

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY

ALISON RENEE LEE, CIRCUIT COURT JUDGE

CASE NO. 2015-001556

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DEC 07 2015

SC Court of Appeals

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 RESPONDENT

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December 7, 2015

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STATEMENT OF ISSUES ON APPEAL

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

STATEMENT OF THE CASE

On May 31, 2013 Respondent filed a Lis Pendens and Amended Petition in the probate court, seeking, among other relief, a lien upon the real estate and a private sale of the decedent's real estate. See ROA _____ and _____. (see page 1 Lis Pendens and page 3 Petition) Appellant filed Responsive Pleadings on June 28, 2013. See ROA _____. Respondent moved for removal to the circuit court (lower court herein) which was granted by probate court order dated August 8, 2013. See ROA _____.

A mediation was conducted by stipulation on May 2, 2014 by retired circuit court Judge G. Thomas Cooper, mediator, resulting in a signed mediated settlement agreement which was attached to the mediator's Proof of ADR filed May 9, 2014. See ROA _____.

On October 30, 2014, Respondent filed his Motion To Enforce Mediation Agreement. See ROA _____. On March 31, 2015 Respondent filed a Memorandum In Support Of Motion. See ROA _____. Appellant filed his Brief In Response on March 27, 2015. See ROA _____.

On January 14, 2015 Appellant sent discovery requests to Respondent's counsel. On March 13, 2015 Appellant filed a Motion To Compel. See ROA _____.

A hearing on both motions was held April 6, 2015, resulting in the lower court order dated May 14, 2015 granting Respondent's motion to enforce mediation and denying Appellant's motion to compel discovery. See ROA _____. Respondent's motion to alter or amend pursuant to Rule 59(e), SCRCF, was denied by order dated June 23, 2015. See ROA _____.

Appellant then filed a Notice of Appeal. See ROA _____ and _____.

FACTS

Helen L. Burton died in 2006 owning her home at 72 Burdell Road (hereinafter Home) which is the subject of the action resulting in this appeal. The estate has not disposed of or distributed the Home.

In his affidavit, Respondent confirmed he is 35 years old and has resided in the Home since he was 7 years old. See ROA _____. (see affidavit attached to memorandum in lower court)The estate has no significant assets other than the Home and the obligations and cost of administration exceed the equity in the home, which is mortgaged. See ROA _____. (See ¶ 45 of Appellant's response pleading in lower court)

Naming all the interested parties in said estate, Jimmy Boykin, Respondent herein, his father (Sammy) and one brother (Kenny) brought an action in the probate court against Appellant Zady R. Burton, individually and as Personal Representative, Appellant herein, and another brother (Kenny). The Lis Pendens states its purpose is for the sale of real estate pursuant to S.C. Code 62-3-1301 et seq. See ROA _____. The Amended Complaint filed May 31, 2013 prays for the same relief by way of private sale to Respondent. See ROA _____. Appellant filed responsive pleading in which he alleges "... he is the residuary devisee of decedent's will....and is entitled to the fee simple absolute ownership of the Home

Place.” See ROA _____. (see ¶ 42&43 on page 6) The case was removed to the circuit court by order dated August 8, 2013, as recited previously.

After the above action was filed, Respondent’s father (Sammy) died and his two brothers (Kenny and Sandy, Jr.) quit claimed any interest in the home. See ROA _____. (see Respondent’s affidavit attached to memorandum in lower court) A mediation was conducted by stipulation on May 2, 2014 by retired Judge G. Thomas Cooper, mediator, resulting in his Proof of ADR providing that the matter was “fully settled” with the agreed to terms of the suit settlements and sale of the Home being reduced to writing by the attorneys on the mediator’s letterhead, signed by Appellant and Respondent, and attached to and filed with the Proof of ADR. See ROA _____.

Thereafter, on October 30, 2014, Respondent filed his Motion to Enforce said mediation agreement because Appellant refused to comply with the mediated settlement.

ARGUMENTS

A. THE LOWER COURT DID NOT ERR WHEN IT GRANTED RESPONDENT’S MOTION TO ENFORCE THE MEDIATION AGREEMENT

The mediation on May 2, 2014 resulted in the agreement being reduced to writing by the attorneys and signed by Appellant and Respondent on May 2, 2014. This agreement is attached to the mediator’s proof of ADR dated May 6, 2014 and filed May 9, 2014 as provided for in Rule 6 (f), SCADR Rules. Appellant characterizes this signed agreement as a “memorandum” which can be required by the mediator under Rule 6 (c), SCADR Rules which was not the case here.

Thereafter, Appellant’s attorney prepared a proposed settlement agreement and release which is attached as Exhibit A to Respondent’s Memorandum In Support Of Motion To

Enforce in the lower court. See ROA_____.

In said proposed settlement agreement and release, Appellant makes closing of the real estate sale contingent upon the dismissal of the action and the signing of mutual releases prior to the delivery of the deed of distribution. See ROA_____ and _____. (see ¶ 2 and 6 of Exhibit A to memorandum in support motion in lower court) Further, said proposed settlement agreement and release requires a cashier's check payable to the estate for the amount of the mortgage payoff, rather than the buyer's closing attorney (settlement agent) making the check (or wire) payable to the lender at closing. See ROA_____. (see ¶ 4(a) of same document as previous) Further, said proposed settlement agreement and release provides for payments of consideration to be made to Appellant, individually, rather than to Appellant, individually and as personal representative. See ROA_____. (see ¶ 4(b) and 4(c) of same document as previous)

Appellant's proposed settlement agreement and release was unacceptable to Respondent, prompting Respondent's motion to compel enforcement.

Recognizing the more normal coordination of suit settlements and real estate closing practices, the lower court order filed May 18, 2015 granted Respondent's motion to enforce the mediated settlement, providing, further:

"The parties shall **simultaneously** execute the following items:

1. Delivery of the executed Deed of Distribution to Jimmy Burton as grantee to be held in trust by (his) attorney until disbursement of the appropriate funds;
2. Payoff of the existing mortgage (Zady shall give authority to get the payoff from the lender);
3. Payment of \$8000 to Zady individually and as PR of the Estate;
4. Delivery of a \$4000 promissory note payable over 5 years at no interest and

first purchase money mortgage to Zady individually and as PR of the Estate;

5. Proof of insurance.

6. Stipulation of Dismissal with Prejudice of this action as well as the pending magistrate action.

7. Filing documents to close the Estate.

8. Mutual releases signed by the remaining parties with terms in compliance with the Mediation Agreement and this Order.

All of the above must be executed within 90 days of the date of this Order.”

(emphasis added) See ROA_____.

Appellant seems to take the position that the lower court should not order delivery of a deed because the mediated settlement agreement does not use the word “deed.” The lower court, however, arrived at its decision “after review of all pleadings, motions, memoranda, exhibits, affidavits and in argument of counsel.....” See ROA_____. The stated goal of the Lis Pendens and Amended Petition is for a private sale of the Home as stated previously. Appellant’s own proposed settlement agreement provides for a deed. See ROA_____. (see page 2 of Exhibit A to Respondent’s memorandum in lower court) Respondent’s affidavit describes his preparation, after the mediated settlement, to get a “proper deed”, by his plans to pay off the mortgage, his acquiring home owners insurance commitment for the closing and his extra repairs to the Home. See ROA_____. (see affidavit attached to Respondent’s memorandum in lower court) The affidavit from the insurance agent, Carl Reynolds, confirms Respondent’s efforts to facilitate a closing for the deed. See ROA_____. (see affidavit attached to Respondent’s memorandum in lower court) In his brief to the lower court Appellant argues against enforcing the mediated settlement stating that Respondent

(Petitioner in lower court) "...has declined to execute a settlement agreement...." See ROA _____. (see Appellant's brief in response in lower court) As stated previously Appellant's own proposed settlement agreement provided for a "deed", but that agreement was unacceptable to Respondent because Appellant required conditions precedent to delivering a deed, without the coordinated or simultaneous closing as provided in the lower court order.

In paragraph 1.2 of his brief here, Appellant seems to argue that the lower court order is based on some unspecified infraction of the SCARR Rule of confidentiality, by quoting from Rule 8(a), SCARR Rules. The undersigned is aware of no oral or written communication having occurred in the mediation which was relied on by the lower court or introduced into evidence.

Probate Code Sections 62-3-1301, 1302, 1308 and 1309 are particularly applicable, this being an insolvent estate with the obvious need for a sale of the only asset with any equity so that the estate, now almost 10 years old can be closed.

It is submitted that "simultaneous" compliance with the eight (8) items in the lower court order properly enforces the mediated settlement and should be upheld.

B. THE LOWER COURT DID NOT ERR WHEN IT CONSIDERED THIS CASE SETTLED.

The mediator confirmed on the Proof of ADR form that the case was "fully settled."

This document, signed by the mediator, with the mediated settlement terms attached, was filed on May 6, 2014.

Respondent takes the position that a settlement in a mediation context is subject to Rule 43 (k), SCRCP, and cites Farnsworth vs. Davis Heating and Air Conditioning, Inc., 367

S.C. 634, 627 S.E. 2d 724 (2006). However, that case is distinguishable as it does not involve a mediation and the filing of the Proof of ADR would constitute noting the settlement “upon the record” as allowed by Rule 43(k).

C. THE LOWER COURT DID NOT ERR WHEN IT DENIED APPELLANT’S MOTION TO COMPEL DISCOVERY.

Again, the Proof of ADR filed May 6, 2014 states that the case is “fully settled.” This fact was confirmed by the lower court’s order filed May 18, 2015 which states “ this order ends this case.”

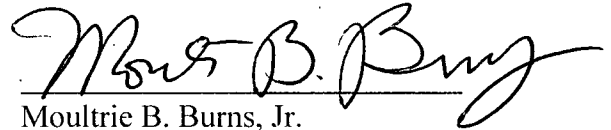
Further, the timing of the discovery requests should be noted. Appellant’s discovery requests were made in January 2015, some eight months after the case was “fully settled” by mediated settlement, while Respondent’s motion to enforce the mediated settlement in the lower court was pending.

Respondent respectfully submits that Rule 5(b) SCADR Rules, noted by Appellant, would apply to discovery requests pending prior to a mediated settlement. There were no pending discovery requests prior to the mediated settlement in this case; therefore, the motion to compel was properly denied by the lower court.

CONCLUSIONS:

Alternate dispute resolution is a favored method of settling disputes in South Carolina and should be vacated only under limited circumstances. See Gissel vs. Hart, 382 S.C. 235, 676 S.E. 2d 320 (2009) dealing with an arbitration. For this reason and the reasons stated above, the lower court order enforcing the mediated settlement should be affirmed.

Respectfully submitted this 7th day of December, 2015.



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PROOF OF SERVICE

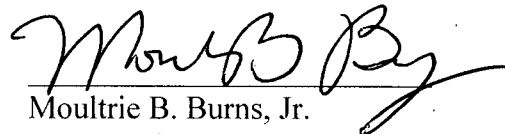
I certify that I have served the Respondent's Initial Brief, Designation of Matter to be Included in Record on Appeal, and this Proof of Service, each dated December 7, 2015, upon Appellant Zady R. Burton, Individually and as Personal Representative of the Estate of Helen L. Burton by depositing a copy of it in the United States Mail, postage prepaid, on December 7, 2015, addressed to her attorney of record, Roger B. Jellenik, Esquire at his office at 1106 Little Street, Camden, SC 29020.

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