

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 0163

KEVIN KINGSTON

VERSUS

ABC INSURANCE COMPANY AND ALVIN D. SINGLETARY

—
**On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 2006-11421, Division "F"
Honorable Martin E. Coady, Judge Presiding**
—

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BEFORE: PARRO, KUHN, AND McDONALD, JJ.

Judgment rendered September 14, 2009

PARRO, J.

In this legal malpractice action, Kevin Kingston appeals a summary judgment in favor of Alvin D. Singletary, dismissing Kingston's claims against Singletary. We vacate the judgment and remand.

FACTUAL AND PROCEDURAL BACKGROUND

On April 17, 2005, Moses Milano died, leaving a last will and testament dated April 17, 2003, which had been prepared by Alvin D. Singletary, a Slidell attorney. Kevin Kingston, decedent's longtime friend, was appointed executor in the testament. Kingston retained Singletary's services to probate Milano's will and to secure a judgment of possession for the property bequeathed to Kingston. In the succession proceeding, Singletary declared that Milano's testament "bequeathed all of his property of every kind and nature, both movable and immovable, corporeal and incorporeal, community and separate, wherever located that he died possessed of to **KEVIN KINGSTON.**" However, this language was inconsistent with the language from Milano's will, which stated that Kingston was bequeathed Milano's "home, the household furnishings therein, and the parcel of ground upon which it is situated, at 142 Lakeview Drive, Slidell, St. Tammany Parish, Louisiana 70458."

This inconsistency went unnoticed, and a judgment of possession was executed and made the judgment of the court on April 29, 2005, recognizing and decreeing Kingston to be the "universal legatee of the decedent, **MOSES M. MILANO,**" and "entitled to the ownership and [to be] placed in possession of decedent's entire estate." On May 19, 2005, nieces and nephews (the intestate heirs) of Milano filed petitions to annul the judgment of possession. Kingston had already received over \$343,000 from Milano's certificates of deposit and checking accounts, none of which was actually bequeathed to him in the will. After the mistake was discovered, Singletary withdrew as Kingston's counsel. Subsequently, Kingston and the intestate heirs reached a settlement dismissing all claims between them. Kingston received the property left to him in the will, plus about \$93,000 that he had already spent on succession debts,

court costs, legal fees, and repairs to the house. He returned \$250,000 to the intestate heirs.¹

After the settlement, Kingston filed a "Petition for Damages for Legal Malpractice" in the Twenty-Second Judicial District Court for the Parish of St. Tammany (22nd JDC) against Singletary and his insurer, alleging Singletary had committed legal malpractice by failing to capture in the will Milano's intent to leave Kingston the entirety of his estate and by improperly probating the will. Singletary filed a motion for summary judgment, contending that the elements for legal malpractice had not been met. After a hearing, the court granted Singletary's motion for summary judgment, dismissing Kingston's claims against Singletary. The judgment was signed October 21, 2008. This appeal followed.

MOTION TO SUBSTITUTE FOR DECEASED PLAINTIFF

While the appeal was pending, Belinda Jane Schultheis Kingston, individually and on behalf of her minor children, Kody William Kingston and Kory Nolan Kingston, as Kingston's survivors, filed a motion in this court to be substituted as plaintiff/appellant. The motion alleged that Kingston had died on July 3, 2008, and that she and her children had been recognized as his heirs and legatees in the matter entitled, "In Re The Succession of Kevin Lewis Kingston, Sr.," Docket No. 2008-30647 in the 22nd JDC. The motion was supported with Mrs. Kingston's notarized affidavit.

Rule 2-9 of the Uniform Rules of Louisiana Courts of Appeal states that "[t]he rules and procedures for substitution of parties provided by LSA-C.C.P. Arts. 801-807 shall regulate the substitution of parties." Article 801 provides for the voluntary substitution of a legal successor for a deceased party, as follows:

When a party dies during the pendency of an action which is not extinguished by his death, his legal successor may have himself substituted for the deceased party, on ex parte written

¹ A consent judgment amending the judgment of possession indicates that Kingston was put in possession of the house, furnishings, and lot; the intestate heirs were put in possession of the funds in the bank accounts, along with two vehicles and a boat. According to Kingston's deposition, the parties reached an amicable resolution concerning the balance of the funds, since he had already used some of the money. The consent judgment dismissed all remaining claims between Kingston and the intestate heirs.

motion supported by proof of his quality.

Article 801 further provides that "legal successor" means:

(1) The survivors designated in Article 2315.1 of the Civil Code, if the action survives in their favor; and

(2) Otherwise, it means the succession representative of the deceased appointed by a court of this state, if the succession is under administration therein; or the heirs and legatees of the deceased, if the deceased's succession is not under administration therein.

Article 2315.1 of the Civil Code sets forth the classes of survivors entitled to assume a pending action upon the death of a party plaintiff. The pertinent provisions state:

A. If a person who has been injured by an offense or quasi offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi offense, shall survive for a period of one year from the death of the deceased in favor of:

(1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children.

* * *

C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.

Louisiana Code of Civil Procedure article 801 is made applicable to appellate courts by virtue of LSA-C.C.P. art. 821 and Rule 2-9 of the Uniform Rules of Louisiana Courts of Appeal. Specifically, Article 821 provides that the substitution of parties in an action pending in a court of appeal is governed by the rules of the appellate court.

The problem with the motion to substitute in this case is that Kingston died before the judgment was rendered in the district court. Upon the death of a litigant, a proper party plaintiff must be substituted to allow the action to continue. LSA-C.C.P. art. 801; Manuel v. New York Life Ins. & Annuity Corp., 01-735 (La. App. 5th Cir. 11/27/01), 803 So.2d 210, 211. A judgment rendered for or against a deceased party is an absolute nullity. Rainey v. Entergy Gulf States, Inc., 01-2414 (La. App. 1st Cir. 6/25/04), 885 So.2d 1193, 1197, writs denied, 04-1878, 1883, and 1884 (La. 11/15/04), 887 So.2d 478 and 479;

Benware v. Means, 98-0203 (La. App. 1st Cir. 5/12/00), 760 So.2d 641, 645, writ denied, 00-2215 (La. 10/27/00), 772 So.2d 650; Carr v. Hibernia Nat'l Bk., 95-1342 (La. App. 1st Cir. 9/25/98), 720 So.2d 81, 82, writ not considered, 98-2246 (La. 1/15/99), 735 So.2d 645; Gulfco Finance of Livingston, Inc. v. Lee, 224 So.2d 524, 525 (La. App. 1st Cir. 1969); Kemper v. Don Coleman, Jr., Builder, Inc., 31,576 (La. App. 2nd Cir. 7/29/99), 746 So.2d 11, 22, writs denied, 99-2954 and 2955 (La. 1/7/00), 752 So.2d 861; Konneker v. Sewerage & Water Bd. of New Orleans, 96-2197 (La. App. 4th Cir. 11/19/97), 703 So.2d 1341, 1343, writ denied, 97-3137 (La. 2/13/98), 709 So.2d 760; Tauzier v. St. Patrick Parade Committee of Jefferson, Inc., 01-1138 (La. App. 5th Cir. 1/29/02), 807 So.2d 1106, 1111.

We conclude, therefore, that the district court judgment is null. We note that Kingston's death was mentioned during the hearing on the motion for summary judgment on October 1, 2008, and the district court was advised that additional pleadings would be filed to correctly identify and substitute the proper party plaintiff. However, no such motion was filed until after the judgment had been signed and this appeal was pending. The district court is the appropriate forum to receive evidence in support of the motion to substitute and to address any potential issues concerning the status of the parties plaintiff and whether the action survives in their favor. See Gulfco, 224 So.2d at 525. Accordingly, the judgment is vacated and the matter and motion to substitute are remanded to the district court for further proceedings.

CONCLUSION

For the foregoing reasons, the judgment of October 21, 2008, is hereby vacated and the case is remanded to the district court for further proceedings. Each party is to bear its own costs.

VACATED AND REMANDED.