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NO. COA09-951

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

IN THE MATTER OF THE PURPORTED
WILL OF GENEVIEVE D. JONES

Gaston County
No. 07 E 565

Appeal by Caveators from order entered 9 February 2009 and judgment entered 11 February 2009 by Judge Beverly Beal in Superior Court, Gaston County. Heard in the Court of Appeals 2 December 2009.

Arthurs & Foltz, by Douglas P. Arthurs, for Propounder-Appellee.

Stott, Hollowell, Palmer & Windham, L.L.P., by Aaron C. Low, for Caveators-Appellants.

STEPHENS, Judge.

Caveators argue that the trial court abused its discretion in denying their motion to continue. We disagree, and affirm the order of the trial court. Although Caveators also appealed from the judgment of the trial court entered upon the verdict of the jury in favor of Propounder-Appellee, in their brief on appeal, Caveators do not challenge the trial court's judgment, and thus, their appeal therefrom is deemed abandoned. N.C. R. App. P. 28(b)(6) (2009).

I. Procedural History and Factual Background

On 4 June 2007, Barbara A. Miller ("Miller") and Gilbert Jones, Jr. ("Jones") (collectively "Caveators" or "Plaintiffs") filed a caveat proceeding alleging that the purported Last Will and Testament of Genevieve D. Jones was procured by the exercise of undue influence by Jason M. Jones ("Propounder" or "Defendant"). Contemporaneously, Caveators filed a separate action against Propounder asserting causes of action for undue influence, constructive fraud, fraud, conversion, and a demand for an accounting of transfers made of the decedent's assets.¹

On 19 December 2008, before Propounder had submitted discovery responses, Miller's attorney, Michael David Bland ("Bland"), made a motion to withdraw as counsel in both the present matter and the separate civil action, 07 CVS 2524. Bland stated that his withdrawal was "necessary" due to "irreconcilable differences" between his law firm² and Miller.³ A hearing was held on Bland's motion on 12 January 2009 in Gaston County Superior Court.⁴ Miller appeared at the hearing and entered a written objection to Bland's

¹In the civil action, 07 CVS 2524, the named Plaintiffs are Barbara A. Miller and Gilbert H. Jones, Jr., and the named Defendant is Jason M. Jones. 07 CVS 2524 is not the subject of this appeal, and is thus not before us for review.

²Michael David Bland is an attorney at Weaver, Bennett & Bland, P.A.

³It appears that the attorney previously representing Jones had been allowed to withdraw several months earlier, and Jones had remained *pro se*. Jones did not appear for the hearing on 9 February 2009.

⁴It is unclear from the record who the presiding judge was at the 12 January 2009 hearing. The presiding judge's signature on the trial court's order is illegible.

motion to withdraw, arguing that the trial was quickly approaching and no discovery had yet been received. On 12 January 2009, the trial court entered an order allowing Bland's motion to withdraw as counsel in both matters.

That same day, Defendant served discovery responses upon Plaintiffs in the civil action. Defendant responded to many of the interrogatories by stating that he "objects to this Interrogatory as being overbroad and irrelevant." This matter and the separate civil action were scheduled for trial to begin on 9 February 2009. On 30 January 2009, Miller filed a *pro se* motion to continue both the present matter and 07 CVS 2524.

On 1 February 2009, Miller was hospitalized at Carolina's Medical Center in Pineville, North Carolina, due to chest pain and hypertension. On 3 February 2009, Propounder filed an objection to Miller's motion to continue. On 4 February 2009, the trial court entered an order to align the parties, whereby the trial court named Jason M. Jones as Propounder, and Barbara Miller, Gilbert Jones, Jr., and Genevieve Kueffer as Caveators.⁵

At the 9 February 2009 civil session of Gaston County Superior Court, Judge Beverly Beal presiding, a hearing was held on Miller's motion to continue. Miller did not attend the hearing, but she was represented by attorney Larry G. Hoyle ("Hoyle") at the hearing. Before the hearing began, Hoyle tendered a letter to Propounder's attorney from Miller's treating physician, Arun K. Grover, M.D.,

⁵Only Caveators Barbara Miller and Gilbert Jones, Jr. are parties to this appeal.

dated 6 February 2009, which stated that Miller was admitted to the hospital for chest pain and hypertension on 1 February 2009 and that Miller was "in no condition to report for court on 2/09/09."

Hoyle explained to the trial court that Miller's daughter had approached him at 5:30 p.m. on Friday, 6 February 2009, and tried to explain to him the background of this case. Hoyle stated that Miller tried to contact several attorneys following Bland's withdrawal, but no one would agree to take her case on such short notice. Hoyle informed Miller that he would not be "interested in representing her" on this type of case, but he agreed to appear at the hearing on her behalf to ask for a continuance. Judge Beal heard arguments from attorneys for both sides, and granted Miller's motion to continue the civil case, 07 CVS 2524, but denied Miller's motion to continue the instant caveat proceeding.

Later that day, the caveat matter proceeded to trial. Caveators were not present, and they were not represented by counsel. Only Propounder presented evidence at trial. At the close of his evidence, Propounder made a motion to exclude the issue of undue influence from the jury instructions and requested a directed verdict on this issue. The trial court granted both of Propounder's motions and entered a directed verdict on the issue of undue influence. The jury returned a verdict that the contested writing was the Last Will and Testament of Genevieve D. Jones. Judge Beal entered judgment on this verdict on 11 February 2009. Caveators retained current counsel shortly thereafter and entered

notice of appeal on 23 February 2009.⁶

II. Motion to Continue

Caveators argue that the trial court abused its discretion by denying Miller's motion to continue. We disagree.

We review the trial court's denial of a motion to continue for an abuse of discretion. *In re Humphrey*, 156 N.C. App. 533, 538, 577 S.E.2d 421, 425 (2003). "Generally, the denial of a continuance, which is within the trial court's sound discretion, will not be interfered with on appeal; however, if the ruling is manifestly unsupported by reason, it is an abuse of discretion and subject to reversal." *In re Safriet*, 112 N.C. App. 747, 751, 436 S.E.2d 898, 901 (1993) (internal citation and quotation marks omitted).

Rule 40(b) of the North Carolina Rules of Civil Procedure provides that "[n]o continuance shall be granted except upon application to the court. A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require." N.C. Gen. Stat. § 1A-1, Rule 40(b) (2009). "Continuances are generally disfavored, and the burden of demonstrating sufficient grounds for continuation is placed upon the party seeking the continuation." *In re J.B.*, 172 N.C. App. 1, 10, 616 S.E.2d 264, 270 (2005).

A. Caveator Miller's Medical Issues

⁶Although Jones did not appear at the hearing on 9 February 2009 and neither joined in Miller's motion to continue that hearing nor made his own motion to continue, Jones joined the appeal from Judge Beal's order denying Miller's motion.

Caveators contend that the trial court abused its discretion in denying Miller's motion to continue when Miller was unavailable due to medical issues. Caveators argue that the letter from Miller's treating physician was admitted into evidence at the hearing and established her medical unavailability for the hearing. We disagree. The record before this Court does not reflect that this letter was admitted into evidence or otherwise relied upon by the trial court.

Indeed, Hoyle argued to Judge Beal that Miller was entitled to a continuance only on the ground that she had not had sufficient time since Bland's withdrawal to obtain other counsel, despite her efforts to find another attorney to take her case. In summarizing his oral motion to continue, Hoyle stated, "[M]y position would be . . . that she hasn't had necessarily time to retain new counsel." Miller's doctor's letter was mentioned only by Propounder's attorney, who had received a copy of the letter immediately before the hearing and who opposed Miller's motion for a continuance on any ground. In his response to the objection by Propounder's attorney, Hoyle reasserted only Miller's purported lack of "sufficient time to prepare" as the reason her motion should be granted.

Judge Beal's ruling from the bench denying the motion to continue was based entirely on Hoyle's asserted ground for the motion. We will not conclude that Judge Beal abused his discretion on a basis not even asserted by Hoyle as a reason to continue the hearing. Moreover, assuming *arguendo* that the physician's letter

was considered by Judge Beal, the letter provided only a vague diagnosis of Miller's condition and gave no indication of how long Miller's condition would prevent her from participating in a trial. We also note that Miller's motion was not supported by affidavit or other evidence. See *Raleigh-Durham Airport Auth. v. Howard*, 88 N.C. App. 207, 215, 363 S.E.2d 184, 188 (1987) (finding no abuse of discretion where trial court denied motion to continue when motion was not supported by affidavit or by forecast of expected testimony or evidence of any kind). We conclude that, even if properly before the trial court and considered by the trial court, the letter from Miller's physician was insufficient to meet Miller's burden to demonstrate sufficient grounds for a continuation of the proceedings.

B. Withdrawal of Miller's Attorney

Caveators also contend that in light of the complexity of this matter and the insufficiency of Propounder's discovery responses, the motion to continue should have been granted because Miller did not have sufficient time following her attorney's withdrawal to find a new attorney and present her case before a jury. We disagree.

Our Supreme Court has previously held that "the general rule is that an attorney's withdrawal on the eve of the trial of a civil case is not *ipso facto* grounds for a continuance." *Shankle v. Shankle*, 289 N.C. 473, 484, 223 S.E.2d 380, 387 (1976). In such a situation, the trial court must examine the circumstances of the case and determine "whether immediate trial or continuance will

best serve the ends of justice." *Id.* at 485, 223 S.E.2d at 387. In *Lamb v. Groce*, 95 N.C. App. 220, 382 S.E.2d 234 (1989), this Court held that the trial court did not abuse its discretion in denying the defendants' motion for a continuance where the defendants' attorney had given his clients two weeks' notice of his intent to withdraw. *Id.* at 222, 382 S.E.2d at 236. This Court has also held that it was not an abuse of the trial court's discretion to deny a motion to continue where the defendant had more than two month's notice of counsel's intent to withdraw. *Trivette v. Trivette*, 162 N.C. App. 55, 64, 590 S.E.2d 298, 305 (2004).

In the present case, Miller was given notice of Bland's intent to withdraw due to "irreconcilable differences" on 19 December 2008 – 50 days before this matter came on for trial on 9 February 2009. The order allowing Bland to withdraw was entered on 12 January 2009, which was 28 days before trial. At trial, Hoyle informed the trial court that Miller had contacted several attorneys but that no one had agreed to represent her. The record does not reveal when Miller contacted these attorneys, nor are their reasons for declining representation revealed.⁷ Miller's claim that she was unable to secure representation within 50 days after learning of Bland's intent to withdraw does not satisfy her burden of demonstrating sufficient grounds for a continuation. See *J.B.*, 172 N.C. App. at 10, 616 S.E.2d at 270. Moreover, in denying the motion, Judge Beal stated:

⁷Hoyle agreed to handle the motion to continue but was not willing to take Miller's case because he "did not handle this type of case[.]"

I realize it takes time for an attorney to investigate these matters, but the order allowing the withdrawal promptly considered would certainly have been enough time for an attorney to come on board in the matter, and I can't foresee that delaying the case further⁸ would assure us that counsel would be coming into the case at all.

Rather than demonstrating an abuse of discretion, Judge Beal's ruling reflects that he properly exercised his discretion.

C. Effect of Denial of Motion to Continue on Separate Civil Case

Caveators also contend that the trial court's ruling that denied the motion to continue the caveat proceeding, but granted the motion to continue the civil case, was an abuse of discretion because it resulted in extreme prejudice to Caveators. Specifically, Caveators assert that the court's judgment in the caveat proceeding established that the will which transferred all of the decedent's assets to Propounder was valid. Caveators contend that entry of this judgment before the civil case is tried would effectively destroy Plaintiffs' ability to sue as heirs in the civil action due to collateral estoppel. Also, Caveators argue that "if the jury verdict in the caveat proceeding is left to stand, [Plaintiffs] could be foreclosed in collecting in their civil lawsuit since the damages collected in that lawsuit would go into the estate and only [Defendant] would be able to collect anything from the estate."

Caveators argue further that both the present matter and the separate civil action were prejudiced by allowing the caveat

⁸The case had been pending for 20 months when it was called for trial on 9 February 2009.

proceeding to move forward without Miller being present. Caveators' argument is flawed, however, as they give no explanation for the absence of the other caveator at the hearing, nor do they offer any explanation for why Miller's presence was crucial to the proceeding. Furthermore, as discussed *supra*, Miller has failed to adequately explain her inability to retain counsel who could have represented her interests in her absence, and Jones had apparently elected to proceed *pro se*.⁹ The alleged inability of one of three caveators to attend the caveat proceeding is insufficient to demonstrate that the trial court abused its discretion or that Caveators were prejudiced by the trial court's order.

Furthermore, even if the judgment in the caveat proceeding affected Plaintiffs' ability to prevail in the civil action due to collateral estoppel, this would not be a basis for overturning the trial court's judgment.

Under the . . . doctrine of collateral estoppel, also known as 'estoppel by judgment' or 'issue preclusion,' the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, *provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding.*

Whitacre P'ship v. BioSignia, Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (emphasis added). Plaintiffs would only be barred from challenging the validity of the decedent's will in the civil proceeding if they had "enjoyed a full and fair opportunity to

⁹Jones has offered no explanation for his failure to appear at the 9 February 2009 hearing.

litigate that issue[,]" *id.*, in the caveat proceeding, in which case they would not have suffered any prejudice. We will find no error in the denial of a motion to continue where a party has failed to demonstrate that material prejudice resulted from the denial of that motion. *Bowers v. Olf*, 122 N.C. App. 421, 427, 470 S.E.2d 346, 350 (1996) (Trial court did not err in denying plaintiff's motions to continue where plaintiff failed to show any prejudice resulting therefrom.).

At the 9 February 2009 hearing, Judge Beal explained the trial court's ruling as follows:

Of significance here to me is the fact, Mr. Hoyle, that as you have candidly said, this is not the type of case that you handle in your routine practice -- I'm familiar with your practice -- and you said that. But what is of significance is that having been given the time that was available, Miss Miller did not choose to employ an attorney and hire them to represent her in this case but only hired you to represent her for the purpose of seeking this continuance.

I realize it takes time for an attorney to investigate these matters, but the order allowing the withdrawal promptly considered would certainly have been enough time for an attorney to come on board in the matter, and I can't foresee that delaying the case further would assure us that counsel would be coming into the case at all.

Now, however, having said that, I think the wisdom in this case is to grant the motion to continue the civil action and to take these matters and separate them.

I think there's some recent legislation or rules that have been adopted that do allow the joinder of these things, but in our practice in the past we found that to be really a difficult thing to do, and I don't think that's the way to handle this upon my review of the situation.

Granting the motion to continue the civil action, denying the motion to continue the

caveat action. It will be tried this week. It's an interim proceeding. And, of course, Miss Miller's absence here is not cause for any sanction against her. It's just that . . . we need to proceed in this matter. It's a caveat, and, of course, our law says that has to be given priority consideration to it.

In the interest of a speedy and convenient determination, Judge Beal decided to continue the civil action and proceed with the caveat matter. We hold that Judge Beal's ruling was sound, well-reasoned, and was not an abuse of discretion.

D. Totality of the Circumstances

Lastly, Caveators argue that considered in their totality, the circumstances in this case justified granting Caveators' motion to continue. For the reasons discussed *supra*, we disagree and hold that the trial court did not abuse its discretion in denying Caveators' motion to continue. Furthermore, assuming *arguendo* that Caveators' motion was improperly denied, Caveators have failed to present sufficient evidence of any prejudice resulting from the trial court's order. Accordingly, the order of the trial court is

AFFIRMED.

Judges MCGEE and STEELMAN concur.

Report per Rule 30(e).