

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

M. Anderson Griffith, Master-in-Equity for Aiken County

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Case No. 2011-CP-02-1375

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Atlantic Coast Properties, Inc.

Respondent,

v.

Jerry E. Swann, Jr. and Sandra A. Swann,  
Patricia Hite.

Respondent(s),

and John Hicks.

Appellant.

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**FINAL BRIEF OF RESPONDENT, PATRICIA HITE**

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SC COURT OF APPEALS

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### **STATEMENT OF ISSUES ON APPEAL**

1. The Master-in-Equity properly determined that Patricia Hite's claim was not barred by the Doctrine of Collateral Estoppel.
2. The Master-in-Equity properly determined that Atlantic Coast Properties, Inc. should convey lots 18, 19, and 20 of Sparkleberry Hills Subdivision to Patricia Hite.
3. The Master-in-Equity correctly relied upon the Release and Quit Claim of Equitable Interest executed by Jerry E. Swann, Jr. and Sandra A. Swann.

## STATEMENT OF THE CASE

This action was filed by Atlantic Coast Properties, Inc. seeking to resolve to whom certain real estate should be conveyed. On September 15, 1999, Atlantic Coast Properties, Inc. entered into a Bond for Title with Jerry E. Swann, Jr. and Sandra A. Swann, which was recorded in Book 2093 at Page 144, Records of Aiken County, South Carolina. (R.pp.168-170) This Bond for Title was an agreement for Swann to pay \$30,220.00 over a 30-year period of time to purchase lots 18, 19 and 20 of Sparkleberry Hills Subdivision.

Patricia Hite filed responsive pleadings alleging that she had entered into an oral agreement with Swann to assume the payments set out in the Bond for Title in order to purchase lots 18, 19 and 20. (R.pp.27-29) On or about November 18, 2003, Patricia Hite began making payments to Atlantic Coast Properties, Inc. On August 23, 2006, Patricia Hite paid off the Bond for Title with a final payment of \$26,267.34. (R.pp.19 and 97) Patricia Hite testified that all payments made to Atlantic Coast Properties, Inc. were made pursuant to an oral agreement with Swann. Jerry Swann testified that he did have an oral agreement for Patricia Hite and her now ex-husband, John Hite, to take over the payments called for in the Bond for Title.

John Hicks filed responsive pleadings in which he alleged that he is entitled to receive the property pursuant to an Assignment of Bond for Title executed November 25, 2009 and recorded in Book 4286 at Page 2202, Records of Aiken County, South Carolina. (R.pp.172-173). John Hicks testified that he contributed \$12,000.00 towards an \$18,000.00 loan made to Jerry E. Swann, Jr.

and Sandra A. Swann. (R.pp.98 lines 13-17). The \$18,000.00 loan was made to assist Swann to move to Georgia. None of the \$18,000.00 loan was used to pay Atlantic Coast Properties, Inc. Jerry E. Swann, Jr., John Hicks and John Hite all testified that the \$18,000.00 was a loan to Jerry E. Swann, Jr. and Sandra A. Swann and was not pursuant to an agreement to purchase the lots in Sparkleberry Hills Subdivision. (R.pp.84 line 17; pp.54 line 16; pp.98 lines 13-17). The issue of John Hicks receiving the lots as repayment of the loan came about at a later time. (R.pp.124).

There is no written agreement for Patricia Hite to take over the payments to Atlantic Coast Properties, Inc. However, on December 5, 2006, Jerry E. Swann, Jr. and Sandra A. Swann did execute a document titled Release and Quit Claim of Equitable Interest. (R.pp.171). The document was not properly witnessed and therefore was never recorded.

An employee of Atlantic Coast Properties, Inc. testified that she was informed by Jerry E. Swann, Jr. that Patricia Hite would take over the payments due pursuant to the Bond for Title. (R.pp.168) She made a notation of that conversation in her file on a copy of a letter dated November 4, 2003. (R.pp.176).

The matter was heard by the Honorable M. Anderson Griffith, Master-in-Equity, for Aiken County on December 8, 2011. Judge Griffith issued an Order dated February 8, 2012 directing that Atlantic Coast Properties, Inc. issue a deed conveying the three lots to Patricia Hite. (R.pp.2)

#### **STANDARD OF REVIEW**

On Appeal, the Findings of Facts and Conclusions of Law made by the trial court are subject de novo review. Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 715 S.E.2d 348 (S.C.App. 2011). “However this de novo review does not require an appellate court to disregard the findings of the trial court or to ignore the fact that the trial court is in the better position to assess the creditability of the witnesses. Pinckney v. Warren, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). Moreover, the appellant is not relieved of the burden of convincing the appellate court that the trial court committed error in its findings. *Id.* at 387-88, 544 S.E.2d at 623. Consequently, we will affirm the findings of the trial court in an equity case unless the appellant satisfies this court that the preponderance of the evidence is against the findings of the trial court.” *Id.* at 352.

### **ARGUMENT**

**I. The Master-in-Equity properly determined that Patricia Hite’s claim was not barred by the Doctrine of Collateral Estoppel.**

Appellant argues that Patricia Hite should be barred from enforcing her alleged equitable lien by the principal of Collateral Estoppel. “Collateral Estoppel prevents a party from relitigating an issue in a subsequent suit which was actually and necessarily litigated and determined in a previous action.” Aaron v. Mahl, 381 S.C. 585, 674 S.E.2d 482,486 (2009). A party claiming preclusive effect under Collateral Estoppel must demonstrate that the issue was “(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.” Carolina Renewal, Inc. v. South

Carolina Dept of Transportation, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct.App.2009). The appellant claims that Patricia Hite's claim of ownership of the subject property is barred by Collateral Estoppel because it was litigated in the divorce action involving Patricia Hite and her ex-husband, John Hite. The ownership of this property was not litigated in the prior action. Both John Hite and Patricia Hite testified in their depositions about this property. John Hite testified in his deposition that he did not claim any interest in the property. Patricia Hite testified in her deposition that she had been making payments to Atlantic Coast Properties. Neither party showed this property on their financial declaration filed in their divorce action. The Divorce Decree does not mention this property. Therefore, any claim to this property was not actually litigated in the prior action. Since the Divorce Decree does not mention lots 18, 19 and 20 of Sparkleberry Hills, any claim to this property was not directly determined by the Court. Therefore, Patricia Hite's claim to this property is not barred by Collateral Estoppel.

**II. The Master-in-Equity properly determined that Atlantic Coast Properties, Inc. should convey lots 18, 19, and 20 of Sparkleberry Hills Subdivision to Patricia Hite.**

Patricia Hite claims to have an equitable interest in lots 18, 19 and 20 pursuant to an agreement she reached with Mr. and Mrs. Swann. The testimony reveals that an oral agreement was entered into and that Patricia Hite paid the balance due pursuant to the Bond for Title entered into between Swann and Atlantic Coast Properties, Inc. To establish an equitable lien, Patricia Hite would need to establish the debt, the specific property to which the debt attaches and an

express or implied intent that the property serve as security for the payment of that debt. Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 715 S.E.2d 348 (S.C.App. 2011). The appellant argues that Patricia Hite should be barred from asserting an equitable lien because there would be an adequate remedy at law. The appellant cites the case of NUTT Corp. v. Howell Road, LLC, 396 S.C. 323, 721 S.E.2d 447, 449 (S.C.App. 2011). That case involved a contract dispute for services rendered. The NUTT Corp. was suing Howell Road, LLC for payment of services rendered related to a road and storm water design plan. The NUTT Corp. was attempting to assert an equitable lien against the property involved in the engineering plans. The Court held that the NUTT Corp. had a legal remedy available by filing suit for breach of contract against Howell Road, LLC. In the present case, the agreement that Patricia Hite is seeking to enforce specifically provided for her to obtain ownership of lots 18, 19 and 20 of Sparkleberry Hills Subdivision. A suit for damages as suggested by the appellant would not be an adequate remedy for the breach of the agreement reached by Patricia Hite and Mr. and Mrs. Swann. The object of that agreement was the property Patricia Hite seeks. Mr. Swann testified that there was an agreement with Mr. and Mrs. Hite to assume the payments on the Bond for Title with the intent to convey ownership when the Bond for Title was paid-off. The handwritten note prepared by Mr. Hite informed Patricia Hite that she should proceed with making payments to Atlantic Coast Properties, Inc. (R.pp.134 and 174). Mr. Swann notified Atlantic Coast Properties, Inc. that Patricia Hite would be making payments. Mr. Swann testified that he believed that he had assigned

the interest in lots 18, 19 and 20 of Sparkleberry Hills Subdivision to the Hites by executing the Release and Quit Claim of Equitable Interest. Patricia Hite clearly has established a debt-the payments due Atlantic Coast Properties, Inc. She has established the intent for the property to serve as security for the payment of debt. Therefore, Patricia Hite is entitled to an equitable lien on lots 18, 19 and 20 of Sparkleberry Hills Subdivision.

The appellant has argued that Patricia Hite should not have an equitable lien because she comes to court with unclean hands. The basis of this claim is Patricia Hite's failure to list this property on her financial declaration in her divorce proceedings. However, a review of the parties' depositions in that litigation reveals that both made statements affirming Patricia Hite's payments to Atlantic Coast Properties, Inc. In fact, John Hite wrote a note to Patricia Hite advising her to proceed with making those payments to Atlantic Coast Properties, Inc. (R.pp.134 and 174). Mr. Hite further testified in his deposition that he had no interest in pursuing that property and that he knew his wife was making those payments. (R.pp.138 and 141). Patricia Hite understandably testified that she did not list the property on her financial declaration because no deed had been issued transferring the property to her. Therefore, she has not acted unfairly in any way concerning this property. If anyone acted unfairly concerning this property, it would be her ex-husband and the appellant. They presented an Assignment to Mr. and Mrs. Swann knowing that Patricia Hite had already paid the balance due pursuant to the Bond for Title. If anyone has acted unfairly that is the subject to the litigation, it would be the appellant and John Hite.

**III. The Master-in-Equity correctly relied upon the Release and Quit Claim of Equitable Interest executed by Jerry E. Swann, Jr. and Sandra A. Swann.**

Mr. and Mrs. Swann executed a Release and Quit Claim of Equitable Interest on December 5, 2006. (R.pp.172). The document was not properly executed and therefore, was never recorded. However, a review of the testimony of all of the parties it is clear that everyone was well aware of Patricia Hite's payments to Atlantic Coast Properties, Inc. Everyone was aware of the oral agreement with Mr. and Mrs. Swann. Atlantic Coast Properties, Inc. informed John Hicks that Patricia Hite was making payments due pursuant to the Bond for Title (R.pp.168). The appellant alleges that there were no valid consideration for the Release and Quit Claim of Equitable Interest because there was no remaining debt owed Atlantic Coast Properties, Inc. at the time the document was signed. It is true that Patricia Hite paid off the Bond for Title on August 23, 2006 and the release was executed by the Swann's after that time. To assert there was no consideration would be incorrect. The consideration was the agreement between Ms. Hite and Mr. and Mrs. Swann that Patricia Hit would assume the Swann's obligations and in return would receive ownership of the lots.

The appellant also relies upon the assignment executed by Mr. and Mrs. Swann on November 25, 2009. (R.pp.172). Jerry Swann testified that he believed the assignment to John Hicks was requested by Mr. and Mrs. Hite. (R.pp.82). Therefore, he believed that he was executing the assignment pursuant to the agreement he had reached several years earlier with Patricia Hite. John Hite was aware that his ex-wife was paying Atlantic Coast Properties, Inc. (R.pp.133).

That information was revealed in the deposition of the parties. John Hite advised Patricia Hite to pay Atlantic Coast Properties, Inc. in a note that he left for her. (R.pp.134). While Mr. and Mrs. Hite were still living together as husband and wife, Atlantic Coast Properties, Inc. informed John Hicks that Patricia Hite had paid off the Bond for Title. (R.pp.101-102). Therefore, John Hicks was on notice that Patricia Hite had paid off the Swann's Bond for Title.

The appellant claims that he should have ownership of this property pursuant to the assignment and his claim of an equitable lien on the property. The testimony reveals that John Hicks loaned money to John Hite, which was subsequently loaned to Mr. and Mrs. Swann. (R.pp.94). There was never any discussion about this property being involved in the loan or indebtedness of John Hite to John Hicks. Therefore, John Hicks can not have an equitable lien. There is no evidence this debt attaches to lots 18, 19, and 20 of Sparkleberry Hill nor that the lots serve as security for the payment of the debt. Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 715 S.E.2d 348 (S.C.App. 2011). Clearly, John Hicks has an adequate remedy at law. He has a cause of action against John Hite and/or Mr. and Mrs. Swann. The record in this case clearly establishes that Patricia Hite has an equitable lien on this property and John Hicks has no claim or interest in this property.

### **CONCLUSION**

For the foregoing reasons, the Respondent, Patricia Hite, respectfully requests this Honorable Court Affirm the judgment below.

Respectfully submitted,

FOX & VERENES

A handwritten signature in cursive script, appearing to read "James Verenes", written over a horizontal line.

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October 24, 2012

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

M. Anderson Griffith., Master-in-Equity for Aiken County

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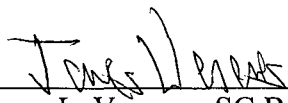
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**CERTIFICATE OF COUNSEL**

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The undersigned certified that this Final Brief of Respondent, Patricia Hite, complies with Rule 211 (b), SCACR.

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October 24, 2012

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**PROOF OF SERVICE**

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I certify that I have served the *Final Brief of Respondent* on Appellant(s) by depositing a copy of same in the United States Mail, postage prepaid, on August 14, 2012, addressed to: Appellant's attorney of record, James R. Snell, Jr. and Jennifer M. Clinkscales, 316 South Lake Drive, Lexington, South Carolina 29072; Kathy O. Rushton, Attorney, 108 West Butler Street, Saluda, South Carolina 29138 and Jerry Swann and Sandra Swann, P.O. Box 452, Butler, GA 31006.

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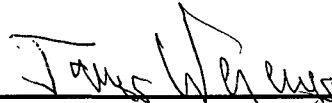
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**SC Court of Appeals**

Atlantic Coast Properties, Inc. v. Jerry E. Swann, Jr., et. al  
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Respectfully submitted,

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November 14, 2012