THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

.....

APPEAL FROM BEAUFORT COUNTY COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

MARVIN H. DUKES, III, PRESIDING JUDGE

CASE NO: 2011-CP-07-2148

.....

BRUCE MILLER, ...Appellant

v.

COLUMBIA FOREST, INC., HATCH FOREST,
AND IDA M. SINGLETON .....Respondents

.....

INITIAL BRIEF OF RESPONDENT

.....

Colden R. Battey, Jr.
HARVEY & BATTEY, P.A.
P.O. Box 1107
Beaufort, SC 29901-1107
843-524-3109 (telephone)
843-524-6973 (fax)
cbattey@harveyandbattey.com

Attorneys for Respondent,
Ida M. Singleton

James H. Moss, Esquire
MOSS, KUHN & FLEMING, P.A.
P.O. Box 507
Beaufort, SC 29901-0507
843-524-3373 (telephone)
843-524-1302 (facsimile)
jim@mossandkuhn.com

Attorneys for Appellant

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STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ERR IN VACATING THE DEFAULT AGAINST THE RESPONDENT, IDA M. SINGLETON AND ALLOWING HER TO FILE AN ANSWER IN THIS ACTION.

2. DID THE COURT ERR IN HOLDING THAT THE APPELLANT HAD FAILED TO ESTABLISH A CLAIM FOR ADVERSE POSSESSION OF THE REAL ESTATE INVOLVED IN THIS MATTER.

STATEMENT OF CASE

The Respondent is a 93 year old woman who resides in Los Angeles, California. She is the record title holder to 7.52 acres of land in Beaufort County that is the subject of this litigation. She obtained title to this property by virtue of a deed from Thomas Kemmerlin, Jr., the Master in Equity for Beaufort County, dated July 9, 1992. Defendant's Exhibit 11. The Property was later conveyed to the Singleton Family Trust of which the Respondent is the sole Trustee. Defendant's Exhibit 12.

The Appellant is an adjoining property owner and operates a salvage yard on which he stores junked automobiles and other salvage.

In 2011, the Respondent, Ida M. Singleton, was contacted by a representative of Columbia Forest, Inc. concerning the purchase of timber on the parcel in question. Mrs. Singleton agreed to sell the timber for $2,131.00 pursuant to a contract for the sale of the timber to Columbia Forest, Inc.

Thereafter, on May 12, 2011, the Appellant filed suit in this action seeking damages against Columbia Forest, Inc. and Forest Hatch for conversion of his property and having sold the same for salvage. The Complaint contained an additional cause of action against the Respondent, Ida M. Singleton, claiming that he had stored vehicles on a portion of her land for the last 25 years and that he was the true owner of the property by adverse possession.

Mrs. Singleton was served with a copy of the Summons and Complaint . Thereafter, she spoke with a Mr. Jack Daniels, an employee with Columbia Forest, and was told not to worry that Columbia Forest would take care of it. Mrs. Singleton, who is 93 years old, received notice of a trial to be held on August 3, 2011, and flew from California to attend the trial. When she arrived she found that despite what she had been told by Columbia Forest no Answer had been

filed in her behalf and, in fact, Columbia Forest, Inc. and Forest Hatch filed no responsive pleading. She was advised by the Court to seek counsel. On August 17, 2011, Colden R. Battey, Jr. of the firm of Harvey & Battey, P.A. filed a motion and affidavit for the Respondent, Ida M. Singleton, seeking to vacate the default and asking that she be allowed to file an Answer to the Complaint.

A hearing was held on October 5, 2011, and the Court issued its Order on October 13, 2011. The Court found that the Respondent, Ida M. Singleton, was 92 years old and resided in California. She was advised by the co-defendants that they would file an Answer for her. Mrs. Singleton traveled from California to Beaufort, South Carolina, for trial and only then did she learn that the Defendants had failed to file any responsive pleadings. The Defendant, Ida M. Singleton, has owned and paid taxes on the property for over 20 years and the court found that she had a meritorious defense to this action. The Court then set aside and vacated the default against the Defendant, Ida M. Singleton and granted her 20 days from the date of the Order (which was October 13, 2011) to answer or otherwise plead. The Respondent's Answer was filed on October 28, 2011.

The matter was heard on July 26, 2012. On October 4, 2012, the Court issued its Order concluding that the Appellant had failed to offer clear and convincing evidence that his claim for adverse possession was actual, open, notorious, exclusive, continuous and hostile for the required period of time and that his claim for adverse possession must fail. The Court Ordered that the prayer of the Appellant's Complaint against the Respondent be denied.

Appellant filed a Motion for Reconsideration on October 22, 2012. The Court, by its Order dated January 30, 2013, held that the Appellant had not established a claim for adverse possession and the Motion for Reconsideration was denied.

Appeal thereafter was timely filed.

ARGUMENT

1. DID THE COURT ERR IN VACATING THE DEFAULT AGAINST THE RESPONDENT, IDA M. SINGLETON AND ALLOWING HER TO FILE AN ANSWER IN THIS ACTION.

Where relief is sought from a default, as is the case here, the standard is set forth in Rule 55 (c) SCRCP which states "For good cause shown the Court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60 (b) SCRCP."

It should be noted that when relief is sought from a default judgment as opposed to a default, the more rigorous standard of excusable neglect as set forth in Rule 60 (b) SCRCP is applicable as opposed to the standard of good cause as set out in Rule 55 (c) SCRCP . *Wham v Shearson Lehman Brothers, Inc.*, 298 S.C. 462, 381 S.E.2d 499 (S.C. App. 1989); *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535 (S.C. App. 1987).

Relief from default is solely within the sound discretion of the trial Judge. *Ammons v. Hood, 288 S.C. 278, 341 S.E.2d 816 (Ct.App. 1986).* "This Court cannot substitute its judgment for that of the trial judge and will not disturb the trial court's decision absent a clear showing of abuse of discretion." Id 341 S.E.2d at 818.

In *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535 (S.C. App. 1987) the Respondent Weinrauch had been served and delivered suit papers to her insurance agent asking that he send this to the insurance company. On December 29, 1985, some 27 days after service, she learned that the insurance agent had gone into bankruptcy and had never forwarded the papers to the insurance company. She had placed the suit papers in the trunk of her car and left them there while the car was being serviced. Default was taken on January 10, 1986 and on January 21, 1986 Mrs. Weinrauch served a Notice of Motion and Motion to Open Default.

The trial judge vacated the entry of default. The Court of Appeals held that the trial court properly vacated the default and cited with approval the Georgia case of *Sears, Roebuck & Company v. Ramey*, 170 Ga. App. 873, 318 S.E.2d 740 (1984), which held that there was good cause for the defendant to believe that her suit was being defended by an insurance company and that her neglect was excusable neglect. The court noted the following "The law should not blindly impose standards which require individuals, in the conduct of their daily business, to distrust the parties with whom they deal. Likewise, a litigant should not unnecessarily be forced into default as a consequence of having reasonably relied upon the word of his fellow, particularly when no innocent party will suffer if the default is opened." *Ricks v. Weinrauch*, Id at page 537

The Court has long held that Rule 55 (c) and its statutory predecessors should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits. *Rochester v. Holiday Magic, Inc.*, 253 S.C. 147, 169 S.E.2d 387 (1969); *Edwards v. Ferguson*, 254 S.C. 278, 175 S.E.2d 224 (1970); *Brown v. Weathers*, 251 S.C. 67, 160 S.E.2d 133 (1968). *Mann v. Walker*, 285 S.C. 194, 328 S.E.2d 659 (Ct.App. 1985)

In the instant case, the Respondent, when served with the suit papers, immediately contacted her co-defendant, Columbia Forest, Inc., the entity that had purchased the timber on the property, and she was told that they would take care of the matter and would file an answer for her. Despite her age (93), she flew from Los Angeles, California, to attend the trial. Only then did she learn that the co-defendants had failed to file any responsive pleadings. She was told by the trial court to seek an attorney and immediately contacted Colden R. Battey, Jr. of the firm of Harvey & Battey, P.A. who timely filed a Motion to Vacate the default, together with an affidavit from Mrs. Singleton. The trial judge on hearing the motion for default vacated the default and

allowed the Respondent to file her answer. Clearly the Respondent's actions meet the requisite showing of good cause and the trial judge did not err in vacating the default against the Respondent

2. DID THE COURT ERR IN HOLDING THAT THE APPELLANT HAD FAILED TO ESTABLISH A CLAIM FOR ADVERSE POSSESSION OF THE REAL ESTATE INVOLVED IN THIS MATTER.

In an action for adverse possession the burden of proof is on the party asserting adverse possession and he must establish his claim by clear and convincing evidence. Davis v. Monteith, 289 S.C. 176, 345 S.E. 2d 724 (1986); Lusk v. Callaham, 287 S.C. 459, 339 S.E. 2d 156 (Ct. App. 1986); Mullis v. Winchester, 237 S.C. 487, 118 S.E. 2d 61 (1961); Gregg v. Moore, 226 S.C. 366, 85 S.E. 2d 279 (1954); Knight v. Hilton, 224 S.C. 452, 79 S.E. 2d 871 (1954).

South Carolina recognizes both a 10 year statute of limitations for adverse possession §15-67-210 Code of Laws of South Carolina (1976) and South Carolina common law recognizes a 20 year presumption of a grant Terwilliger v. Daniels, 222 S.C. 191, 72 S.E.2d 167 (1952).

To constitute adverse possession, which results in obtaining title to the disputed property, the possession must be continuous, hostile, open, actual, notorious, and exclusive for the requisite period. Mullis v. Winchester, 237 S.C. 487, 118 S.E. 2d 61 (1961); Lusk v. Callaham, 287 S.C. 459, 339 S.E. 2d 156 (Ct. App. 1986); Lynch v. Lynch, 236 S.C. 612, 115 S.E .2d 301 (1960).

These elements must be present where adverse possession is claimed under both the 10 year statutory limitation and the 20 year presumption of a grant. "The claimant's possession must be hostile to not only the true owner, but also to the rest of the world so as to indicate his exclusive ownership of the property. Id. These elements must also be present in the presumption of a grant. See 3 Am.Jur.2d Adverse Possession §5 (1986) (title by adverse possession is often

said to rest on the presumption of a lost grant; mere possession does not afford the presumption of a grant–the possession must be actual, open, adverse, exclusive, and uninterrupted, as well as inconsistent with the existence of title in another, and under a claim or right or title)." *Getsinger v. Midlands orthopaedic Profit Sharing Plan, et al*, 327 S.C. 424, 489 S.E.2d 223 (S.C.App.1997).

South Carolina case law establishes six essential elements of adverse possession. The possession must be continuous, hostile, open, actual, notorious and exclusive for the requisite period of time. Lusk v. Callaham, 287 S.C. 459, 339 S.E. 2d 156 (Ct. App. 1986); King v. Hawkins, 282 S.C. 508, 319 S.E. 2d 361 (Ct. App. 1984). In the instant case there has been no showing that the possession of the property was continuous for the requisite ten year period. The Plaintiff testified that he initially put cars along a road on the Defendant Singleton's property and later expanded as he needed space.

On August 2, 2011, David Youmans surveyed the Defendant Singleton's property and found cars throughout an area shown on his plat. (Appellant's Exhibit 1). Mr. Youmans testified that he could not say the cars had been in that location for 1 day, 1 year or five years, much less 10 years. (Transcript p. 59, line 18 to p. 61, line 8) To the contrary; based on Mr. Miller's testimony, it appears that the number of cars increased over time. There is absolutely no showing of the location of any cars that were stored on the Defendant's property for at least 10 years.

The next requirement is that the possession be hostile. To be hostile the possession must be with intent to claim and hold the land against the true owner and the whole world. Haithcock v. Haithcock, 123 SC 61, 115 SE 727 (1923). A possession in recognition of the true owner is insufficient ever to ripen into title. Carr v. Mouzon, 86 SC 461, 68 SE 661 (1910).

The evidence and testimony revealed that Miller was cited by Beaufort County Codes Enforcement Officer Mark Giles in 2006 for failure to comply with the conditions of a zoning permit requiring him to remove vehicles from the Respondent's property. At that time the Appellant represented to Mr. Giles that he had put cars on Ms. Singleton's property with her permission. (Transcript p. 111, line 1 - p. 114, line 2; Transcript p. 135, line 10 - p. 137, line 22) The Appellant Miller did not deny this but stated that he did not remember making this statement. (Transcript p. 39, line 19 - p. 40, line 5) There was no question in Mr. Giles mind. (Transcript p. 108, line 24 - p. 109, line 14 and p. 136 line 24 - p. 137 line 7). Giles, who was the Code Enforcement Officer for Beaufort County wrote a contemporaneous report that Miller stated he had permission from Singleton in his contemporaneous notes that were entered into evidence. (Appellant's Exhibit 16; Respondent's Exhibit 17). Miller never claimed this adjacent property as his own. His statement to Beaufort County officials and to the Magistrate Court was he had stored cars on his neighbor's property but that he had permission to do so and that he would remove them. Ms. Singleton in her testimony confirmed that she had given permission. (Transcript p. 156, line 16 - p. 157, line 3) Based on this, it is clear that Miller never claimed title to the Singleton property until filing this action in 2011.

Next, Miller was required to prove his claim was open and notorious. Miller knew that Ms. Singleton was an out-of-state owner (he advised Mr. Giles that he had gotten permission from the owner that was in Los Angeles) (Plaintiff's Exhibit 16, Defendant's Exhibit 17) and while he did not have to notify her that he was using a portion of her land for storage the use had to be so notorious that the legal owner with the exercise of diligence should have known.

As shown on the Youmans plat, the cars were in the woods where they would not normally be seen from a road. Bay Pines Road and a small portion of Lawson Road are the only

roads running by the property. The first Code Enforcement complaint was in 2006 when Miller was going to sell some cars to be crushed and had moved the cars close to Bay Pines Road where they could be seen.

Ms. Jenkins, a niece of Defendant Singleton, who lives in Beaufort County, testified that she did not know the cars were on Ms. Singleton's property until it was pointed out to her by Mr. Giles in 2006. (Transcript p. 163, line 1 - p. 164, line 20) It is clear that the Plaintiff Miller's use of Ms. Singleton's property was not open and notorious but was done so that it would not be obvious to anyone in a position to observe the property.

The claimant Miller was required to also show that his possession was such as to indicate his exclusive ownership of the property. Not only must his possession be without subserviency to or recognition of the title of the true owner, but it must be hostile to the owner and the whole world. Curtis v. DesChamps, 290 S.C. 315, 350 S.E. 2d 201 (Ct. App. 1986); Gregg v. Moore, 226 S.C. 336, 85 S.E. 2d 279 (1954); Mullis v. Winchester, 237 S.C. 487, 118 S.E. 2d 61 (1961)

In the absence of color of title, as in this case, one claiming land adversely may acquire title to only such land which he has actually occupied. The title of such adverse possession extends only so far as the known and visible marks or boundaries of the claimant's actual possession. King v. Hawkins, 282 S.C. 508, 319 S.E. 2d 361 (Ct. App. 1984)

In the instant case, there is no clear and convincing evidence that the cars were placed on any part of the Singleton tract, in fact, there is no clear and convincing evidence to prove that any specific location on the Singleton land was occupied by the claimant Miller for 10 years or more.

In an adverse possession claim, an important element is whether the adverse claimant fenced the property for the requisite 10 year period. There was testimony that Miller had fenced his own property and the Appellant on redirect testified that there was a fence running parallel to

his fence, however, there is no showing that there was any fence on the Singleton property for the requisite 10 year period. The Appellant's surveyor, David Youmans, prepared a plat that did not show any fences. (Appellant's Exhibit 1) Moreover, he testified that he did not see any fences on the property when he surveyed it in August of 2011. (Transcript p. 61, line 9 - p. 62, line 4) The County Code enforcement officer testified that he saw no fences on the Singleton property at any time when he inspected the property. When shown recent photographs of the property, he testified that the only fence he could see was the fence surrounding the Appellant's salvage yard. (Transcript p. 133, line 8 - p. 133, line 23) Clearly, the Appellant has failed to show by clear and convincing evidence that any portion of the Singleton property was fenced for the requisite period.

While payment or nonpayment of taxes are not conclusive in an adverse possession action, they are an element and may be considered. In this case, both parties introduced their tax receipts and offered evidence that they had paid taxes on the property shown on the receipts for more than 10 years. Ellen v. Ellen, 16 SC 132 (1881); Terwilliger v. White, 222 SC 176, 72 SE 2d 169 (1952)

The Appellant Miller offered evidence for payment of taxes on Parcel 16A which is shown on the GIS records introduced through Mr. Giles. Parcel 16A consists of 2 acres. If the Appellant paid taxes on any portion of the Respondent Singleton's property, this would have been some evidence of his claim of ownership. Likewise, while the Defendant's payment of taxes on the 7.52 acres does not unilaterally defeat the Plaintiff's claim, it is evidence of her continued claim of ownership of the property.

The Appellant has raised the doctrine of laches. While laches is an equitable remedy similar to the Statute of Limitations at law the court has held that in certain cases it may be

considered in an action at law. *Bell v. Mackey, et al*, 191 S.C. 105, 3 S.E.2d 816 (S.C. 1939).

Under the circumstances of this case, *Laches* is clearly inapplicable. The Appellant contends that the Respondent acquired the property in 1992 and never attended to it until the Appellant brought an action for Adverse Possession. The Respondent had legal title to the property, she paid taxes on it, she sold timber on the property and when requested by the Appellant, she gave him temporary permission to store some of his cars.

The Appellant now claims her property by Adverse Possession. The burden is on him to prove his claim and laches is not applicable under the facts of this action.

Appellant also contends that laches is applicable because 78 days elapsed from the time that the Respondent was served and the date that she appeared in court.

A party seeking to establish laches must show (1) delay, (2) that was unreasonable under the circumstances and (3) prejudice. *Kelley v. Kelley*, 368 S.C. 602, 629 S.E.2d 388 (S.C. App. 2006); *Brown v. Butler*, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001).

In the instant case the 78 day delay was not unreasonable under the circumstances and did not prejudice the Appellant since the Respondent appeared at the initial hearing of the case.

An adverse possession claim is an action at law. *McDaniel v. Kendrick*, 386 S.C. 437, 688 S.E.2d 852 (S.C. App. 2009); *Miller v. Leaird*, 307 S.C. 56, 61 413 S.E.2d 841, 843 (1992).

As stated earlier, one claiming land has the burden of proving adverse possession by clear and convincing evidence. Davis v. Monteith, 289 S.C. 176, 345 S.E. 2d 724 (1986); Lusk v. Callaham, 287 S.C. 459, 339 S.E. 2d 156 (Ct. App. 1986); Mullis v. Winchester, 237 S.C. 487, 118 S.E. 2d 61 (1961); Lynch v. Lynch, 236 S.C. 612, 115 S.E .2d 301 (1960); Gregg v. Moore, 226 S.C. 366, 85 S.E. 2d 279 (1954); Knight v. Hilton, 224 S.C. 452, 79 S.E. 2d 871 (1954).

In this case, the Plaintiff Miller when cited by Beaufort County Code Enforcement did

not make any claim to the Singleton property on which his cars were stored but represented to them that it was Ms. Singleton's property and that he had permission to use it.

In addition, there has been no showing of any specific portion of the Singleton property that was occupied for the 10 year period.

The Plaintiff has failed to offer clear and convincing evidence that his claim of adverse possession was actual, open, notorious, exclusive, continuous and hostile for the requisite period and therefore his claim for adverse possession must fail.

Because an adverse possession claim is an action at law, the character of the possession is a question for the jury or fact finder. *Miller v. Leaird*, 307 S.C. 56, 61 413 S.E.2d 841, 843 (1992). Therefore, appellate review is limited to a determination of whether any evidence reasonably tends to support the trier of the fact's findings. *Jones v. Leagan*, 384 S.C. 1, 681 S.E.2d 6 (S.C. App. 2009).

In the instant case there is ample evidence to support the trial judge's findings of fact that the Appellant had not established a claim for adverse possession of any portion of the Respondent Singleton's 7.52 acres of land and the Order of the trial court of October 4, 2012 should be affirmed.

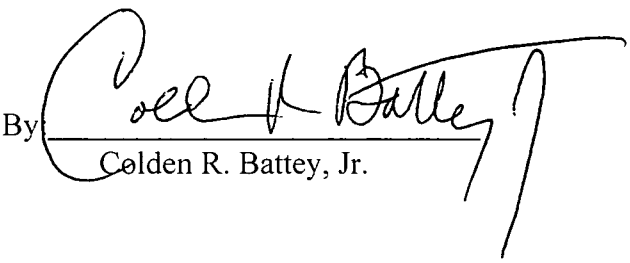
CONCLUSION

For the reasons stated herein, the Respondent believes the Order of the trial court dated October 4, 2012 should be affirmed, on the following grounds:

1. That the trial Judge found "good cause" to set aside the entry of default and this finding is solely within the trial Judge's sound discretion.

2. The Appellant has failed to prove adverse possession under either the 10 year statutory period or under the 20 year presumption of a grant in that he has failed to demonstrate that his claim was continuous, open, hostile, notorious, adverse and exclusive.

HARVEY & BATTEY, P.A.

By 
Colden R. Battey, Jr.

Beaufort, South Carolina

November 8, 2013