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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

Case No. 2024-000460

MARK C. BOYLES

Appellant,

v.

NCP BAYOU, LLC

Respondent.

RESPONDENT NCP BAYOU, LLC'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court properly grant Respondent’s Motion to Dismiss based upon the determination that Appellant’s Complaint failed to establish the existence of a justiciable controversy because as a matter of law there is no private cause of action for the unauthorized practice of law (“UPL”), and it is not the law of South Carolina that a deed prepared by a non-lawyer is null and void?

STATEMENT OF THE CASE¹

A. Procedural and Factual History.

This is an appeal of the Order of the Honorable Alison Renee Lee dismissing Appellant’s January 3, 2023 declaratory judgment action pursuant to Rule 12(b)(6), SCRPC. Accordingly, the statement of the case must be limited solely to those facts pled by Appellant in his Complaint.

Appellant filed his declaratory judgment action on January 3, 2023 in response to Respondent’s August 2022 efforts to collect on a valid Jasper County judgment lien² against Appellant by seizing and selling property located in Jasper County, identified as TMS No. 062-00-01-090 and 047-00-03-027 (“Subject Property”). Appellant’s interest in the Subject Property arises out of that certain deed recorded with the Jasper County Register of Deeds on November 1, 2016 in Book 0933 at Page 1527 from the late Grace M. Boyles to Mark C. Boyles, Sr. and reserving unto herself a life estate (“Deed”). As a direct result of Respondent’s efforts, Appellant filed the instant action alleging that a justiciable controversy existed regarding Respondent’s ability to seize and sell the Subject Property in light of Appellant’s allegation that the Deed to the

¹ Respondent’s reading of Rule 208(b)(1)(C) SCACR is that disputed facts or matters should not be included in the Statement of Case. To avoid being bound by Appellant’s Statement of the Case under Rule 208(b) (2) SCACR, Respondent has set forth a brief statement of the case.

² On December 5, 2017, Respondent acquired a Confession of Judgment against Appellant and undertook collection efforts to satisfy that judgment. During the collection process, Appellant filed Bankruptcy and received a discharge on January 24, 2020. However, there is no dispute that the Bankruptcy did not impact Appellant’s interest in the Subject Property, obtained in October 2016, and Respondent’s right to seize and sell the Subject Property.

Subject Property was prepared by an individual, with no connection to Respondent, engaging in the UPL. Specifically, Appellant alleges that the Deed was drafted, witnessed, notarized, and filed in the public record by a non-lawyer engaging in the UPL. Appellant then argues that due to the alleged UPL, the Deed is null and void as a matter of law and Appellant has no legal interest in the Subject Property that Respondent can seize and sell.

In response to Appellant's allegations, on July 19, 2023, Respondent filed a Motion to Dismiss Mark C. Boyles as Personal Representative of the Estate of Grace Laverne Boyles or in the alternative to dismiss the instant matter entirely for failing to state facts sufficient to constitute a cause of action ("Motion to Dismiss"). Prior to a hearing on the Motion to Dismiss, the parties agreed to dismiss Mark C. Boyles in his capacity as Personal Representative, as evidenced by the October 2, 2023 consent order on file with the Court.³ Thus, Respondent's Motion sought its alternative remedy of dismissal of the instant matter in its entirety. Prior to the September 28, 2023 hearing in this matter ("Hearing"), Appellant submitted an Objection to Motion to Dismiss and Respondent submitted a Memorandum in Support of Motion to Dismiss. During the Hearing, Judge Lee ruled that the parties could submit supplemental briefs prior to her ruling on the Motion. Accordingly, Appellant filed a Memorandum in Opposition to Motion to Dismiss, dated October 11, 2023, and Respondent filed a Reply Memorandum in Support of its Motion to Dismiss, dated October 19, 2023. After careful consideration, Judge Lee issued an Order on December 21, 2023 granting Respondent's Motion to Dismiss ("Order") and dismissing the instant action entirely for failure to establish the existence of a justiciable controversy for two reasons – first, as a matter of law there is no private cause of action for the UPL; and second, it is not the law of South Carolina

³ Mark C. Boyles as Personal Representative of the Estate of Grace Laverne Boyles was dismissed because no estate has ever been opened on behalf of Ms. Boyles and thus, Mr. Boyles has never been appointed the Personal Representative of her Estate.

that a deed prepared by a non-lawyer is null and void.

Subsequently, on December 28, 2023, Appellant filed a Motion to Reconsider the Order (“Motion to Reconsider”). The Motion to Reconsider was denied by Judge Lee on February 28, 2024 (“Order Denying MTR”) and the instant appeal followed.

B. Appellant’s Statement of the Case Includes Information Not Properly Before the Court.

In his Brief, Appellant’s Statement of the Case includes at least seven (7) statements and information that are outside the scope of the pleadings and are not properly before this Court. Br. at 2. Specifically, Respondent contends the following statements are improper because they rely on information and documents not entered into evidence at the Hearing or the Complaint:

1. “The Appellant would testify that he was unaware that he had an equitable or legal interest in this real property.”

2. “It is undisputed that no licensed attorney was involved in that real estate transaction.”

3. “If that deed were valid, the Appellant Boyles obtained a vested remainder interest to which the judgment lien could attach.”

4. “If that deed were invalid, the Appellant Boyles would become fee simple owner of the property only after his mother died intestate of December 5, 2021.”

5. “A judgment 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).”

6. “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.”

7. “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.”

These seven (7) statements are not supported by any evidence presented at the Hearing. Additionally, throughout these seven (7) statements, Appellants make multiple statements regarding alleged testimony Appellant would provide in the case. Appellants cannot attempt to enter these statements as facts through their Initial Brief. *See Hodges v. Tarrant*, 31 S.C. 608, 9 S.E. 1038, 1039 (1889) (an alleged fact cannot be asserted for the first time in an appeal, it must also have been asserted in the underlying case). Thus, these seven (7) statements are not properly before this Court and any information pertaining to them should be disregarded. *Ravan v. Greenville Cty.*, 315 S.C. 447, 460, 434 S.E.2d 296, 304 (Ct. App. 1993) (the appellate court will not consider any fact which does not appear in the Record on Appeal).

STANDARD OF REVIEW

An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRPC. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). Under Rule 12(b)(6), SCRPC, a defendant may move to dismiss a complaint where the plaintiff fails to state facts sufficient to constitute a cause of action. *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869, 874 (2006). The court should dismiss a complaint when “the facts alleged and inferences reasonably deducible therefrom, when viewed in the light most favorable to the plaintiff, would not entitle the plaintiff to relief of any theory.” *See Doe* at 395, 645 S.E.2d at 247. To successfully assert a cause of action for declaratory relief, the plaintiff must demonstrate a justiciable controversy. *Brown v. Wingard*, 285 S.C. 478, 479, 330 S.E.2d 301, 302 (1985). A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination. *Guimarin & Doan, Inc. v. Georgetown Textile & Mfg. Co.*, 249 S.C. 561, 566 155 S.E.2d 618, 621 (1967).

The underlying Motion in this matter is Respondent's Motion to Dismiss pursuant to Rule 12(b)(6), SCRPC.

As discussed in more detail below, at no point did Respondent argue or the Trial Court rule this case should be dismissed due to lack of subject matter jurisdiction, Rule 12(b)(1), SCRPC or Rule 82, SCRPC. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (it is axiomatic 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). Instead, the Trial Court granted Respondent's Motion solely pursuant to Rule 12(b)(6), SCRPC. Thus, Appellant's stated standard of review is incorrect and should be disregarded by the Court.

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED THE UNDERLYING ACTION FOR FAILURE TO STATE FACTS SUFFICIENT TO ESTABLISH A JUSTICIABLE CONTROVERSY.

After careful consideration, the Court properly dismissed the instant action for a declaratory judgment pursuant to Rule 12(b)(6) based on Appellant's failure to establish the existence of a justiciable controversy for two reasons – (1) as a matter of law there is no private cause of action for the UPL; and (2) it is not the law of South Carolina that a deed prepared by a non-lawyer is null and void. In making this determination, the Trial Court properly assumed, for the sole purpose of the Motion, Appellant's allegation that the Deed to the Subject Property was prepared in connection with the UPL was correct. *See Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987) (in evaluating a motion to dismiss, the court must view the complaint in the light most favorable to the plaintiff, with every doubt resolved in the plaintiff's favor). After making this assumption, the Trial Court properly determined Appellant failed to establish the existence of a justiciable controversy.

A. The Trial Court Properly Ruled that Appellant’s Complaint Failed to State a Claim Because as a Matter of Law There is No Private Cause of Action for the UPL.

It is well established in South Carolina that there is no private cause of action for the UPL. *Franklin v. Chavis*, 371 S.C. 527, 535, 640 S.E.2d 873, 877 (2007) (“There is no private right of action in South Carolina for the unauthorized practice of law.” (citing *Linder v. Insurance Claims Consultants, Inc.*, 348 S.C. 477, 496-97, 560 S.E.2d 612, 622-23 (2002)); *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 123-24, 634 S.E.2d 5, 8-9 (Ct. App. 2006) (affirming dismissal of complaint when charges of the UPL were the basis for all alleged causes of action because no private cause of action for the UPL exists.)).

After reviewing Appellant’s Complaint, the Trial Court properly determined the sole basis for Appellant’s declaratory judgment cause of action were charges of the UPL. The Trial Court recognized that Appellant’s cause of action specifically sought a determination that the Deed granting Appellant an interest in the Subject Property was null and void due to the alleged UPL. Appellant then sought a second determination that Respondent’s judgment lien did not attach to the Subject Property because the UPL caused the Deed to be invalid. After analyzing these claims, the Trial Court properly concluded that the claims constitute a private cause of action for the UPL, which does not exist under South Carolina law. *Franklin* at 535, 640 at 87. Thus, Appellant’s Complaint failed to establish a justiciable controversy as a matter of law and was properly dismissed. Accordingly, the instant appeal should be denied.

B. The Trial Court Properly Ruled that Appellant’s Complaint Failed to State a Claim Because it is Not the Law of South Carolina that a Deed Prepared in Connection with the UPL is Null and Void.

The second basis of the Trial Court’s proper dismissal of Appellant’s Complaint is that Appellant failed to establish a justiciable controversy because it is not the law of this State that a deed prepared in connection with the UPL is null and void. Because the validity of the Deed is

not in question as a matter of law, Appellant failed to present a justiciable controversy.

Throughout South Carolina case law there are multiple cases answering the question of what constitutes the UPL. *See, e.g. In re Helton*, 372 S.C. 245, 249, 642 S.E.2d 573, 575 (2007) (failure of attorney to supervise preparation of deeds by non-lawyer assistants constituted UPL); *In re Deddish*, 347 S.C. 614, 617, 557 S.E.2d 655, 657 (2001) (preparation of real estate deeds by non-lawyer constituted the UPL); *State v. Buyers Serv. Co.*, 292 S.C. 426, 432, 357 S.E.2d 15, 18 (1987) (preparation of a deed falls within the definition of the practice of law and may constitute the UPL); *In re Easler*, 275 S.C. 400, 272 S.E.2d 32 (1980) (holding that the preparation of a deed for another constitutes the UPL). Many of these cases specifically address whether the preparation of a deed by a non-lawyer constitutes the UPL, but not a single case holds that a deed prepared in connection with the UPL is null and void. *See supra*. If the South Carolina Supreme Court wanted to establish that a deed prepared in connection with the UPL is null and void, the Court would have explicitly established this principle throughout these cases. The fact that not a single case addressing the UPL in preparing deeds holds that the resulting deed is null and void proves that is not the law of our state.

Furthermore, when faced with the decision of whether other documents prepared in connection with the UPL were null and void, South Carolina courts have explicitly held the documents remained valid. *See Brown v. Citifinancial, Inc.*, 414 F. Supp. 2d 561, 565 (D.S.C. 2006); *Franklin* at 535, 640 S.E.2d at 877; *Linder* at 496, 560 S.E.2d at 622. In *Franklin*, the Supreme Court ruled that a will drafted by an individual engaged in the UPL “should not be invalidated simply because it was drafted by a nonlawyer.” *Franklin* at 535, 640 S.E.2d at 877. Similarly, in *Brown*, the South Carolina District Court ruled that the arbitration agreement contained in a mortgage prepared by a party engaged in the UPL was not void due to the actions

of the preparer. *Brown* at 565. In *Linder*, our Supreme Court ruled again that a contract as performed amounted to the partial UPL was not null and void. *Linder* at 496, 560 S.E.2d at 622 (contracting party is responsible for the value of work which did not constitute the UPL).

Additionally, our Courts have routinely held that litigation initiated and or pursued by a party engaged in the UPL does not render the proceedings a nullity, but instead merely amounts to an amendable defect. *Brown v. Coe*, 365 S.C. 137, 144, 616 S.E.2d 705, 709, *order clarified*, 365 S.C. 664, 620 S.E.2d 323 (2005); *The Roof Dr., Inc. v. Birchwood Holdings, Ltd.*, 366 S.C. 637, 643, 622 S.E.2d 746, 750 (Ct. App. 2005); *Renaissance Enterprises, Inc. v. Summit Teleservices, Inc.*, 334 S.C. 649, 653, 515 S.E.2d 257, 259 (1999); *Blue Star Rental & Sales, Inc. v. Ridge Env't, LLC*, No. 2014-MO-048, 2014 WL 6977616, at *3 (S.C. Dec. 10, 2014). Thus, the Court is not in the practice of voiding instruments that are prepared by a party engaging in the UPL.

In his multiple briefs on this issue, Appellant repeatedly fails to cite any case ruling that a deed prepared in connection with the UPL is null and void. Instead, Appellant correctly emphasizes the fact that all of the cases addressing whether the preparation of a deed by a non-lawyer concluded the subject deeds were nonetheless valid. This argument only further supports Respondent's position and the Trial Court's determination that Appellant's Complaint fails to establish the existence of a justiciable controversy as a matter of law.

Instead of citing any cases on point, Appellant attempts to make vague analogies to support its argument. He attempts to rely on the established equitable principle that a party who commits the UPL is barred from acting in equity to enforce any document prepared in connection with its UPL. *Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 140, 714 S.E.2d 532, 535 (2011) ("a lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by law"); *Wachovia Bank N.A. v. Coffey*, 389 S.C.

68, 75, 698 S.E.2d 244, 248 (Ct. App. 2010) (a lender who prepares legal documents in connection with the UPL may be barred from bringing an action to enforce the lender's rights under the document); *Hosey v. Quicken Loans, Inc.*, 2018 WL 3216105, at *3 (D.S.C. July 2, 2018) (the UPL "acts as a bar (or defense) to foreclosure" when asserted by the party who committed UPL). This reliance is misplaced because, it is undisputed that Respondent did not commit the UPL and is merely a third-party attempting to enforce its right to collect its legal judgment against Appellant's interest in the Subject Property as a matter of law, not in equity.⁴ Thus, this equitable principle does not apply to the instant matter. Similarly, any analogy between the instant matter and the criminal charge of receiving stolen goods is inaccurate and inapplicable.

Finally, S.C. Code Ann. §30-5-30(b) outlines the requirements for witnessing and recording a deed. This section only requires that a deed must be signed by the grantor, must be acknowledged by two witnesses, and taken before an officer of the State competent to administer an oath. S.C. Code Ann. §30-5-30(b). There is no requirement in the statute that the deed must be prepared, witnessed, or notarized by a licensed attorney to be valid. If the Legislature wanted to require a deed to be prepared by an attorney to be valid when recorded, that requirement would have been explicitly stated in this section.

There are likely numerous deeds throughout the state of South Carolina that have been prepared by a non-lawyer likely constituting the UPL. If Appellant's allegation is correct that these deeds are null and void due solely to their connection with the UPL, our courts would be inundated with litigation, not to mention the intent of the parties to these transactions would be swept aside by judicial decree based on technicalities. This is clearly not the intent of our Supreme

⁴ It is undisputed that Respondent was not involved in drafting, signing, or recording the Deed.

Court when it determined that the preparation of a deed by a non-lawyer generally constitutes the UPL.

Accordingly, there is no justiciable controversy to be resolved because the Deed to the Subject Property is not null and void due to its alleged connection with the UPL. Appellant's conclusion regarding the validity of the Deed is incorrect as a matter of law. Therefore, there is no longer a question of whether Respondent's judgment lien attaches to the Subject Property pursuant to S.C. Code Ann. § 15-35-810 (final judgments shall constitute a lien upon the real estate of the judgment debtor situate in the county in which the judgment is recorded) and consequently, no justiciable controversy presented by Appellant. Accordingly, the Trial Court properly granted the Motion and dismissed Appellant's Complaint pursuant to Rule 12(b)(6), SCRPC. Thus, the instant appeal should be denied.

II. APPELLANT'S ARGUMENT REGARDING RULE 82, SCRPC IS NOT PROPERLY BEFORE THIS COURT AND MUST FAIL AS A MATTER OF LAW.

Appellant's Brief contains a new argument regarding Rule 82, SCRPC that was not presented at the Trial Court level. In his Brief, Appellant asserts for the first time the position that rather than granting Respondent's Motion, the Trial Court should have *sua sponte* transferred the case to the South Carolina Supreme Court pursuant to Rule 82(b) SCRPC for a determination as to whether the non-party who prepared the Deed committed the UPL. This new argument is not properly before this Court for two reasons. First, at no point was Appellant's argument regarding Rule 82, SCRPC ever presented to the Trial Court. It is well established that an Appellant cannot raise a new issue for the first time on appeal. *Wilder Corp.* at 76, 497 S.E.2d at 733 (it is axiomatic 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). Thus, this new argument is not properly before the Court and must be disregarded.

Second, even if Appellant’s new argument is properly before this Court, there is no need for the South Carolina Supreme Court to make a determination regarding the existence of the UPL in this matter because the Trial Court’s ruling already assumes Appellant’s allegations of the UPL are valid. The Trial Court’s Order specifically states that its decision to dismiss Appellant’s Complaint for failure to establish a justiciable controversy is based on the assumption that UPL occurred when the Deed was prepared. *See Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987) (in evaluating a motion to dismiss, the court must view the complaint in the light most favorable to the plaintiff, with every doubt resolved in the plaintiff’s favor). Thus, any determination by the South Carolina Supreme Court supporting or contradicting that assumption would have no impact on the Trial Court’s ruling because Appellant did not allege any other theory of recovery. There is no dispute that the Deed was properly executed and recorded. Appellant’s only argument to invalidate the Deed was the UPL.

CONCLUSION

Accordingly, for the reasons outlined above, the Trial Court properly dismissed Appellant’s Complaint for failure to state facts sufficient to establish a justiciable controversy and Appellant’s appeal should be denied.

Respectfully submitted,

/s/ Lauren P. Williams _____

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