. It is undisputed that no licensed attorney was involved in that real estate transaction. If that deed were valid, the Appellant Boyles obtained a vested remainder interest to which the judgement lien could attach. If that deed were invalid, the Appellant Boyles would become the fee simple owner of the property only after his mother died intestate on December 5, 2021. (DOM-Death Certificate). A judgement prior to Bankruptcy would not attach to property obtained by the debtor after discharge in the Bankruptcy. 11 U.S.C. Ann. § 524(a)(3). The Appellant Boyles would show, if given the opportunity, that his late mother occupied the property and paid property taxes on that property from the date of the deed in 2016 until her death in 2021. The Appellant Boyles would also testify that he did not receive a copy of that deed to real property until after the death of his mother.

After his personal bankruptcy and discharge of all personal liabilities and after the Respondent NCP commenced foreclosure of a judgement lien, the Appellant Boyles instituted the subject Declaratory Judgment in the Jasper County Court of Common Pleas against the Respondent NCP. (DOM-Complaint). After some discovery in the Declaratory Judgment Action, the Appellant filed a Motion to Dismiss under Rule 12(b)(6) SCRCPC. (DOM-NCP Motion to Dismiss). The Appellant Boyles objected to that Motion to Dismiss arguing that he was not attempting to establish that the Respondent NCP had, itself, engaged in the unauthorized practice of law. (DOM Objection and Memo in Objection). The trial court granted the Motion to Dismiss (DOM Order of Dismissal). The Appellant Boyles moved for reconsideration (DOM- Motion for Reconsideration and Memo). That request was denied by the trial court (DOM- Order).

THE STANDARD OF REVIEW

The Motion to Dismiss filed by the Respondent NCP Bayou LLC was made on the basis of “failing to state facts sufficient to constitute a cause of action.” Rule 12(b)(6) SCRCPC. (See DOM Motion to Dismiss) However, this matter was argued before and decided by the Trial Court on the basis of subject matter jurisdiction. Rule 12(b)(1) SCRCPC. Subject matter jurisdiction is a jurisdictional issue and the question on appeal is one of law. Posey v. Proper Mold and Engineering Inc., 378 S.C. 210, 661 S.E.2d 395 (2008). When the appeal is based on an issue of law, the appellate court has the power and duty to review the entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence. *Id. at 216.*

ARGUMENTS

I. THE APPELLANT BOYLES DID NOT ALLEGE OR ASSERT A PRIVATE CUASE OF ACTION AGAINST THE RESPONDENT NCP BAYOU LLC FOR THE “UNAUTHORIZED PRACTICE OF LAW” (UPL) AND THE DECLARATORY JUDGEMENT WAS BROUGHT BY THE APPELLANT TO STOP THE RESPONDENT’S ENFORCEMENT OF A JUDICIAL LIEN.

The Appellant Boyles filed a Declaratory Judgment in the Jasper County Court of Common Pleas. Nowhere in the Complaint did the Appellant allege that the Respondent NCP Bayou LLC was itself ever engaged in the unauthorized practice of law. The alleged unauthorized practice of law was conducted by a third party who is not an employee, agent or representative of the Respondent NCP Bayou LLC. That third party, who drafted, witnessed, notarized and recorded the subject deed, was not a licensed attorney in the state of South Carolina.

The Appellant Boyles in his Memorandum of Law Objecting to the Respondents Motion to Dismiss, agrees and admits that a person may not assert a “private cause of action” against a Defendant, Determination or sanctions against the perpetuator is solely within the original jurisdiction of the South Carolina Supreme Court. (DOM-Appellants Memo and App. Motion to Reconsider). The question raised in the Declaratory Judgement is whether a party may profit or benefit from the unauthorized practice of law by a third party.

The Appellant Boyes initially filed his Complaint on behalf of himself personally and as personal representative of the estate of his late mother Grace Laverne Boyles. However, due to objections from the Appellant’s brother and sister, no Probate Estate for the late Grace Laverne Boyles has ever been opened in the Probate Court for Jasper County South Carolina. The Respondents Motion to Dismiss was based on two grounds: Boyles did not have standing to sue on behalf of an estate which had not been opened and “In the alternative, NCP seeks an Order

from the Court dismissing the suit entirely for failing to state facts sufficient to constitute a cause of action.” (DOM-Respondent Motion to Dismiss).

The Appellant consented to dismiss any claims brought on behalf of the estate of his late mother because no probate estate had been opened. Despite the Appellants consent to the relief requested by the Respondent in its Motion to Dismiss, the Respondent NCP wished to proceed to a hearing on its Motion to Dismiss. (DOM-Consent Order of Dismissal of Estate). In the Respondent’s Motion to Dismiss, the language is based on Rule 12(b)(6) SCRPC-“failing to state facts sufficient to constitute a cause of action.” (DOM-Respondents Motion to Dismiss). The trial court adopted the rationale of the Respondent NCP in its Order of Dismissal. (DOM-Order of Dismissal). At the very beginning of the Order of Dismissal, line 3, the trial court stated that “Plaintiff’s Complaint fails to state facts sufficient to constitute a cause of action and must be dismissed.” As stated above, the Appellant agreed with the Respondent and trial court that there is no “private cause of action” for the unauthorized practice of law.

In the second part of the trial court Order of Dismissal, the Trial Court went further to conclude that a deed prepared in connection with the unauthorized practice of law is not null and void under South Carolina Law. The court cited four South Carolina cases in which the court found the Defendants to have engaged in the unauthorized practice of law, but did not rule that the work product was itself null and void.

In his Motion to Reconsider Dismissal, the Appellant Boyles distinguished the cases cited by the Trial Court. (DOM-Motion to Reconsider). In the Helton case, which was a disciplinary action against an attorney for the unauthorized practice of law, the Court suspended Helton from the practice of law. In re Helton, 372 S.C. 245, 642 S.E. 2d 573 (2007). There was no holding regarding the validity of the Defendant’s legal actions. In the Deddish case, another disciplinary action against an attorney, the order of the South Carolina Supreme Court was to suspend that lawyer from the practice of law for nine months. Again, there was no discussion of the validity

of the actions undertaken by that Defendant. In re Deddish, 347 S.C. 614, 557 S.E. 2d 655 (2001). In the Easler case, another disciplinary action, the Defendant was found to be practicing law after having been disbarred previously. The Supreme Court ordered that the attorney be imprisoned in the Richland County Jail for a period of thirty days for contempt of court for violating the previous order of disbarment. In re Easler, 275 S.C. 400, 272 S.E. 2d 32 (1980). In the Buyers Service case, the South Carolina Supreme Court found that a commercial title company was engaged in the unauthorized practice of law. In that case, the Supreme Court set forth which actions will, or will not, constitute the unauthorized practice of law. Again, there was no discussion of whether or not the previous activities of Buyers Service were valid and enforceable. State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E. 2d 15 (1987). In all of these cases, the issue about the validity and enforceability of real estate closings was not before the Court and there was no finding that deeds or mortgages created, executed and recorded in the unauthorized practice of law would be valid.

On the contrary, the South Carolina Supreme Court found that Matrix Financial Services Corporation could not enforce its mortgage refinancing because it occurred by and through the unauthorized practice of law. Justice Kittredge stated in his concurring opinion that the holding in the case essentially voided the real estate mortgage refinance secured through unauthorized practice of law. Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E. 2d 532 (2011).

In a more recent case, the United States District Court for the District of South Carolina ruled that there is no private cause of action for the unauthorized practice of law and claims against another party for doing that must be heard in the South Carolina Supreme Court's original jurisdiction. However, Judge J. Michelle Childs, U.S. District Judge, stated that UPL "acts as a bar (or defense) to foreclosure..." Hosey v. Quicken Loans Inc., (U.S. District Court, South Carolina 2018 WL 3216105).

In the first section of the Trial Court Order of Dismissal, the Court stated that “charges of unauthorized practice of law are basis for the Plaintiffs Declaratory Cause of Action.” (DOM-Order of Dismissal pg. 2). Making an analogy, the state may charge a defendant with Receiving Stolen goods without identifying or convicting the original thief. The state only has to prove that the goods were stolen. S.C Code Ann. § 16-13-180(A) (2013). The Appellant Boyles did not sue the Respondent NCP for the unauthorized practice of law. While evidence of the unauthorized practice of law by a third party may be introduced in this case, the Appellant Boyles is not asserting or alleging that NCP itself engaged in the unauthorized practice of law. The question in this lawsuit is whether the Respondent NCP can benefit or profit from the wrongful and unlawful conduct of a third party engaging in the unauthorized practice of law. In an earlier case, the South Carolina Court of Appeals ruled that a bank may not foreclose on a mortgage that was created through the unauthorized practice of law. Wachovia Bank N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d. 244 (2010). In that case, the Appellant Court ruled that equitable and legal causes of action are barred when the mortgage was created through the unauthorized practice of law.

II. IF THE APPELLANT BOYLES FILED HIS CASE IN THE WRONG COURT (COURT OF COMMON PLEAS VS. SOUTH CAROLINA SUPREME COURT), THE TRIAL COURT SHOULD HAVE TRANSFERRED THE CASE FROM THE COURT OF COMMON PLEAS TO THE SOUTH CAROLINA SUPREME COURT PURSUANT TO RULE 82 OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE AND NOT DISMISS THE LAWSUIT AS PROHOBITED BY THE RULE.

If a Plaintiff files a lawsuit in the wrong county or the wrong court, Rule 82(b) of the South Carolina Rules of Civil Procedure mandates that the court shall not dismiss the action but must transfer the case to the proper court: “When an action is brought in the wrong county or in the wrong court (emphasis added), the Court shall not dismiss the action but shall transfer it to any proper county or court in which it could have been brought.” S.C. R. Civ. P. 82(b). In this case, the Appellant Boyles filed a Declaratory Judgement Action in the Jasper County Court of

Common Pleas seeking a judicial determination that the deed from the Appellant's late mother was invalid and improper because it was drafted, witnessed, notarized and filed by a person who is not licensed to practice law in the state of South Carolina. The Respondent, in its Motion to Dismiss, argued that the Appellant was actually suing the Respondent NCP for the "unauthorized practice of law." The trial court concluded that the lawsuit was basically a private cause of action against the Respondent for the unauthorized practice of law. All parties agreed that the South Carolina Supreme Court has exclusive jurisdiction to prosecute or sanction a party for the unauthorized practice of law. The Appellant Boyles simply disagreed with the Respondent and the Trial Court that his Declaratory Judgement, involving the issue of validity of a deed, was not a Declaratory Judgement brought pursuant to S.C. Code Ann. § 15-53-30 (2014), "Declaratory Judgements."

Rule 82(b) SCRCP is not just about improper venue. The title of the rule is "Jurisdiction and Venue." If a Plaintiff filed a case in Magistrate Court for damages in excess of \$7,500.00, the Magistrate must not grant a Motion to Dismiss the action but is, rather, required to transfer that case to the Court of Common Pleas. The Rule contains the disjunctive particle "or" two times: if the case is filed in the wrong court, that court should transfer it to the proper county venue "or" if the case is filed in the wrong court, the court must transfer the case to the "court in which it could have been brought." By containing the word "or" in the Rule means that there are alternative remedies for wrong venue county or wrong court. Brewer v. Brewer, 242 S.C. 9, 14, 129 S.E.2d. 736,738 (1963): cited in K&A Acquisitions v. Pointe, 383 S.C. 563, 682 S.E.2d. 252 (2009). The South Carolina Supreme Court has stated "We urge any interested individual who becomes aware of such conduct to bring a Declaratory Judgement Action in this Court's original jurisdiction to determine the validity of conduct." In Re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 309 S.C. 304, 307, 422 S.E.2d. 123 (1992). If the Appellant

Boyles is suing the Respondent NCP for the unauthorized practice of law, the matter should be transferred to the South Carolina Supreme Court and should not be dismissed.

Rule 82(b) of the South Carolina Rules of Procedure is in the nature of a remedial statute. “A statute remedial in nature should be liberally construed in order to accomplish the object sought.” Auto Owners Ins. v. Rollison, 378 S.C. 600, 609, 663 S.E.2d. 484, 488 (2008). According to the Notes appended to Rule 82 of the South Carolina Rules of Civil Procedure, Rule 82(b) is similar to that adopted by many states: “Rule 82(b) is similar to that adopted by many states to avoid having an action dismissed only to be commenced again in the proper jurisdiction.” Dismissal of the Appellant’s lawsuit is contrary to the express words of Rule that “the court shall not dismiss the action”...Rule 82(b) SCRPC.

CONCLUSION

The Appellant Boyles in this case is not alleging or accusing the Respondent NCP of having engaged in the unauthorized practice of law. The Appellant argues that the Respondent NCP should not be allowed to rely on an invalid deed to enforce its judgement lien against the Appellant when that very deed is invalid. While the validity of the deed is an element of proof in the Appellant’s Declaratory Judgement, that does not convert the whole case into a private action against the Respondent NCP for the unauthorized practice of law. If this Appellate Court agrees

with the trial court that this case does involve a claim for the unauthorized practice of law, the proper remedy would be to transfer the case to the original jurisdiction of the South Carolina Supreme Court.

Respectfully submitted,

ROSEN HAGOOD, LLC

June 19, 2024

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MARK C. BOYLES,

Appellant,

v.

NCP BAYOU, LLC,

Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on NCP Bayou, LLC by email on June 19, 2024, addressed to its attorneys of record, Lauren P. Williams (lauren@russellpattersonlaw.com) and Russell P. Patterson (russell@russellpattersonlaw.com).

June 19, 2024

Respectfully submitted,



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SC Court of Appeals

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June 19, 2024

Via Email

The Honorable Jenny Abbott Kitchings
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Re: Mark C. Boyles v. NCP Bayou, LLC
Appellate Case No.: 2024-000460

Dear Ms. Kitchings:

On behalf of Appellant Mark C. Boyles, attached please find the following for filing:

1. Initial Brief of Appellant;
2. Proof of Service of Initial Brief;
3. Designation of Matter; and
4. Proof of Service of Designation of Matter.

With best regards, I am

Sincerely,



Karen Nissen
Paralegal to F. Truett Nettles, II

Encs.

cc: Lauren Williams, Esq. (via email)
Russell P. Patterson, Esq. (via email)