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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Honorable James O. Spence, Master-in-Equity for Lexington County

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Appellate Case No. 2020-000872

First Reliance Bank,..... Respondent,

v.

Charles E. Bishop, Brett D. Blanks, BCM of Lexington, LLC,
and Branch Banking and Trust Company of South Carolina ..... Defendants,

of Whom Charles E. Bishop is the.....Appellant.

FINAL BRIEF OF RESPONDENT

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3) IS THE BANK ESTOPPED FROM ARGUING THIS APPEAL WAS FILED UNTIMELY?

STATEMENT OF THE CASE

This case arises out of a deficiency judgment that was subsequent to a foreclosure action initiated by First Reliance Bank ("Bank") against Charles E. Bishop ("Bishop"). On January 11, 2012, the Honorable James O. Spence issued the above-mentioned Judgment of Foreclosure sale on three parcels in Lexington County located at 1605 North Lake Drive, Lexington, SC. (R. pp. 1-11). On February 6, 2012, the properties were sold at public auction, and the bidding remained open for thirty days after in order to promote competition and ensure a fair price was paid. On March 7, 2012, the sale became final, and the highest bid was $910,000.00. (R. p. 12). This left a deficiency of $632,121.09, and the court entered a Deficiency Judgment for that amount. (R. p. 12).

On April 3, 2012, Bishop and his co-defendants submitted a petition for an Order of Appraisal pursuant to S.C. Code Ann. Sec. 29-3-680 (2004) et. seq. (R. pp. 37-38). Bishop designated James Petty as his appraiser, the Bank designated Phillip Urso as its appraiser, and the Court designated Kevin McGee as its appraiser. (R. p. 15). On February 21, 2013, the appraisers returned their written appraisal finding the market value of the subject property to be $1,040,000.00. (R. pp. 16; 39-40). On March 15, 2013, the Defendants, including Bishop, appealed the appraisal the panel had returned. (R. pp.41-43).

On December 31, 2013, George H. McMaster, Esq. was named as the new attorney for the Defendants, including Bishop. (R. pp. 17-18). On April 10, 2014, Judge Spence, Master in Equity, heard the appeal of the appraisal. (R. pp. 82-110). At the hearing, Bishop and the other Defendants called Mr. Petty as a witness. (R. pp. 83-97). Mr. Petty testified he had made a mistake in assessing the value of the land because he believed it had limited access when he made his appraisal, and he claimed he did not read the appraisal he signed. (R. pp. 83-100). Mr. Petty also testified that he

believed the other two appraisers would agree with his assessment; however, Bishop and the other Defendants never called either of the other two appraisers even though they were in the courtroom. (R. pp. 83-100). The Defendants, including Bishop, did not present any other testimony or argue any other issues, even though they were in the courtroom.

On or about June 12, 2014, both George McMaster and James Bradley, attorney for First Reliance, submitted their respective Memoranda, which were requested by the Court. (R. p. 98). After the Court reviewed both Memoranda, the Court asked Mr. Bradley to provide a proposed order for the Court's consideration. (R. pp. 49-51). On July 15, 2014, Mr. McMaster notified Mr. Bradley that he had been placed on interim suspension and instructed Mr. Bradley to send further notices and correspondence to Peyre Lumpkin, who had been appointed as the receiver of Mr. McMaster's files by the South Carolina Supreme Court. (R. p. 54). Mr. Bradley sent a copy of Mr. McMaster's July 15, 2014, letter with a proposed order to the Court, Mr. McMaster, Mr. Lumpkin, and to the last known address of Mr. Bishop. (R. pp. 56-57).

Mr. Lumpkin responded on July 31, 2014, stating that he had notified the clients of Mr. McMaster's suspension and asked them to retrieve their files, but they had not done so. (R. pp. 52-53; 57). Mr. Lumpkin indicated that he had not received a response from McMaster's clients. (R. pp. 58-59). On October 27, 2014, the Court entered an order denying the Defendant's appeal of the appraisal. (R. pp. 20-33). Mr. Bradley sent a copy of the signed order to Mr. Lumpkin, George McMaster, Charles Bishop, and the other Defendants on or about October 29, 2014. (R. pp. 74 - 77). On April 30, 2020, the Bank requested a transcript of judgment. (R. pp. 60-61). Bishop filed this appeal on June 4, 2020.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 440 (2014) (quoting *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997)). "In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence." *Id*. at 328, 755 S.E.2d at 441.

ARGUMENTS

1. CHARLES BISHOP IS BARRED FROM BRINGING THIS APPEAL BECAUSE HE WAITED MORE THAN FIVE YEARS TO FILE IT, AND HE KNEW OR SHOULD HAVE KNOWN JUDGE SPENCE RULED ON HIS APPEAL OF THE APPRAISAL.

A notice of appeal is required to be filed within thirty (30) days from the receipt of notice of an order. SCACR 203. The Clerk is required to send orders by first class mail. SCRCP 77(d). Bishop had a hearing on the merits of the appraisal where he was represented by counsel. He then appealed that appraisal to Judge Spence where he was also represented by counsel. Judge Spence asked for memoranda from both parties with their positions on the case, which Bishop's attorney provided. Judge Spence then asked Mr. Bradley for a proposed order, which he provided. Judge Spence then asked Mr. Bradley to serve the final order upon Mr. McMaster, Mr. Lumpkin, and the parties, including Bishop. Mr. Bradley sent the order to Mr. McMaster, Mr. Lumpkin, and the last known address of all the Defendants, including Bishop. Specifically, Mr. Bradley sent the order to Bishop's last known address which was 628 Haskell Road, Gilbert, SC 29054.

Bishop never told anyone that he had moved, did not inform the Court of his change of address, did not contact the Supreme Court of South Carolina, never contacted the Clerk to determine what the result of his appeal of the appraisal was, and never hired an attorney to investigate what had occurred. Instead, Bishop ignored the proceeding for over five years and now

wishes to vacate Judge Spence's order by an appeal. Furthermore, Bishop participated in this case from 2011 through July 15, 2014, when Mr. McMaster was suspended from the practice of law. Bishop filed an answer, a counterclaim, participated in pre-trial discovery, the foreclosure trial, chose a member of the appraisal panel, filed an appeal of the appraisal, and called a witness at the appeal hearing of the appraisal.

Bishop relies upon *Insurance Company of North America v. Hyatt,* 290 S.C. 159, 348 S.E.2d 532 (Ct. App. 1986) for the proposition that the failure to receive notice of the order allows him to ignore the action he participated in and appeal more than five years later. However, the facts in *Hyatt* are distinct from this case. In *Hyatt,* an employee's estate filed a workers compensation claim for death benefits. Hyatt was the employee's employer at the time of his death. The employee's estate served Hyatt with notice of a hearing before a single worker's compensation commissioner, at which Hyatt appeared. The matter was then heard by the full Worker's Compensation Commission and then by the Circuit Court; however, Hyatt never appeared or participated in either of these hearings. Hyatt alleged he never received notice of the single commissioner's award or any of the later proceedings.

Here, Bishop participated in all portions of the foreclosure and appraisal process. He hired an attorney who appeared in the foreclosure and appraisal action; he then fired that attorney and retained Mr. McMaster who appeared in the appeal of the appraisal. At all times, Bishop was aware that he was a party to an action, and that Judge Spence would make a decision that would impact his rights; however, Bishop never took any affirmative steps to stay abreast of Judge Spence's decision. Furthermore, Bishop waited over five years to initiate this appeal, while Hyatt initiated an appeal within a year.

For those reasons, Bishop cannot bring this appeal because he failed to file his Notice of Appeal in a timely fashion, and any argument that Bishop was denied due process is inaccurate because he had a full and fair chance to be heard, he was represented by counsel, and he failed to take any steps whatsoever to determine the outcome of the action he was involved in.

II. EVEN IF THIS APPEAL IS TIMELY, JUDGE SPENCE WAS CORRECT TO DENY BISHOP'S APPEAL OF THE APPRAISAL.

a. Judge Spence Was Correct to Deny Bishop's Appeal of The Appraisal Because The Board of Appraisers Considered All The Factors Required by S.C. Code Ann. § 29-3-720.

South Carolina Code Section 29-3-720 sets forth the appraisal process that appraisers follow. This section requires the appraisal board to consider: (1) sale value; (2) cost and replacement value of improvements; and (3) income production. *Id.; See Peoples Federal Sav. and Loan Ass'n v. Myrtle Beach Retirement Group, Inc.,* 302 S.C. 223, 394 S.E.2d 849 (Ct. App. 1990). The appraisers acted in accordance with the statute because they identified and examined each of the considerations required under the statute.

The appraiser's report specifically sets forth the property's market value and states that it was performed in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP). *See Appraisal.* (R. pp. 39-40). In addition, Mr. Petty, the appraiser for Bishop, testified the board of appraisers considered sales value when determining the valuation of the property. (R. p. 87 [p. 19]). Mr. Petty agreed to the value and signed the report.

Next, the appraisal report sets forth the cost and replacement value of improvements, as required by the S.C. Code Ann. § 29-3-720. The report states the value as follows:

Front Land (2.357):	$200,000.00
Improvements:	$715,000.00
FF&E:	$100,000.00

Excess Back Land (1.753 Acres) $ 25,000.00

(R. p. 39). The above appraisal for the cost and replacement value of improvements has not been challenged. Mr. Petty testified that the board of appraisers considered the value of improvements in determining the property's true value. (R. p. 84 [p. 7:3-19]).

Finally, the board of appraisers considered the property's potential income production. Mr. Petty's notes show that the panel considered income production. (R. p. 106**).**

Exhibit 3 reads:

Income- $1,200,000.00

@ 8% occupancy = $ 96,000.00

Cap Rate 9% = $1,066,000.00

Mr. Petty testified these notes documented "the conclusion we came up with in our meeting." (R. p. 86 [p. 13; ll. 24-25]). Mr. Petty also testified the notes show what "I considered when I came up with my value." (R. p. 87[p.18; ll 3-6]).

Therefore, the board of appraisers considered sale value, cost and replacement value of improvements, and income production, as required by S.C. Code Ann. § 29-3-720.

b. Judge Spence Was Correct to Deny Bishop's Appeal of The Appraisal Because an Alleged Mistake by a Single Member of The Appraisal Panel is Not Enough to Overturn The Opinion of The Majority of The Panel.

A mistake is grounds to reform a legal document only if it is a mutual mistake, and the complaining party shows this by clear and convincing evidence.

> Before equity will reform an instrument, it must be shown by evidence which is most clear and convincing not simply that it was a mistake on the part of one of the parties but that it was a mutual mistake. *Belin v. Strikeleather*, 232 S.C. 116, 101 S.E.2d 185 (1957). A mutual mistake is one where both parties intended a certain thing and by mistake in the drafting did not get what both parties intended.

Sims v. Tyler, 276 S.C. 640, 642, 281 S.E.2d 229, 230 (1981).

Bishop's appraiser, Mr. Petty, testified he made a mistake regarding the acreage being appraised, and therefore, Bishop believes Judge Spence should have ordered a new appraisal. (R. pp. 90-91 [pp. 32:3 – 33:19]). This is despite the fact the appraisal report that Mr. Petty signed included the actual acreage as 4.11 acres, which is the correct acreage. Mr. Petty testified that he did not pay attention to the report he signed, and therefore, the Court should have ordered a new appraisal. (R. pp. 90-91 [pp:32:3 – 33:19]). The exact testimony follows:

Q. Mr. Petty, you met with the panel, right?
A. I met with the panel. Yes, sir.
Q. And you reviewed the appraisal that you signed under oath, correct?
A. Yes, sir.
Q. And that was based on 4.12 acres, right?
A. I thought it was three-point-six. I didn't pay any attention to the total acreage. When Kevin came back with the letter, he had 4.1. And that's what we signed.
Q. You knew at the time that it was based off 4.1 acres.
A. No, I didn't - -
Q. Well, didn't you just - -
A. - - pay any attention.
Q. - - say Kevin said that?
A. I didn't pay any attention to the 4.1 in the letter. If I had realized that the 4.1 acres included the half acre, that I didn't think was under the ownership, I would have said, "No, wait a minute. Hold on, that's not correct."
Q. Okay. At the time, did you know it was 4.1 acres?
A. No.
Q. Did Kevin tell you it was 4.1 acres?
A. No, sir. We didn't discuss that.
Q. Well, why did you raise the thing about the 4.1 acres?
A. Why did I what?
Q. Why did you raise it - - at the time Kevin said, "It was 4.1 acres, but I wasn't paying attention"?
A. Well, he came back with the letter. And that's what was in the letter. And I didn't - -
Q. It's in the letter - -
A. You can say I didn't read it.
Q. So you didn't read the letter that said 4.1 - -
A. No, I didn't - -
Q. - - acres.

A. - - pay attention that it was 4.1 acres.
Q. You just didn't pay attention to what you signed.
A. Right.
Q. Okay. All right.
A. Which is a mistake.

(R. pp. 90-91 [pp:32:3 – 33:19]).

In addition to a mistake on acreage, Mr. Petty also testified to a mistake on valuation:

A. No. Well, I might have - - no, I haven't discussed any values with the other appraisers.
Q. Well, when did the value the first time, the front land was valued at $100,000 an acre.
A. Right.
Q. Well, how come it was valued $100,000 an acre, under oath, in February, but now it's worth $200,000 an acre?
A. Because I felt that was worth 300,000. We can't - - collectively, we came up with 200,000.
Q. You signed under oath, that you agreed it was worth $200,000 in February, didn't you?
A. Yeah. But my - -
Q. For 2.37 acres. Right?
A. My opinion is, that this acreage right here is all that's needed for the restaurant.
Q. And it's worth about $100,000 an acre.
A. No, I think - - I thought it was worth 300,000 - -
Q. Well, why did you sign the piece of paper that said you agreed it was worth - -
A. Because I - -
Q. - - $100,000 an acre?
A. - - made a mistake.
Q. Why is it worth $200,000 an acre now, and it was only worth $100,000 an acre a year ago?
A. Because it wasn't a full - - it wasn't a full 2.357 acres. It's less than that.
Q. Aren't you the one who wanted to add the allocation to the - -
A. Yes, sir.
Q. - - return? Does your allocation say 2.357 is equal to $200,000?
A. Because I wasn't paying attention to - -
Q. No, no, that's not my question. My question is: Does the allocation say 2.357 acres is worth $200,000?
A. Yes.

Q. And today you're saying that number should be almost $500,000?
A. Based on the fact I made a mistake. Yes, sir.

(R. pp. 91-92 [pp. 36:2 – 37:15]).

There was no testimony that the other appraisers made a mistake, and Bishop did not call the other appraisers to testify, even though they were in the courtroom. In addition, Mr. Petty did not testify that any fraud took place to deceive him. He simply testified that he did not review the report he signed and that he made a mistake in signing it.

While there are no reported cases in which a member of the board of appraisers disavows an appraisal he signed, South Carolina courts have held the differing opinion of a minority appraiser is not enough to invalidate the opinion of the majority of the appraisers. *See, South Carolina National Bank. v. S&L Investment Partnership,* 308 S.C. 511, 419 S.E.2d 243 (1992); *First Citizens Bank and Trust Co. v. Overlook, Inc.,* 286 S.C. 473, 334 S.E.2d 146 (1985).

In *South Carolina National Bank,* the debtors attempted to invalidate the appraisal which had been agreed to by the majority of the appraisers by arguing the Court's appraiser did not consider all the statutory factors. *Id.* The debtors submitted a statement from their chosen appraiser in which the debtor's appraiser claimed the Court's appraiser believed the only relevant factor was the income production potential of the property. *Id.* The South Carolina Court of Appeals affirmed the trial court's order to not order another appraisal and noted that the other appraisers did not testify or submit affidavits.

In *First Citizens,* the Court of Appeals affirmed a majority appraisal against the challenge of the debtor. The minority appraiser testified he relied on the value of mineral deposits when he determined the value of the appraised property was $187,500.00. The majority of the appraisers had returned a true value of $18,000.00. Both the trial court and the Court of Appeals affirmed the appraisal agreed to by two of the three appraisers.

Here, Bishop has only presented the testimony of a single appraiser, Mr. Petty. Mr. Petty testified that he no longer agrees with the appraisal report that he signed. There has been no testimony from the other two appraisers that they agree with Mr. Petty. Furthermore, Bishop had the opportunity to call the other two appraisers and chose not to. And, as the appellant of the appraisal, Mr. Bishop had the burden of proof. Assuming all of Mr. Petty's testimony is accurate, he is still a minority appraiser and has put forth no reason to invalidate a report that was agreed to by a majority of the appraisers.

Therefore, Judge Spence correctly denied Bishop's appeal of the appraisal because the appraisal panel complied with S.C. Code Ann. § 29-3-720, and Bishop only provided the testimony of a single appraiser.

III. THE BANK IS NOT ESTOPPED FROM ASSERTING THAT THIS APPEAL WAS FILED IN AN UNTIMELY FASHION BECAUSE THE ELEMENTS OF BOTH JUDICIAL ESTOPPEL AND EQUITABLE ESTOPPEL ARE NOT MET.

Bishop has asserted the Bank is estopped from asserting this appeal was filed in an untimely manner. Bishop first argues the doctrine of judicial estoppel should prevent First Reliance Bank from asserting the appeal was filed in an untimely fashion. The doctrine of judicial estoppel is inapplicable to this case. The doctrine of judicial estoppel is only relevant in cases where a party attempts to change its version of the facts during the process of litigation to gain an unfair advantage. *See, Hayne Federal Credit Union v. Bailey* 327 S.C. 242, 489 S.E.2d 472 (1997) (holding that South Carolina recognizes the doctrine of judicial estoppel when one party changes versions of the facts during the course of litigation).

Bishop then argues the doctrine of equitable estoppel should preclude the Bank from asserting this appeal is untimely. The doctrine of equitable estoppel also does not apply. The doctrine of equitable estoppel comprises the following elements: (1) conduct which amounts to a

false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. The party asserting estoppel must show: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped. *Boyd v. Bellsouth Tel. Tel. Co., Inc*., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006).

Bishop has argued the doctrine of equitable estoppel precludes First Reliance Bank from asserting that his appeal was untimely filed. First, Bishop states Mr. Bradley's forwarding of Judge Spence's Order to Mr. McMaster, Mr. Lumpkin, and the last known address of Bishop is conduct which amounts to a false representation. Mr. Bradley followed the Court's directions to the best of his ability by forwarding the Court's Order to the last known address of Bishop. Therefore, Mr. Bradley's good faith following of a Court's directive is not tantamount to a false representation.

Bishop argues the second element of equitable estoppel is met because the failure to personally serve the Court's Order on Bishop **could** result in the failure of Bishop to file a Rule 59(e) motion or an appeal. However, the second element required for equitable estoppel is that the party must have acted with the intention the other party would act upon the false representation. Bishop has failed to argue the actions by the Bank and its counsel were taken with any intention that Bishop would act upon them.

Bishop argues the third element of equitable estoppel is met because the Bank and its Counsel were aware Bishop was unrepresented. However, this element is also not met. The element requires actual or constructive knowledge of the real facts. Here, the Bank never made

any representation of any fact that was not accurate; therefore, the third element is inapplicable to this case.

Finally, Bishop argues he has satisfied all three elements required of the party invoking equitable estoppel. However, Bishop is mistaken. Assuming equitable estoppel applies to this case, Bishop has not satisfied the requirements of the party invoking equitable estoppel. First, Bishop had the means to discover Judge Spence's Order and chose not to. Bishop hired an attorney who appealed the trial court's decision to Judge Spence. Bishop's attorney appeared in front of Judge Spence on behalf of Bishop. Bishop's attorney called a witness. And, there is no evidence Bishop ever reached out to the Clerk of Court, the Receiver, the Supreme Court, or any other person to inquire as to the result of his appeal in front of Judge Spence. Therefore, Bishop has failed to show that he did not have the means of discovering the truth as required to invoke equitable estopped. Bishop has also failed to provide any evidence he relied upon any representation made by the Bank or its counsel, or that he changed his position in any way.

For those reasons, the doctrine of both judicial and equitable estoppel are inapplicable to this case, and even if they could apply, Bishop has failed to show that he has met the elements required to invoke either judicial or equitable estoppel.

CONCLUSION

This Court should find Bishop is barred from bringing this appeal because he participated in the foreclosure action for years and never attempted to gain any information about Judge Spence's Order relating to his appeal of the appraisal. Additionally, Attorney James Bradley complied with all the Court's directives and attempted to serve Judge Spence's Order on Bishop by mailing a copy to the Bishop's last known address, the Court Appointed Receiver, and George McMaster.

If this Court finds this appeal is not time-barred, this Court should find Judge Spence was correct in upholding the panel's appraisal because the panel examined all the required factors under S.C. Code Ann. § 29-3-720, and an alleged mistake by a single member of an appraisal panel is not a sufficient basis to require a new appraisal.

s/James Edward Bradley

February 15, 2021

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