

STATE OF SOUTH CAROLINA
COUNTY OF WILLIAMSBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP-45-295

RECEIVED

Gilbert Brown and Sue Manaway

Aimee Brown

MAY 24 2016

PLAINTIFF(S)

DEFENDANT(S)

SC Court of Appeals

Submitted by: G. Wells Dickson, Jr., Special Referee	Attorney for : <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant.
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Gilbert Brown and Sue Manaway	Aimee Brown	\$N/A
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

G. Wells Dickson Jr.
Circuit Court Judge

Judge Code _____ Date August 21, 2015

STATE OF SOUTH CAROLINA
COUNTY OF WILLIAMSBURG

COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
CA#: 2013-CP-45-295

Gilbert Brown and Sue Manaway,

Plaintiffs,

vs.

Aimee Brown,

Defendant.

ORDER

2015 AUG 21 AM 10:48
CLERK OF COURT
WILLIAMSBURG, SC

PURSUANT TO RULE 53 SCRPC, and the Order of Reference signed and filed on January 14, 2014, this case was referred to the undersigned to make appropriate findings of fact and conclusions of law with authority to enter a final judgment. This matter is before the Court upon the Plaintiffs' Summons and Complaint, the Defendant's Amended Answer and Counterclaim, and the Plaintiffs' Reply.

STATEMENT OF CASE

In the Complaint, dated June 24, 2013, the Plaintiffs are asking the Court to determine the respective interest of the Plaintiffs and Defendant in the property that is the subject of this action; to grant the Plaintiffs a fee simple ownership in the property, or allow the Plaintiffs to purchase Defendant's interest in the property for an amount to be determined after computing the amount they are entitled to be reimbursed by the Defendant. They are also requesting attorney fees and cost.

On September 4, 2013, the Defendant moved for an order dismissing the Complaint pursuant to Rule 12(b)(6) on the grounds of *res judicata*, collateral

estoppel, and voluntary payment by the Plaintiffs.

Also, on September 4, 2013, the Defendant filed an Answer and Counterclaim asking that the Court dismiss the Complaint, and charge the Plaintiffs with the costs and disbursements of this action. The Defendant prayed that, in the alternative, she be awarded an in-kind share of the property, and the Plaintiffs be charged with the attorney fees and costs that she had incurred in this action; or that she be granted the value of her one-third interest in the property, plus reimbursement for taxes, monthly installments (payments on the two mortgages), maintenance and upkeep, and rent for the months the Plaintiffs exclusively used the property.

The Defendant has also prayed, in the alternative, that she be awarded the betterments she provided as improvements, and for the increase in value that her improvements and maintenance provided; or she be given credit and awarded an offset for the monies she has paid toward the upkeep, maintenance, taxes, insurance, and payments on the two mortgages. Finally, also in the alternative, the Defendant prayed that she be granted an offset for any rental that was not paid by the Plaintiffs when they used the property.

On September 9, 2013, the Plaintiffs replied, admitting that this action is for a partition, or the recovery of tenements of land, as alleged in paragraph 13 of the Defendant's Answer and Counterclaim. The Plaintiffs denied all other allegations in the counterclaims, and requested the Court to dismiss the counterclaims, and those items (allegations) in the counterclaims not admitted by the Plaintiffs, and requested that the Defendant bear her own cost.

On September 9, 2013, the Plaintiffs also moved to dismiss the Defendant's Counterclaims pursuant to Rule 8 and Rule 12 SCRPC.

A hearing was held on February 6, 2014. M. Amanda Shuler, Esquire, of Whetstone, Perkins and Fulda, LLC, appeared for the Plaintiffs; Richard C. Jones, Esquire, of Jones, Seth, Shuler & Jones, LLP, appeared for the Defendant. Testimony was taken which is reported herewith, and other evidence received. Based upon the same, I make the following:

FINDINGS OF FACT

1. The real property that is the subject of this action is located in Williamsburg County, South Carolina, and is more particularly described as follows:

All that certain piece, parcel or lot of land and all improvements thereon lying, being and situate south of Hemingway in the County of Williamsburg, State of South Carolina, containing 1.20 acres, more or less, being more fully shown on a map thereof made by Travis L. Carter, RLS, dated July 26, 1996, recorded in the Office of the Clerk of Court for Williamsburg County in Plat Book 45 at page 778, being bounded and described as follows, to wit: On the North by lands now or formerly of Mack Sanders Estate for a distance of 211.44 feet, more or less; on the East by lands of Mack Sanders Estate and by lands of Margaret S. Brown Estate for a combined distance of 265.42 feet; more or less on the South by lands of Martha Allen McNair for a distance of 208.78 feet, more or less; and on the West by lands of Road S-45-121 for a distance of 236.52 feet, more or less. Reference to the said plat is hereby made as part and parcel of this description.

Being the identical lot of land conveyed to Harvey Eugene Brown by deed of Margaret S. Brown dated October 7, 1980, recorded January 20, 1981, in the Clerk's Office for Williamsburg County in Deed Book A-150 at page 879.
TMS # 45-454-047

2. Harvey Eugene Brown died on October 28, 2003, leaving the property to his children, DeShawn Brown, Aimee Brown, and Harvey Brown, Jr.

3. The Plaintiff, Gilbert Brown, currently owns an undivided one-third interest in the real property which is the subject of this action. He obtained this interest in October, 2011, from Harvey Brown, Jr., and DeShawn Brown, who had inherited it from their father.

4. The Plaintiff, Sue Manaway, currently owns an undivided one-third interest in the real property which is the subject of this action. She obtained this interest in October 2011, from Harvey Brown, Jr., and DeShawn Brown, who had inherited it from their father.

5. The Defendant, Aimee Brown, currently owns an undivided one-third interest in the real property which is the subject of this action, which she obtained in October 2003, when she inherited it from her father.

6. The Plaintiff, Gilbert Brown, testified that the property should be valued at Eighty Thousand (\$80,000.00) Dollars. The Defendant testified that the property should be valued at Eighty-four Thousand Two Hundred (\$84,200.00) Dollars. The Williamsburg County Tax Assessor has valued the property at Seventy-seven Thousand Seven Hundred Fifty Two (\$77,752.00) Dollars. (Plaintiffs' Exhibit 14).

7. The Plaintiffs have made all mortgage payments since 2006. They have also paid all taxes since the 2005 tax year, and the maintenance and upkeep of the house and land since 2005, after the Defendant vacated the home in September, 2005.

8. At the hearing on February 6, 2014, the evidence received established that the Plaintiffs had paid a total of Seventy-four Thousand Five Hundred Four

and 49/100 (\$74,504.49) Dollars on the two mortgages, which includes Seven Thousand Three Hundred Eighteen and 09/100 (\$7,318.09) Dollars paid after September, 2011. The Plaintiffs have paid Eighteen Thousand One Hundred Sixty Five and 71/100 (\$18,165.71) Dollars towards the maintenance and upkeep of the home. On July 7, 2015, evidence was received from the Plaintiffs, without objection, that in 2014, the Plaintiffs had paid Two Thousand Three Hundred Twenty-Nine and 34/100 (\$2,329.34) Dollars for the maintenance and upkeep on the property. This increased the total payments for maintenance and upkeep to Twenty Thousand Four Hundred Ninety-five 05/100 (\$20,495.05) Dollars, which includes Twelve Thousand One Hundred Eighty-four and 17/100 (\$12,184.17) Dollars, paid after September, 2011. The total amount expended on the property by the Plaintiffs, since they acquired an interest in the property, is Nineteen Thousand Five Hundred Two and 26/100 (\$19,502.26) Dollars.

9. The Plaintiffs have incurred Three Thousand Five Hundred (\$3,500.00) Dollars in attorney fees. (Plaintiff's Exhibit 15).

10. Since October, 2003, the Defendant has paid Twenty Thousand Three Hundred Seventy-one and 72/100 (\$20,371.72) Dollars on the first and second mortgages on the home. The Defendant also spent Seven Thousand Seven Hundred (\$7,700.00) Dollars for improvements to the home. The Defendant paid the taxes for the years 2003 and 2004 in the annual amount of \$252.72, for a total of \$505.44. The total amount expended on the home by the Defendant since she acquired her interest in the property is Twenty-eight Thousand Five Hundred Seventy-seven and 16/100 (\$28,577.16) Dollars.

11. The Defendant has incurred attorney fees of Two Thousand Five Hundred and 00/100 (\$2,500.00) Dollars, in this action. (Transcript p.89).

12. The Plaintiff, Gilbert Brown, testified that Aimee Brown had not contributed financially to the upkeep of the home since she left the house in September, 2005. He explained that she had not paid taxes, insurance, lights (electricity) or anything of that nature since December of 2005, and therefore this action for partition became necessary.

CONCLUSIONS OF LAW

A. The Defendant moved to dismiss the complaint based on SCRCP 12(b)(6). The Defendant argues that *res judicata* and/or collateral estoppel applies and that the claim should be dismissed because it could have been litigated in the prior action.

B. The Defendant also argues that the parties dismissed case number 2010-CP-45-469 on January 22, 2013. The Defendant points out that the case at bar, a subsequent action, includes the same parties that were in the first case; the claims arise out of the same transaction or occurrence that was the subject of the prior action, and the issues raised in this subsequent action were raised or might have been raised in the former suit.

C. *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 those parties. Under the doctrine of *re judicata*, “[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.” *S. Carolina Pub.*

Interest Found. v. Greenville Cnty., 401 S.C. 377, 389, 737 S.E.2d 502, 508 (Ct. App. 2013), reh'g denied (Jan. 23, 2013).

D. Collateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action. *Plott v. Justin Enterprises*, 374 S.C. 504, 512-13, 649 S.E. 2d 92, 96 (Ct. App. 2007).

E. The Defendant further alleges that the stipulation and agreement of the parties, which ended case number 2010-CP-45-469, as required by Rule 43, speaks for itself. See the Stipulation of Dismissal. (Defendant's Exhibit 1). The case was dismissed by agreement of the parties. With this dismissal, consistent with the doctrine of *res judicata* and collateral estoppel, all issues that were raised or might have been raised were adjudicated and thus barred from being presented in this lawsuit.

F. At the time the prior case was brought (case number 2010-45-469), the Plaintiffs had no ownership interest in the property, and no action for partition of the property, or other relief sought in the complaint in this case, could have been prosecuted by the Plaintiffs. In addition, the prior case was not adjudicated, no judgment was pronounced or given, and no issue was actually and necessarily litigated and determined in the prior action. Therefore, the motion to dismiss pursuant to Rule 12(b)(6) on the grounds that this case be dismissed because of the application or *res judicata* or collateral estoppel is denied.

G. The Defendant finally argued that the case should be dismissed because the case was settled in the 2010-CP-45-469 action. In support of the settlement, the Defendant produced the Stipulation of Dismissal. (Defendant's Exhibit #1).

H. A stipulation of dismissal is addressed in Rule 41 SCRPC, which provides in pertinent part, as follows:

(a) Voluntary Dismissal: Effect Thereof.

(1) ...; By Stipulation.

(B) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

The Stipulation of Dismissal ending case number 2010-CP-45-469 did not state that the dismissal was with prejudice, and was therefore without prejudice, and does not prevent the present case from being brought.

I. An agreement to settle is not binding unless reduced to writing, signed by parties and their attorneys or made in open court. Rule 43(k) SCRPC provides that:

(k) Agreements of Counsel. No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel.

J. A settlement is unenforceable when it fails to set forth the terms of the settlement as required by Rule 43(k). *Widewater Square Assocs. v. Opening Break of America, Inc.*, 319 S.C. 243, 245, 460 S.E.2d 396, (1995). The parties' entire agreement must be reduced to writing or placed upon the record in order to be enforceable. *Reed v. Associated Invs. of Edisto Island, Inc.*, 339 S.C. 148, 152, 528 S.E.2d 94, 96 (Ct.App. 2000).

K. The settlement agreement between the parties in this case is not enforceable. There was no writing evidencing a settlement agreement and it was not entered into the record in open court. The entire agreement must be reduced to writing or placed upon the record to be enforceable. The agreement, as alleged by the Defendant, is not enforceable as there is admittedly no writing or no agreement on the record in the prior action. Therefore, in accordance with *Widewater*, any agreement would not be enforceable in this case, and the Defendant's motion to dismiss is denied.

L. The only remedy that has been plead and that can address all of the claims and allegations in the pleadings, is to partition the subject property. A partition pursuant to section 15-61-10 *et. seq.* is appropriate; a partition in kind is not practicable or expedient and cannot be fairly and equitably made. *Anderson v. Anderson*, 299 S.C. 110, S.E. 2d 287 (S.C. 1989), section 15-61-100 SC Code of Laws, as amended.

M. The provisions of section 15-61-25, SC Code of Laws as amended, does not apply in this case because there are no "...nonpetitioning joint tenants or tenants in common who are interested in purchasing the property...."

N. The disparate testimony of co-owners of the property as to the value of the subject property requires partition by public sale, which affords each party an opportunity to back his or her own judgment of value by bidding for the interest of the other. *Pruitt vs. Pruitt*, 298 S.C. 411, 380 S.E. 2d 862 (S.C. App. 1989).

O. Pursuant to the provisions of sections 15-61-10, *et. sec.*, SC Code of Laws as amended, and the case law decided thereunder, the Parties shall be

credited for payments as follows:

1. The parties, during the period that they had an ownership interest in the property, shall be credited for monies they expended for payments of the two mortgages referred to herein above, and for payments that were reasonable and necessary for the upkeep of the property, such as real estate taxes, insurance on the home, lawn care, and improvements to the property.
2. The parties shall also receive credit for attorney fees incurred in the prosecution and defense of this action. The attorney for the Plaintiffs shall receive Three Thousand Five Hundred and 00/100 (\$3,500.00) Dollars, and the attorney for the Defendant shall receive Two Thousand Five Hundred and 00/100 (\$2,500.00) Dollars.
3. The Plaintiffs shall be credited for those amounts paid after September 11, 2011, for a total of Nineteen Thousand Five Hundred Two and 26/100 (\$19,502.26) Dollars.
4. The Defendant shall be credited for her total payments of Twenty-eight Thousand Five Hundred Seventy-seven and 16/100 (\$28,577.16) Dollars.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

- I. That the property herein above described, shall be sold by the Special Referee or his designee, at public auction, at the Williamsburg County Courthouse, in Kingstree, South Carolina, at 12:00 on the next convenient sales

day hereafter, on the following terms, that is to say:

- a. **FOR CASH:** The Special Referee shall require, at the conclusion of the bidding, a deposit of 5% of the amount of the bid, in cash or equivalent, as evidence of good faith, the same to be applied on the purchase price in case of compliance with the bid, but in case of non-compliance within twenty (20) days, the same to be forfeited and applied to the costs and then to the Plaintiffs' debt.
- b. Interest on the balance of the bid shall be paid to the day of compliance at the rate of 5.000% per annum.
- c. The sale shall be subject to taxes and assessments, existing easements and easements and restrictions of record.
- d. Purchaser is to pay for the deed and the cost of recording the deed.

II. That the Special Referee, by advertisement according to law, shall give notice of the time and place of sale and the terms thereof; and that he will execute to the purchaser, or purchasers, a deed to the premises sold. The Plaintiffs and the Defendant, or any other person, may become a purchaser at such sale. Upon such sale being made, should the successful bidder, or his assignee, fail to comply with the terms thereof within twenty (20) days after the date of the sale, then the Special Referee may re-advertise the premises for sale on the next, or some other subsequent, sales day, at the risk of the highest bidder, and so from time to time thereafter until a full compliance shall be secured.

III. That the Special Referee shall apply the proceeds of the sale as follows:

FIRST: To the payment of the amount of the costs and expenses of this action, including the fees and cost of the Special Referee to be submitted in a subsequent bill for services, and the fees of the attorneys for the parties, as noted herein above on page 10.

NEXT: To the payment of the amount to the Plaintiffs, and to the Defendant as has been determined herein; that is, to the Plaintiffs Nineteen Thousand Five Hundred Two and 26/100 (\$19,502.26) Dollars, and to the Defendant, Twenty-eight Thousand Five Hundred Seventy-Seven and 16/100 (\$28,577.16) Dollars.

NEXT: Any surplus will be paid to the Plaintiffs and Defendant in proportion to their respective ownership interest in the property.

IV. That the Special Referee shall retain jurisdiction to do all necessary acts incident to this partition, including but not limited to, the issuance of a Writ of Assistance, and disposing of any surplus funds pursuant to Rule 71(c), SCRPC.

AND IT IS SO ORDERED!



G. Wells Dickson, Jr.
Special Referee

August 21, 2015
Kingstree, South Carolina