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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1317

Filed: 15 November 2016

Anson County, No. 15 E 35

In The Matter of The

ESTATE OF HOWARD HURLEY LISK, SR., Deceased.

Appeal by Appellant-Petitioner from order entered 10 September 2015 by Judge Richard T. Brown in Anson County Superior Court. Heard in the Court of Appeals 11 May 2016.

Ruff Bond Cobb Wade & Bethune, LLP, by Ronald L. Gibson, for Petitioner-Appellant.

Buckner Law Office, PLLC, by Richard G. Buckner, for Respondent-Appellee.

INMAN, Judge.

The heirs of an estate are not precluded by *res judicata* or collateral estoppel from alleging abandonment as a defense against a surviving spouse's statutory claim for inheritance and support, even though the defense could have been raised by the decedent in a prior equitable distribution proceeding, because the issue was not litigated or necessary to adjudicate the first proceeding.

Mark T. Lowder ("Petitioner"), guardian of the Estate of Myrtle Arlene Oliver Lisk, appeals from an order granting Summary Judgment in favor of the devisees, daughter, son, grandchildren, and great-grandchildren of Howard Hurley Lisk, Sr.

("Respondents"), named under the Last Will and Testament of Howard Hurley Lisk, Sr., ("Estate") and against Petitioner's Petition for Elective Share and Application and Assignment Year's Allowance (collectively the "Petition and Application") in the Estate.

Petitioner asserts that Respondents were barred by *res judicata* and collateral estoppel from bringing abandonment as a defense to the Petition and Application, and that the trial court erred in allowing setoffs under N.C. Gen. Stat. §§ 30-3.1 and 30-3.2(3c). After careful review, we affirm the trial court's order.

I. Facts and Procedural History

Howard Hurley Lisk, Sr. ("Husband") and Myrtle Arlene Oliver Lisk ("Wife") were married on 11 May 1992 and at all times relevant to this action resided in Stanly County, North Carolina. Both are now deceased.

In April 2008, Wife suffered a severe stroke, which left her unable to communicate and required permanent long-term care. Wife received inpatient treatment for the first month following her stroke. Then, with the consent of Wife's daughters from a prior marriage, Wife was returned to the home she shared with Husband, where she received 24-hour supervision and care from a certified nursing assistant.

Disputes soon arose among family members regarding Wife's medical treatment and care. In July 2008, Wife's daughters (the "Guardians") were jointly

appointed the guardians of her person, and Petitioner was appointed guardian of her estate. In an order appointing the Guardians, the Stanly County Clerk of Court found, *inter alia*, that Wife "has received good care while residing in her home," that Husband "has been paying for the services of the nursing assistants from his own funds," and that Wife's care was directed by her primary care physician, but that Wife's daughters and Husband "have had numerous disputes regarding medical appointments . . . communications with physicians . . . visitation times for the daughters . . . and telephone contact between the daughters and the nursing assistants for [Wife]."

On 28 February 2009, the Guardians, whom Wife had previously named as agents of her health care power of attorney, removed Wife from the marital residence without Husband's consent.

On or about 5 May 2010, the Guardians and Petitioner filed a complaint in Stanly County District Court seeking for Wife, *inter alia*, a divorce from bed and board, post-separation support, permanent alimony, and equitable distribution of the martial assets. The complaint alleged that Husband's failure to seek out reasonable and timely medical attention for Wife's cerebrovascular accident resulted in constructive abandonment by driving Wife from the marital home.

Husband opposed the divorce, denied he had abandoned Wife, and asserted counterclaims against the Guardians for intentional infliction of emotional distress

and tortious interference with the contractual relations between Husband and Wife. Husband also denied that marital separation had occurred and did not pray for a divorce from bed and board.

All claims other than those for divorce and equitable distribution were settled by a consent order entered 7 September 2010. The record does not reflect whether Wife's claim for a divorce was pursued or voluntarily dismissed, but Wife's claim for divorce was never granted.

On 20 October 2010, while the equitable distribution action remained pending, Husband executed a will in which he disinherited Wife, explaining:

> At the date of my execution of this my Last Will, my wife, ARLENE O. LISK, has been declared incompetent and has been alienated from me by her daughters . . . . I have hereto before transferred to my wife, ARLENE O. LISK, real property, personal property and intangible property of substantial value. It is for this reason that I make no provision for my wife, ARLENE O. LISK, in this my Last Will.

Husband's will named as devisees his daughter, son, grandchildren, and great-grandchildren, Respondents in this case.

On 1 November 2011, Judge Scott T. Brewer entered an order granting unequal distribution of marital assets in favor of Wife. Judge Brewer's order found, *inter alia*, that "it is impossible to determine whether this separation was desired by [Wife], however the guardians of the person had legal authority to cause the separation and did in fact do so." Judge Brewer's order also found that "[t]here is no

credible evidence that the medical condition of [Wife] . . . was in any way, form or fashion caused by [Husband]." The Guardians gave notice of appeal to this Court from the equitable distribution order, but while the appeal was pending, the parties settled the dispute through a consent order entered 28 August 2012.

Although living separately, Husband and Wife were still married at the time of Husband's death on 5 December 2014. Husband's will was admitted for probate on 9 February 2015.

On 24 February 2015, Petitioner, acting as Guardian of the Estate of Wife, filed in Stanly County Superior Court the Petition and Application seeking for Wife a statutory share in Husband's Estate.

Respondents opposed the Petition and Application, alleging that Wife was not entitled to any share in the Estate because she had abandoned Husband. Respondents filed a Motion for Summary Judgment based on that allegation. As an alternative to summary judgment, Respondents' Motion sought setoffs based on the monies Wife received from an irrevocable family trust which Husband had established using his separate funds (the "Trust"), the equitable distribution award ordered by the Superior Court, and an additional $100,000 paid by Husband to settle the Guardians' and Petitioner's appeal from the equitable distribution award.

The trial court on 10 September 2015 entered an order granting Respondents' Motion for Summary Judgment against the Petition and Application, and in the alternative allowing Respondents' request for setoffs. Petitioner timely appealed.

II. Analysis

A. Standard of Review

"An order of summary judgment by the trial court is fully reviewable by this Court." *Yadkin Valley Land Co., L.L.C. v. Baker*, 141 N.C. App. 636, 638, 539 S.E.2d 685, 688 (2000) (citations omitted). "Summary judgement is appropriate when the pleadings, depositions, affidavits, and other evidentiary materials demonstrate the absence of any triable issue of fact and the moving party's right to judgment as a matter of law." *Murakami v. Wilmington Star News, Inc.*, 137 N.C. App. 357, 359, 528 S.E.2d 68, 69 (2000) (citing *Yamaha Corp. v. Parks*, 72 N.C. App. 625, 325 S.E.2d 55 (1985); N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999)). "In reviewing the trial court's grant of summary judgment this court must examine the evidence in the light most favorable to the non-movant[.]" *Delk v. Hill*, 89 N.C. App. 83, 84-85, 365 S.E.2d 218, 219 (1988).

The trial court's order made no findings of fact but recited several undisputed facts. Neither party disputes, on appeal, any of the recited undisputed facts.

B. Res Judicata and Collateral Estoppel

Petitioner contends that Respondents were barred from asserting abandonment as a defense to the Petition and Application based on *res judicata* and collateral estoppel. We disagree.

"Under the doctrine of res judicata [sic] or "claim preclusion," a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies . . . . The doctrine prevents the relitigation of 'all matters . . . that were or should have been adjudicated in the prior action.' " *Whitacre Partnership v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (alteration in original) (citations omitted). "Under the companion doctrine of collateral estoppel . . . 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." *Id.* For collateral estoppel to bar a party's subsequent claim,

> (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

Williams v. City of Jacksonville Police Dept., 165 N.C. App. 587, 593, 599 S.E.2d 422, 428-429 (2004) (quoting *McCallum v. N.C. Coop. Extension Serv.*, 142 N.C. App. 48, 54, 542 S.E.2d 227, 233 (2001)). These complimentary doctrines advance the twofold

policy goals of "protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) (citations omitted).

Here, Petitioner asserts that Respondents' abandonment defense is barred by *res judicata* and collateral estoppel because Husband previously pleaded abandonment by Wife as a bar to post-separation support, permanent alimony, and equitable distribution. The record does not support Petitioner's assertion. Husband denied that he and Wife were separated and opposed equitable distribution on that basis. Husband did not allege abandonment by Wife or assert a counterclaim based on abandonment. Rather, he opposed the claim for equitable distribution by asserting that he and Wife were not legally separated. Husband asserted no counterclaim against Wife but asserted counterclaims directly against the Guardians—individually—for infliction of emotional distress and for tortious interference with his marital relationship with Wife.

Even if Husband had made a claim of abandonment, it would not have been relevant to the equitable distribution proceeding. "[M]arital fault or misconduct of the parties which is not related to the economic condition of the marriage is not germane to a division of marital property under [N.C. Gen. Stat. §] 50-20(c) and should not be considered." *Smith v. Smith*, 314 N.C. 80, 87, 331 S.E.2d 682, 687

(1985). Petitioner has not argued that the economic condition of Husband and Wife's marriage was at issue in the equitable distribution proceeding.

Barring the defense of abandonment in this action would penalize Respondents for Husband's failure to raise and litigate a claim that was premature, given his opposition to the entire proceeding for alimony, support, and equitable distribution. The North Carolina Supreme Court, in a decision which cited the need to provide guidance to the bench and bar, held: "We recognize and adhere in this state to a policy which within reason favors maintenance of the marriage. This policy militates against the application of any procedural rule which forces a spouse to file an action for absolute divorce or any action which tends to sever the marital relation before that spouse is really desirous of pursuing such a course." *Gardner v. Gardner*, 294 N.C. 172, 180-81, 240 S.E.2d 399, 405 (1978). Despite Husband's disputes with Petitioner and Guardians, the record reflects his steadfast desire to maintain his relationship with Wife and his choice to assert no claim against her. Barring his heirs from asserting the defense of abandonment against claims by Wife's estate would not only conflict with our precedents regarding the criteria for *res judicata* and collateral estoppel, but also would violate the policy pronouncement by our Supreme Court in *Gardner*.

For all the foregoing reasons, Respondents' abandonment defense in this action was not barred by *res judicata* or collateral estoppel.

C. Setoffs under N.C. Gen. Stat. §§ 30-3.1 and 30-3.2(3c)

Petitioner next contends the trial court erred by allowing setoffs for the elective shares and application and assignment year's allowance under N.C. Gen. Stat. §§ 30-3.1 and 30-3.2(3c) from the monies Wife received from the Trust, the equitable distribution award, and an additional $100,000 received pursuant to the settlement of the appeal from the equitable distribution award. We need not address whether setoffs from these sources are permitted under N.C. Gen. Stat. §§ 30-3.1 and 30-3.2(3c), because Wife, having abandoned Husband, is not entitled to any statutory recovery.

III. Conclusion

For the reasons stated above, we affirm the trial court's order granting Respondents' Motion for Summary Judgment and denying Petitioner's Petition for Elective Share and Application and Assignment Year's Allowance.

AFFIRMED.

Judges ELMORE and MCCULLOUGH concur.

Report per Rule 30(e).