

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM KERSHAW COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE ROBERT E. HOOD
CIRCUIT COURT JUDGE

FEB 14 2020

SC Court of Appeals

CASE NO. 2019-001508

Jimmy Boykin,

Respondent

V.

Zady 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, is the Appellant

Appellant

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Court err in finding Appellant in contempt of Judge Lee's Order dated May 14, 2015?
2. Did the Court err in its award of attorney fees to Respondent?
3. Did the Court err in its award to Respondent of interest paid?

STATEMENT OF THE CASE

Helen Burton died testate October 24, 2006. Her estate was probated in Kershaw County as 2006-ES-28-0391.

On May 31, 2013 Jimmy Boykin, Respondent herein, filed an Amended Complaint (R. pp. 124-127) with four (4) causes of action. Zady Burton, Appellant herein, filed Responsive Pleadings (R. pp. 131-141) on June 28, 2013 with three (3) counterclaims.

That probate action was removed to circuit court, after which it was settled by mediation. When Appellant failed to comply, Judge Alison Renee Lee enforced compliance with the mediated settlement by her Order dated May 14, 2015. Judge Lee's one page Order (R. p. 4) required eight (8) "simultaneous" tasks to be accomplished by the parties within ninety (90) days to "end the case". The Order was affirmed by the Court of Appeals and certiorari was denied by the Supreme Court. (R. p. 20)

Ninety (90) days after certiorari was denied Respondent filed a motion to compel compliance in the probate court. Probate Judge Branham determined by Order filed June 26, 2018 she did not have jurisdiction to enforce the circuit court order (R. p. 22)

Respondent then sought and obtained Judge Hood's Order and Rule to Show Cause filed

July 19, 2018 (R. pp.15-27). After efforts to settle failed, the matter was heard May 22, 2019 by Judge Hood, he found and concluded by Order filed May 29, 2019 (R. pp. 1-2) that Appellant was in contempt of Judge Lee's Order. Judge Hood, further, awarded Respondent attorney's fees and interest he paid on the mortgage. Judge Hood's Order was appealed to this court.

ARGUMENT

Issue 1 on Appeal: Did the Court, err in finding Appellant in contempt of Judge Lee's Order dated May 14, 2015.

At oral argument, Appellant's attorney made it plain that his client would sign a dismissal and a release, but "...not in advance of receiving the property that belongs to [him]." (R. p. 40, lines 19-24) The record is clear that there is no valid claim for such property and no basis for refusing to execute dismissals and releases to end this case.

Paragraph 6 of Judge Lee's Order (R. p. 4) provides that the parties shall execute a "stipulation of dismissal with prejudice of this action ...". The then pending action included Appellant's "Third Counterclaim" (R. pp. 140-141) in his "Responsive Pleadings" filed June 28, 2013 which seeks actual and punitive damages for the contents of the home which were alleged to have been sold, wasted and/or converted. Paragraph 45 of that action alleges "the Estate has no assets other than the Home Place...." (emphasis added) (R. p. 136)

Judge Lee's Order enforcing the mediated settlement clearly precludes Appellant from now claiming delivery of personal property he alleged was converted, given that the conversion claim was settled. Nevertheless, the record reveals that is what Appellant attempted to accomplish when he delivered his executed deed. Paragraph 1 of Judge Lee's Order (R. p. 4) required delivery of the executed deed "to be held in trust" pending compliance with the other requirements of that Order. Appellant delivered the deed, not pursuant to Judge Lee's Order but rather pursuant to the conditions imposed by Mr. Jellenik's letter of transmittal dated May 14,

2018 (R. p. 23) reserving ...“Any claims to the personal property and funds of the Estate of Helen Burton.” Judge Hood has correctly determined that those conditions imposed when the deed was delivered... “are clearly contrary to and in conflict with Judge Lee’s Order.” (R. p. 1)

Before a party may be found in contempt, the record must clearly and specifically show the contemptuous conduct. Hawkins vs. Mullins, 359 S.C. 497, 597 S.E 2d 897, 899. (Ct. App. 2004). That standard has been met by Appellant’s refusal to execute documents to end the case and his attempt to unilaterally impose conditions contrary to and in conflict with Judge Lee’s Order, as Judge Hood has determined. It is submitted that the record is clear on its face as to the contemptuous conduct and the requirements of Rule 52 are met by Judge Hood’s finding and conclusion.

It should be noted that Appellant continues to argue facts that are not supported by the record including:

(a) Appellant continues to argue that the dismissal of his Counterclaims in 2013 would not dismiss his present claim for personal items because those Counterclaims sought damages only “for the personal property that was sold and wasted before the action was filed.” (emphasis added) (R. p. 39 lines 7-24) On the contrary, Appellant’s Third Counterclaim actually uses the word “conversion” in its title and it alleges “ [Respondents] converted Estate assets to their own use.....” (R. p. 140)

(b) Appellant continues to argue that he had items at the home place, non-probate items, that are missing (R. pp. 40-41, lines 24-25 and lines 1-23), but that concern was satisfied over a year ago by our amending the “Release” as Exhibit F to the Rule to Show Cause filed July 19, 2018 which provides “For clarification, the release does not apply to any of Zady Burton’s

personal property at 72 Burdell Road.” (R. p. 24)

(c) And, if this court accepted Appellant’s argument that the mediated settlement involved real estate only (R. p. 39, lines 12 - 16), then this case could not “end” as Judge Lee required, until future resolution of several then pending causes of action, including Respondent’s “Fourth Case of Action” (R. pp. 126-127) for a constructive trust of insurance proceeds, Appellant’s “Third Counterclaim” (R. pp. 140-141) for actual and punitive damages for other items sold, wasted and/or converted, as well as Appellant’s “First Counterclaim” (R. pp. 138-140), seeking actual and punitive damages for abuse of process, none of which relate to real estate.

Appellant argues that Court erred in making any finding relative to Mr. Jellinik’s letter. The contents of the letter speaks for itself. Mr. Jellinik, the drafter of the letter, defended the letter at oral argument (R. p. 40, lines 7-14). This is distinguishable from Bowers v. Bowers, 304 S.C. 65, 403 S.E. 2d 127 (1991) at 129 which held “mere allegations, denied by the other party, are not evidence.” (emphasis added) Another case cited in Respondent’s Initial Brief is Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 442 S.E. 2d 611 (1994) which involves a criminal contempt issue and is distinguishable on that basis.

Issue 2 on Appeal: Did the Court err in its award of attorney fees to Respondent?

Judge Hood approved an award to Respondent of attorney fees and cost in the amount of \$4,067.23 based upon the affidavit of his attorney. The attorney fee for 18.25 hours at \$250.00 per hour applied only to the period of time beginning July 19, 2018, which was more than 90

days after certiorari was denied by the Supreme Court (R. p. 20), when Judge Lee's Order dated May 14, 2015 became the law of the case. That Order specifically requires the case to end. Appellant simply refuses to execute the dismissals and releases to end the case. Attorney fees are justified based on the record of this case and Judge Hood's approval based on the Affidavit of Respondent's attorney (R. pp. 54-55) which references an engagement letter dated June 11, 2019 as Exhibit B.

Appellant argues that any attorney fees awarded in circuit court should not include efforts taken in probate court. However, Appellant continues to seek rights and property in probate court that he is not entitled to under Judge Lee's Order. That Order simply requires "7. File documents to close the Estate." (R. p. 4) Appellant's probate filings on May 30, 2019, which are attached to Mr. Syrett's Affidavit filed here May 31, 2019 (R. pp. 56-84) to advise the Court of "efforts to comply", include an Amended Inventory and Proposal for Distribution with Addendum (R. p. 71) which adds personal property to the inventory and then seeks 5 items from Respondent, seemingly in defiance of Judge Hood's Order dated May 29, 2019. Mr. Jellinik's letter transmitting the deed would have preserved this claim for personal property that Appellant now seeks in probate. Judge Hood's May 29, 2019 Order released Respondent from the conditions of that letter, but Respondent must now continue contesting such claims in probate and should be entitled to costs and attorney's fees when the probate claims are brought to a conclusion and the case is ended.

It should be noted that the above Addendum (R. p. 71) filed in probate provides that Appellant is entitled to the 5 items based on the "the agreement reached between Regina Burton and Jimmy Boykin pursuant to at status conference presided over by Judge Hood." (R.p. 71) The

record confirms that there was an attempt to settle, specifically Judge Hood's Order filed September 27, 2018 (R. pp. 9-10) but that attempt obviously failed and Judge Hood's exchange with Ms. Burton at oral argument expresses his frustration after his considerable efforts to resolve the case. (R. p. 51, lines 15 - 19). The point being, this claim for the 5 items, unsupported in the record, is pending in probate and will require continuing attorney efforts to resolve.

It is submitted the attorney fee issue should be remanded as the case has not ended, related issues continue in the Probate Court and the Court could then consider the 6 criteria recited in Baron Data Systems vs. Loter, 297 S.C. 382, 377 S.E. 2d 296 (1989) and Miller vs. Miller, 375 S.C. 443, 652 S.E. 2d 754 (Ct. App. 2007) if the Court deems that appropriate.

Issue 3 on Appeal: Did the Court err in its award to Respondent for interest paid?

The interest paid by Respondent is supported by his Affidavit (R. pp. 93-95) and his attorney's Affidavit. (R.p.54-55)

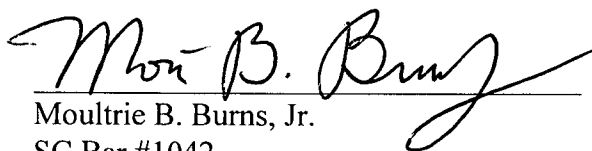
The Respondent was prepared to pay Appellant in compliance with Judge Lee's Order, 90 days after certiorari was denied. Appellant has been held in contempt of Judge Lee's Order and the interest award should be upheld.

CONCLUSION

This Court should affirm the finding that Appellant is in contempt of Judge Lee's 2015 Order and that Respondent is entitled to the award for interest.

Further, this Court should remand the case to ensure Appellant's compliance with Judge Lee's Order to consider the attorney fees and an award of further attorney's fees if the Court deems them appropriate.

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