STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
HON. MARVIN H. DUKES
MASTER IN EQUITY

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Oct 17 2022
SC Court of Appeals

Appellate Case # 2022-00027

GEORGIA HARRISON, BARBARA HARRISON, JOYCE ELLEN HARRISON, WILLIAM S. HARRISON, III, STANLEY ROBERTS AND DIANA MENDHEIM INDIVIDUALLY AND AS AGENT AND ATTORNEY IN FACT,

Plaintiffs, RESPONDENTS

vs.

STEPHANIE LORRAINE KIRKLAND, GARY LAMONT KIRKLAND, KIETA NICOLE WHITE, AND CHERYL KIRKLAND,

Defendants.
APPELLANTS

INITIAL BRIEF OF APPELLANTS

The Houston Law Firm LLC
1000 Main Street, Suite 200C
Hilton Head Island, SC 29926
Phone: 843-684-0211
chouston@houstonlawfirm.net
By: S/ Charles E. Houston Jr.
Charles E. Houston Jr.
SC Bar # 2663 Fed. Bar # 1961
Attorney for Appellants

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STATEMENT OF ISSUES ON APPEAL

1

Was the Order filed October 20, 2021 issued by this Court a final order to the effect that the Court lacked subject matter jurisdiction to address a Motion for Reconsideration filed more than ten (10) days afterwards.?

2

In an action to quiet title is there any statutorily provisions that grants to a Master in Equity the authority to convey property that is the subject matter of the action and if it were done would that be a voidable transfer for lack of jurisdictional

Authority?

3

Was the court was in error and abused its discretion as a matter of law, when setting the conditions for the defendants to exercise their "Right of First Refusal" as provided under section 15-61-35 **of the Clementa C. Pinckney Act by requiring Defendants to deposit with the clerk of court the sum of Six Million Dollars, within 60 days next to the order dated October 21, 2021 into an non-interest bearing account under the conditions where no provision was made in the order as to when they would receive a deed, and if so; would it be a warranty deed and what entity or person(s) would make the conveyance and would the deposit be refundable and/or applied to the purchase price.**

STATEMENT OF CASE

This is an action filed by the Plaintiffs to quiet title filed under S.C. Code Ann. Section 15-67-10 *et seq.* and to Partition the land by sale, pursuant to S.C. Code Anno. Section 15-61-10 *et seq.* The Summons and Complaint were filed on November 24, 2020, and the Complaint advised the Court and the Defendants in November of 2020, of a pending contract that had been entered into by the Plaintiffs to sell the property at issue to Rotunda Land & Development Group, LLC ("Rotunda") for $9,100,000.00, which the Plaintiffs believed to be a fair and equitable price for the property. See the Affidavit of Andre Johnny White (the "White Affidavit") filed in support of the Respondents' Return to the Appellants' original Motion for Stay filed on March 28, 2022, and Exhibits A and B thereto.

The property at issue is a tract of approximately 26.462 acres located on the north end of Hilton Head Island in Beaufort County (the "Property"), which has been through two previous quiet title actions. Pursuant to South Carolina Rule of Civil Procedure 71(e), because the suit included a partition action, the Circuit Court was empowered to determine the title and interests in the real property of the several parties to the action. In response to the Complaint, Defendants Stephanie Lorraine Kirkland, Gary Lamont Kirkland, Keita Nicole White and Cheryl Kirkland, filed an Answer on January 7, 2021. See Exhibit C to the White Affidavit. The case was then

referred to the Beaufort County Master in Equity, Judge Marvin H. Dukes III, by consent. See Exhibit D to the White Affidavit.

On May 21, 2021, the Plaintiffs and the Defendants presented a joint Consent Order to the Court evidencing a written agreement between all parties that the Property is owned in indivision by the Plaintiffs, the represented Co-Owners, and the Defendants, and that Consent Order provided a detailed "Exhibit A" setting forth the mutually-agreed upon undivided interest percentages of each party. Judge Dukes signed and filed the Consent Order on May 21, 2021. See Exhibit E to the White Affidavit. At that time, the Plaintiffs owned an undivided 99.192707 percent interest in the Property and the Defendants owned an undivided 0.807293 percent interest in the Property.

Once the quiet title portion of the case had been resolved by the May 21, 2021 Consent Order and all owners of the Property specifically identified by percentage ownership, the parties and counsel moved forward under the Pinckney Act (S.C. Code Annot. Section 15-61-310, *et seq*.) to determine the Fair Market Value of the 26.462 acres, and on September 15, 2021, the Court entered its Order pursuant to S.C. Code Annot. Section 15-61-360(B), establishing the Fair Market Value of the

26.462 acres at Nine Million, One Hundred Thousand ($9,100,000.00) Dollars. See Exhibit F to the White Affidavit.

ARGUMENTS

ISSUES PRESENTED

1

Was the Order filed October 20, 2021 issued by this Court a final order to the effect that the Court lacked subject matter jurisdiction to address a Motion for Reconsideration filed more than ten (10) days afterwards.?

2

Was the October 20, 2021 Consent Order the Final Order of the Court?

3

Was the court was in error and abused its discretion as a mater of law, when setting the conditions for the defendants to exercise their "Right of First Refusal" as provided under section 15-61-35 **of the Clementa C. Pinckney Act by requiring Defendants to deposit with the clerk of court the sum of Six**

Million Dollars, within 60 days next to the order dated October 21, 2021 into an non-interest bearing account under the conditions where no provision was made in the order as to when they would receive a deed, and if so; would it be a warranty deed and what entity or person(s) would make the conveyance and would the deposit be refundable and/or applied to the purchase price.

ARGUMENT 1

1) The October 20 2021 Order is void or voidable for the following reasons:

A) This was not a Consent Order as the Defendants filed a response in opposition the provisions in its proposed order form.(Response in Opposition)

B) The Order was not raised by motion as required by *Rule 7(b)* (1) SCRCP and the filing fee of $25.00 paid to the Clerk of Court as required by *§ 8-21-320 S.C. Code Ann*. as amended, effective July 1, 2002, by H4431, R470, which requires a filing fee of $25 for all motions in a Court of Common Pleas and Family Court unless exempted under the Order of the South Carolina Supreme Court dated June 26, 2002 that allows for the

waiver of the fee only when forma pauperis has been granted under Rule 3(c) SCRCP that is not present in this instance.

RULE 7, reads as follows:

PLEADINGS ALLOWED: FORM OF MOTIONS

(b) Motions and Other Papers.

(1) *An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.*

C) The October 20, 2021 Order Is not a final order as a provision in the Order required that the publication of the Summons and Complaint be made to give prospective notice of the proceeding to unknown heirs, minors and present their claims., persons under disability and those who may be in the Military Services; of their right to appear in the action and state their claims upon the property.

D) An evidentiary hearing as required by *§15 –61–330* which is the prerequisite before a final order can be rendered as not been held. Section 15-61 – 330 reads as follows:

(A) *In an action to partition real property under Article 1,*

upon motion of a party or from statements contained in the pleadings, the court shall determine, in a preliminary hearing held after the filing of the action, whether the property is heirs' property. If the court determines that the property is heirs' property, the partition of the heirs' property is governed by the provisions of this article, unless all cotenants otherwise agree in a record.

(B) *This article supplements the provisions of Article 1 and if the provisions of this article differ from the provisions of Article 1, the provisions of this article control for partitions of heirs' property.*

E. The order of October 20, 2021 is not a final order or judgment as a judgment that determines what law is applicable but leaves questions of fact unsettled is not a final judgment for appeal purposes. See *Watson v. Underwood 407 S.C. 443 756 S.E. 2d 1 55.*

This action was brought seeking a Court order quieting title to the property. This has not occurred. The property is heirs title property though the Court has not officially decreed it as such. The Plaintiffs admitted in their complaint that two prior quiet title actions had been brought seeking to remove the "heirs title" cloud upon the property as a series of non-probated estates had reverted the title back into "heirs title."

There are presently four foreign non probated intestate estates of deceased

persons who held a possessor interest in the property to be probated and a judicial determination of who accedes to their interest has not been determined and no ancillary probate administration in South Carolina. Additionally, creditors or governmental agencies may have or acquire judgment liens upon these estates which may be registered in South Carolina.

F. If the Master in Equity had intended the Order of October 20, 2021 to have been the Final Order a Form 4 Order Sheet would have been filed with the Order indicating that the Order ended the case. If this had been done all parties would have been informed and noticed that the time for filing an appeal would begin to run. This was not done while the Defendant's Motion for Determination has not been heard.

The text of the applicable rules is the following:

RULE 60

RELIEF FROM JUDGMENT OR ORDER

> ***(a) Clerical Mistakes.*** *Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, leave to correct the mistake must be obtained from*

the appellate court. The ending of a term of court or departure from the circuit shall not operate to deprive the trial judge of jurisdiction to correct such mistakes. A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion. ***Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.*** *On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:*

(1) *mistake, inadvertence, surprise, or excusable neglect;*

(2) *newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);*

(3) *fraud, misrepresentation, or other misconduct of an adverse party;*

(4) *the judgment is void;*

(5) *the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.*

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality

of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. During the pendency of an appeal, leave to make the motion must be obtained from the appellate court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

G. By the Court making the proper finding that the October 20, 2021 is not the final Order of the case then Defendant's Motion should all be considered by this court under the purview of Rule 60 (b) (1) (2) and the axiom of Equity that " when matters of the conscience are decided in providentially equity stands ready to rectify" . See *Chapman v. Citizen and Southern National Bank of South Carolina 302 S.C. 469, 395 S.E.2d 446 (CT. APP. 1990)*.

The Defendants' second objection is to that section or portion of the proposed order that would require the Defendants, who have exercised their

Right of First Refusal, to tender Six Million dollars of the purchase price of 9.1 million Dollars within a 60 days period of time. This required performance is premature, untenable, unreasonable, inequitable and judicially prejudicial;(an abuse of discretion) especially in an arm length transaction with a regulated commercial institution where *"Heirs' Title* and not the *Fee Simple Absolute* (marketable) title, as collateral for the loan, cannot, as yet, be tendered.

Financing cannot be reasonable procured for the purchase of the property pursuant to *§ 15-61-25* until the Court issues an Order stating that the parties identified in the proposed order, are vested with the fee simple absolute title to the property by Adverse Possession since title by chain of title does not exist. Further until the Publication process not having started at the time this Order was issued left the title to the property to be exposed to new and adverse claims. the three out of state intestate estates are administered and auxiliary administration opened in the Probate Court for Beaufort County to enable a deed of conveyance from the deceased testators to their heirs, and

1) that the two completed estates that were cited in the complaint have not had auxiliary administration in Beaufort County, and

2) Further, no hearing has been scheduled to have pedigree

and genealogy testimony and examination for the Court to find and verify who owns the property to the exclusion of the whole world and the exact percentage each of the owners possess with a description of the boundaries of the land that the possessory interest attached to.

3) While it is true that some buyers may offer to purchase "Heirs Title" property on a title "as is" basis, this risk is undertaken because the trade-off is acquiring the property at a below market value and after purchase than quieting the title to the property to achieve its market value. In contrast, here the designated Defendant purchasers desire to acquire the financing to enable the plaintiff heirs to receive their own appraisal value of their inheritance.

Argument 2

FIRST: The Court objected to a Master's Deed for the proposed sale of the property when the Defendants were attempting to exercise their Right of First Refusal. (Tr..) The court would now, by the principle of *Stare Decisis* , be precluded from taking an opposite position, especially where the Court is aware that a Master's Deed for the property subject to this action cannot convey fee simple marketable title and for the same reason did not grant the Defendant's request for a Master's deed. Additionally, for the Court to grant this relief to the Plaintiffs while having

previously denied it to the Defendants would constitute an inequity and impinge upon the Defendants constitutional right for the equal application and equal protection of the laws administered by the Court. It would be a travesty of justice and judicial bias for the Court to grant the issuance of a Master's Deed

SECOND: Without an order decreeing the fee simple title on the property the only title the court could convey would be a quit-claim deed that would not be commercially acceptable. The American Land Title Associations (ATLA} in their industry regulations on this point, state the following:

DDSR02STG
12/01/1995
V 4
Require General Warranty Deed
The Company requires for its review a satisfactory General Warranty Deed conveying the title to the land. The Deed must then be signed, delivered and recorded.
Comment: *The title commitment customarily requires a deed (or other instrument, if appropriate) from the current owner. Additional requirements may be necessary when securing conveyances from fiduciaries or entities.*

DDSR03
STG
12/01/1995
V 4
Require Warranty Deed
The Company requires for its review a satisfactory Warranty Deed conveying the title to the land. The Deed must then be signed, delivered and recorded.
Comment: *The title commitment customarily requires a deed (or other instrument,*

if appropriate) from the current owner. Additional requirements may be necessary when securing conveyances from fiduciaries or

THIRD: That to issue a Master's Deed would be in violation of Rule 71, SCRCP. This rule states that "Prior to the filing of the master's report or final order of judgment, the judge or master shall assure that the plaintiff and all other claimants have complied with the statutes pertaining to the filing of notices of Lis pendens." The Plaintiffs have not filed a Lis Pendens in this action that would constitute both a procedural and jurisdictional defect.

FOURTH: That required and indispensable parties have not been joined in this action that constitutes another jurisdictional defect. There are Four (4) non probated estates of deceased persons possessing an undivided interest in the property subject to this action in violation of Rule 71(d)(1), SCRCP. This rule states the following: Parties to Partition Actions. In addition to the requirements of these rules for the joinder in an action of all parties in interest, pursuant to Rule 17(f) no partition of real property of a deceased person shall be had unless the legal representative or representatives of such deceased person be made parties to the action and it be made to appear to the court that the debts of such deceased person are fully paid or that the personal estate in the hands of the personal representative or representatives is sufficient for the payment of the debts of such deceased person. Likewise, the adjoining land owners have not been joined as parties to this action. There being

made parties is mandatory and compulsive to provide the court with a factual basis upon which to rule that the boundaries of the property are correct.

If the partition action involves real property of a deceased person whose estate has not been administered or is not being administered at the time of the bringing of the action, then all known encumbrancers of the estate of the deceased person shall be made parties to the action and no decree in partition shall be entered unless due provision is made for the payment of the debts found due such encumbrancers. In all actions for partition, all heirs at law or devisees of the deceased person shall likewise be made parties. The Plaintiffs who commenced and prosecuted this action have failed to do this which constitutes a personal jurisdictional defect in this proceeding.

FIFTH: Another jurisdictional defect falls under Rule 71(e). This Rule states the following: Actions When Title Is at Issue. In foreclosure or partition

actions when title to real property is at issue the court or master to whom the action is referred shall take testimony and receive evidence as to the title and interest in the premises of the several parties. In all such actions the judge or master shall ascertain the rights and interests of the several parties and set forth in the report or order of judgment the conveyances or probate estates, if any, through which the rights or interests were acquired. The Plaintiffs have failed to convene and the Court "Sua Sponte" has not held an evidentiary hearing in this proceeding to come into compliance with the provisions of this rule.

SIXTH: and lastly, it would be an injustice perpetrated upon our citizenry for the Court to convey the property by Master's Deed as many would misconstrue a Masters' deed equivalent to a warrant deed that conveys marketable title. Additionally, the completion of an action to quiet title, not as it is in the present case, infers that all the clouds, imperfections and impediments upon the title have been removed and what remains is the naked unencumbered fee simple absolute marketable title.

A perfect example of this is the prior action to quiet title to this same tract of land. (See Case # 2008-CP-07-0452.) In this case the Master in Equity in his *Final Order* of the case stated the following: "*I now conclude as a matter of law: a) The property which is the subject of this action is now owned in fee simple absolute by the following persons, having the respective ownership shares as outlined below:"* (Order of the Court)

ARGUMENT 3

The court was in error and abused its discretion when setting the unconscionable conditions for the defendants to exercise their right of first refusal as provided under section 16-) of the Clementa C. Pinckney Act by depositing with the clerk of court the sum of Six Million Dollars within 60

days next to the filing of its order dated October 21, 2021 with the Clerk of Court in an non-interest bearing account under the conditions where no provision was made in the order as to when they would receive a deed, and if so; would it be a warranty deed and what entity or person(s) would make the conveyance and would the deposit be refundable.

An order setting forth unconscionable conditions is a denial of due process of law and in this case unreasonably effectuated the denial to the defendants of exercising their right of first refusal to buy the property from the petitioning heirs. Unconscionability is defined as unfair or oppressive to one party in a way that suggests abuses during its formation, a court may find it unconscionable and refuse to enforce it. A contract is most likely to be found unconscionable if both unfair bargaining and unfair substantive terms are shown. An absence of meaningful choice by the disadvantaged party is often used to prove unfair bargaining. § 37 - 5 – 108 Code of Laws of South Carolina and *Holler v. Holler,* 364 S.C. 256, 612 S,E, 2d 469 (Ct App 2005), Smith v. D.R. Horton "403 S.C. 1042 S.E.2d 37, Smith v. D.R. Horton, Inc., 403 S.C. 10, 742 S.E.2d 37, (Ct. App. 2013) This was done despite the defendants demonstrating to the court that they had the financial resources to pay the purchase price of Nine Million

CONCLUSION

There have been multiple procedural and due process of law discrepancies in

this case along with demonstrated abuse of discretion committed by the lower court and foundational jurisdictional infractions committed during the course of this proceeding. The Order of October 20, 2021 should be set aside and the case remanded for further proceedings including the filing of a Lis Pendens and serving a copy of the Summons and Complaint upon all the adjacent landowners. Upon the completion of this the master in Equity shall make a determination rather the property is heirs property and upon a factual showing that the title to the property has been quieted among the established heirs issue an Order decreeing they are vested with the fee simple title to the property. Upon the court issuing such a decree the defendants shall thereafter have a period of 75 days to purchase the property from the petitioning heirs. The conveyance shall be by the petitioning heirs conveying their interest in the property to the Defendants.

Respectfully submitted,

The Houston Law Firm LLC
1000 Main Street, Suite 200C
Hilton Head Island, SC 29926
Phone: 843-684-0211
chouston@houstonlawfirm.net
By: S/ Charles E. Houston Jr.
Charles E. Houston Jr.
SC Bar # 2663 Fed. Bar # 1961
Attorney for Appellants

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