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STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
Civil Action No.: 2014-CP-32-1951

2017 MAR 21 PM 2:26

David D. McGee and
Karen L. McGee,

Plaintiffs,

vs.

Wells Investments, LLC and
Joanne McGee,

Defendants.

LISA POWER
CLERK OF COURT

RULE 59 ORDER

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APR 20 2017

SC Court of Appeals

The parties tried this contested property case on February 25, 2016. Carlos W. Gibbons, Jr. represented Plaintiffs David D. McGee and Karen L. McGee. William E. Booth, III, represented Defendant Joanne McGee. An Order in this matter was issued by the undersigned on September 21, 2016 and filed with the Clerk of Court on September 22, 2016. Subsequent to service of said Order, Defendant's counsel timely served and filed Defendant's Notice of Motion to Alter or Amend Order pursuant to Rules 52(b), 59(e) and 60(b), SCRPC.

A hearing on Defendant's Motion was scheduled and held before the undersigned in open Court on January 4, 2017. Both attorneys were present and presented their respective arguments for consideration. Based thereupon, and upon the Court's review of the file in this matter and all other relevant considerations, the Court vacates the prior Order dated September 21, 2016 and substitutes therefor the following:

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INTRODUCTION:

Plaintiff David D. McGee is the son of Defendant Joanne McGee and the late Calvin Bruce McGee. Plaintiffs and Defendant McGee formerly lived with other family members in close proximity. Prior to his father's death, father and Defendant McGee, his mother learned that Plaintiff son wanted to build a home on a lot that father and mother were buying pursuant to Bond for Title from Defendant Wells Investments, LLC. Based on his parents' actions, son started making the payments on the lot to Wells and began owner contracted construction on the property on or around 2010. Construction was in the family "compound" in plain view of all family members. All parties, including father and mother, walked through the home as it was being built, and discussed plans for future family outings.

Father died in 2012. Thereafter the relationship between son and mother worsened to the extent that mother directed Wells Investments to stop accepting son's payments and had a No Trespass Notice placed on property, barring son from access, after a confrontation with various family members over personal property and actions at her home.

Thereafter, son took steps to read father's will where he discovered mother had changed her will to no longer leave property to him. Son contacted his attorney and filed this suit a week after the Trespass Notice was issued. Defendant Wells Investments, LLC was previously dismissed by consent with the proviso that it would abide by the Order issued in this case as to the respective interests of the parties as to the real property in question.

Based on the following facts and conclusions of law, the Court determines that Plaintiffs have established title by constructive trust, subject to the below described terms and conditions.

FINDINGS OF FACT:

1. This court obtained jurisdiction pursuant to July 30, 2014 Order of Reference.
2. The Court has personal and subject matter jurisdiction in this matter and venue is proper in Lexington County, South Carolina, where the subject property is located. Plaintiffs and Defendant Joanne McGee are citizens and residents of the County of Lexington and Defendant Wells Investments, LLC owns property and conducts business in Lexington County.
3. The following facts are undisputed or were stipulated by the parties:
 - (a) November 30, 1998: Donald McGee and Calvin McGee enter into a Bond for Title Sales Contract with Wells, Investments, LLC for the purchase of Lot 9, Charleston Estate, which is the subject of this litigation, for the sum of \$13,000.00 (copy introduced at trial as Exhibit #26);
 - (b) July 21, 2010: Donald and Calvin McGee assign their interest in the Bond for Title to Joanne McGee (copy introduced at trial as Exhibit #10);
 - (c) August 4, 2010: Residential Building Permit and related documents obtained in the name of Joanne McGee (trial exhibits #1, 2, 3, 4, and 5);
 - (d) October 19, 2010: Recording date of subsequent Installment Land Sales Contract between Joanne McGee and Wells Investments, LLC for purchase of subject property. This documents was dated November 30, 1998, the same date on the original Bond for Title, but testimony indicated this was executed pursuant to the aforesaid Assignment (copy introduced as Exhibit #9);
 - (e) March 15, 2011: Date of execution of Last Will and Testament of Calvin Bruce McGee;
 - (f) May 25, 2012: Date of Death of Calvin Bruce McGee;
 - (g) May 20, 2014: Notice of No Trespassing sent to Plaintiffs and other family members (copy attached to Complaint as Exhibit E);

- (h) May 27, 2014: Summons, Complaint and Lis Pendens filed by Plaintiffs and subsequently served on Defendants;
- (i) June 20, 2014: Answer filed and served by Defendant Wells Investments, LLC;
- (j) June 30, 2014: Answer filed and served by Defendant Joanne McGee;
- (k) July 28, 2014: Order of Reference signed by Judge Keesley (filed July 30, 2014).
- (l) December 15, 2014: Consent Order entered by Judge Spence dismissing Defendant Wells Investments, LLC from action (filed January 16, 2015);
- (m) February 25, 2016: Merits Hearing before Master in Equity

4. At the conclusion of the merits hearing, Plaintiffs voluntarily abandoned their causes of action based on resulting trust and equitable lien. The remaining claims to be determined are unjust enrichment, constructive trust, the betterments statute claim, and for equitable estoppel.

5. Defendant Wells Investments, LLC is the record title owner of the real property in Lexington County designated as Lot 9 of Charlestown Estates, TMS No. 012500-02-142, Plat Book 6390, page 242 in the Lexington County ROD office. A copy of the recorded survey of the property was attached to the Complaint. As can be determined from examining the survey, it is in the name of Calvin Bruse (sic) McGee.

6. Joanne McGee is the current purchaser of the property, with Wells Investments, LLC as the seller, under that certain Installment Land Sales Contract dated November 30, 1998 and filed with the Lexington County ROD Office on October 19, 2010 in Book 14516 at page 63. As a result, Joanne McGee has an equitable interest in the property. Calvin Bruce McGee and his brother, Donald McGee, previously had a Bond for Title with Wells Development, LLC for the subject property, but, as noted above in the chronology [2(b)] , they assigned their interests to

Joanne McGee and she executed the separate Installment Land Sales Contract retroactively dated the same date as the Bond for Title.

7. The Plaintiffs offered testimony that they were repeatedly told by Joanne McGee's husband, Calvin Bruce McGee, deceased, the father of Plaintiff David D. McGee and father-in-law of Plaintiff Karen L. McGee, that the subject property was in his name and that it would be devised to Plaintiff David D. McGee in his will. Certain statements of dad, Calvin Bruce McGee were not admitted pursuant to the "Dead Man's Statute" and not considered by the Court in its decision. However, a certified copy of his will was admitted which confirmed the fact that the subject property was to be devised to David D. McGee in said will. Considerations relative to the application of the Dead Man's Statute are more fully discussed elsewhere in this Order.

The testimony showed that Joanne McGee had also executed a will with this provision, although she has since changed it. Plaintiffs were aware of the existence of these wills and the provisions for the devise of the subject property. Multiple times Joanne McGee testified that (1) she made the wills and (2) told the lawyer how to draft the wills containing the devises to David McGee.

(See Transcript Pages 228, 244-245) Plaintiffs were not made aware that Joanne McGee had changed her will. Joanne McGee testified at trial that she changed her will as a result of a dispute which arose between the parties over the disposition of some personal property and an incident which occurred at the property where allegedly, Plaintiffs were slinging mud in her driveway. However, at that time, Plaintiffs, in reliance on the promises made to David McGee by both of his parents that the property would be left to him in their wills, had already begun construction and expended a substantial amount of money on improvements to the property.

8. The subject property is located in an area where other family members owned property or had located their residences. Based on the understanding that the land would be devised to David McGee upon the death of his parents, Plaintiffs began constructing a residence there. Plaintiffs also began making the payments on the land contract. There was no evidence that David McGee was required or expected to pay any value to his parents other than assuming the payments under the installment sale contract.

9. Plaintiff discovered after his dad died that the property was not in the father's name, but, rather, was as stated hereinabove. Joanne McGee took the interest of Calvin Bruce McGee subject to his promise to devise the property to his son, much like taking title to property subject to a mortgage.

10. Based upon the will of Calvin Bruce McGee and the testimony of the parties, the Court finds that the original agreement between the parties is that the subject property would belong to David McGee, contingent upon the earlier occurrence of the deaths of both Calvin Bruce McGee and Joanne McGee, or the payoff of the installment sales contract.

DISPUTED FINDINGS OF FACT:

11. The Court has fully considered the testimony and evidence provided by the witnesses and the documents introduced. Witnessed testified about what they (i) heard and (ii) saw. The Court has carefully weighed this evidence and the credibility of the testimony presented by both sides, including the demeanor of the witnesses and the testimony during both direct and cross examination.

12. Testimony was offered by Plaintiffs that during the construction (and before the no trespass notice) they were making the payments on the installment sales contract. They also paid for property taxes on more than one occasion. The payments on the installment contract were confirmed by the witness from Wells Investments, LLC. The Court finds that these payments, together with the value of the improvements, constitute an equitable interest on the part of the Plaintiffs, even though none of the witnesses could state with certainty the total paid to Wells Investments, LLC by Plaintiffs or Joanne McGee.

13. Defendant McGee offered testimony that the initial procurement of the building permit in her name was fraudulent. She testified that Plaintiffs went to her job at Wal-Mart to take her to the Lexington County offices to apply for the permit as Owner/Contractor. The Court finds that Joanne McGee's arguments on this point are not persuasive and that no fraud was proven to support this allegation. It is permissible for an owner of land to subcontract the construction of a house. Upon the building permit being issued, Plaintiffs began construction in plain view and sight of Joanne McGee. Prior to the issuance of the no-trespass notice, Joanne McGee did not object to the construction or otherwise take action to stop it or assert any rights to the property. To the contrary, the testimony showed that Joanne McGee visited the house regularly while under construction, participated in plans for decorating and furnishing the house, and looked forward to having family gatherings there. The construction extended over several years. It is not uncommon for construction of this nature to take longer than if the project was contractor managed.

14. There was differing testimony as to the value of property, both with and without the improvements and as finished construction. Plaintiffs offered Rudi Laub, a licensed appraiser, who was offered and accepted by the Court as an expert witness. He opined that the value of the

lot as of August 4, 2010 (the date the building permit was issued) was \$13,000.00 (Exhibit 23). He testified that the value of the lot and partially-completed residence as of May 22, 2015, when he performed the appraisal, was \$124,000.00 (Exhibit 24). He further testified that the value of the lot and residence, if fully completed, would be \$225,000.00 (Exhibit 25). Defendant Joanne McGee did not counter this testimony with any formal appraisals, but stated that she thinks the lot is worth \$20,000.00 or \$25,000.00 (Tr. 224). On cross-examination, Joanne McGee conceded that she did not state a value in her answers to discovery (Tr. 238) and that in her deposition she stated that she did not have any proof that the land was worth more or less than between \$13,000.00 and \$14,000.00. The tax assessed value is \$18,000.00. The Court finds that the most relevant and probative evidence as to the values are those offered by Mr. Laub. However, based upon the conclusions of law which result from these findings, the value of the land and improvements is not an issue. The Court further notes that there was no allegation nor evidence that Plaintiff was to pay Father or Mother any consideration for the lot, other than assuming the payments. While there was differing opinions as to lot value, there was no evidence indicating how much money Father and Mother had paid under the contract.

ISSUES:

1. Has Plaintiff proven constructive trust?
2. Did Plaintiff abandon the property?
3. Is relief sought by Plaintiff barred by Statute of Frauds?
4. Effect of "Dead Man's Statute" on testimony offered.

CONCLUSIONS OF LAW AND DISCUSSION:

1. PLAINTIFF HAS PROVEN ELEMENTS OF CONSTRUCTIVE TRUST.

Defendant McGee argues that Plaintiff has not proven constructive trust because (1) such a finding requires a legal title holder (2) fraud is required and (3) Plaintiffs' cited cases are not factually similar. Actions seeking the imposition of a constructive trust are in equity. Carolina Park Association v. Marino, 732 S.E.2d 876, 400 S.C. 1 (S.C. 2012) The evidence must be clear and convincing. McDaniel v. Kendrick, 688 S.E.2d 852, 386 S.C. 437 (S.C. app. 2009).

Constructive trusts arise by operation of law whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding legal title. Carolina Park Association, supra. Gaymon v. Richland Memorial Hospital, 488 SE.2d 332, 327 S.C. 66 (S.C. 1997). Constructive Trusts result from fraud, bad faith, abuse of confidence or (emphasis added) violation of fiduciary duty which gives rise to an obligation in equity to make restitution. Dye v. Gainey, 463 S.E.2d 97 320 S.C. 65 (S.C. App. 1995) There is no requirement for every element to be present and proven. The circumstances taken as a whole may satisfy the existence of a constructive trust. Fraud is usually an element essential to the establishment of a constructive trust, though it need not be actual fraud. Smith v. South Carolina Retirement System, 520 S.E.2d 339, 336 S.C. 505 (S.C. App. 1999). Further, "equity is less than demanding and quite flexible in prescribing the elements essential to a constructive trust." Estate of Tucker v. Tucker, Opinion No. 2008-UP-284 (SC App. 2008), citing Whitmire v. Adams, 257 S.E.2d 160, 273 S.C. 453 (S.C. 1979).

Plaintiffs alleged title to the subject property pursuant to a constructive trust. A constructive trust arises by operation of law when circumstances under which property was acquired make it inequitable that it should be retained by one holding legal title. Halbershers v. Berry, 394, S.E.2d 7, 302 S.C. 97 (S.C. App. 1990). (Defendant has offered no authority, nor any persuasive argument that since the disputed title in Defendant McGee is equitable, rather than legal, then the claim should be denied. Further, the legal title holder was made party to the action, testified and indicated that upon proper payment they would issue title as court directed.)

There is no requirement for any actual or supposed intention of creating such a relationship. Smith v. South Carolina Retirement System, supra. It may be imposed where money has been paid by accident or mistake of fact. Smith, supra.

The Court finds that such is the case under the facts presented in this matter. A substantial amount of money was spent by Plaintiffs under the mistaken, but reasonable, belief that the property was in the name of Calvin Bruce McGee and it would be devised to his son, David. The initial construction of the residence was begun when Calvin Bruce McGee was still alive. Clearly the direct and inference evidence is that the home was being constructed in the family compound, and everyone including deceased dad was aware of the building. Deceased dad's awareness of the construction is not barred by Deadman Statute.

More importantly, neither he nor Joanne McGee raised any objection, complaint or otherwise commented on the matter. The Court finds that their silence and acquiescence caused Plaintiffs to rightfully believe they would obtain title to the property. To further support this finding,

Calvin Bruce McGee and Joanne McGee allowed Plaintiffs to make payments to Wells Investments, LLC under the Installment Land Sales Contract and to pay the taxes on the property. The Court finds and concludes that this evidence is sufficient to satisfy the requirements of the Dye v. Gainey case, supra.

Plaintiff David McGee has established by clear and convincing evidence title to the subject property pursuant to a constructive trust, subject to Defendant Joanne McGee's life estate interest. Such life estate interest may be divested upon Plaintiff David McGee paying the balance due on the installment contract. Upon the payoff of the balance due, Defendant Wells Investments, LLC shall execute and deliver to David McGee, or his assigns, a deed to the subject property in the manner and form provided under the installment sales contract.¹

The Defendant Joanne McGee is estopped from asserting any claims to the property as she took the property subject to the promise regarding the conveyance of the subject property that Calvin McGee made to his son, as reflected in his will and the will of Defendant Joanne McGee also to this effect. Defendant Joanne McGee cannot now, after her relationship with her son has deteriorated after disputes over other personal property and actions at her house, opt to change her decision about the property. She and her husband were aware of the construction and the payments, and encouraged it. If Defendant McGee believes her Plaintiff son has wrongfully taken personal property from her or any other family member, the remedy is to take appropriate legal or police action; not to bar access to the house construction and instruct legal owner to refuse payments. The two matters have no legal connection.

¹ This is pursuant to the terms and provisions of the Consent Order Dismissing Defendant Wells Investments, LLC, referenced hereinabove.

Similarly, Plaintiffs, in good faith, relied on the information they received about the disposition of the property. There is nothing in the record to suggest that Plaintiffs' actions in building the residence were not in good faith or that their reliance on the information regarding the ultimate ownership of the land was in any way mis-placed. Up until the death of Calvin Bruce McGee and continuing until May 20, 2014, the date of the no-trespass letter, Plaintiffs had no reason to ever question their construction of the residence.

The Court finds that Plaintiffs suffered a detrimental change to their position upon the issuance of the no-trespass notice by Joanne McGee. The testimony showed that up to that point, Plaintiffs were basically free to come and go as they pleased and had unrestricted control of the construction process. Until that time, no party had ever questioned Plaintiffs' access to, and use of, the property or the construction of the residence.

2. PLAINTIFF DID NOT ABANDON PROPERTY.

Defendant Joanne McGee pled abandonment of the premises by the Plaintiffs and testified to a conversation she had with Karen McGee to this effect. The Court finds that this evidence does not support a conclusion that, Plaintiffs abandoned the property.

A person can abandon personal property or contractual rights if the party takes clear, unequivocal steps and decisive actions that indicate that party's intent to abandon and not reclaim the property. Generally, real property or dirt cannot be simply abandoned. Black's Law Dictionary 6th Ed. (1991)

While equitable rights, leases, contractual rights or goods may clearly be abandoned under South Carolina law as correctly argued by Defendant, it is not necessary to determine if a Bond for Title, which can result in a fee simple ownership, can be abandoned, since the facts do not indicate the requisite intent and actions to abandon. (Presumably if Contract for Deed rights abandoned, no further payments and legal owner would foreclose).

Plaintiff testimony and that of their financial planner/ insurance advisor witness Evette Adams indicate careful thought and consideration about building the home prior to commencement. Plaintiff gave thought to what they wanted to build and then searched for plans that would result in a large house to be built in the midst of adjoining family properties that would allow them to have large family gathering. They also consulted Adams to determine if they could financially build the home on their own. Adams testified they discussed their options and that after determination was made to proceed, they did so, knowing the financial parameters they were to work within. Adams also visited the home during construction and continued discussions with Plaintiff which included life care plan for Defendant mom. Adams also saw mother on property with son.

In addition to financial due diligence prior to home start, Plaintiff also made the lot payments for approximately four (4) years pursuant to the agreement he had with his father and mother until his mother directed the legal title holder to not accept payments from her son.

Plaintiff made decision to owner contract when building the house. This choice, if properly utilized, operates off owner effort or "sweat equity", takes more time, but less money, and allowed them greater flexibility in timing the work. During the construction, they also employed various subcontractors including some family members to do the work.

While work may have slowed, the property was not abandoned. Once Defendant filed the No Trespass Notice, son took necessary steps to protect his legal interest. If he had abandoned the property, then logically he would not have responded to the NO Trespass Notice his mother posted to prevent his access of property. Instead, Plaintiff took immediate steps to (1) review father's will (2) consult attorney and file lawsuit.

Defendant testified that after Plaintiff had moved way from property that she had conversation with Defendant Karen McGee, her daughter in law. Mother claims daughter in law stated that Plaintiffs had abandon property since they had moved to another residence out of the family property site and were not going to pay for anything else. Butch McGee, another son, testified that on the day in question he was bush hogging and saw a red or maroon car, but did not speak directly to Karen. Karen disputes her mother in law's testimony.

Even if true, what Karen (DIL) said to Joann (MIL) does not legally bind David McGee (the son). If Son were to abandon property, he, not his wife would have to abandon his property rights. There is no evidence that his wife had any legal authority to abandon his legal rights. Further, given the character of the testimony from mom and son about their relationship, son may have very well have intended to abandon any relationship with mother when he moved, but this act is not the same as abandoning his home under construction.

3. THE STATUTE OF FRAUDS DOES NOT BAR PLAINTIFF'S CLAIM:

Defendant McGee asserted the affirmative defense of the statute of frauds. The Court finds that this defense must fail based upon the part performance of the verbal promises for the devise of the property (as contained in the wills of Calvin McGee and Joanne McGee) and the justified reliance by Plaintiffs on the promises made to them about the transfer of the property. Part performance of an oral agreement can remove the agreement from the Statute of Frauds. Part performance can be proven by (1) improvements to the real estate (2) possession of the real estate (3) payment of the purchase price. Bradshaw v Ewing, 376 S.E. 264, 266 (1989). Here, until Defendant's action, Plaintiff had satisfied all three criteria.

4. "DEAD MAN'S STATUTE" CONSIDERATIONS:

The "Dead Man's Statute" is codified in Section 19-11-20, Code of Laws of South Carolina, 1976, as amended. It prohibits any interested person from testifying concerning conversations or transactions with a decedent if the testimony could affect the witness's interest. It is founded on the principle that is against public policy to allow a witness thus interested to testify as to such matters when such testimony, if untrue, cannot be contradicted. Brooks v. Kay, 530 S.E.2d 120, 339 S.C. 479 (S.C.2000). Because this statute is an exception to the general rule of witness competency, it must be strictly construed and the exclusion of such testimony is disfavored. Brooks, supra. Further, its application will not be extended by construction beyond its clearly expressed terms. Hicks v. Battey, 192 S.E.2d 477, 259 S.C. 426 (S.C. 1972).

The statute was designed to protect estates from fraudulent claims, Burns v. Caughman, 178 S.E.2d 151, 255 S.C. 199 (S.C. 1970); In re Estate of Fabian, 483, S.E.2d 474, 326 S.C. 349 (S.C. App. 1997)

There are two statutory exceptions to the Dead Man's Statute: 1. where the administrator or survivor testifies regarding the transaction or communication with the deceased; and, 2. where the testimony of the deceased regarding the transaction or communication is given in evidence by the administrator or survivor. The statute also does not apply when the party asserting the statute "opens the door," by offering testimony otherwise excludable, or when a witness testifies to a transaction between the deceased and a third party. The Dead Man's Statute does not prohibit the introduction of documentary evidence; the statute is directed toward the competency of a witness, rather than the transaction or communication itself. §18, 32 S.C. Juris 197, citing 27 South Carolina Digest 2d, Section 125.

In the present case, the testimony of Plaintiff Karen L. McGee, not being an heir of Calvin Bruce McGee or otherwise interested in his estate, is not subject to any prohibition or restriction as imposed by the Dead Man's Statute. Likewise, the testimony of Defendant Joanne McGee relative to her knowledge of the contents of the will of Calvin Bruce McGee would reduce the interest of Joanne McGee. Therefore, her testimony about same would not be restricted. Regardless, this does not prohibit or restrict documentary evidence and a certified copy of the will of Calvin Bruce McGee was admitted.

The Court finds and concludes that the testimony of the witnesses, taken as a whole in light of any application of the Dead Man's Statute, shows that Calvin Bruce McGee knew the house was

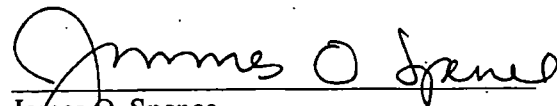
under construction before he died, Joanne McGee knew the contents of her husband's will, and the testimony of Plaintiff Karen McGee on these issues is not affected by the Dead Man's Statute. ~~Additionally, as the Estate of Calvin Bruce McGee is not a party to this litigation and the matters in dispute do not involve any claim against said estate, the stated purpose of the Dead Man's Statute and the protection it is designed to afford are not directly applicable under the facts of this case.~~ Joy

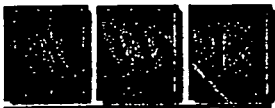
CONCLUSION:

Plaintiffs have established David D. McGee's title to the subject property pursuant to constructive trust, subject to a Defendant Joanne McGee's life estate interest, which may be divested upon Plaintiff David McGee's full payment of remaining balance of Defendant Wells Investments, LLC contract.

AND IT IS SO ORDERED.

Lexington, South Carolina
February 17, 2017


James O. Spence
Master in Equity for Lexington County



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