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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2022-CP-22-00176

Kevin Penland, APPELLANT

V.

Key Largo Mobile Home Park, LLC, RESPONDENT

Appellant's Initial Reply Brief

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I. THE LOWER COURT ORDERS ARE NOT SUPPORTED BY ANY EVIDENCE OR TESTIMONY

Respondent's appeal arguments depend upon this Court upholding the legitimacy of a magistrate's writ of ejectment that was procured by *ex parte* communications with the court. Respondent overlooks the fact that there was no connection between the two "meetings" with Magistrate Jonathan D. Guiles, on February 18 and 28, 2022, and Judge Guiles' writ of ejectment which was issued under the same case number, on March 2, 2022. Respondent accomplished this by filing a "Motion for Writ of Ejectment" on March 1, 2022, even though it had filed an "Application For Ejectment" on November 21, 2021, that had yet to be heard. Judge Guiles incorrectly granted this motion and issued the writ *sub judice*, without giving Appellant an opportunity to be heard. No evidence or testimony on the merits of Respondent's case were ever presented to Judge Guiles. This deprived Appellant of his requested jury trial, and denied his due process rights of notice and an opportunity to be heard by an impartial tribunal.

Respondent incorrectly contends that the Magistrate's Writ of Ejectment should be affirmed, because it was adequately supported by evidence. The only evidence considered was Respondent's *ex parte* submissions. Neither Respondent's motion, Ms. Holland's Affidavit, nor any comments or arguments made by Respondent's counsel to Judge Guiles in support thereof, constituted admissible evidence. Appellant was denied any opportunity to object, confront, and cross examine any such evidence and testimony offered by Respondent on these issues. In the absence of such due process, Judge Guiles' Writ of Ejectment was wholly unsupported and unenforceable. Appellant's appeal of Judge Guiles' writ was heard by Judge Benjamin H. Culbertson, in the Court of Common Pleas, on April 22, 2022. After receiving argument from counsel for both parties, Judge Culbertson made no findings of fact, nor otherwise recite any grounds for his ruling, simply stating that: "All right. I've reviewed the record on appeal

submitted by the magistrate and I'm gonna affirm the magistrate's decision for the eviction. I affirm the eviction."

Appellant disagrees with Respondent's assertion, that there was supporting evidence for Judge Guiles' writ of ejectment, or for Judge Culbertson's decision to affirm same. *Vacation Time of Hilton Head Island, Inc., v. Kiwi Corp.*, 280 S.C. 232,233,312 S.E.2d 2021 (Ct.App. 1984 "[T]he circuit court's affirmance was controlled or affected by errors of law." *Bowers v. Thomas*, 373 S.C. 240,245,644, S.E.2d 751,753 (Ct. of App.2007). There was no evidence or testimony properly considered by the magistrate's court to sustain its judgment. Thus, there was no such evidence or testimony to support or sustain its affirmance by the circuit court. As a result, both orders of the lower courts were controlled or affected by errors of law. (*Stanford v Cudd*, 93 S.C., 367,370,76 S.E. 986,987 (1913).

The two orders were obtained through *ex parte* communications by a party, which was improper. "A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding..." *Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003).

With regard to the issue of prejudice, the Supreme Court recognized specifically that:

It is rarely possible to prove to the satisfaction of the party excluded from the communication that nothing prejudicial occurred. The protestations of the participants that communication was entirely innocent may be true, but they have no way of showing it except by their own self-serving declaration. This is why the prohibition is not against "prejudicial" *ex parte* communications, but against *ex parte* communications. *Burgess v. Stern*, 311 S.C. 326,428 S.E.2d 880,883 (1992).

In *Rzs Holdings Avv v. Pdvsa Petroleo S.A.*, 506 F. 3d 350 (4th Cir. 2007), the 4th Circuit Court of Appeals held that the district court's decision to conduct "an *ex parte* proceeding in which it ruled on the merits of the controversy... obliged [the court] to vacate and remand."

The lower court therefore abused its discretion in issuing its writ of ejectment on March 2, 2022. In doing so, the Court violated Appellant's right to procedural due process, deprived him of a mode of trial to which he was entitled, and forced him to incur substantial expense for the stay and supersedeas of the Order of ejectment, and for the appeal of the decisions which produced and upheld the writ.

II. APPELLANT WAS DENIED HIS RIGHT TO A JURY TRIAL

Appellant would refer this Court to Argument I(B) of his Initial Brief, regarding his preservation of the issue of his right to a jury trial for appeal. Respondent contends that this issue was not preserved for appeal, because it was not raised or ruled upon by the lower court. Appellant again agrees with the principles of law stated by Respondent concerning issue preservation, and the prohibition against raising an issue for the first time on appeal. In the present case, however, by issuing the writ without giving Appellant any opportunity to be heard, Judge Guiles completely preempted Appellant's ability to raise this or any other issue and deprived him of his right to procedural and substantive due process. This issue was however, raised and argued by Appellant before Judge Culbertson. Appellant submits that there was no credible or admissible evidence introduced in support of these orders, because he was denied the opportunity to object to its introduction, to cross examine, and to offer his own evidence.

It is well established in this State, that the right to a civil jury trial is a substantial right, which is immediately appealable, and must be appealed immediately in order... "to preserve [a] party's' constitutional right to trial by jury which would otherwise be lost." *Hagood v. Sommerville*, 362 S.C. 191,607, S.E.2d 707 (2005)

III. MANUFACTURED HOME PARK TENANCY ACT APPLIED

Respondent contends that the Manufactured Home Park Tenancy Act (“MHPTA”) issue was not preserved for appeal, and, in the alternative, that it does not apply to the facts of this case. This argument fails as: (a) Respondent procured the magistrate’s writ by *ex parte* communications with the court, and Appellant was denied any opportunity to raise any issues; (b) Appellant was not represented at the “hearings” before Judge Guiles, nor when the writ was issued without a hearing on March 2, 2022.; (c) The MHPTA was raised and preserved by argument and inferences before Judge Culbertson; and (d) as argued fully in Appellant’s Initial Brief, Appellant fully paid for the mobile home, and was entitled to have it titled in his name. These same Respondents have now admitted in Court pleadings that Appellant and Defendant were in agreement that Appellant was purchasing the mobile home at the time the lease was in place.

CONCLUSION

In reliance upon the foregoing recitals of fact and law, together with those matters asserted in Appellant’s Initial Brief, Appellant submits that the lower court orders should be reversed and remanded. The Orders were unsupported by any facts or law, having been the product of *ex parte* communications. Appellant respectfully submits that Judge Culbertson failed to account for this critical issue, and the denial of Appellant’s right to a jury trial, when he affirmed Judge Guiles’ writ of ejectment. Appellant therefore requests that this Court reverse the orders of Judge Culbertson and Magistrate Guiles, and remand this action back to Judge Culbertson, with instructions to remand the matter back to Magistrate Guiles, and with instructions to Magistrate Guiles to dismiss Respondent’s “Application for Ejectment,” without

prejudice, in order that it may be joined with the action filed by Appellant in the Court of
Common Pleas bearing Case No. 2022-CP-22-00990.

Respectfully submitted,

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