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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel Hall, Circuit Court Judge

Case No. 2019-CP-46-00310

Ex Parte, Ryan Powell Appellant,

In re LB PARK, LLC Respondent,

v.

San Juan Holdings, Bret Osborne, the trustee; Brett Osborne as Trustee of San Juan Holdings; and John Doe and Mary Roe, representing all unknown persons having or claiming to have any right, title, or interest in or to, or lien upon, the real estate described as 250056 Timberlake Drive, York County, South Carolina, TMS 643-10-01-023, their heirs and assigns, and all other persons, firms, or corporations entitled to claim under, by or through the abovenamed Defendant(s), and all other persons or entities unknown claiming any right, title, interest, estate in, or lien upon, the real estate described as 25056 Timberlake Drive, York County, South Carolina, TMS 643-10-01-023..... Respondents.

AMENDED INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Was this appeal from the denial of a motion to intervene in an action to quiet tax title made moot when this Court granted LB PARK's motion to remand this case to the circuit court for dismissal without prejudice and refile as a new action naming Ryan Powell as a defendant?

STATEMENT OF THE CASE & FACTS

On January 25, 2019, LB PARK, LLC (“LB Park”) filed this action pursuant to S.C. Code Ann. §§ 12-61-10 to -60 for the purpose of quieting tax title to real property known as 25056 Timberlake Drive, York County, South Carolina, tax map number 643-10-01-023 (the “Property”). (Complaint, R. at ____). On April 8, 2019, Appellant Ryan Powell (“Powell”), a non-party to this action, filed a motion to dismiss or intervene. (Motion, R. at ____). On May 1, 2019, LB Park filed a motion for an order of reference. (Motion, R. at ____). Both motions were heard on May 30, 2019.

The circuit court denied the motion to dismiss and granted the motion for order of reference in separate orders filed May 31, 2019. (Orders, R. at ____). These are the orders referenced in Powell’s Notice of Appeal. (6/8/2019 Notice of Appeal).

LB Park filed a motion to dismiss the appeal on the grounds that denial of a motion to dismiss is not appealable and that the order of reference did not deprive Powell of a mode of trial to which he was entitled because there is no right to a jury trial in actions to quiet tax title, even if the defendant asserts a counterclaim stating a cause of action at law as set forth in *Rosenbaum v. S-M-S* 32, 311 S.C. 140, 427 S.E.2d 897 (1993). (6/17/2019 Motion to Dismiss). Powell responded in part that the appeal should not be dismissed unless and until he was made a party to this action. (8/22/2019 Return to Motion to Dismiss at 7 (“Relief requested: The named defendants must be dropped and Appellant must be added as a party and this appeal **THEN and ONLY THEN** can be dismissed and the case remanded back to the trial court under the just terms decided by this Court.”)).

This Court denied the motion to dismiss as follows:

After careful consideration, the motion to dismiss is denied. *See Ex parte Johnson*, 63 S.C. 205, 41 S.E. 308 (1902) (establishing an order refusing a petition to be made a party to an action is immediately). Furthermore, Appellant's motion requesting this court to strike Respondent's motion to dismiss, to substitute parties, and for sanctions is denied.

(7/31/2019 Order). Upon receipt of this order, LB Park moved for a remand to the circuit court “to dismiss the underlying action without prejudice pursuant to Rule 41(a), SCRC. If the motion for remand is granted, LB PARK will dismiss the underlying action and refile a new action to include Ryan Powell as a named defendant.” (8/13/2019 Motion for Remand). LB Park attached its proposed stipulation of dismissal and proposed new complaint to the motion for remand. (*Id.*).

This Court granted the motion for remand by order dated October 15, 2019. (10/15/2019 Order). Pursuant to that order, this appeal was “held in abeyance pending the lower court’s consideration of the motion.” Powell filed a petition for rehearing (10/25/2019 Petition), which this Court declined to consider (2/10/2019 Order).

LB Park filed its dismissal on February 12, 2020 (Notice, R. at ____). It then filed a new action naming Powell as a defendant, C/A # 2020-CP-46-549 (“2020 Case”). Each of these filings was in substantially the same form as those proposed in the attachments to the motion for remand.

Powell filed a motion to revive the appeal on April 20, 2020. (4/20/2020 Motion to Revive Appeal). This Court denied the motion and ordered that this appeal be held in abeyance pending the issuance of a final order in the 2020 Case. (5/20/2020 Order). By letter dated December 13, 2022, this Court advised that this matter would no longer be held in abeyance. (12/13/2022 Letter).

ARGUMENT¹

I. This appeal is moot.

The underlying action was dismissed before any ruling on the merits of any claim or defense. As a result, there is nothing left to resolve with respect to Powell's request to intervene.

Courts are not in the business of issuing advisory opinions. *In Int. of Kaundra C.*, 318 S.C. 484, 486, 458 S.E.2d 443, 444 (Ct. App. 1995); *Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975). "South Carolina courts, like the federal courts, require a justiciable case or controversy before any decision on the merits can be reached." *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 417–18, 498 S.E.2d 906, 908 (Ct. App. 1998). "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *Peoples Fed. Sav. & Loan Ass'n of S.C. v. Res. Plan. Corp.*, 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004) (internal citations omitted); *see Wallace v. City of York*, 276 S.C. 693, 694, 281 S.E.2d 487, 488 (1981) (holding the function of a court is "to decide actual controversies injuriously affecting the rights of some party to the litigation.").

"A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy." *Leventis v. S.C. Dep't of Health & Env't Control*, 340 S.C. 118, 137–38, 530 S.E.2d 643, 654 (Ct. App. 2000) (quoting *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). Here, the dismissal of the underlying action means that there

¹ Concurrent with this brief, LB Park filed a motion to consolidate this appeal with the appeal pending in the 2020 Case (Appellate Case No. 2022-001650). Pursuant to Rule 208, SCACR, LB Park adopts by reference its brief in that action.

is no existing controversy for purposes of this appeal, and a ruling on the motion to intervene would have no effect.²

Moreover, as a practical matter, Powell received the relief he sought with respect to the motion to intervene—he was made a party to LB Park’s action to quiet tax title. Therefore, this appeal should be dismissed.

II. The only immediately appealable issue in the orders on appeal was whether Powell should have been permitted to intervene. The Court should decline to consider any other issues.

“The right of appeal arises from and is controlled by statutory law.” *N.C. Fed. Sav. & Loan Ass’n v. Twin States Dev. Corp.*, 289 S.C. 480, 481, 347 S.E.2d 97, 97 (1986). Appealability is generally governed by S.C. Code Ann. § 14-3-330, and interlocutory orders are otherwise not immediately appealable. *See, e.g., Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000); *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 533 S.E.2d 575 (2000); *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2000). In this case, the only issue that the Court found to be immediately appealable was that of intervention. (7/31/2019 Order).

The order of reference and the denial of the motion to dismiss are not appealable rulings under any of the categories provided in S.C. Code Ann. § 14-3-330. (Orders, R. at ____). Generally, the denial of a motion to dismiss under Rule 12(b)(6) is not immediately appealable. *Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995); *McLendon v. S.C. Dep’t of Highways & Pub. Transp.*, 313 S.C. 525, 443 S.E.2d 539 (1994); *Moyd v. Johnson*, 289 S.C. 482, 347 S.E.2d 97 (1986). Nothing about the denial here should trigger any exception to this rule.

² All of Powell’s arguments on appeal were rendered moot by the dismissal. The dismissal without prejudice prior to any adjudication on the merits did not result in any prejudice to any party. As shown in Powell’s brief in the appeal of the 2020 Case, Powell continues to assert arguments relating to jurisdiction over the Property, referral to the Master, and LB Park’s title.

With respect to the order of reference, the order does not deprive Powell of any mode of trial to which he might otherwise be entitled. “Ordinarily the granting or refusal of an order of reference is not appealable unless the granting of the reference deprives a party of a mode of trial to which he is entitled by law, or the trial judge in refusing a reference did so upon the erroneous belief that the cause of action was a legal one.” *Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d 242, 243 (1975). “Hence, the issue before the Court is whether the appellant is entitled to a jury trial as a matter of right. If [h]e is not, the appeal should be dismissed.” *Id.*

In actions to quiet tax title, the South Carolina Supreme Court has made it clear that there is no right to a jury trial, even if the defendant asserts a counterclaim stating a cause of action at law. *Rosenbaum v. S-M-S* 32, 311 S.C. 140, 427 S.E.2d 897 (1993). As stated there:

Considering the unique circumstances existing in a tax forfeiture acquisition, and the prevailing statutory provisions governing suits to clear tax titles, we conclude that the appellant may not evade the intent of the legislature and obtain the right to a jury trial by interposing a counterclaim designed to thwart the reasonable and practical implication of Chapter 61.

Id. Additionally, an action concerning the validity of a tax sale is an action in equity. *Johnson v. Arbabi*, 355 S.C. 64, 69, 584 S.E.2d 113, 115 (2003) (citing *Bryan v. Freeman*, 253 S.C. 50, 52, 168 S.E.2d 793, 793–94 (1969) (“An action to remove a cloud on and quiet title to land is one in equity.”)); *see also Godfrey v. Webb*, 277 S.C. 246, 247, 285 S.E.2d 883, 884 (1982) (holding that an action to set aside a tax deed and an action to confirm the same tax sale were both actions in equity); *Cathcart v. Jennings*, 137 S.C. 450, 135 S.E. 558, 562 (1926) (“[A] court of equity has jurisdiction to remove a cloud upon title.”) (internal citations omitted). As such, the order granting the motion for reference is not immediately appealable.

CONCLUSION

For these reasons, this appeal should be dismissed at this time and the Court should decline to consider any of Powell's arguments on the merits. To the extent the Court is inclined to reach any issue on the merits, LB Park rests on its briefing in the 2020 Case.

Respectfully submitted,

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