

IN 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

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SC Court of Appeals

William Rice Cook, III Appellant

v.

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

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF COUNTER-ISSUE

I. Was the Circuit Court Judge correct in granting Summary Judgment to the Respondent and cancelling the Lis Pendens where the Complaint and Affidavit demonstrated that Appellants's entire case was based on 2006 contracts with decedent Claudia Harden?

Appellant's 4 Issues are discussed in the Argument.

STATEMENT OF THE CASE

This action was commenced by William Rice Cook, III (hereinafter “Cook”) by the filing of a Summons, Complaint and Lis Pendens on December 31, 2015. The action named as Defendant, Bennie Richard Phillips, Jr. (hereinafter “Phillips, Jr.”), and, *in rem* the real property situate at 207 North Avenue, Anderson, South Carolina 29625, Tax Mapping System No. 123-26-08-02.

Phillips, Jr. filed his Motion for Summary Judgement and Motion to Dismiss for Failure to State a Cause of Action, pursuant to S.C.R.C.P. Rule 12(b)(6), on January 26, 2016 and a Motion to Quash the Lis Pendens on March 22, 2016, on the basis that the claim fell outside of the Statute of Limitations, S.C. Code Ann. §15-3-530; and was further barred pursuant to the provisions of §62-3-801 and §62-3-803 of the South Carolina Probate Code (the Nonclaim Statute); and was further barred by the provisions of the South Carolina Dead Man’s Statute as set forth in S.C. Code Ann. §19-11-20. The Motion further requested the Court consider imposing sanctions pursuant to the provisions of S.C. Code Ann. §15-36-10. It is important to understand that Cook had previously filed a Summons and Petition for Allowance of Creditor Claim (R. pp. _____) on September 16, 2015 against the Estate of Bennie Richard Phillips, Sr. (“Phillips, Sr.”). The claim was denied by Motion (R. p. _____) and the matter was removed to the Circuit Court for the Tenth Judicial Circuit by Order of the Probate Court filed October 23, 2015 (R. pp. _____). The claims made by Cook in the action against the Phillips, Sr. Estate were substantially the same claims made in the present action. Prior to the Summary Judgement Motion hearing in this case, Cook’s attorney initiated contact with Phillips, Sr.’s attorney and a Stipulation of Dismissal without Prejudice was filed

January 21, 2016 (R. pp. ____). Cook filed an Affidavit June 7, 2016 (R. pp. ____). Cook filed a Memorandum in Opposition to the Motion to Dismiss and for Summary Judgement on June 9, 2016. Phillips, Jr. filed a Brief in Reply (R. p. ____) to the Appellant's Affidavit on June 13, 2016 , and a Hearing Brief (R. p. ____) and the matter was heard before the Circuit Court Judge on June 13, 2016. R. Lawton McIntosh issued his Order filed June 24, 2016, granting Phillips' Motion for Summary Judgement, and ordered the Clerk of Court to cancel this Lis Pendens (R. p. ____).

The basis of the Appellant's claims were alleged sales agreements dated February 28, 2006, and August 11, 2006 (R. p. _____) , allegedly entered into by Cook and Phillips' predecessor in title, Claudia P. Harden, and are grounded upon Cook's claims which existed before the death of Mrs. Harden. The Court ruled that the claims were barred by S.C. Code Ann. §62-1-106; §62-3-203. The Court further quashed the filing of the Lis Pendens and ordered the Clerk of Court to cancel it. (R. pp _____); (Order Granting Summary Judgement).

Cook filed a Motion for the Court to reconsider its rulings. The Court denied the Motion by Order on July 26, 2016.

The Notice of Appeal was filed on August 10, 2016.

STATEMENT OF FACTS

Cook initially filed his claim in the Probate Court (R. pp. ____), which action was later stipulated to be dismissed, and then filed this action in Circuit Court against Phillips, Jr. alleging that he was due money based upon an alleged contract or sales agreement dated February 28 and August 11, 2006 which was allegedly signed by Claudia Harden's Attorney in Fact, and Cook. The alleged sales agreements concerned

the renovation and repair of a certain home situate at 207 North Avenue, Anderson, South Carolina, which was owned by Claudia P. Harden who was the grandmother of the Defendant, Phillips, Jr.

The agreements were allegedly signed by Julia H. Phillips on February 28, 2006, who had been appointed as attorney in fact for Claudia P. Harden by instrument recorded in Deed Book 1849 at page 90, in the Register of Deeds Office for Anderson County, South Carolina (R. pp. ____). This alleged agreement was amended by an additional written agreement dated August 11, 2006, again signed by the attorney in fact for Claudia P. Harden, Julia Harden Phillips, the mother of the present Defendant. Both sales agreements contain various obligations of the Appellant. Julia Harden Phillips (the Attorney In Fact) died October 26, 2011, and her Estate was administered in the Probate Court for Anderson County, Probate File 2011-ES-04-01168 and Cook filed no claims of any kind against the Estate. Ben R. Phillips, Jr. was appointed Conservator for Claudia P. Harden, in 2011 by Certificate of Appointment dated October 14, 2011. No claims against Claudia P. Harden, were filed with the Conservator, as noted by the Trial Judge.

Claudia P. Harden died testate December 3, 2013 with her Estate being probated in Anderson County Probate Court File 2014-ES-04-00047. The Estate was closed by Order of the Probate Court on June 1, 2015 and no claims were filed by Cook for the supposed debt due to him at any time. If any had been filed, the same would have been contested, *inter alia*, as being barred by the Statute of Limitations, S.C. Code Ann. §32-3-10.

The property at 207 North Avenue, Anderson, South Carolina, was devised by Claudia P. Harden to her daughter, Julia H. Phillips, who had pre-deceased her and in that event, to Phillips, Jr., pursuant to the Will (R. p. _____); and deeds of distribution conveying the subject property to Phillips, Jr. were recorded in the Register of Deeds Office for Anderson County on October 20, 2014, and a corrective deed on February 24, 2015, in Deed Book 11576 at page 247, and Deed Book 11717 at page 168 (R. p. _____).

Cook filed his claim, first, in the Probate Court in the Estate of Bennie Richard Phillips, Sr. , the father of the current Defendant based upon substantial similar allegations as are contained in the current Appellant’s Complaint (R. pp. _____), at which time the claim was summarily denied. (R. pp. _____). The Probate Court claim was removed to Circuit Court and was resolved by Stipulation of Dismissal (R. pp. _____). The action now before the Court was then filed December 31, 2015.

The Phillips, Jr. Motion for Summary Judgement and 12(B)(6) Motion was scheduled to be heard by the Court, and Briefs and Memoranda and Argument was presented to the Court on June 13, 2016. The Court issued its Order of Summary Judgement on June 24, 2016, and this appeal followed.

STANDARD OF REVIEW

The Matter before the Trial Court was governed by Rule 56(c) of the South Carolina Rules of Civil Procedure. This rule provides a motion for summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCF.

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

The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” Baughman v. Am. Tel. & Tel. Co. 306 S.C. 101, 115, 410 SE 2d 537, 545 (1991). This initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the non-moving party's case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent's claim. *Id.* Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial. *Id.*; Rule 56(e), SCRCP. Lord v. D & J Enterprises, Inc., 407 S.C. 544, 552 53, 757 S.E.2d 695, 699 (2014), reh'g denied (May 22, 2014).

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

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

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

ARGUMENT

In the action before the Court, Cook’s Complaint is grounded and based on alleged contracts which he signed with Claudia Harden in 2006. Cook took no action to enforce his claim for work and labor within the Statute of Limitations as to his claims for supposed repairs or obligations of Claudia Harden during her lifetime; and at her death, then would be converted into claims to be made against her Estate; and since Cook did nothing within the time permitted by the Statute of Limitations [three years from 2006]; and the Nonclaim Statute, §62-3-803, his claims were barred by the Trial Court. He comes before the Court now, having no basis for any action and alleges in conclusions and hearsay allegations, and attempts to establish a claim against Phillips, Jr. for an obligation that Phillips, Jr. had nothing to do with; and attempts to revive and resurrect

his barred claims by conclusorily alleging that Phillips, Jr. defrauded him. Phillips, Jr. had no contractual agreement with Cook, and had no duty toward Cook. Cook bases his whole case on paragraphs 6 through 9 of his Complaint, making reference to the alleged contract that he entered into with Claudia P. Harden. Then in paragraph 12 of his Complaint, he attempts to hook the Defendant Phillips, Jr. by a conclusory allegation about something that Phillips, Jr. and his father, Philips, Sr. allegedly did. The claim he makes is “[Plaintiff has never been paid for the labor, materials and improvements made to the property” per the contract with Harden. (R. p. _____). Cook took no action to enforce his alleged agreement with Harden, and that claim was barred. He cannot legally resurrect that claim by attempting to tag Phillips, Jr. with it, years beyond the Statute of Limitations and the Nonclaim Statute. He then sets forth four causes of action which will be discussed in turn.

The claims made by Cook are frivolous. The Statute of Limitations in South Carolina provides that actions upon contract must be brought within three years. S.C. Code §15-3-530(1). The alleged contracts were for services and materials only and, even if believed, are dated February 28, 2006 and August 11, 2006. Cook filed his first claim against the Estate of Bennie Richard Phillips, Sr. on September 16, 2015 and that action has been dismissed. Cook filed this action December 31, 2015, did not serve it until January 2016, well beyond the Statute of Limitation. Cook never performed any services or provided any labor for Phillips, Jr. There was no contractual obligation or duty that existed between Phillips, Jr. and Cook. He now says his claim is against Phillips, Jr. but he has no contract with Phillips, Jr. His claim, to have any origin, is in fact grounded upon the 2006 contracts with Claudia Harden, which he alleges in his Complaint; and then tries to deny that this alleged contract

has any bearing on this claim. He makes conclusory allegations (not facts) about oral conversations with Phillips, Jr. (which all relate back to the 2006 contract) but nowhere sets forth any fraud establishing that Phillips, Jr. wrongfully acquired title to the property.

As above set forth, the Statute of Limitations, S.C. Code Ann. §15-3-530(1), we believe, barred Cook from making a successful claim against Claudia Harden during her lifetime. Then he files a claim against the Estate of Bennie Richard Phillips, Sr., and subsequently agrees and stipulates to dismiss that claim, because evidently he understood and realized that the South Carolina Nonclaim Statute, S.C. Code Ann. §62-3-801, and §62-3-803 barred him from bringing that claim. Appellant has attempted to set out “agreements” with Benny Richard Phillips, Jr. which are barred by virtue of the Statute of Frauds, §32-3-10, and even attempted to set out an allegation as to conversations pertaining to Benny Richard Phillips, Sr. and such assertions or transactions as alleged are totally barred by the Dead Man’s Statute, S.C. Code Ann. §19-11-20.

We believe, and the Trial Court agreed, the provisions of the Nonclaim Statute are mandatory and imperative under the laws of this state, and require that any outstanding claim against an individual be brought within one year of that individual’s death. See S.C. Code Ann. §62-3-803(a)(1):

“(a) all claims against a decedent’s estate which arose before the death of the decedent ... whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis; if not barred earlier by another statute of limitations or nonclaim statute; are barred against the Estate, the Personal Representative, the decedent’s heirs and devisees, [emphasis added] and the non-probate transferees of the decedent; unless presented within the earlier of the following: (1) one year after decedent’s death.... [emphasis added].

Thus the Nonclaim Statute is actually is a stronger version of the Statute of Limitations and this alleged claim of the Appellant is completely barred, pursuant to the Statute of Limitations, the Nonclaim Statute and Earl Phillips as Personal Representative v. Brigitte Quick 399 S.C. 226, 731 S.E. 2d 327 (2012). Our Court has held that §62-3-803 is a Nonclaim Statute and unless the Statute is complied with, a creditor's claim is forever barred. If Cook has any status at all, which is denied, his status would be solely as a creditor of Claudia P. Harden, and he was mandated by law to comply with the Nonclaim Statute. In addition, Phillips, Jr. is protected by the very words set forth in the Nonclaim Statute as the Personal Representative and an heir and devisee of Claudia Harden. Even if you consider oral communications made by Phillips, Jr. (to constitute the basis for this action), such allegation has already answered by the Courts in South Carolina in the case of In Re: Estate of Hover 407 S.C. 194, 203, 204, 754 S.E. 2d 875, 879, 880 (2014), where the Court stated as follows:

“While equitable principles may extend the time for commencing an action under the Statute of Limitations, Nonclaim Statutes impose a condition precedent to the enforcement of a right of action and are not subject to equitable exceptions (quoting Estate of Decker v. Farm Credit Services of Mid-Am ACA 684 N.E. 2d 1137, 1139 (Ind. 1997); 34 CJS Executor and Administrators §547 (Supp. 2013) (“misleading statements, assurances or conduct of the representative inducing a creditor to refrain from the due presentation of his or her claim do not estop the representative from contesting the claim because of such a failure to present the claim”). [emphasis added]. See generally E. W. H. Annotation, Effect of Conduct of Personal Representative Preventing Filing of Claims Within Time Allowed by Statute of Nonclaim, 66 ALR 1415 (1930) (Citing State and Federal Cases addressing the general rule that no promise on the part of a Personal Representative is sufficient to prevent the bar of the Statute as to a claim not filed within the statutory period.” [Emphasis added].

In Phillips supra, page 230, the Court held “Nonclaim Statutes impose a condition precedent to the enforcement of a right of action and are not subject to equitable limitations... The time element is a built in condition of

the Nonclaim Statute and is of the essence of the right of action, and unless the claim is filed within the prescribed time set out in the statute, no enforceable right of action is created.”

Cook continues to try to raise the claim in his Brief, by alleging a Constructive Trust and then denies that his claim has any basis on the contract he entered into and plead with Harden. A Constructive Trust is an equitable claim and is barred. Then he says that he is not making any claim against Benny Richard Phillips, Jr. as a distributee because he has evidently read the provisions of S.C. Code Ann. §62-3-106 which prevents him from having a cause of action against Phillips, Jr. as Phillips, Jr. never had any obligation to pay the claim that existed against Claudia Harden.

The Appellant’s reading of 62-3-803(a) is simplistic in that it ignores the fact that the statute describes remedies which arose during the lifetime of a decedent but are not pursued until the Decedent’s death. His supposed claim was against a living person, i.e., Claudia Harden, but he never pursued that claim legally.

Phillips, Jr. had no contractual obligation, nor duty to Cook in this matter in the context of anything. Evidently Cook attempts to conjure up an equitable interest out of thin air, again with no facts and with no basis; and just because he seems to call what he has an “equitable lien” does not mean that it is so. His pleading of equitable interest is a conclusion based on nothing. He has no facts to base his “right” except the contracts which expired in 2009. His attempt to bootstrap this on to 62-3-803(d)(1) is simply wrong again. The examples quoted on page 14 of his Brief to establish an equitable interest, are all connected with actual contracts or legal obligations created by the parties, between themselves. In this case, there are no relations between Cook and Phillips, Jr. and it is clear, as he quotes from Chase Home Finance, “for an equitable lien to arise, there must be a debt” ... and an

express or implied intent that property serve as security. (R. pp. _____).

CONSTRUCTIVE TRUST

Cook appears to rely upon the case of Briggs v. Richardson 273 S.C. 376, 256 SE 2d 544 (1979) to state a claim for constructive trust. Briggs (1979) predated the Nonclaim Statute. This of course, is an equitable matter which is not allowed by virtue of the Nonclaim Statute. (See In Re: Hover supra). Cook fails to recognize and take note of the fact that the law of the Nonclaim Statute in this State bars all claims whether they be legal claims or equitable claims.

The Court defined a constructive trust as follows:

“A constructive trust, otherwise known as a trust *ex maleficio*, a trust *ex delicto*, a trust *do son tort*, an involuntarily trust or an implied trust is a trust by operation of law which 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 to hold and enjoy. 76 Am Jur 2nd §221, page 446. The burden of proof to establish constructive trust requires clear and convincing evidence”

Thus, this definition requires that someone obtain property by means of a fraudulent act. Cook failed to exercise his legal rights against Claudia Harden personally or against her estate, and Cook is now trying to revive and resurrect that claim against an heir, a devisee, and one who legally inherited property without any legal basis therefore as recognized by the Trial Judge.

Interestingly, the Court in Briggs v. Richardson 288 S.C. 537, 343 SE 2d 653 (1986) affirmed the lower court holding that there was not sufficient evidence to establish a constructive trust in the matter at all.

Our Court has repeatedly held that the Statute of Limitations applied equally to claims against an Estate and to all charges for services which may have been performed for the decedent. See Gaston v. Gaston 80 South Carolina 157, 61 S.E. 393 (1908); Sullivan v. Latimer 17 SE 701 (1893), (Statute of Limitations applies to all charges for services performed for decedent); Godbold v. Vance 14 S.C. 458, 1881 WL 5848 (1881), claim barred by Statute of Limitations cannot be waived by acknowledgment of the debt by the administrator of the Estate; see also Black v. White 13 S.C. 37 (1880) WL 5606, Reigne v. Desportes' Ex'r 23 SCL. 118 (1838), WL 1597, (1838); Moore v. Porcher 8 S.C. E.Q., 195, 1831 WL 1618 (S.C. App.) (1831), Knox v. McCalls ADIR, 3 SCL 531 1805 WL 347 (1805). Cook continues to address a hodge-podge of baseless conclusions, theories and statements [most of which are violative of the Statute of Frauds; and the Dead Man's Statute, S.C. Code Ann. §19-11-20)] attributable to Claudia Harden and to Bennie Richard Phillips, Sr. , this Defendant's father, in attempts throughout the Brief to divert the attention of the Court from the simple fact that he bases his claim on the 2006 sales agreements. The allegations denominated by hearsay contained in Cook's affidavit were recognized by the Trial Court to be non-factual, conclusory, insubstantial, illusory, and failed in every respect to constitute valid facts sufficient to constitute a cause of action, recognized by the laws of this State. The Court is entitled to disregard a conclusory affidavit when it appears to have been submitted solely to create a factual issue to avoid summary judgement. See Cothran v. Brown 350 S.C. 352, 566 S.E. 2d 548 (Ct. App. 2002). Cook alleges conversations with Ben Phillips, Sr. in paragraphs 11 and 12 of his Complaint, none of which are admissible and are barred by either the South Carolina Dead Man's Statute, S.C. Code Ann §19-11-20, or have no relevance or relation to any issue before the Court or the basis of Cook's claims, i.e. the

contract with Claudia Harden. The effect of the dismissal as to any claim against Bennie Richard Phillips, Sr. is that any claim that may have existed, if any at all could have, is now barred. There are no writings which create any obligation of Claudia P. Harden, other than the 2006 alleged contracts, and as to the other claims made by Cook in the pleadings, such are likewise barred by the Statute of Frauds and S.C. Code Ann. §32-3-10 as well as the Statute of Limitations set forth above.

The general rule in this State (as to Constructive Trust) was first established by the case of Wilkinson v. Wilkinson 192 S.C. 497, 7 SE 2d 447 (1940) where the Court quoted as follows:

“The general rule in this respect is well stated in 69 C.J. 750-751, as follows: “An exception to the rule that a trust cannot be established by evidence *dehors* the will is allowed and enforced in equity where the devisee or legatee has procured an absolute devise or bequest to himself by promising the testator, expressly or impliedly, that he would hold it for the benefit of another, and afterward refuses to perform his promise, but claims to hold the property in his own right and for his own benefit. In such a case equity will raise and enforce a constructive trust, unless the intention to create a trust is lacking.” This doctrine was recognized by the Supreme Court in the case of Stuckey v. Truett, 124 S.C. 122, 117 S.E. 192, 195, where Judge Cothran in his concurring opinion quotes the following with approval from 1 Tiffany, Real Estate, Section 94: ‘If one procures a devise by promising the testator to give the beneficial interests in the whole or a part of the property to a third person, he will be regarded as holding in trust for such person.’

It will thus be seen that a (constructive) secret trust is based principally upon a promise made by the devisee or legatee to the testator or testatrix, upon the faith of which an absolute devise or bequest was made.”

In order to establish a constructive trust against Phillips, Jr., in the circumstances before the Court, Phillips, Jr. would have had to have obtained the property by the use of fraudulent means, and he did not. He obtained the property by operation of law through the

Will of his grandmother, not through any representations made to this Appellant.

“A constructive trust arises whenever a party has obtained money 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.”

S.S.I Medical Services, Inc., v Cox, 301 SC 493, 392SE2d 789 (1990).

EQUITABLE LIEN

Cook cites the South Carolina case of Chase Home Finance, LLC v. Risher 405 S.C. 202, 746 SE 2d 471 (Ct. App. 2013) for his position as to an equitable lien. This case actually establishes that Cook would not have any right to an equitable lien at all, because he fails to meet several of the requirements specified even were this remedy available to him. The Court in Chase Home Finance stated as follows:

“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... If a party seeking an equitable lien cannot satisfy any of these requirements, the remedy is not available.”

The remaining cases cited by the Appellant are all distinguishable and do not support the Appellant’s case.

Cook has failed to show anywhere, an obligation to him of Bennie Richard Phillips, Jr. He failed to allege the nine elements of fraud necessary to constitute fraud. Phillips, Jr. obtained title solely through the devise made in the Will of Claudia Harden (R. pp. _____) and not through any independent actions of his own. The property was devised to him as a contingent beneficiary and was placed in his name due to the fact that his mother predeceased Mrs. Harden. Phillips inherited the property by operation of law. Cook attempts to create an equitable lien out of thin air based upon no recognizable legal theory or reason. His failure to pursue a claim against Claudia Harden based upon the alleged

contract bars any future attempt to do what he is now trying to do and which the Circuit Court recognized to be improper. In fact, the Mechanic's lien statute (S.C. Code 29-5-10 *et seq.*) provided him his only opportunity to establish a "Lien" against Harden, and he failed to establish same. Cook's supposed labor all took place evidently in the 2006-2007 time frame as admitted by his counsel (R. p_____) (Transcript of Record). He has conferred no benefit on Phillips, Jr. Phillips, Jr. has agreed to nothing with Cook and has no obligations to Cook under any theory of law, much less those propounded by Cook. Cook's conclusory, illusory allegations do not constitute facts, and without facts, no cause of action has been stated to overcome the law which was recognized by the Circuit Court Judge.

CONFIDENTIAL RELATIONSHIP

The Appellant misconstrues the definition of a confidential relationship. There was no relationship between Cook and Phillips, Jr., much less a confidential relationship. The Appellant defines confidential relationship as set forth in the case of Chapman v. Citizens & S. Nat. Bank of S.C. 302 S.C. 469, 395 SE 2d 446 (Ct. App. 1990) but there are no facts which connects Cook to Philips, Jr. Cook was not an heir of the Estate; he was not a beneficiary of the Estate; if he had a claim, he had a duty to file it against Phillips, Jr.'s predecessor in title. Cook failed to do that. The Nonclaim Statute of this State is a complete bar to any and all claims set forth in Cook's Complaint, including illusory claims, legal claims, equitable claims, or any possible obligation. In the case of In Re: Hover 407 S.C. 195, 754 S.E. 2d 875 (2014), our Supreme Court stated the following which bar Cook from pursuing against Phillips, Jr. all claims, including equitable claims, set forth in his Complaint.

“Pursuant to the general statutory scheme of the Probate Code, all claims against a decedent's estate and his successors must be presented after a personal representative is appointed and within the time limits prescribed by S.C. Code §62-3-803, which our appellate courts have designated as a ‘nonclaim statute.’ See S.C. Code Ann. §62-3-104(2009) (“Not proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this article [§§ 62-3-101 et seq.].”); In re: Estate of Tollison 320 S.C. 132, 135, 463 SE 2d 611, 613 (Ct. App. 1995) (“Section 62-3-803 is a nonclaim statute.”).

The Probate Code generally defines “claims” to include “liabilities of the decedent ... **whether arising in contract, in tort [emphasis added]**, or otherwise, and liabilities of the estate which arise at or after the death of the decedent ..., including funeral expenses and expenses of administration.” S.C.Code Ann. § 62-1-201(4) (2009). As stated in the nonclaim statute, claims against a decedent's estate include all claims “whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis.” *Id.* § 62-3-803(a), (b). Thus, “[b]roadly speaking, all claims against the decedent should be presented for allowance, and the word ‘claims’ includes such **debts or demands as existed against the decedent in his or her lifetime and that might have been enforced against him or her by personal actions for the recovery of money.**” 34 C.J.S. Executors & Administrators § 548 (Supp.2013) (footnotes omitted). “Stated another way, the term includes every species of liability that the personal representative can be called on to pay out of the general funds of the estate.” *Id.* “However, claims against an estate are not limited to obligations of the decedent that could have been enforced against him or her while living.” *Id.*”

UNJUST ENRICHMENT

Cook argues in his Brief, the doctrine of “Unjust Enrichment”. Again, this is an equitable doctrine which is precluded to Cook under the Nonclaim Statute and would only apply to the Decedent Harden, with whom Cook had an “alleged agreement” and would not be applicable in any event to Phillips, Jr. who obtained the subject real estate through operation of law. No facts are alleged to show that Phillips, Jr. obtained this property through any interaction with Cook in any manner. Cook’s supposed work and labor to this

property took place in 2006 - 2007, for Harden; no work or labor has been done since that time. No work and labor was done by Cook for Phillips, Jr.; no promise was made by Phillips, Jr. that if Cook did certain labor he would be compensated; there is just a failure and complete lack of factual allegations to support such claim. It is submitted that Cook has misquoted the test for “quantum merit/quasi-contract/implied by law claim”. In the case of Myrtle Beach Hospital, Inc. v. City of Myrtle Beach 341 S.C. 1, 532 SE 2d 868, the Supreme Court stated:

“We adopt the Scudder May Test (Columbia Wholesale Co. v. Scudder May, N. V. 312 S.C. 259, 440 SE 2d 129 (1994)) as the sole test for a quantum merit/quasi-contract/implied by law claim. . .

- (1) Valuable services or materials furnished;
- (2) To the Defendant,
- (3) Who accepted, used and enjoyed them,
- (4) Under such circumstances as reasonably notified, the Defendant that the Plaintiff was expecting to be paid by Defendant....”

This test indicates that Cook would have had to have had an agreement as to the furnishing of labor and materials with Phillips, Jr. back in 2006 - 2006; that Phillips, Jr. received a benefit from Cook based upon the promises made or contracts entered into in 2006 - 2007. This again, did not happen and therefore, Cook’s claim has no merit. Also if there is an express contract which existed in this case, then Cook has no way to prevail on his quantum-merit (Unjust Enrichment Claim).

LIS PENDENS

The Lis Pendens filed in this matter was properly dismissed by the Court as it was filed in violation of S.C. Code Ann. §15-11-10. A Lis Pendens may be filed:

“[in] an action affecting the title to real property... not more than 20 days before filing the Complaint or at any time afterward... With the Clerk of each county in which the property is situated, a notice of the pendency of the action

containing the names of the parties, the object of the action and the description of the property in that county affected thereby". S.C. Code Ann. §15-11-10.

The filing of a Lis Pendens is an extraordinary privilege granted by statute, strict compliance with the statutory provisions is required. Pond Place Partners v. Poole 351 S.C. 1, 567 S.E. 2d 881 (Ct. App. 2002). As set forth in Pond Place Partners supra an action affecting the title to real property clearly allows the filing of a Lis Pendens by an interested party **in order to protect their ownership interest in the property subject to the litigation. The Appellant has no ownership interest in this property by any stretch of the imagination.**

See also Carolina Park Assocs. LLC v. Marino 400 S.C. 1, 732 SE 2d 876 (2012) where the Court reiterated that a Lis Pendens is only allowed "in an action affecting the title to real property"... The Carolina Park Assocs. Court further stated:

"However, if the Court finds that the Lis Pendens does not 'affect' the title to real property as required under S.C. Code Ann. §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. The Trial Court thus found that the Lis Pendens did not meet the requirements of the Statute and was therefore subject to being cancelled as was held by the Court."

The Appellant in this case does not even have a viable claim that can be made in the Courts of this state, as set forth by the numerous statutory prohibitions set forth above. Appellant's only purpose in filing the Lis Pendens is to harass and to subject the Defendant to a burdensome cloud on his title and to affect his ability to market the property.

CONCLUSION

Appellant has attempted to set out "agreements" with Benny Richard Phillips, Jr. which are barred by virtue of the Statute of Frauds, §32-3-10, and even attempted to set out

an allegation as to conversations pertaining to Benny Richard Phillips, Sr. and such assertions or transactions as alleged are totally barred by the Dead Man's Statute, S.C. Code Ann. §19-11-20.

The dismissal of the Appellant's claims require the dismissal of the Lis Pendens as there is no basis for an assertion of ownership interest in the property.

1. The first cause of action for unjust enrichment is an equitable action that is barred by the Nonclaim Statute. See Myrtle Beach Hospital *supra*.

2. The second cause of action for conversion against this Defendant, relates to unauthorized exercise of ownership over personal property of another and cannot arise over the Respondent's exercise of a legal right over property which he received as a distributee. See Richardson's Restaurant v. NBSC 30 S.C. 289, 403 SE 2d 669 (1991).

In addition, this cause of action is barred by the Nonclaim Statute and Statute of Limitations.

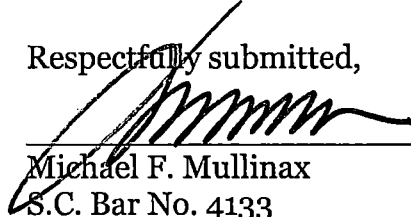
3. The third cause of action, constructive trust/equitable title, only arise from the initial alleged contract which was not with this Defendant and is barred by the Statute of Limitations, Statute of Frauds, and Nonclaim Statutes. Likewise, this cause of action is an equitable action barred by the Nonclaim Statute. See Whitmire v. Adams 273 S.C. 453, 257 SE 2d 160 (1991).

4. The fourth cause of action again has no basis in law or in fact; a partition action requires ownership as a tenant in common or joint tenancy, and this claim is likewise barred by the Nonclaim Statute, the Statute of Limitations, the Statute of Frauds. S.C. Code Ann. §15-61-10 *et seq*.

The Order of the Circuit Court Judge should be upheld in its entirety. The claims of Cook are solely based and have their origin in the 2006 sales agreements. The Statute of

Limitations and the Nonclaim Statute conclusively and finally prevent him from maintaining the within action as was recognized by the Circuit Court Judge.

Respectfully submitted,



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ATTORNEY FOR THE RESPONDENT

May 3, 2017

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

SC Court of Appeals

R. Lawton McIntosh, Circuit Judge

Appellate Case No.: 2016-001653

William Rice Cook, III Appellant

v.

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

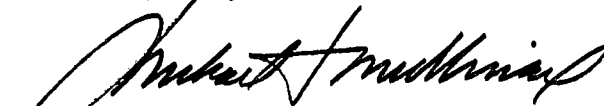
CERTIFICATE OF SERVICE

I certify that I have served the Initial Brief of the Respondent and Designation of
Matter to Be Included in the Record on Appeal, on the Attorneys for the Appellant,
William Rice Cook, III, by depositing a copy of same in the United States Mail, postage
prepaid, and addressed as follows:

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May 3, 2017

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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RECEIVED

MAY 05 2017

SC Court of Appeals

Re: William Rice Cook, III v. Benny Richard Phillips, Jr.
and the real estate property located at 207 North Avenue,
Anderson, SC 29625, TMS #123-26-08-02
Appellate Case No.: 2016-001653

Dear Ms. Kitchings:

Enclosed for filing are the originals and one copy each of the Respondent's Initial Brief, the Designation of Matter to Be Included in the Record on Appeal, and Proof of Service.

By copy of this letter I am serving copies of Respondent's Initial Brief, Designation of Matter to Be Included in the Record, and the Proof of Service on Mr. Andrew S. Radeker, and Mr. Daniel L. Draisen, Attorneys for the Appellant.

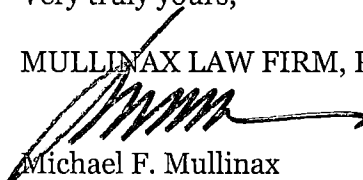
I would appreciate your returning clocked copies of the above documents to me in the self-addressed, stamped envelope I have provided.

Thank you for your assistance in this matter.

With kindest regards, I am

Very truly yours,

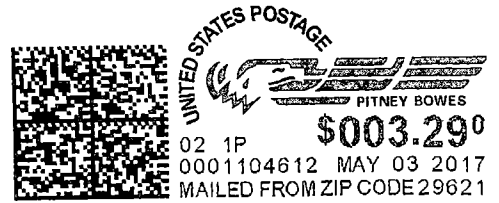
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Michael F. Mullinax

MFM/lcm

Enclosures

cc: Mr. Andrew S. Radeker
Mr. Daniel L. Draisen



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MAY 05 2017
SC Court of Appeals

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