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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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,.....Respondent,

v.

Bridget D. Inman, Muriel C. Kennedy, and Patricia Clarkin Smith,
Of whom Muriel C. Kennedy is.....Petitioner

PETITIONER MURIEL C. KENNEDY'S PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

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CERTIFICATION OF COUNSEL

The undersigned counsel for Petitioner hereby certifies that a Petition for Rehearing was made and ruled upon by the Court of Appeals on November 15, 2023.

QUESTION PRESENTED FOR REVIEW

I. ***Did the Court of Appeals err in failing to affirm the trial judge's dismissal of the Amended Complaint against Petitioner because the allegations contained within the four corners of the Amended Complaint and other evidence in the Record on Appeal, negate at least one necessary element of proof of each of the causes of action alleged against Petitioner in the Amended Compliant?***

STATEMENT OF THE CASE

Respondent Family Services, Inc. (hereinafter "Respondent") is the conservator appointed by the Charleston County Probate Court for a protected person, Muriel W. Clarkin.

Petitioner Muriel C. Kennedy (hereinafter "Petitioner") is the daughter of Muriel W. Clarkin (hereinafter "Clarkin").

Bridget D. Inman (hereinafter "Inman") is the daughter of Petitioner and granddaughter of Clarkin.

In 2017, Respondent commenced this action against Inman. The Complaint alleged that, in 2006, prior to the conservatorship, Clarkin took out a home equity line of credit (HELOC) with Wachovia Bank, now Wells Fargo, in the initial amount of $100,000.00 and in 2008 modified the HELOC to increase the maximum indebtedness to $150,000.00 (R. p. 248).

The Complaint alleges that Clarkin withdrew from the HELOC approximately $138,000.00 to loan money to Inman to finance the 2008 purchase of real estate known as 316 Elrod Drive, Goose Creek, South Carolina 29445 (R. p. 248).

Inman alleges that the HELOC proceeds were a gift to her from her grandmother, rather than a loan (R. p. 282).

The Complaint alleges seven (7) causes of action against Inman to recover $131,237.90 plus interest and/or finance charges (R. pp. 250-254).

On December 3, 2019, Respondent filed an Amended Complaint naming Petitioner as an additional Defendant.

The Amended Complaint alleges that the Elrod Drive property was sold by Inman for $100,000.00 on February 6, 2017 (R. p. 266).

The Amended Complaint further alleges that Inman transferred $85,000.00 of the sales proceeds to Petitioner to invest and hold on behalf of Inman (R. p. 271). The Amended Complaint alleges that Petitioner invested $67,091.00 in Apple, Inc. stock and retains the remaining funds (R. p. 271).

The Amended Complaint alleges several causes of action against Petitioner: equitable lien; fraudulent conveyance; civil conspiracy; constructive trust; and unjust enrichment (R. pp. 272-279).

The Amended Complaint alleges in Paragraph 87 that prior to Inman's sale of the Elrod Drive property "Defendant offered to deed the Subject Property to Plaintiff." (R. p. 273)

On February 25, 2020, Petitioner moved to dismiss the Amended Complaint on the grounds that Inman's offer to deed the subject property to the Plaintiff negated proof of at least one of the necessary elements of each of the causes of action claimed against Petitioner, and on other grounds (R. pp. 194-196).

Petitioner's motion to dismiss was further supported by a supplemental memorandum filed June 19, 2020 (R. pp. 500-503).

Respondent filed its memorandum in opposition to Petitioner's motion to dismiss on June 22, 2020 (R. pp. 504-518).

A hearing was held before the Honorable Bentley D. Price, Circuit Court Judge on June 24, 2020, concerning this and other motions. The hearing was continued and resumed on June 30, 2020 (R. pp. 354-407).

By Order dated July 9, 2020 (R. pp. 19-21) Judge Price granted Petitioner's motion to dismiss. Judge Price denied Respondent's motion to reconsider by Order dated July 30, 2020 (R. pp. 22-24), and this appeal followed.

The Court of Appeals reversed the trial judge's order granting Petitioner's motion to dismiss by opinion filed August 9, 2023.

Petitioner timely filed a petition for re-hearing.

Respondent timely filed a response to the petition for re-hearing.

The petition for re-hearing was denied on November 15, 2023.

ARGUMENT

I. Did the Court of Appeals err in failing to affirm the trial judge's dismissal of the Amended Complaint against Petitioner because the allegations contained within the four corners of the Amended Complaint and other evidence in the Record on Appeal, negate at least one necessary element of proof of each of the causes of action alleged against Petitioner in the Amended Compliant?

The timeline, according to the Amended Complaint, is relevant.

In Paragraph 25 of the Amended Complaint, it is alleged that Inman sold the Elrod Drive property for $100,000.00 on February 6, 2017 (R. p. 266).

Paragraphs 71 & 72 allege that Inman transferred $85,000.00 to Petitioner on September 2, 2017 (R. p. 271).

On October 20, 2017, this action was commenced against Inman (R. pp. 244-255).

Not until December 3, 2019, some twenty-five (25) months after the filing of initial Complaint and thirty-four (34) months after the sale of Elrod Drive, was the Amended Complaint filed adding Petitioner as a Defendant.

Paragraph 74 alleges that "On November 2, 2017, Petitioner took a majority of the disputed funds in Petitioner's possession and purchased $67,000,000.91 worth of Apple, Inc. stock in Petitioner's name which at present remains titled in Petitioner's name (R. p. 271).

Paragraph 76 of the Amended Complaint alleges, that thereafter Petitioner paid a retainer fee to Attorney Bruce Berlinsky for Inman's representation in this matter (R. p. 272).

All of the causes of action made against Petitioner in the Amended Compliant depend upon proof of some inequitable or fraudulent conduct worked by Petitioner either alone or in concert with Inman, or such conduct by Inman being ratified by Petitioner.

The allegation that prior to the sale of the Elrod Drive property, Inman "...offered to deed the Subject Property to Plaintiff." negates any fraudulent or inequitable intent, by Inman which could be imputed to or ratified by Petitioner.

Once Respondent declined Inman's offer to deed the property, Inman was free to do what she pleased with the proceeds of the sale of the Elrod Drive property.

As pled in Paragraph 87 of the Amended Complaint, the offer to deed the property was unconditional.

"87. Defendant offered to deed the Subject Property to Plaintiff." (R. p. 273).

In evaluating a 12(b)(6) motion, the trial court and the appellate courts" must presume all well-pled facts to be true." *Hhhunt Corporation v. Town of Lexington*, 389 S.C. 623, 633, 689 S.E. 2nd 699 (Ct. App. 2010).

The Respondent is therefore bound by this admission in its pleading. See *Postal v. Mann*, 308 S.C. 385, 418 S.E. 2nd 322 (Ct. App. 1992), wherein Court of Appeals stated:

> "It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements, or admissions contained in the pleading are *conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with its pleadings...*" and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action." (Citation omitted) Id. at 308 S.C. 387, 418 S.E. 2nd 323.

Thus, Paragraph 87 of the Amended Complaint, for purposes of evaluating the trial judge's dismissal, must be viewed as an acknowledgment of an unconditional, good faith offer to deed the Elrod Drive property to Mrs. Clarkin's conservator.

Paragraph 88 of the Amended Complaint, states that Inman had testified in her deposition

that the purpose of the offer was "...trying to help my grandmother." an acknowledgement that Inman's actions were not malicious, inequitable or fraudulent.

There is other evidence in the record that reinforces that Inman's offer was made in good faith and without precondition. In an email dated June 23, 2015, Inman wrote to Kelley Evans of Family Services:

> "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 due so several times in the past. Please let me know if this is acceptable." (R. p. 639).

Consistent with Paragraph 87 of the Amended Complaint, no conditions are stated nor demands made by Inman's email.

On page 25 of Respondent's Final Brief, Respondent offered that its reason for declining the offer of the deed was, not because of any demands or conditions made by Inman, but rather because in the conservator's opinion the ownership of the property would have been a burden and not a benefit to Clarkin and because the value of the Elrod Drive property at the time was significantly less than the amount Inman allegedly owed Clarkin (Respondent's Final Brief, p. 25).

Regardless of whether those reasons were well-founded, the refusal of the offer to deed the property, negates as to Inman and Petitioner any inequitable or fraudulent conduct of the type necessary to satisfy the various causes of action brought against Petitioner, which are each hereinafter addressed.

EQUITABLE LIEN

A detailed discussion of the law of equitable liens is found in the Court of Appeals' opinion in *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 715 S.E. 2nd 348 (Ct. App. 2011) wherein it was stated:

> "For an equitable lien to arise, there must be a debt, specific property to which the debt attaches, and an expressed or implied intent that the property serve as security or payment of the debt." *First Fed. Sav. & Loan Ass'n of S.C. v. Finn*, 300 S.C. 228, 231, 387 S.E. 2nd 253, 254 (1989). "An equitable lien is a 'mere floating equity until a judgment or decree subjecting the property to the payment of the debt or claim is rendered." *Horry Cnty. v. Ray*, 382 S.C. 76, 83-84, 674 S.E. 2nd 519, 524 (Ct. App. 2009) (Internal citation and quotation marks omitted). Even though an equitable lien is not judicially recognized until a judgment is entered declaring its existence, the lien relates back to the time it was created by the conduct of the parties." Id. at 84, 674 S.E. 2nd at 524. "Whether an equitable lien exists that would take priority over a mortgage must be considered in conjunction with other well recognized equitable principals. Equitable liens must rest on an expressed or implied contract; moral obligations do not sustain equitable liens." *Carolina Attractions, Inc. v. Courtney*, 287 S.C. 140, 145, 337 S.E. 2nd 244, 247 (Ct. App. 1985). Id. at 394 S.C. 250, 715 S.E 2nd 353.

Regardless of whether the money transferred by Mrs. Clarkin from the HELOC proceeds was a debt or a gift, having relinquished and abandoned its opportunity to acquire title to the Elrod Drive property, Respondent cannot possibly tie the Elrod Drive property or its proceeds to an equitable lien.

As stated in *Regions Bank* "equitable liens must rest on an expressed or implied contract; moral obligations do not sustain equitable liens." Id. at 394 S.C. 250, 715 S.E. 2nd 353.

There can be no expressed or implied intent that Elrod Drive served as security for payment of any debt because once Respondent refused the offer of the deed, Inman, and therefore Petitioner, had the right to conclude that the Elrod Drive property was neither implied or express security for payment of the money Mrs. Clarkin had previously bestowed upon Inman. Neither were the proceeds of its sale.

Respondent's argument that the Elrod Drive property would be a burden rather than a

benefit is a "voluntary and intentional relinquishment or abandonment of a known right", according to the definition of waiver established in *Strickland v. Strickland*, 375 S.C. 76, 650 S.E. 2nd 465, 471 (2007). Any claim that an equitable lien may have been established in the proceeds of sale of the Elrod Drive property has been absolutely extinguished by the admissions in Paragraph 87 of the Amended Complaint. The acknowledgment on page 25 of its brief that the refusal to accept the deed was a reasoned business decision, by Respondent indicated a knowing waiver of any rights in the Elrod Drive property.

In light of the admissions in its pleadings, Respondent cannot now prove the elements of the doctrine of equitable lien.

FRAUDULENT CONVEYANCE

The Amended Complaint alleges that Inman, after Respondent's refusal to accept the deed to the subject property, sold the property, and transferred the majority of proceeds to Petitioner who then invested $67,000.00 in Apple, Inc. stock. Respondent alleges that the transfer of proceeds was made to delay, hinder or defraud Plaintiff in its attempt to collect its claims. Respondent has no claim over the proceeds of sale having waived any equitable lien or other claim against the property by refusing the offer of the deed. Inman was free to do what she wished with the sale proceeds.

It should also be noted that Respondent's claims against Inman are yet unproven and disputed. If the transfer of money from Clarkin to Inman is ultimately determined a gift rather than a loan, this cause of action and all others against Petitioner fail.

Although Respondent attempts to cast the transfer of proceeds as without valuable consideration (Amended Complaint paragraph 115, R. p. 276), that allegation is refuted by Paragraph 109 of the Amended Complaint (R. p. 276) alleging that Petitioner paid "...all of

Defendant's legal expense and costs regarding this matter." These payments were valuable consideration for the alleged transfer flowing from Petitioner to Inman.

While well-pled allegations in the pleadings are taken as true for purpose of a motion to dismiss, the allegation of lack of consideration in paragraph 115 (R. p. 276) is clearly inconsistent with paragraph 109 and therefore cannot be considered "well-pled" so as to be entitled to the presumption of veracity.

Since, as pled in paragraph 109, there was consideration exchanged between Inman and Petitioner (Petitioner's payment of legal fees and costs), actual intent to defraud must be pled and proven by clear and convincing evidence. *Oskin v. Johnson*, 400 S.C. 390, 396-397, 735 S.E. 2nd 459 (2012).

> "The Statute of Elizabeth is concerned with the intent of the grantor, who conveys an interest in land" McDaniel, 265 S.C. at 242-43, 217 S.E. 2nd 755-76 (requiring that the grantor must have an intent to defraud)." Id. at 400 S.C. 398.

In *McDaniel v. Allen*, 265 S.C. 237, 243, 217 S.E. 2nd 773, 776 (1975), it was held:

> "To annul for fraud, a deed based upon a valuable consideration it must not only be shown that the grantor intended thereby to hinder, delay, or defraud creditors, but it must also appear that the grantee participated in such fraudulent purpose."

The allegations of paragraphs 87, 88, 89, 90 and 91 of the Amended Complaint (R. pp. 273-274) alleging the unqualified offer of the deed, the grantor's purpose to help rather than harm or grandmother, and the offer of the proceeds of sale completely negate any possibility that Respondent can prove that neither Inman nor Petitioner acted with the intent to defraud in the alleged transfer of the sales proceeds.

CIVIL CONSPIRACY

As defined by the Court of Appeals in *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 170, 682 S.E. 2nd 871 (Ct. App. 2009), the tort has three elements:

> "1) A combination of two or more persons, 2) for the purpose of injuring the Plaintiff, and 3) causing Plaintiff special damages." Id. at 682 S.E. 2nd 874.

Respondent has pled that the deed to the Subject Property was offered without qualification by Inman (Amended Complaint, paragraph 87, R. p. 273); and that Inman's purpose and state of mind was "...trying to help my grandmother." (Amended Complaint, paragraph 88, R. p. 273); and that Inman stated concerning the sales proceeds "I did make attempts to give that lump sum to them to show my appreciation for the gift." (Amended Complaint, paragraph 91, R. p. 274).

The Amended Complaint does not allege that Inman misrepresented her state of mind and the offer of the sales proceeds.

Having pled that Inman offered the deed to the property without qualification (Amended Complaint, paragraph 87, R. p. 273) and "to show appreciation for the gift" (Amended Complaint, paragraph 91, R. p. 274), which is fully corroborated by Inman's email to Respondent of June 23, 2015, memorializing that she had offered the deed to the property several times, Respondent cannot now possibly satisfy the second of the three elements of civil conspiracy, the mutual intent of the Petitioner and Inman to harm Mrs. Clarkin.

In an effort to plead the third element of civil conspiracy, the Respondent seeks to cast its attorney fees for the prosecution of the lawsuit against Petitioner as special damages (Amended Complaint, paragraph 123, R. p. 278). Attorney fees for the prosecution of this action are not damages, special or otherwise, but merely unrecoverable legal fees since recovery is neither authorized by statute or specified by contract.

Under limited circumstances, attorney fees may be recovered as damages.

In order to claim attorney fees as damages from Petitioner, Respondent must show that 1) it has become involved in a legal dispute either because of a breach of contract or because of tortuous conduct; 2) that the dispute was with a third party (not a dispute with Petitioner herself); and 3) that it has incurred attorney fees connected with that dispute. See *McCoy v. Greenwave Enterprises, Inc.*, 408 S.C. 355, 360, 759 S.E. 2nd 136 (2014).

Such a claim would be one for equitable indemnification, which also requires a showing of some special relationship between the parties. Id. at 408 S.C. 359. The type of special relationship necessary to support such a claim, would be a legal one such as a contractual or fiduciary relationship not merely the family relationship alleged in paragraph 114 of the Amended Complaint (R. p. 276).

Further, any attorney fees incurred by Respondent cannot have been the result of any unlawful combination between Inman and Petitioner, but were rather caused by its own waiver and refusal to accept the deed to the subject property which was explained by Respondent as a reasoned business decision (Respondent's Brief, page 25) and not as a result of any conspiracy to harm Mrs. Clarkin. Respondent could have sold the Elrod Drive property and realized $100,000.00, less costs of sale, which amounts to greater than its claim against Petitioner.

The allegations of the Amended Complaint coupled with other evidence placed in the record by Respondent, indicate that Respondent cannot possibly prove the second and third elements of the tort of civil conspiracy, and Judge Price's Order should therefore be affirmed.

CONSTRUCTIVE TRUST

A constructive trust action is for the purpose of frustrating fraud, bad faith or abuse of confidence or fiduciary duty. An explanation of the equitable doctrine of constructive trust is found

in *Carolina Park Associates, LLC v. Marino*, 400 S.C. 1, 732 S.E. 2nd 876 (2012) in which the Supreme Court held:

> "An action to declare a constructive trust is in equity, and a reviewing court may find facts in accordance with its own view of the evidence. *Lollis v. Lollis*, 291 S.C. 525, 530, 354 S.E. 2nd 559, 561 (1987). "A constructive trust lies whenever the circumstances under which property was acquired make it inequitable that it should be retained by one holding legal title." Id. at 529, 354 S.E. 2nd at 560. It "results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which give rise to an obligation in equity to make restitution." Id. "It is resulted to by equity to vindicate right and justice or frustrate fraud." *Whitmire v. Adams*, 273 S.C. 453, 457, 257 S.E. 2nd 160, 163 (1979). In addition, the standard of proof is high, in that "to establish a constructive trust the evidence must be clear, definite, and unequivocal." *Lollis*, 291 S.C. at 530, 534 S.E. 2nd at 561; see *Whitmire*, 273 S.C. at 458-61, 257 S.E. 2nd at 163-65. Id. at 400 S.C. 6, 732 S.E. 2nd 879.

It is important to note that the Amended Complaint does not allege that Respondent conferred a benefit upon Petitioner, but rather that Inman conferred the benefit which Respondent now seeks to "enforce."

Here, the Amended Complaint alleges no confidential or fiduciary duty owed by Petitioner to either Respondent or Mrs. Clarkin.

After Respondent declined the opportunity to receive title to the Elrod Drive property, it now asks the appellate courts to ignore its own waiver and abandonment and seek to maintain the equitable claim of constructive trust against Petitioner concerning a portion of the sales proceeds.

The Elrod Drive property, both legally and beneficially, belonged to Inman who was free to dispose of the property as she saw fit.

Inman chose to, according to the Amended Complaint, transfer a portion of the proceeds of sale to her mother (Petitioner), to hold on her behalf (Amended Complaint, paragraph 71, R. p.

271).

As observed in *Carolina Park Associates, LLC*, "to establish a constructive trust the evidence must be clear, definite and unequivocal." Id. at 400 S.C. 6, 732 S.E. 2nd 879.

The only evidence which satisfies that heightened standard is the evidence that Inman offered to deed the property to Respondent and that Respondent declined the offer.

Fraud is an essential element to the claim of constructive trust, although it may not be actual fraud. See *McDaniel v. Kendrick*, 386 S.C. 437, 688 S.E. 2nd 852, 856 (Ct. App. 2009). Having pled that the subject property was without qualification offered to the Respondent (Amended Complaint, paragraph 87, R. p. 273); that the offer was made by Inman to help her grandmother (Amended Complaint, paragraph 88, R. p. 273) and arguing that the offer was declined after reasoned deliberation (Respondent's Final Brief, page 25), any ability to prove that either Inman or Petitioner acted fraudulently or even inequitably is precluded.

The facts as alleged in the Amended Complaint are analogous to the circumstances in *McDaniel v. Kendrick*, Id. at 688 S.E. 2nd 858, wherein the party claiming imposition of a constructive trust upon a home, based her argument on the belief that she acquired an interest in the property because it had served as her marital home and that she had made monetary contributions toward its purchase. The Court noted that she had abandoned a divorce action in which the issues of her special equity could have been determined, therefore, the Court of Appeals did not address her claim to impose a constructive trust.

Similarly, once Respondent abandoned its opportunity to exercise actual titled ownership to the subject property, it can hardly now ask the court to ignore its own abandoned opportunity and maintain an equitable claim against Petitioner concerning the sale proceeds.

As pled, Respondent cannot possibly prove a beneficial ownership interest in the subject

property or the proceeds of its sale. The proceeds were legally and beneficially owned by Inman and therefore the Amended Complaint alleges no actionable claim of constructive trust obligating Petitioner to Respondent. The good faith offer to deed the property eliminates any suspicion of fraud or bad faith by Inman which could be imputed to Petitioner.

UNJUST ENRICHMENT

As stated in *Inglese v. Beal*, 403 S.C. 290, 742 S.E. 2nd 687 (Ct. App. 2013) "a party may be unjustly enriched when he or she 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 *Saumer 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.

For the same reasons that the claim of constructive trust fails, the claim of unjust enrichment also fails.

Respondent did not confer a benefit to Petitioner. Inman conferred the benefit to Petitioner. Once Respondent declined the offer to receive the deed to the Elrod Drive property, Inman had every right to do so. Inman's conduct was not inequitable or fraudulent and she owed nothing to Respondent connected to the Elrod Drive property.

Respondent is not deprived of its claim versus Inman to attempt to obtain a money judgment, but it has lost the right to attempt to trace assets into the hands of Petitioner under an unjust enrichment theory or any other equitable theory.

Respondent has no right to stand in the shoes of Inman in regards to the sale proceeds of a property to which it waived and abandoned any claim that it may have had.

Additionally, the Amended Complaint does not allege that Petitioner realized any personal benefit from the transfer of the proceeds since Respondent pled in Paragraph 71, that the funds were "...to invest and hold on behalf of Defendant." (R. p. 271), referring to Inman.

Equity does not require Petitioner to restore to Respondent an asset ownership of which has been waived and abandoned by its refusal to accept title to the subject property when offered.

It is evident from the four corners of the Amended Complaint as well as other evidence in the record, that Respondent's unjust enrichment claim fails as a matter of law.

CONCLUSION

It is respectfully submitted that the Court of Appeals erred in reversing the trial judge as to the grant of Petitioner's motion to dismiss, and that this court should issue its writ of certiorari directed to the Court of Appeals in order to review that court's final decision.

Respectfully submitted,

12.13, 2023

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