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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 property located at 207 North Avenue,
Anderson, SC 29625 TMS # 123-26-08-02.....Respondents.

PETITION FOR REHEARING OR REHEARING *EN BANC*

The Appellant, William Rice Cook, III, hereby respectfully moves and petitions, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an order granting rehearing or rehearing *en banc* in this case as to certain issues and submits the memorandum below in support of the same.

In its opinion issued on December 19, 2018, this court made the right decision in reversing and remanding the unjust enrichment claim against Respondent Phillips (hereinafter "Phillips") for trial. The court, however, should have remanded other claims and should have reversed the cancellation of this lis pendens. Appellant (hereinafter, sometimes, "Cook") respectfully submits that the court may have overlooked or misapprehended certain points in this case, as the following shows:

I. For a constructive trust claim to lie, Phillips was not required to have *acquired* the property through inequitable conduct, and the court should have reversed as to the constructive trust cause of action.

The court ruled that “summary judgment is appropriate on the constructive trust claim because Phillips did not acquire the Property through ‘fraud, bad faith, abuse of confidence, or violation of a fiduciary duty.’” (Opinion Dec. 19, 2018, quoting Lollis v. Lollis, 291 S.C. 525, 529, 354 S.E.2d 559, 561 (1987).)

Respectfully, the court overlooked authority cited and quoted in Cook’s briefs that states that a constructive trust may apply in a situation in which a person *holds* or *retains* property under such circumstances. “A constructive trust 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 hold and enjoy.” Halbersberg v. Berry, 302 S.C. 97, 106, 394 S.E.2d 7, 13 (Ct. App. 1990) (emphasis added). The *obtaining* does not have to be the bad act in order for a constructive trust to be imposed; rather, the *holding* of the property can be the bad act. Id.; accord Smith v. S.C. Ret. Sys., 336 S.C. 505, 529, 520 S.E.2d 339, 352 (Ct. App. 1999) (quoting SSI Medical Servs., Inc. v. Cox, 301 S.C. 493, 500, 392 S.E.2d 789, 793-94 (1990) (constructive trust may be imposed when a party obtains a benefit “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”). This is borne out by the Supreme Court’s decision in Briggs v.

Richardson, 273 S.C. 376, 256 S.E.2d 544 (1979), in which heirs brought an action against another heir to impose a constructive trust on properties that passed through the estate of their mother. The plaintiffs had not contested the will during the time period allowed and, similarly to this case, title to property had passed by operation of law. Id. The heirs were not included in the will, but they alleged that the heir who was also personal representative of their mother's estate repeatedly reassured the plaintiffs that he would divide the property equitably as per their mother's wishes. Id. On the basis that the plaintiffs had adequately alleged a cause of action for constructive trust, the Supreme Court upheld the trial court's decision to deny the defendant's motion to dismiss. Id. Briggs recognized the properly pleading of a constructive trust where it was alleged that a bad actor *held* property under circumstances justifying a constructive trust, even though he did not *obtain* the property through fraudulent means. Id.

If the court's position is that, because Phillips inherited the property by operation of law, he did not *acquire* the property through such inequitable means, that will not bar the trial court on remand from recognizing a constructive trust, since there is evidence that Phillips *holds* the property under circumstances justifying the imposition of a constructive trust, as the record demonstrates amply. This is consistent with the theory behind constructive trusts generally, that constructive trusts arise "under the broad doctrine that equity regards and treats as done what in good conscience ought to be done" and "the forms and varieties of constructive trusts are practically without limit, such trusts being raised, broadly speaking, *whenever* necessary to prevent injustice." Dominick v. Rhodes, 202 S.C. 139, 149, 24 S.E.2d 168 (1943) (emphasis). "[E]quity is less than demanding and quite flexible in

prescribing the elements essential to a constructive trust.” Whitmire v. Adams, 273 S.C. 453, 458, 257 S.E.2d 160, 163 (1979). Under existing precedent, none of which Phillips challenged and none of which this court’s opinion purports to overrule, a constructive trust is a remarkably flexible remedy, applicable whenever inequitable circumstances call for it. Id.; Dominick, 202 S.C. at 149; Halbersberg, 302 S.C. at 106. Whitmire, Dominick, Smith, SSI Medical, Briggs, and Halbersberg all remain binding precedent.

Appellant respectfully submits that, in light of that precedent, this court overlooked or misapprehended that *acquisition* of property under inequitable circumstances is not a required element of a constructive trust and that Cook pled and made a factual showing of all of the elements of this cause of action. The court should take another look at this issue.

II. Because Cook had an interest in the property regardless of whether Phillips held it in a constructive trust for him, the court should have reversed as to the partition/equitable title cause of action.

Respectfully, Cook notes that the opinion issued in this case gives short shrift to the analysis of Cook’s partition/equitable title cause of action. The opinion states that “[b]ecause Cook’s constructive trust claim fails, and Cook has no other cognizable legal or equitable interest in the property, summary judgment is also appropriate on the partition claim.” (Opinion Dec. 19, 2018.) There is more to this cause of action than whether Phillips holds the realty subject of this case in a constructive trust for Cook.

As discussed in Cook’s brief, Cook pled, independently of whether there was a constructive trust involved, that “he has acquired an equitable interest in the Property.” (R. p. 22.) Under the facts alleged in the complaint and set forth in Cook’s affidavit,

he did have an equitable interest in the property, particularly when the record is viewed in the light most favorable to him. (R. pp. 14-25, 91-92.) South Carolina case law does not make exactly clear what equitable title is. It appears that equitable title is a significant interest in the property; however, it is an interest that does not carry with it all the incidents of legal title. Lewis v. Premium Investment Corp., 351 S.C. 167, 173 & n. 4, 568 S.E.2d 361 (2002); Brooks v. Council of Co-Owners of Stones Throw Horizontal Property Regime I, 315 S.C. 474, 476-77, 445 S.E.2d 630 (1994); FCX, Inc. v. Long Meadow Farms, Inc., 269 S.C. 202, 206-07, 237 S.E.2d 50 (1977); Dempsey v. Huskey, 224 S.C. 536, 541-42, 80 S.E.2d 199 (1954); cf. Singleton v. Cuttino, 107 S.C. 465, 469, 92 S.E. 1046 (1917); Southern Pole Bldgs., Inc. v. Williams, 289 S.C. 521, 524, 347 S.E.2d 121 (Ct. App. 1986). It would appear to apply where a party has entered into an agreement to sell real estate. Singleton, 107 S.C. at 469 (vendee “equitable owner of the rents and profits of the land”). Its quantum or value may bear a strong relationship to “equity” in the lay or business sense of the word: the amount of the value of an owner’s net interest when discounted by the value of other interests in a piece of real property. Lewis, 351 S.C. at 173 n. 4. It can function and operate much as a security interest in land. Dempsey, 224 S.C. at 541-42 (vendee corresponds to mortgagor and vendor to mortgagee, and court may sell property similarly to mortgage foreclosure sale).

Under his agreement with Harden (the previous owner of the property before Phillips), especially as amended, Cook was essentially treated as having purchased the property with a seller-financed mortgage loan that would be repaid upon the property’s sale to a third party. (R. pp. 34, 91-92.) The amended sales agreement provides that

“[i]f the property has not sold by October 1, 2006, Cook Construction Co. shall begin paying an interest-only loan at 6.5% on the outstanding principal of \$155,000 until the house sells.” (R. p. 34.) The agreement also called for Cook to maintain insurance coverage and pay utility bills for the property. (R. pp. 31-34.)

Here are echoes of Lewis, 351 S.C. at 171, and Dempsey, 224 S.C. at 541-42, in which long-term, seller-financed land sales arrangements were recognized as corresponding in equity to a mortgagor-mortgagee relationship. As in Singleton, 107 S.C. at 469, Cook was treated under the sales agreement as the land’s equitable owner. Under the sales agreement, Harden, the nominal owner to whose position Phillips has succeeded, was treated as being owed a finite amount of financing money on loan terms, and Cook was treated being entitled to the rest of the sales proceeds, no matter how much they were – just as the owner of a mortgaged house would be upon its sale. Cook was the owner of the property’s “equity” in the lay sense of the word: the amount of the property’s value remaining after paying off Harden’s quasi-mortgage interest in the property. See Lewis, 351 S.C. at 173 n. 4.

When the record is viewed in the light most favorable to Cook, it is apparent that he has equitable title to the subject property – regardless of whether it is subject to a constructive trust. See Lewis, 351 S.C. at 173 & n. 4; Brooks, 315 S.C. at 476-77; FCX, 269 S.C. at 206-07; Dempsey, 224 S.C. at 541-42; Singleton, 107 S.C. at 469; Southern Pole Bldgs., 289 S.C. at 524. As owner of that title interest in the land, Cook is entitled to seek partition of the property. See S.C. Code Ann. § 15-61-10; cf. Dempsey, 224 S.C. at 541-42 (property sold and proceeds divided according to parties’

rights in equitable title scenario). He is at least entitled to some judicial recognition of his interest in the property.

Appellant respectfully submits that this court overlooked or misapprehended that, regardless of whether there is a constructive trust involved here, Cook has an interest in the subject real estate, and the court's conclusion that he does not is incorrect. The court should take another look at this issue, as well.

III. Because there are independent proper bases for a lis pendens in this case, the court should have reversed the trial court's cancellation of the lis pendens.

This court concluded that the trial court properly cancelled the lis pendens in this case "because Cook has no interest in the property[.]" (Opinion Dec. 19, 2018.) As discussed above, Cook must respectfully note that the court's conclusion that he has no interest in this real estate was wrong. Further, as a constructive trust will lie in this case on the facts presented by the record when viewed in the light most favorable to Cook, there are at least two reasons why the court should revisit this issue and reverse the cancellation of the lis pendens.

"[A] lis pendens that meets the statutory requirement for filing may not be canceled during the pendency of litigation." Carolina Park Assocs., LLC v. Marino, 400 S.C. 1, 9, 732 S.E.2d 876, 880 (2012). If, however, "the lis pendens does not 'affect[] the title to real property' as required under § 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." Id. Here, this action pled at least two causes of action on which, as discussed above, the court should have reversed the trial court and for which a lis pendens is proper.

Not only is a lis pendens appropriate when a plaintiff brings a partition action, it is also appropriate where a plaintiff brings an action for a constructive trust affecting title to real property. Carolina Park Associates, 400 S.C. at 9; Pond Place Partners v. Poole, 315 S.C. 1, 17, 567 S.E.2d 881 (Ct. App. 2002) (proper actions for the filing of a lis pendens include “actions to establish a constructive trust over real estate”).

The court’s opinion also does not mention that this action was brought *in rem* with regard to the property at issue. When actions in rem are brought seeking relief with respect to specific real estate, a lis pendens is proper. See Bush v. Aldrich, 110 S.C. 491, 96 S.E. 922 (1918). While Cook’s constructive trust, partition/equitable lien, and unjust enrichment causes of action were directed at the property as well as at Phillips, even a simple declaration of Cook’s rights with regard to the property, which could occur under what is pled, would make a lis pendens proper in this case.

Upholding the trial court’s cancellation of the lis pendens will allow Phillips to do what he has been trying to do: sell the property that Cook spent his money and time improving and beat Cook out of any cut of the sales proceeds entirely. That is wrong.

Appellant respectfully submits that this court overlooked or misapprehended that the lis pendens Cook filed in this case was a proper one. Granting this petition for rehearing would allow the court to revisit this issue and prevent this injustice.

IV. The court appears to have misapprehended Cook’s argument concerning the conversion cause of action.

The court’s opinion concludes that Cook’s cause of action for conversion will not lie because it is based upon Phillips converting Cook’s improvements to the property. (Opinion Dec. 19, 2018.) With respect, Cook notes a clarification: his

conversion cause of action is based upon Phillips converting the money and items that Cook used up in improving the property.

Appellant respectfully submits that this court overlooked or misapprehended this point, and that the court should take another look at this issue.

V. Rehearing *en banc* would be proper.

“A hearing or rehearing *en banc* is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.” Rule 219(a), SCACR.

Consideration by the full court appears necessary to secure or maintain the uniformity of its decisions, as well as to ensure adherence to Supreme Court precedent. This is particularly apparent with regard to this court’s decision on the constructive trust cause of action, as noted above.

WHEREFORE Appellant prays for an order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'A. S. Radeker', written over a horizontal line.

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January 3, 2019

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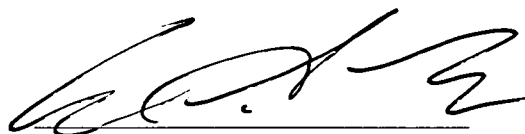
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PROOF OF SERVICE

I certify that I served the foregoing petition for rehearing or rehearing *en banc*
by depositing a copy of it on the date shown below in the United States Mail, postage
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January 3, 2019



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