THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
Oct 02 2020
SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Appellate Case File No. 2019-001827

DAVID J. MATTOX, Appellant,

vs.

LISA JO BARE MATTOX, Respondent.

BRIEF OF APPELLANT

Michael L. Brown, Jr.
Zachary Merritt
Post Office Box 1025
Rock Hill, SC 29731
(803) 328-8822

John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
(803) 324-8100
Attorneys for Appellant

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 4

Statement of the Case 4

Standard of Review 5

Arguments 6

1) THE APPELLANT IF ENTITLED TO RELIEF UNDER RULE 60(b) DUE TO THE DISCOVERY OF EVIDENCE OUTSIDE HIS POSSESSION AND, AS TO WHICH, THERE WAS NO LACK OF DUE DILIGENCE. 6

2) THE APPELLANT IF ENTITLED TO RELIEF DUE TO THE PROBATE COURT'S RELIANCE ON EVIDENCE OUTSIDE THE RECORD 10

3) THE APPELLANT IF ENTITLED TO RELIEF UNDER S.C. CODE § 62-3-412 RELATING TO AN ORIGINAL WILL WHERE HE WAS EFFECTIVELY UNAWARE OF ITS EXISTENCE. 11

Conclusion 12

*

TABLE OF AUTHORITIES

CASES: SOUTH CAROLINA

SUPREME COURT

Matter of Howard, 315 S.C. 356, 434 S.E.2d 254 (1993) 5

Sullivan v. Brown (IN RE Estate of Kay), 423 S.C. 476, 816 S.E.2d 542 (2018) 6

COURT OF APPEALS

Dean v. Kilgore, 313 S.C. 257, 437 S.E.2d 154 (Ct.App. 1993) 5

Eagles v. South Carolina Nat'! Bank, 301 S.C. 402, 392 S.E.2d 187 (Ct.App. 1990) 5

Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 446 (Ct.App. 2005) 7-9

Stoney v. Stoney, 425 S.C. 47, 819 S.E.2d 201 (Ct.App. 2018) 9

STATUTES

S.C. Code § 62-3-412 ..... 4, 7-8, 12

RULES OF COURT

Rule 60(b), S.C.R.C.P. 8, 9, 11, 12

Rule 60(b)(1), S.C.R.C.P. 4, 5

Rule 60(b)(2), S.C.R.C.P. 4,5

Rule 60(b)(5), S.C.R.C.P. 4,5

UNITED STATES CIRCUIT COURTS

Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., 833 F.2d 208, 2 11-12 (9th Cir. 1987) 8

Longden v. Sunderman, 979 F.2d 1095, 1103 (5th Cir. 1992) 8

Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir.1987) 8

UNITED STATES DISTRICT COURTS

American Cetacean Soc'y v. Smart, 673 F.Supp. 1102, 1106 (D.D.C. 1987) 8

Gibbes v. Rose Hill Plantation Devl. Co., 794 F.Supp. 1327 (1992) 10

Lans v. Gateway 2000, Inc., 110 F.Supp.2d 1 (D.D.C. 2000) 8

STATEMENT OF THE ISSUES ON APPEAL

I. THE APPELLANT IF ENTITLED TO RELIEF UNDER RULE 60 (B) DUE TO THE DISCOVERY OF EVIDENCE OUTSIDE HIS POSSESSION AND, AS TO WHICH, THERE WAS NO LACK OF DUE DILIGENCE.

II. THE APPELLANT IF ENTITLED TO RELIEF DUE TO THE PROBATE COURT'S RELIANCE ON EVIDENCE OUTSIDE THE RECORD.

III. THE APPELLANT IF ENTITLED TO RELIEF UNDER S.C. CODE § 62-3-412 RELATING TO AN ORIGINAL WILL WHERE HE WAS EFFECTIVELY UNAWARE OF ITS EXISTENCE.

STATEMENT OF THE CASE

JONATHAN RAY MATTOX died October 1, 2016. By its Order in his Estate entered September 26, 2017, the York County Probate Court determined that the Decedent signed a Last Will and Testament in 2005 in Gwinett County, Georgia, a copy of which was entered into evidence at the hearing on his Estate held August 9, 2017. That will named his brother DAVID J. MATTOX as his heir.

After execution of the said will, the deceased married the Respondent LISA JO BARE MATTOX. No later will naming her as an heir has been found.

The 2017 Order of the Probate Court concluded that in the absence of evidence that the will had been inadvertently lost or destroyed, the legal presumption was that will had been intentionally revoked. [RECORD ON APPEAL, Order of Sep. 26, 2017, Conclusion of Law E, p. 4.] In light of the legal presumption, the Decedent was found to be intestate and without children, leaving his wife, the Respondent, as his sole heir. [RECORD ON APPEAL, Order of Sep. 26, 2017, Conclusion of Law F., p.4.]

The original will, conforming in all respects to the copy submitted as evidence, was later discovered in the possession of Mrs. Peggy M. Mattox, mother of the Deceased and the Appellant DAVID J. MATTOX, and filed with the Probate Court.

With the will, the Appellant filed his Motion under Rule 60(b)(1), (2) and (5), S.C.R.C.P. and Petition under S.C. Code § 62-3-412, both within one year after the judgment contained in the said Order of September 26, 2017.

Hearing on the Motion and Petition was heard by the Probate Court on October 5, 2018. The Probate Court denied Appellant's Motion and Petition by Order filed November 21, 2018 and received

by Appellant November 26, 2018. Appeal to the Circuit Court for York County was filed December 5, 2018.

The Circuit Court, by the Honorable William A. McKinnon, affirmed the Probate Court by Order filed September 3, 2019. The Appellant's Motion to Alter or Amend Judgment was denied, with some modification of the recited facts, by Order filed October 2, 2019.

STANDARD OF REVIEW

In *Dean v. Kilgore,* 313 S.C. 257, 437 S.E.2d 154 (Ct.App. 1993), this Court held:

> This court and the Supreme Court, in a line of recent cases, have clearly addressed the important rules concerning the standard of review of cases appealed from the probate court. *[Matter of] Howard,* [315 S.C. 356,] 434 S.E.2d 254 (1993); *Eagles v. South Carolina Nat'! Bank,* 301 S.C. 402, 392 S.E.2d 187 (Ct.App.1990). These cases hold that the determination of the standard of review by an appellate court of matters originating in the probate court is controlled by whether the cause of action is at law or in equity. *Id.* To make this determination, the appellate court must look to the essential character of the cause of action alleged by the petitioners in the court below. If the essential character of the petitioner's cause of action is grounded on equitable rights and equitable relief is sought, the case is regarded as equitable and the appellate court has jurisdiction to make findings in accordance with its own view of the preponderance of the evidence. *Eagles,* 301 S.C. at 408, 392 S.E.2d at 191.
>
> [313 S.C. 257, 437 S.E.2d at 155 (Ct.App. 1993); citation of *Howard, supra,* corrected]

Relief under Rule 60(b)(1), S.C.R.C.P is based, *inter alia,* upon mistake, inadvertence or excusable neglect; relief under Rule 60(b)(2) is based on newly discovered evidence; relief under Rule 60(b)(5) is based, inter alia, upon a claim that it is no longer equitable that a judgment have prospective application.

Relief as allowed under S.C. Code § 62-3-412 is stated in relevant part:

> Subject to appeal and subject to vacation as provided herein and in Section 62-3-413, a formal testacy order under Sections 62-3-409 through 62-3-411, <u>including an order that the decedent</u>

left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs, except that:

(1) 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*.]

In *Sullivan v. Brown (IN RE Estate of Kay),* 423 S.C. 476, 816 S.E.2d 542 (2018), the Supreme Court held:

> Under the framework set out in *Townes,* prior to our master in equity system, when circuit judges referred matters to special referees or masters to make findings of fact, the limited scope of appellate review over factual findings concurred in by two judges may have been appropriate. However, we hold today that the two-judge rule has no applicability to cases wherein the circuit court, sitting in a purely appellate capacity, as here, affirms the findings of a lower tribunal. Instead, the applicable standard of review is the same as in other equity matters, and the appellate courts of this state may take their own view of the preponderance of the evidence. Accordingly, we analyze this case through this broad lens.
>
> *[Id.,* 423 S.C. at 481, 816 S.E.2d at 545.]

The proof required under both Rule 60 and § 62-3-412 come down to the elements of knowledge, real and imputed, and the petitioner's care in searching for a newly-discovered will. The weighing of those elements are matters of equity and reviewable as such.

ARGUMENT

I. THE APPELLANT IF ENTITLED TO RELIEF UNDER RULE 60(b) DUE TO THE DISCOVERY OF EVIDENCE OUTSIDE HIS POSSESSION AND, AS TO WHICH, THERE WAS NO LACK OF DUE DILIGENCE.

The Probate Court recited, and based its ruling in part, upon a finding that the Appellant, David Mattox, lived with his mother Peggy Mattox at the time she discovered the will in her home. That Order recites that he lived in that house in 2017. [RECORD ON APPEAL, Order of Nov. 21, 2018, Finding 12. p.8.].

There is no evidence on record to show Mr. Mattox' residency as a fact as of the time the will was discovered. The first Probate Order is silent on this point, and there is no transcript of the earlier Probate hearing. This fact in the Order appealed to the Circuit Court is stated as based upon the Probate Judge's memory from the earlier hearing.

Assuming the truth of this memory, it is irrelevant in absence of evidence of his residence at the time the will was discovered. It is also irrelevant in the absence of any evidence that the Appellant controlled or had access to his mother's safe, in which the will was found. [RECORD ON APPEAL, Order of Nov. 21, 2018, p.6 – 10; Transcript of Hearing, p.197 - 227.].

In *Lanier v. Lanier*, 364 S.C. 211, 612 S.E.2d 446 (Ct.App. 2005) this Court was faced with a claim of a lost or undisclosed document in a Family Court case. This Court held:

> To obtain a new trial based on newly discovered evidence, a movant must establish that the newly discovered evidence:
> 1) will probably change the result if a new trial is granted;
> 2) has been discovered since the trial;
> 3) could not have been discovered before the trial;
> 4) is material to the issue; and
> 5) is not merely cumulative or impeaching.
> *[Id.*, 364 S.C. ___, 612 S.E.2d 459; paragraphing added.]

Here, as to the above elements, there is no question that:

1) acceptance of the discovered will would change the result of the first Probate Order of September 27, 2017;
2) that the original will was discovered since the first Probate trial;

3) that the original will is material to the issue of Probate and the Decedent's heirs; and
4) that the original will in not merely cumulative or impeaching.

This listing of requirements leaves us with only element number (3): could the will (with due diligence) been discovered before trial? To quote again from *Lanier:*

> We find the instant case analogous to *Lans* [*v. Gateway 2000, Inc., 110* F.Supp.2d 1 (D.D.C. 2000)]. Wife was well aware the agreement existed; yet, she did not plead its contents or otherwise inform the court of the document's potential application.
> [*Id.*, 364 S.C.___, 612 S.E.2d 460]

Here, the Appellant had plead the contents in the earlier Probate action and produced a copy of the will. [RECORD ON APPEAL, p.29 – 47; Transcript of Hearing, p.197 - 227.]. The *Lanier* court clarified its holding as follows:

> [T]his court has previously held that evidence "in the possession of the party before the judgment was rendered . . . is not newly discovered evidence that affords relief." *American Cetacean* Soc'y v. *Smart,* 673 F.Supp. 1102, 1106 (D.D.C.1987) (Richey, J.). *See Coastal Transfer Co. v.* Toyota *Motor Sales, U.S.A.*, 833 F.2d 208, 211-12 (9th Cir.1987) (evidence that is somehow in possession of a party at time of trial may not be "discovered"); *see also Longden v. Sunderman*, 979 F.2d 1095, 1103 (5th Cir.1992) (misplaced evidence is not newly discovered evidence); *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir.1987) (party may not "discover" after trial evidence that was within knowledge of employees at time of trial).
> [*Id.*, 364 S.C._____, 612 S.E.2d 460]

In this case, the original will was not in possession of the Appellant or his agents. In expanding on this point, the Lanier Court referenced earlier cases on discovery of documents:

> However, most of these cases sounded in equity and were decided before the advent of Rule 60(b). Additionally, in all of the cases cited, existence of the lost document was alleged at trial.

When the documents were found, the courts held that the original documents themselves were material and not merely cumulative of other evidence as to their contents. Thus, retrials were merited.

[Id., 364 S.C. ___, 612 S.E.2d 461]

Likewise, in the case of *Stoney v. Stoney*, 425 S.C. 47, 819 S.E.2d 201 (Ct.App. 2018), this Court, following *Lanier*, held that documents in the hands of a partner's wife were allowed as newly-discovered evidence.

As to the requirement of due diligence, the earlier Order of the Probate court found, in relevant part, as follows:

9. The Petitioner's [David Mattox'] attorney has spent much time and research attempting to locate the original Will but has been unsuccessful.

10. The Petitioner testified that he had no knowledge of where the Decedent kept the original Will and had not seen or discussed the Will since 2005, but he understood the Decedent kept it in a safe place.

[RECORD ON APPEAL, Order of Probate Court, September 26, 2017, p.3.]

The Appellant contends that the Probate Court's findings above settle the question of the Appellant's due diligence.

In *Lanier, supra,* this Court based its ruling under Rule 60(b) upon the Appellant's failure to exercise due diligence to find a document in her possession. In the case at hand, there is no evidence that the Appellant knew the whereabouts of the original will, that he had control or possession of the same, or that he failed to exercise due diligence in learning its whereabouts. Counsel would note that the Appellant's mother was herself unaware that the deceased had placed the will in her safe. [RECORD ON APPEAL, Affidavit of Peggy M. Mattox, p.43 – 44.] To recite, the Decedent's mother swore as follows, in relevant part:

2. I knew my son JONATHAN RAY MATTOX had executed a will; I saw it in his truck the day it was executed. I did not see it again until the events described below.

3. During the litigation between DAVID J. MATTOX and LISA JO BARE MATTOX above, no one contacted me about the location of JONATHAN RAY MATTOX' will. Had anyone done so, I would have had no information to give them.

4. In or about October, 2017, I bought a new car. I then looked into selling my old car, which was then 17 years old.

5. I went into my safe to find the title to the old car. While looking for the title, I found the original will of JONATHAN RAY MATTOX in my safe.

6. Until I found this document, I had no knowledge of its presence in my safe. I very seldom use my safe or go into it.

7. JONATHAN RAY MATTOX, DAVID J. MATTOX and I know the location of the combination to my safe. I can only speculate that JONATHAN RAY MATTOX placed it there because the will named me as Personal Representative.

8. No one had told me the will had been placed in the safe.

9. Upon discovering the will, I contacted my son DAVID J. MATTOX and gave the original to him.

[RECORD ON APPEAL, Affidavit of Peggy M. Mattox, p.43 – 44.].

The Probate Court, as affirmed, effectively ascribes to the Appellant knowledge or possession of a document he did not have, and finds (in apparent contradiction of its earlier findings) a lack of due diligence in obtaining that knowledge. There is no evidentiary basis for that finding. The Appellant is entitled to Relief under Rule 60, S.C.R.C.P.

ARGUMENT

II. THE APPELLANT IF ENTITLED TO RELIEF DUE TO THE PROBATE COURT'S RELIANCE ON EVIDENCE OUTSIDE THE RECORD.

In addition, in the absence of evidence as to the Appellant's later residence, the Probate Court's imputation of his residence during the time the will was discovered, was based on early testimony and was, at best, a matter of judicial notice. Rule 201(e) of the South Carolina Rules of Evidence affords the Appellant the right to be heard on this point. That right was not granted. *Gibbes v. Rose Hill* Plantation Devl. Co., 794 F.Supp. 1327 (1992).

ARGUMENT

III. THE APPELLANT IF ENTITLED TO RELIEF UNDER S.C. CODE § 62-3-412 RELATING TO AN ORIGINAL WILL WHERE HE WAS EFFECTIVELY UNAWARE OF ITS EXISTENCE.

S.C. Code § 62-3-412 allows relief on a broader basis than Rule 60(b), S.C.R.C.P., stating in relevant part:

> Subject to appeal and subject to vacation as provided herein and in Section 62-3-413, a formal testacy order under Sections 62-3-409 through 62-3-411[1], including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs, except that:
>
> (1) 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.]*

The Appellant contends that the reference to the "existence" of a will, as stated in the Statute above, must mean ignorance of the actual document as well as ignorance of the document itself. The only requirement to probate of a will under § 62-3-412 is that the Petitioner be unaware of the will's existence at the time of the earlier proceeding. The Appellant contends this language is broad enough to comprehend a situation where the Petitioner is unaware of an original will's location. The Order of the Probate Court of November 21, 2018 omits any discussion of § 62-3-412. The Orders of the Circuit Court apparently limits the applicability of § 62-3-412 to matters in which two or more wills are involved, citing the referenced language to "another will". This reading contradicts the emphasized language of the first paragraph of the Statute cited above.

---

1. S.C. Code § 62-3-409 through 62-3-411 have no application to this matter, and were not argued below.

S.C. Code § 62-3-412 is a part of the Uniform Probate Code enacted in this State. S.C. Code § 62-1-102 of that Code states, in relevant part:

> (a) This Code shall be liberally construed and applied to promote its underlying purposes and policies.
>
> (b) The underlying purposes and policies of this Code are:
>
> (1) to simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors, and incapacitated persons;
>
> (2) to discover and make effective the intent of a decedent in the distribution of his property; . . .

Appellant would also note the language of S.C. Code § 62-3-412(b)(4), which states:

> (4) The order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances by the order of probate of the later-offered will or the order redetermining heirs.
>
> [*Emphasis added.*]

A narrow reading of § 62-3-412, which excludes the chance to apply that Statute to a sole lost will, defeats the general purpose of the Uniform Code and allows a distinction between litigation involving the discovery of two or more wills, and a lost will. There is no basis in law or equity in such a distinction and such a distinction defeats the general purpose of the Probate Code. The proper and logical reading of § 62-3-412 must include a factual situation such as found in this case, where relief may be granted "if appropriate under the circumstances."

CONCLUSION

All evidence in this matter evidences the Appellant's lack of possession and lack of knowledge as to the whereabouts of the original will of the Decedent. There is no basis to find a lack of due diligence on his part in discovering the will. He is entitled to relief under both Rule 60(b), S.C.R.C.P. and S.C.

Code § 62-3-412. He is entitled to enter his brother's will into Probate and proceed with the Estate.

October 2, 2020

Respectfully submitted,

Michael L. Brown, Jr.
Zachary Merritt
Post Office Box 1025
Rock Hill, SC 29731
(803) 328-8822

John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
(803) 324-8100

Attorneys for Appellant

By: _____

RECEIVED
Oct 02 2020
SC Court of Appeals

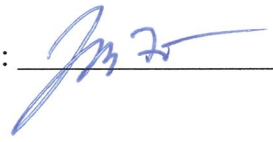
CERTIFICATE OF COUNSEL

The undersigned certifies that the final Brief of Appellant complies with Rule 211(b), S.C.A.C.R.

Michael L. Brown, Jr.
Zachary Merritt
Post Office Box 1025
Rock Hill, SC 29731
(803) 328-8822

John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
(803) 324-8100

Attorneys for Appellant

By: 

October 2, 2020