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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**SIXTEENTH JUDICIAL CIRCUIT**
COUNTY OF YORK	)	
	)	
David J. Mattox,	)	Case No.: 2018-CP-46-03672
	)	
Appellant	)	
v.	)	
	)	**ORDER AFFIRMING PROBATE COURT**
Lisa Jo Bare Mattox, LLC,	)	
	)	
Respondent.	)	

RECEIVED
OCT 30 2019
SC Court of Appeals

PRESIDING JUDGE: The Honorable William A. McKinnon
DATE OF HEARING: July 31, 2019
APPELLANTS'S ATTORNEY: Michael L. Brown Jr.; John M. Foster; Zachary M. Merritt;
RESPONDENT'S ATTORNEY: John P. Gettys, Jr.; J. Nathanial Pierce

This matter came before the Court on appeal after the Probate Court denied the Appellant's Motion for relief under South Carolina Rule of Civil Procedure 60. For the reasons set forth below, the judgment of the Probate Court is AFFIRMED.

Facts on Appeal:

This underlying matter in this appeal began on October 1, 2016 with the death of Jonathan Mattox ("Decedent"). Decedent had signed a valid Last Will and Testament ("will") in 2005, appointing his brother, David J. Mattox, as personal representative. After the signing of the will, Decedent then married Lisa Jo Bare Mattox ("Respondent"), but purportedly failed to execute another will. Additionally, the original 2005 will could not be located at the time of the Decedent's death. The Probate Court determined that the inability to locate the will indicated it had been intentionally revoked. As a result, the Probate Court found that the Decedent had died intestate and without children, leaving the Respondent as his sole heir. The Respondent was awarded the entirety of the Decedent's estate.

According to a July 12, 2018 affidavit filed by Peggy Mattox (the mother), the original will was discovered in her safe on or about October 2017. The affidavit also states both Decedent and Decedent's brother (the appellant) David Mattox knew of the safe and had access to the combination. On July 13, 2018, approximately nine months after discovery of the alleged original will, Appellant filed a Motion and Petition for Relief from Judgment and Stay of Enforcement under South Carolina Rule of Civil Procedure 60. Appellant argued that he had obtained newly discovered evidence in the form of the original will, requiring that the Decedent's assets be redistributed according to that will. The bases for the "Notice, Motion and Petition" were: SCRCP 60(b)(1), (2), and (5) and S.C. Code. Ann. § 62-3-412(1). The "Notice, Motion and Petition" was also alleged to be an "independent action in equity." On November 21, 2018 Judge Rogers issued an order denying the Appellant's Motion. This appeal followed.

Standard on Appeal:

An appeal from the probate court is governed by the provisions of the South Carolina Probate Code. *Matter of Howard*, 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993). The probate code provides that a final order or decree of the probate court may be appealed to the circuit court, and the circuit court must hear and determine the appeal "according to the rules of law." S.C. Code Ann. § 62–1–308 (1987). This phrase means according to the rules governing appeals. *Howard*, 315 S.C. at 360, 434 S.E.2d at 257. On appeal from the final order of the probate court, the circuit court should apply the same standard of review as the Court of Appeals. *Golini v. Bolton*, 326 S.C. 333, 338, 482 S.E.2d 784, 786–87 (Ct. App. 1997). The decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Smith v. Fedor*, 422 S.C. 118, 124, 809 S.E.2d 612, 615 (Ct. App. 2017) (citing *Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 336, 644 S.E.2d

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793, 795 (Ct. App. 2007)). An abuse of discretion arises where the order was controlled by an error of law or based on factual conclusions that are without evidentiary support. *Id.*

Discussion:

I. There is evidence that the Appellant did not act with due diligence in his attempt to locate the will of the Deceased, as it was found in his mother's safe, such that a Motion under Rule 60(b)(2) cannot be sustained.

Under SCRCP 60(b)(2) a court may relieve a party from a judgment on the basis of newly discovered evidence. SCRCP 60(b)(2): "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons…(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)."

A five part test is used to determine whether the evidence offered satisfies Rule 60(b)(2): (1) the evidence will probably change the result if a new trial is granted; (2) it has been discovered since the trial; (3) it could not have been discovered before the trial; (4) it is material to the issue; and (5) it is not merely cumulative or impeaching. *Jamison*, at 272, 644 S.E.2d at 767 (citing *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct.App.2005)). The movant has the burden of presenting evidence proving the facts essential to secure relief. *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct.App.1991). To satisfy Rule 60(b)(2), and the third factor of the test, "newly discovered evidence" must be evidence which could not have been discovered with due diligence in time to move for a new trial under Rule 59(b). *Jamison v. Ford Motor Co.*, 373 S.C. 248, 272, 644 S.E.2d 755, 767 (Ct. App. 2007). "Due diligence" is defined as the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." *Jamison* at 272, 644 S.E.2d at 767 (citing *Black's Law Dictionary*.)

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When evidence is misplaced, a party must make a specifically targeted search to find the missing evidence in order for due diligence to be satisfied. *Lanier* at 220, 612 S.E.2d at 460. Additionally, in order for evidence to be newly discovered, it must not have been known to the parties or discovered by the parties at the time of the trial court's decision. *See Fassett v. Evans*, 364 S.C. 42, 50, 610 S.E.2d 841, 845 (Ct. App. 2005); *Bowman v. Bowman*, 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct.App.2004) (where a party could have discovered the "new" evidence prior to trial, the party is not entitled to relief under Rule 60(b)(2).)

Here, the factors as they are set out in *Jamison* and *Lanier* are not met. The evidence shows Appellant did not act with due diligence in searching for the original will. Due diligence requires that a movant act with the diligence reasonably expected of a party seeking to fulfil a legal obligation, and that the movant make a targeted effort to locate missing evidence. The Appellant has offered no evidence to suggest that a targeted search for the will occurred, even though he was aware of its existence. The fact the will was discovered in the Appellant and Decedent's mother's safe, is, in fact, evidence of a lack of due diligence. Appellant argues that because the will was not found in his own residence, but his mother's residence under which he had no control, that he had no duty to attempt to search for the will there. However, His mother's own affidavit established that Appellant had access to his mother's safe and knew the combination to that safe. Further, a safe would be among the most likely places to store an important legal document. Because of the lack of due diligence in searching for the safe, the Probate Court correctly denied relief under Rule 60(b)(2).

II. <u>There is no basis for a 60(b)(1) Motion.</u>

Under Rule 60(b)(1) of the South Carolina Rules of Civil Procedure, a court may relieve a party from any final judgment, order, or proceeding if the party shows there has been "mistake,

inadvertence, surprise, or excusable neglect." SCRCP 60(b)(1). This rule is intended to allow relief from errors by counsel. As Wright and Miller write regarding the analogous Federal Rule: "[C]ourts have held that a party should not be deprived of the opportunity to present the merits of the claim because of a technical error or slight mistake by the party's attorney." §2858 Mistake, Inadvertence, Surprise, or Excusable Neglect, 11 Fed. Prac. & Proc. Civ. § 2858 (3d ed.). There is no mistake by counsel here.

Further, it is inappropriate to allow the "excusable neglect" provision to apply when there are specific rules to the contrary – or else the "excusable neglect" exception would swallow the whole of the Rules. The "excusable neglect" in question in this matter is failure to discover the original will – and that is covered by Rule 60(b)(2), not Rule 60 (b)(1). "[I]t would be a perversion of [Rule 60(b)(1)] and its purpose to permit it to be used to circumvent another rule." §2858 Mistake, Inadvertence, Surprise, or Excusable Neglect, 11 Fed. Prac. & Proc. Civ. § 2858 (3d ed.) (citing Edwards v. Velvac, Inc., 19 F.R.D. 504 (E.D. Wis. 1956)). Rule 60(b)(1) has no application here.

III. There is no basis for a 60(b)(5) Motion.

Under Rule 60(b)(5) of the South Carolina Rules of Civil Procedure, a judgment may be set aside if it has been "satisfied, released, discharged, or a prior judgment upon which the judgment is based is reversed or vacated, or it is no longer equitable that the judgment should have prospective application." This Rule has no application here, either. Rule 60(b)(5) only applies to judgments which have prospective application, such as a paternity order or an injunction. Executed orders, such as those which determine the ownership of property, are beyond the ambit of Rule 60(b)(5). *See Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 49, 590 S.E.2d 502, 505 (Ct. App. 2003) (orders which "mandate a one-time change in the ownership of property are " wholly outside the scope of Rule 60(b)(5)").

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IV. Section 62-3-412(1) does not apply because the judgment below was one of intestacy.

S.C. Code. Ann. § 62-3-412(1) is an exception to the finality of probate proceedings. It provides: "The court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will were unaware of its existence at the time of the earlier proceeding or were unaware of the earlier proceeding and were given no notice thereof, except by publication" (emphasis added). It is clear from this language ("later-offered will" and "another will") that this provision applies when the probate court distributed property to a will. Intestate distributions, such as the instant one, are governed by S.C. Code. Ann. § 62-3-412(2). S.C. Code. Ann. § 62-3-412(1) has no bearing on this matter.

V. Appellant cannot obtain relief as an "independent action"

Finally, Appellant asserts an "independent action" in equity. Such action are permitted in the case of a fraud on the court, or "rare, special, exceptional or unusual circumstances that may warrant equitable relief." Mr. T v. Ms. T, 378 S.C. 127, 135, 662 S.E.2d 413, 417 (Ct. App. 2008). No such fraud or "rare or unusual" issue is present here – this matter is an issue of after-acquired evidence, which is properly handled pursuant to Rule 60 (b)(2).

Conclusion:

For the reasons set forth above, the judgment of the Probate Court is AFFIRMED.

JUDGMENT AFFIRMED. IT IS SO ORDERED.

THIS THE ____ DAY OF _____________, 2019.

____

THE HONORABLE WILLIAM A. MCKINNON

York Common Pleas

Case Caption: David J Mattox VS Lisa Jo Bare Mattox

Case Number: 2018CP4603672

Type: Order/Other

So Ordered

/s William A. McKinnon, #2761, Circuit Judge

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