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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

Jeffrey M. Tzerman, Master-In-Equity

Appellate Case No.: 2022-001041

Elizabeth A. Farmer……. Respondent,

v.

James Timothy Short……Appellant.

INITIAL REPLY BRIEF OF APPELLANT

Respectfully submitted,

s/Michael D. Wright

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ARGUMENTS IN REPLY

I. There is no evidence in the record to support the Master's Finding to Deny Appellant's Request for Relief from the Cause of Action of Ouster.

In her brief, Respondent failed to address whether there was evidence in the record to support the trial court's denial of Appellant's relief from the cause of action of ouster. The only evidence in the record is that Respondent exclusively possessed the Property adverse to the rights of the Appellant. Respondent never once addressed Appellant's counterclaim for ouster throughout the underlying proceeding. See Jefferies v. Phillips, 316 S.C. 523, 451 S.E.2d 21 (Ct. App. 1994)("The appellate court will correct any errors of law, but it must affirm the master's factual findings **unless no evidence exists that reasonably supports those findings**.")(emphasis added). There is no evidence to support the Master's finding and Respondent fails to point to any evidence in the record to support this finding. Appellant contends that this is in large part because neither the Respondent nor any of her witnesses addressed the issue of ouster. Moreover, Respondent's counsel did not even question Appellant on the issue of ouster during cross-examination. Respectfully, the Master's ruling in this particular matter shows a disregard for the testimony that was presented and the court committed an error of law. There is no evidence in the record to support Judge Tzerman's finding on this issue. See also Twelfth RMA Partners, L.P. v. National Safe Corporation, et. al., 335 S.C. 635, 518 S.E.2d 44 (1999)("The appellate court will correct any errors of law, but it must affirm the master's factual findings unless no evidence exists that reasonably supports those findings.").

II. The Master erred in failing to find that Appellant was ousted from the Property and therefore further failed to properly compensate Plaintiff for the aforementioned ouster.

In her responsive brief, Respondent presents a myriad of reasons as to why Appellant was not ousted from the Property, but conveniently omits the most salient fact: the only testimony in

evidence on the issue of ouster is from Appellant. On appeal, Respondent cannot now take the opportunity to present a twisted version of facts which are not supported by the Record on Appeal.[1]

At its core, Respondent's strained logic is as follows: a) The layout of the Property allowed for Appellant to access a portion of the Property no matter what, particularly after the lower court partitioned the property; b) Respondent did not physically prevent Appellant from coming onto the Property and therefore there can be no ouster without force; c) Even if ouster is present, there can be no damages for Appellant to collect despite Respondent having exclusive use and access to the Property because Respondent did not rent out the Property to a third-party; and d) in the alternative, if ouster is present, Appellant is only entitled to half the value he testified to at trial and only up to the date Respondent filed the partition action. These arguments are nonsensical and are not consistent with South Carolina jurisprudence.

a. Property

Respondent's initial brief attempts to paint a picture that the Property is wide-open to which anyone has unfettered access. This is simply not accurate. There is only one drivable entrance to the Property and it is locked by a gate and the Respondent is the only one that has a key. This precludes Appellant's entry onto the Property.

This particular Property is bordered on its Southern side by some wooded area and Twenty-Five-Mile creek, intermittent and regular streams and buffers on the Eastern and Western side, and a ditch frontage along Kellytown Road which necessitates entry to the Property only through the locked driveway. (Tr. P. 73-74; Tr. P. 117-118). Respondent contends in her brief that "there were

[1] Respondent seeks to include a September 19, 2021 electronic mail correspondence between the undersigned, the Master, and John Wells, Esquire, identified as Document #13 in Respondent's Designation of Matter to Be Included in the Record on Appeal. Appellant contends that Document #13 should be excluded from the Record on Appeal pursuant to Rule 210(c) of the South Carolina Rules of Appellate Procedure ("SCACR"). If Respondent maintains Document #13 must be included in the Record on Appeal, Appellant will move to strike Document #13 from Respondent's Designation of Matter and any portions of Respondent's brief referencing the same pursuant to Rule 240, SCACR.

never any gates, locked or otherwise, or fencing located on the twenty-eight (28) acre Lot 9 which was given to the Appellant as his share of the fifty-five (55) acre tract in the January 26, 2022, Final Order of Judge Tzerman granting the parties a partition in kind." (Resp. Brief, P. 4). As an initial matter, Appellant owns the entire Property and Respondent's contention that Appellant having access to a mere portion of the Property means he was not ousted is not valid. More importantly, for purposes of this analysis, is that there is no gate, fence, or otherwise to this portion of the Property because there is quite simply no access to it. Respondent admitted at trial that she had to obtain an encroachment permit from the South Carolina Department of Transportation because there was no curb cut or driveway entrance to this portion of the Property off of Kellytown Road. (Tr. P., 185-186). Moreover, in this same area that Respondent asserts Appellant could enter—and to which she had to obtain an encroachment permit—exists a ditch along the frontage of Kellytown Road. (Tr. P. 73-74; Tr. P. 117-118). Put simply, the only way for Appellant or anyone else to gain access to the Property is through the locked driveway. Any contention to the contrary is in contravention of the facts presented at the hearing and as the Property exists in the present today.

b. Force

Respondent's brief implies it was necessary for Appellant to be kept out by physical force in order for there to be an award of ouster. Appellant's daughter did not have to physically accost him each time he attempted to enter the Property. This is not an accurate recitation of South Carolina law nor would this be a prudent way to resolve affairs. "'Ouster' is the actual turning out or keeping excluded a party entitled to possession of any real property." Freeman v. Freeman, 323 S.C. 95, 99, 473 S.E.2d 467, 470. "**By actual ouster is not meant a physical eviction**, but a possession attended with such circumstances as to evince a claim of exclusive right and title and a

denial of the right of the other tenants to participate in the profits." Woods v. Bivens, 292 S.C. 76, 80, 354 S.E.2d 909, 912 (1987) (emphasis supplied).

As an owner in the Property, Appellant is entitled to be in possession of the real property and is entitled to unfettered access to the property that he owns—not just the portions of the property Respondent states it is "OK" for him to be on. It is uncontroverted that Respondent turned out and excluded Appellant from entering and possessing real property which was titled in his name. Prior to any actions being filed between the parties, Appellant attempted to retrieve his tractor and was refused entry to the Property with law enforcement informing Appellant that his tractor was sold. (Tr. P. 262, L. 13-20). Absent two court orders stemming from the claim and delivery actions allowing Appellant to retrieve personal property items and one occasion accompanying the appraiser for this underlying action, Appellant has not been allowed back on the Property since January 2020. (Tr. P. 262, L. 1- P. 263, L. 1). Importantly, in each of the court orders, law enforcement was present to effectuate the transfer of the tangible property and Appellant was not allowed onto the actual Property itself. (Tr. P. 261, L. 20-25). Appellant testified that since the parties' dispute, he has not been allowed back on the property "without having a – a deputy or somebody—somebody else present" (Tr., P. 261, L. 20-25) or absent a court order. (Tr., P. 262-263, L. 21-1). While not physical force, the evidence in the record—which the trial court ignored—is that Appellant was actually turned out and excluded from the Property unless law enforcement was present or a court order allowed him to retrieve personal belongings. See Felder v. Fleming, 278 S.C. 327, 330, 295 S.E.2d 640, 642 (1982) ("The acts relied upon to establish an ouster must be of an unequivocal nature, and so distinctly hostile to the rights of the other cotenants that the intention to disseize is clear and unmistakable.")

c. Rent

Respondent asserts—without support—that Appellant is not entitled to damages for ousting her father from the Property because she did not rent the Property out to a true third party. As more fully argued in Appellant's Initial Brief, Respondent's numerous actions—erecting and locking the gate, calling law enforcement, and utilizing the Property to the exclusion of Appellant—are sufficient to disseize Appellant from the Property and "clearly evince [her] claim of exclusive right and denial of [her father's] right to use the property." See Parker v. Shecut, 349 S.C. 226, 562 S.E.2d 620 (2002). There is no requirement that Respondent rent the Property to a true third-party to have ousted Appellant from the Property.

d. Argument in the Alternative

Appellant testified—without objection or contravention—that this type of parcel could be rented for $1,500 a month given the amenities attendant to this unique property—hunting privileges, equine boarding, and other recreational activities. (Tr. P. 264, L. 11-17). There is no evidence in the record from Respondent or her witnesses contradicting this rental value. Moreover, there is no evidence in the record from Respondent or her witnesses contradicting Appellant's assertion of ouster or justifying Respondent's actions in excluding Appellant from the Property from January 2020 until the present date. Respondent argues that, if the court finds ouster did occur, that Appellant only be awarded damages from the date of ouster in January 2020 until Respondent filed the underlying partition action. (Resp. Brief, P. 10). As detailed more fully in Appellant's Initial Brief, Respondent has lived on this Property rent free since Appellant purchased it, but more importantly to the exclusion of Appellant since his last access in January 2020 (Tr. P. 263, L. 16-18). With the exception of retrieving a few tangible personal property items after a court order was issued, Appellant has been uniformly excluded from this Property. This is despite

Appellant's counterclaim asserting the allegation of ouster, accounting, and right to inspection. Respondent submits—again without any supporting legal authority—that the value of damages for Appellant's ouster should end once Respondent brought suit. On the contrary, Appellant is still deprived the use of the Property that he owns and respectfully contends this is an ongoing damage until this matter is resolved.

CONCLUSION

For the reasons stated more fully herein, Appellant requests that this Honorable Court issue an opinion consistent with the uncontroverted facts presented in the trial of this case finding that Respondent ousted Appellant from the Property and enter an award of damages to the Appellant consistent with the only testimony presented for the period from January 2020 until an opinion is rendered by this Honorable Court.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that, on October 6, 2022, a copy of the Initial Reply Brief of Appellant has been served upon counsel of record for the Respondent via electronic mail using the email addresses listed in the Attorney Information System as set forth below:

John W. Wells, Esquire
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[Signature Page to Follow.]

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