RECEIVED
Mar 30 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

Appellate Case No. 2022-001041

Elizabeth A. Farmer..... Respondent,

v.

James Timothy Short..... Appellant.

FINAL BRIEF OF RESPONDENT

Respectfully submitted,

S/John W. Wells
John W. Wells
Baxley, Wells & Benson, P.A.
P.O. Box 10
Lugoff, SC 29078
(803) 438-4200 Office
jwells@baxleywells.com

Other Counsel of Record:

Michael D. Wright, Esquire
Savage, Royal & Sheheen, L.L.P.
P.O. Drawer 10
Camden, SC 29021
(803) 432-4391
mwright@thesavagefirm.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. DID THE MASTER ERR IN FAILING TO AWARD DAMAGES FOR OUSTER?

STATEMENT OF THE CASE

On July 17, 2020, Elizabeth A. Farmer ("Farmer" or "Respondent") filed a Summons and Complaint in the Court of Common Pleas in Kershaw County against James Timothy Short ("Short" or "Appellant") seeking a partition pursuant to section 15-61-10 of the South Carolina Code Ann. on property which the parties own as joint tenants with the right of survivorship. ("Complaint"). (See July 17, 2020 Complaint). (R. p. 21) On August 14, 2020, Short timely filed his Answer and Counterclaim, alleging a general denial and counterclaiming against Farmer requesting a partition and private sale and alleging causes of action for ouster, accounting, and a right of inspection. ("Answer and Counterclaim") (See August 14, 2020 Defendant's Answer and Counterclaim). (R. p. 25) Farmer timely filed a Reply to Defendant's Answer and Counterclaim on September 2, 2020 ("Reply"). (See September 2, 2020 Plaintiff's Reply).(R. p. 32).

On December 4, 2020, Farmer filed a Motion for A Writ of Partition and nominated certain commissioners to serve pursuant to Rule 71(f) of the South Carolina Rules of Civil Procedure ("Motion for Writ of Partition"). (See Motion for Writ of Partition dated December 4, 2020).(R. p. 35) Contemporaneously, Farmer filed a Motion for an Order of

Reference requesting that the underlying matter be referred to The Honorable Jeffrey M. Tzerman, Master-in-Equity for Kershaw County ("Motion for an Order of Reference"). (See Motion for an Order of Reference dated December 4, 2020). (R. p. 38) On March 22, 2021, in advance of the scheduled hearings on Farmer's Motion for Writ of Partition and Motion for an Order of Reference, Short filed a Memorandum in Opposition to Motion for a Writ of Partition and Appointment of Commissioners on March 22, 2021 ("Memorandum in Opposition"). (See Memorandum in Opposition to Motion for Writ of Partition and Appointment of Commissioners dated March 22, 2021). (R. p. 40) Farmer's motions were heard by The Honorable Alison Renee Lee on March 29, 2021 and shortly thereafter Judge Lee issued a Form 4 Order referring this matter to the Kershaw County Master-in-Equity and further ordered that the Master-in-Equity shall hear Farmer's Motion for Writ of Partition (Judge Lee Form-4 Order). (R. p. 1)

On August 5, 2021, the Honorable Jeffrey M. Tzerman conducted a bench trial on the cause of action alleged by Farmer and the counterclaims as filed by Short. The parties presented multiple witnesses, including appraisers, a realtor, a registered land surveyor, and the litigants also testified. On January 26, 2022, Judge Tzerman issued a Final Order in this matter, ordering that the property that was the subject of the dispute to be partitioned in kind and "denying all further requests of relief raised by the pleadings." (See Judge Tzerman Final Order dated January 26, 2022). (R. p. 4) On February 4, 2022, Short timely filed his Motion to Alter or Amend and for Reconsideration of Judge Tzerman's Final Order. ("Motion for Reconsideration") (See Motion to Alter or Amend and for Reconsideration). (R. p. 44) On June 23, 2022, the Master-in-Equity (the "Master") entered a Form-4 Order denying Short's Motion for Reconsideration. (See June 23, 2022 Order). (R. p. 19)

On July 22, 2022, Short timely filed his Notice of Appeal from the "Orders of the Honorable Jeffrey M. Tzerman" and included a copy of the orders referenced in the Notice of Appeal. (See July 22, 2022 Notice of Appeal). (R. p. 582)

STATEMENT OF THE FACTS

On February 1, 2018, Wyrian Alana B. Todd conveyed a fifty-five (55) acre tract of land located at 1301 Kellytown Road, Lugoff, South Carolina to the Appellant and the Respondent as joint tenants with rights of survivorship. The tract had been marketed to the parties as a Lot 9 with approximately three hundred ten (310') feet of frontage on Kellytown Road, a paved state highway, containing twenty-eight (28) acres, and Lot 10 with approximately seven hundred thirty-six (736') feet of frontage on Kellytown Road containing twenty-seven (27) acres all as shown on a sketch prepared for Ms. Todd by surveyor Robbie Lackey. (Plaintiff's Ex. 2) (R. p. 353) The total road frontage on the paved state highway is just over one thousand (1000') feet according to the recorded plat of the fifty-five (55) acre tract, also prepared by Robbie Lackey. (Plaintiff's Ex. 3) (R. p. 354) Lot 9 and Lot 10 are separated by what the surveyor called a perennial stream resulting in a one hundred (100') foot wide water quality buffer imposed by Kershaw County's Planning and Zoning Ordinance, which is noted on the January 8, 2018, plat of the fifty-five (55) acre tract. (Plaintiff's Ex. 3) (R. p. 354) The perennial stream and the water quality buffer dividing the subject property into two (2) tracts of nearly equal size made the perennial stream the logical dividing line for a partition in kind with one party getting the twenty-eight (28) acre Lot 9 on the western side of the stream and the other party getting the twenty-

seven (27) acre Lot 10 on the eastern side of the stream. Ultimately, the Master-in-Equity used the stream as the dividing line for a partition in kind, granting Lot 9 to the Appellant, granting Lot 10 to the Respondent, and requiring a payment to the Appellant from the Respondent to compensate for the value of the improvements on Lot 10. (January 26, 2022 Final Order P.9) (R. p. 16)

From the time the property was purchased in February of 2018 until a dispute arose between them in January of 2020, both parties contributed to the construction of improvements including a steel building used as a shop with living quarters occupied by the Respondent and her family as a residence, fencing and shelters built for horses, and the clearing of pastures for the horses. All of the improvements were confined to a nine (9) to ten (10) acre area according to the Appellant's appraiser on what is shown as Lot 10 on Plaintiff's Ex. 2. (R. p. 353) (R. p. 149, lines 22-25) An aerial view of the improved area is shown on page 26 of Plaintiff's Ex. 6. (R. p. 391) There were 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. The Appellant had access to the twenty-eight (28) acre parcel that he received in the partition in kind at all times since the fifty-five (55) acre tract was conveyed to the parties. All fencing was located on the twenty-seven (27) acre Lot 10 that was given to the Respondent as her share of the property in the partition in kind.

The Appellant made a visit to the Respondent over the 2019 Christmas Holiday. A conflict arose during the visit over the Respondent's stringent objection to the Appellant's expressed desire to bring his girlfriend to stay in the Respondent's residence in the shop

building on the subject property twenty-four (24) months after the death of the Appellant's wife and Respondent's mother in December of 2017. After a visit in January 2020, the Appellant did not make another visit without being accompanied by the County Sheriff's Deputies until the Respondent filed her Summons and Complaint and Lis Pendens on July 17, 2020, and served the same on the Appellant on July 31, 2022, a period of six (6) months.

No rent was ever collected by either party as to the subject property. The gate referred to in the Appellant's brief was a gate in the fencing on the nine (9) to ten (10) acre improved pasture area on the eastern one-half (1/2) of the fifty-five (55) acre tract. During this period, the Appellant testified that he was not "allowed back on the property." (R. p. 310, lines 20-25) He does not say that the Respondent kept him out by force.

STANDARD OF REVIEW

An action for partition is equitable in nature. *Wilson V. McGuire* 320 S.C. 137, 140-141, 463 S.E.2d 614, 616 (Ct. App. 1995) "On appeal from an action in equity, [the appellate court] may find facts in accordance with its view of the preponderance of the evidence." *Walker v. Brooks*, 414 S.C. 343, 347, 778 S.E.2d 477, 479 (2015). "However, this broad scope of review does not require this court to disregard the findings at trial or ignore the fact that the [circuit court] was in a better position to assess the credibility of the witnesses." *Laughon v. O'Braitis*, 360 S.C. 520, 524-25, 602 S.E.2d 108, 110 (Ct. App. 2004). Further, "this broad scope does not relieve the appellant of [the] burden to show that the trial court erred in its findings." *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012).

ARGUMENT

THE TRIAL JUDGE DID NOT COMMIT ERROR IN FAILING TO AWARD DAMAGES TO THE APPELLANT FOR OUSTER.

At the outset, it must be noted that the Final Order issued by the Master-in-Equity on January 26, 2022, partitioned the subject property as follows:

Now Therefore it is Ordered:

1. The property located at 1301 Kellytown Road, Lugoff, South Carolina is divided in kind according to the February 12, 2012, Robbie Lackey Sketch, Plaintiff's Exhibit 2, with the Plaintiff receiving title to Tract 10 on that Sketch and the Defendant receiving title to Tract 9 on that sketch.
2. That the Court hereby commissions Robert H. Lackey to prepare a plat for recording in the Kershaw County ROD showing Tract 9 and Tract 10 as depicted on Plaintiff's Exhibit 2.
3. The Court shall execute a deed conveying and vesting title to Tract 9 to the Defendant and the Court shall execute a deed conveying and vesting title to Tract 10 to the Plaintiff once a plat has been prepared and approved for recording showing the division between Tract 9 and Tract 10.
4. That all further requests of relief raised by the pleadings are denied.
5. That the Plaintiff and Defendant shall equally split the cost of the Court Reporter who made the trial transcript, and the cost of preparing the plat by Robbie Lackey.
6. That the Plaintiff shall pay to the Defendant the sum of forty-nine thousand three hundred eighteen and 00/100 ($49,318.00) dollars, within ninety (90) days of this Order, which payment will equalize the value of the property of each party at One hundred sixty-two thousand five hundred and 00/100 ($162,500.00) dollars. (January 26, 2022, Final Order P. 9) (R. p. 16)

The only issue on appeal is Paragraph 4 denying the Appellant damages for Ouster. The Master's ruling as to the actual partition of the subject property is now the law of the case.

The case of *Freeman v. Freeman*, 323 S.C. 95, 473 S.E.2d 467 (Ct. App. 1996) is a case in which the Appellants are trying to establish ouster of the Respondents in order to claim

adverse possession of real property against the cotenants. It is the reverse of the case at bar where the alleged ousted party is trying to establish ouster in order to collect damages. The Court in Freeman stated:

"Ouster" is the actual turning out or keeping excluded a party entitled to possession of any real property. *Grant v. Grant*, 288 S.C. 86, 340 S.E.2d 791 (Ct. App. 1986). The possession of one tenant in common is the possession of all and, for one tenant to establish title against a cotenant by adverse possession, he must overcome the strong presumption that he holds possession in recognition of the cotenancy. *Felder v. Fleming*, 278 S.C. 327, 295 S.E.2d 640 (1982); *Horne v. Cox*, 237 S.C. 41, 115 S.E.2d 513 (1960). Actual Ouster of a tenant in common by a cotenant in possession occurs when the possession is 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, 354 S.E.2d 909 (1987); *Brevard v. Fortune*, 221 S.C. 117, 69 S.E.2d 655 (1952). 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. *Felder*, 278 S.C. at 330, 295 S.E.2d at 642. Only in rare, extreme cases will the ouster by one cotenant of other cotenants be implied from exclusive possession and dealings with the property, such as collection of rents and improvement of the property. *Id*, 278 S.C. at 331, 295 S.E.2d at 642; *see also Horne*, 237 S.C. at 45, 115 S.E.2d at 515.

In his Final Order, the Master-in-Equity relied upon the case of *Jones v. Massey*, 14 S.C. 292 (1880). The reason why the Master-in-Equity relied on *Jones v. Massey*, supra., is because that case, and only that case, was cited by the Appellant in his September 19, 2021, email to the Master (R. p. 352-353) arguing for an award of damages for ouster. On the issue of ouster, the court in *Jones v. Massey* stated:

"If James R. Massey had ousted the other co-tenants, **and kept them out by force**, which is not alleged, then he would have been liable as a trespasser for the rental value beyond his share. But as it is not alleged that he kept the other tenants out of possession of their respective parts, they were in default in not occupying or claiming partition, and he is liable for the rents which he recovered from the lands beyond his own share," *James v. Massey* supra. Emphasis added.

The Appellant states in his brief that it was error for the trial judge to rely on *Jones v. Massey*, supra., and the requirement that the ouster be done by force. However, the Appellant, not the Master-in-Equity, picked out *Jones v. Massey*, supra., as controlling

authority, and the case argued by the Appellant as controlling authority in his brief, *Parker v. Shecut*, 349 S.C. 226, 562 S.E.2d 620 (2002), cites *Jones v. Massey,* supra., for the proposition that the ouster must be accomplished by force. *Parker v. Shecut,* 562 S.E.2d at 623. The holding of *Jones v. Massey*, supra. as set forth above is that where actual rent is collected by a tenant in possession, then the tenant in possession owes his cotenant the cotenant's proportional share of the collected rent. If no actual rent is collected, as here, the tenant in possession is only liable for the co-tenant's proportionate share of the rental value if "he ousted the other cotenants and kept them out by force." *Jones v. Massey*, supra.

In *Parker v. Shecut*, supra. the property was a beach house where Shecut occupied the entire property as his residence to the exclusion of Parker. In the case at bar, the property was a fifty-five (55) acre tract where the Respondent occupied, improved, and fenced less than half of the entire tract. The twenty-eight (28) acre portion of the tract shown as Lot 9 on Plaintiff's Ex. 2 (R. p. 353) which was ultimately partitioned to the Appellant was unimproved and the Appellant had unobstructed access to it. The Appellant was "in default in not occupying or partitioning" his respective share of the lands according to *Jones v. Massey*, supra. Therefore, he is entitled to only his proportionate share of any rent actually collected, of which there was none. In *Parker v. Shecut*, the parties had a history of collecting actual rent from the beach house until Shecut occupied it. His occupancy of the beach house deprived his cotenant of the rent collection. By contrast, in this case neither party had ever collected rent.

Parker v. Shecut, supra., involved a beach house where the occupancy as a residence by one cotenant eliminated the possibility of collecting rent, and seriously restricted occupancy by the other cotenant. *Jones v. Massey*, supra., was a dispute over a farm of eleven

hundred sixty-six (1166) acres, devised by Elizabeth Massey to her three (3) living children and to the children of a deceased daughter. The eleven hundred (1100) acre Massey Farm, like the fifty-five (55) acre tract in this case, could have been occupied by more than one (1) cotenant at a time. With a large tract of land, as opposed to a beach house, occupancy by one (1) cotenant does not oust or exclude occupancy by another cotenant. This is why the Court in *Jones v. Massey*, supra., considered the failure to occupy a portion of the farm by one (1) cotenant to be a default by that cotenant rather than an ouster by the other cotenant who did occupy his portion of the property. In this case, the Appellant did not occupy any portion of the fifty-five (55) acre tract because he lives in Virginia, not because of any actions by the Respondent.

In the case of *Felder v. Fleming*, 278 S.C. 327, 295 S.E.2d 640 (1982), the court stated "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." The Respondent herein had no intention to disseize the Appellant. The unpleasantness between the parties came to a head during the Appellant's visit over the Martin Luther King Day holiday of 2020. (R. p. 326, line 25-p. 327, line 4) Within six (6) months as relations between the parties deteriorated, on July 17, 2020, the Respondent filed this partition action confirming in her Complaint that she fully recognized the Appellant's status as an equal cotenant seized with a fee simple interest in the subject property. The Respondent took the initiative to partition the subject property through a court action that would be respectful and protective of the Appellant's right to occupy his proportionate share of the subject property.

ARGUMENT IN THE ALTERNATIVE

In the alternative, if the Court finds that an ouster did occur, the damages for this ouster should be calculated as the Appellant's one-half (1/2) interest in the Fifteen Hundred and 00/100 ($1500.00) dollar monthly rental value of the property or Seven Hundred Fifty and 00/100 ($750.00) dollars per month from the Appellant's last visit to the property in January 2020 (R. p. 312, lines 12-15) until the filing of this partition action on July 17, 2020, by the Respondent seeking a court order placing the Appellant in possession of his rightful share of the property, a period of six (6) months.

CONCLUSION

The Appellant and the Respondent are equal cotenants of a fifty-five (55) acre farm with one thousand (1000') feet of frontage on a paved state highway. The property is cut in half by a perennial stream. In 2019, the Respondent occupied the one half (1/2) of the property to the east of the perennial stream. The one half (1/2) of the property west of the stream was not fenced and remains to this day unimproved and Appellant's access to it unobstructed by any act of the Respondent. The Appellant is trying to elevate a family squabble over a girlfriend into an ouster by force. The facts do not support the Appellant's claim.

The case cited by both parties to this appeal, *Freeman v. Freeman*, supra., stated, "Only in rare, extreme cases will the ouster by one cotenant of other cotenants be implied from exclusive possession and dealings with the property such as collection of rents and improvement of the property. *Freeman v. Freeman*, 473 S.E. 2d at 470. This is not one of those rare and extreme cases.

Respectfully Submitted,

By: _____

Baxley, Wells & Benson, PA
John W. Wells, SC Bar No.: 6019
P.O. Box 10
Lugoff, SC 29078
(803) 438-4200 Office
jwells@baxleywells.com
Attorney for Respondent

Date: March 29, 2023

RECEIVED
Mar 30 2023
SC Court of Appeals

Certificate of Counsel

The undersigned hereby certifies that the Final Brief of the Respondent complies with Rule 211(b) SCRAP.

Date: March 29, 2023

s/ John W. Wells
Baxley, Wells & Benson, PA
John W. Wells, SC Bar No.: 6019
P.O. Box 10
Lugoff, SC 29078
(803) 438-4200 Office
jwells@baxleywells.com
Attorney for Respondent