

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

Charles E. Deal, Jr.,)
)
)
Plaintiff, Appellant,)
)
v.)
)
Angela Godfrey,)
)
)
Defendant, Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT
CASE NO.: 2018-CP-11-00838

ORDER

RECEIVED
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SC Court of Appeals

Hearing Date: April 8th, 2019 at 9:30 a.m.,
Hearing Judge: Grace Gilchrist Knie
Counsel for Plaintiff: James G. Carpenter
Counsel for Defendant: William G. Rhoden
Court Reporter: Sandra L. Satterwhite

This matter was before this Court on Monday, April 8th, 2019, at 9:30 a.m., in Cherokee County, South Carolina, in the Seventh Judicial Circuit, upon Plaintiff/Appellant Charles E. Deal, Jr. ("Plaintiff")'s Notice of Appeal from Probate Court, filed on December 6th, 2018.

Attorney James G. Carpenter of the Carpenter Law Firm, PC, was present representing the interests of the Plaintiff/Appellant. Attorney William G. Rhoden of Winter & Rhoden, LLC, was present representing the interests of the Defendant/Respondent. Sandra L. Satterwhite was the Court Reporter.

FACTUAL AND PROCEDURAL HISTORY

Charles E. Deal, Sr., died testate in Cherokee County on May 16, 2013. Decedent was predeceased by his spouse, Ruth Deal. Ruth Deal died intestate on December 17, 2010, survived by Charles Deal, Sr., their child Charles Deal, Jr., and Ruth Deal's child by a previous relationship, Patricia Petchey. The primary asset was the house and land where Charles and Ruth lived. Since Ruth had no will and the property was jointly titled, Charles Deal, Sr. received 1/2 of Ruth's 1/2

interest, Charles Deal, Jr. received $\frac{1}{4}$ of Ruth's $\frac{1}{2}$ interest and Patricia Petchy received $\frac{1}{4}$ of Ruth's $\frac{1}{2}$ interest. Therefore, at Charles Deal, Sr.'s death, he held a $\frac{3}{4}$ interest in the property, while Charles, Jr., and Patricia Petchy each held a $\frac{1}{8}$ interest. Approximately three (3) months prior to his death, Charles Deal, Sr., executed his Last Will and Testament, which was prepared by local attorney Joseph L. Mathis. In his Will, he named Respondent as his sole beneficiary and also as Personal Representative of his estate. At the time Charles Deal, Sr., executed his Will, he was estranged from his son Charles Deal, Jr. He was also estranged from his stepdaughter, Patricia Petchy, who lived in England and had so lived for many years.

After Charles Deal, Sr. died on May 16, 2013, Respondent filed his Last Will and Testament with the Probate Court and opened an estate. Respondent was appointed Personal Representative by the Probate Court on May 22, 2013. On January 9, 2014, Charles Deal, Jr., filed an action in Probate Court contesting the Will on grounds of undue influence. On May 1, 2014, Charles Deal, Jr., filed an action in Probate Court seeking to remove Respondent as Personal Representative and have the Court appoint a Special Administrator. It should be noted that Charles Deal, Jr., is of limited mental capacity and was incapable of being the Personal Representative. Due to Charles Deal, Jr.'s, limited capacity, the Probate Court appointed a Guardian *ad Litem* for Mr. Deal. As set forth in the Court's Order of July 3, 2014, a hearing was held on Appellant's action to remove Respondent as Personal Representative. The hearing was adjourned after Charles Deal, Jr.'s, Guardian *ad Litem* withdrew due to conflicts of interest. Josh Henderson, of the Spartanburg County Bar, was substituted as Charles Deal, Jr.'s, Guardian *ad Litem*. The action to remove Respondent as Personal Representative was eventually dismissed by Order dated September 3, 2014. Thereafter, on September 10, 2014, the Will contest was removed to the Circuit Court. On July 22, 2015, the parties participated in mediation and reached a mediated

agreement. The main asset of the estate is the house and land owned by Charles Deal, Sr., at the time of his death. Charles Deal, Sr., owned a $\frac{3}{4}$ interest in the property. A $\frac{1}{8}$ interest was owned by Charles Deal, Jr. and a $\frac{1}{8}$ interest was owned by Patricia Petchy. The agreement provided that Charles Deal, Jr., would receive a life estate in the property and that the remainder interest would be sold. From the proceeds, Respondent would receive \$25,000.00. The agreement also provided that the case would be returned to Probate Court for the approval of this agreement.

At mediation, the parties contemplated that the property could be sold to a neighbor, who owned property adjoining the Deal property and had already expressed his interest in buying the property. It was also contemplated at mediation that Patricia Petchy who owned a $\frac{1}{8}$ interest in the property and was not a party to the action would cooperate in consummation of the agreement. After mediation, problems arose from Patricia Petchy and from Mary Bloomfield (Ruth Deal's sister who also lived in England). Subsequent to the Mediation, by Order of the Probate Court dated October 4, 2015, Attorney Karen McManaway, was relieved as counsel for Charles E. Deal, Jr., and Attorney James Carpenter was substituted. Efforts were made for a period to keep the agreement alive. After little progress, counsel for Respondent wrote to Appellants' counsel on February 26, 2016, insisting that the agreement be consummated by March 31, 2016, or that the parties resume litigation.

Over the next 2 $\frac{1}{2}$ years, the case lay dormant. During this time, Patricia Petchy, owner of a $\frac{1}{8}$ interest in the property died on May 17, 2017. On August 16, 2018, Respondent filed her Motion to Dismiss the action for failure to prosecute. This Motion was granted by the Probate Court's Order of November 19, 2018.

The Plaintiff/Appellant filed the Notice of Appeal on December 6th, 2019, in the Circuit court, Court of Common Pleas, commencing the appellate action. The Plaintiff/Appellant filed a

Statement of the Issues on January 4th, 2019. On February 4th, 2019, the Plaintiff/Appellant filed the Initial Brief of Appellant and the Appellant's Designation of Matter to be Included in the Record on Appeal. Also on February 4th, 2019, the Defendant/Respondent filed its Designation of Matter to Be Included in the Record on Appeal and the Initial Brief of Appellant. On March 1st, 2019, the Defendant/Respondent filed its Brief of Respondent. On March 8th, 2019, the Plaintiff/Appellant filed a Motion for Extension of Time. On March 21st, 2019, the Plaintiff/Appellant filed its Initial Reply Brief of Appellant. On March 29th, 2019, the Plaintiff/Appellant filed its Record on Appeal. On April 1st, 2019, the Plaintiff/Appellant filed another Appellate Reply Brief and Appellate Brief. On April 5th, 2019, the Defendant/Respondent filed a Final Brief of Respondent. The issues on appeal are whether the Probate Court correctly dismissed the action for failure to prosecute; and whether the Appellate Court has jurisdiction to grant the relief requested by Appellant.

LAW AND ANALYSIS

An appeal from the Probate Court to the Circuit Court is governed by S.C. Code Ann. Section 62-1-308. The hearing in the Circuit Court must be based strictly on appeal and no new evidence may be presented. Whether an action should be dismissed for failure to prosecute is left to the discretion of the trial court judge, and the trial court's decision will not be disturbed, except upon a clear showing of an abuse of discretion. *Small v. Mungo*, 254 SC 438, 175 SE 2d 802 (1970); *McComas v. Ross*, 368 SC 59, 626 SE 2d 902 (S.C. App. 2006). An abuse of discretion arises in cases in which the judge issuing the Order was controlled by some error of law or where the Order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. *Stewart v. Floyd*, 274 SC 437, 265 S.E. 2d 254 (1980). Plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for Plaintiff's

unreasonable neglect in proceeding with his cause. *Shevey & Spires, Inc. v. American Motors*, 279 SC 58, 301 SE 2d 757, (1983). (Citing *Thomas & Howard Company v. Fowler, et al.*, 238, SC 46, 119 SE 2d 97 (1961); *Small v. Mungo*, 254 SC 438, 175 SE 2d 802 (1970)).

The duty to pursue an action lies with Plaintiff and not Defendant. As stated in *Thomas & Howard, id.*, and cited with approval in *Shevey & Spires, id.*, “While a Defendant may bring about an expeditious trial of a case, he has no legal obligation to do so; except to meet such actions as are taken by the Plaintiff, he may remain passive.”

In the present case, a Mediation was held on July 22, 2015. The agreement contemplates that the action contesting the Will would be returned from the Circuit Court to the Probate Court for the Court to consider the approval of the agreement. The case was returned to the jurisdiction of the Probate Court by Order of the Honorable R. Keith Kelly dated August 28, 2015. The Order of August 28, 2015 was the last Order, Motion or Pleading of any kind until August of 2018, when Respondent filed her Motion to Dismiss for failure to prosecute. As illustrated by the recent case of *Innovative Waste Management v. rest Emergency Partners GP, LLC*, 423 SC 611, 815 SE 2d 780 *affirmed as modified* Op. No. 27862 (February 6, 2019), a settlement agreement entered into after mediation does not end the case. The case can be ended by either a stipulation of dismissal signed by all parties, Rule 41(a)(1)(B) SCRCF or by the Court upon such terms and conditions as the Court deems proper, Rule 41(a)(2) SCRCF.

Also, in his appeal, Plaintiff/Appellant seeks the following relief: an order requiring that Respondent grant the realtor free access to the property; to vacate the premises, and leave them cleaned, in good order and in good repair; for an order requiring that the property to be sold, and the proceeds distributed as required by the mediated Settlement Agreement; and an Order requiring the full implementation of the mediated Settlement Agreement.

S.C. Code Ann. Section 62-1-308(i) provides that the Circuit Court sits as an appellate Court in appeals from the Probate Court. The hearing must be based strictly on appeal. An issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. *Wilder Corporation v. Wilke*, 330 SC 71, 497 S.E. 2d 731 (1998).

CONCLUSION

The Court commends counsel for their excellent and efficient presentations and professionalism in the handling of this matter. After considering the pleadings and Record on Appeal, documents presented, Briefs, arguments of counsel, and the law presented, The Court finds as follows with regard to the issues raised in the aforementioned matter: The Probate Judge did not abuse his discretion in dismissing the within action for Plaintiff/Appellant's failure to prosecute. Therefore, the dismissal of the action should be affirmed. And further, the Appellate Court lacks jurisdiction to grant the other relief requested by Plaintiff/Appellant because those issues are not properly before the Appellate Court. For the foregoing reasons, it is ordered that the Plaintiff/Appellant's Appeal is denied and the decision of the Probate Court is hereby affirmed.

IT IS SO ORDERED.

/s/Grace Gilchrist Knie
The Honorable Grace Gilchrist Knie
Resident Judge
Court of Common Pleas
Seventh Judicial Circuit

Spartanburg, South Carolina
Dated: May 9th, 2019



Cherokee Common Pleas

Case Caption: Charles E. Deal VS Angela Godfrey

Case Number: 2018CP1100838

Type: Order/Other

IT IS SO ORDERED.

S/GRACE GILCHRIST KNIE - 2760