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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.

APPELLANT MARK BOYLES' REPLY BRIEF

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I. THE STATEMENTS OF THE APPELLANT IN HIS INTIAL STATEMENT OF THE CASE INCLUDE STATEMENTS WHICH ARE PROPERLY INCLUDED PURSUANT TO RULE 209, SCACR AND RULE 210(c) SCACR.

At the end of the Respondent's Statement of the Case, it objects to certain statements contained in the Appellant's Statement of the Case. The Appellant is not attempting to argue facts, but is trying to identify factual and legal issues that will arise in the Declaratory Judgement action.

1. The Respondent has objected to the Appellant's statement "The Appellant would testify that he was unaware that he had an equitable or legal interest in this real property." This statement is not offered as evidence of a fact. It is an argument that this issue would arise in full litigation of the case. The Appellant has not had an opportunity to complete discovery, take depositions or otherwise actually obtain evidence.

2. The Appellant also made the statement that "It is undisputed that no licensed attorney was involved in that real estate transaction." This allegation of fact was properly before the Trial Court because this allegation is set forth in paragraph 14 of the Appellant's Complaint. Pleading may be included in the Record on Appeal pursuant to Rule 210(c), SCACR. The Trial Court mentioned this fact in its order.

3. The Appellant stated that "If that deed were valid, the Appellant Boyles obtained a vested remainder interest to which the judgement lien could attach." This is a statement of law, not an allegation of fact. This legal statement is actually the legal position taken by the Respondent in this case.

4. The Appellant also argued that "If that deed were invalid, the Appellant Boyles would become fee simple owner of the property only after his mother died intestate on December 5, 2021." Again, this is a statement of a legal conclusion. While the Respondent's legal position is based on statement 3, above, the Appellant's legal position is based on the statement set forth in

this sentence from the Appellant's Statement of the Case. These legal issues are certainly relevant to the ultimate disposition of the subject Declaratory Judgement.

5. In the Appellant's Statement of the Case, the Appellant made a statement of applicable law "A judgement prior to bankruptcy would not attach to property obtained by the debtor after discharge of the bankruptcy." 11 U.S.C. Ann. Section 524(a)(3). This legal issue applies to the allegation of the Appellant set forth in paragraph 11 of his Complaint. If the deed, with retention of a life estate, is found to be invalid, then the Appellant had no interest in the property prior to his discharge in bankruptcy and the Respondent's judgement and judicial lien would never have attached to the Appellant's property after bankruptcy.

6. In the Appellant's Statement of the Case, the Appellant merely suggested a factual allegatoin that the Appellant did not have an opportunity to prove: "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 deed from the Appellant's mother in 2016 is alleged in paragraph 12 of the Appellant's Complaint. Obviously, if the Appellant were allowed to go forward with this Declaratory Judgement, the issue of his mother's death in 2021 would be an important fact concerning the grantor's life estate and the Appellant's alleged remainder interest. These issues are raised in this Declaratory Judgement and are properly before the Court.

7. Lastly, the Appellant offered an issue in this controversy, and not an allegation of fact. He stated "The Appellant Boyles would also testify that he did not receive a copy of the deed to the real property until the death of his mother." The issue of recording the deed in the record office and non-delivery to the Appellant would be an issue if the Appellant were allowed to fully litigate this case. That issue is therefore relevant in this appeal.

II. THE APPELLANT AGREES WITH THE TRIAL COURT THAT THERE IS NO PRIVATE CAUSE OF ACTION FOR THE UNAUTHORIZED PRACTICE OF LAW, BUT THE TRIAL COURT ERRED IN EFFECTIVELY HOLDING THAT ALL DEEDS CREATED THROUGHT THE UNAUTHORIZED PRACTICE OF LAW ARE VALID UNDER SOUTH CAROLINA LAW.

The Appellant has never alleged or accused the Respondent of engaging in the unauthorized practice of law. In his Complaint the Plaintiff alleges that that a deed unto himself for some timber land in Jasper County, South Carolina was drafted, witnessed, notarized and recorded by a third party who is not licensed to practice law in South Carolina. That non-lawyer third party is not a party to this Declaratory Judgement and appeal. The Appellant has no objection to that portion of the Trial Court Order which ruled that there is no private cause of action for the unauthorized practice of law. Whether or not a defendant itself was engaged in the unauthorized practice of law is a matter wholly within the original jurisdiction of the South Carolina Supreme Court.

In the second section of the Respondent's Brief, four cases are cited regarding what constitutes the unauthorized practice of law. The Respondent argues that since none of these cases declared the work product of a deed or mortgage to be null and void, then all real estate documents drafted by a non-lawyer are valid. In those four cases, the Court did not declare the work product, mortgage or deed to be null and void. The Respondent argues because those cases did not have a holding regarding the validity of a real estate deed it was, *ipso jure*, the law of South Carolina that deeds prepared by non-lawyers are valid. The Appellant disagrees.

In the Helton Case, the lawyer was operating a residential real estate closing practice in which he allowed non-lawyer staff to create the documents and actually conduct the real estate closing without any supervision or participation by a lawyer. The Court suspended the lawyer indefinitely. The question was not presented and the Court did not hold that all of the deeds, mortgages or other legal documents were valid. In the matter of Will Roger Helton, 372 S.C. 245,

642 S.E.2d. 573 (2007). The Respondent also cited the Deddish case which involved lawyer partnering and sharing fees with a non-lawyer in a business that conducted estate planning and creation of trusts. The Court suspended that lawyer from the practice of law for nine months. In re Michael R. Deddish, 347 S.C. 614, 557 S.E.2d. 655. Again, the question of validity of the legal documents created was not addressed or mentioned in the holding of the Court. In a third case cited by Respondent, the State of South Carolina brought a Declaratory Judgement against a title insurance company which conducted residential real estate closings without the presence or supervision of a lawyer. State v. Buyers Service Company, 292 S.C. 426, 357 S.E.2d. 15 (1987). The Circuit Court ruled and the Supreme Court affirmed an injunction against the title company for the preparation of deeds, mortgages, notes and other legal instruments related to mortgage loans and transfers of real property. However, the issue of whether or not the prior closings and real estate documents were valid or void was not addressed by the Court and was not part of the holding in that case. The Respondent also cited a case in the Supreme Court against a person who continued to practice law after being disbarred. In the matter of William Randolph Easler, 275 S.C. 400, 272 S.E.2d. 32 (1980). The Supreme Court sentenced the former lawyer to thirty days in the Richland County jail. However, the validity of deeds and mortgages was not presented to the Court and the decision made no holding on the validity of real estate documents created in the unauthorized practice of law.

The Respondent goes further to suggest that South Carolina Courts have held that legal documents created by the non-lawyer remain valid. In the first case cited for that proposition, the U.S. District Court for the District of South Carolina held that the preparation of mortgage instruments by non-lawyers is prohibited as the unauthorized practice of law in South Carolina. Brown v. Citifinancial, 414 F. Supp. 2d. 561 (2006). That case held that the portion of the documents prepared by the defendant involving arbitration were valid. That Court did not hold

that all documents created in the unauthorized practice of law are valid. The Respondent then cites a case involving an insurance adjuster negotiating settlements for the insured plaintiffs. Linder v. Insurance Claims Consultants Inc., 348 S.C. 477, 560 S.E.2d. 612 (2002). The Supreme Court, in its original jurisdiction, found that some of the activities of the adjusters were valid and other activities, such as negotiating settlements, constituted the practice of law. The Court held that the defendant claims company was entitled to be paid for normal adjusting activities but was not eligible to receive compensation for the unauthorized practice of law. Again, there was no holding in the Linder case that the improper work by the non-lawyer was valid. The issue was not part of that case.

The Respondent also cites a case where surviving relatives of a testator challenged the will because it was prepared by a non-lawyer neighbor of the testator. Franklin v. Chavis, 371 S.C. 527, 640 S.E.2d. 873 (2007). While the Court found that the neighbor engaged in the unauthorized practice of law, the Court decided that the will should not be invalidated. The Court did not invalidate the will because the testator should not be penalized by having his will declared void. That case falls far short holding that all deeds created by non-lawyers are valid.

The Respondent cites some cases concerning litigation conducted by a non-lawyer. In the Brown v. Coe case, a non-lawyer daughter filed an appeal from Probate Court with the Supreme Court. The court held that while the representation by a non-lawyer was improper, it was essentially an "amendable defect." Brown v. Coe, 365 S.C. 137, 616 S.E.2d. 705 (2005). In that case, the Motion to Dismiss the appeal was not granted and the Supreme Court allowed the estate a reasonable amount of time to retain legal counsel to continue with the appeal. In the Roof Doctor case, a roofing contractor sued a corporation for non-payment for roofing work. The corporation was represented by an employee in Magistrate Court. The Roof Doctor, Inc. v. Birchwood Holdings Ltd., 366 S.C. 637, 622 S.E.2d. 746 (2005). The court held that the unauthorized practice

of law by the corporation was a "collateral matter" and refused to make a finding concerning the corporation employee's unauthorized practice of law. Again, there was no holding that all legal work conducted by a non-lawyer is valid. In another case cited by the Respondent, the court ruled that a corporation may be represented by an employee in Magistrate Court. Renaissance Enterprises, Inc. v. Summit Teleservices, Inc., 334 S.C. 649, 515 S.E.2d. 257 (1999). That case does not hold that all litigation or other legal work conducted by a non-lawyer would be held valid by South Carolina Courts. Finally, the Respondent also cited the Blue Star case, a non-published opinion, which states that drafting and filing a Summons and Complaint by a corporation's president is not a nullity, but rather it is an "amendable defect." Blue Star Rental & Sales, Inc. v. Ridge Environmental, LLC, No. 2014-MO-048, 214 WL 6977616 (2014). Again, that decision fell far short of ruling that all legal documents created by a non-lawyer are valid.

There are cases in which the Supreme Court refused to uphold real estate documents created in the unauthorized practice of law. In a leading case on that subject, a judgement creditor asserted priority over a refinanced mortgage. When the mortgage company commenced foreclosure it sought to take priority over the judgement creditor lien under a theory of equitable subrogation. The Supreme Court held that the activities of the mortgage company constituted the unauthorized practice of law and, as such, the refinanced mortgage would not be entitled to equitable subrogation and priority over an earlier filed judgement lien. Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d. 532 (2011). In that case, the Supreme Court stated very clearly that the unauthorized practice of law is prejudicial not only to the parties involved but also to public at large. That case cited an earlier case between a widow and a bank that had obtained a mortgage from the deceased husband and then wished to foreclose. Wachovia Bank N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d. 244 (2010). In this case, the Court of Appeals held that the bank

could not profit or benefit from its own, improper and unauthorized practice of law. If the Master in Equity and the Court of Appeals can make this ruling, the Trial Court in this case also has the authority to decide these issues. There is another interesting case from the U.S. District Court for the District of South Carolina, also cited by the Respondent. In that case, the court held that the borrower had no private cause of action against the mortgage lender because the mortgage transaction did involve lawyer participation or supervision. Judge J. Michelle Childs, U.S. D.C., in dicta made an interesting observation: "However, while UPL acts as a bar (or defense) to foreclosure it does not constitute a private cause of action from which relief can be granted." Hosey v. Quicken Loans Inc., #1:17-cv-02060 JMC, 2018 WL32161.

The Appellant is bringing this Declaratory Judgement as a defense to the Respondents enforcement of a judicial lien. The Appellant must have some remedy in some court to prevent the unjust enrichment of the Respondent when it relies on the unlawful acts of a third party.

III. IN THIS DECLARATORY JUDGEMENT ACTION, THE APPELANT SEEKS TO HAVE THE COURT DETERMINE THE STATUS OF THE RESPONDENT'S JUDGEMENT LEIN AND THIS CREATES A "JUSTICIABLE CONTROVERCY."

In South Carolina, the Trial Court has jurisdiction to declare the rights, status or other legal relations between the parties "whether or not further relief is or could be claimed." S.C. Code Section 15-53-20 (1976). The Appellant seeks to have the Trial Court determine the validity or enforceability of the Respondent's judicial lien on some timber land in Jasper County. As argued above, the Appellant is not suing the Respondent for the unauthorized practice of law. The possibility that the Appellant could initiate an action in the original jurisdiction in the Supreme Court, against the non-lawyer who drafted, witnessed, notarized and filed the deed in question does not alter the proper adjudication of this Declaratory Judgement in the Court of Common Pleas.

South Carolina courts have long held that a demurrer (or a Rule 12(b)(6), SCRCP motion) is not proper if there is a justiciable controversy between the parties. "We are of the opinion that the Circuit Court was in error in sustaining the demurrer and ordering the Complaint to be dismissed. It is well settled that where the Complaint seeking a Declaratory Judgement sets forth a justiciable controversy, it is not subject to demurrer on the grounds that it fails to state the cause of action." Dantzler v. Callison, 227 S.C. 317, 88 S.E.2d. 64 (1955). This case was later cited with approval in the more recent case of Brown v. Wingard, 285 S.C. 478, 330 S.E.2d. 301 (1985). A justiciable controversy is a case where the parties have real and substantial conflicting legal positions and not a mere dispute or difference of a contingent, hypothetical or abstract character. Guimarin v. Georgetown Textile, 249 S.C. 561, 155 S.E.2d. 618 (1967). There is a justiciable controversy between the Appellant and the Respondent and the dismissal of the case by the Trial Court should be overruled and this case remanded for full adjudication of the dispute between the parties.

IV. AFTER FURTHER REVIEW OF APPLICABLE CASE LAW AND THE RECORD IN THIS MATTER, THE APPELLANT HEREBY WITHDRAWS THAT PORTION OF HIS APPEAL BASED ON RULE 82, SCRCP.

CONCLUSION

The South Carolina Supreme Court has held in several cases that the proper remedy for the unauthorized practice of law may be to fashion a different resolution. However, the Court has on occasion refused to enforce real estate transaction documents created by the unauthorized practice of law See Matrix, *supra.* There is a justiciable controversy between the Appellant and the Respondent and that controversy does not include an accusation that the Respondent engaged in the unauthorized practice of law. This matter should be remanded to the Trial Court for full

litigation, discovery, collection of evidence and a full hearing on the merits of the case.

Charleston, South Carolina
November 5, 2024

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Appellant Mark Boyles' Reply Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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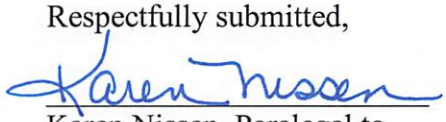
PROOF OF SERVICE

I certify that I have served the Appellant Mark Boyles' Reply Brief on NCP Bayou, LLC by email on November 5, 2024, addressed to its attorneys of record, Lauren P. Williams (lauren@russellpattersonlaw.com) and Russell P. Patterson (russell@russellpattersonlaw.com).

November 5, 2024

Respectfully submitted,



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