

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

Mikell R. Scarborough, Master-in-Equity

COA: 2016-01227
2014-CP-10-02844

Darryl M. Blaylock Respondent,

v.

Erica Lynn LaMarche Respondent,

and David S Chung Proposed Intervenor/Appellant.

BRIEF OF PROPOSED INTERVENOR/APPELLANT CHUNG

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STATEMENT OF ISSUE ON APPEAL

1. Did the Master-in-Equity abuse his discretion in failing to allow judgment creditor David Chung to intervene in a partition action of the judgment debtor's home where the money obtained by the debtor went to the partitioned property and the filed *lis pendens* relied on by the Master was from a dismissed case?

STATEMENT OF THE CASE

On February 26, 2013, a District of Columbia jury awarded Proposed Intervenor David Chung (hereinafter “Chung”) a judgment against plaintiff Darryl Blaylock (hereinafter “Blaylock”) in the amount of \$100,000 plus interest. (R. pp. 121-122) Chung filed a Petition to Domesticated Foreign Judgment in Charleston County in November 14, 2013, (R. pp. 115-141) where Blaylock was living at the time. To buy more time so he could evade execution of the judgment and hide his assets, Blaylock appealed the District of Columbia judgment. The District of Columbia Court of Appeals affirmed on July 29, 2015. (R. pp. 23-29)

On February 24, 2012, Blaylock filed an action for damages against his live-in girlfriend, defendant/appellant Erica LaMarche (hereinafter “LaMarche”). (R. pp. 43-55) She counterclaimed against him for partition of their home in Mount Pleasant. (R. pp. 59-53) That action was dismissed by SCRCRCP Rule 40(j) on February 5, 2013. (R. pp. 64-67) LaMarche restored the action on May 6, 2014. (R. p. 11) Even though Chung's judgment was filed in Charleston County, she did not add Chung or other lienholders to the case when she restored it. (R. pp. 18) A final hearing was held on November 20, 2014, at which Blaylock failed to appear. (R. pp. 167-191)

Blaylock later filed a motion pursuant to SCRCRCP Rule 60 in the partition action on May 15, 2015. The Master-in-Equity denied that motion on June 15,

2015. (R. p. 12) Chung filed his motion to reopen the case and intervene pursuant to SCRCP Rules 60 and 19 on September 11, 2015. (R. pp. 68-87) The Master-in-Equity denied that motion on February 12, 2016. (R. pp. 1-5) A timely motion to alter or amend was filed, (R. pp. 109-111) which the Master-in-Equity denied by form order dated May 5, 2016. (R. pp. 6-9) This appeal ensued.

FACTS

The facts in this matter cannot be disputed inasmuch as they are drawn from the District of Columbia judgment, this Court's judgment, and the testimony of both Blaylock and LaMarche. Blaylock and LaMarche purchased a single family home located at 1309 Langford Drive, Mount Pleasant, South Carolina (the "Langford property") on September 28, 2005. (R. pp. 32-36) They bought the home in cash without any debt and owned it as joint tenants. In 2007, Blaylock and LaMarche borrowed \$400,000.00 against the home. (R. pp. 32-36) That loan was secured by a mortgage on the Langford property. (R. pp. 32-36)

Chung's interests here arise from a District of Columbia lawsuit against Blaylock and others. (R. pp. 23-29) At the trial level, a District of Columbia jury found Blaylock guilty of the following counts: fraud, unjust enrichment, conversion, and fraudulent conveyance. (R. pp. 23-29) The jury awarded Chung \$100,000 and costs. The District of Columbia Court of Appeals affirmed that decision and found:

Blaylock and [Ryan] Egle [Blaylock's co-conspirator] were business partners in 1309 19th Street LLC [doing business as Saxby's coffee], which operated a coffee shop in [Washington, D.C.]. In 2008, Egle induced Chung to lend the LLC \$100,000 on the pretext that the funds would be used to renovate the coffee shop so that it could be sold at a substantial profit. In actuality, the \$100,000 that Chung lent the LLC was not used to renovate the coffee shop.

Instead, unbeknownst to Chung, the money was wired from the LLC's bank account directly into Blaylock's personal bank account. The LLC's

remaining assets were sold, and Blaylock received the proceeds of their sale as well. Chung was not repaid. (R. pp. 23-29)

The District of Columbia court specifically found that Blaylock defrauded Chung. (R. pp. 23-29) On February 26, 2013, a District of Columbia jury found, among other things: "David Chung has proven by a preponderance of the evidence that Ryan Egle was acting as the agent of Darryl Blaylock when he accepted the check from David Chung, deposited the check in the LLC account, and then transferred the funds to Darryl Blaylock." (R. pp. 23-29) It held Blaylock liable to Chung for fraud, unjust enrichment, conversion, and fraudulent conveyance. It awarded judgment to Chung against Blaylock for \$100,000 plus costs. (R. pp. 23-29)

Blaylock testified that when he received Chung's \$100,000 from Egle, (R. pp. 69, 85) he used all of it to pay down the mortgage he and LaMarche placed on the Langford Road house:

- Q: You got \$100,00 that came from David Chung.
A: And I got that money that came from Ryan Egle.
Q: And you testified that you used that money to pay off the home equity loan?
A: Yes.

Depo. of Darryl Blaylock, October 5, 2011, p. 432, ln. 6-15. (R. pp. 69, 85)

LaMarche was also deposed in the District of Columbia action. (R. pp. 089-094) She testified that she also knew Egle had given Blaylock \$100,000 and that those funds were used to pay down the mortgage on the home. (R. pp. 089-094) In

fact, LaMarche testified that she was the one that paid down the mortgage: "... I was responsible for paying down the mortgage because [Blaylock] has proven himself to be irresponsible with money," (R. pp. 089-094) She also testified that she knew Egle's funds were taken from Chung. (R. pp. 089-094)

In February of 2012, Blaylock brought an action in Charleston County against LaMarche for conversion of certain property (a diamond ring, art work, etc.); LaMarche counterclaimed for partition of the Langford Road home. (R. pp. 43-63) In requesting the equitable relief of partition, LaMarche admitted that, "All indebtedness owing 1309 Langford Road is jointly titled. *Each party is equally responsible for all debt that is attached to this property.*" (R. pp. 59-63) That action proceeded until February 5, 2013, when Blaylock and LaMarche dismissed the action pursuant to SCRCRCP Rule 40(j). (R pp. 64-76)

Chung domesticated his District of Columbia judgment in Charleston County on November 4, 2013. (R. pp. 115-141) LaMarche caused the 2012 partition case to be restored on May 6, 2014. (R. pp. 11) However, when she restored the claim, she did not fulfill her legal duty of joining anyone to the case who may have an interest in the property, including the mortgagor, the homeowner's association that claimed a lien, or Chung. (R. pp. 11)

A partition trial was held on November 20, 2014, at which Blaylock failed to appear. (R pp. 167-191) This Court found the Langford property to be worth

\$525,000. This Court partitioned the Langford property, the mortgage and the HOA lien, by requiring LaMarche to purchase the remainder of Blaylock's interest for approximately \$20,000.00 and evicting Blaylock from the house. (R. pp. 10, 19-22) Chung's judgment was not mentioned. (R. pp. 10, 19-22) The Court issued a Quiet Title Deed on January 23, 2015. On May 15, 2015, Blaylock filed a Rule 60 Motion to set aside the partition judgment and LaMarche filed a Petition for Ejectment on May 27, 2015. Both of those matters were heard on June 15, 2015.

Chung filed this motion on September 11, 2015. (R pp. 68-87) The day before, LaMarche sold the Langford property for \$605,000.00. The Master-in-Equity denied the motion and a subsequent motion to alter or amend. (R. pp 1-9) This appeal followed.

ARGUMENT

1. The Master-in-Equity erred in failing to reopen the Partition Action judgment and allow David Chung to intervene because he was, by rule, a necessary party to the action and because equity demanded he be protected in the proceedings.

Chung moved to set aside the Court's December 3, 2014 judgment pursuant to SCRCR Rule 60(b) due to accident, mistake or fraud. On appeal, the Court of Appeals views a denial of a SCRCR Rule 60 motion for abuse of discretion. *BB&T v. Taylor*, 369 S.C. 548, 633 S.E.2d 501 (2006). "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *Id.* at 501, 551. Here, the Master-in-Equity erred in determining that a *lis pendens* from a dismissed case foreclosed Chung's ability to obtain relief where he should have named in the first place. Chung asserts the accident, mistake, or fraud is the failure of the parties' to join him in the action as required by Rules 71 and 19¹ and that his right to collect on his judgment has been unfairly prejudiced as a result, requiring

¹ Rule 71(d)(1) requires that all parties in interest be joined in an action to partition property. Rule 19 provides that, "A person ... shall be joined as a party in the action if ... (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest..." Chung asserts the failure to join him when Blaylock and LaMarche had notice of his judgment at the time of restoration "impairs or impedes" his ability to collect on his judgment.

reopening. On appeal, this court review of equitable matters is *de novo*. *Horry County v. Ray*, 382 S.C. 76, 674 S.E.2d 519 (Ct. App. 2009); *Mr. T v. Mrs. T*, 378 S.C. 127, 662 S.E.2d 413 (Ct. App. 2008) (holding that, to a large extent, equitable principals guide the determination of whether to grant Rule 60 relief, especially where fraud is at play.) Because the Master-in-Equity should have opened the judgment and allowed Chung to intervene, the trial court's order should be reversed.

A. The existence of a *lis pendens* from a dismissed case is not a bar to other relief.

The Master relied in error on a *lis pendens* filed in 2012 in a case Blaylock and LaMarche dismissed pursuant to SCRCP Rule 40(j) as a complete bar to relief. (R. pp. 1-5) First, a *lis pendens* in a dismissed case is no *lis pendens* at all. The Court of Appeals recently held that a Rule 40(j) dismissal by which the parties consent to dismiss the case with the right-- but not the obligation-- to restore the case, was a dismissal of the action. *Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 779 S.E.2d 826 (Ct. App. 2015) citing *Maxwell v. Genez*, 356 S.C. 617, 620-21, 591 S.E.2d 26, 28 (2003). ("Rule 40(j) does not require that a party move to restore the case to the docket within one year after it was stricken. Instead, the unambiguous language provides that, if the claim is restored...")(emphasis in

original). The effect of restoring a case dismissed under Rule 40(j) is to put it back where it was; however, while stricken it is not a case. When LaMarche sought restoration, she had a duty to conduct a title search and determine if any other lien holders should have been joined as required by Rule 71. No true creditor such as Chung should be required to think into the mind of the parties as to whether they may refile or be pawns to games they may play to avoid creditors. Chung, the defrauded judgment creditor, should not be left as the goat yet again to the Blaylock/LaMarche conspiracy.

Second, since the relief sought both by LaMarche and Chung is equitable, the requirement for hard compliance with the rules is relaxed. “After a party establishes an equitable right, the court may dispense with pure formalities which would otherwise defeat the equity.... This maxim has at times guided a court to relieve a party from the consequences of accident, mistake, and fraud.” *Wingard Properties, Inc.*, 394 S.C. at 253, 715 S.E.2d at 355 (Ct. App. 2011). Inasmuch as Blaylock has already been found to have defrauded Chung, and LaMarche has benefited from it, not allowing Chung to intervene in this action and be made whole through the property would surely defeat equity. In this sense, the Master’s reliance on the existence of a *lis pendens*, is not only faulty it defeats the purpose of his equitable court.

Third, the fact that a *lis pendens* is viable by statute for five years does not bar other relief; if anything, it encourages it. S.C. Code Ann. § 15-11-50. The Master relied on a United States District Court case from 1990 to find that *Goodwin* was not good and cited nothing that a *lis pendens* in a dismissed case barred a judgment creditor from seeking to reopen a case. 414 S.C. 623, 779 S.E.2d 826 (Ct. App. 2015). Because the Master ruled without a hearing, Chung never had the chance to argue that the five year notice provision puts creditors on notice and, to the extent they had a claim otherwise, to properly intervene in that time period. The Master never ruled, or could he, that Chung was not otherwise entitled to relief. Rather, Chung met every element of his assertion. In this light, that a *lis pendens* puts a creditor on notice for five years, expands the ability of a court to provide relief to the disenfranchised creditor such as Chung. Otherwise, people like LaMarche can walk into a court of equity, having benefitted unjustly from Blaylock's fraud, then secondarily from—at least—her willful blindness of the source of Chung's money. Since a, "a *lis pendens* is designed primarily to protect unidentified third parties," reliance on a *lis pendens* as a complete bar for relief is improper. *Horry County v. Ray*, 382 S.C. 76, 674 S.E.2d 519 (Ct. App. 2009).

B. Chung was entitled to intervene in the Partition Action because he previously filed a judgment and because he was entitled to equitable relief against the parties to that case.

Because Chung claims an interest in the property at issue here, SCRCRCP Rule 24(a) governs his intervention. The rule provides:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: ... or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24(a), SCRCRCP. Chung claims an interest in the property by virtue of his judgment and neither Blaylock nor LaMarche can adequately represent his interests since they have adversarial positions; therefore, the only salient issue here is whether the application is timely.

In determining whether a motion to intervene is timely, the court should consider:

(1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial.

Davis v. Jennings, 304 S.C. 502, 505, 405 S.E.2d 601, 603 (1991).

It is important to note that Chung filed his judgment in South Carolina promptly and, at the time he filed his judgment in South Carolina, no action was

pending as the original action had been dismissed. (R. pp. 115-141) As the partition claim plaintiff, LaMarche was obligated by Rules 71 and 19 to join all interested parties. She did not do so when she restored the case in 2014.

Though rare, “the mere fact that judgment already has been entered should not by itself require a motion for intervention to be denied.” Wright and Miller, § 1916 Timeliness of Motion, 7C Fed. Prac. & Proc. Civ. § 1916 (3d ed.). “[A]lthough the cases ‘tend to involve unique situations’ and to require ‘a close examination of all the circumstances of the case,’ in a significant number of cases intervention has been allowed even after judgment.” *Id.* South Carolina courts have considered intervention after the entry of a judgment on numerous occasions; no case has denied intervention on this ground. In *Davis v. Jennings*, the Supreme Court granted a newspaper’s request to intervene in a case after the parties settled and the case dismissed with prejudice to challenge an order sealing the record. *Davis v. Jennings*, 304 S.C. 502, 505, 405 S.E.2d 601, 603 (1991). There, the court noted the motion was filed a month after judgment. *Id.* In *State ex rel. Wilson*, the Court of Appeals affirmed denial of the State of South Carolina’s motion to intervene in an annexation case, because the statute of limitations had passed and there was no relief the State could obtain. *Ex parte The State ex rel. Wilson*, 391 S.C. 565, 707 S.E.2d 402 (2011). In *Horry County State Bank v. Flemington Properties, LLC*, the court also affirmed denial of a mortgagor’s

intervention application after summary judgment had been granted, but because the borrower's rights were the same as the lenders and it was otherwise adequately represented. *Horry County State Bank v. Flemington Properties, LLC*, 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004). These cases suggest that intervention after judgment is not improper unless no relief can be afforded the intervening defendant. That is not the case here.

This case presents the type of 'unique situation' where intervention after judgment is required. First, pursuant to SCRPC Rule 71, it was LaMarche's duty to name all parties necessary to partition to the Langford home when she restored the case after it was dismissed under Rule 40(j). Chung's judgment was filed in South Carolina six months before restoration, and she failed to join him. Second, Chung sought intervention promptly within weeks of the last action by this Court. A hearing was held on June 15, 2015 on Blaylock's request to set aside the judgment. Chung's motion was filed less than two months later.

Third, and most compelling, neither Blaylock nor LaMarche can argue they would be prejudiced. If anything, by not opening the judgment, they will both be enriched by Blaylock's fraud by not including Chung. The fraud Blaylock imposed on Chung would be rewarded if this Court does not reopen this matter. This Court is bound by the District of Columbia court's findings as to Blaylock as a fraudfeisor and Chung his victim. Both Blaylock and LaMarche have admitted

that they used Chung's money to pay down the mortgage on the home. As this court found in the initial partition proceeding, both Blaylock and LaMarche were jointly liable on the note, and LaMarche has admitted as much. Accordingly, both Blaylock and LaMarche benefited from the fraud. LaMarche was aware of the scheme and chose to keep quiet.

On the other hand, Chung will be substantially harmed by not allowing intervention. Chung has a claim to the property. The judgment, alone, is a sufficient claim to property. S.C. Code Ann. §15-35-810 (A filed judgment is a lien on all property in the name of the judgment debtor when filed in the county in which the property is located.). In addition, not only did Chung have a judgment, the source of the judgment supported the specific property being partitioned. The District of Columbia court found Egle was Blaylock's agent; hence, Egle's knowledge that the funds came from Chung was imparted to Blaylock when Blaylock and LaMarche used Chung's money to pay the Langford Road debt. Therefore, Chung may claim an equitable lien in the property against both Blaylock and LaMarche as they were joint tenants equally liable for the property. "For one to have notice of an outstanding equitable interest, [one need not] know the identity of the third party or the extent of his interest. It is sufficient that one either knows or ought to know that some third party interest exists." *South*

Carolina Federal Sav. Bank v. San-A-Bel Corp., 307 S.C. 764, 13 S.E.2d 852, 854 (1992).

Because of Blaylock's fraudulent conduct, this case represents the classic situation for a constructive trust.

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.

SSL Medical Services, Inc. v. Cox, 301 S.C. 493, 500, 392 S.E.2d 789, 793 (1990).

Cox is instructive. Cox was employed by SSL, which was in the automobile leasing business. Once vehicles were returned to SSL by lessors, Cox would sell the vehicles. Rather than give the funds from the sale of SSL's cars to SSL, Cox pocketed the money. The court ruled that the funds Cox obtained during the scheme should be subjected to a constructive trust.

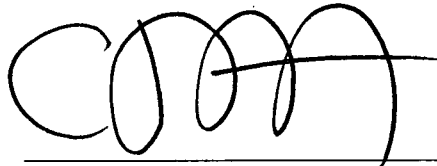
Chung is entitled to the same result here. Blaylock obtained funds from Chung by fraudulent or unjust means. Those funds went toward his Langford property, which has now been sold and converted to cash. Chung is entitled to a constructive trust over the funds from the sale in the amount of his judgment.²

² Since a constructive trust may be an appropriate remedy, reopening the case will not require undoing the Master's Deed. Rather, the Court can impose a constructive trust over the sales proceeds in the amount of the judgment, then reapportion the remainder of the proceeds between Blaylock and LaMarche as may be appropriate.

Not only has Chung been a victim of Blaylock's fraud, but his funds have unjustly enriched LaMarche. The elements of unjust enrichment are "(1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value." *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 257, 715 S.E.2d 348, 356 (Ct. App. 2011). Chung's funds were used to pay a debt that LaMarche could otherwise have been required to pay or satisfy through the house. The District of Columbia court has already found the funds were unjustly obtained; it would be unfair for LaMarche to retain Chung's money. She testified as a witness in Chung's case against Blaylock. She has known about this case since its inception. Such a holding results in a windfall for LaMarche and makes Chung a second victim of inequitable conduct.

CONCLUSION

The Master's denial of Chung's motion to intervene was in error. The Master's determination that a *lis pendens* was a complete bar to relief is not supported by any rule and runs counter to the intent of a *lis pendens*. Not opening the case defeats equity here and is an abuse of the court's discretion, where Chung should have been joined initially, the funds at issue were taken by fraud, the funds were applied to the partitioned property, both Blaylock and LaMarche benefitted, and Chung's ability to receive restitution is ended. For these reasons, the Master's ruling should be reversed and the matter remanded for a hearing.



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