

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY
ALISON RENEE LEE, CIRCUIT COURT JUDGE
CASE NO. 2015-001556

Jimmy Boykin, Sammy Boykin a/k/a Sandy H. Boykin, Sr., and
Kenny Boykin, Plaintiffs

v.

Zady R. Burton, Individually and as Personal Representative of
the Estate of Helen L. Burton, and Sandy Boykin a/k/a Sandy H. Boykin, Jr., Defendants,

Of Whom Zady R. Burton, Individually and as Personal Representative of the Estate of Helen L.
Burton is the Appellant and Jimmy Boykin is the Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- A. Did the Trial Court err when it granted Appellee's Motion to Enforce the Mediation and denied Appellant's Rule 59(e) Motion?
- B. Did the Trial Court err when it considered this case settled?
- C. Did the Trial Court err when it denied Appellant's Motion to Compel?

STATEMENT OF THE CASE¹

This case arose out of the probate of the Estate of Helen L. Burton ("Decedent"), who died testate in 2006. Her Last Will and Testament ("Decedent's Will")² named Appellant as her Personal Representative and devised all of her property to a testamentary trust ("Trust"). *See* ROA _____. Item II of Decedent's Will also named Appellant as Trustee and Appellant's brother Sammy, his three children Kenny, Sandy, and Appellee Jimmy, and Appellant again as the Trust's lifetime beneficiaries. Item II further provided that title to Decedent's property would vest in Appellant, his heirs, or assigns after the death of the other lifetime beneficiaries. Due, among other things, to the Decedent's Estate's lack of cash or other liquid assets needed to probate the Estate, Appellant issued a letter dated August 16, 2011,³ terminating the Trust as of September 30, 2011, pursuant to S.C. Code 62-7-414(a) and (c) and offering alternative arrangements to Appellee and the other family members. On September 28, 2011, Appellee and his father and

¹ This Statement of the Case does not address Appellant's filing of a Magistrate's Court proceeding against Appellee related to mortgage loan payments or related matters inasmuch as Appellant believes the details of that proceeding do not affect the merits of Appellant's arguments herein. For the same reason, this Statement of the Case does not address certain other issues relevant to the Court of Common Pleas case.

² *See* Exhibit A, attached, for Decedent's Will. *See* Items V and II of Decedent's Will for the provisions discussed herein.

³ *See* Exhibit B, attached.

brother Kenny petitioned the Probate Court i) challenging termination of the Trust, ii) requesting removal of Appellant as Trustee and Personal Representative and seeking either recovery of mortgage loan and other payments made by them or title to Decedent's residence. Appellant's responsive pleading contained denials, affirmative defenses, and counterclaims. After Appellant filed a motion for summary judgment, the Kershaw County Probate Court issued an Order dated June 25, 2012, upholding termination of the Trust. Appellee and his father and brother Kenny then appealed the Probate Court's Order, but, in a Form 4 Order filed May 20, 2013, the Court of Common Pleas denied the appeal and ordered the Decedent's Estate closed under Probate Court supervision. Then, on May 31, 2013, Appellee, his father Sammy, and his brother Kenny filed an Amended Petition, seeking, among other things, a lien on Decedent's residence and a private sale of Decedent's residence to them. *See* ROA _____. Appellant filed a responsive pleading on June 28, 2013. *See* ROA _____. Then, on July 2, 2013, Appellee filed for removal of this action to the Court of Common Pleas, which motion was granted by the Kershaw County Probate Court by order dated August 8, 2013. *See* ROA _____ and _____.

Against this background, this parties eventually agreed to a mediation ("Mediation"), which took place on May 2, 2014. At its conclusion, the mediator prepared a mediation memorandum ("Mediation Memorandum") executed by the parties and also a Proof of ADR,⁴ both of which were filed on May 6, 2014. *See* ROA _____ and _____. On October 30, 2014, Appellee filed his Motion to Enforce Mediation Agreement ("Appellee's Motion") and, on March 31,

⁴ *See* Exhibit C, attached for both documents.

2015, Appellee filed a Memorandum in Support of Motion.⁵ See ROA ___ and ___. On March 27, Appellant filed Respondent Burton's Brief in Response to Petitioners' Motion. ROA ___.⁶

On January 14, 2015, Appellant's counsel sent discovery requests to Appellee's counsel.⁷ When no response was received, Appellant's counsel sent a letter dated March 5, 2015,⁸ to no avail. Consequently, Appellant filed a Motion to Compel ("Appellant's Motion") on March 13, 2015.⁹ See ROA ___. A hearing on both motions was held before Judge Alison Renee Lee on April 6, 2015. Thereafter, Judge Lee issued her Order dated May 14, 2015,¹⁰ granting Appellee's Motion and denying Appellant's Motion. See ROA ___. On May 29, 2015, Appellant timely filed a motion pursuant to Rule 59(e), SCRCR, denied by Judge Lee without a hearing by Form 4 Order dated June 23, 2015. See ROA ___ and ___. Appellant then filed a Notice of Appeal dated July 17, 2015, and an Amended Notice of Appeal dated July 27, 2015.¹¹ See ROA ___ and ___.

ARGUMENTS

1. THE COURT OF COMMON PLEAS ERRED WHEN IT GRANTED APPELLEE'S MOTION TO ENFORCE THE MEDIATION AGREEMENT BECAUSE

⁵ See Exhibit D, attached, for both documents.

⁶ See Exhibit E, attached. *N.B.*: Exhibit A to Respondent Burton's Brief is a limited power of attorney not relevant to this appeal. The other Exhibits to that Brief are already included in other Exhibits attached hereto.

⁷ See Exhibit A to Appellant's Motion to Compel, attached hereto as Exhibit F.

⁸ See Exhibit B to Appellant's Motion to Compel, attached hereto as Exhibit F.

⁹ See Exhibit F, attached.

¹⁰ See Exhibit G, attached.

¹¹ The Amended Notice of Appeal was filed in order to clarify Appellee's counsel's representation of Appellee and Appellee's identity as the sole Appellant in this matter.

1.1. IT ORDERED TRANSACTIONS NOT SET FORTH IN THE MEDIATION MEMORANDUM. According to Rule 6(f), SCADR Rules, in a Circuit Court mediation,

Upon reaching an agreement, the parties shall, before the adjournment of the mediation, reduce the agreement to writing and sign along with their attorneys. If the parties envision a more formal agreement, the mediator shall assign one of the parties' attorneys to prepare the agreement. A consent judgment or voluntary dismissal shall be filed with the court by such persons as may be designated by the mediator.

The Mediation Memorandum provides for a settlement payment of \$12,000.00 by Appellee to Appellant, \$8,000.00 upon execution of appropriate releases and \$4,000.00 payable in installments over a five year period with no interest. The Mediation Memorandum also calls for execution of a family settlement agreement, the mutual release of all parties, and co-operation in the settlement of the Burton Estate. However, the Mediation Memorandum was not signed by either attorney, no formal settlement agreement was executed, no releases were signed, no consent judgment or voluntary dismissal was filed, and the Estate remains open.

Notwithstanding, Appellee's Motion seeks a private sale of Decedent's residence and asserts that the Mediation "[resulted in] the Proof of ADR filed May 6, 2014, ... specifying the terms of the sale, which would be accomplished by Defendant executing a Deed of Distribution" ¹² See ROA _____. Further, opposing counsel's oral argument at

¹²See Exhibit D (Appellee's Motion).

the April 6 motion hearing echoes this position,¹³ as does Appellee's Memorandum in Support of Motion.¹⁴ See ROA ___ and ___. However, none of Appellee's documents or arguments addresses the simple fact that neither the Proof of ADR nor the Mediation Memorandum makes any provision or reference to any real estate transaction, real estate closing, deed of distribution, or mortgage loan payoff.

Based upon the facts, the documents, and applicable Court rules, Appellant respectfully submits that there is no proper basis for Judge Lee's Order.

1.2. IT CONSIDERED ARGUMENTS REFERRING TO THE CONTENTS OF THE MEDIATION THAT WERE NOT IN THE MEDIATION MEMORANDUM. In both Appellee's Motion and argument at the motion hearing, Appellee expressed or implied the existence of communications alleged to be part of the Mediation that are not in the Proof of ADR or the Mediation Memorandum. However, according to the Court-Annexed Alternative Dispute Resolution Rules ("SCADR Rules"), the parties and the mediator have a duty to respect the confidentiality of communications during a mediation settlement conference. See Rules 6(e), 7(c), and 8, SCADR Rules. Indeed,

... [T]he parties, their attorneys, and any other person present shall maintain the confidentiality of of the mediation and shall not rely on, or

¹³ See, e.g., Transcript at 4:14 - 4:16: "THE MEDIATION ... RESULTED IN AN AGREEMENT FOR JIMMY TO BUY THE HOME." See also Transcript at 5:9 - 5:14 (ROA ___ - ___): "IN MY MEMORANDUM, I LISTED SEVEN THINGS THAT COULD OCCUR SIMULTANEOUSLY, THAT WOULD RESULT IN US GETTING GOOD TITLE AND ALSO RESULT IN A DISMISSAL OF THE ACTION AND WITH THE RELEASE OF THE PARTIES, ALL SIMULTANEOUSLY. SO THAT'S THE BASIS OF MY MOTION, YOUR HONOR."

¹⁴ See Exhibit D (Appellee's Memorandum) at 2-3 listing the "SEVEN THINGS" referred to in the preceding footnote.

introduce as evidence in any ... judicial ... proceeding, any oral or written communications having occurred in a mediation proceeding

Rule 8(a), SCADR Rules.

Judge Lee's Order specifies matters that are simply not part of the Proof of ADR or the Mediation Memorandum and which therefore implicate the SCADR Rules cited above.

While limited exceptions to confidentiality exist, neither Appellee's Motion nor oral argument at a motion hearing is one of them. *See* Rule 8(b), SCADR Rules. Therefore, Appellant again respectfully submits that there is no proper basis for Judge Lee's Order.

2. THE COURT ERRED WHEN IT CONSIDERED THIS CASE SETTLED. The definition of the term "Mediation" is set forth in Rule 2(a), SCADR Rules, as follows: "**Mediation.** An informal process in which a third-party mediator facilitates settlement discussions between parties. Any settlement is voluntary. In the absence of settlement, the parties lose none of their rights to trial." A settlement in a mediation context is subject to Rule 43(k), SCRCF. *See Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 627 S.E.2d 724 (2006) . *See also Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 (2006). In the captioned case, no formal family settlement agreement has been signed as required by the Mediation Memorandum; no consent order has been signed by the attorneys in this case and filed as required by the mediator's Proof of ADR and Rule 43(k), SCRCF; and no written stipulation has been signed by counsel and entered in the record or made in open court and noted upon the record as required by Rule 43(k). Thus, there is no basis for depriving Appellant of the right to trial. Accordingly, Appellant respectfully submits that Appellee's Motion should be denied and this case remanded to the Court of Common Pleas for further proceedings.

3. THE COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO COMPEL.

According to Rule 5(b), SCADR Rules, "The ADR Conference shall not be cause for delay of other proceedings in the case, including the completion of discovery, the filing and hearing of motions, or any other matter that would delay preparation of the case for trial, except by order of the court." No order of any court was ever issued in this case regarding completion of discovery except for Judge Lee's Order, which appears to take the position that this case has been settled.¹⁵ Appellee has alleged no other rationale to justify his failure to answer Appellant's discovery requests. For these reasons, Appellant respectfully submits that Appellant's Motion to Compel should be granted.

CONCLUSIONS

For the reasons stated, the Appellee's Motion to Enforce Mediation Agreement should be denied, this case should be remanded to the Court of Common Pleas for further proceedings, and the Appellant's Motion to Compel should be granted.

Respectfully submitted this 5th day of November, 2015.



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¹⁵ See Appellant's Argument #2 above.