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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM COLLETON COUNTY AND DORCHESTER COUNTY
Court of Common Pleas

Patrick R. Watts, Special Referee

Appellate Case No. 2023-000689

John Murray Gibbs, ... Respondent,

vs.

Henderson Gibbs, Jr., ... Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE SPECIAL REFEREE ERRED IN DENYING APPELLANT'S MOTION TO RECONSIDER OR AMEND ORDER PURSUANT TO RULE 59, SCRCP.**

STATEMENT OF THE CASE

The Respondent, John Murray Gibbs (hereinafter “Respondent”) filed partition actions in Colleton County on April 06, 2015, and in Dorchester County on April 08, 2015. See Pl.’s Colleton Cnty. Compl.; see also Pl.’s Dorchester Cnty. Compl. The Appellant, Henderson Gibbs, Jr. (hereinafter “Appellant”), appearing in the case *pro se*, filed an Answer with a general denial on September 24, 2015. See Def.’s Answer. Respondent moved for the two cases to be referred to a Special Referee, filing a Motion for Order of Reference in Dorchester County on December 16, 2015 and a Motion for Order of Reference in Colleton County on January 19, 2016. See Pl. Mot. for Order of Reference filed in Dorchester Cnty.; see also Pl. Mot. for Order of Reference filed in Colleton Cnty. Appellant consented to the reference of the cases to a Special Referee, and on February 18, 2016, Judge Diane Goodstein signed an order referring the Dorchester County case to Special Referee Patrick R. Watts, and on March 14, 2016, Judge Perry Buckner signed an order referring the Colleton County case to Special Referee Patrick R. Watts. See Dorchester Cnty. Order of Reference to Special Referee; see also Colleton Cnty. Order of Reference to Special Referee. The final hearing in this case began on April 22, 2019, but the hearing was held open to allow Respondent to obtain appraisals of the properties at issue in the case. The final hearing was then scheduled to continue on December 04, 2019. The Special Referee filed the Final Order partitioning the properties in this case on July 17, 2020. See Final Order filed July 17, 2020.

After the Special Referee’s Order was filed, Appellant retained his current counsel who timely filed a Motion to Set Aside Judgment on July 24, 2020. See Def.’s Mot. to Set Aside J. A hearing for that motion took place on August 27, 2020. On October 07, 2020, the Special Referee filed his Order denying Appellant’s Motion to Set Aside. See Order filed October 07, 2020. On November 06, 2020, Appellant served the Notice of Appeal on Respondent. See Notice of Appeal.

The Special Referee's decision was affirmed, and a Remittitur was filed with Dorchester County on January 23, 2023. See Remittitur filed January 23, 2023. Subsequent to the Remittitur being filed, the Special Referee issued a new Order for Writ of Assistance and Possession which was filed March 28, 2023. See Order filed March 28, 2023. Appellant then timely filed a Motion to Reconsider or Amend Order on April 05, 2023. See Mot. to Reconsider or Amend. On April 21, 2023, an Order from the Special Referee was filed with the Court denying Appellant's motion. See Order Denying Mot. to Reconsider or Amend.

STANDARD OF REVIEW

Rule 59, SCRPC allows for the Court, upon motion made no later than 10 days after receipt of written notice of the final order to "open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." Rule 59(a), SCRPC. "The grant or denial of a new trial motion rests within the trial court's discretion, and its decision will not be disturbed on appeal unless the court's findings are wholly unsupported by the evidence or its conclusions are controlled by error of law." Winters v. Fiddie, 394 S.C. 629, 638, 716 S.E.2d 316, 321 (Ct. App. 2011) (citing Vinson v. Hartley, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996)).

"An abuse of discretion occurs when the judge issuing the order was controlled by some error of law" Sundown Operating Company, Inc. v. Intedge Industries, Inc., 383 S.C. 601, ___, 681 S.E.2d 885, 888 (2009). "This Court has held that an abuse of discretion arises in cases in which: (1) the judge issuing the order was controlled by some error of law; or (2) where the order, based upon factual, as distinguished from legal, conclusions, is without evidentiary support." Thermal Insulation Co., Inc. v. Town & Campus, Inc., 271 S.C. 478, 481, 248 S.E.2d 310, 311 (1978) (citations omitted).

STATEMENT OF FACTS

Respondent filed suit in this case to partition three separate lots which were jointly owned with Appellant. See Pl.'s Colleton Cnty. Compl. and Dorchester Cnty. Compl. Two of these lots are located in Dorchester County, and one lot is located in Colleton County. The Dorchester County properties each have houses located on the property while the Colleton County property is an unoccupied lot with a shed and a garage that has been damaged by fire. See Final Order filed July 17, 2020, p. 8. At the hearing in this case, Respondent testified that Appellant had been continuously renting out the Dorchester County properties to tenants for a period of ten years and retaining all of that rental income. See Final Order filed July 17, 2020, p. 12. In his order, the Special Referee used the numbers of money received, as provided to him by Respondent, and ordered, based on this use and rental income testimony, that Respondent be given full title of the two properties in Dorchester County and Appellant be given ownership of the Colleton County property. See Final Order filed July 17, 2020, p. 15.

The Final Order was appealed by the Appellant, and this Court issued a Remittitur denying Appellant's Appeal of the Final Order in January 2023. See Remittitur filed January 23, 2023. The Special Referee then signed and filed a new order on March 28, 2023. See Order for Writ of Assistance and Possession filed March 28, 2023. Within this new Order language was included naming Jason Gibbs, as well as referring to any other persons currently residing on the subject property and ordering them to vacate the properties. Id. at p. 4.

Appellant contends that the Order filed March 28, 2023, by the Special Referee improperly includes language removing Jason Gibbs and any other persons, none of whom are parties to this case, from the subject properties. See Order for Writ of Assistance and Possession filed March 28, 2023, p. 4.

ARGUMENT

I. THE SPECIAL REFEREE ERRED IN DENYING APPELLANT’S MOTION TO RECONSIDER OR AMEND ORDER PURSUANT TO RULE 59, SCRPC.

a. The Special Referee’s Order Violates Due Process as it Attempts to Order Non-Parties to Take Certain Action.

In this case the Respondent filed suit against Appellant in the context of a partition action related to properties in Dorchester and Colleton Counties. See Pl.’s Colleton Cnty. Compl.; see also Pl.’s Dorchester Cnty. Compl. Respondent, John Murray Gibbs, only sued his brother, the Appellant, Henderson Gibbs, Jr. Id. No other parties were named in the lawsuit. However, the Order of the Special Referee, filed March 28, 2023, included language not only related to the original case and partition action involving Appellant and Respondent, but also directing the removal of non-parties, Jason Gibbs and any other persons and their personal property from the subject properties. See Order for Writ of Assistance and Possession filed March 28, 2023, p. 4. The Order states that

Applicant is entitled to a Writ of Assistance to remove the Defendant, Defendant’s son Jason Gibbs, together with any and all persons whosoever claiming thereunder, and all their personal property from the subject property, and to put Applicant in full, peaceable, and quiet possession thereof, and to keep Applicant in such possession.

Id. No separate action or hearing was scheduled, and no opportunity for Jason Gibbs or any other persons residing on the subject properties to be heard was provided. Those other persons’ property rights are affected by the Special Referee’s Order.

“The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.” S.C. Const. art. I, § 3. “The fundamental requirement of due process is the opportunity to be heard at a

meaningful time and in a meaningful manner.” South Carolina Dept. of Social Services v. Beeks, 481 S.E.2d 703, 325 S.C. 243 (1996). “The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.” Ross v. Medical University of South Carolina, 492 S.E.2d 62, 328 S.C. 51 (1997) (citation omitted).

By including “Defendant’s son Jason Gibbs, together with any and all persons whosoever claiming thereunder. . . .” within his Order, the Special Referee is bringing in other individuals, who are not parties to the case, and ordering their removal from the subject properties. See Order for Writ of Assistance and Possession filed March 28, 2023, p. 4. Instead of including this language within one Order, the Respondent should file an eviction, either with the Magistrate Court or the Special Referee, notifying all occupants of the properties of pending eviction with an opportunity to be heard if they have grounds to object to such removal from the property. See S.C. Code Ann. § 27-40-130(a). The South Carolina Code has the Landlord-Tenant Act specifically dedicated to outlining the proper process for evicting and removing persons from residences. See S.C. Code Ann. § 27-40-10.

The transfer of ownership in real property pursuant to a civil action cannot be sufficient notice or opportunity to be heard for the removal of tenants of real property who were not named in the suit. To allow this would be to open the door for the eviction process to be totally circumvented. Family members could theoretically simply transfer a deed or title to each other and then seek an order from a Court to remove the tenants from their property. To issue a blanket Order removing all persons from a property, without serving those persons with both notice and an opportunity to be heard, denies them due process. The due process requirements are easily satisfied by the owner of the property filing an action, either in Magistrate Court or Circuit Court pursuant

to the Landlord-Tenant Act or for Ejectment and serving those individuals with notice and an opportunity for a hearing if they so desire. In denying Appellant's Motion to Reconsider or Amend its Order regarding the due process of the removal of persons from the properties in this case, the Special Referee's order was controlled by an error of law and ought to be amended. See Thermal Insulation Co., Inc. v. Town & Campus, Inc., 271 S.C. 478, 481, 248 S.E.2d 310, 311 (1978) (citations omitted).

CONCLUSION

Because the only parties to the case were Appellant and Respondent, the Court did not have the authority within an Order for this case to remove tenants or their property from the subject properties. For proper due process to take place the Order needs to be amended to have those tenants served with a separate action and an opportunity to be heard regarding their eviction. See Ross v. Medical University of South Carolina, 492 S.E.2d 62, 328 S.C. 51 (1997) (citation omitted).

Respectfully Submitted,
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Appellate Case No. 2020-001489

John Murray Gibbs,.....Respondent,

vs.

Henderson Gibbs, Jr.,.....Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that, on this day, he served the **Initial Brief of Appellant** upon all Parties by placing a copy of the Notice in the U.S. Mail, sufficient postage affixed thereto and addressed to the below-named individuals at the stated address for each:

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THIS 25th DAY OF MAY 2023.



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SWORN TO BEFORE ME THIS 25th
DAY OF MAY 2023.



Print Name: Renee Bryant
Notary Public for the State of S.C.
My Commission Expires: 02/04/2031