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Aug 21 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Bentley D. Price, Circuit Court Judge
Case No. 2017-CP-10-05426

Appellate Case No. 2020-001132

Family Services, Inc., as Conservator for Muriel W. Clarkin,.....Appellant,

v.

Bridget D. Inman, Muriel C. Kennedy, and Patricia Clarkin Smith,Respondents

v.

Bruce A. Berlinsky,Intervenor

**PETITION FOR REHEARING OF
RESPONDENT MURIEL C. KENNEDY**

Pursuant to Rules 221 and 240, S.C.A.C.R., Respondent Muriel C. Kennedy petitions this court to rehear and reconsider its opinion in Family Services, Inc., as Conservator for Muriel W. Clarkin, Petitioners v. Bridget D. Inman, Muriel C. Kennedy, and Patricia Clarkin Smith, Respondents and Bruce A. Berlinsky, Intervenor, unpublished Opinion No. 2023-UP-290, filed August 9, 2023.

The Court reversed the Honorable Bentley D. Price’s order granting Respondent Kennedy’s motion to dismiss filed July 9, 2020.

It is respectfully submitted that:

1. The Court of Appeals overlooked or misapprehended that the Respondent Inman's offer to deed the Elrod Drive property was unconditional as alleged (Amended Complaint, Paragraph 87):

"87. Defendant offered to deed the subject property to Plaintiff. "

The Amended Complaint does not allege that the deed offer was conditional in any way.

Further, the Court of Appeals overlooked or misapprehended that, in its Initial Brief, Appellant did not argue that it declined the offer of the deed because the offer was conditioned upon a release or any other stipulation, but because the Appellant made a business decision that the title to the property would cause a burden rather than a benefit.

For whatever reason, Appellant intentionally and knowingly declined the deed to the subject property after the unconditional (as pled) offer.

Further, Appellant placed in the record other evidence that the offer to deed the property was unconditional, particularly an email written by Respondent Inman dated June 23, 2015, stating:

"Good evening Ms. Evans, I will happily sign over the deed of 316 Elrod Drive, Goose Creek, South Carolina 29445 to Family Services, Inc., Wells Fargo or to my mother Muriel W. Clarkin (immediately), I have kindly offered to do so several times in the past. Please let me know if this is acceptable." (R. p. 639).

No conditions or demands were made in the above offer. Inferentially, this is why none were alleged in the Amended Complaint. The unconditional offer, as pled, demonstrated good faith by Respondent Inman and negates any element of the causes of action against Respondent Kennedy that allege she combined with Inman in fraud, bad faith or inequitable conduct toward the protected person which Appellant represents.

2. The Court of Appeals overlooked or misapprehended that Appellant knowingly and intentionally waived any claim of equitable lien when it made a conscious and reasoned decision not to accept the deed to the subject property (Appellant's Brief, p. 25).

3. The Court of Appeals overlooked or misapprehended that, whether or not the Elrod Drive property was "upside down", meaning that its value (Amended Complaint Paragraph 113, R. p. 276) was less than the HELOC mortgage balance, that the same is irrelevant as to any claims against Kennedy. While Appellant may have a claim based in contract against Inman if it can demonstrate a loan rather than a gift, it is clear from the Amended Complaint that the \$99,317.71 realized from the sale of the property (Amended Complaint, Paragraph 89, R. p. 274) which Appellant could have received, was greater than the maximum claim against Kennedy which is \$85,000.00 (Amended Complaint Paragraph 131, R. p. 279), the amount alleged to have been transferred by Inman to Kennedy.

4. The Court of Appeals overlooked or misapprehended that, as pled, the Appellant's cause of action for fraudulent conveyance fails because of the knowing and intentional waiver of Appellant's claim against the Elrod Drive property by its refusal of the deed. Respondent Inman's transfer of a portion of the sales price could not have been fraudulent because of her good faith, unconditional offer to deed the property to Appellant and therefore Respondent Kennedy could not participate with Inman in a fraudulent act regarding the proceeds of sale.

Further, as to the fraudulent conveyance claim, the Court of Appeals overlooked or misapprehended that the Amended Complaint alleged valuable consideration in the form of payment of Inman's legal fees and costs by Kennedy (Amended Complaint, Paragraph 109, R. p. 276).

The Court of Appeals further overlooked or misapprehended that the Amended Complaint, alleged that Inman's purpose in offering the deed, was to help rather to harm her grandmother (Amended Complaint, Paragraph 88, R. p. 273).

5. The Court of Appeals overlooked or misapprehended that Respondent Inman's offer of the deed to the Elrod Drive property negates the second element of the cause of action for civil conspiracy.

The elements of the tort of civil conspiracy are as follows:

"1) A combination of two or more persons, 2) for the purpose of injuring the Plaintiff, and 3) causing the Plaintiff special damages." Hackworth v. Greywood at Hammett, LLC, 385 S.C. 170, 682 S.E. 2nd 871, 874 (Ct. App. 2009).

The Court of Appeals also overlooked or misapprehended that the Amended Complaint alleges that Respondent Inman's state of mind in offering the deed was to "help my grandmother" (Amended Complaint, Paragraph 88, R. p. 273) and that Respondent Inman made attempts to give "that lump sum to them to show my appreciation for the gift." (Amended Complaint, Paragraph 91, R. p. 274). Therefore, as alleged in the Amended Complaint, there was no combination for the purposes of injuring Mrs. Clarkin.

The Court of Appeals overlooked or misapprehended that the Appellant's claim for attorney fees are not a claim for special damages under its cause of action for civil conspiracy as, absent a statute or contract providing for attorney fees, the same are not recoverable in this action.

6. The Court of Appeals also overlooked or misapprehended that Respondent Inman's offer to deed the Elrod Drive property to Appellant negates fraud, bad faith, abuse of confidence or any violation of fiduciary duty which is a necessary element of the equitable cause of action for constructive trust. See Carolina Park Associates, LLC v. Marino, 400 S.C. 1, 732 S.E. 2nd 876 (2012).

7. The Court of Appeals overlooked or misapprehended that the allegations of the Amended Complaint negate at least one element of the cause of action for a unjust enrichment

In Inglese v. Beal, 403 S.C. 290, 742 S.E. 2nd 687 (Ct. App. 2013) this court held “a party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another.” Id. at 742 S.E. 2nd 690.

The remedy for an alleged unjust enrichment is restitution.

“The remedy for unjust enrichment is restitution. See Sauner v. Pub. Serv. Auth. Of S.C., 354 S.C. 397, 409, 581 S.E. 2nd 161, 167 (2003)(“restitution is a remedy designed to prevent unjust enrichment”). To recover restitution in the context of unjust enrichment, the Plaintiff must show: (1) he conferred a non-gratuitous benefit on Defendant; (2) the defendant realized sum value for the benefit; (3) it would be inequitable for the defendant to retain the benefit without paying the Plaintiff for its value:” (Citations omitted) Id. at 742 S.E. 2nd 691.

The Amended Complaint alleges that the benefit supposedly conferred upon Respondent Kennedy was from Respondent Inman not from Appellant (Amended Complaint, Paragraph 71, R. p. 271).

The Appellant (Plaintiff) cannot therefore demonstrate that it conferred a non-gratuitous benefit on (Respondent Kennedy).

8. The Court of Appeals overlooked or misapprehended that, while Appellant may have standing to claim against Inman, its claims against Kennedy are totally dependent upon Appellant having some equitable right in the Elrod Drive property. Once it knowingly and intentionally waived the opportunity to possess, receive and own this property, any chain of causation or causal connection between the alleged the injury and the challenged conduct by Kennedy was broken. See Youngblood v. South Carolina Department of Social Services, 402 S.C.

311, 741 S.E. 2nd 515 (2013). Therefore, Appellant had no standing to make any claim against Respondent Kennedy in relation to the Elrod Drive property, or its proceeds.

SUMMARY

The reasons for Appellant's refusal to accept the Elrod Drive deed may or may not have been valid business decisions, but that is not relevant as to the claims against respondent Kennedy. All the claims against Respondent Kennedy include an element of fraudulent or inequitable conduct which are negated by the allegations of the Amended Complaint. These allegations must be taken as true at this stage.

Dismissal of the Complaint claims against Kennedy does not deprive Appellant of her remedy against Inman.

CONCLUSION

The Court of Appeals should grant the petition for re-hearing, discharge opinion and determine that, for the reasons stated above, the trial judge's order granting Respondent Kennedy's motion to dismiss should be affirmed.

Respectfully submitted,



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8-21, 2023

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PROOF OF SERVICE

I certify that on August 21, 2023, I served a copy of Respondent Kennedy’s Petition for Rehearing, by emailing a copy of the same and by U.S. Mail, addressed to the following:

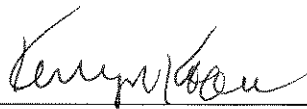
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