RECEIVED
May 17 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2020-001678

Michelle N. Gardner .....Respondent,

v.

Ernest J. Gardner, Jr., Individually and as Personal Representative of the Estate of Jason F. Gardner.....Appellant.

APPELLANT'S REPLY BRIEF

Scott W. Hutto
Hutto Law Firm, P.A.
PO Box 556
Georgetown, SC 29442
Attorney for Ernest J. Gardner, Jr.,
as Personal Representative of the
Estate of Jason F. Gardner

AND

Kenneth B. Wingate
Matthew J. Myers
Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, South Carolina 29211
Attorney for Ernest J. Gardner, Jr.,
Individually

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

ARGUMENT IN REPLY

I. Appellant timely filed his claim.

Respondent makes several arguments contesting the timeliness of Appellant's creditor claim that were not raised before the Probate Court, whether in brief or oral argument,[1] nor were they ruled on by the Probate Court. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998) (holding that to be preserved for appellate review, an argument must have been raised to and ruled on by the trial court).

First, Respondent argues that "[t]here is no dispute that if a creditor 'fails to timely present a claim in compliance with the nonclaim statute, the creditor's right of action against the estate is barred.'" (Respondent's Brief, p. 6, quoting In re Estate of Hover, 407 S.C. 194, 205, 754 S.E.2d 875, 881 (2014)). However, Appellant has not conceded that an untimely claim would bar his right to recovery, nor has Respondent previously alleged such a concession. To the contrary, Appellant has made several alternative arguments as to why his claim may be paid even his claim is deemed untimely pursuant to S.C. Code Ann. § 62-3-803.[2] Because the Probate Court correctly ruled that Appellant's claim was timely, it did not reach these alternate arguments. (Order dated Dec. 10, 2019, p. 8).

Second, Respondent argues that the relevant creditor claims statutes, S.C. Code Ann. §§ 62-3-801 & -803, must be construed in light of the policy of promoting a "speedy and efficient

[1] This despite the fact that Respondent was provided the unusual opportunity of submitting a supplemental brief after the summary judgement hearing.

[2] These include Appellant having an equitable lien for which a claim need not be filed, there is no deadline to provide a creditor with written notice, which Appellant as Personal Representative may still provide in order to trigger a timely filing, Appellant has already validly accepted his claim, and a creditor claim need not be filed with regard to amounts of the claim properly paid prior to the claims deadline. (Memo. in Opp. to Petitioner's Motion for Summary Judgement, pp. 3-4 and 7-10; Transcript dated Aug. 22, 2019, pp. 11-16 and 25-31).

system for liquidating the estate of a decedent" under S.C. Code Ann. § 62-1-102(b)(3). (Respondent's Brief, p. 8). In addition to not having been raised to or ruled on by the Probate Court, this argument ignores the competing policy "to discover and make effective the intent of a decedent in the distribution of his property" under S.C. Code § 62-1-102(b)(2). Accordingly, Respondent's second argument is also not a proper ground for summary judgment in favor of Respondent because Decedent evidenced an intent for Appellant to receive his retirement accounts, and that Respondent should not receive them. (Appellant's Affidavit dated Aug. 20, 2019; Appellant's Amended Affidavit dated Aug. 22, 2019).

Third, Respondent argues that the deadline for creditors with actual notice pursuant to S.C. Code Ann. §§ 62-3-801(b) & -803(a)(2) may be nullified by the deadline for creditors barred by publication "[u]nless notice has already been given under this section," pursuant to S.C. Code Ann. § 62-3-801(a). (Respondent's Brief, p. 9). In addition to not having been raised to or ruled on by the Probate Court, the quoted language cannot possibly be referring to written notice under Section 62-3-801(b) because the quoted language was adopted years before Section 62-3-801(b) was added by the Legislature. Cf. 1986 S.C. Act No. 539, § 1, eff. July 1, 1987; 1990 S.C. Act No. 521, § 51, eff. June 5, 1990. Therefore, the only logical interpretation of the clause "[u]nless notice has already been given under this section," is that a successor personal representative does not need to republish the notice to creditors if a prior personal representative had already done so, as otherwise required by S.C. Code Ann. § 62-3-704(a). Moreover, given that a primary purpose of requiring a published notice to creditors is to notify creditors that the personal representative may not know about, it would be nonsensical for the Legislature to waive the publication requirement simply because the personal representative mailed notices directly to known creditors. However, that would be the result of Respondent's proposed interpretation.

Fourth, Respondent argues that the deadline for creditors barred by publication pursuant to S.C. Code Ann. §§ 62-3-801(1) & -803(a)(2) applies to all creditors because the probate "Notice to Creditors" form 370ES purports to apply to "[a]ll persons having claims against [an] estate." (Respondent's Brief, p. 10). In addition to not having been raised to or ruled on by the Probate Court, the argument ignores the fact that the probate court forms do not override the Probate Code as promulgated by the South Carolina Legislature, and the Legislature has deemed it fit to provide for separate deadlines between creditors with actual notice, and those otherwise barred by publication or the general one year non-claims statute.[3] See S.C. Code Ann. § 62-3-803(a). Further, it is quite understandable that the drafters of form 370ES did not deem it appropriate to confuse the public with that nuance of the law, and simply instructs people to meet the earlier deadline so that those doing so would be timely regardless of which deadline applied.

Fifth, Respondent argues that the lack of explicit statutory language that S.C. Code Ann. § 62-3-801(a) does not apply to creditors with actual notice means that it does so apply. (Respondent's Brief, p. 11). In addition to not having been raised to or ruled on by the Probate Court, the argument ignores that the South Carolina legislature clearly provided for separate deadlines as between creditors with actual notice and other creditors barred by publication in S.C. Code Ann. § 62-3-803(a)(2). That rule did not need to be restated in S.C. Code Ann. § 62-3-801(a) because S.C. Code Ann. § 62-3-803(a)(2) makes specific reference to S.C. Code Ann. § 62-3-801(b) for creditors given actual notice.

[3] With regard to the deadline for creditors with actual notice, it should be noted that neither Respondent nor the Circuit Court disagreed with the Probate Court's finding that Appellant is a creditor with actual notice. (Order dated Dec. 10, 2019, pp. 4 and 6). Accordingly, that finding is the law of the case and must lead to the necessary legal conclusion that Appellant had one year after death to file his claim, because he did not receive the optional written notice of a 60 day deadline. See S.C. Code Ann. §§ 62-3-801(b) & -803(a)(2).

Sixth, Respondent implicitly argues, by reference to the Circuit Court's order, that giving creditors with actual knowledge a potentially longer time to file a claim than creditors barred by publication produces a bizarre result. (Respondent's Brief, p. 11). In addition to not having been raised to or ruled on by the Probate Court, the argument ignores that the South Carolina Legislature's decision to bifurcate the deadlines for creditors with actual notice and those otherwise barred by publication was a logical response to the constitutional due process protection against known creditors having their claims cutoff from an arbitrarily short notice-by-publication deadline. See Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988). Moreover, in this case specifically, there was nothing bizarre about Appellant waiting to see if he even needed to file a creditor claim at all, since he was Decedent's sole beneficiary. Ultimately Respondent filing her claim the day before the deadline for creditors barred by publication informed Appellant that there was a potentially competing claim and he therefore needed to file his claim before the deadline as to creditors with actual notice.

In summary, as admitted by Respondent herself, "[t]he Probate Court's ruling was based solely on its construction of the nonclaim statute." (Respondent's Brief, p. 4). However, neither Appellant nor the Circuit Court disputed the Probate Court's finding that Appellant is a creditor with actual notice, and Appellant may not raise new arguments as a means of circumventing the necessary statutory conclusion that Appellant had one year after death to file his creditor claim pursuant to S.C. Code Ann. §§ 62-3-801(b) & -803(a)(2).

II. Respondent waived her right to recover from Decedent's retirement accounts.

As a point of clarification, Respondent states that she "has not made any claim on any retirement account held by the Decedent. Instead, she has made a claim against the Estate seeking the benefit of her bargain as to lump sum alimony. The Probate Court confirmed that she had a right to make that claim in the March 8 order, which is not on appeal and is the law of the case." (Respondent's Brief, p. 12). However, the Probate Court's March 8 order specifically did not rule on whether any assets, retirement accounts or otherwise, would be available to satisfy Respondent's creditor claim. (Order dated Mar. 8, 2019, p. 10). Quite simply, whether or not Decedent waived her right to recover Decedent's retirement accounts is one of the central issues on now appeal, and Respondent at this time continues her effort to recover from the same retirement accounts that she promised Decedent in writing that she would not pursue any future claims against.

Respondent also contends that Appellant did not preserve the following arguments for appellate review: a "new analogy to creditor/debtor rights, a new argument relating to whether Ms. Gardner waive her 'expectancy interest' in any retirement account, and a new theory of promissory estoppel." (Respondent's Brief, p. 13, n. 9). However, Appellant has made these same arguments from his initial Memorandum in Opposition to Petitioner's Motion for Summary Judgement (pp. 10-12) and in his oral argument before the Probate Court (Transcript dated Aug. 22, 2019, pp. 74-77, 83-84, and 87-88). In response, the Probate Court held that Respondent had not waived her right to recover from Decedent's retirement accounts as a matter of law, specifically rejecting Appellant's reliance on Stribling v. Stribling, 369 S.C. 400, 632 S.E.2d 291

(Ct. App. 2006),[4] and otherwise specifically declining to rule on Appellant's promissory estoppel argument. (Order dated Dec. 10, 2019, p. 9-10). On Appeal to the Circuit Court, Appellant again argued that Respondent waived her expectancy interest under Stribling case and analogized this to general principals of creditor/debtor rights (Appellant's Initial Brief, pp. 7-11; Transcript dated Oct. 30, 2020 pp. 49-51 and 54), which the Circuit Court rejected (Order dated Nov. 23, 2020, pp. 8-10).

The only salient defense Respondent provides in an effort to negate her express waiver of future claims against Decedent's retirement funds is a California case dealing with a general waiver of "inheritance" rights. See Hawkins v. McLaughlin, 16 Cal. Rptr. 572 (Cal. Ct. App. 1961). However, as discussed in Appellant's Initial Brief, that case does not apply where one has also waived their rights as a future creditor, and not merely as a beneficiary. Ultimately, Respondent can provide no meaningful defense to the South Carolina precedent that one can specifically waive their expectancy interest in a retirement account, other than to hope that the Court of Appeals will not hold her to her word. Moreover, Respondent is not without recourse for her claim. Her agreement with Decedent allowed her to maintain his life insurance as a beneficiary, which she did and has already received a windfall much larger than the claim she now seeks to recover against assets she promised would forever remain free of her claims.

[4] This decision, authored by now Chief Justice Beatty, held that an ex-wife waived her "expectancy interest" to the predeceased ex-husband's retirement account under their divorce agreement, even though the ex-husband left her as the named beneficiary of the account. Respondent also inaccurately claims that Appellant admits that Stribling is not on point. (p. 14). Although Appellant indicated the case is not "directly" on point, because it involves the ex-wife as named beneficiary rather than as an estate creditor, Appellant's briefs and oral arguments have made it clear that Appellant does believe Stribling to be controlling in this matter, even more so because Respondent lacks the status of a named beneficiary.

CONCLUSION

For the reasons provided in Appellant's Initial Brief and above, the Court of Appeals should reverse the order of the Circuit Court dated November 23, 2020, affirm the portion of the order of the Probate Court dated December 10, 2019 regarding the timeliness of Appellant's creditor claim, and reverse the portion of the same order regarding Respondent's waiver of claims against Decedent's retirement accounts.

HUTTO LAW FIRM, P.A.

s/Scott W. Hutto
Scott W. Hutto, SC Bar 15582
Hutto Law Firm, P.A.
PO Box 556
Georgetown, SC 29442
Attorney for Ernest J. Gardner, Jr.,
as Personal Representative of the
Estate of Jason F. Gardner

AND

SWEENY, WINGATE & BARROW, P.A.

s*/Matthew J. Myers*
Kenneth B. Wingate, SC Bar 8004
Matthew J. Myers, SC Bar 74664
Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, South Carolina 29211
Attorney for Ernest J. Gardner, Jr., Individually

Columbia, South Carolina
May 17, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2020-001678

Michelle N. Gardner .....Respondent,

v.

Ernest J. Gardner, Jr., Individually and as Personal Representative of the Estate of Jason F. Gardner.....Appellant.

PROOF OF SERVICE

I certify that I have served a copy of the Appellant's Reply Brief in the above referenced matter by e-mailing a copy of same to the attorneys of record, on May 17, 2021, as allowed by section (g)(3) of South Carolina Supreme Court Order No. 2020-000447, with a copy of such e-mail included with this Proof of Service.

John R. Chase, Esq.
Haynsworth, Sinkler, Boyd
134 Meeting Street, Third Floor
P.O. Box 340 (29402)
Charleston, SC 29401
jchase@hsblawfirm.com

Sarah P. Spruill, Esq.
Haynsworth, Sinkler, Boyd
ONE North Main, 2nd Floor
P.O. Box 2048 (29602)
Greenville, SC 29601-2772
sspruill@hsblawfirm.com

Respectfully submitted,

HUTTO LAW FIRM, P.A.

s/Scott W. Hutto
Scott W. Hutto, SC Bar 15582
Hutto Law Firm, P.A.
PO Box 556
Georgetown, SC 29442
Attorney for Ernest J. Gardner, Jr.,
as Personal Representative of the
Estate of Jason F. Gardner

AND

SWEENY, WINGATE & BARROW, P.A.

s/Matthew J. Myers
Kenneth B. Wingate, SC Bar 8004
Matthew J. Myers, SC Bar 74664
Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, South Carolina 29211
Attorney for Ernest J. Gardner, Jr.,
Individually

Columbia, South Carolina
May 17, 2021

Matthew J. Myers

From: Matthew J. Myers
Sent: Monday, May 17, 2021 5:53 PM
To: 'Chase, John'; 'Spruill, Sarah'
Cc: 'Scott Hutto'
Subject: Gardner appeal
Attachments: Gardner Reply.pdf

John & Sarah,

Please find a copy of Appellant's Reply brief that I will be filing with the Court of Appeals in a few minutes by email.

Thank you,

S·W·B
Matthew J. Myers | *Member*
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street, Columbia, SC 29201
Tel ▪ 803-256-2233 Fax ▪ 803-256-9177