

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

The Honorable Letitia Verdin, Circuit Court Judge

Case No.: 2013-CP-23-5575

(Appellate Case No. 2015-000159)

RECEIVED
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SC Court of Appeals

HHH Ltd. of Greenville, Respondent,

v.

Randall S. Hiller, Robert E. Hiller and Randall S. Hiller, P.A. Appellants.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. IS THERE ANY REASON CONSISTENT WITH SOUTH CAROLINA APPELLATE RULE 242 FOR THIS COURT TO CONSIDER GRANTING CERTIORARI?

- II. DID THE COURT OF APPEALS CORRECTLY DECIDE THAT APPELLANT WAS NOT ENTITLED TO A JURY TRIAL ON HIS COUNTERCLAIMS AGAINST THE DEBTOR IN RECEIVERSHIP?

STATEMENT OF THE CASE

Holly Woods obtained a verdict against HHH Ltd. (“HHH”) and Joe W. Hiller on February 7, 2007 in the principal amount of \$971,000.00. [R. pp. 140-154]. The verdict was entered as a judgment on May 14, 2007. *Id.* On March 15, 2007, Judge Edward W. Miller issued an order in the Holly Woods Lawsuit (the “Miller Order”) making clear that:

“Mr. [Joe] Hiller and HHH [Ltd. of Greenville] be and are hereby enjoined from selling, transferring, secreting, encumbering, disposing of or otherwise impairing the value of any and all real and personal property owned by the Defendants either individually or jointly. If it shall become necessary in the course of defendants’ business to dispose of, transfer or encumber any property, defendants [Joe] Hiller and HHH [Ltd. of Greenville] may make application to this court for an order allowing such disposition.” *Id.*

The Respondent, HHH, was put into receivership via order of the Greenville County Master in Equity, the Honorable Charles B. Simmons, Jr., on January 16, 2013 (“Receivership Order”) [R. pp. 129-139]. The Receivership Order was granted pursuant to the supplemental proceedings initiated by Holly Woods Association of Residence Owners (“Holly Woods”), a judgment creditor of HHH. The Appellants are Defendants in the Receivership complaint based upon transfers made by HHH to Appellants, which the Receiver sought to set aside. The Receivership Order appointed

Randy A. Skinner, Esq., as Receiver for HHH. In deciding to put HHH into receivership, Judge Simmons found, in pertinent part, as follows:

Based on the evidence provided to this Court, no one was able to establish who currently owns or operates HHH, or who has in the past owned and operated HHH. However, as shown from the evidence produced to this Court, several transactions have been made by HHH since the Plaintiff's Judgment was rendered. Plaintiff contends these transactions appear to have been consummated in an effort to frustrate the efforts of Plaintiff in satisfying its Judgment lien. The Plaintiff is entitled to have its Judgement carried into effect by the disposition of the Property of HHH, in addition to the ability of Plaintiff to safeguard, preserve and protect the subject Property.

[R. p. 129].

Judge Simmons further ruled in the Receivership Order that “the Court retains jurisdiction of this matter to enter such further orders as may be just and proper.”¹ **[R. pp. 137].** The Receivership Order set forth the authority of the Receiver to take legal actions including the present action. **[R. pp. 135].**

Appellant Randall S. Hiller, who is serving as counsel for all Appellants, was in attendance on his own behalf (pursuant to subpoena) and in a representative capacity during the aforementioned supplemental proceedings hearing.

Appellant Randall S. Hiller is, upon information and belief, the sole member and practicing attorney of Appellant law firm Randall S. Hiller, P.A in Greenville, South Carolina. HHH was owned at some point by Joe Hiller, Sr., who died on May 6, 2012. Joe Hiller, Sr. was the father of Appellants Robert E. Hiller and Randall S. Hiller.

¹ In accordance with universally accepted legal writing standards, the capitalization of the word “Court” in the Receivership Order means the court with which the matter is currently pending, or Judge Simmons. *See Blue Book Rules B7.3.1 and 8.*

By virtue of the powers vested in Randy A. Skinner, as Receiver for HHH, Ltd., the underlying case was initiated against the Appellants on October 16, 2013. [R. pp. 1-41]. The Receiver brought the case in the name of HHH on behalf of the Receiver. The case involves three claims – two of which were brought under the Statute of Elizabeth (S.C. Code § 27-23-10 (1976)) and one of which was brought for specific performance. The two claims brought under the Statute of Elizabeth alleges that the Appellants participated in the wrongful transfer of three (3) different pieces of real property with the intent to delay, hinder, and defraud a judgment creditor. All three of these properties were subject to the Holly Woods judgment and the Miller Order enjoining transfer by HHH dated March 15, 2007. The Respondent’s claim for specific performance requests the deeds with which the alleged ill-gotten interests were transferred to the Appellants in the three aforementioned properties be set aside so as to restore full title to the property back in the name of the Respondent. All three (3) of the Respondent’s claims are supported, in pertinent part, by filed public records described in detail in the Complaint, copies of which are attached as exhibits to the Complaint. The Appellants are parties to several of these documents, including more than one affidavit signed by Appellant Randall S. Hiller.

Appellants responded to the Receiver’s Complaint by filing a Motion to Dismiss [R. pp. 111-113] pursuant to Rules 12(b)(6) and 12(b)(7), alleging the judgment creditor (“Holly Woods”) must bring the claims asserted in the underlying case, rather than, as was done here, by the Receiver on behalf of the judgment debtor/Respondent. The Appellants’ Motion to Dismiss was summarily denied upon the well-established law in South Carolina that the Statute of Elizabeth does not limit its application to judgment creditors and no judgment is needed to invoke it. [R. pp. 115-120]. In so ruling, the lower court found that the Receiver - who is charged with the responsibility of managing the assets of the judgment debtor, HHH Ltd., and disposing of those assets to satisfy the

judgment - is a person who is entitled to bring an action for fraudulent conveyances under the Statue of Elizabeth.

Appellants then answered and asserted three counterclaims against Respondent. [R. pp. 42-52]. Fraud, breach of contract and constructive trust; the first two counterclaims being accompanied by a jury demand, the third being a claim in equity; see Lollis v. Lollis, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987)(“An action to declare a constructive trust is in equity”). [R. pp. 42-52]. Thereafter, Judge Simmons held a conference call on June 19, 2014 with all parties for the purpose of getting an update from the Receiver as to the Receiver’s efforts under the Receivership Order. [R. pp. 96-97; 108]. On that call, Judge Simmons was informed of the Respondent’s oversight in filing the underlying case in Circuit Court, rather than in Judge Simmons’ Court per the Receivership Order. Judge Simmons confirmed on that call to all parties that it was his intention to retain jurisdiction over this matter. Judge Simmons instructed the Respondent to file a Motion for Reference in order to have the case under his jurisdiction, per the Receivership Order.

After the Respondent filed a Motion for Reference [R. pp. 53-54] and the Appellants subsequently filed a Motion for Summary Judgment [R. pp. 66-79], a hearing was held before the Honorable Letitia H. Verdin. On December 19, 2014, Judge Verdin issued an Order granting Plaintiff’s Motion for Reference to the Master in Equity. Judge Verdin’s December 19, 2014 Order did not ever address, or much less include any ruling, judgment or decree on, the Appellants’ Motion for Summary Judgment. The Appellants then filed a Motion to Reconsider [R. pp. 86-91] only in regards to the lower court’s ruling on the Motion for Reference, never mentioning their previously filed Motion for Summary Judgment. Judge Verdin subsequently denied the Appellants’ Motion to Reconsider. [R. pp. 82-85].

On January 23, 2015 (more than thirty days from Judge Verdin's December 19, 2014 Order), the Appellants filed this appeal. [R. pp. 121-128].

On June 29, 2016, in an unpublished opinion, without hearing oral arguments, the Court of Appeals dismissed the appeal.

Appellants Randall S. Hiller and Randall S. Hiller, P.A., argues that the Court of Appeals and trial court erred in not finding entitlement to a jury trial on his counterclaims brought in the equitable action brought by the Receiver. These Appellants contend their counterclaims are compulsory. It is the dismissal of this argument by the Court of Appeals that Appellant seeks review. It should not be granted.

ARGUMENT

I. THERE ARE NO REASONS CONSISTENT WITH SOUTH CAROLINA APPELLATE RULE 242 FOR THIS COURT TO CONSIDER GRANTING CERTIORARI.

Granting a writ is within the discretion of this Court and even then should only be granted when "there are special and important reasons." Rule 242(b), SCACR. While not exhaustive, the following are the "character of reasons" for which review is typically considered; 1) novel issues of law, 2) where there is a dissent in the Court of Appeals, 3) when the decision conflicts with Supreme Court precedent, 4) where substantial constitutional issues are directly involved, and 5) where a federal question is included and the Court of Appeals conflicts with a decision of the U.S Supreme Court.

Respondent respectfully asserts that Appellant has not raised any issues in this matter regarding the Court of Appeals decision on the trial court's ruling that rise to the level of criteria as set forth in SCAR 242 in order for this Court to grant Appellant's petition. Appellant is merely disappointed in the lower court's ruling.

There is no special or important reason for this Court to grant the petition. Supporting this position is the fact that the Court of Appeals determined that the opinion would not be published and did not even hear oral arguments on the issues.

There is no novel issue of law and no dissent in the Court of Appeals' decision. There are no substantial constitutional issues, nor any conflict with any Supreme Court decisions. The Appellant may argue the right to a jury trial on his counterclaim is a substantial right. Where that argument fails is that the counterclaims he brought in the equity action are not compulsory.

The Petition should be denied. Appellant did not argue grounds under Rule 242 but simply took issue with the Court of Appeals rejecting their position in the underlying case, because his claims arise out of different transactions although they involve the same parties and property.

II. THE COURT OF APPEALS CORRECTLY DETERMINED APPELLANT IS NOT DEPRIVED OF A MODE OF TRIAL TO WHICH HE WAS ENTITLED.

Reference Orders are only immediately appealable if they “deprive a party of a mode of trial to which he is entitled.” C & S Real Estate Service, Inc. v. Massengale, 290 S.C 300, 350 S.E.2d 192 (1986). If a complaint is equitable, a party has a right to a jury trial only if the counterclaim is legal and compulsory. N.C Fed. Sav. & Loan Ass’n v. DAV Corp., 298 S.C. 514, 517, 381 S.E.2d 903, 905 (1989). A counterclaim is compulsory if it arises out of the transaction or occurrence that is the subject matter of the opposing parties claim. Rule 13(a), SCRPC. Our Court has determined that a counterclaim is compulsory if any logical relationship exists between the claim and counterclaim. N.C Fed. Sav. & Loan Ass’n, at 517, 381 S.E.2d at 905. Here, the opposing parties claim brought by the Receiver arises out of the 2007 judgment and subsequent order enjoining HHH from transferring property. Appellants complain of prior transactions although on the same subject property.

A. Appellant Randall Hiller’s Fraud Claim Is Not Logically Related To The Deed in Lieu

Transfer In The Respondent's Complaint.

The Court of Appeals correctly found that Respondent's Statute of Elizabeth Action to rescind a transfer in a deed in lieu of foreclosure to the Appellant, was not logically related to the Appellants claim.

Appellant Randall Hiller contends his counterclaim for fraud was compulsory and that he had a right to a jury trial and that the trial court and appellate court are wrong. Appellants counterclaim for fraud follows the following chronology.

In September 1999, Appellant Randall Hiller was assigned a mortgage (hereinafter the "Mortgage") on a property owned by Respondent, securing a loan given to Respondent. The property was located off Old Buncombe Road in the County of Greenville and State of South Carolina, having a Tax Map Number of 0476000100108 (hereinafter "Property 1"). The Mortgage was filed originally in the Greenville County Register of Deeds Office on December 14, 1995. The assignment of the Mortgage to the Appellant Randall Hiller is in the record. On October 2, 1999 the Appellant Randall Hiller executed and filed a Release of Mortgage ("Satisfaction") whereby Appellant Randall Hiller "release[d] and forever discharge[d]" Property 1 "from the lien of said Mortgage." Appellant Randall Hiller claims that Satisfaction was fraudulent despite acknowledging he sent the Satisfaction to the closing attorney and the Satisfaction having been filed and available to the public notice for over a decade. After the Satisfaction of the Mortgage, Respondent sold Property 1 to Poinsett Development, LLC. In 2000, Respondent got Property 1 back. On February 7, 2007, a verdict was rendered against Plaintiff in the amount of \$971,000.00 in connection with the lawsuit filed in Greenville County, South Carolina under the caption of: *Holly Woods Association of Residence Owners v. Joe W. Hiller, HHH Ltd. of Greenville, et al.*; 2005-CP-23-2852 (the "Holly Woods Lawsuit"), which became public record (the "Judgment")

and was entered in the judgment rolls for Greenville County. Property 1 became subject to the Judgment and the subsequent Miller Order enjoining HHH from transferring property.

Appellant had Property 1 transferred to himself via a deed in lieu of foreclosure on December 30, 2011, even though the alleged mortgage has been satisfied of record for over a decade.

Respondents Complaint deals with the 2011 transfer of Property 1 **not** the transaction Appellant complains about that took place in 1999. The Court of Appeals correctly determined there was no logical relationship between the transaction complained about by the Respondents and the one in his counterclaim

B. Appellant Randall S. Hiller, P.A. Is Not Entitled To A Jury Trial On His Breach Of Contract Claim.

Appellant Randall S. Hiller, P.A. (“Hiller P.A.”) contends the court erred by not determining its breach of contract claim was compulsory and it had a right to a jury trial. This argument fails for the same reason, it’s a different transaction. Even if Appellant Hiller P.A. had a breach of contract claim, the result would not be different. The two parcels Appellant Hiller P.A. received a one half interest to in 2012 were subject to the Judgement and the Miller Order.

Appellant Hiller P.A. claims it learned after it prosecuted the tax appeals that Respondents could not transfer the property, because of the March 15, 2007 order Judge Edward W. Miller issued. The Miller Order made it clear that Respondents were enjoined from transferring property without the permission of the court. It is with that Order the Respondent attacks the transfer to Appellant Hiller P.A. in its Complaint. Appellant Hiller P.A.’s claim for breach of contract does not rise to the level of being a compulsory claim because 1) the claim arises out of an alleged contingency fee agreement signed in 2010 not the transfer that was prohibited by the Miller Order,

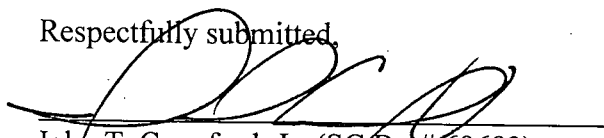
2) because the transfer whether to the Appellant Hiller P.A. or any else would have been subject to the Judgment, and 3) the Judgment was of public record and could have been discovered in the tax appeal litigation.

As a result of the aforementioned reasoning, Appellant Hiller P.A. has no damages. He is an attorney and well aware of the Judgment and even if not an attorney, any title search would have discovered the Judgment. Moreover, the alleged contingency "agreement" Appellant Hiller P.A. refers to does not provide that the property would be free and clear of any encumbrances. Appellant Hiller P.A. got exactly what it said it bargained for, a one half interest. That interest is just subject to the Judgment. The transaction Appellant Hiller P.A. complains of is the contingency agreement with HHH, not the transfer of property, because it was always going to be subject to the Judgment. Therefore, no logical relationship exists.

CONCLUSION

For the foregoing reasons, the Respondents ask the Court to deny the petition for a writ of certiorari.

Respectfully submitted,



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October 14, 2016
Greenville, SC

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HHH Ltd. of Greenville, Respondent,

v.

Randall S. Hiller, Robert E. Hiller and Randall S. Hiller, P.A. Appellants.

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of Respondent's Return to Petition for Writ of Certiorari has been served on all parties of record by mailing a copy of same in the United States mail, postage prepaid this 14th day of October, 2016, addressed as follows:

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October 14, 2016

VIA FIRST CLASS MAIL

South Carolina Supreme Court
 Attn: Clerk of Court
 Supreme Court Building
 1231 Gervais Street
 Columbia, South Carolina 29201

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OCT 18 2016

SC Court of Appeals

RE: *HHH Ltd. of Greenville v. Randall S. Hiller, et al*
 Appellate Case No.: 2016-001910

Dear Mr. Shearouse:

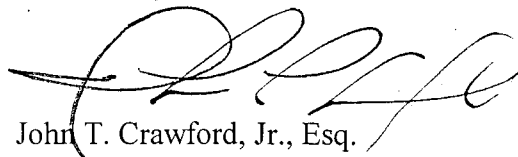
Please find enclosed an original and seven (7) copies of Respondent's Return to Petition for Writ of Certiorari and Proof of Service regarding the above-referenced matter. Please file the original and six copies and return a filed copy to me in the envelope provided.

By copy of this letter, I am providing the South Carolina Court of Appeals and opposing counsel with a copy of the Return to Petition for Writ of Certiorari and Proof of Service.

Thank you for your assistance in this matter. Please do not hesitate to contact me with any questions you may have.

Very truly yours,

KENISON, DUDLEY & CRAWFORD, LLC



John T. Crawford, Jr., Esq.

JTCjr/kb

Enclosures

cc: South Carolina Court of Appeals (with enclosures)
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OCT 18 2016

SC Court of Appeals

Hon. Jenny Abbott Kitchings
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