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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Courtney Clyburn Pope

Case No. 2024-CP-10-06162
Appellate Case No.: 2025-00893

AVE SMITH Appellant

v.

HEIRS OF HELEN TOLBERT, CHARLES TOLBERT, SARA JO TOLBERT LATTEN, KEITH
TOLBERT, BETTY JEAN TOLBERT JONES and CAROLYN TOLBERT SMITH
..... Respondents

INITIAL BRIEF OF RESPONDENT KEITH TOLBERT

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STATEMENT OF ISSUES ON APPEAL

- I. The Circuit Court did not err in denying Appellant's Motion for Title by Adverse Possession because Plaintiff failed to establish the necessary elements.

- II. The Circuit Court did not err in granting Respondent Keith Tolbert's Motion to Dismiss pursuant to Rule 12(b)(6), SCRPC, and doctrine of res judicata.

STATEMENT OF THE CASE

This is an appeal by Ave Smith (“Appellant”) of the order denying Appellant’s Motion for Title by Adverse Possession and granting Respondent Keith Tolbert’s (“Respondent”) Motion to Dismiss issued by The Honorable Courtney Clyburn Pope on March 28, 2025. Appellant filed the Summons and Complaint on December 12, 2024 alleging that she is entitled “Title to Adverse Possession”. Contemporaneously therewith, Appellant filed a “motion of title to Adverse Possession” as to two (2) parcels of property. No proof of service was ever filed, but Respondent voluntarily submitted to the jurisdiction of the court by filing a notice of appearance and Motion to Dismiss on February 4, 2025.

A hearing was held on the motions on March 17, 2025, and all parties appeared at the hearing except for Respondent Betty Jean Tolbert Jones. The presiding judge took the arguments under advisement and issued her ruling on March 28, 2025. Respondent served a copy of the Order on all pro se parties on March 31, 2025. Appellant filed an “Appeal Response” and “Intent to Appeal the Decision to Deny my Motion” on April 16, 2025. The initial Notice of Appeal to the Court of Appeals was filed on or about May 7, 2025, and an amended Notice of Appeal was filed on May 16, 2025.

STANDARD OR REVIEW

Under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). The decision to grant a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. *Id.*; *Clearwater Trust v. Bunting*, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006).

In deciding whether the circuit court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *Spence*, at 116, 628 S.E.2d at 874 (2006). A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory. *Id.*; *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Spence*, at 116-17, 628 S.E.2d at 874.

FACTS

Appellant has either failed to properly order a copy of the hearing transcript, or a copy has failed to be produced. Regardless, Respondent believes reference to certain undisputed facts is necessary for a proper understanding of the appeal. However, no reference can be made to the record on appeal because there is no transcript and a formal record on appeal has not yet been filed by the Appellant.

Appellant is the daughter of Respondent Carolyn Tolbert Smith (“Smith”). Smith is a Defendant in a separate lawsuit, case no. 2021-CP-10-04058, that was filed by Respondent on September 9, 2021. That Complaint contained causes of action for Quiet Title and Partition, related to the same two (2) parcels of property as the Complaint filed by Appellant over three (3) years later. Smith answered the complaint and asserted a counterclaim for Adverse Possession. Smith, through her attorney, and the other parties, which included all Respondents hereto, filed a consent order on August 15, 2022 quieting title to the properties at issue. A hearing was then held on Smith’s counterclaim for Adverse Possession. Prior to the hearing, Respondent Charles Tolbert filed a Motion for Summary Judgment on the issue, and argument on the motion was heard at the start of the hearing on September 21, 2022.

After considering the arguments of counsel and facts of the case, The Honorable Mikell R. Scarborough issued an Order Granting Summary Judgment, thereby entering judgment against Smith on the Adverse Possession claim on November 8, 2022. That case remains pending and the subject of no less than eighteen (18) filings by Smith, including at least one (1) appeal to this Court, all of which center on the ruling on the Adverse Possession Claim. Appellant’s case, including the documents and Initial Brief filed in this appeal, are restatements of the same facts and issues that have been presented, argued and denied in case no. 2021-CP-10-04058.

ARGUMENT

I. The Circuit Court did not err in denying Appellant's Motion for Title by Adverse Possession because Plaintiff failed to establish the necessary elements.

Appellant's Complaint fails to allege all of the elements of an adverse possession claim within the pleading itself and no amendment to the pleading would be able to cure the issue. Simply put, Appellant cannot establish the necessary elements to prove a claim of adverse possession. While Appellant names her mother, Respondent Smith, as a Defendant in the Complaint, she only lived on the property because her mother allowed her to reside with her on the property. Therefore, Plaintiff cannot establish hostile and/or exclusive possession, which are necessary elements to prove an adverse possession claim. *Getsinger v. Midlands Orthopaedic Profit Sharing Plan*, 327 S.C. 424, 489 S.E.2d 223 (Ct. App. 1997).

Mere possession of land does not show the requisite hostility to the owner, and anyone who enters into possession recognizing the rights of others in the land is not hostile unless acting in a manner that indicates an adversary position to the owner. *Lusk v. Callaham*, 287 S.C. 459, 339 S.E.2d 156 (Ct. App. 1986); *Brunson v. Sports*, 239 S.C. 58, 121 S.E.2d 294 (1961). A party is not in exclusive possession if their occupancy is shared with an owner of the property. *Butler v. Lindsey*, 293 S.C. 466, 361 S.E.2d 621 (Ct. App. 1987). Because Appellant not only recognizes the right of Respondent Smith in the properties at issue, but shares occupancy with her, she cannot establish hostile or exclusive possession, and her motion was properly dismissed as a matter of law. Failure to establish hostile possession, among other issues, was also the basis for the dismissal of Appellant's mother's claim of adverse possession in case no. 2021-CP-10-04058.

II. The Circuit Court did not err in granting Respondent Keith Tolbert's Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP, and doctrine of res judicata.

In addition to the reasons stated in the preceding section, Appellant does not have any interest in the property independent of her relationship with her mother, Respondent Smith. Appellant is not on the deed and does not have any ownership interest in the properties at issue. Smith filed a counterclaim in case no. 2021-CP-10-04058 alleging the same adverse possession claim asserted by the Appellant. Judgment was entered against Smith on that claim after a hearing on a motion for summary judgment, and the parties entered a consent order quieting title in the names of the Respondents to this appeal. To the extent Appellant's Complaint is merely an attempt to avoid the judgment entered against Smith on her adverse possession claim, then the action is rightfully barred pursuant to the doctrine of res judicata and was properly dismissed as a matter of law by the Circuit Court.

"Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between these parties." *Nelson v. QHG of South Carolina, Inc.*, 354 S.C. 290, 304, 580 S.E.2d 171, 178 (Ct. App. 2003). The doctrine of res judicata prevents any party "from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Hilton Head Ctr. Of South Carolina, Inc. v. Pub. Serv. Comm'n of South Carolina*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). To dismiss a subsequent action under the doctrine of res judicata, a "defendant must prove three elements: (1) identity of the parties; (2) identify of the subject matter; and (3) adjudication of the issue in the former suit." *Nelson*, at 304, 580 S.E.2d at 178.

In this case, while the identity of the parties is not identical, Appellant essentially stands in the shoes of Smith from the previous action. Her alleged possession of the property is wholly dependent upon Smith's ownership interest, which was previously adjudicated to be insufficient

to establish adverse possession of the properties at issue. Appellant has no independent claim to an ownership interest in the properties. Therefore, Appellant's claim for title by adverse possession fails as a matter of law and is barred pursuant to the doctrine of res judicata.

The Initial Brief of Appellant is instructive on this issue as it contains many of the same arguments raised by Respondent Smith in case no. 2021-CP-10-04058. Moreover, Appellant's brief references matters and issues that did not arise in Appellant's case. The references to "summary judgment" and "ouster", as well as references to "Judge Mikell Scarborough" and "Judge Thomas Rode" are clearly references to case no. 2021-CP-10-04058, as those issues and judges were only involved in that case and have nothing to do with Appellant's Complaint, motion or this appeal. When reviewing the totality of the filings in this appeal, it is clear that Appellant's case is nothing more than an attempt to subvert the judgment entered against Respondent Smith in case no. 2021-CP-10-04058 and should therefore be barred by the doctrine of res judicata.

As stated in more detail in the preceding section, the Complaint fails to establish the necessary elements of adverse possession, and even an amended complaint would fail for the reasons set forth above. Therefore, the Complaint was properly dismissed pursuant to Rule 12(b)(6), SCRCF, and the motion for title by adverse possession was properly barred pursuant to Rule 12(b)(8) and the doctrine of res judicata.

CONCLUSION

For all the above-stated reasons, this Court should affirm the Circuit Court's ruling, dismiss Appellant's appeal and award costs to the Respondent as allowed by South Carolina Appellate Court Rule 222. This Court should also affirm the Circuit Court's ruling for any other grounds appearing in the Record on Appeal as provided by Rule 220(c), SCACR.

Respectfully submitted,

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