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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT, YORK COUNTY

Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2024-0002719

Stephanie Kozak
(Personal Representative for the Estate of John Witkowski),

Appellant,

v.

Chris Cutway,

Respondent.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Forthcoming, as applicable.

RULES

OTHER AUTHORITIES

Forthcoming, as applicable.

STATEMENT OF ISSUES ON APPEAL

Did the Court of Common Pleas for York County, the Sixteenth Judicial Circuit ("trial court"), err in (i) entering an *Order and Final Judgment* against the Appellant, Stephanie Kozak (Personal Representative for the Estate of John Witkowski) ("Appellant"), on November 15, 2022, and/or (ii) denying Appellant's *Motion for Relief from Judgment* on January 26, 2024, where (i) Appellant had executed and filed an *Application for Settlement of the Estate of John Witkowski* with the York County Probate Court on November 7, 2022, requesting that she be discharged as the Personal Representative of said Estate and the appointment of the Personal Representative be terminated and (ii) the York County Probate Court had issued an Order closing the Estate of John Witkowski and issued a *Termination of Appointment*, by which the appointment of Stephanie Kozak as the Personal Representative of Estate of John Witkowski was duly terminated on December 7, 2022?

STATEMENT OF THE CASE

On November 19, 2021, Appellant was appointed as the Personal Representative of the Estate of John Witkowski in the York County Probate Court.

On April 20, 2022, Appellant, in the capacity as "Personal Representative of the Estate of John Witkowski," filed a lawsuit against the Respondent, Chris Cutway ("Respondent"), asserting one (1) cause of action for Claim and Delivery. Respondent timely filed and served his Answer and Counterclaims. However, Appellant failed to respond to Respondent's Counterclaims in a timely manner.

On June 23, 2022, the trial court issued an Entry/Order of Default against Appellant. After reviewing and hearing on Appellant's *Motion to Set Aside Entry of Default* and

Respondent's *Motion for Judgment by Default and Hearing for Attorney's Fees*, the trial court issued a Form 4 Order, by which "[Appellant's] Motion to Set Aside Default is DENIED" and "[Respondent's] Motion for Judgment by Default and Hearing for Attorney's Fees is GRANTED."

On November 7, 2022, Appellant executed and filed an *Application for Settlement of the Estate of John Witkowski* with the York County Probate Court and requested that she be discharged as the Personal Representative of said Estate and the appointment of the Personal Representative be terminated.

On November 15, 2022, the trial court issued an *Order and Final Judgment* in the total amount of $13,925.96 in favor of Respondent and against Appellant.

On December 7, 2022, the York County Probate Court issued an *Order* closing the Estate of John Witkowski and a *Termination of Appointment*, by which the appointment of Appellant as the Personal Representative of Estate of John Witkowski was duly terminated.

On October 6, 2023—almost eleven (11) months after the trial court's issuance of the *Order and Final Judgment* in this matter—Appellant filed the *Motion for Relief from Judgment*, which the trial court denied on January 26, 2024.

On February 26, 2024, Appellant filed a *Notice of Appeal* with this Court.

STANDARD OF REVIEW

The decision to grant or deny a motion made pursuant to Rule 60(b) is within the sound discretion of the trial judge. *Rouvet v. Rouvet*, 388 S.C. 301, 308, 696 S.E.2d 204, 207 (Ct. App. 2010) (citing *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502 (2006)).

The appellate standard of review is limited to determining whether there was an abuse of discretion. *Id.* at 551, 633 S.E.2d at 502-03. An abuse of discretion occurs when the order of the court is controlled by an error of law or where the order is based on factual findings that are without evidentiary support. *Rouvet, supra*, 388 S.C. at 308, 696 S.E.2d at 207 (citing *Gainey v. Gainey*, 382 S.C. 414, 423, 675 S.E.2d 792, 797 (Ct. App. 2009)).

ARGUMENTS

I. THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANT'S CLAIM OR DENYING HER RULE 60 MOTION BECAUSE SHE HAD ABANDONED HER CLAIM AND HAD NO STANDING TO SEEK RELIEF.

Rule 17(a), SCRCP, provides, in pertinent part, that:

> Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought[.]

In examining and applying this Rule, this Court has consistently explained that "[a] plaintiff must have standing to institute an action." *See, e.g., Sloan v. Greenville Cnty.*, 356 S.C. 531, 547, 590 S.E.2d 338, 347 (Ct. App. 2003). This Court has further explained that "[s]tanding refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." *See, e.g., Bank of Am., N.A. v. Draper*, 405 S.C. 214, 219, 746 S.E.2d 478, 480 (Ct. App. 2013).

To have standing, this Court has emphasized, "one must be a real party in interest. A real party in interest is one who has a real, material, or substantial interest in the subject matter

of the action, as opposed to one who has only a nominal or technical interest in the action." *See Sloan*, *supra*, 356 S.C. at 547, 590 S.E.2d at 347.

"[T]he burden of compliance with Rule 17(a) and its real party in interest requirement falls to the plaintiff." *Fisher ex rel. Estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 241, 811 S.E.2d 739, 742 (2018). "Under ordinary circumstances, the Probate Court grants the personal representative the exclusive authority to bring civil actions . . . om behalf of an estate." *Id.* at 238, 811 S.E.2d at 741.

Here, at the outset, it should be noted that Appellant—acting in the capacity as "Personal Representative for the Estate of John Witkowski"—was the sole plaintiff in the original action brought to the lower court. As the sole plaintiff, Appellant voluntarily sought to have her representative capacity eliminated when filing an *Application for Settlement of the Estate of John Witkowski* with the York County Probate Court on November 7, 2022. In so doing, she expressly and specifically requested that she be discharged as the Personal Representative of said Estate and her status as the Personal Representative be terminated. By doing so, Appellant essentially abandoned her status as a real party in interest, and consequently, any and all claims she had asserted or could assert in this case. As a result, the trial court could not recognize Appellant as a real party in interest, to whom any relief could be granted. Thus, the trial court did not err in dismissing all of Appellant's claims and issuing an *Order and Final Judgment* on November 15, 2022.

Further, it should be noted that the York County Probate Court's record clearly shows that the appointment of Appellant as the Personal Representative of Estate of John Witkowski was duly terminated as of December 7, 2022. Thus, when her *Motion for Relief from Judgment* under Rule 60, SCRCP, was filed on October 6, 2023, Appellant was no longer the Personal

Representative of the Estate of John Witkowski. Accordingly, she did not have standing to seek any relief on behalf of the Estate of John Witkowski at that time. Consequently, the trial court could not find any real party in interest, to whom any relief could be granted. Thus, the trial court did not err in denying Appellant's *Motion for Relief from Judgment* on January 26, 2024.

To be sure, when requesting that her appointment as the Personal Representative of the Estate of John Witkowski be terminated on November 7, 2022, Appellant effectively abandoned all of her claims against Respondent in this action. Moreover, Appellant formally lost her legal status as the Personal Representative of the Estate of John Witkowski on December 7, 2022, which effectively deprived her of any lawful standing to seek any relief under Rule 60, SCRCP. Of course, no relief can now be granted to Appellant because she no longer is a real party in interest under Rule 17(a), SCRCP.

Because the trial did not err in dismissing Appellant's claim(s) or denying her *Motion for Relief from Judgment*, Appellant's appeal is without merit. Therefore, this Court should affirm the trial court's rulings and decisions *in toto*.

II. THE DOCTRINE OF JUDICIAL ESTOPPEL PRECLUDES ANY RELIEF AVAILABLE TO APPELLANT.

"Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489, S.E.2d 472, 477 (1997). "The purpose of the doctrine is to ensure the integrity of the judicial process[.]" *Corthran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004).

The elements necessary for the application of the doctrine of judicial estoppel are:

> (1) two inconsistent positions taken by the same party or parties in privity with one another;

(2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other;

(3) the party taking the position must have been successful in maintaining that position and have received some benefit;

(4) the inconsistency must be part of an intentional effort to mislead the court; and

(5) the two positions must be totally inconsistent.

Id. at 215-16, 592 S.E.2d at 532.

"[T]he term 'privity,' when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right." *Carrigg v. Cannon*, 347 S.C. 75, 80, 552 S.E.2d 767, 770 (Ct. App. 2001) (alteration in original).

Here, all of these elements are plainly satisfied. First, as described above, on November 7, 2022, Appellant requested to the York County Probate Court that she be discharged as the Personal Representative of the Estate of John Witkowski and the appointment of the Personal Representative be terminated. Subsequently, on October 6, 2023, she filed her *Motion for Relief from Judgment*, requesting that the trial grant her relief in the capacity "as the Personal Representative of the Estate of John Witkowski." These two positions, taken by the same party, are clearly inconsistent and cannot be reconciled.

Second, these two inconsistent positions were taken in this action and the probate proceedings pending in the York County Probate Court, with which Respondent had filed a *Statement of Creditor's Claim* against the Estate of John Witkowski and in connection with Respondent's Counterclaims in this action while Appellant was still acting as said Estate's

Personal Representative. Clearly, this action and the probate proceedings are closely related to each other and involve the same parties.

Third, Appellant, who takes the inconsistent positions at issue, has been successful in maintaining one of the two inconsistent positions and has received substantial benefit in that she succeeded in disallowing Respondent's claims for payment during the probate proceedings pending in the York County Probate Court. Indeed, these claims were the very subject matter of Respondent's Counterclaims in this action, and Appellant indisputably received substantial benefits as the Personal Representative of the Estate by disallowing Respondent's claims.

Fourth, Appellant's inconsistency cannot possibly be anything other than a product of her intentional effort to mislead this Court and/or the York County Probate Court, particularly given that she sought and procured the termination of her status as the Personal Representative in the York County Probate Court after disallowing Respondent's claim, liquidating the assets of the Estate of John Witkowski, and taking the proceeds therefrom. She, then, filed a *Motion for Relief from Judgment* seeking to invoke Rule 60, SCRCP, requesting that relief be granted to her "as the Personal Representative of the Estate of John Witkowski, in an apparent effort to "have her cake and eat it, too."

Finally, the fifth element is easily satisfied because Appellant's two conflicting positions—*i.e.*, (1) requesting that the York County Probate Court discharge her as the Personal Representative; and (2) requesting that relief be granted to her "as the Personal Representative"—are totally inconsistent and irreconcilable.

As shown above, all of the elements required for the application of the doctrine of judicial estoppel are plainly satisfied. Accordingly, no relief was/is available to Appellant under the doctrine of judicial estoppel.

Accordingly, the trial court did not err in declining to grant any relief to Appellant. Therefore, this Court should affirm the trial court's rulings and decisions *in toto*.

III. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S RULE 60 MOTION BECAUSE IT WAS NOT MADE WITHIN A REASONABLE TIME.

Appellant's *Motion for Relief from Judgment* purported to rely on Rule 60(b)(4) and Rule 60(b)(5), SCRCP.

Rule 60(b), SCRCP, provides, in pertinent part, that "[t]he motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken."

Because Appellant's *Motion for Relief from Judgment* did not seek to invoke subsections (1), (2), or (3) of Rule 60, SCRCP, the one-year period within which a Rule 60 motion must be made did not apply. It follows, then, said *Motion for Relief from Judgment* must have been made "within a reasonable time."

As explained above, Appellant's *Motion for Relief from Judgment* at issue was made on October 6, 2023—almost eleven (11) months after the trial court's issuance of the *Order and Final Judgment* being challenged. At the hearing on Appellant's *Motion for Relief from Judgment*, Respondent contended that it was not made within a reasonable time. More specifically, Respondent argued that the period of eleven (11) months could not be deemed an insubstantial period of time, and thus, such a delayed making of said motion could not be justified or reasonably explained. Upon careful review and consideration, the trial court declined to grant relief to Appellant under Rule 60, SCRCP.

Clearly, the trial court did not err in denying Appellant's *Motion for Relief from Judgment* at issue. Therefore, this Court should affirm the trial court's rulings and decisions.

IV. RULE 21, SCRCP, IS NEITHER APPLICABLE NOR CONSEQUENTIAL.

Nothing in the records shows that Appellant has ever pursued an Order of the trial court to cause any of the Parties to be dropped or added under Rule 21, SCRCP. Clearly, Appellant has never filed a motion under Rule 21, SCRCP. Accordingly, the trial court was never required to apply Rule 21, SCRCP, to this matter. Thus, at this juncture for this Court's appellate review of the trial court's rulings, Appellant may not invoke Rule 21, SCRCP, for the first time.

Even assuming *arguendo* that Rule 21, SCRCP, is applicable here—which Respondent contends it is not—it is still of no consequence and of no help to Appellant under the doctrine of judicial estoppel, which was more fully discussed above.

Therefore, this Court should disregard Appellant's arguments regarding Rule 21, SCRCP, altogether, and affirm the trial court's rulings and decisions *in toto*.

CONCLUSION

Given the foregoing, Respondent respectfully requests that this Court affirm and uphold all of the trial court's rulings, decisions, Orders, and Final Judgment in this matter *in toto*.

Respectfully submitted,

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August 21, 2024

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CERTIFICATE OF SERVICE

The undersigned certifies that on August 21, 2024, a copy of the foregoing ***Respondent's Initial Brief*** was filed with this Court and served upon all counsel of record in this matter, including the following, pursuant to the relevant Order of the Supreme Court[1]:

John Martin Foster, Esq. (S.C. Bar #2086)
Email: jmfoster340@gmail.com
Attorney for Appellant

[1] Order, *RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022)*, Appellate Case No. 2020-000447, May 6, 2022.

This 21st day of August, 2024.

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