The State of South Carolina
In The Court of Appeals

ON APPEAL FROM THE COURT OF COMMON PLEAS
Ellis B. Drew, Master in Equity
Trial Case No.: 2014-CP-37-00143

APPELLATE CASE NO.: 2015-001860

Polly A. Thompson,

Respondent,

v.

Cathy J. Swicegood,

Appellant.

FINAL BRIEF OF RESPONDENT POLLY A.THOMPSON

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COUNTER-STATEMENT OF THE CASE

This appeal arises from a partition action instituted by Respondent, Polly Thompson, against Appellant, Cathy Swicegood. There are two properties subject to this partition action, one located at 505 West Sheffield Drive, Westminster, South Carolina, County of Oconee (the "Lake Hartwell property") and the other located at 85 Folly Field Road, Hilton Head, South Carolina, County of Beaufort (the "Hilton Head" property). (R. p. 223, lines 18-22).

Respondent filed her Petition for Partition, Ouster and Accounting on March 11, 2014, seeking partition of the properties, equitable compensation for her contributions, as well as a finding of ouster against Appellant and reimbursement for her expenditures during the period of ouster. (R. pp. 210-213). On April 23, 2014, Appellant filed a Motion to Dismiss or In The Alternative, Motion To Stay Proceedings asserting this matter is better suited for family court. (R. pp. 132-133). A hearing on Appellant's Motion to Dismiss was held on June 23, 2014. On October 16, 2014, the trial court issued an order denying Appellant's motion and ruling that jurisdiction over the case was properly vested in the circuit court. (R. pp. 7-8).

On October 23, 2014, the case was referred to the Master in Equity for Oconee County. Appellant subsequently filed an Answer and Counterclaim on November 17, 2014. (R. pp. 70-77). On November 24, 2014, Respondent filed a Reply to Appellant's Answer and Counterclaim. (R. pp. 67-69).

A trial was held before the Honorable Ellis B. Drew, Jr., Master in Equity for Oconee County (the "Master"), on March 16, 2015. A subsequent hearing was held before the Master on May 21, 2015. The Master issued his Order on June 26, 2015, granting Respondent, Polly Thompson, full ownership and title of both properties and attorney's fees and costs in the amount of $5,250.00. (R. pp. 2-6).

Appellant filed a Motion to Reconsider stating the trial court failed to address the relationship between the parties. (R. pp. 12-15). Respondent filed a Memorandum in Opposition to Appellant's motion on July 10, 2015. (R. pp. 9-11). On August 3, 2015, the Master issued an order denying the Motion to Reconsider. (R. p. 1). Appellant filed a Notice of Appeal on September 2, 2015. (Notice of Appeal, September 2, 2015).

COUNTER-STATEMENT OF THE FACTS

Counsel has set out the facts relevant to this case in great detail in the arguments set forth below.

ARGUMENTS

I. THIS COURT SHOULD AFFIRM THE MASTER'S RULING BECAUSE EVEN IF APPELLANT AND RESPONDENT WERE MARRIED IT WOULD NOT DIVEST THE CIRCUIT COURT OF JURISDICTION

Appellant's argument that the circuit court's jurisdiction hinges upon the parties' marital status is devoid of merit. The marital status of these parties is irrelevant to the issue of jurisdiction to hear partition actions. The circuit court has jurisdiction to hear partition actions between married couples just as it does for non-married individuals. South Carolina law on this issue is clear. "The court of common pleas has jurisdiction in **all** cases of real and personal estates held in joint tenancy or in common to make partition in kind or by

allotment . . . ." S.C. Code Ann. § 15-61-50 (2014) (emphasis added). Additionally, "**All** joint tenants and tenants in common who hold, jointly or in common, . . . shall be compellable to make severance and partition of all such lands, tenements and hereditaments." S.C. Code Ann. §15-61-10 (2014) (emphasis added); *See also Smith v. Rucker*, 357 S.C. 532, 537, 593 S.E.2d 497 (S.C. App., 2004) (holding that husband and wife's deed created a joint tenancy with rights of survivorship, thus the property was subject to partition under § 15-61-10).

A partition action "is not marital litigation, and thus is not within the jurisdiction of the family court." *Gilley v. Gilley*, 327 S.C. 8, 1, 488 S.E.2d 310,311 (S.C. 1996) (*quoting Eichor v. Eichor,* 290 S.C. 484, 351 S.E.2d 353 (S.C. App., 1986)). "The general rule is that jurisdiction of a court depends upon the state of affairs existing at the time it is invoked." *Gilley v. Gilley*, 327 S.C. at 1, 488 S.E.2d at 311 (*quoting Gardner v. Gardner*, 253 S.C. 296, 170 S.E.2d 372 (1969)). Thus, jurisdiction of the court is "based on the status of the case **at the time of filing**." *Gilley*, 327 S.C. at 11, 488 S.E.2d at 311 (emphasis added). "If jurisdiction once attaches to the person and subject matter of the litigation the subsequent happening of events will not ordinarily operate to oust the jurisdiction already attached." *Id.* (holding husband's subsequent filing of a family court action did not divest the circuit court of its jurisdiction over wife's partition action). Just as in the *Gilley* case, the partition action in this case was filed **before** the family court action. Appellant's subsequent filing in family court did not strip the circuit court of subject matter jurisdiction.

Appellant's contention that the circuit court would lack subject matter jurisdiction if the parties are determined to be married is contrary to the South Carolina partition statutes. Like the husband and wife in *Smith*, the parties in this case hold their properties as joint

tenants with rights of survivorship which makes the parties and their properties subject to partition and the jurisdiction of the circuit court under § 15-61-10 and § 15-61-50. Furthermore, even if Respondent and Appellant were determined to be married (as were the parties in *Smith*) their marital status alone would not create an exception to the Circuit Court's jurisdiction over the parties and their properties.

Appellant further argues that only family court can determine the parties' interest in the properties because if the parties are found to be married, the properties would "presumptively" be marital property. This argument is also incorrect. Under the Equitable Apportionment Act, "marital property as such does not exist until the date when marital litigation is filed or commenced." *Prosser v. Pee Dee State Bank*, 295 S.C. 212, 214, 367 S.E.2d 698, 700 (1988) (interpreting S.C. Code § 20-3-630(A)(2014)(formerly § 20-7-473)).

Appellant had not commenced family-court litigation at the time Respondent filed her partition action on March 11, 2014. Therefore, at the time the circuit court's jurisdiction attached, family court did not, and could not, have jurisdiction over the properties. Thus, at the time the partition was filed the properties were not and could not have been deemed "marital property" under the law. Because the jurisdiction of a court attaches to the person and the subject matter of the litigation at the time of filing, Appellant's subsequent filing of her family court Complaint did not divest the circuit court of jurisdiction over the properties. Thus, the circuit court properly asserted jurisdiction based on the status of the case and the properties at the time of filing regardless of whether or not the parties are married or not.

II. THE MASTER PROPERLY EXCLUDED EVIDENCE OF ANY CONRTIBUTIONS AND IMPROVEMENTS TO PROPERTIES OTHER THAN THE COMMON PROPERTIES

"The admission of evidence is a matter addressed to the sound discretion of the trial judge and his ruling will not be disturbed absent a clear abuse of discretion amounting to error of law." *Anchor Point, Inc. v. Shoals of Anderson, Inc.*, 309 S.C. 486, 491, 424 S.E.2d 521, 524 (1992). To be subject to a partition action, real property must be held in joint tenancy or in common. S.C. Code Ann. § 15-61-50 (2014). The law is unambiguous, to be entitled to contribution from a cotenant or to be entitled to compensation for improvements, those contributions or improvements must be made to the common property, not properties that have long been sold. *See Shumaker v. Shumaker*, 234 S.C. 421, 426, 108 S.E.2d 682,685 (1959). (holding that "a joint tenant who, at his own expense, places permanent improvements upon the **common property**, is entitled in a partition suit to compensation for the improvements."); *Ackerman v. Ackerman*, 287 S.C. 626, 629, 340 S.E.2d 560, 562 (1986) (holding the amount of compensation to be awarded in a partition and accounting action for improvements is "estimated by and limited to the amount by which the value of the **common property** has been enhanced.") 6 S.C. Jurisprudence Cotenancies § 29 (1991) ("a cotenant who has made essential repairs for the maintenance or preservation of the **common property** is entitled to contribution"); *Id.* at § 27 (A cotenant who pays more than their share of a common debt or obligation or who pays repair or maintenance costs for the benefit of the **common property** is entitled to contribution from cotenants for their proportionate shares of the amount paid") (emphasis added).

Respondent contends that any evidence of Appellant's contributions or improvements to any properties other than those subject to this partition action is irrelevant. The Master

properly excluded such evidence because the other properties are not subject to this partition action and had either been sold prior to litigation or are owned solely by Respondent. (R. p. 223, lines 18-25). Any improvements made to properties not subject to this litigation cannot be assessed against the Hilton Head or Hartwell properties because these alleged improvements were not made to the common properties and did not enhance the value of the common properties.

III. THE MASTER ERRED IN ALLOWING SUMMARIES OF APPELLANT'S ALLEGED IMPROVEMENTS TO THE PROPERTIES INTO EVIDENCE UNDER S.C. RULES OF EVIDENCE 1006 AND 803

The Master erred in allowing Appellant's invoice for work allegedly performed to the Hilton Head property into evidence under Rule 1006 of the South Carolina Rules of Evidence. Rule 1006 states,

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation, provided the underlying data are admissible into evidence. **The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place.** The court may order that they be produced in court.

SCRE 1006 (emphasis added).

When asked on direct examination to identify the invoice for the Hilton Head property, Appellant testified that the invoice was one she prepared to "summarize" basically everything she had done to the Hilton Head property. (R. p. 314, lines 17-20). Respondent's counsel objected to the use of the summary because Appellant had not complied with the requirements for a summary under Rule 1006 (R. p. 315, lines 3-11).

Following Respondent's objection under Rule 1006, Appellant's counsel informed the court that Appellant had "reconstructed" the invoice from her recollection and memory.

(R. p. 315, lines 20-23). Respondent's counsel then objected to the admission of the invoice because it was created in preparation for trial and did not fall within the exception to Rule 803 of the South Carolina Rules of Evidence. (R. p. 316, lines 1-7).

Rule 803(5) states the following as an exception to the hearsay rule,

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, **shown to have been made or adopted by the witness when the matter was fresh in the witness' memory** and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

SCRE 803(5) (emphasis added).

The Master overruled both objections and allowed Appellant's invoice of the Hilton Head property into evidence as Defendant's Exhibit 7. (R. p. 316, lines 13-14).

Respondent contends that the invoice does not meet the requirements of Rule 1006 in that the underlying documents of the summary were not provided to or made available to Respondent for examination. (R. p. 315, lines 3-11). On cross-examination, Appellant testified that she had not provided any documentation by way of canceled check, bills or receipts for any materials for any property, but had only provided counsel with the invoices. (R. p. 329, lines 8-19). My her own admission, Appellant has not supplied Respondent with any underlying documents in support of the Hilton Head invoice.

Respondent further contends the Master erred in admitting the invoice into evidence under Rule 803. The invoice does not meet an exception to hearsay under Rule 803 and is not admissible because the invoice cannot be shown to "have been made or adopted by the witness when the matter was fresh in [her] memory" as required under the rule. On direct-examination, Appellant identified the invoice as one she prepared trying to recall what she had done to the property. (R. p. 314, lines 15-16). Appellant further testified on cross-

examination that neither the invoice proffered for the excluded properties nor the invoice for Hilton Head were originals, and neither were created at or near time the alleged work was performed. (R. p. 329, lines 3-7). In fact, Appellant testified she had "reconstructed" the invoices a mere three weeks prior to trial. (R. p. 329, lines 8-19). Trial in this case was held on March 15, 2015, and Appellant's summary was for work allegedly performed on or around June of 2013. (R. p. 542). Appellant's own testimony shows the invoice was "reconstructed" almost two years after the work was allegedly done, not when the matter was fresh in her memory.

For these reasons, Respondent contends the invoice for Hilton Head should have been excluded by the Master.

IV. THE MASTER PROPERLY CONSIDERED THE EVIDENCE IN DETERMINING THE VALUE OF EACH PARTIES' CONTRIBUTIONS

When reviewing an appeal from an equitable action, the Court may find facts in accordance with its own view of the preponderance of the evidence. *Laughon v. O'Braitis*, 318 S.C. 520, 524-25, 602 S.E.2d 108, 110 (Ct. App. 2004). "However, this broad scope of review does not require the Court to disregard the findings at trial or ignore the fact that the trial judge was in a better position to assess the credibility of the witnesses." *Id.*

In fashioning an award in a partition action, a court may consider the amount of any down payment and any mortgage payments, as well as the reasonable value of repairs and improvements made to the property. *See Shumaker v. Shumaker*, 234 S.C. 421,426, 108 S.E.2d 682,685 (1959) (holding that "a joint tenant who, at his own expense, places permanent improvements upon the common property, is entitled in a partition suit to compensation for the improvements."); 6 S.C. Jurisprudence Cotenancies § 27 (1991) (A cotenant who pays more than their share of a common debt or obligation or who pays repair

or maintenance costs for the benefit of the common property is entitled to contribution from cotenants for their proportionate shares of the amount paid").

The following facts regarding the Hilton Head property are undisputed and are firmly established by the record: its fair market value was $389,700.00, the mortgage loan balance was $269, 100.57, and the estimated equity was $120,599.43. (R. pp. 374-424).[1] Nor is it disputed that the mortgage note is solely in Respondent, Polly Thompson's, name, and her contributions to the property totaled $142,477.01 at the time of the hearing. (R. pp. 374-424) (R. pp. 228-239) (R. p. 326, lines 16-19).

Likewise, the following facts regarding the Lake Hartwell property are undisputed and are firmly established by the record: its fair market value was $211,150.00, the mortgage loan balance was $143,407.75, and the estimated equity was $67,742.25. (R. pp. 425-475). Nor is it disputed that the mortgage note is solely in Respondent, Polly Thompson's, name, and her contributions to the property totaled $129,838.70 at the time of the hearing. (R. pp. 425-475) (R. pp. 239-254) (R. p. 327, lines 13-25) (R. p. 328, lines 1-3).

Despite stipulating to the property values and accounting contained in Plaintiff's Exhibits 1 and 2, Appellant now claims some of Respondent's contributions to the properties came from her. This assertion, however, is not supported by any evidence in the record. (R. pp. 215-348). The evidence shows that the overwhelming majority of the monies paid on the Hartwell property and all the money paid on the Hilton Head property came from Respondent, Polly Thompson. (R. pp. 230-231) (R. pp. 279-280). Respondent testified that the funds she used came either from inheritance from her parents or from her salary. *Id.* Respondent presented the Master with bank statements, checks and other documentation

[1] Plaintiff's Exhibit 1 and 2 are notebooks containing a summary of the property values and contributions, as well as the underlying documents in support of the summary. The notebooks were admitted into evidence without objection from Appellant.

reflecting her contributions to the properties. (R. pp. 374-475). In contrast, Appellant did not present the Master with any cancelled checks, bank statements, deposit slips or any evidence whatsoever of any funds she allegedly gave Respondent or contributed to the properties. (R. p. 329, lines 8-19).

Appellant also claims that the Master's calculation fails to consider her alleged "sweat equity" contributions to the properties. Respondent asserts the Master properly considered Appellant's alleged "sweat equity" under South Carolina partition law. "A joint tenant who, **at his own expense**, places permanent improvements upon the common property, is entitled in a partition suit to compensation for the improvements." *Shumaker*, 234 S.C. at 425, 108 S.E.2d at 682. (emphasis added).

Appellant testified that she worked on both properties and would sometimes use her own money to purchase materials and other items. (R. p. 328, lines 4-8) (R. p. 330, lines 10-11). She admitted, however, Respondent paid her for material and labor. *Id.* Appellant did not provide the Master with any cancelled checks, bills or receipts for any of her alleged expenditures. (R. p. 329, lines 3-11). While Respondent did not deny Appellant did work to the properties, Respondent testified she paid Appellant for both her labor and materials. (R. p. 235, lines 12-19). Respondent supported this assertion by producing cancelled checks paid to and cashed by Appellant for labor and materials, which reflect payment of over $13,000.00 to Appellant for materials and labor. (R. pp. 374-475) (R. pp. 509-514) (R. pp. 330-334). Appellant presented no evidence that her improvements and materials were paid at her own expense as required under *Shumaker*. They were clearly paid at the expense of Respondent. Appellant cannot expect to be compensated for her alleged "sweat equity" by

way of partition when she was compensated for her labor by Respondent at the time the work was performed.

Respondent contends that the Master did consider Appellant's alleged "sweat equity." The Appellant failed to produce any credible evidence, documentary or otherwise, as to the value of her alleged "sweat equity" or the value by which the properties were enhanced by her efforts. The Master obviously found that it was Respondent's money alone that was used to pay the debts, improvements, maintenance and repairs for both properties. (R. pp. 358-359). Therefore, Respondent contends deference should be given to the Master's credibility assessments, as well as his finding that Respondent's money funded the properties (including paying for Appellant's labor), and his decision should be upheld.

V. THIS COURT SHOULD AFFIRM THE MASTER'S RULING BECAUSE APPELLANT'S OUSTER OF RESPONDENT FROM THE LAKE HARTWELL PROPERTY IS A PROPER CONSIDERATION IN DETERMINING THE DIVISON OF THE PROPERTIES

The South Carolina Rules of Appellate Procedure provide that "respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record on appeal as provided by Rule 220(c), SCACR." Rule 208(b)(2), SCACR. Rule 220(c), SCACR, further provides that "the appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record on appeal." Moreover, a respondent may raise any additional basis on which the appellate court should affirm the trial court's ruling, regardless of whether it was presented to or ruled upon by the trial court. *I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

Although the Master did not award Respondent damages in her action for ouster against Appellant, Respondent contends Appellant's ouster of Respondent is a proper equitable consideration in deciding to affirm the Master's distribution of the properties to the

parties. A partition action is an equitable action. *Anderson v. Anderson*, 299 S.C. 110, 382 S.E.2d 897 (1989). As such the maxim – "He who seeks equity should do equity" must apply. *Anderson v. Purvis*, 211 S.C. 255, 44 S.E.2d 611, 613 (1947). "Ouster is the actual turning out or keeping excluded a party entitled to possession of any real property." *Freeman v. Freeman*, 323 S.C. 95, 99, 473 S.E.2d 467, 470 (Ct. App. 1996). "The acts relied upon to establish an ouster must be of an unequivocal nature, and so distinctly hostile to the rights of the other cotenants that the intention to disseize is clear and unmistakable." *Id.*

In December 2013, Appellant and Respondent ended their relationship. At that time, the parties agreed Appellant could stay at the Lake Hartwell home. (R. p. 247, lines 7-11). Prior to Appellant moving in, Respondent had unfettered access to the property. Respondent testified that in January 2014, she went to check on the property and discovered Appellant had changed the locks on the home. (R. p. 247, lines 17-20) (R. p. 480). After Respondent discovered she could not access her home, Respondent's counsel sent a letter to Appellant's counsel on January 28, 2014, asking for keys to the property. (R. p. 476). Appellant's counsel in turn refused to give Respondent keys to the property. (R. p. 477). Respondent requested keys and access to the property on two other occasions. (R. pp. 478-479). Appellant, however, continued to deny Respondent keys or access to the property. (R. p. 250, lines 14-17). Appellant not only denied Respondent access to the property, she also removed Respondent's personal items and furniture from inside the home without Respondent's knowledge. (R. pp. 250-251). Respondent went to check on the Hartwell property in November 2014, and while walking around the perimeter of the home she discovered her items were dumped onto the porch on the back of the home. *Id.* By the time Respondent discovered the items they were covered with mold and mildew. (R. p. 482-486).

Appellant admitted that she had changed the locks and had not given Respondent a working key. (R. p. 335, lines 1-5). Appellant also admitted she removed Respondent's possessions from the home. (R. p. 335, lines 6-8). Furthermore, even after changing the locks and excluding Respondent from the property, from January 2014, to the date of the hearing, March 16, 2014, Appellant did not pay any mortgage payments, tax payments, or any other bill with the exception of power and water. (R. pp. 425-475). Nevertheless, during this period, Respondent paid $14, 143.77 in mortgage payments, taxes and other expenses on property she could not access or enjoy. (R. p. 251, lines 22-25) (R. p. 252, lines 1-16).

Appellant's actions of changing the locks, refusing to provide Respondent with a key, and removing Respondent's possessions were distinctly hostile to Respondent's rights to the Lake Hartwell home. Therefore, Respondent asserts that Appellant's failure to act equitably toward Respondent is supported by the evidence and is a proper consideration in deciding to affirm the Master's distribution of the properties to the parties.

CONCLUSION

For the foregoing reasons, this Court should find that subject matter jurisdiction is properly vested in the circuit court and that the Master's Order properly partitions the properties between the parties according to their contributions. Therefore, Respondent respectfully request that this Court affirm the Master's ruling.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief complies with Rule 211, SCACR. Exclusive of Table of Contents, Table of Authorities, and this Certificate of Counsel, this Brief contains (15) pages.

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