

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon

Civil Action No. 2012-CP-32-00541
Appellate Case No.: 2012-212587

ORIGINAL

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SC Court of Appeals

David Randolph Whitt.....Appellant,

v.

Clonta M. Fox.....Respondent.

FINAL BRIEF OF APPELLANT

Timothy F. Rogers
Richard L. Whitt
Austin & Rogers, P.A.
508 Hampton Street, Suite 300
Columbia, South Carolina 29201
(803) 251-7442
Attorneys for Appellant

Other Counsel of Record:

James R. Snell Jr., Esquire
316 South Lake Drive
Lexington, South Carolina 29072

Jean P. Derrick, Esquire
Law Offices of Jean Perrin Derrick, LLC
205 East Main Street
Lexington, South Carolina 29072

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STATEMENT OF ISSUE ON APPEAL

- I. DID THE TRIAL COURT ERR IN FAILING TO GRANT THE RELIEF SOUGHT IN APPELLANT'S MOTION TO ATTACH PROPERTY, GIVEN THE DISJUNCTIVE NATURE OF THE CONTROLLING PROVISIONS OF *SECTION 15-19-10*?

STATEMENT OF THE CASE

This action began with Appellant David Randolph Whitt, (hereinafter as, “Mr. Whitt”), filing a Complaint against Respondent Clonta M. Fox, (hereinafter as, “Fox”) alleging Abuse of Process, Malicious Prosecution and Civil Conspiracy, which was filed on February 6, 2012, (*R. p. 1*). The Respondent Fox filed his Answer on June 7, 2012. Because Respondent Fox had (i) after the date the Complaint in this matter was filed against him, placed a “For Sale” sign in front of his residence (*R. p. 27*) (ii) Respondent Fox, listed his residence for sale with a realty company, M & R Realty, Inc.; (“Admitted.” Answers to Plaintiff’s Request for Admissions,, March 15, 2012, *R. p. 27*) (iii) Respondent or someone acting on Respondent’s behalf, has placed a “For Sale” sign at Respondent’s current residence (*R. p. 27*) and (iv) A “rental, moving truck” was observed parked on the premises of Respondent Fox’s residence, overnight from Friday, March 2, 2012, until Saturday, March 3, 2012, (*R. p. 27*). Appellant filed a Motion to Attach Property on March 6, 2012 (*R. p. 7*). Thereafter, Respondent filed a Memorandum in Opposition to Motion to Attach Property, dated April 17, 2012, (*R. p. 13*). Appellant filed his Affidavit in support of Motion to Attach Property on April 23, 2012, (*R. p. 10*). Appellant’s Motion to Attach Property was heard by the Trial Court on May 17, 2012, and denied, in open Court on the same date. No formal Order was issued by the Trial Court and Appellant filed his Notice of Appeal on July 26, 2012, (*R. p. 17*), on the single issue of the Trial Court’s denial of the relief sought in Appellant’s Motion to Attach Property (*R. p. 7*). This Appeal follows:

ARGUMENT

Summary of Argument

I. THE TRIAL COURT ERRED IN FAILING TO GRANT THE RELIEF SOUGHT IN APPELLANT'S MOTION TO ATTACH PROPERTY, GIVEN THE DISJUNCTIVE NATURE OF THE CONTROLLING PROVISIONS OF SECTION 15-19-10.

Given the disjunctive nature of *Section 15-19-10, S.C. Code Ann. (1976, as amended)*, the Trial Court erred in applying only one provision of *Section 15-19-10*. Factually, *Section 15-19-10*, also contains a second provision, “(8) When any person or corporation... or is about to assign, dispose of or secrete any of his or its property with intent to defraud creditors as mentioned in this chapter;” (emphasis not in original). The Trial Court failed to grant relief under the second disjunctive provision of *Section 15-19-10* described hereinabove, which violates South Carolina case law, (see, Garris v. Governing Bd. of South Carolina Reassurance Facility, 511 S.E. 2d 48, 52 (1998)).

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO GRANT THE RELIEF SOUGHT IN APPELLANT'S MOTION TO ATTACH PROPERTY, GIVEN THE DISJUNCTIVE NATURE OF THE CONTROLLING PROVISIONS OF SECTION 15-19-10.

The Trial Court's decision in this matter, reads as follows,

"It's just not clear to my satisfaction as a circuit court judge that the debtors departed the state with the intent to defraud his [the Respondent's] creditors or to avoid the service of a summons and complaint. He's [the Respondent] been properly served, he [the Respondent] has an attorney, he's [the Respondent's] answered the complaint. I ---I'm not attaching his [the Respondent's] property." (*R. p. 26, Lines 14-19*).

On its face, the Trial Court's decision addresses only provision one of *Section 15-19-10*, *S.C. Code Ann. (1976, as amended)*.

Given the disjunctive nature of the two provisions of *Section 15-19-10*, the Trial Court erred in applying only one provision of *Section 15-19-10*, as set forth hereinabove. Factually, *Section 15-19-10* also contains a second provision, which is also controlling, "(8) When any person or corporation... **or** is about to assign, dispose of or secrete any of his or its property with intent to defraud creditors as mentioned in this chapter;" (emphasis not in original). The Trial Court failed to properly apply and failed to grant relief under the second disjunctive provision of *Section 15-19-10*, described hereinabove, which violates South Carolina case law, (see, Garris v. Governing Bd. of South Carolina Reassurance Facility, 511 S.E. 2d 48, 52 (1998)).

As stated, the Trial Court's decision fails to properly apply the provision of *Section 15-19-10* that reads, "...**or** is about to assign, dispose of or secrete any of his or its property with intent to defraud creditors as mentioned in this chapter;" (emphasis not in original),

ARGUMENT (Cont.)

which was argued to the Trial Court by way of Affidavit¹, (*R. p. 10*), four Admissions by Defendant (*R. p. 27*) and oral argument (*R. p. 21, Lines 22-24*) (*R. p. 22, Lines 16-18*) (*R. p. 22 Lines 21-25*) (*R. p. 24, Lines 9-11*).

The provision highlighted hereinabove, of *Section 15-19-10*, was relied upon in Appellant's Motion² to Attach Property (*R. p. 7*) and was raised by Affidavit (*R. p. 10*) in the Respondent's Admissions (*R. p. 27*) and in oral argument before the Trial Court, (*R. p. 21, Lines 22-24*) (*R. p. 22 Lines 16-18*) (*R. p. 22, Lines 21-25*) (*R. p. 24, Lines 9-11*).

South Carolina case law is clear on the application and importance of the word "or" in a Statute. "The word "or" used in a statute, is a disjunctive particle that marks an alternative." Brewer v. Brewer, 129 SE 2d 736, 738 (1963); K & A Acquisition Group v. Island Pointe, 682 SE 2d 252 (2009). The word "or" used in a statute imports choice between two alternatives and as ordinarily used, means one or the other of two, but not both, Brewer, supra at p. 738. "Or" generally indicates an alternative corresponding to "either", as "either this or that"; that is to say either one or another" Brewer, supra at p. 739; Harris v. Anderson County Sheriff's Office, 673 SE 2d 423 (2009)). The Trial Court improperly applied only one provision of *Section 15-19-10*, when both provisions are equally important and controlling and the applicable provision was before the Trial Court by way of Affidavit (*R. p. 10*), in the Respondent's Admissions (*R. p. 27*) and oral argument (*R. p. 21, Lines 22-24*) (*R. p. 22, Lines 16-18*) (*R. p. 22, Lines 21-25*) (*R. p. 24, Lines 9-11*).

¹ Appellant's Affidavit was filed of record on April 23, 2012, and also provided to the Trial Judge again in a reference document, which was reviewed by the Trial Judge during oral argument before the Trial Court, (*R. p. 21, Lines 5-13*).

² The "second" provision of *Section 15-19-10*, which was not properly applied by the Trial Judge, was set forth as the sole basis for Appellant's Motion, in Appellant's Motion to Attach Property, (*Record p. 7*), (The first provision of *Section 15-19-10*, addressed and relied on by the Trial Court, was not addressed in Appellant's Motion to Attach Property), (*R. p. 7*).

ARGUMENT (Cont.)

Further clear guidance is given in Garris v. Governing Bd. of South Carolina Reassurance Facility, 511 S.E. 2d 48, 52 (1998), As in the instant case, “Where a statute contains two clauses which prescribe its applicability and the clauses are connected by the disjunctive ‘or,’ application of the statute is not limited to cases falling within both clauses, but applies to cases falling within either”. Garris supra at 52.

“Because the statute's language is clear and unambiguous and conveys a clear and definite meaning, there is no need for statutory interpretation by this Court.” Mosseri v. Austin’s at the Beach, 642 SE 2d 760 (S.C. Ct. of App. 2007). Therefore, consistent with South Carolina case law, the second disjunctive provision of *Section 15-19-10* is applicable and controlling.

Appellant’s Affidavit (*R. p. 10*) was before the Trial Court and the Respondent’s Admissions (*R. p. 27*) were before the Trial Court, along with oral argument (*R. p. 21, Lines 22-24*) (*R. p. 22 Lines. 16-18*) (*R. p. 22, Lines. 21-25*) (*R. p. 24, Lines. 9-11*).

Appellant provided overwhelming evidence that Respondent, after being served with a Summons and Complaint (*R. p. 1*) by Appellant, acted to dispose of a substantial asset and presumably Respondent’s largest asset (Respondent’s primary residence) with the intent to make that asset unavailable to answer to the claims of the Appellant, “[t]he purpose of attachment generally is to take a defendant's property into legal custody so that it may be applied to the plaintiff's debt, when established.” Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc., 603 SE 2d 905, 908 (2004), “... attachment, by which the court takes jurisdiction over the defendant's property ‘as a security for such judgment as a plaintiff may recover...” Grosshuesch v. Cramer, 623 SE 2d 833, 835 (2005). In the instant case, the Defendant is expected to receive proceeds from the sale of his current residence. It is clear that, because Plaintiff has an interest in the proceeds, those proceeds are subject to attachment by the Plaintiff, Allen, Inc. v. Island Co-op. Ass’n LTD., 109 234 S.C. 537, 548 (1959).

ARGUMENT (Cont.)

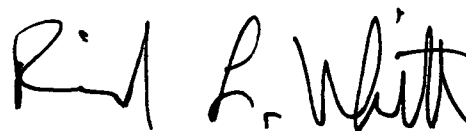
Section 15-19-30, only required Plaintiff to plead facts by Affidavit, but in the case *sub judice*, Appellant provided an Affidavit (*R. p. 10*) and four Admissions (*R. p. 27*) by the Respondent, to the Trial Court.

CONCLUSION

Based on the foregoing, the decision denying the Attachment of Property, of the Trial Court should be reversed, because the Trial Court failed to properly apply the disjunctive, controlling provision of *Section 15-19-10, S.C. Code Ann. (1976, as amended)*, relied on by the Appellant, before the Trial Court.

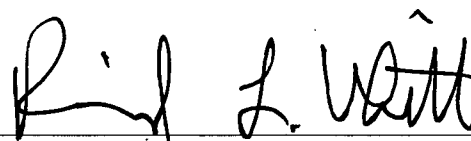
CERTIFICATE OF COUNSEL

I certify that the contents of this Brief complies with Rule 211(b).

Handwritten signature of Timothy F. Rogers and Richard L. Whitt in black ink, written over a horizontal line.

Timothy F. Rogers
Richard L. Whitt

Respectfully Submitted,
AUSTIN & ROGERS, P.A.

Handwritten signature of Timothy F. Rogers and Richard L. Whitt in black ink, written over a horizontal line.

Timothy F. Rogers
Richard L. Whitt
508 Hampton Street, Suite 300
P.O. Box 15907
Columbia, South Carolina 29211
Phone: (803) 256-4000
Fax: (803) 252-3679
Attorneys for Appellants

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