RECEIVED
Jul 21 2020
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Hon. William A. McKinnon, Circuit Court Judge

Civil Case No.: 2018-CP-46-03672
Appellate Case No. 2019-001827

David J. Mattox, Appellant,

v.

Lisa Jo Bare Mattox, Respondent.

FINAL BRIEF OF RESPONDENT

July 29 2020

John P. Gettys, Jr., SC Bar No. 8673
Morton & Gettys, LLC
P.O. Box 707
Rock Hill, SC 29731
803.366.3388

J. Nathanial Pierce, SC Bar No. 102803
Morton & Gettys, LLC
P.O. Box 707
Rock Hill, SC 29731
803.366.3388

Attorneys for Respondent

Other Counsel of Record:

Michael L. Brown, Jr.
Law Offices of Michael L. Brown, Jr.
P.O. Box 1025
Rock Hill, SC 29731
803.328.8822

Zachary M. Merritt
Law Offices of Michael L. Brown, Jr.
P.O. Box 1025
Rock Hill, SC 29731
803.328.8822

John Martin Foster
John Martin Foster, Attorney
P.O. Box 106
Rock Hill, SC 29731
803.324.8100

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Rules of Court

Secondary Sources

STATEMENT OF ISSUES ON APPEAL

I. **Is Appellant entitled to relief under Rule 60(b)?**

II. **Is Appellant entitled to relief due to the Probate Court's reliance on evidence outside the record?**

III. **Is Appellant entitled to relief under S.C. Code Ann. § 62-3-412 relating to an original will where he was effectively unaware of its existence?**

STATEMENT OF THE CASE

Jonathan Ray Mattox ("Decedent") and Lisa Mattox ("Respondent") were married June 11, 2011. Decedent died October 1, 2016, in Georgetown County, South Carolina. The York County, South Carolina Probate Court opened Decedent's Estate and appointed Respondent as personal representative October 13, 2016. Appellant filed a Summons and Petition for Formal Appointment on April 28, 2017. (R. 24-28). The Petition demanded David J. Mattox ("Appellant") be appointed as personal representative of Decedent's Estate based on the existence of a purported original will wherein Appellant was allegedly named as Personal Representative. (R. 24-28). Additionally, Appellant sought to restrain Respondent, the Personal Representative of Decedent's estate. (R. 24-28).

A hearing was held before the Honorable Carolyn W. Rogers on August 9, 2017. Appellant and Respondent were the only witnesses called at the hearing. (R. 2). The purported original will was not presented at the hearing. (R. 3). However, a copy of the purported will was introduced and accepted into evidence. (R. 3). Following the hearing, and per the Court's Order September 26, 2017, Judge Rogers denied Appellant's Petition for Appointment as Personal Representative as well as his request to restrain the Personal Representative. (R. 5). As a result, the original will was, by law, presumed revoked and the Respondent was left as the sole beneficiary of the Decedent's Estate, which passed under the South Carolina intestacy statute. (R. 5).

On July 13, 2018, some ten months later, Appellant, by and through counsel, filed a Summons, Notice, Motion, and Petition for Relief from Judgment and Stay of Enforcement pursuant to Rule 60 of the South Carolina Rules of Civil Procedure ("S.C.R.C.P.") alleging, *inter alia*, newly discovered evidence. (R. 29-32). Appellant also filed multiple lis pendens against properties owned wholly by Respondent, some not within the jurisdiction of the Probate Court. At a hearing held October 5, 2018, Appellant and Respondent argued Appellant's S.C.R.C.P. 60 motion, along with Respondent's Motion to Quash the lis pendens, before Judge Rogers. (R. 197-227). On November 21, 2018, Judge Rogers issued an order denying Appellant's motion for relief under S.C.R.C.P. 60 and denying Respondent's Motion to Quash the remaining lis pendens (R. 10).

On December 5, 2018, Appellant filed Notice of Intent to Appeal the findings of the Probate Court to the York County Circuit Court. At oral argument before the Honorable William McKinnon, on July 31, 2019, Appellant argued matters listed in his Statement of Issues on Appeal, as well as others that were raised for the first time on appeal. (R. 228-262). In his order dated September 3, 2019, Judge McKinnon affirmed Judge Rogers, finding:

1. 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.
2. There is no basis for a Rule 60(b)(1) motion.
3. There is no basis for a Rule 60(b)(5) motion.
4. Section 62-3-412(1) does not apply because the judgment below was one of intestacy.
5. Appellant cannot obtain relief as an "independent action."

(R. 11-17). This appeal followed. (R. 276).

STANDARD OF REVIEW

Appellant claims this Court must review this case *de novo*, citing *Dean v. Kilgore*, 313 S.C. 257, 437 S.E.2d 154 (Ct. App. 1993) for the proposition that "[i]f 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." Initial Br. of Resp't, 5. Appellant goes on to claim that a motion under Rule 60(B), S.C.R. Civ. P. and a request for relief under S.C. Code Ann. § 62-3-412 are equitable in nature because they "come down to the elements of knowledge, real and imputed, and the petitioner's care in searching for the newly discovered will" and the "weighing of those elements are matters of equity." Initial Br. of Resp't, 6.

South Carolina jurisprudence is clear on this point. 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 793, 795 (Ct. App. 2007)). An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support. *Id.* Therefore, the appropriate standard of review in this case is an abuse of discretion standard, not *de novo* review.

ARGUMENT

I. The Appellant is not entitled to relief under Rule 60(b) of the of the South Carolina Rules of Civil Procedure based on his lack of due diligence.

a. Appellant is not entitled to relief under Rule 60(b)(1), S.C.R.C.P.

Rule 60(b)(1) is not applicable to this case. S.C.R.C.P. 60(b)(1) permits the court to relieve a party from a final judgment, order, or proceeding based on "mistake inadvertence, surprise, or excusable neglect." This rule is intended to allow a party relief based on errors committed by the party's counsel. *See* 2858 Mistake, Inadvertence, Surprise, or Excusable Neglect, 11 Fed. Prac. & Proc. Civ. § 2858 (3d ed.). There is no mistake by counsel alleged in this instance, and "it would be a perversion of [Rule 60(b)(1)] and its purpose to permit it to be used to circumvent another rule." *Id.* Here, the issue is not mistake by counsel but, rather, whether Appellant acted with due diligence in locating the original will ahead of trial. Rule 60(b)(2) specifically addresses this situation, and Appellant must not be allowed to circumvent the due diligence requirement of Rule 60(b)(2) by seeking to avail himself of Rule 60(b)(1).

To the extent this Court finds Rule 60(b)(1) is applicable in this matter, Appellant is not entitled to relief. In determining whether to grant relief under S.C.R.C.P. 60(b)(1), the court must consider the following factors: (1) the promptness within which the relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party. *Rouvet v. Rouvet*, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010) (citing *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct. App. 2001)).

First, Appellant failed to seek relief promptly. In her affidavit, Peggy M. Mattox ("Peggy"), the mother of the Appellant and Decedent attests that she found the Decedent's original will in a

safe in Peggy's house in or around October 2017. (R. 75). Peggy further attests that upon discovering the original will, she contacted Appellant and gave the original will to him. (R. 76). As such, Appellant was in possession of the original will for approximately ten months prior to making the motion for a new trial. Additionally, based on Peggy's affidavit, Appellant came into possession of the original will less than one month after the final Order of the Court was filed September 26, 2017. (R. 75). Appellant cannot provide a suitable reason for failing to act promptly. The crux of the underlying case was the non-existence of an original will. Within weeks of the Court's final Order, Peggy located the original will and provided it to Appellant.

Next, Respondent possesses a meritorious defense. In the underlying case, the Court concluded as a matter of law that "there was no credible evidence presented to the Court that the Decedent provided for his spouse outside of the Will or in lieu of a testamentary disposition." As such, even if Appellant were to be granted a new trial, Respondent would still prevail on an omitted spouse claim under S.C. Code Ann. § 62-2-301. *Id.* Finally, Respondent would be prejudiced should the Court grant Appellant's motion, as the property at issue in this matter was under contract at the time of the hearing on Appellant's 60(b) motion and has since been sold. For these reasons, Appellant is not entitled to relief under S.C.R.C.P. 60(b)(1).

b. Appellant is not entitled to relief under Rule 60(b)(2), S.C.R.C.P.

Pursuant to S.C.R.C.P. 60(b)(2), the Court may relieve a party from a final judgment, order, or proceeding based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial...." Due diligence is defined not as what a litigant actually discovered, but what the litigant could have discovered. *See Lanier v. Lanier*, 364 S.C. 211, 612 S.E.2d 456 (Ct. App. 2005). To prevail on a motion under Rule 60(b)(2), the purported newly discovered evidence must satisfy the following five-part test: (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. *Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 638, 670 S.E.2d 680, 689 (Ct. App. 2008) (citing *Lanier*, 364 S.C. at 211). The party seeking to have judgment set aside has burden of presenting the evidence proving facts essential to entitle him to relief. *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991).

Appellant makes rote assertions regarding the status of four of the five elements of the *Southeastern Housing* test as beyond question. Initial Br. of Resp't, 7-8. While Respondent does not concede Appellant has carried its burden of proof as to any of the five elements, the two elements most at issue are that the newly discovered evidence would not change the result if a new trial is granted, and that Appellant did not exercise due diligence in attempting to locate the original will ahead of trial.

First, the result will not change if a new trial is granted. Appellant states in his Statement of the Case the Decedent signed the purported original will in Gwinett Count, Georgia in 2005. Initial Br. of Resp't, 4. As argued before the Probate Court on Appellant's motion under Rule 60, S.C.R.C.P., should the original will be submitted for probate, Respondent would ultimately be considered an omitted spouse under S.C. Code Ann. § 62-2-301 (2014). (R. 208). Pursuant to § 62-2-301(a), if the testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse is entitled to inherit as if there was no will unless it appears the omission was intentional or the decedent provided for the spouse outside the will. Here, it is undisputed Respondent and Decedent met and were married after 2005, and the Probate Court concluded "there was no credible evidence presented to the Court that the Decedent provided for his spouse outside of the Will or in lieu of a testamentary disposition." (R. 4). Based on the

above, it is unlikely the result of the underlying trial would change even were the purported original will to be introduced into evidence.

Second, Appellant did not exercise due diligence in locating the original will. In order to prove the third element of the five-part test prescribed by *Southeastern Housing*, supra, the "newly discovered evidence" must be evidence that could not have been discovered with due diligence in time to move for a new trial under Rule 59(b) of the South Carolina rules of Civil Procedure. *See Jamison v. Ford Motor Co.*, 373 S.C. 248, 272, 644 S.E.2d 755, 767 (Ct. App. 2007). Further, in order for evidence to be "newly discovered," it could 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). "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*, 644 S.E.2d at 768. A party must make a specifically targeted search to find missing evidence in order to have exercised "due diligence." *Lanier*, 612 S.E.2d at 460.

The evidence in the record shows the requirements under *Lanier* and *Jamison* have not been met. Appellant failed to present any evidence on his motion under Rule 60(b) that he acted with the diligence reasonably expected of a party seeking to fulfill a legal obligation or that Appellant made a targeted effort to locate the original will, though Appellant was aware of the original will's existence. (R. 197-228; 26). The will was discovered in the Appellant and Decedent's mother's house, in a safe for which Appellant was one of three who knew the location and combination, the other two being the Decedent and the Decedent's mother. (R. 75). Appellant argues that because the will was not found in his home, but in his mother's home, he had no duty to attempt to search for the will there. Initial Br. of Resp't, 7. However, the affidavit of Appellant's

own mother established Appellant knew the location of and combination to the safe. (R. 75).

Further, the Probate Court Order dated September 27, 2017 provides in its Findings of Fact "[t]he 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*." (emphasis added). (R. 3). As Judge McKinnon noted in his order affirming the Probate Court, "a safe would be among the most likely places to store an important legal document." (R. 14). Based on the above, Appellant failed to exercise due diligence in searching for the will, and Appellant is not entitled to relief under S.C.R.C.P. 60(b)(2).

c. Appellant is not entitled to relief under Rule 60(b)(5), S.C.R.C.P.

Finally, Appellant is not entitled to relief pursuant to 60(b)(5). According to S.C.R.C.P. 60(b)(5), the court may relieve a party from a final judgment, order, or proceeding if "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Relief under S.C.R.C.P. 60(b)(5) is available only in cases of fraud upon the court or rare, special, exceptional or unusual circumstances that may warrant equitable relief, including accident or mistake, citing *Mullarkey v. Mullarkey*, 397 S.C. 182, 191, 723 S.E.2d 249, 254 (Ct. App. 2012). Further, executed orders, such as those which mandate a one-time change in the ownership of property, are outside the scope 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). Based on the above, and the lack of any such allegations allowing for relief under Rule 60(b)(5), Appellant is not entitled to relief.

II. The Appellant is not entitled to relief due to the Probate Court's reliance on evidence outside the record.

Appellant asserts he is entitled to relief due to the Probate Court's reliance on evidence "outside the record." Appellant argues the issue of his residence at the time the purported original will was found is a matter of judicial notice and he was not granted the right to be heard on the point. Initial Br. of Resp't, 10.

First, the issue of Appellant's residence is not a matter of judicial notice, nor is it evidence outside the record. Appellant filed for relief under, *inter alia*, Rule 60(b)(2), SCRCP. A necessary element under a Rule 60(b)(2) analysis is whether the newly discovered evidence "will probably change the result if a new trial is granted." *Southeastern Housing Foundation,* 670 S.E.2d at 689. Necessarily, the judge ruling on the 60(b)motion must consider the evidence presented at the underlying trial in order to make this determination. It is an uncontested fact that Appellant once resided in the home where the purported original will was located. This fact was presented in evidence at the underlying trial. (R. 8). Based on the necessary scope of review, Judge Rogers did not need to take judicial review to recognize this fact, nor was this fact outside the record.

Next, to the extent the Court agrees the fact of Appellant's residence in the home where the purported original will was located does constitute an adjudicative fact of which judicial notice was taken, Appellant waived his right to object. Rule 201 of the South Carolina Rules of Evidence ("SCRE") provides, in part, "[a] party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." Rule 201 goes on to say, "[i]n the absence of prior notification, the request may be made after judicial notice has been taken." SCRE, 201. In this instance, Appellant was provided a letter, dated November 2, 2018, from Judge Rogers, laying out her ruling and instructing Respondent's counsel to draft an

order based on her findings. (R. 88-89). This letter included the finding Appellant failed to exercise due diligence due, in part, to his prior testimony stating he lived at the residence where the purported original will was ultimately located. (R. 88). Neither Appellant nor his attorney requested an opportunity to be heard as to the propriety of Judge Rogers taking judicial notice of this fact. Respondent's counsel then provided Appellant's counsel a draft order containing the language regarding Appellant's residence. (R. 90-91). Neither Appellant nor his attorney requested a hearing on judicial notice. Finally, Judge Rogers filed the final Order, containing the language regarding Appellant's residence. Again, neither Appellant nor his counsel requested a hearing on the alleged judicial notice. Based on the above, Appellant has waived his right to appeal the denial of his Rule 60(b) motion on judicial notice grounds.

Finally, while Appellant's residence at the time the purported original will was found is mentioned in Judge Rogers's order, Judge McKinnon's order makes it abundantly clear that Appellant's residence is not a critical component of the applicable standards of behavior set forth in *Lanier* and *Jamison*, *supra.* Without regard to his residence, Appellant failed to make a sufficiently specific, targeted, search for the purported original will. It is undisputed, by the affidavit of Appellant's own mother, Appellant knew the location of and combination to the safe where the purported original will was located. To the extent Judge Rogers relied on Appellant's residence in reaching her decision, it was, at most, a harmless error.

III. The Appellant is not entitled to relief under S.C. Code § 62-3-412 because he had knowledge or constructive knowledge of the purported will.

Appellant argues he is entitled to relief under S.C. Code Ann. § 62-3-412 (2014). Initial Br. of Resp't, 11-12. However, Appellant's arguments both before the circuit court and in his initial brief before this court are limited to § 62-3-412 (1) which provides:

> Subject to appeal and subject to vacation as provided herein and in Section 62-3-413, a formal testacy order under Section 62-3-409 through 63-3-411, 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). Appellant contends the above language "comprehend[s] a situation where the Petitioner is unaware of an original will's location." Initial Br. of Resp't, 11.

It is well-established that the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Grief v. Amisub of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 695-96 (2012) (citing *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. *Id.* Here, it is clear § 62-3-412(1) is not applicable. In using the phrases "later-offered will" and "another will," the legislature clearly intended this subsection to apply in situations where a will is offered for probate, and another, distinct, will of which the proponents had no knowledge is subsequently offered. The case at bar does not comport with this standard. Appellant sought to enter a copy of the purported will for probate. The Probate Court, after a hearing, found the Decedent "died without a will and had no children, and the Petitioner is his sole heir," leaving Respondent to inherit under the South Carolina intestacy statute. (R. 4). Now, Appellant seeks to gain a new trial by entering the original will "conforming in all respects to the copy submitted as evidence." Initial Br. of Resp't, 4. Appellant does not seek to enter a "later-offered will" or

"another will," he seeks to enter the original version of a will he knew to exist at the time of trial. (R. 26). Therefore, § 62-3-412(1) does not apply in this case.

To the extent this Court finds § 62-3-412(1) does apply to the facts of this case, it need look no further than the phrase "if it is shown that the proponents of the later-offered will were unaware of its existence at the time of the earlier proceeding." First, Appellant's own Complaint states "Decedent provided [Appellant] with a copy of his Last Will and Testament." (R. 26). Next, the Probate Court found as fact "the Petitioner testified that he had no knowledge of where the Decedent kept the original Will and had not seen or discussed the original Will since 2005, but he understood the Decedent kept it in a safe place." (R. 3). Further, the affidavit of the Decedent and Appellant's motion, introduced as an exhibit at the October 5, 2018 hearing, provides: "I know my son [Jonathan Ray Mattox] had executed a will; I saw it in his truck the day it was executed." The record shows Appellant and people close to Appellant had knowledge of the existence of the purported will in this case. (R. 75). Therefore, to the extent the Court finds § 62-3-412(1) applies generally, Appellant is not entitled to relief because he had actual and constructive knowledge of the existence of the purported will.

CONCLUSION

The trial court found that Appellant was not entitled to relief under Rule 60(b). The Circuit Court affirmed that ruling. For the reasons set forth above, Respondent respectfully requests this Court affirm.

[Signature Block on Following Page]

July 20, 2020

John P. Gettys, Jr., SC Bar No. 8673
Morton & Gettys, LLC
P.O. Box 707
Rock Hill, SC 29731
803.366.3388

J. Nathanial Pierce, SC Bar No. 102803
P.O. Box 707
Rock Hill, SC 29731
803.366.3388

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Hon. William A. McKinnon, Circuit Court Judge

Civil Case No.: 2018-CP-46-03672
Appellate Case No. 2019-001827

David J. Mattox, Appellant,

v.

Lisa Jo Bare Mattox, Respondent.

PROOF OF SERVICE

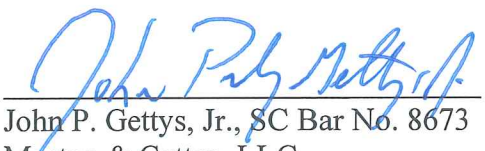
The undersigned certifies that she has served this Respondent's Final Brief by depositing a copy of it in the United States Mail, postage prepaid, on July __, 2020, addressed to its attorneys of record to the below addresses:

Michael L. Brown, Jr.
Law Offices of Michael L. Brown, Jr.
P.O. Box 1025
Rock Hill, SC 29731
803.328.8822

Zachary M. Merritt
Law Offices of Michael L. Brown, Jr.
P.O. Box 1025
Rock Hill, SC 29731
803.328.8822

John Martin Foster
John Martin Foster, Attorney
P.O. Box 106
Rock Hill, SC 29731
803.324.8100

July 20, 2020



John P. Gettys, Jr., SC Bar No. 8673
Morton & Gettys, LLC
P.O. Box 707
Rock Hill, SC 29731
803.366.3388

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Hon. William A. McKinnon, Circuit Court Judge

Civil Case No.: 2018-CP-46-03672
Appellate Case No. 2019-001827

RECEIVED
Jul 21 2020
SC Court of Appeals

David J. Mattox, Appellant,

v.

Lisa Jo Bare Mattox, Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that Respondent's Final Brief complies with Rule 211(b), South Carolina Appellate Court Rules.

July 20, 2020

John P. Gettys, Jr., SC Bar No. 8673
Morton & Gettys, LLC
P.O. Box 707
Rock Hill, SC 29731
803.366.3388