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STATE OF SOUTH CAROLINA SC Court of Appeals THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

CASE NO: 15-CP-10-4849

Richard Dority, Jr. and Melissa J. Dority,)

Plaintiffs,)

Vs.)

ORDER OF SUMMARY JUDGMENT

Mary Clement Porcher and Joel Porcher,)

Defendants.)

FILED
2017 AUG -9 AM 9:43
JULIE J. ARMSTRONG
CLERK OF COURT

Having appeared before me Curtis Bostic and Chris Ramsey on behalf of the Plaintiff this 31st day of May, 2017 on Defendants' Motion for Summary Judgment as put forth by Bonum S. Wilson, III, I make the following statements of fact and conclusions of law.

FACTUAL HISTORY

Plaintiffs, the current owners of a house and lot on James Island, instituted this action against their adjoining neighbors, Defendants Joel and Mary Porcher, seeking to declare a dock abutting both properties as exclusively theirs.

In 1970, Defendants bought a home at 757 Grimsley Drive with a dock in place and in use by the selling homeowner and his neighbor at 753 Grimsley Drive. Lots on that stretch of Clarke Sound are not unduly wide, and evidently the seller to the Defendants and his neighbor had constructed a single dock on the dividing property line for their shared use. The dock is now L-shaped with two floating docks so that each owner enjoys a floating dock. The fixed walkway to the shore abuts the highland of each property owner, but the dividing property line is not precisely in the middle of the adjoining lots, and the angle of the dock does not precisely extend out along

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the boundary line of the parties' real estate. Joint docks, however, by their nature are not required to comply with the general rule of a 20-foot setback from adjoining property lines. See 23 S.C. Code Ann. Reg. 30-12(A)(1) (p) (2008) (stating that "No docks, pierheads or other associated structures will be permitted closer than 20 feet from the extended property with the exception of joint use docks shared by two adjoining property owners. . .").

In 1971, one year after the Defendants purchased their home, Richard Dority, Sr. now deceased, bought the neighboring house at 753 Grimsley adjoining the Defendants with the joint dock arrangement then in place. Both Dority, Sr. and Defendants used and maintained the dock for decades during which two OCRM permits were granted. Dority, Sr., Plaintiffs' predecessor in title, applied for the first permit and in his application he described the dock as "shared or joint use." Dority, Sr. as well as his wife after Dority Sr.'s passing, repeatedly referred to the dock as joint in other documents.*

In 1990 after Hurricane Hugo demolished the fence between the properties, Defendants rebuilt the wire/split rail fence with decorative brick along the common property line between the two properties from the street to the foot of the joint dock. Around this same time, Defendants built a concrete bulkhead and foundation for the joint dock.

In 2009 Dority, Sr. instituted an action against the Defendants alleging encroachment on his property by the wall built 19 years previously. By the time of this wall litigation, dock use issues had begun, and Defendants' previous counsel, Benjamin Goldberg, answered and filed a counterclaim seeking a declaratory judgment regarding the parties' joint ownership of the dock. One of the current plaintiffs was a party to that action. The wall claim and dock counterclaim were ended with prejudice before trial on the issues in 2010. The current Plaintiffs purchased Mr.

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* Interestingly, the existence of the dock predates the creation of the Coastal Council, predecessor to SLOHEC-OCRM.

Dority, Sr.'s property on October 29, 2010 just prior to his passing on November 12, 2010.

PROCEDURAL HISTORY

The parties and their predecessors in title have applied to DHEC and received a number of critical area permits, all of which consider the subject dock to be a joint use structure. It is noteworthy to the Court that Mr. Dority Sr. designated this dock as "joint use" with the Defendant Porchers when he submitted his January 7, 2002 application to DHEC.

Most important to the instant motion, Defendant Mary Porcher filed a permit application on July 3, 2014 seeking to modify a portion of the joint dock. The permit application was given public notice by newspaper July 21, 2014, and the application drawings and public notice were specifically mailed to the neighboring landowners, including the Plaintiffs. Plaintiffs filed timely objections to DHEC in response to this application.

DHEC reviewed Plaintiffs' objections and concluded that the two previous permits issued for the structure "were processed per OCRM Regulations for joint-use docks and issued as additions to a joint-use dock." DHEC requested additional information from Plaintiffs to support their claim of exclusive ownership. Although Plaintiffs repeated their position, they failed to provide any additional information and took no further action to challenge the DHEC decision regarding the permit.

DHEC granted the Defendants' permit on October 10, 2014. There is no question the grant of the permit was sent to Plaintiffs or that the permit was later amended to allow a 2 1/2-foot increase in boat lift size, again without objection. Although a letter protesting the permit was sent February 12, 2015 no appeal to the Administrative Law Court of the DHEC decision occurred from either the original permit or the amendment.

The current action was commenced in Circuit Court on September 1, 2015, claiming trespass by Defendants' use of the dock, a request to quiet title with a finding that Plaintiffs' sole interest in the dock be recognized, and a declaratory judgment with a prayer of damages and declaration of plaintiffs' sole ownership of the subject dock.

Plaintiffs did not name DHEC as a party to this action, despite the fact that any ruling by the court regarding dock permitting over marshlands and joint dock use remain subject to the agency's permit process and review.

Defendants answered on October 26, 2015 joining in the plaintiffs' request for a declaration of dock use. Subsequently Defendants amended their Answer to raise the exhaustion of remedies defense. Plaintiffs' Motion for Summary Judgment on grounds that the 2010 consent order served to divest the Defendants' interest in the joint dock was denied on November 2, 2016. Defendants' current Motion for Summary Judgment was filed January 17, 2017, after an order permitting amendment to the responsive pleadings was granted. The action was referred to this court on February 8, 2017.

Standard for Summary Judgment

A thorough review of the briefs and material before the court and consideration of the oral arguments of counsel reveals no material fact in issue. Plaintiffs concede they make no claim for ownership to the land beneath the subject dock in issue, nor dispute that some part of the subject dock abuts both parties' real property.

LEGAL ISSUE

- 1) Did Plaintiffs exhaust their administrative remedies after DHEC issued its final ruling against the Plaintiffs' claim of exclusive ownership and use of the subject dock?

2) If Plaintiffs failed to exhaust their administrative remedies, is plaintiffs' "defense" of *res judicata* relevant to the outcome of the motion before the court.

LAW

1) Where an adequate administrative remedy is available to determine a question of fact, a plaintiff must pursue the administrative remedy or be precluded from seeking relief in the courts. Hyde v. S.C. Dep. Of Mental Health, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994). The Plaintiffs did not appeal DHEC's final ruling to issue a dock permit to Defendants. Therefore, they are precluded from seeking relief from the agency's decision in the courts.

The Legislature granted DHEC the authority to regulate costal tidelands, including the issuance of permits for private and joint-use docks. *S.C. Code Reg. R30-6 (2008) sets forth the initial manner by which an aggrieved party may appeal DHEC permit decision. (See also S.C. Code 1-23-310 et. seq.) An appeal from a DHEC decision that gives rise to a contested case should be heard before the Administrative Law Court.

If unsatisfied with the Administrative Law Court holding, S.C. Code 48-39-150 (2011) sets forth the guidelines under which appeal from the Administrative Law Court's decision on a DHEC permit will occur. Specifically, subsection (D) states: "a person adversely affected by the granting of the permit has the right of direct appeal from the decision of the administrative law judge pursuant to Section 1-23-610." This extensive process of administrative review culminates with the aggrieved party's right to appeal the ALC's order to the Court of Appeals.

Rather than appealing the DHEC finding to the Administrative Law Court, and if still unsatisfied, appealing that holding to the Court of Appeals, Plaintiffs instituted a separate action in Circuit Court. It is axiomatic that a party need exhaust all administrative remedies available to

* DHEC's Issuance of a dock permit grants the permittee a license to use the dock to extend into the public waters of the state.

it before seeking relief in the court. See Columbia Developers v. Elliot, 269 S.C. 486, 490, 238 S.E.2d 169, 170 (1977). For that reason, Defendants' Motion for Summary Judgment is granted by virtue of Plaintiffs' failure to appeal the administrative finding of DHEC.

DHEC's specialized knowledge should be given considerable weight in evaluating evidence regarding the joint use dock. See S.C. Code §1-23-330 ("The agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence.") DHEC determined that Defendants had an ownership interest in the joint dock and granted a permit to Defendants to modify the dock. Plaintiffs' initial objections made to DHEC at the administrative level alleged:

- (a) Defendants' proposed dock would restrict access and use of Plaintiffs' existing dock;
- (b) the fact of dock ownership by the Plaintiffs based upon the boundary lines between the properties, alleging the line remains that of record, and consequently the dock is solely the possession of my clients;" and
- (c) that the intent of a previous consent order between Plaintiffs' predecessor in interest and the Defendants terminated the Defendants' dock ownership.

Despite Plaintiffs' allegations of exclusive dock ownership, DHEC found a review of all available information concludes that this dock is located on shared property boundary as evidenced by a survey provided by Mrs. Porcher. Past permitting history indicates two past permits were issued for this structure, both of which reference the structure as a joint use dock for 753/757 Grimsley Drive. Furthermore, there is no question that an appeal of the determination by DHEC regarding permission to construct a dock within its jurisdiction should be reviewed by the

Administrative Law Court pursuant to S.C. Code Ann. Reg. R30-6. A party aggrieved by any Administrative Law Court ruling may then appeal the ruling to the Court of Appeals pursuant to S.C. Code 48-39-150(D).

Plaintiffs' attempt to draw a distinction between DHEC authority to establish "ownership" of the dock versus "use" of the dock, and while its authority regarding use is appropriate, its authority regarding "ownership" is not.

~~While ownership may be contested, Defendants counsel concedes that on the issue before~~
the court ownership is not relevant, only use is. Without DHEC as a party before the Court, any declaration of "use" arising from "ownership" is not binding on DHEC, nor is "use" capable of restriction, as DHEC retains sole authority on matters of dock usage. Any ruling of this Court as to which party may or may not use the dock is irrelevant without a binding effect on DHEC, which agency is not before it. Plaintiffs' prayer that the Court divest Defendants from their use or deny joint use in general remains subject to DHEC's determination on what uses are ultimately permitted. Had Plaintiffs in fact appealed the original DHEC ruling, regardless of the outcome, DHEC would be so bound. The support this provides to the Plaintiffs' critical duty to exhaust their administrative remedies is apparent.

2. Likewise, the court remains unconvinced that dismissal "with prejudice" of Defendants' original demand in their original declaratory judgment action to permit access to their joint use dock use is tantamount to a declaration or divestiture of their rights to continued dock use. ^{to} ~~*~~ Even were the Court ₁ rule that the dock was solely owned by the Plaintiffs, such would not affect the determination by DHEC of its status or continued use.

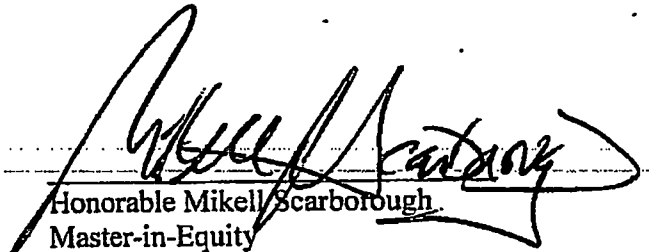
Defendants by their motion seek nothing but dismissal of Plaintiffs' claim. With no

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** No Agreement has been provided to support the terms of the settlement in 2009-CP-10-5241 other than it was dismissed with prejudice Court Order filed Nov. 4, 2010.*

counterclaim, the matter between them is ended, and the finding by DHEC in its October 10, 2014 remains unaffected.

THEREFORE, IT IS HEREBY ORDERED that Defendants Motion for Summary Judgment is **GRANTED** and this action is hereby dismissed.



Honorable Mikell Scarborough
 Master-in-Equity
 Charleston County, South Carolina

This 1st day of August, 2017.