

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Honorable J. Ernest Kinard, Jr., Circuit Court Judge
Case No. 2013-CP-07-02255

Appellate Case No. 2014-001587

Mamdouh Sabry Abdelrahman,

Appellant,

vs.

Daufuskie Island Utility Company, Inc.,

Respondent,

INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

Did the Circuit Court err in holding that the limitations imposed in S.C. Code Ann. §15-67-20, is not a bar to Respondent's subsequent Condemnation action?

STATEMENT OF THE CASE

In October of 2010, Beaufort County sold a .337 acre tract in Haig Point, Daufuskie Island, South Carolina upon which the Daufuskie Island Utility Company, Inc. (DIUC), a privately owned water and sewer utility, operates a 125,000 gallon storage tank and related water and sewer system facilities ("the property") at a tax sale public auction to the Plaintiff Mamdough Sabry Abdelrahman (Sabry) for the sum of \$526.70. DIUC failed to redeem the property within the statutory redemption period of one year and on December 1, 2011, and Beaufort County issued a tax deed conveying the property to Sabry. Thereafter, DIUC filed a Declaratory Judgment action against Beaufort County, the Beaufort County Treasurer, and Sabry (DIUC v. Douglas Henderson, et al., Civil Action Number 2012-CP-07-02715) seeking to recover possession of the property and an order that the tax deed issued to Sabry is invalid, void and unenforceable and to enter into an injunction enjoining the Defendant "Sabry" from interfering in any manner with Plaintiff's title to and possession of the property. (R. ____). DIUC also sought for the Court "enter a Declaratory Adjudication that the Plaintiff is the true legal as well as beneficial owner of the property with the right to exclusive possession of the property." That action was voluntarily dismissed by Stipulation of Dismissal filed on April 8, 2013. (R. ____)

On September 12, 2013, DIUC filed a Notice of Condemnation and Tender of Payment thereby instituting Civil Action Number 2013-CP-07-2338, which sought to condemn the property that was subject of DIUC's first action captioned DIUC v. Douglas Henderson, et al., Civil Action

Number 2012-CP-07-02715. (R. ____) The Condemnation Notice named Sabry as the Landowner, Condemnee and was brought under the provisions of the Eminent Domain Procedure Act. Thereafter in September, 2013, the Appellant filed the action challenging DIUC's right to condemn alleging among other grounds, that, "Section 15-67-20, Code of Laws of South Carolina (1976) as amended, provides "the Plaintiff's action for the recovery of real property or the recovery of possession of real is limited to one action for recovery, that Daufuskie Island Utility Company, Inc., previously litigated an action for the recovery of real property captioned under Daufuskie Island Utility Company, Inc. v. Douglas Henderson and Mamdough Sabry Abdelrahman ,under Civil Action Number 2012-CP-07-02715, with that case ended by Stipulation of Dismissal filed in the Court of Common Pleas on April 8, 2013 and; that the previous action was for the recovery of real property that is subject to the condemnation notice, and therefore, DIUC was forever barred from maintaining another action for the possession or recovery of the subject property." (R. ____)

On November 25, 2013, DIUC filed a Motion for Summary Judgment asserting that the Defendant DIUC was entitled to judgment as a matter of law. On June 13, 2014, the Circuit Court held a hearing on DIUC's Motion for Summary Judgment. At the outset of the hearing, Plaintiff conceded argument on Counts 2 through 7 of the Complaint. The Court then heard oral argument only as to the remaining Count 1 of the Complaint, which alleges that the Condemnation is a second action "for the recovery of real property" and is therefore barred by the limitations imposed by S.C. Code § 15-67-20. On June 12, 2014, the Circuit Court granted DIUC's Motion for Summary Judgment and Appellant timely served the Notice of Appeal on July 21, 2014.

ARGUMENT

S.C. Code §15-67-20 is a complete bar to the Respondent's Condemnation action. S.C.

Code §15-67-20 of the Code of Laws of South Carolina (1976) as amended, provides, “[T]he Plaintiff in actions for the recovery of real property or the recovery of the possession of real property is limited to one action for recovery.” It is uncontroverted that DIUC previously litigated a case captioned Daufuskie Island Utility Company, Inc. v. Douglas Henderson in his official capacity as Treasurer of Beaufort County, Beaufort County and Mamdough Sabry Abdelrahman, Civil Action Number 2012-CP-07-02715 (R. ____) with that case being ended by Stipulation of Dismissal filed in the Court of Common Pleas on April 8, 2013. That action was for the purpose of the recovery of real property, the same real property that is subject of the Condemnation Notice filed by DIUC on September 12, 2013. (R. ____).

S.C. Code §15-67-20, is intended to protect persons from burdensome litigation about real property as a result of the great inconvenience and injustice which resulted to a party in possession of real property from repeated and continued attacks on his title and possession by the same person. The statute is a statute of repose and should be considered so. Logan v. Jones, 155 S.C. 258, 158 S.E. 518 (1930), also see Ladd v. Dupree, 247 S.C. 328, 147 S.E.2nd 253 (1966). Under S.C. Code §15-67-20 both actions at issue must be to “recover” the land in question in order to bar the second action. Foster v. Foster, 81 S.C. 307 (1908), Walsh v. Evans, 112 S.C. 131 (1919). When both actions primary purpose is to recover possession of the same premises, the statute bars the subsequent action. Southern Cotton Oil Co. v. Shelton, 220 F. 247 (1914).

The character of an action is not to be determined by terminology which the pleaders may chance give to it. On the contrary, the character of an action is fixed by the events which the pleaders have recited, the one to enforce a right and the other to resist such an enforcement, or to set up another right. Walsh v. Evans, 112 S.C. 131 (1919).

In this case, clearly both the action to recover the real property lost in a tax sale and the action to re-take the property by condemnation seeks the recovery and possession of the same land by the same Plaintiff against the same Defendant. In the first action seeking to recover the property by voiding a tax sale under Civil Action Number 2012-CP-07-02715 the allegations state: “Wherefore the Plaintiff relying on the allegations set forth herein, prays that this Court: 1) enter a Declaratory Adjudication that the tax sale in December 1, 2011 tax deed issued to the Defendant Mamdough Sabry Abdelrahman are invalid, void and unenforceable and enter an injunction injoining Defendant from interfering in any manner with Plaintiff’s title and possession of property. 2) enter a Declaratory Adjudication that the Plaintiff is the true legal as well as beneficial owner of the property with the right to the exclusive possession of the property.” (R. ___)

After that first action was dismissed by the Court on Stipulation of the parties, DIUC filed a second action that stated: “1. Daufuskie Island Utility Company, Inc. is the Condemnor herein and seeks to acquire the real property described herein for public purposes” (that being the same property as sought in the previous action under Civil Action Number 2012-CP-07-02715). (R. ___)

While the causes of action between the same parties are described by terms, the allegations, the character and the relief sought are the same, they seek the recovery and possession of the same real property in both actions. Having then, the same parties, the identity of premises, and the identity of relief sought, there is little doubt that the statute bars the subsequent action under S.C. Code §15-67-20.

The Circuit Court also erred when the Court held, “[T]he Court finds that neither the two actions filed by DIUC is an action for the recovery of real property as that term is used in §15-67-20 therefore, S.C. §15-67-20 does not apply to bar the condemnation.” (R. ___)

First, The Court held that the tax sale action previously filed by DIUC was an action to overturn a tax sale and held that it was “not an action for the recovery of real property” as the terms is used in §15-67-20. (R.____) On its plain and ordinary meaning, Plaintiff’s action for the recovery of real property lost at a tax sale for failure to pay the required taxes and the failure to redeem within the statutory redemption period is nothing less than an action for the redemption of real property previously owned. The provisions of §15-67-20 of the Code, provide that a Plaintiff in actions for the recovery of real property or the recover of possession of real property is limited to one action for recovery. Simply stated, that action for the recovery of the real property lost for the failure to pay the required ad valorem taxes was DIUC’s first action to recover the property according to §15-67-20, no further actions are allowed.

The next question that is required to be answered, Is the subsequent condemnation action by DIUC a “second action to recover real property” and therefore barred by the limitations of §15-67-20 or exemption from the limitations of §15-67-20? A review of the Condemnation Notice and Tender of Payment filed by DIUC, the Condemnor clearly seeks to acquire real property owned by Appellant that being the same property formerly owned by DUIC and acquired by Appellant “at the delinquent tax sale of October 4, 2010 for delinquent 2009 taxes.” (R.____)

While the causes of action between the same parties are described by different terms, the allegations, character and the relief sought are the same. In both actions DIUC sought the recovery and possession of .337 acres used for a water facility on Daufuskie Island. There is no difference between the relief sought in both the two suits. The recovery and the possession of real property DIUC lost by the failure to pay the taxes and the failure to redeem within the following year is the request of both actions. Having then, the same parties, the identity of premises and the identity of

relief sought, there is no doubt that the statute bars the subsequent action for condemnation. There is no doubt the chief and primary purpose of both complaints was the recovery of the possession of the premises known as .337 acres on Daufuskie Island. In addition, the Court erred in determining the “condemnation action was filed pursuant to DUIC’s Eminent Domain Authority and pursuant to the South Carolina Eminent Domain Procedure Act, a condemnation action, by clear legislative intent, is not an action “for the recovery of real property,” as that term is used in §15-67-20. (R. ___)

The Eminent Domain Procedure Act provides a uniform method by which a condemning authority may acquire real property (S.C. Code §28-2-210 and S.C. Code §28-2-260) Nowhere in the Act does the Legislature grant a condemning authority unlimited power to acquire or re-acquire real property. In fact, the purpose of the Act is to create an orderly procedure by which a condemning authority may acquire real property. S.C. Code §28-2-20. Nowhere in the Eminent Domain Procedure Act is the condemnor granted the unlimited or repeated right to attempt to acquire or litigate the acquisition of real property. The Eminent Domain Procedure Act does not excuse the statute of limitations, statute of repose or any other law that is not in conflict with the Act. To allege such a claim would be to hold that the condemning authorities had unlimited rights to unlimited actions against a landowner until the condemning authority ultimately acquired the property sought.

In the case at bar, the provisions of §15-67-20 and the Eminent Domain Procedure Act are not in conflict. The Eminent Domain Procedure Act provides a procedure to acquire property but not unlimited, repeated or successive actions. The Eminent Domain Procedure Act does not excuse a condemning authority’s violation of the statute of repose or statute of limitations or any other laws that are not in conflict. S.C. Code §15-67-20 merely provides a limitation of one action for the recovery of the same real property between the same parties. The purpose of the Statute is to relieve

landowners from the burdens of successive attacks upon their title or possession of real property. There is no conflict between the limitations imposed by §15-67-20 and any provision of the Eminent Domain Procedure Act. Accordingly, it was an error by the trial judge to rule so.

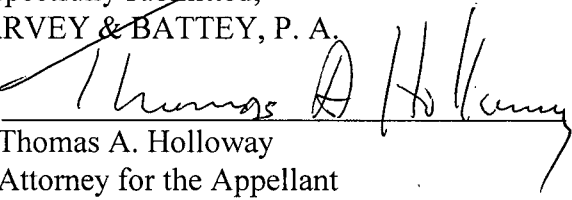
CONCLUSION

Considering the pleadings as a whole, there can be no doubt that both prior actions were to recover possession of the same land Respondent formerly owned. The right to two actions is prohibited by §15-67-20 and not excused by the Eminent Domain Procedure Act.

For the foregoing reasons, Appellant respectfully submits that the Court should reverse the judgment of Circuit Court and remand the case back to the trial court for trial.

Respectfully submitted,
HARVEY & BATTEY, P. A.

By:


Thomas A. Holloway
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Beaufort, South Carolina
January 12, 2015

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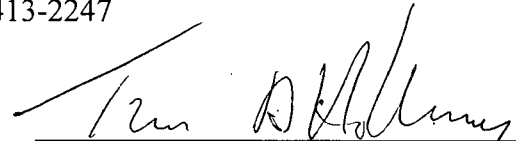
Daufuskie Island Utility Company, Inc.,

Respondent,

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief and Designation of Matter in the above matter upon the following attorney:

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