

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ANDERSON)
)
 WILLIAM RICE COOK, III)
)
 Plaintiff)
)
 vs.)
)
 BENNY RICHARD PHILLIPS, JR.)
)
 and the real estate property located)
)
 at 207 North Avenue, Anderson,)
)
 South Carolina 29625,)
)
 TMS# 123-26-08-02)
)
 Defendant)
)

IN THE COURT OF COMMON PLEAS

2015-CP-04-03024

A TRUE COPY
 JUN 24 2016
 Clerk of Court

ORDER FOR SUMMARY JUDGEMENT

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SC Court of Appeals

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 ANDERSON SC
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 COMMON PLEAS AND
 GENERAL SESSIONS

FACTUAL PROCEDURAL HISTORY

This matter is before the Court pursuant to a Motion to Dismiss (Rule 12(B)(6) and Motion for Summary Judgement filed January 26, 2016, and Defendant's Motion to Quash the Lis Pendens filed in this matter. The action was commenced by the filing of the Summons and Complaint on December 31, 2015.

The Plaintiff alleged that he had entered into a Sales Agreement with the Defendant's Decedent, Claudia P. Harden, on February 28, 2006, and that the Agreement was amended by written instrument dated August 11, 2006. Both Agreements were attached as exhibits to the Complaint and were allegedly executed by Claudia P. Harden by her Power of Attorney, Julia H. Phillips, who was the Defendant's mother, and the daughter of the Decedent, Claudia P. Harden. The Plaintiff alleged that he was a residential builder at the time these agreements were made. Pursuant to the terms of the Sales Agreement, Plaintiff was to make improvements to real estate located at 207 North Avenue, Anderson, South Carolina 29625, TMS# 123-26-08-02. Both of these Agreements required Plaintiff to, *inter alia*, make improvements to the property within a specified time frame (6 - 7 months). Thereafter, the property was to be sold with Plaintiff receiving the net sales proceeds after specified amounts were paid to the Decedent, Claudia P. Harden. Plaintiff was not purchasing the property and had no ownership interest in that property. The Plaintiff (or his company) was responsible for the cost of improvements and closing.

The Plaintiff alleged in the Complaint, that subsequent to the completion of the improvements in 2007, that the Plaintiff and various people, including the Defendant as Conservator for the Decedent, Claudia P. Harden, [the Plaintiff having been appointed Conservator after the death of his mother on 10/14/2011] agreed to delay the sale of the property due to the existing dire real estate market conditions during that time period. Much, if not all of the alleged communications set forth in the Affidavit of the Plaintiff are hearsay, (with

no applicable exception thereto), and/or are barred by the Dead Man's Statute, or the Statute of Frauds.

The Decedent, Claudia P. Harden, ultimately died on December 3, 2013. At the time of her death, neither of the 2006 Agreements had been carried out and the subject property remained unsold. The Defendant was appointed Personal Representative of the Decedent's Estate. The Decedent's Estate was closed by Order of the Probate Court on June 1, 2015 and no claims were filed by the Plaintiff.

The Plaintiff in the Complaint asserts that the Defendant, in his capacity as Personal Representative of the Estate of Claudia P. Harden, allegedly, fraudulently induced him not to file claims against the Decedent's Estate by promising (orally) to honor the 2006 Sales Agreement(s). As a result, according to the Plaintiff, he did not file any claims against the Decedent's Estate. Thereafter, on October 20, 2014, the Defendant, as the sole heir under the Will of Claudia P. Harden, conveyed the property by Deed of Distribution to himself and subsequently refused to honor the 2006 Agreement(s). On December 31, 2015, the Plaintiff filed this action against the Defendant and an *in rem* action against the subject property, asserting causes of action as follows:

1. Unjust enrichment
2. Conversion
3. Constructive Trust/Equitable Title
4. Partition

All of the Plaintiff's claims relate back to, and are dependent on the 2006 Agreement. The Defendant has moved for Summary Judgment on the basis that the claims made by the Plaintiff violate the provisions set forth in the Non-Claim Statute established by S. C. Code Ann. §62-3-801 and S.C. Code Ann. §62-3-803.

LAW

The Defendant's filed their Motion for Summary Judgment, and the Plaintiff has submitted an affidavit in opposition to the Motion and therefore, it is governed by Rule 56(c) of the South Carolina Rules of Civil Procedure. This rule provides a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC.

"When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857. In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In cases requiring a heightened burden of proof, the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment. Id. at 330-31, 673 S.E.2d at 803. See Turner v. Milliman, 392 S.C. 116, 121 22, 708 S.E.2d 766, 769 (2011).

The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). This initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the non-moving party's case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent's claim. *Id.* Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial. *Id.*; Rule 56(e), SCRCP.

Lord v. D & J Enterprises, Inc., 407 S.C. 544, 552 53, 757 S.E.2d 695, 699 (2014), reh'g denied (May 22, 2014)

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001).

“Summary judgment is appropriate in those cases in which plain, palpable and undisputable facts exist on which reasonable minds cannot differ.” *Priest v. Brown*, 302 S.C. 405, 408, 396 S.E.2d 638, 639 (Ct.App.1990). “It is not sufficient that one create an inference [that] is not reasonable or an issue of fact that is not genuine.” *Id.*

Once the moving party meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings but must come forward with specific facts showing there is a genuine issue for trial. Rule 56(e), SCRCP; *Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 579, 556 S.E.2d 732, 736 (Ct.App.2001).

The Plaintiff bases his claim on the alleged Contract in 2006 with Claudia P. Harden allegedly executed by her attorney in fact, Julia H. Phillips. Any other interpretation urged by the Plaintiff is unreasonable. Julia H. Phillips died October 26, 2011; no claim was ever made against Julia H. Phillips, nor her estate and the Plaintiff was appointed Conservator for Claudia H. Harden October 14, 2011 with no claim or action being filed against Claudia H. Harden, who died December 3, 2013. The Estate of Claudia H. Harden was closed on June 1, 2015 as appears by Probate Roll 2014-ES-04-00047 and no claim was filed against the Estate of Claudia Harden within the one year time limit permitted by the Non-Claim Statute, §62-3-803.

The causes of action in the Complaint all have their basis in the Agreement of Claudia H. Harden, signed in 2006. This Court finds that it is mandatory and imperative under the laws of this State that any claims that may be outstanding and in existence before the death of a decedent, must be brought within one year after decedent's death as provided by §62-3-803 (a)(1), or no later than eight months (following publication of notice for all creditors barred by publication) as provided in §62-3-801(a).

“ (a) all claims against a decedent's estate which arose before the death of the decedent, . . . whether due or to become due, absolute or contingent , liquidated or unliquidated, found on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or non-claim statute; are barred against the estate, the personal representative, the decedent's heirs and devisees, and the non probate transferees of the decedent; unless presented with the earlier of the following:

- (1) one year after the decedent's death;
 - (2) the time provided by § 62-3-801 (b) for creditors who are given actual notice, and within the time provided in § 62-3-801 (a) for all creditors barred by publication.”
- See, SC Code §62-3-803 (a)(1).

See, Earl Phillips as Personal Representative v. Brigitte Quick 399 S.C. 226, 731 S.E. 2d 327 (2012). (See Exhibit 5)

The Supreme Court has held that §62-3-803 is a **non-claim statute** and unless the statute is complied with, a creditor's claim is barred.

The Phillips Court held that “**non-claim statutes impose a condition precedent to the enforcement of a right of action and are not subject to equitable exceptions.**” Estate of Decker 684 N.E. 2d at 1130; see also 51 AmJur 2nd **Limitation of Actions Section 3 (2011); The time element is a built-in condition of a nonclaim statute and is of the essence of the right of action, and unless the claim is filed within the prescribed time set out in the statute, no enforceable right of action is created.**” Phillips at page 230.

The Plaintiff has attempted to get around the Non-Claim Statute by alleging a constructive trust, however this attempt is without merit, as both equitable and legal claims are likewise barred. In the Phillips case, our Court held that §62-3-803 makes no mention of the discovery rule, nor does it permit equitable exceptions to extend the time for commencing an action as is set forth above.

Also, in the case of In Re: Estate of Hover 407 S.C. 194, 754 S. E. 2d 875 (2014), our Supreme Court held that S.C. Code Ann. §62-3-803 is a Non-Claim Statute and stated as follows:

If the “secured” creditor [**the Plaintiff in this case is an unsecured creditor**] fails to timely present a claim in compliance with the Non-Claim Statute, the creditor's right of action against the estate is barred.

See also, Phillips v. Quick, 399 S.C. 226, 230, 731 S.E.2d 327, 329 (Ct.App.2012) “While equitable principles may extend the time for commencing an action under statutes of limitation, nonclaim statutes impose a condition precedent to the enforcement of a right of action and are not subject to equitable exceptions.” (quoting Estate of Decker v. Farm Credit Servs. of Mid-Am., ACA, 684 N.E.2d 1137, 1139 (Ind.1997)); 34 C.J.S. Executors & Administrators § 547 (Supp.2013) (“**Misleading statements, assurances, or conduct of the representative inducing a creditor to refrain from the due presentation of his or her claim do not estop the representative from contesting the claim because of such a failure to present the claim.**”) See generally E.W.H., Annotation, Effect of Conduct of Personal Representative Preventing Filing of Claims Within Time Allowed by Statute of Nonclaim, 66 A.L.R. 1415 (1930) (citing state and federal cases addressing the general rule that no promise on the part of a personal representative is sufficient to prevent the bar of the statute as to a claim not filed within the statutory period.” In re Estate of Hover, 407 S.C. 194, 211 12, 754 S.E.2d 875, 884 (2014). See also, In Re: Estate of Tollison 320 S.C. 132, 135, 463 S.E. 2d 611, 613 (Ct. App. 1995).

Therefore, this Complaint should be dismissed in its entirety with prejudice.

The Lis Pendens filed in this matter must be dismissed as it is in violation of the provisions set forth in S.C. Code Ann. §15-11-10.

The filing of a Lis Pendens is an extraordinary privilege granted by statute, strict compliance with the statutory provisions is required. Pond Place Partners v. Poole 351 S.C. 1, 567 S.E. 2d 881 (Ct. App. 2002). As set forth in Pond Place Partners supra an action affecting the title to real property clearly allows the filing of a Lis Pendens by an interested party **in order to protect their ownership interest in the property subject to the litigation.**

The Plaintiff has no ownership interest in this property by any stretch of the imagination. The Plaintiff in this case does not even have a viable claim that can be made in the Courts of this state, as set forth above and the Lis Pendens must be cancelled of record.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The right to assert any of the above claims, whether legal or equitable, originates from the 2006 Sales Agreement(s) between the Plaintiff and the Decedent, Claudia Harden, and arose during the life of the Decedent. Any other interpretation as urged by the Plaintiff is not reasonable. Accordingly, the Plaintiff was required to file a claim against the Decedent's Estate. Having failed to file any Estate claims, Plaintiff is barred from pursuing the claims arising under or out of the Contract and against the subject real estate by virtue of the Non-Claim Statute (§62-3-803).

Accordingly, Defendant's Motion for Summary Judgement as to all claims, and to cancel the Lis Pendens against the subject property is granted. This ruling is based on Rule 56 and not Rule 12(B)(6).

In arguments before the Court and in its Brief, the Plaintiff points to S.C. Code Ann. §62-1-106 and asserts that this Code Section is an exception to the Non-Claim Statute. If this Statute had the meaning claimed by the Plaintiff under this general statute, it would effectively eviscerate the specific procedures and provisions of the Non-Claim Statute created by the legislature and upheld by our Appellate Courts. These Statutes are required to be read *in para materia*. As is set forth above, the Non-Claim Statute bars all claims made by the Plaintiff in its Complaint. The attempt to use this provision of the Code [§62-1-106] to "bootstrap" their argument so as to establish the equitable remedy of a "constructive trust," clearly is barred by the South Carolina Non Claim Statute, §62-3-803. The statute primarily deals with fraud perpetrated in the making of a will, or relating to statements of creditor's claims; various forms filed under the Probate Code in the administration of Estates, and has no relevance to the Complaint allegations filed in this case.

In addition, the Plaintiff has argued that his claim and causes of action set forth in his Complaint are not against the Defendant in his representative capacity, but against the Defendant individually. The Plaintiff does not allege any individual promises of the Defendant to be responsible for the debt. S.C. Code §62-3-619 provides for personal liability (*Executor de son tort*) against "any person who obtains, receives, or possesses property... belonging to the Decedent, by means or fraud..." However, contrary to Plaintiff's intent, actions pursuant to S.C.

Code §62-3-619 and/or actions by virtue of executor *de son tort* "cannot be levied on the lands of the Testator". Warren v. Raymond 17 S.C. 163 (1882). The Defendant received title by operation of law.

The Plaintiff asserts that he is not precluded from bringing an independent action against Defendant, individually, for his alleged representations while Personal Representative of the Estate of Claudia P. Harden, however, in such a situation any judgement obtained may be only for monetary damages and not against the property.¹

CONCLUSION

After hearing arguments of counsel and considering the pleadings, the affidavits and oral arguments of the parties, it is ORDERED, ADJUDGED AND DECREED:

1. The Defendant is entitled to Summary Judgement (Rule 56 SCRPC) as a matter of law and the case is dismissed, with prejudice.

2. The Clerk of Court is ordered to cancel the Lis Pendens filed in this matter in Book 2015-LP-04-00680.

3. Nothing in this order shall prevent Plaintiff from bringing an action against Defendant AND IT IS SO ORDERED. individually as provided by the Family Order and which is incorporated herein.

(RCM)

[Signature]

R. LAWTON MCINTOSH
PRESIDING JUDGE, TENTH JUDICIAL CIRCUIT

Anderson, South Carolina

June 23, 2016

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2016 JUN 24 AM 9:23
COMMON PLEAS AND
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¹ Without ruling such, the Court expresses doubt regarding whether Plaintiff may base "fraud" claims on alleged statements by Defendant while a Conservator due to the statutory requirements, that a Conservator must first obtain permission from the Probate Court before acting, and further, based upon the Court's above Findings of Fact and Conclusions of Law, as it pertains to the Non-Claim Statute.

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS

FILED-CLERK'S OFFICE
ANDERSON SC

CASE NO. 2015 CP-04-3024

William Rice Cook, III

2016 JUN 24 AM 9:33

Benny Richard Phillips, Jr. and the real estate property located at 207 North Ave., Anderson, SC

PLAINTIFF(S)

COMMON PLEAS AND
GENERAL SESSIONS

TMS: 123-26-08-02

DEFENDANT(S)

Submitted by: Michael F. Mullinax

Attorney for: Plaintiff Defendant

Self-Represented Litigant

A TRUE COPY

JUN 24 2016

- 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 :

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SC Court of Appeals

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)
		\$
		\$
		\$

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.

Circuit Court Judge

Judge Code

Date

2155 6-23-16

