

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2006-CP-07-861

ISAAC SMALLS AND)
ARTHURMAE ALSTON,)

Plaintiff,)

-versus-)

ROBERT L. SMALLS,)

Defendant.)

RECEIVED

OCT 14 2013

SC Court of Appeals

FINAL ORDER

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BEAUFORT COUNTY, SC
CLERK OF COURT

The facts giving rise to the controversy in this case involve heirs property purchased at a tax sale. The tax sale was held in October 2001 for past due and delinquent taxes for the tax year 2000.

There is a procedure which has been followed in Beaufort County for more than twenty-five (25) years. It was started by and under the administration of former Beaufort County Treasurer, Eldridge Moody in an effort to cut some of the knots of the **“heirs property problems”**. When a parcel of land is announced for bid an Heir stands and announces that the property is heirs property and asks the bidding public not to offer competing bids. The public will generally not bid; an exception is rare. The Heir then offers a bid just slightly above the starting bid announced by the treasurer’s office. The starting bid includes the past due taxes, the current year’s taxes and penalties for late payment; the minimum amount necessary for a successful bid.

The title clearance and subsequent partition among heirs is greatly simplified once the tax deed has been delivered because one person now holds title. All of the statutory requirements

for the sale of property for delinquent taxes are strictly followed and met. There is typically an agreement among the heirs for the division of the property purchased.

This case was commenced with the filing of a Summons and Complaint, followed by an Answer. The Plaintiff basically alleged unjust enrichment. In his Answer, the Defendant denied the major allegations of the Plaintiff's Complaint and pled the statute of limitations, laches and lack of standing. Thereafter, Horace Jones, Esquire, Plaintiff's attorney was substituted by Louis O. Dore.

An Amended Complaint was filed alleging breach of contract, breach of contract accompanied by a fraudulent act, breach of fiduciary relationship and fraud, and also adding Arthurmae Alston as a party plaintiff. Defendant's answer to the Amended Complaint consisted of a qualified general denial and the assertion of the defenses of the statute of limitations and the Statute of Fraud.

At the trial of the case Ms. Alston testified that her brother William, Isaac's father and Robert's uncle, had paid the taxes over the years. William suffered a stroke, became disabled, and could no longer afford to pay the property taxes. She and William met a few days before the tax sale and agreed to allow Isaac and Robert to buy the property at the tax sale and own the property equally. She called Robert to her home, discussed the plan with him and he agreed. She then called Isaac and he too agreed. She met Robert the following day at the sale. Robert had already procured a bidding card in his name. Each bidder obtains a numbered card as a way to identify the successful bidder. When the property was announced for bid Ms. Alston testified she stood and announced the property as heirs property and was the successful bidder. She then left the sale and Robert followed. Robert went to the bank and withdrew the funds for payment, which he necessarily had to do since the numbered card was in his name. The tax deed

would also be in Robert's name and delivered to him because he procured the card in his name. The day following the sale Robert delivered the original receipt for payment of the bid to her. She was in possession of the original receipt at the trial of the case. The matter ended there for her and she did not hear anything further until Robert refused to deed an interest in the property to Isaac. The successful bid was \$2,118.57 for twenty (20) acres of land. The delinquent taxes were \$1,011.76 and the current taxes which are required to be paid as a part of the bid were \$876.13 plus interest.

Robert testified at his deposition and at trial that he went to the tax sale because he learned from Ms. Alston that the property would be sold for delinquent taxes. He claimed that he went to the tax sale to purchase the property for himself, he did not see Ms. Alston at the sale, and did not know whether she was there or not. He further testified that he stood at the sale and announced the property to be heirs property and was the successful bidder without competing bids. Assuming this to be true, he would have circumvented the policy by lying that his bid was for the benefit of heirs when he intended to purchase the property exclusively for himself. That testimony, however, is not believed. Further assuming his testimony to be true, he would have no reason to deliver the original paid tax receipt to Ms. Alston.

Carrie Major testified that she attempted to obtain an easement across the property for her daughter, Ava. She approached Robert about an easement and was told by Robert that he could not grant an easement without the consent of Isaac, that Isaac was in Korea, and he would do nothing regarding a proposed easement until Isaac returned to Beaufort County. She then contacted Isaac in Korea who agreed to the easement, and took leave and came home from Korea. Carrie Major had an easement prepared and it was signed by Isaac. The original easement signed by Isaac was produced at trial. Robert refused to sign the easement. He did not

deny that he learned of the tax sale the night before, but claimed he just happened to be visiting his Aunt and not specifically called by her to discuss the matter.

Isaac testified that he was contacted by his aunt Arthur Mae Alston. She discussed the plan with him and he agreed. Isaac further testified that he could not leave Fort Stewart on the day of the sale. Three or four days later he came to Beaufort and withdrew funds from his bank account at Navy Federal Credit Union to pay his share of the Bid. Isaac had in his possession his account record showing that he withdrew \$900.00 from his account, and he testified that the balance was paid in cash out of his pocket. There were no witnesses to the transfer of the funds from Isaac to Robert and he did not get a receipt. Isaac further testified that he did not think that he needed a receipt because he and Robert were cousins and very close friends. According to Isaac he and Robert spent a lot of time together working on computers and attending athletic events together. He had no reason to believe Robert would renege on the agreement and that he came from Korea to sign the easement thinking that Robert had transferred an ownership interest in the property to him.

Ms. Alston also testified that Robert and Isaac were her favorite nephews and prior to the tax sale Robert visited with her regularly at her home. Following the sale, Robert discontinued his visits to her home. Robert denied a close friendly relationship with either Ms. Alston or Isaac.

After completion of discovery, Defendant filed a Motion for Summary Judgment. The Court granted partial summary judgment as to fraud and breach of contract accompanied by fraudulent act. The case was tried on breach of contract and breach of a fiduciary relationship. Following the trial of the case on February 1, 2011, during a post-trial conference, Plaintiff moved to amend his pleadings to conform to the proof by adding constructive trust as a cause of

action.

Rule 15(b) SCRPC, allows for the amendment of pleadings:

Rule 15(b) SCRPC provides in pertinent parts:

When issues not raised by the pleadings are tried by express or implied consent by the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

The decision whether to allow the amendment of pleadings to conform to the evidence is left to the sound discretion of the trial court. Kelly v. South Carolina Farm Bureau Mut. Ins. Co., 316 S.C. 319, 323, 450 S.E. 2d 59, 61 (Ct. App. 1994). Amendments should be allowed if no prejudice occurs to the opposing party. Rule 15(b), SCRPC; Soil & Material Eng'rs., Inc. v. Folly Assocs., 293 S.C. 498, 501, 361 S.E. 2d 779, 781 (Ct. App. 1987)

Defendant objected to the Plaintiff's Motion on the grounds that it came too late and not timely made. Defendant did not object to any evidence during the trial tending to prove constructive trust, nor did he claim surprise or prejudice.

The prejudice that Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it. Amendments to conform to the proof should be liberally allowed when no prejudice to the opposing party will result.

Additionally, Plaintiffs did not specifically allege constructive trust in their Amended Complaint, however, Plaintiffs' Amended Complaint sufficiently alleged a claim for a constructive trust. The Motion to Amend was held in abeyance and under advisement. It is now hereby granted.

Defendant asserted standing as a defense to Plaintiffs' Complaint, but not to the

Amended Complaint. "Standing to sue is a fundamental requirement in instituting an action".

Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 528 S.E.2d 647 (1999). "A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Charleston County Sch. Dist. V. Charleston County Elec. Comm'n*, 336 S.C. 174, 519 S.E.2d 567 (1999).

To have standing, a plaintiff must establish (1) prejudice from a particularized injury that is not merely a matter of general interest common to all members of the public; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood, as opposed to speculation, that the injury will be redressed by a favorable decision. *Sea Pines Ass'n for the Prot. Of Wildlife, Inc. v. South Carolina Dep't of Natural Res. & Cmty. Servs. Assocs.*, 345 S.C. 594, 550 S.E.2d 287 (2001).

Here, Ms. Alston was a party to the agreement and also an heir to the property. As an heir to the property she was relinquishing the opportunity to pay the taxes herself and, thereby, maintain her beneficial interest therein. It was William who could no longer afford to pay the taxes, not Ms. Alston. She could have paid the taxes and retained the property thereby protecting her interest. As an heir she held an interest not common to all members of the public and stood to suffer a particularized injury. Further, as an heir there was a causal connection between the injury and the conduct complained of and there stood the likelihood as opposed to speculation, that the injury would be redressed by favorable decision. She, therefore, had standing to sue. Isaac Smalls certainly had standing to sue. He paid one half of the purchase money which he stood to lose and, thereby, losing a 50% interest in twenty (20) acres of real property.

Defendant also asserted the statute of limitations as a defense. Plaintiffs learned that the Defendant did not intend to perform his part of the agreement for the first time when Isaac came

home to Beaufort to sign the easement for Mrs. Major. At that time, Isaac was in the Army and stationed in Korea. He was protected by the provisions of the Soldiers and Sailors Civil Relief Act, 50 United States Code Appendix, Sections 501-593 as amended. His protection continued until he retired from the United States Army. He retired from the Army and returned to the continental United States in February 2006. The original Summons and Complaint were filed on April 11, 2006 within thirty (30) days from the date the statute of limitations began to run; notwithstanding, he learned that Robert reneged in August or September 2003.

Laches arises upon the failure to assert a known right. The failure to assert does not come into existence until there is a reason or situation that demands assertion. *Ex parte Stokes*, 256 S.C. 260, 182 S.E.2d 306 (S.C. 1971). Isaac's right to assert a claim became known in August or September 2003. From that date until February 2006 Isaac Smalls was protected by the Sailors and Soldiers Civil Relief Act. Laches does not apply.

"A constructive trust is a creation of the court and is permitted to be proven by parole despite the statute of frauds upon the high and long established ground that the statute will not be permitted to shield a fraud. However, it does not result from unwritten words alone, but by the fact of fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution to the wronged cestui.." *Wolfe v. Wolfe*, 215 S.C.530, 56 S.E.2d 343 (S.C. 1949), *Searson v. Webb*, 208 S.C. 453, 38 S.E.2d 654 (1946). *Dominick v. Rhodes*, 202 S.C. 139, 24 S.E.2d 168 (1943), *Bank of Williston v. Alderman*, 106 S.C. 386, 91 S.E. 296 (1917).

"In order to establish a constructive trust the evidence must be clear, definite, and unequivocal. *Lollis v. Lollis*, 291 S.C. 525, 354 S.E.2d 559 (S.C. 1987).

I had the opportunity to observe the witnesses, hear their testimony and to judge their

credibility. I found Robert's testimony to be almost totally unbelievable with a total lack of credibility. On the other hand, I give great weight and credit to the testimony of Ms. Alston, Isaac Smalls and Carrie Major.

Now having heard the testimony of the witnesses, and having reviewed the exhibits I make the following findings of fact:

1. Prior to the tax sale there was an agreement between Ms. Alston, Robert Smalls and Isaac Smalls to purchase the property at the tax sale.
2. The agreement provided for the purchase money to be paid by Robert and Isaac equally with the property to be owned equally by them.
3. Isaac gave and delivered to Robert and Robert accepted and received from Isaac \$980.00 as Isaac's share of the purchase money.
4. Ms. Alston attended the tax sale and was the successful bidder. Robert also attended the tax sale, he did not bid on the property, he paid the purchase money to the Treasurer's office, obtained a receipt and turned the receipt over to Ms. Alston.
5. The money withdrawn from the Navy Federal Credit Union by Isaac was used to pay part of the purchase money for the bid.
6. A successful bid of \$2,118.57 for twenty (20) acres of land in Beaufort County is consistent with the alleged agreement.
7. Robert told Ms. Major that he could not grant her daughter Ava an easement without the consent of Isaac. Isaac came home from Korea and signed the easement because Isaac agreed they were to own the property together and equally. This is an indication of an agreement that Robert and Isaac would own the property together and equally.
8. Plaintiffs proved by clear, cogent, definite, unequivocal, and convincing evidence, that an

oral contract to convey land existed, that Defendant breached the oral contract, abused the confidence reposed in him by Plaintiffs and exercised bad faith by depriving plaintiff Isaac Smalls a fifty (50%) percent ownership in the property. A constructive trust should be impressed upon the property which is the subject of this action.

CONCLUSIONS OF LAW

1. The Defendant, Robert Smalls, breached an oral contract entered into by him and the Plaintiffs. Defendant also acted in bad faith, and abused the confidence reposed in him by the Plaintiffs.
2. Plaintiffs' cause of action for fraud was dismissed on Defendant's Motion for Summary Judgment following discovery, perhaps prematurely. "To establish constructive fraud, all elements of actual fraud except that element of intent must be established". *Ardis v. Potts*, 314 S.C. 512, 516 S.E.2d 267 (Ct. 1993). "Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud while intent to deceive is an essential element of actual fraud. The presence or absence of such an intent distinguishes actual fraud from constructive fraud". After hearing and considering all of the testimony at the trial I am now convinced that Defendant's conduct constituted constructive fraud.
3. A constructive trust should be and is hereby impressed upon the property which is the subject of this action and is hereafter described.

IT IS THEREFORE ORDERED Defendant shall within ten (10) days following the date of this Order sign, execute and deliver a deed of conveyance transferring to the Plaintiff, Isaac Smalls, a one-half (1/2) undivided ownership interest in the property which is the subject of this action. Plaintiff, Isaac Smalls, shall upon delivery of the deed by the Defendant for recording,

pay to the Defendant one-half (1/2) of all taxes and assessments paid by Robert Smalls on the property since purchased by him at the tax sale. Should the Defendant fail to transfer, convey and deliver a deed of conveyance to Isaac Smalls as ordered, Isaac Smalls may file a written Affidavit so stating and without further hearing or order of this Court, the Clerk of Court shall upon receipt of a copy of such Affidavit transfer and convey to Isaac Smalls a one-half (1/2) undivided ownership interest in the subject property, subject only to the delivery by Isaac Smalls to the Clerk of Court one-half of all taxes and assessments paid since the property was purchased at the tax sale by certified bank funds made payable to the Defendant, Robert Smalls.

The property which is the subject of this action is described as follows, to-wit:

ALL that certain piece, parcel or lot of land situate, lying and being on St. Helena Island, Beaufort County, South Carolina, containing twenty (20) acres, and bordering on the North by lands now or formerly of the heirs of Virginia Glover, and lands of Jonathan Gray and David Simmons, and on the East by Brickyard Holdings, and on the South by lands now or formerly of Joseph Brantley, and lands of Medelyn Roucoulet, and lands now or formerly of Lucille Loundes and Michael Rivers, and on the West by the lands of Barry Alderson.

This is the same property which was conveyed to Robert L. Smalls by deed of Joy Logan, Beaufort County Treasurer on November 22, 2002, and recorded at Deed Book 1668, Page 771. This conveyance is made subject to that certain utility easement in favor of South Carolina Electric and Gas Company which is recorded in Book 365, Page 114.

DMP# R300-17-000-0096-0000

AND IT IS SO ORDERED.

AND IT IS SO ORDERED.



MARVIN H. DUKES, III, MASTER IN
EQUITY FOR BEAUFORT COUNTY

Beaufort, South Carolina

September 19, 2013

06-861