

STATE OF SOUTH CAORLINA)

COUNTY OF LANCASTER)

IN THE COURT OF COMMON PLEAS

Ned Gregory,)

Plaintiff,)

vs.)

Howell Jackson Gregory, The)

Gregory Company, Inc., and the)

City of Lancaster,)

Defendants.)

ORDER AND JUDGMENT

Case No.: 2008-CP-29-1084

FILED
2013 APR 30 PM 9:00
LANCASTER COURT
LANCASTER, SC

This case was referred to me on June 30, 2009. The referring order directs me to serve as Master and to rule “[O]n outstanding motions and enter final judgment as to the causes of action presented in the case.”

A hearing on all motions and a trial on the merits of the case was held September 26, 2012. Plaintiff and his attorney, Palmer Freeman was present, as was Defendant Howell Jackson Gregory (“Jack Gregory”). Creighton Coleman appeared by telephone for The Gregory Company, Inc.

BACKGROUND

There is little dispute on the facts of this case.

I. THE ORIGINAL PROCEEDINGS AND JUDGMENT

Ned Gregory, Sr. died in 1985. He left his sons, Ned Gregory, II and Howell Jackson Gregory, equal undivided interests in a house and lot in Myrtle Beach, Horry County, South Carolina (the “Beach House”) and adjacent commercial properties at 329 South Main St., 331 South Main St. and 104 Chesterfield Ave., Lancaster, Lancaster County, South Carolina (collectively the “Lancaster Properties”).

In 2000, Ned Gregory filed suit to partition both properties, collect unpaid rent for Jack Gregory’s use of the Beach House and for an accounting. The case was filed in Lancaster (Case No. 2000-CP-29-896), but was later referred to the Master-in-Equity for Horry County for final disposition. Horry County assigned it a new case number (Case No. 2002-CP-26-1706).

A. PARTITION SALE, TITLE AND RECORDING

In 2005, the Master ordered the auction of both properties. He appointed Robert Folks to auction the Lancaster Properties. On June 6, 2005, Folks auctioned the Lancaster Properties. Folks report of the sale states: "Mr. Jack Gregory bid in the Lancaster County property at the sale conducted this day as ordered for the sum of \$170,000."

Folks testified at the hearing. He confirmed the notice and also produced the directive from the Horry County Master regarding the sale. Under the terms of the order of sale, third party bidders were required to pay 5% down and comply with the terms of their bid within 30 days. Jack Gregory did not do either.

A final hearing on the remaining issues in the suit was held in 2006. A decision was rendered April 26, 2006. The Master's Order of April 26, 2006 noted: "The Lancaster County property sold at auction on June 6, 2005, to the Defendant [Jack Gregory]. To date, the Defendant has not complied with his bid. (Order of April 26, 2006, at p. 3)

On April 28, 2006, Jack Gregory paid the Horry County Master \$93,925 on the Lancaster bid. This was one-half of the \$170,000 bid, plus additional charges and interest assessed in the April 26 Order. The check was drawn on The Gregory Co., Inc.

In October 2006, James Irvin, Jack Gregory's attorney, prepared and sent the Master a deed to the Lancaster Properties. The deed recites that the property was sold "unto The Gregory Company, Inc." The deed later states: "TO HAVE AND HOLD, the said premises, with its hereditaments, privileges and appurtenances, unto the said parties of the second part, The Gregory Company, Inc."

The Master signed it on October 30, 2006 and returned it to attorney Irvin.

On November 6, 2006, Irvin filled out a recording affidavit about the transfer as required by the Lancaster Clerk of Court. Irvin swore that Jack Gregory had bid for the property and then assigned rights to it over to The Gregory Company, Inc.

The Master's deed was not recorded until June 4, 2008.

B. NED GREGORY'S JUDGMENTS AGAINST JACK GREGORY

In the order of April 26, 2006, the Master rendered judgment in favor of Ned Gregory for \$45,087.47. The transcript of judgment was offered as an Exhibit by Plaintiff.

On September 24, 2012, Jack Gregory filed a motion challenging the correctness of this judgment. Since this hearing, Jack Gregory's motion has been denied by the Horry Master, so the amount remains \$45,087.47 plus interest.

Robert K

On May 27, 2006, a month after the Master's Order, Ned Gregory obtained a second judgment against Jack Gregory for \$3,060 in an unrelated case. The amount of this judgment is not disputed. It too was offered as an Exhibit by Plaintiff.

Ned Gregory has not recovered on either judgment. Jack Gregory testified at the hearing he did not have assets immediately available to satisfy either judgment.

Judgments entered in 2006 accrue interest at the rate of 11.25%, compounded annually.

II. THE CURRENT LAWSUIT

On September 19, 2008, Ned Gregory filed this suit against Jack Gregory, The Gregory Company, Inc., and the City of Lancaster. Before the hearing, the Plaintiff and the City announced they had resolved their dispute. The City therefore did participate in the subsequent hearing.

Since the City did not participate in the trial, I refer to Jack Gregory and The Gregory Company, Inc. as the Defendants in this Order.

The suit alleges that there was a transfer of title rights from Jack Gregory to The Gregory Company, Inc. and this was a fraudulent conveyance to defeat his judgments. Plaintiff also placed a Lis Pendens against the Lancaster Properties.

The Defendants answered the Complaint and counterclaimed. At the beginning of the hearing, the Defendants were granted permission to amend their Answers. These amendments resolved many of the issues in this case related to unauthorized representation of a corporation and requests for default judgments filed by both sides.

The Defendants also took the position that Plaintiff was not entitled to file a Lis Pendens.

The Defendants' Answers claimed that Ned Gregory's attorney, Clifford Welch, collaborated in preparing the Master's deed to The Gregory Company, Inc. However, neither Defendant offered evidence to support this argument. Welch testified by deposition. His deposition was introduced by Plaintiff. Welch testified that he did not receive a copy of the deed before or after it was signed and he did not approve of or know of the wording of that deed.

Plaintiff also offered the recording affidavit Irving prepared for the Lancaster County Clerk of Court. It states in relevant part:

The above transaction is exempt, or partially exempt from the recording fee . . . as this is a partition sale whereby the Court granted the property back to the defendant, Howell Jackson Gregory, who assigned his bid to his corporation, The



Gregory Company, Inc.

Jack Gregory testified at the hearing, that he was the sole owner of The Gregory Company, Inc. until March 16, 2007. He offered the minutes of the annual shareholders meeting of that day to show his wife and daughter received shares in the company for the first time that day.

Jack Gregory also testified he attended the Lancaster auction and bid for The Gregory Company, Inc. not for himself. He introduced the check used to pay for the property that was drawn on The Gregory Company.

Jack Gregory also testified that at present he did not have assets to satisfy the judgments against him, though he thought he could pay something if given time.

DECISION

As noted, many of the issues in this case are resolved. Two issues remain for my decision:

1. Is Plaintiff's Lis Pendens valid? and
2. Should title now in The Gregory Company, Inc. be set aside under The Statute of Elizabeth, Section 27-23-10, S.C. Code?

THE LIS PENDENS

The Defendants have made several motions challenging the validity of Plaintiff's Lis Pendens. I reviewed Defendants' arguments and determine Plaintiff's Lis Pendens is proper.

Lis Pendens are governed by Sections 15-11-10 through 15-11-50, S.C. Code. The Supreme Court addressed the issues raised by the Defendants in Lebovitz v. Mudd, 293 S.C. 49, 398 S.E. 2d 698 (1987).

In Lebovitz the Plaintiff sued alleging a fraudulent conveyance of property. He filed a Lis Pendens against the disputed property. The property owner challenged the Plaintiff's right to file a Lis Pendens. The Supreme Court ruled the lien was proper and held: "An action to set aside a fraudulent conveyance is one "affecting title to real property" and notices of lis pendens properly were filed against the subject property." 398 S.E.2d 698, 701.

Therefore Plaintiff's Lis Pendens is proper.

The Defendants' assertion that this is a third Lis Pendens is without merit. While there were other Lis Pendens filed, they were filed in the partition suit. Plaintiff filed the current Lis Pendens when he filed this fraudulent conveyance suit in 2008. It is the only Lis Pendens that has been filed in this case. It is appropriate under Lebovitz v. Mudd cited earlier.

B. Mudd

THE STATUTE OF ELIZABETH

Section 27-23-10 S.C. Code, also known as the Statute of Elizabeth, states in relevant part:

Every ... conveyance of lands ... which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful ... debts ... must be deemed and taken ... to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

In Albertson v. Robinson, 371 S.C. 311 (SC Ct App, 2006), the Court of Appeals recounted what a plaintiff must prove to prevail in a fraudulent conveyance suit.

When there was a transfer of assets without consideration, the conveyance will be set aside in favor of a creditor, if the creditor shows the following three elements:

1. The grantor was indebted to the creditor at the time of the transfer.
2. The conveyance of the debtor's asset was voluntary by the debtor.
3. The grantor failed to retain sufficient property to pay the creditor.

371 S.C. 311, 317.

All of these elements exist in this case.

First, Jack Gregory owed Ned Gregory money at the time the deed for the Lancaster Properties was signed. In April 2006, Ned Gregory obtained a judgment against Jack Gregory. In May 2006, he obtained a second judgment against Jack Gregory. Neither judgment was appealed. Neither is paid. The deed conveying the Lancaster Properties was signed October 30, 2006. Jack Gregory was indebted to Ned Gregory before the deed was signed.

The Defendants' main argument goes to the second element. Defendants argue there was no transfer of ownership. They assert that Jack Gregory bid as a representative of The Gregory Company, Inc. at the Lancaster auction.

However it is my determination that Jack Gregory was bidding for himself at the Lancaster auction, not the Gregory Company, Inc. Several factors point to this.

First, Jack Gregory did not identify himself as an agent to Folks. Folks' report of the sale states that Jack Gregory individually bid for the property.

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Second, a high bidder who was not a party to the suit was required to immediately pay 5% down and comply with the terms of their bid within 30 days of the auction. The high bidder here did neither. In addition, a high bidder who was not a party to the suit would have had to pay the full bid price of \$170,000. The high bidder here paid only one-half of that amount plus penalties and interest.

The use of a corporate check drawn on the Gregory Company does not alter this finding. The fact that a bidder uses third party funds to fulfill his bid does not show the bidder is an agent. In addition, at the time of the auction, Jack Gregory testified he was sole owner of all the assets of The Gregory Company, Inc. That being the case, the use of a corporate check does not prove agency.

The recitations in the Master's deed do not change my finding. The Master's deed was prepared by Jack Gregory and his attorney Jim Irvin, not the Master. They were solely responsible for its wording. Plaintiff's attorney Cliff Welch's uncontradicted testimony was that he was not shown this deed before it was sent to the Master and that he played no part in its preparation. The recitations in the deed indicating The Gregory Company, Inc. was the bidder were added by the Defendants over a year after the auction. The Defendants then did not record the deed until three years after the auction.

It is clear that Jack Gregory was the high bidder at the auction and I so find. Between June 5, 2005, and October 2006, Jack Gregory, assigned his right to receive a deed to the Lancaster Properties to The Gregory Company, Inc. This conveyance was an attempt to defeat creditors.

James Irvin's recording affidavit supports this finding as does the nineteen month delay in recording the deed.

My decision that there was a fraudulent conveyance is reinforced by findings of the South Carolina Supreme Court. In 2000, the Supreme Court found The Gregory Company, Inc. was controlled by Jack Gregory and had been used to hide assets. (See, In the Matter of H. Jackson Gregory (Opinion No. 25135, filed May 30, 2000 - "He [Jack Gregory] deposited it [client funds] into an account belonging to The Gregory Company, Inc., a company he controlled.") At the hearing, Jack Gregory testified that at the time the deed was prepared and signed by the Master, he still owned 100% of the stock in The Gregory Company, Inc.

As to the third element, Jack Gregory has no other assets or funds available to satisfy Ned Gregory's two judgments. He has paid nothing on the judgments and testified at the hearing on this case he was not able to pay them unless he was given "a little time." His only other asset, the Beach House, is fully mortgaged. Jack Gregory testified he is attempting to get this mortgage modified so he can afford to keep the property.

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IT IS THEREFORE ORDERED:

1. The Lis Pendens is proper.
2. The transfer of the right to receive the title for the Lancaster Properties located at 329 South Main Street, 331 South Main Street and 104 Chesterfield Avenue, from Jack Gregory to The Gregory Company, Inc. violates Section 27-23-10 S.C. Code.
3. The initial judgment remains \$45,087.47 plus interest at 11.25% accruing since April 26, 2006. The second judgment is \$3,060 plus interest at 11.25% accruing since May 27, 2006. (the initial judgment and the second judgment collectively the "Ned Gregory Judgments"). Interest continues to accrue hereafter.
4. The Defendants, Howell Jackson Gregory and The Gregory Company, Inc. be and are hereby enjoined from transferring title, or any interest therein, to all or any portion of the Lancaster Properties pending further order of this Court.
5. Plaintiff and the City of Lancaster have 60 days after this order to request a further hearing on the issues between them or to advise me that they have finally settled their dispute. If I do not hear from the parties, the Plaintiff's claims against the City are dismissed.
6. The Lancaster Properties described in the Lis Pendens shall be sold at public auction at the Lancaster County Courthouse, 104 North Main Street, Lancaster, South Carolina on a sales day determined by the below signed Special Referee, on the following terms:
 - a. For cash or its equivalent: An immediate deposit of 5% is required on the amount of the bid. The deposit will be applied to the purchase price when total compliance is made. In the event compliance is not made, the deposit shall be forfeited without further hearing and applied first to costs and expense of the action and then to the Ned Gregory Judgments. Should the successful bidder at the regularly conducted sale fail or refuse either to make the required deposit at time of bid or to comply with the other terms of the bid within 30 days, then the property may be re-sold on the same terms and conditions on the same or some subsequent sales day and at the risk of the defaulting bidder.
 - b. Interest on the balance of the bid after the deposit is applied shall be paid through the day of compliance at the rate of 11.25%.
 - c. Purchaser shall pay for any statutory commission on sale from the proceeds of the final bid amount.



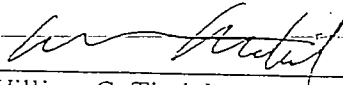
- d. Purchaser to pay for deed preparation, costs of recording the deed and transfer taxes on the deed.
 - e. Purchaser shall be entitled to possession of the premises only after Purchaser fully complies with the bid amount and a deed is issued by the Special Referee.
7. If Plaintiff is the successful bidder at the said sale for a sum not exceeding the amount of costs and expenses of the sale, the Special Referee hearing fee, plus the Ned Gregory Judgments in full, Plaintiff may pay to the Special Referee only the amount of the costs and expenses crediting the balance of the bid on the Ned Gregory Judgments.
8. The Special Referee will apply the proceeds of the sale as follows:
- FIRST: All costs and expenses associated with my service as Special Referee, including Special Referee hearing fee, and costs of advertising the properties.
- NEXT: To the payment to Plaintiff or Plaintiff's attorney of the amount of the Ned Gregory Judgments and interest or so much thereof as the purchase money will pay on the same;
- NEXT: Any surplus should be held pending further Order of this court.
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9. In the event the successful bidder is someone other than the Defendant(s) in possession of the subject property, the Sheriff of Lancaster County is ordered and directed to eject and remove from the property the occupant(s) of the property sold, together with all personal property located thereon, and put the successful bidder or his assigns in full, quiet, and peaceable possession of said property without delay, and to keep said successful bidder or his assigns in such peaceable possession.
10. In the event the successful bidder is other than the Defendant(s) in possession of the subject property and the occupants have voluntarily vacated the property or have been ejected from the property leaving furnishings, fixtures and items in said property, the Purchaser is authorized to remove from the property all furnishings, fixtures and items. The personal property, being deemed abandoned, shall be removed by the Purchaser or its agents from the subject property by placing said personal property on the public street or highway or by any other means.
11. The Defendant(s) named herein, and all persons whosoever claiming under Defendant(s), are forever barred and foreclosed of all right, title, interest, equity

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of redemption or lien in the Lancaster Properties so sold, or any part thereof.

12. In accordance with Rule 77(d), of the South Carolina Rules of Civil Procedure, the Clerk of Court shall serve a notice of entry of this Order and Judgment upon all parties not in default for failure to appear in this action.
13. The deed of conveyance made pursuant to the sale shall contain the names of only the first-named Plaintiff and the first-named Defendant(s), and the Defendant(s) who was/were the titleholder(s) of the Lancaster Properties at the time of the filing of the notice of pendency of the within action, and the name of the grantee. The Register of Deeds is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deed.
14. The undersigned will retain jurisdiction to do all necessary acts incident to this matter, including without limitation, the advertisement and sale of the Lancaster Properties in separate units or as a whole, to conduct auction(s), and the issuance of a Writ of Assistance.
15. Because of my decision, it is not necessary to hear or decide Plaintiff's post hearing motion filed on October 9, 2012.

IT IS SO ORDERED:



William C. Tindal
Special Referee

April 30, 2013

