

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 0719

SUCCESSION OF KATIE ROBISON, ET AL.

VERSUS

DAWN SCOTT AND STEVEN SHANE SCOTT

July
RHP by JMS
WFK

Judgment Rendered: NOV - 3 2010

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 574,845

Honorable Wilson E. Fields, Judge

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BEFORE: PARRO, GUIDRY, AND KLINE, JJ.¹

¹ The Honorable William F. Kline, Jr., retired, is serving *pro tempore* by special appointment of the Louisiana Supreme Court.

GUIDRY, J.

Co-executors of a deceased legatee's succession appeal a judgment dismissing their petition to annul a judgment that declared invalid the testament in which the deceased legatee had been granted a bequest. Finding that the trial court erred in dismissing the petition to annul on the grounds of no right of action and waiver, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

On September 19, 2004, Coley Austill Scott, Sr. died at Our Lady of the Lake Regional Medical Center in Baton Rouge, Louisiana. Six days prior to his death, on September 13, 2004, the decedent executed a new will, naming the following persons and entity as legatees: Coley A. Scott, Jr. ("Buddy"), Charles A. Scott, Steven S. Scott, Forrest Scott, Katie Robison, and the Dawn Scott Trust. On March 30, 2007, the decedent's daughter, Dawn Scott, filed a "Contradictory Motion to Annul Probated Testament," wherein she asserted that the September 13, 2004 testament should be declared invalid, because the decedent "lacked the mental and physical capacity to understand, formulate, and legally execute a binding Last Will & Testament" and because the testament was a result of the undue influence exercised over the decedent by his then wife, Katie Robison. On December 23, 2008, the trial court signed a judgment declaring the September 13, 2004 probated testament "null, void, and invalidated."

Thereafter, on January 29, 2009, Buddy and Charles, as the duly appointed co-executors of the Succession of Katie Robison,² filed a petition to annul the December 23, 2008 judgment, alleging that based on Dawn's failure to join the Succession of Katie Robison, through its co-executors, in the action to invalidate

² Forrest also joined in the lawsuit in another capacity, but he is not a party to this appeal.

the September 13, 2004 testament, the judgment should be annulled.³ Named as defendants in the petition to annul the judgment were Dawn, Steven, and the Dawn Scott Trust.

In response to the petition to annul the judgment, Steven filed a peremptory exception raising the objection of no right of action. Dawn separately excepted to the petition to raise the objections of no cause of action and waiver. Following a hearing on the exceptions, the trial court rendered judgment sustaining the exceptions of no right of action and waiver and dismissed the petition to annul with prejudice in a judgment signed November 12, 2009. It is from that judgment that Buddy and Charles, as representatives of the Succession of Katie Robison, now appeal.

DISCUSSION

On appeal, Buddy and Charles assert that the trial court erred in sustaining the objections of no right of action and waiver. We agree.

The trial court dismissed the petition to annul on the basis of having sustained the objections of no right of action and waiver. The premise for both objections, however, is basically the same. Namely, it is argued that because Buddy and Charles were named and participated in the proceedings to annul the September 13, 2004 probated testament, they should be barred from asserting that they did not participate in those proceedings in their capacity as representatives of the Succession of Katie Robison, particularly since the individual rights and interests of Buddy and Charles in the proceedings were the same as any they would seek to assert on behalf of the Succession of Katie Robison.

³ It was further alleged that the December 23, 2008 judgment should be annulled for failure to join the Dawn Scott Trust in the action to annul the September 13, 2004 testament; however, on appeal, no one contests the dismissal in respect to the Dawn Scott Trust, so our review is limited to the issue of the Succession of Katie Robison.

The focus of the objection of no right of action is on whether a particular plaintiff has a right to bring the suit, but it assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case is a member of the class that has a legal interest in the subject matter of the litigation. Howard v. Administrators of Tulane Educational Fund, 07-2224, p. 17 (La. 7/1/08), 986 So. 2d 47, 60. Katie Robison was a legatee of the September 13, 2004 testament, which legacy became an asset of her estate at her death. As the succession representatives of her estate, Buddy and Charles had a fiduciary duty to manage and preserve the property of the succession pursuant to La. C.C.P. art. 3191. Moreover, they had a duty to defend the succession while under administration. See La. C.C.P. arts. 734 and 3249. As the motion to annul the September 13, 2004 testament would result in voiding the bequest to Katie Robison, Buddy and Charles, as the representatives of the Succession of Katie Robison, clearly had a legal interest in seeking to preserve the legacy as property of the succession.

Although any defenses Buddy and Charles would raise on behalf of the Succession of Katie Robison would be common to those raised on their own behalf, the law, nevertheless, required that Buddy and Charles be specifically cited as the representatives of the Succession of Katie Robison, and not just individually. Louisiana Code of Civil Procedure article 2931 states that "[a] probated testament may be annulled **only** by a direct action brought in the succession proceeding **against the legatees**, the residuary heir, if any, and the executor, if he has not been discharged. The action shall be tried as a summary proceeding." (Emphasis added.) Therefore, we conclude that Buddy and Charles, as co-executors of the Succession of Katie Robison, do have a right of action.

Katie Robison was named a legatee in the September 13, 2004 probated testament; however, by the time Dawn filed the motion to annul the testament, on

March 30, 2007, Katie Robison had died,⁴ and her succession was under the administration of her sons, Buddy and Charles. In the motion to annul the probated testament, Dawn named Buddy, individually and as testamentary co-executor of the Succession of Coley A. Scott, Sr., and Charles as defendants in the action. Although reference was made to Katie Robison's death and to her being a legatee under the contested will, Katie Robison was not cited as a defendant, either individually or through her succession representatives, in the motion to annul the probated testament.

In Succession of Hoffpauir, 411 So. 2d 714, 716 (La. App. 3d Cir. 1982), an action to collate an allegedly excessive donation was filed against the person who was the duly appointed succession representative; however, the person was named only in her individual capacity and not as succession representative. The court held that the action could only be brought against the succession through the succession representative, and since the action was filed against defendant, individually, and not as the succession representative, the court found that the trial court properly dismissed the action.

Moreover, in order for Buddy and Charles's actions in participating in the proceedings to annul the September 13, 2004 probated testament to constitute waiver, they would have had to appear in the proceedings *as representatives of the succession*. In Jeffries v. Estate of Pruitt, 598 So. 2d 379, 384-85 (La. App. 3d Cir.), writs denied, 599 So. 2d 306 and 605 So. 2d 1124 (La. 1992), although the plaintiff "failed to name as a defendant the duly appointed succession representative," because the defendant made general appearances in the proceedings on behalf of the estate, the court held that the succession representative had waived the objection of lack of joinder and service. Specifically, counsel for the succession representative filed pleadings on her behalf

⁴ Katie Robison died on February 14, 2006.

in her capacity as succession representative, which the court found was sufficient to constitute a general appearance and therefore waiver with regard to the court's jurisdiction over the defendant.

There is nothing in the record before us to indicate that Buddy or Charles's actions in the proceedings to annul the September 13, 2004 probated testament would in any way constitute a general appearance or waiver of the objections of lack of joinder and service with respect to the Succession of Katie Robison. Nor do we find that allegations made by Buddy and Charles in their capacity as representatives of the Succession of Katie Robison in pleadings filed in a separate court proceeding were sufficient to bar them from raising the objections as to joinder and service, as a party is not inexorably bound by testimony given on the witness stand or by factual allegations contained in pleadings from another suit. See Scoggins v. Frederick, 98-1815, pp. 5-6 (La. App. 1st Cir. 9/24/99), 744 So. 2d 676, 681-82, writ denied, 99-3557 (La. 3/17/00), 756 So. 2d 1141. Therefore, we find that the trial court did err in sustaining the objections of no right of action and waiver.

CONCLUSION

For the foregoing reasons, we find that the trial court erred in dismissing the petition to annul the December 23, 2008 judgment on the basis of no right of action and waiver. Having concluded that the co-executors of the Succession of Katie Robison do have a right of action and did not waive the right to contest the failure to join the succession as a necessary party needed for just adjudication, we reverse the November 12, 2009 judgment of the trial court and remand this matter for further proceedings consistent with this opinion.. All costs of these proceedings are cast to the appellee, Steven Scott.

REVERSED AND REMANDED.