

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

The Estate of A. Rafael Gomez,
by and through the Executor of his Last
Will and Testament, Mark Gomez,
Plaintiff,

2018 MAY -9 PM 4:26

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

v.

Civil Action Nos. 17-C-1292
Honorable James C. Stucky
Honorable Thomas Evans
pro tempore

Andrea G. Smith, and
Western Surety Company,
Defendants.

ORDER

Came the 2nd day of April, 2018 the Defendants, Andrea G. Smith and Western Surety Company, by counsel Gary E. Pullin and Christopher C. Ross, and Mark Gomez who sought to appear as a *pro se* Executor for Plaintiff. Whereupon Defendants were appearing before the Court on other pleadings brought in the companion case of 17-P-402 and brought before the Court motions similar to those raised in the instant case. Whereupon the Court chose to rule on Defendants' pending *Motion to Dismiss* ("Motion to Dismiss"), *Motion to Strike Pleadings* ("Motion to Strike"), and *Motion to Enjoin Mark Gomez from Filing Further Pleadings in a Representative Capacity as a Non-Attorney Who Is Not Authorized to Practice Law in the State of West Virginia* ("Motion to Enjoin").

FINDINGS OF FACT

1. This civil action, 17-C-1292, was filed by Mark Gomez who sought to act on behalf of the Estate of A. Rafael Gomez as its Executor in a *pro se* capacity against Andrea Gomez Smith and Western Surety Company on December 4, 2017.

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Pleadings in a Representative Capacity as a Non-Attorney Who Is Not Authorized to Practice Law in the State of West Virginia ("Motion to Enjoin").

FINDINGS OF FACT

1. This civil action, 17-P-402, was filed by Andrea Gomez Smith and Matthew Eric Gomez, D.O. against Mark Andrew Gomez as Executor of the Estate of Aurelio Rafael Gomez ("Gomez Estate"); Mark Andrew Gomez (individually); David Brent Gomez; and Robert Brian Gomez on October 25, 2017.

2. Mark Andrew Gomez, Executor of the Estate of Aurelio Rafael Gomez, is not an attorney licensed to practice law in West Virginia.

3. On December 12, 2017 Mark Gomez signed and filed an *Answer & First Amended Counterclaims & First Amended Third Party Complaint*, on behalf of the Gomez Estate as "*pro se* Executor," without the benefit of counsel.

4. In the *Answer & First Amended Counterclaims & First Amended Third Party Complaint*, Mark Gomez filed claims on behalf of the Gomez Estate against Third Party Defendants Empower Retirement, Kayla Addison, and Western Surety Company as "*pro se* Executor" (the "Third Party Complaint").

5. No attorney has entered an appearance on behalf of the Gomez Estate, which has filed numerous pleadings signed by Mark Gomez as Executor.

6. The named Third Party Defendants have joined in the *Motion to Strike the Third Party Complaint* on the basis that the *Third Party Complaint* is not properly before this Court for the reason that the *Third Party Complaint* asserts claims by the Gomez Estate, but was not brought by an attorney licensed to practice law in West Virginia.

7. As such, the Third Party Defendants have joined in moving this Court to (1) strike, as a nullity, the *Third Party Complaint*; and (2) to enjoin Mark Gomez from filing subsequent pleadings and/or motions as Executor of the Gomez Estate. The basis of the Third Party Defendants' motions, as discussed in detail *infra*, is (1) that the *Third Party Complaint* was illegally brought before the Court, and as a result is void *ab initio* and thus this Court does not have jurisdiction to hear the matters asserted therein; and (2) for the same reasons, any submissions, whether they be pleadings or motions, cannot stand and must likewise be stricken from the record because there was no initial valid pleading, inasmuch as the *Third Party Complaint* was void *ab initio*, and thus no case against the Third Party Defendants is properly before this Court.

CONCLUSIONS OF LAW

1. The practice of law in West Virginia is governed by the West Virginia Supreme Court of Appeals. *See West Virginia State Bar v. Earley*, 144 W.Va. 504, 518, 109 S.E.2d 420, 430 (1959).

2. To practice law in Courts of record in West Virginia a person must be duly licensed to practice law by the West Virginia Supreme Court of Appeals. *See id.*

3. The practice of law, both in court and out of court, by a person not licensed to practice law is an illegal usurpation of the privilege of a duly licensed attorney at law; and the privilege to practice law is personal to the holder of such privilege. *See id.*

4. "A party who has suffered or may likely suffer a legally cognizable injury, wrong, or other actionable violation of his or her personal rights and interests as a proximate result of the unlawful and unauthorized practice of law by another has standing to assert a claim alleging unlawful and unauthorized practice and seeking relief appropriate to the actual or threatened

injury, wrong, or violation.” Syl. Pt. 1, *McMahon v. Advanced Title Services Co. of West Virginia*, 216 W.Va. 413, 607 S.E.2d 519 (2004).

5. “The exclusive authority to define, regulate and control the practice of law in West Virginia is vested in the Supreme Court of Appeals.” Syl. Pt. 1, *Shenandoah Sales & Serv., Inc. v. Assessor of Jefferson Cnty.*, 228 W.Va. 762, 724 S.E.2d 733 (2012).

6. West Virginia Code §30-2-4 states:

(a) It is unlawful for any person to practice or appear as an attorney-at-law for another in a court in this state or to make it a business to solicit employment for any attorney, or to hold himself or herself out to the public or any member thereof as being entitled to practice law ... without first having been duly and regularly licensed and admitted to practice law in the courts of this state, and without having subscribed and taken the oath required by the provisions of section three of this article.

7. Further, the unauthorized practice of law is not limited to the conduct of cases before courts, but also includes services rendered outside of court such as:

the preparation and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law.

West Virginia Code §30-2-4.

8. Rule 4.03 of the West Virginia Trial Court Rules states:

Every party to proceedings before any court, except parties appearing *pro se*, shall be represented by a person admitted to practice before the Supreme Court of Appeals of West Virginia and in good standing as a member of its bar and may be represented by a visiting attorney as provided by Rule 4.02.

9. An estate if not a natural person, but rather an artificial entity which may pursue legal actions on behalf of the beneficiaries of the estate. See, e.g., *Horton v. Proff'l Bureau of*

Coll. of Maryland, Inc., 238 W.Va. 310, 321-22, 794 S.E.2d 395, 406-07 (2016) (Davis, J. dissenting).

10. The West Virginia Supreme Court of Appeals has not yet formulated a syllabus point as to whether an executor of an estate who is not a duly licensed attorney, can appear on behalf of the estate in a representative capacity in a court of law. However, there are many decisions, both from the West Virginia judiciary and other jurisdictions that suggest the analysis would be the same as that of another artificial legal entity such as a corporation.

11. A corporation cannot act *pro se* but must act, in all of its affairs, through an agent or representative. See *Shenandoah*, at 766, 724 S.E.2d at 737 citing *West Virginia Trial Ct. Rule* 4.03. When a corporate entity seeks legal representation such representation must be by a person admitted to practice law before the Supreme Court of Appeals of West Virginia. See *Shenandoah* at 768, 724 S.E.2d at 739. This prohibition also applies to closely held or sole shareholder corporate entities. See *id* at 771, 724 S.E.2d at 742. The reason for such a determination is that a corporation is not a "natural person" but is an artificial entity created by law. See *id* at 767, 724 S.E.2d at 738.

12. The "executor or administrator is the proper representative of the personal estate, and generally all suits should be brought against him in relation thereto." Syl. Pt. 10, *Richardson v. Donehoo*, 16 W.Va. 685 (1880).

13. West Virginia Code §44-1-22 permits a personal representative to "sue or be sued upon any judgment for or against, or any contract of or with, his decedent." *SER Remke v. Falland*, 145 W.Va. 364, 368, 115 S.E.2d 326, 339 (1960).

14. To pursue legal actions in a court of record, a personal representative must be represented by an attorney duly licensed to practice law in West Virginia.

15. This Court concludes that other jurisdictions which have addressed this issue have found that an executor or personal representative of an estate may only appear in court and file legal pleadings through a licensed attorney. Cf. e.g., *SER Baker v. County Ct. of Rock Cnty.*, 29 Wis.2d 1, 8, 138 N.W.2d 162, 166 (1965); *Brown v. Coe*, 365 S.C. 137, 616 S.E.2d 705 (2005) (An executor who files legal pleadings on behalf of an estate is engaged in the practice of law and cannot do so without being an attorney who is admitted to the practice of law before the tribunal.); *Davenport v. Lee*, 348 Ark. 148, 72 S.W.3d 85 (2002) (Administrators and other fiduciaries cannot proceed *pro se* in their representative capacity without being a licensed attorney.); *Ex Parte Ghafary*, 738 So.2d 778 (Ala. 1998) (An nonlawyer executrix cannot represent the interests of an estate, which is a separate legal entity with interests other than her own, in a legal action.); *Ratcliffe v. Apantaku*, 318 Ill.App.3d 621, 742 N.E.2d 843 (2000) (A nonlawyer personal representative cannot represent the legal interest of the decedent's estate in a *pro se* capacity.); *Waite v. Carpenter*, 1 Neb.App. 321, 496 N.W.2d 1 (1992) (A non-lawyer personal representative is engaged in the unauthorized practice of law who files a complaint on behalf of an estate in a legal action.); *State v. Simanonok*, 539 A.2d 211 (Me. 1988) (An executor's appearance in a probate proceeding is not to be deemed the mere appearance of an individual in his own behalf, but is also a representation of others such that an executor not licensed to practice law must appear by an attorney in court.); *Kasharian v. Wilentz*, 93 N.J.Super. 479, 226 A.2d 437 (1967) (A legal action brought by a non-lawyer administrator acting on behalf of an estate was required to be brought by an attorney duly qualified to practice law.); *Arkansas Bar Ass'n v. Union Nat. Bank of Little Rock*, 224 Ark. 48, 273 S.W.2d 408 (1954) (A personal representative of an estate does not act for himself and cannot appear before a court, or in connection with any pending litigation, without being a licensed attorney or he is

engaged in the unauthorized practice of law.); *Ellis v. Cohen*, 118 Conn.App. 211, 982 A.2d 1130 (2009) (The appointment of a personal representative does not create an individual right of action, but only creates a representative, fiduciary relationship such that a personal representative of an estate does not act *pro se* and cannot represent the estate in matters of law without being duly a licensed attorney admitted to practice before the court.); *Prigden v. Andresen*, 113 F.3d 391 (2d. Cir. 1997) (An administratrix or executrix of an estate may not proceed *pro se* when the estate has beneficiaries or creditors other than the litigant.); *Shepherd v. Wellman*, 313 F.3d 963 (6th Cir. 2002) (An executor cannot proceed *pro se* with a legal action where he is not the sole beneficiary of the decedent's estate.)

16. In the instant case, Mark Gomez has appeared in this court as Executor of the Gomez Estate to file and pursue legal causes of action against the named Third Party Defendants. Such action is violative of the rules which govern the practice of law in West Virginia.

17. The other beneficiaries and creditors to the Gomez Estate are entitled to the protection and expertise of an attorney as a matter of public policy and this provision cannot be waived or cured. *Cf. Ratcliffe* at 846, 742 N.E.2d at 308.

18. A beneficiary *pro se* cannot act on behalf of the estate and cannot maintain a lawsuit asserting claims on behalf of the estate. *Cf. id.*

19. For a plaintiff to have standing his interest "must be a present, substantial interest, as distinguished from a mere expectancy or future, contingent interest." *Inlow v. Henderson*, 787 N.E.2d 385, 395 (Ind. 2003) *quoting* Am.Jur.2d *Parties* §37, at 442 (2002). Expectant heirs have an interest in the assets of the estate, but such interest is future and contingent to the satisfaction of other obligations: thus "[a]n expectant heir cannot maintain an action for the enforcement or adjudication of a right in the property the heir may subsequently inherit." *Id.*

20. Thus, this Court finds, as a matter of law, that the Gomez Estate is, and was at all times relevant to any of the filings submitted in this matter, not a "natural person" but an artificial legal entity like a corporation. *Cf. Shenandoah*, at 767, 724 S.E.2d at 738.

21. Rule 11(a) of the West Virginia Rules of Civil Procedure requires that "every pleading, motion and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party." *See also Morris v. Gates*, 124 W.Va. 275, 20 S.E.2d 118 (1942) (An unverified complaint that is not signed in the name of the complainant nor by responsible counsel acting for him cannot be treated as a pleading upon which either to grant or decline relief.)

22. Where a non-attorney engages in the unauthorized practice of law, the result of such practice should not be an amenable defect. *Cf. Davenport* at 160, 72 S.W.2d at 94. "A pleading signed by a person who is not licensed to practice law in this state is a nullity even if a duly licensed attorney subsequently appears in court."; *Ratcliffe* at 626, 742 N.E.2d at 308. *See also, Kone v. Wilson*, 272 Va. 59, 64, 630 S.E.2d 744, 746 (2006) (The court was unable to grant the non-lawyer plaintiff an amended pleading because "an amendment to a pleading presupposes a valid instrument as its object" and found that the original pleading, signed in a representative capacity by one unauthorized to practice law within Virginia, was invalid and without legal effect.); *Carlson v. Workforce Safety & Ins.*, 765 N.W.2d 691, 702 (ND 2009) ("The proper remedy when a corporation is represented by a non-attorney agent is to dismiss the action and strike as void all legal documents signed and filed by the non-attorney" for the reason that when a case is commenced by a non-attorney not authorized to practice law "all documents signed by the non-attorney are void from the beginning."); *Matter of Estate of Nagel*, 950 P.2d 693, 694 (Colo. App. 1997) (A petition is null and void because it was not signed by an attorney such that

the lower court erred by denying the motion to strike the petition.); *Berg v. Mid-Am. Indus., Inc.*, 688 N.E.2d 699, 704 (1997) ("Any proceedings that ensue in a case involving laypersons representing a corporation are null and void *ab initio* [t]his rule applies even where the lay agent merely filed the complaint over his own signature, and all subsequent court appearances are made by a duly licensed attorney."); and *Mayer v. Lindenwood Female Coll.*, 453 S.W.3d 307, 313 (Mo. Ct. App. 2014) ("[I]t is the judiciary's duty to regulate the practice of law and a *sua sponte* strike of the filings of a nonattorney who purports to represent another in court is entirely consistent with the judiciary's duty.")

23. For the Third Party Complaint in this matter to be valid, it had to be filed by an attorney duly licensed to practice law in West Virginia. *Cf. West Virginia State Bar v. Earley*, at 518, 109 S.E.2d at 430.

24. Thus, this Court finds, as a matter of law, that all pleadings, including the *Third Party Complaint*, filed by the non-lawyer Mark Gomez as "*pro se* Executor," are void *ab initio* and are hereby deemed to be a nullity having no effect as to any of the Third Party Defendants named therein.

25. Therefore, and for the reasons set forth *supra*, the *Third Party Complaint* filed in civil action 17-P-402, having been brought by Mark Gomez, *pro se*, in an attempt to represent the Gomez Estate, is deemed to be invalid and improperly and illegally brought before this Court and is hereby **STRICKEN** from the docket. As such, the *Third Party Complaint* against the Third Party Defendants is hereby **DISMISSED** without prejudice.

26. Moreover, and for the reasons set forth, *supra*, Mark Gomez is enjoined from filing any additional pleadings as Executor of the Gomez Estate. The Gomez Estate may only

file legal causes of action or other pleadings through an attorney licensed to practice law in the State of West Virginia.

Accordingly, it is **ADJUDGED, ORDERED AND DECREED** as follows:

Third Party Defendants' Motion to Strike pleadings filed by Mark Gomez, Executor, is hereby **GRANTED**;

Third Party Defendants' Motion to Enjoin is hereby **GRANTED**.

The *Third Party Complaint*, as well as all subsequent pleadings and claims found in civil action 17-P-402 against the named Third Party Defendants brought by the Gomez Estate by Mark Gomez, Executor, are hereby **DISMISSED** and **STRICKEN** from the docket.

ENTERED: _____

Honorable Thomas Evans III
Circuit Judge

Presented by:



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