THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge

Appellate Case No. 2016-001653

William Rice Cook, III,.....Appellant,

v.

Benny Richard Phillips, Jr., and the real property located at 207 North Avenue, Anderson, SC 29625 TMS # 123-26-08-02.....Respondents.

INITIAL BRIEF OF APPELLANT

Andrew S. Radeker
S.C. Bar No. 73743
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211

Daniel L. Draisen
S.C. Bar No. 13536
Timothy A. Nowacki
S.C. Bar No. 100967
Krause, Moorhead & Draisen, PA
207 E. Calhoun Street
Anderson, South Carolina 29621
(864) 225-4000

Attorneys for Appellant

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STATEMENT OF THE CASE

Appellant, William Rice Cook, III (hereinafter "Cook"), filed a lis pendens, summons, and complaint to begin this case on December 31, 2015. (R. pp. ____; lis pendens; summons; complaint.) He sued the Respondent, Benny Richard Phillips, Jr. (hereinafter "Phillips"), and, *in rem*, the real property located at 207 North Avenue, Anderson, South Carolina 29625, which has the tax mapping system number 123-26-08-02. (R. p. ___; complaint p. 1.)

The complaint alleges that Cook, a licensed residential builder, doing business as Cook Construction Co., entered into a contract with the then-owner of the property, Claudia P. Harden (Phillips' grandmother), under which Cook was to renovate and remodel the property and Harden was to sell the renovated and remodeled property, with Harden receiving $155,000.00 from the sale and Cook receiving the remainder of the sales proceeds. (R. pp. ___; complaint p. 3 & exhs. B & C). The agreement, as amended, provided that if the property remained unsold by October 1, 2006, Cook would "begin paying an interest-only loan at 6.5% on the outstanding principal of $155,000 until the house sells." (R. p. ____; complaint exh. C.) Cook completed the renovation and remodeling, and the appraised value of the property rose to $260,000.00. (R. p. ____; complaint p. 4.) The complaint alleges that Cook made such payments to Harden for about a year before the property was listed for sale, at which time Cook and Harden "agreed that in lieu of monthly payments the monthly interest amount would be added to the principal amount (of $155,000.00) and would be paid when the Property sold." (R. p. ___; complaint p. 4.)

The complaint states that when the economic recession hit around the end of 2008, Phillips' father assumed handling Harden's affairs and unilaterally took the property off the market. (R. p. ____; complaint p. 4.) Cook discovered this and met with Phillips' father and then Phillips about it. (R. p. ____; complaint p. 4.) Both assured him that taking the property off the market was only a temporary measure and that that the property would be re-listed. (R. pp. ____; complaint pp. 4-5.) The complaint specifically notes that Phillips, who was fully aware of the agreement between Cook and Harden, assured Cook "that nothing had changed, the he and his father had decided to put furniture in the home to 'stage it,' and that they planned to re-list the Property soon." (R. p. ____; complaint p. 5.)

Phillips was later appointed conservator for Harden and, as alleged in the complaint, continued to assure Cook that he knew Cook was owed for his work and that he would be paid for it. (R. p. ____; complaint p. 6.)

Harden then died on December 3, 2013, without the property being sold and without Cook having been paid for his work. (R. pp. ____; complaint p. 6 & exh. E.) Phillips was appointed as personal representative of Harden's estate. (R. pp. ____; complaint p. 6 & exh. E.)

Phillips' father then died on February 11, 2015. (R. p. ____; complaint p. 6.) The complaint notes that after waiting an appropriate period of time, Cook brought the topic of performing the agreement to sell up to Phillips again, recounting Phillips' previous assurances. (R. p. ____; complaint p. 6.) Phillips then stated that the agreement was between his father and Cook and that Cook's "time was up and nothing could be done about it." (R. p. ____; complaint p. 6.)

The property has not been sold; rather, Phillips issued a deed of distribution of the property from Harden's estate to himself. (R. pp. ____; complaint pp. 6-7 & exhs. F-G.) Cook "has never been paid a single cent for the labor, materials and improvements made to the Property." (R. p. ____; complaint p. 7.)

Cook's complaint asserts causes of action against Phillips (and the property, *in rem*) that the complaint titled unjust enrichment, conversion, constructive trust/equitable title, and partition. (R. pp. ____; complaint pp. 7.-12)

Phillips made a motion to dismiss the complaint pursuant to Rule 12(b)(6), SCRCP, and for summary judgment. (R. pp. ____; motion to dismiss and for summary judgment.) Phillips' motion contended that Cook's claims were barred by S.C. Code Ann. §§ 62-3-801 and -803, the statute of limitations, the statute of frauds, and the "Dead Man's Statute," S.C. Code Ann. § 19-11-20. (R. pp. ____; motion to dismiss and for summary judgment.) It further sought the imposition of sanctions pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10. (R. pp. ____; motion to dismiss and for summary judgment.)

Later, Phillips also moved to quash the lis pendens filed in this case. (R. pp. ____; motion to quash.) In that motion, Phillips contended "that the action is for money only[.]" (R. pp. ____; motion to quash.)

Cook swore an affidavit, which was submitted on June 7, 2016. (R. pp. ____; affidavit of Cook.) The affidavit states the facts alleged in the complaint and also specifically notes the following:

> I was never paid anything for the labor, materials, renovations and remodeling work to the property. I did not invest my time and money into this project as a gift. The renovations and remodeling to the property greatly

> increased its value for which I have not been paid anything. I was repeatedly promised I would receive payment and that the property would be re-listed. I had no reason not to believe Benny Phillips, Jr. and I relied on his word and also his representations as the appointed Conservator and Personal Representative of Mrs. Harden's estate.

(R. pp. ____; affidavit of Cook.)

In the days before the motions were set to be heard, the parties both submitted memoranda concerning the motions. (R. pp. ____; defendant's motion brief; plaintiff's memorandum in opposition.) The circuit court heard Phillips' motions on June 13, 2016. (R. pp. ____; transcript.)

By order filed June 24, 2016, the circuit court granted Phillips' motion for summary judgment and ordered the clerk of court to cancel the lis pendens. (R. p. ___; order granting summary judgment p. 6.) The court ruled that all of Cooks' claims were barred by the probate non-claim statute, S.C. Code Ann. § 62-3-803, because they were not presented as claims against the estate of Claudia P. Harden within the earlier of one year after her death or eight months from the publication of the notice to creditors in her estate. (R. pp. ___; order granting summary judgment pp. 3-6.) The court also ruled that the filing of the lis pendens was improper and cancelled it. (R. pp. ___; order granting summary judgment p. 5, 6.)

Cook timely moved for the court to reconsider its rulings. (R. pp. ___; motion to reconsider.) The court denied that motion by form order, without a hearing. (R. p. ___; order denying motion to reconsider.) This appeal followed.

STATEMENT OF FACTS

Phillips promised Cook, repeatedly, that the agreement with Harden would be honored and Cook would be compensated for his significant investment of time and money in the property involved in this case. (R. pp. ___; complaint; affidavit of Cook.) Phillips induced Cook not to file a creditor's claim with Harden's estate, then called time on Cook and distributed the property to himself. (R. pp. ___; complaint; affidavit of Cook; transcript p. 13 ln. 18-25, p. 32 ln. 6-11.) Cook sued the person who did him wrong – Phillips. (R. pp. ___; complaint.)

STANDARD OF REVIEW

Summary judgment. When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). That standard is that "summary judgment may be rendered only when 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 judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks &

Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). If "the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]" Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (S.C. 2008).

"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. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues." Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008).

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-3 (2009). In Hancock, the Court held that "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 in order to withstand a motion for summary judgment." Id. What is required to defeat a summary judgment motion in cases requiring heightened burdens of proof or applying federal law is simply more than a scintilla of evidence. Id.

Motion to dismiss. The ruling on a motion to dismiss under Rule 12(b)(6), SCRCP, for failure to state facts sufficient to constitute a cause of action must be based solely upon the allegations set forth in the pleading. Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601 (1995). "The motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any

theory of the case. The question is whether in the light most favorable to plaintiff, and with every doubt resolved in her behalf, the complaint states any valid claim for relief." Dye v. Gainey, 320 S.C. 65, 67-68, 463 S.E.2d 97, 98-99 (Ct. App. 1995). The complaint should not be dismissed even if the court doubts the plaintiff will prevail in the action. Id.

Cancellation of lis pendens. Pursuant to S.C. Code Ann. § 15-11-40, a court may "cancel a lis pendens 'authorized by this chapter[,]'" i.e., Chapter 11 of Title 15 of the South Carolina Code of Laws, "'at any time after the action is settled, discontinued, or abated.' By implication, a lis pendens that meets the statutory requirement for filing may not be canceled during the pendency of litigation." Carolina Park Assocs., LLC v. Marino, 400 S.C. 1, 9, 732 S.E.2d 876, 880 (2012). If, however, "the lis pendens does not 'affect[] the title to real property' as required under § 15-11-10, the lis pendens is not authorized by the statute and the statute does not limit the court's power to cancel it." Id.

ARGUMENT

I. Cook did not sue the Estate of Claudia P. Harden. Cook sued Phillips individually for what Phillips did.

Nowhere does Cook's complaint say that it was brought against Harden's estate. (R. pp. ___; complaint.) Nowhere does Cook's complaint say that it was brought against Phillips in his capacity as personal representative of that estate. (R. pp. ___; complaint.) The person who is a defendant in this case is Phillips, individually. (R. pp. ___; complaint p. 1; transcript p. 16 ln. 7-10, p. 21 ln. 9-11, p. 32 ln. 6-11; plaintiff's memorandum in opposition p. 3.) Nonetheless, the circuit court ruled as though Cook's complaint had been brought against Harden's estate, ending Cook's

case because of a statute – S.C. Code Ann. § 62-3-803, referred to as the probate non-claim statute – that sets a time limit for bringing a different kind of claim against a different kind of defendant. (R. pp. ___; order granting summary judgment pp. 3-6.) This was reversible error.

The Probate Code's non-claim statute, S.C. Code Ann. § 62-3-803, contains time limits for the presentation of creditors' claims against an estate. The non-claim statute does not limit, nor does it purport to limit, anything other than the time in which "claims against a decedent's estate" may be presented. S.C. Code Ann. § 62-3-803(a)&(c). The lower court and Phillips cited a number of authorities and stated that they mean that the non-claim statute bars Cook's claims against Phillips; however, as Cook's counsel noted at the hearing, all of those cases concerned claims brought against an estate, not claims brought against an individual. (R. p. ____; order granting summary judgment; transcript p. 19 ln. 14-15.) For example, the Phillips v. Quick case relied upon by the circuit court concerns claims made against an estate, not claims made against a living individual. 399 S.C. 226, 228, 731 S.E.2d 327, 328 (Ct. App. 2012).

With some exceptions that are noted in the statute, if a "creditor fails to timely present a claim in compliance with the nonclaim statute, the creditor's right of action *against the estate* is barred." In re: Estate of Gurnham: Beach First Natl. Bank v. Estate of Gurnham, 407 S.C. 194, 754 S.E.2d 875, 881 (2014)[1] (emphasis added). "The presentation of claims *against an estate* is governed by the probate code." In re: Estate of Tollison: Anderson Area Med. Ctr., Inc. v. Tollison, 320 S.C. 132, 136, 463 S.E.2d

[1] This opinion is referred to as "In Re Estate of Hover" in some filings made in the circuit court in this case, probably as a result of it concerning the estate of Margaret Dever Hover Gurnham and Hover being the last name of that estate's personal representative.

611, 613 (Ct. App. 1995) (emphasis added). The non-claim statute does not bar actions against living individuals for wrongs those individuals have committed. That, however, was precisely the result that the lower court reached in this case. (R. pp. ____; order granting summary judgment.)

Underscoring that the General Assembly never intended the non-claim statute to bar actions against living individuals, including individuals who happen to be or to have been personal representatives, are two statutes that dispel any doubt about it. In S.C. Code Ann. § 62-3-808(b), the Probate Code notes that "[a] personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if he is personally at fault." That is because, if the person who holds the office of an estate's personal representative is the individual who committed a legal wrong, he is of course liable himself for the consequences of his own wrongful conduct, just as in other vicarious liability situations. See, e.g., Steinke v. Beach Bungee, Inc., 105 F.3d 192, 195-96 (4th Cir. 1997) (corporate owner, director, or officer can be personally liable along with corporation for corporation's tort if that individual participated directly in the tort); Gilbert v. Mid-South Mach. Co., Inc., 267 S.C. 211, 227 S.E.2d 189 (1976); Mackey v. Frazier, 234 S.C. 81, 106 S.E.2d 895 (1959); Long v. Norris & Assocs., 432 S.C. 561, 538 S.E.2d 5 (Ct. App. 2001) (error to dismiss employee as defendant); Thomas v. Delta Enter., Inc., 302 S.C. 351, 396 S.E.2d 122 (Ct. App. 1990) (agent liable in tort). Further, S.C. Code Ann. § 62-1-106[2] provides as follows:

[2] This Code section was changed by an amendment effective January 1, 2014, but not in any material way. Cook quoted the pre-amendment language in his memorandum. (R. pp. ___; plaintiff's memorandum in opposition pp. 3-4.)

> Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may: (i) obtain appropriate relief against the perpetrator of the fraud and (ii) restitution from any person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or not, but only to the extent of any benefit received. Any proceeding must be commenced within two years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

When it was enacted in 1986, this statute simply adopted the language of Uniform Probate Code § 1-106 word for word. The comment to this section of the Uniform Probate Code reinforces the intent, force, and effect of the section to make clear that the provisions of the Probate Code are not to be used to shield or permit fraud. It states:

> This is an overriding provision that provides an exception to the procedures and limitations provided in the Code. The remedy of a party wronged by fraud is intended to be supplementary to other protections provided in the Code and can be maintained outside the process of settlement of the estate.

In adopting this section and enacting it as S.C. Code Ann. § 62-1-106, our legislature intended to allow victims of fraud a remedy despite the time limitations and procedures found elsewhere in the statute, including the non-claim statute. One of the purposes envisioned for this section was to provide relief for persons induced not to bring their claims before the probate court as the result of fraud. See John C.P. Goldberg & Robert H. Sitkoff, Torts and Estates: Remedying Wrongful Interference with Inheritance 65 Stan. L. Rev. 353-354 (2013).

While these statutes and their history illustrate that the legislature did not intend for the non-claim statute to bar a claim against an individual who happened to serve as a personal representative, it is not necessary to resort to them. The plain words of S.C. Code Ann. § 62-3-803 provide that its limits are bars only to "claims against a decedent's estate[,]" not bars to anything else. "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). When a court interprets a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Id. at 499.

With due respect to the lower court, what it did was force a construction of S.C. Code Ann. § 62-3-803 that expanded its meaning to cover claims against Phillips, a living person. (R. pp. ____; order granting summary judgment.) This was error, and it is the error on which the circuit court's entire decision was based. This court should reverse and remand this case for trial.

II. Cook's claims against the land were not against the estate and were not barred.

The circuit court appeared to conceive of Cook's claims against Phillips as sounding under the executor *de son tort* statutes, S.C. Code Ann. § 62-3-619 and -620. (R. pp. ___; order granting summary judgment pp. 5-6.) For that reason, the circuit court stated that Cook could not maintain an action with regard to the subject property because "actions pursuant to S.C. Code § 62-3-619 and/or actions by virtue of executor *de son tort* 'cannot be believed on the lands of the Testator.' Warren v. Raymond 17 S.C. 163 (1882)." (R. pp. ___; order granting summary judgment pp. 5-6.) The order

then states that "[t]he Defendant received title by operation of law." (R. p. ___; order granting summary judgment p. 6.)

Phillips did apparently receive title by operation of law under S.C. Code Ann. § 62-3-101; however, Cook's claims do not sound under the executor *de son tort* statutes. The purpose of the executor *de son tort* statutes is to require an executor *de son tort* to return to the estate, via the personal representative, what he has misappropriated from it or to render judgment in favor of the estate against him for what he has wasted. See S.C. Code Ann. § 62-3-620; Greenfield v. Greenfield, 245 S.C. 604, 615, 141 S.E.2d 920, 926 (1965) ("the language of the statute is clear and reflects an intention by the legislature to authorize the probate court to require an executor *de son tort* to account for assets not wasted or lost by delivering the same to the administratrix"). Cook, however, was not acting on behalf of the estate in bringing this case, and he did not seek the subject property to be returned to the estate. (R. pp. ____; complaint.) Cook did not seek executor *de son tort* remedies. Further, since the estate had already been closed and a deed of distribution issued to Phillips, the estate no longer had any interest in the property at all, and there was no estate for anything to be returned to. S.C. Code Ann. § 62-3-101; S.C. Code Ann. § 62-3-907(B). The executor *de son tort* statutes are simply not brought into play by Cook's claims.

Also, Cook pled that "he has acquired an equitable interest in the Property." (R. p. ____; complaint p. 9.) Under the facts alleged in the complaint and set forth in Cook's affidavit, he did have an equitable interest in the property, particularly when the record is viewed in the light most favorable to him. (R. pp. ____; complaint; affidavit of Cook.) This is important because, even if this court were to view –

incorrectly – the property subject of this case as property of Harden's estate, Cook's claims against the property would fall under the exception in S.C. Code Ann. § 62-3-803(d)(1) to the bar of the non-claim statute. That exception provides:

> (d) Nothing in this section shall be construed as placing a limitation on the time for:
>
> (1) commencing a proceeding to enforce a mortgage, pledge, lien, or other security interest upon property of the estate[.]

Id.

South Carolina case law does not make exactly clear what equitable title is. It appears that equitable title is a significant interest in the property; however, it is an interest that does not carry with it all the incidents of legal title. Lewis v. Premium Investment Corp., 351 S.C. 167, 173 & n. 4, 568 S.E.2d 361 (2002); Brooks v. Council of Co-Owners of Stone Throw Horizontal Property Regime I, 315 S.C. 474, 476-77, 445 S.E.2d 630 (1994); FCX, Inc. v. Long Meadow Farms, Inc., 269 S.C. 202, 206-07, 237 S.E.2d 50 (1977); Dempsey v. Huskey, 224 S.C. 536, 541-42, 80 S.E.2d 199 (1954); cf. Singleton v. Cuttino, 107 S.C. 465, 469, 92 S.E. 1046 (1917); Southern Pole Bldgs., Inc. v. Williams, 289 S.C. 521, 524, 347 S.E.2d 121 (Ct. App. 1986). It would appear to apply where a party has entered into an agreement to sell real estate. Singleton, 107 S.C. at 469 (vendee "equitable owner of the rents and profits of the land"). Its quantum or value may bear a strong relationship to "equity" in the lay or business sense of the word: the amount of the value of an owner's net interest when discounted by the value of other interests in a piece of real property. Lewis, 351 S.C. at 173 n. 4. It can function and operate much as a security interest in land. Dempsey,

224 S.C. at 541-42 (vendee corresponds to mortgagor and vendor to mortgagee, and court may sell property similarly to mortgage foreclosure sale).

Another equitable interest a party may have in property is an equitable lien. "For an equitable lien to arise, there must be a debt, specific property to which the debt attaches, and an expressed or implied intent that the property serve as security for payment of the debt." Chase Home Finance, LLC v. Risher, 746 S.E.2d 471, 475 (S.C. App. 2013) (internal citations and quotation marks omitted). "Although not judicially recognized until a judgment is entered declaring its existence, an equitable lien relates back to the time it was created by the conduct of the parties." First Fed. Savings & Loan Assn. of Charleston v. Bailey, 316 S.C. 350, 356, 450 S.E.2d 77, 81 (Ct. App. 1994) (citing Fibkins v. Fibkins, 303 S.C. 112, 116, 399 S.E.2d 158, 160 (Ct. App. 1990)); accord United Carolina Bank v. Caroprop, Ltd., 311 S.C. 376, 381, 429 S.E.2d 197, 199 (Ct. App. 1993), *rev'd on other grounds*. An equitable lien is a security interest in property. Chase Home Finance, 746 S.E.2d at 475.

Cook's claims against the land were not against the estate and were not barred by any probate code provision or by anything else. The lower court erred reversibly.

III. Cook alleged and made a factual showing as to each element of his claims, and they are not barred by the statute of limitations, the statute of frauds, the hearsay rule, or the Dead Man's Statute.

The circuit court's grant of summary judgment is not a case of harmless error. Neither dismissal of Cook's claims nor summary judgment on them would have been proper on the content of his complaint or the factual record, respectively. The lower court erred reversibly in ending these claims.

While the matters addressed below were not the basis for the circuit court's ruling, Cook addresses them here to note that there is not an alternative basis for affirming the decision of the lower court.

a. Cook pled and made a showing of the necessary elements of his claims.

Constructive Trust. Cook pled facts sufficient to state a cause of action for constructive trust, and the facts appearing in the record, viewed in the light most favorable to him, provide more than a scintilla of evidence tending to establish the elements of this claim.

> A constructive trust is distinguished from an express trust in that the former arises entirely by operation of law without reference to any actual or supposed intention of creating a trust. It is resorted to by equity to vindicate right and justice or frustrate fraud. All v. Prillaman, 200 S.C. 279, 20 S.E.2d 741 (1942). Generally, fraud is an essential element, but it need not be actual fraud. The case of Bank of Williston v. Alderman, 106 S.C. 386, 91 S.E. 296, 298 (1917) states: "Actual fraud is not necessary, but such trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by him who holds the legal title." See also Dominick v. Rhodes, 202 S.C. 139, 24 S.E.2d 168 (1943).
>
> As evidenced by the above summary, equity is less than demanding and quite flexible in prescribing the elements essential to a constructive trust. Further, a constructive trust is permitted to be proved by parol evidence despite the statute of frauds. Wolfe v. Wolfe, 215 S.C. 530, 56 S.E.2d 343 (1949).

Whitmire v. Adams, 273 S.C. 453, 457-58, 257 S.E.2d 160, 163 (1979).

The fraud element of a constructive trust is far broader than the narrow, nine-element definition of actual fraud. Halbersberg v. Berry, 302 S.C. 97, 106, 394 S.E.2d 7, 13 (Ct. App. 1990). "A constructive trust arises against one who by fraud, actual or

constructive, by duress or abuse of confidence, by commission of a wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience, either has obtained or holds the right to property which he ought not in equity and good conscience hold and enjoy." Id.; accord Straight v. Goss, 383 S.C. 180, 210, 678 S.E.2d 443, 459 (Ct. App. 2009); Macaulay v. Wachovia Bank of S.C., N.A., 351 S.C. 287, 294, 569 S.E.2d 371, 375 (Ct. App. 2002) Hendrix v. Hendrix, 299 S.C. 233, 235, 383 S.E.2d 468, 469 (Ct.App.1989). In general, a constructive trust may be imposed when a party obtains a benefit "which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it, as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty." Smith v. S.C. Ret. Sys., 336 S.C. 505, 529, 520 S.E.2d 339, 352 (Ct. App. 1999) (quoting SSI Medical Servs., Inc. v. Cox, 301 S.C. 493, 500, 392 S.E.2d 789, 793-94 (1990)). Constructive trusts arise "under the broad doctrine that equity regards and treats as done what in good conscience ought to be done" and "the forms and varieties of constructive trusts are practically without limit, such trusts being raised, broadly speaking, whenever necessary to prevent injustice." Dominick, 202 S.C. at 149.

Here, Phillips has received a benefit, property with a value that has been greatly enhanced by Cook's work, that does not equitably belong to him, since that benefit was conferred under an agreement that provided for a sale of the property to compensate Cook for his materials and labor used to create that value. (R. pp. ___; complaint; affidavit of Cook.) Cook has received no compensation, but Phillips is retaining the property, with full knowledge of the circumstances under which Cook enhanced its

value. (R. pp. ___; complaint; affidavit of Cook.) Phillips' assurances induced Cook to take no action to enforce his rights, and now Phillips has raised a technicality in the hope – realized by the lower court's ruling – that he can forever retain the benefit of Cook's enhancement of the property without Cook ever being able to benefit from it. (R. pp. ___; complaint; affidavit of Cook; transcript p. 13 ln. 18-25, p. 32 ln. 6-11.) This benefit does not equitably belong to Phillips and he cannot in good conscience retain or withhold the benefit from Cook. Phillips received this benefit as a result of fraud, bad faith, and an abuse of confidence, as Phillips repeatedly reassured Cook that the original agreement would be honored so that Cook would be compensated, which Phillips now refuses to do. (R. pp. ___; complaint; affidavit of Cook.) In other words, Phillips has been successful in lying to Cook long enough to prevent him from making a creditor's claim and long enough to allow Phillips to issue a deed of distribution to himself and cut Cook out. (R. pp. ___; complaint; affidavit of Cook.) Viewed in the light most favorable to Cook, Phillips' representations were intentionally made for the purpose of causing Cook not to take any legal action against Phillips' grandmother or her estate. (R. pp. ___; complaint; affidavit of Cook.)

Further, a confidential relationship existed between the parties, which Phillips abused to perpetuate his fraud. A confidential or fiduciary relationship exists when one reposes a special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one reposing the confidence. Chapman v. Citizens & S. Nat. Bank of S.C., 302 S.C. 469, 477, 395 S.E.2d 446, 451 (Ct. App. 1990) (citing SSI Medical Services,, 301 S.C. 493). This court has stated that "[a]lthough a precise definition of a confidential relationship is

elusive, a thorough review of available material left us impressed with the definition found in Black's Law Dictionary 270 (5th ed. 1979)[,]" which includes the relation of "executors or administrators and creditors[.]" Chapman, 302 S.C. at 475-76 (quoting Black's Law Dictionary 270).

The complaint and Cook's affidavit state that Cook reposed his confidence in Phillips and Cook relied on Phillips' promises to honor the agreement. (R. pp. ___; complaint; affidavit of Cook.) It would be inequitable to permit Phillips to abuse that confidence and receive a windfall at Cook's expense.

The instant case bears some similarity to Briggs v. Richardson, 273 S.C. 376, 256 S.E.2d 544 (1979), in which heirs brought an action against another heir to impose a constructive trust on properties that passed through the estate of their mother. The plaintiffs had not contested the will during the time period allowed. Id. The heirs were not included in the will, but they alleged that the heir who was also personal representative of their mother's estate repeatedly reassured the plaintiffs that he would divide the property equitably as per their mother's wishes. Id. On the basis that the plaintiffs had adequately alleged a cause of action for constructive trust, the Supreme Court upheld the trial court's decision to deny the defendant's motion to dismiss. Id.

Unjust enrichment. A party may be unjustly enriched when he has and retains benefits or money which in justice and equity belong to another. Dema v. Tenet Physician Servs. Hilton Head, Inc., 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009). Unjust enrichment is an equitable doctrine which permits the recovery from the defendant of the amount by which he has been unjustly enriched at the expense of the plaintiff. Ellis v. Smith Grading and Paving, Inc., 294 S.C. 470, 473, 366 S.E.2d 12,

14 (Ct. App. 1988). The test for unjust enrichment, per our Supreme Court, is as follows:

> (1) benefit conferred by plaintiff upon the defendant;
>
> (2) realization of that benefit by the defendant; and
>
> (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value.

Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872-73 (2000).

As discussed above with regard to the constructive trust cause of action, Cook conferred a benefit on Phillips, the enhanced value of the property Phillips now owns. Since Phillips now owns the property with its enhanced value, he has realized the value of the benefit. Phillips repeatedly reassured Cook that the original agreement would be honored so that Cook would be compensated, which Phillips now refuses to do, and Phillips has taken the position that Cook has no recourse whatsoever to realize any compensation. Phillips is keeping the benefit conferred by Cook under circumstances that make it inequitable for him to do so without paying Cook the amount Cook's work enhanced the value of the property.

Cook pled facts sufficient to state a cause of action for unjust enrichment, and the facts appearing in the record, viewed in the light most favorable to him, provide at least a scintilla of evidence tending to establish the elements of this claim.

Conversion. "Conversion is defined as the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights." Moore v. Weinberg, 383 S.C. 583, 589, 681

S.E.2d 875, 878 (2009); accord Mullis v. Trident Emergency Physicians, 351 S.C. 503, 506-07, 570 S.E.2d 549, 550-51 (Ct. App. 2002); Green v. Waidner, 284 S.C. 35, 37, 324 S.E.2d 331, 333 (Ct. App. 1984).

Phillips has converted the improvements Cook made to the property. (R. pp. ___; complaint; affidavit of Cook.) Without authorization from Cook, he is treating them as his own and excluding Cook from their use and benefit altogether. Cook pled facts sufficient to state a cause of action for conversion, and the facts appearing in the record, viewed in the light most favorable to him, provide at least a scintilla of evidence tending to establish the elements of this claim.

Equitable title/partition/equitable lien. Under at least two theories, Cook pled and made a showing of facts sufficient to survive Phillips' motion to dismiss or for summary judgment as to his claims seeking the sale of the subject property. The record contains more than a scintilla of evidence indicating that Cook is entitled to relief on a claim seeking the sale of the subject land.

Cook pled that "he has acquired an equitable interest in the Property." (R. p. ____; complaint p. 9.) The facts alleged in the complaint and set forth in Cook's affidavit, viewed in the light most favorable to him, tend to establish that he did have an equitable interest in the property. (R. pp. ____; complaint; affidavit of Cook.)

Under his agreement with Harden, especially as amended, Cook was essentially treated as having purchased the property with a seller-financed mortgage loan that would be repaid upon the property's sale to a third party. (R. pp. ____; complaint; affidavit of Cook.) The amended sales agreement provides that "[i]f the property has not sold by October 1, 2006, Cook Construction Co. shall begin paying an interest-only

loan at 6.5% on the outstanding principal of $155,000 until the house sells." (R. p. ____; complaint exh. C.) The agreement also called for Cook to maintain insurance coverage and pay utility bills for the property. (R. pp. ____; complaint exhs. B & C.)

Here are echoes of Lewis, 351 S.C. at 171, and Dempsey, 224 S.C. at 541-42, in which long-term, seller-financed land sales arrangements were recognized as corresponding in equity to a mortgagor-mortgagee relationship. As in Singleton, 107 S.C. at 469, Cook was treated under the sales agreement as the land's equitable owner. Under the sales agreement, Harden, the nominal owner to whose position Phillips has succeeded, was treated as being owed a finite amount of financing money on loan terms, and Cook was treated being entitled to the rest of the sales proceeds, no matter how much they were – just as the owner of a mortgaged house would be upon its sale. Cook was the owner of the property's "equity" in the lay sense of the word: the amount of the property's value remaining after paying off Harden's quasi-mortgage interest in the property. See Lewis, 351 S.C. at 173 n. 4.

It is certainly not true that Cook "has no ownership interest in this property by any stretch of the imagination[,]" as the lower court concluded. (R. p. ___; order granting summary judgment p. 5.) To see how the record shows a genuine issue of fact about whether Cook has such an interest in this property, no imagination is needed at all. When the record is viewed in the light most favorable to Cook, it is apparent that he has equitable title to the subject property. See Lewis, 351 S.C. at 173 & n. 4; Brooks, 315 S.C. at 476-77; FCX, 269 S.C. at 206-07; Dempsey, 224 S.C. at 541-42; Singleton, 107 S.C. at 469; Southern Pole Bldgs., 289 S.C. at 524. As owner of that title interest in the land, Cook is entitled to seek partition of the property. See S.C. Code Ann. § 15-

61-10; cf. Dempsey, 224 S.C. at 541-42 (property sold and proceeds divided according to parties' rights in equitable title scenario).

He is also entitled to seek the sale of the property under non-partition theories. He is entitled to seek a Dempsey-style sale of the property under the facts alleged and in the record. 224 S.C. at 541-42. He is also entitled to a sale of the property in enforcement of the equitable lien that the record, viewed in the light most favorable to Cook, indicates that he has in the subject property. While Cook labeled his causes of action seeking a sale of the property as "constructive trust/equitable title" and "partition," the complaint makes clear that Cook is seeking the sale of the property in order to liquidate and realize his interest in it. (R. pp. _____; complaint.) Phillips' motion to dismiss "cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle [Cook] to relief on *any* theory of the case." Dye, 320 S.C. at 67-68 (emphasis added). "For an equitable lien to arise, there must be a debt, specific property to which the debt attaches, and an expressed or implied intent that the property serve as security for payment of the debt." Chase Home Finance, 746 S.E.2d at 475. Here, there is a debt, the compensation owed to Cook under the sales agreement for his work enhancing the value of the subject property. (R. pp. ____; complaint; affidavit of Cook.) There is specific property to which the debt attaches, the property subject of this case, which is the property that was improved by Cook and out of the proceeds of which he was to be paid. (R. pp. ____; complaint; affidavit of Cook.) There is intent that the property serve as security for Cook's right to be compensated, as the parties to the sales agreement intended that Cook be paid from the proceeds of that property's sale. (R. pp. ____; complaint; affidavit of Cook.) When

the record is viewed in the light most favorable to Cook, all the elements of an equitable lien are met. See Chase Home Finance, 746 S.E.2d at 475.

b. Cook did not offer hearsay evidence.

While not the basis for its ruling, the circuit court's order does state that "[m]uch, if not all of the alleged communications set forth in the Affidavit of the Plaintiff are hearsay[.]" (R. p. ____; order granting summary judgment p. 1.) In fact, there is no hearsay problem with Cook's affidavit, and certainly nothing that precluded its key points from being considered by the court.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. A statement by a party opponent is not hearsay. Rule 801(d)(2), SCRE.

The key statements of another person in Cook's affidavit are Phillips' statements. (R. pp. ___; affidavit of Cook.) Phillips is Cook's opposing party in this case. None of those statements are or even can be hearsay. Rule 801(d)(2), SCRE.

"[N]ot all words or utterances are offered for the truth of the matter asserted." Fields v. J. Haynes Waters Builders, Inc. 376 S.C. 545, 658 S.E.2d 80, 87 (2008). "For example, in some scenarios, words or utterances themselves from an out of court declarant may, regardless of their truth, accompany an ambiguous act and give the act legal significance, be used circumstantially, such as to show a state of mind, or form part of an issue in a case." Id. The statements of Phillips' father that are recounted in Cook's affidavit were not offered for their truth, and they are thus not hearsay for that reason. Rule 801(c), SCRE. They were not offered to establish that Phillips' father

actually "felt we needed to wait until the market improved to try again[,]" that "nothing had changed and the agreement was still valid[,]" or that "they felt that by placing furniture in the home to 'stage it,' it would help with prospective buyers as they planned to re-list the property soon." (R. p. _____; affidavit of Cook p. 1.) These statements were offered to show their effect on the hearer, Cook, to show his state of mind (particularly, reliance). (R. pp. ____; affidavit of Cook.) Cook was not trying to show that the things said in those statements were actually true, as part of his case is that they were not. Statements that are not offered to prove the truth of the matter asserted should not be excluded as hearsay. Deep Keel, LLC v. Atl. Private Equity Group, LLC, 413 S.C. 58, 69, 773 S.E.2d 607, 613 (Ct. App. 2015).

The only other statement by an out-of-court declarant in Cook's affidavit is of Cook's agreement with Julia Phillips, acting on Harden's behalf, that "instead of making the monthly interest payments, the interest would be added to the principal amount of $155,000.00 and would be paid when the property sold." (R. p. ____; affidavit of Cook p. 1.) This statement is not offered for the truth of the matter asserted but for its operative legal significance and is, thus, a statement of "words of contract," which the Supreme Court and this court have recognized do not constitute hearsay. See Fields, 658 S.E.2d at 87-88; Deep Keel, 413 S.C. at 70.

c. The Dead Man's Statute did not bar Cook's claims.

While also not a basis for the lower court's ruling, the order at issue does make the comment that the testimony in Cook's affidavit is "barred by the Dead Man's Statute[.]" (R. p. ___; order granting summary judgment p. 2.) It is not.

None of the testimony in Cook's affidavit violates the Dead Man's Statute, S.C. Code Ann. § 19-11-20. Our Supreme Court has noted the following:

> [Under the Dead Man's Statute], if a witness is either (1) a party to the action or proceeding, or (2) a person having an interest which may be affected by the event of the trial, of (3) a person who has had such an interest, but which has been in any manner transferred to, or has in any manner come to, a party to the action or proceeding, or (4) an assignor of a thing in controversy in the action, he is disqualified only if the testimony of the witness is (a) in regard to any transaction or communication between the witness and a person deceased, insane or lunatic, and (b) against a party prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or as assignee or committee of such insane person or lunatic, and (c) when the present or previous interest of the witness may in any manner be affected by the testimony or by the event of the trial.

Long v. Conroy, 246 S.C. 225, 232, 143 S.E.2d 459, 462 (1965). All of its criteria must be present in order for the statute to operate. Id.

"Because this statute is an exception to the general rule of witness competency, it requires a restrictive reading on which the party requesting its muzzling effect bears the burden." Hanahan v. Simpson, 326 S.C. 140, 151, 485 S.E.2d 903, 909 (1997). The statute "has been sharply criticized in recent years[,]" and "the courts of this state have strictly construed the rule and endeavored to limit its applicability to cases which clearly fall within its intended scope." Id. at 151-52.

The statute does not bar testimony about communications or transactions with someone other than a deceased person. S.C. Code Ann. § 19-11-20; Long, 246 S.C. at 232. Cook's recounting of Phillips' statements does not fall within the ambit of the statute. Id. Further, an essential element of the statute is that the statement must be

offered "against a party prosecuting or defending the action *as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person.*" Long, 246 S.C. at 232 (emphasis added). Our Supreme Court has observed that it is not enough that the opposing party simply *be* an heir of a deceased person for the statute to apply; rather, the party against whom the testimony is offered has to be prosecuting or defending the action in one of the capacities listed in the statute. Brown v. Moore, 26 S.C. 160, 2 S.E. 9, 10 (1887). Consistently with the history of narrow construction of S.C. Code Ann. § 19-11-20, the Court has also noted that "[i]t is at least doubtful whether the statute applies to this action in which the parties prosecute and defend as grantees or alienees of the deceased person, rather than as executor, administrator, heir-at-law, etc." Branton v. Martin, 243 S.C. 90, 97, 132 S.E.2d 285, 288 (1963).

Here, Phillips was sued individually. (R. pp. ___; complaint.) He is not defending this action in any capacity vis-à-vis a deceased person; rather, he is defending it as himself.

The Dead Man's Statute does not provide an alternative basis for the circuit court's ruling.

d. The statute of frauds did not bar Cook's claims.

The circuit court commented that Cook's affidavit is "barred" by "the Statute of Frauds." (R. p. ___; order granting summary judgment p. 2.) The Statute of Frauds, S.C. Code Ann. § 32-3-10, operates only with regard to contract claims about the specific kinds of contracts listed in the statute. By its terms, the statute is not and does not purport to be an evidentiary rule. Id. Given that there are writings that show the

only contract that is even in the background of this case was in writing, it is difficult to see how the lower court believed the Statute of Frauds was in play at all. (R. pp. ____; complaint exhs. B & C.)

Further, none of the claims in this case are for breach of contract. (R. pp. ___; complaint.) And, as Cook pointed out below (R. pp. ___; transcript p. 21 ln. 24 through p. 25 ln. 4) and as noted in Whitmire, "a constructive trust is permitted to be proved by parol evidence despite the statute of frauds." 273 S.C. at 458 (citing Wolfe, 215 S.C. 530.)

The Statute of Frauds does not provide an alternative basis for the circuit court's ruling.

e. The statute of limitations did not bar Cook's claims.

The statute of limitations is an affirmative defense in South Carolina. E.g., Glenn v. Sch. Dist. No. Five of Anderson County, 294 S.C. 530, 533, 366 S.E.2d 47, 49 (Ct. App. 1988). "[A]n affirmative defense ordinarily may not be asserted in a motion to dismiss under Rule 12(b)(6) unless the allegations of the complaint demonstrate the existence of the affirmative defense." Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869, 878 (2006). "The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and when the testimony is conflicting upon the question, it becomes an issue for the jury to decide." Turner v. Milliman, 381 S.C. 101, 110, 671 S.E.2d 636, 641 (Ct. App. 2009). Only "when there is no conflicting evidence or only one reasonable inference can be drawn from the evidence [does] the determination . . . become[] a matter of law[.]" Id.

First of all, statutes of limitation are not applicable to equity claims. Dixon v. Dixon, 362 S.C. 388, 400, 608 S.E.2d 849, 855 (2005); Parr v. Parr, 268 S.C. 58, 67, 231 S.E.2d 695, 699 (1977); Parrot v. Dickson, 151 S.C. 114, 148 S.E. 704, 707 (1929). An action to declare a constructive trust, a claim in unjust enrichment, a claim to enforce an equitable lien, and a claim for partition are all actions in equity. Halbersberg, 302 S.C. at 106 ("Constructive trusts are resorted to in equity"); Dema, 383 S.C. at 123, ("Unjust enrichment is an equitable doctrine"); Anderson v. Anderson, 299 S.C. 110, 382 S.E.2d 897 (1989) ("A partition action is an equitable action."); Chase Home Finance, 746 S.E.2d 471 (claim to enforce equitable lien sounds in equity). Cook's equitable claims could not be barred by a statute of limitations.

Most at-law claims in this state have a three-year statute of limitations under S.C. Code Ann. § 15-3-530. As Cook maintained below, his claims against Phillips did not come into being until Phillips refused to sell the property or otherwise compensate Cook, which was less than a year before this action was commenced. (R p. ___; transcript p. 22 ln. 6-15.)

Even were the court to conclude that Cook's claim arose at some earlier time, that would not establish that Cook's claim is necessarily barred by the statute of limitations. South Carolina follows the discovery rule. See S.C. Code Ann. § 15-3-535. "Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." True v. Monteith, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997). In some cases (e.g., a typical car wreck case), this date is fairly obvious. In others, among them cases involving deception, like the case

at bar, this moment is not so easy to pinpoint. See Monroe v. Benson, 390 S.C. 153, 700 S.E.2d 273, 278 (Ct. App. 2010) (statute of limitations did not begin to run until over four and a half years after deceptive property transfer).

Further, the record does not establish that Cook is outside the time limits of S.C. Code Ann. § 62-1-106, which provides that a proceeding within its scope "must be commenced within two years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud." Nothing in the record indicates that Cook discovered Phillips' fraud earlier than when Phillips refused to sell the property, which was in 2015, the same year this action was brought. (R. pp. ___; complaint; affidavit of Cook.)

The statute of limitations does not provide an alternative basis for the lower court's ruling.

IV. This is a proper case for a lis pendens.

The circuit court ruled that Cook "has no ownership interest in this property by any stretch of the imagination" and canceled the lis pendens as being improperly filed. (R. pp. ___; order granting summary judgment pp. 5, 6.) As discussed above, this conclusion is inaccurate. Further, this was undoubtedly a proper case for a lis pendens, and the court had no discretion to cancel the lis pendens here.

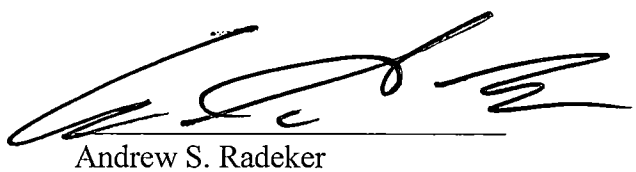
A lis pendens is appropriate when a plaintiff brings an action for constructive trust affecting title to real property. Carolina Park Associates, 400 S.C. at 9. Indeed, the case of Pond Place Partners v. Poole, 315 S.C. 1, 17, 567 S.E.2d 881 (Ct. App. 2002), cited by the lower court in support of its ruling, states that proper actions for the filing of a lis pendens include "actions to establish a constructive trust over real estate[.]"

The circuit court erred in cancelling the lis pendens.

CONCLUSION

The lower court's ruling left a victim of fraudulent and inequitable conduct with no recourse against the perpetrator. It did so on the basis of perceived technicalities that actually do not apply. This court should reverse the lower court, reinstate the lis pendens, and remand this case for trial.

Respectfully submitted,



Andrew S. Radeker
S.C. Bar No. 73743
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211

Daniel L. Draisen
S.C. Bar No. 13536
Timothy A. Nowacki
S.C. Bar No. 100967
Krause, Moorhead & Draisen, PA
207 E. Calhoun Street
Anderson, South Carolina 29621
(864) 225-4000

Attorneys for Appellant

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