

THAT STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No.: 2010-CP-10-00250

Eugene Gathers Respondent,

v.

Ned Wright, Hattie Wright Gaston, Annie M. Wright, Edward Wright, Samuel Wright, James Wright, Earline Wright Maxwell, Wilmenia Wright, Henry Wright, Oscar Wright, Leroy Wright, Harold Wright, Charles Wright, Samuel Wright, Jr., Ernestine Wright, Henry Wright, Jr., Ernest McKnight, along with John Doe or Mary Roe, fictitious names to designate minors, infants, person of unsound mind, under disability or incompetent. Person in prison, persons in the military service within meaning of Title 50, United States Code, commonly referred to as The Soldiers and Sailors Civil Service Act of 1940, if any, and Richard Roe and Sarah Roe, fictitious names to designate the unknown heirs, devisees, distributes, issue, executors, administrators, successors or assigns of Ned Wright, Hattie Wright Gaston, Annie M. Wright, Edward Wright, Samuel Wright, James Wright, Earline Wright Maxwell, Wilmenia Wright, Henry Wright, Oscar Wright, Leroy Wright, Harold Wright, Charles Wright, Samuel Wright, Jr., Ernestine Wright, Henry Wright, Jr., also all other unknown person claiming any right, title, estate of lien upon the real estate which is the subject of this action, Defendants,

of whom Ernest McKnight is the Appellant.

FINAL BRIEF OF APPELLANT

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MAR 20 2013

SC Court of Appeals

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SOUTH CAROLINA CODE

Section 15-61-25	
Right of First Refusal of Joint Tenants or Tenants in Common.....	6-7, 10

STATEMENT OF THE ISSUES ON APPEAL

- I. WAS THE JUDGE'S FAILURE TO ADDRESS THE SPECIFIC ELEMENTS OF APPELLANTS' EQUITABLE CLAIMS A REVERSIBLE ERROR?
- II. DID THE APPELLANT HAVE AN EQUITABLE RIGHT OF REDEMPTION?
- III. WAS THE JUDGE'S DECISION TO GRANT THE RESPONDENT FEE SIMPLE TITLE BY WAY OF SUMMARY JUDGMENT REVERSIBLE ERROR?

STATEMENT OF THE CASE

Ernest McKnight (hereinafter referred to as "Appellant") executed a mortgage to Respondent.

1. Procedural History of this Case

Respondent filed a Complaint on January 12, 2010. (R. p. 5). The Appellant answered Respondent's Complaint and filed a Counter Claim on March 16, 2010. (R. p. 18). The respondent replied on March 31, 2010. (R. p. 200). On July 26, 2010, there was a Consent Order of Dismissal, dismissing with prejudice McKnight's Counter claim for adverse possession. (R. p. 31). On April 21, 2011 there was an Order granting John Wright's Motion for summary Judgment and Quieting title in John Wright (as to all Defendants except McKnight). (R. p. 33). On September 19, 2011 there was a Motion to Set Aside Summary Judgment. (R. p. 42). On March 12, 2012, there was an Order on Anna Porcher's Motion to Intervene (as a creditor only). (R. p. 99). On May 2, 2012, there was an Order denying Motion to Set Aside Summary Judgment. (R. p. 115).

FACTS

With the exception of McKnight's claim for adverse possession, the trial court's 2nd Order purportedly preserved all of McKnight's allegations and claims in this matter. However, by vesting the Plaintiff with fee simple title to the subject property, the court

summarily stripped McKnight of certain rights and interests in the property, as is further explained below. As this 2nd Order was a final judgment as to the issue of ownership of the property, it is an appealable order under Rule 72, SCRCR, and Rule 201, SCACR.

The Notice of Appeal mistakenly describes the Order appealed from as one dated March 12, 2012, (instead of being one dated May 2, 2012). (R. p. 119). McKnight will serve and file an Amended Notice of Appeal to correct the date of the 4th Order if such an amendment is warranted.

Appellant *timely served* his Notice of Appeal from the trial court's 4th Order on May 22, 2012, in accordance with Rule 203(b)(1), SCACR, which allows for service "within thirty (30) days (after receipt of written notice of entry of the order or judgment). McKnight then *timely filed* this Notice of Appeal on the same day, May 22, 2012, in accordance with Rule 203(d)(1)(B), SCACR, which allows for filing within ten (10) days (after the notice of appeal is served). The arguments presented herein are also reflected in the Memorandum of Appealability filed with court as to and the same arguments are incorporated herein. (R. p. 121).

The court's order granted the Respondent a fee simple interest in the real property, through summary judgment, that is the subject of this quiet title action. Appellant was not afforded a right of first refusal to purchase the petitioning tenant's interest because he was deemed to lack standing to do so.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). When determining whether any triable issue

of fact exists, the evidence and all inferences, which can reasonable be drawn from it, must be viewed in the light most favorable to the nonmoving party. *Faile v. S.S. Dept of Juvenile Justice*. 350 S.C. 315, 324, 566 S.E. 2d 536, 540 (2002).

If triable issues exist, those issues must be submitted to the jury, *Young v. S.C. Dep't of Corrections*, 333 S.C. 714, 718, 511 S.E 2d 413, 415 (Ct. App.1999). Even where no dispute as to evidentiary facts exists, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted. *Hall v. Fedor*, 349 S.C. 169, 173-74, 561 S.E.2d 654, 656 (Ct.App.2002). Moreover, summary judgment is a drastic remedy that should be cautiously invoked to ensure no person is improperly deprived of a trial of disputed factual issues, *Lanham v. Blue Cross and Blue Shield of S.C.* 349 S.C. 356, 363, 563 S.E. 2d 331, 334 (2002).

ARGUMENTS

I. DID THE APPELLANT HAVE AN INTEREST IN THE SUBJECT PROPERTY OR WAS HE MERELY A CREDITOR?

The Appellant executed a mortgage dated September 25, 2003, in the principal amount of \$6,187.52, which was filed on September 29, 2003, in the Charleston County RMC Office in Book M-469, at page 341 (herein after referred to as 'Mortgage'. (R. p. 129). This Mortgage was given to McKnight by three of the named defendants: John Wright, Anna Michelle Porcher, and Harold L. Wright ("Mortgagors") to secure repayment of sums that the Appellant paid to redeem the property after it was sold for delinquent property taxes. The mortgage by its terms conveyed to the Appellant the interest of the Mortgagors in the subject property. The Mortgage expressly states that the Mortgagors:

“do grant, bargain, sell and release unto the said Earnest McKnight ...[the subject property]... TOGETHER with all and singular the rights, members, hereditaments, and appurtenances to the said premises belonging, or in anywise incident and appertaining.”

The only right with respect to the property not conveyed by the Mortgage to Appellant was The right of possession and use of the property as indicated by the limiting provision that stated:

“...the mortgagor is to hold and enjoy the same premises until default of payment shall be made.” All of the Mortgagors being, at the time of execution and the time of filing of the Complaint for quiet title, heirs at law to the deceased title-holder of the subject property, Ned Wright. The Mortgage by its terms, evidences an intent by the parties, to convey (emphasis added) an interest in the subject property until the debt on the encumbered property was re-paid. Additionally, the monies advanced by the Appellant for the benefit of the Mortgagors was for the direct benefit of the subject real property. It is Appellant’s position that he was conveyed an equitable interest in the subject property by the named Mortgagors and maintains that interest since the Mortgage has not been satisfied.

II. DID THE APPELLANT HAVE A STATUTORY RIGHT OF FIRST REFUSAL?

Appellant contends that he has standing to assert claims as a “non-petitioning co-tenant” pursuant to Section 15-61-25 (“Right of First Refusal of Joint Tenants or Tenants in Common”). Quiet Title actions that result in several owners implicate a partition action by default when a mortgage interest and foreclosure is involved as to some, but not all, of the owners. Appellant’s rights as a co-tenant inured from the conveyance of the interest of the Mortgagors and/or the assignment of Section 15-61-25 (“Right of First Refusal of Joint Tenants or Tenants in Common”) their statutory right of first refusal therein from the three Mortgagors to the Appellant to properly exercise this right pursuant to S.C. Code Section 15-61-25. The Statutory Right of First Refusal states in pertinent part states:

Section 15-61-25. Right of first refusal of joint tenant or tenant in common to purchase property prior to partition; procedure.

- (A) For the purposes of this section “joint tenants and tenants in common” include heirs or devisees. Upon the filing of a petition for partition of real property owned by joint tenants or tenants in common, the court shall provide for the nonpetitioning joint tenants or tenants in common who are interested in purchasing the property to notify the court of that interest no later than ten days prior to the date set for the trial of the case. The nonpetitioning joint tenants or tenants in common shall be allowed to purchase the interest in the property as provided in this section whether default has been entered against them or not. (Emphasis added).

The court, after hearing the Appellant’s argument that Appellant was an assignee of those heirs who were signatories to the Mortgage and Note, declared that they were in default and therefore not to be accorded the rights as enumerated in Section 15-61-25. The right of first refusal, by its very terms specifically provides for survival of that right even if the party is in default.

III. WAS THE JUDGE’S DECISION TO GRANT THE RESPONDENT FEE SIMPLE TITLE BY WAY OF SUMMARY JUDGMENT REVERSIBLE ERROR?

If, *arguendo*, the Appellant has standing to challenge the order granting the Respondent summary judgment then it is reversible error to grant summary judgment to the Respondent given the judicial findings in this case. The order granting the Respondent a fee simple interest in the subject property was based on a finding that the Respondent paid taxes and maintained possession of the property for a period of twenty years”. The court then concluded that these actions on the part of the Respondent constituted an “ouster of all other heirs and possible claimants”. Although ouster may be presumed after possession for a period of over twenty years, possession must also be accompanied by the payment of property taxes.

Specifically, the trial court erred in finding that there was an ouster by Respondent as against the Mortgagors when neither the pleadings nor the court’s orders

set out the required elements of such an ouster. See Fender v. Smashum, 354 S.C. 504, 581 S.E.2d 853, (S.C.App.2003). There was no showing by Plaintiff's counsel of "actual" and "exclusive" possession as against Respondent's fellow co-tenants for the requisite Twenty (20) year period for implied ouster by possession. In addition, one of the three (3) mortgagors granting the mortgage interest to Appellant was none other than the Respondent. The mere existence of this Mortgage, in which all three Mortgagors assert a legal or equitable interest in the property, negates any valid claim of "Ouster" by Respondent as to the other Co-Mortgagors. The court in Fender stated:

"Ouster" is the actual turning out or keeping excluded a party entitled to possession of any real property. Grant v. Grant, 288 S.C. 86, 340 S.E. 2d 791 (Ct. App. 1986)... Actual ouster of a tenant in common by a cotenant in possession occurs when the possession is attended with such circumstances [354 S.C. 511] as to evince a claim of exclusive right and title and a denial of the right of the other tenants to participate in the profits, Woods v. Bivens, 292 S.C. 76, 354 S.E.2d 909 (1987); Brevard v. Fortune, 221 S.C. 117, 69 S.E. 2d 355 (1952). The acts relied upon to establish an ouster must be of an unequivocal nature, and so distinctly hostile to the rights of the other cotenants that the intention to disseize is clear and unmistakable, Felder [v. Fleming], 278 S.C. [327] at 330, 295 S.E.2d [640] at 642[(1982)]. Only in rare, extreme cases will the ouster by one cotenant of other cotenants be implied from exclusive possession and dealings with the property, such as collection of rents and improvement of the property, *Id.*, 278 S.C. at 331, 295 S.E.2d at 642.

Freeman v. Freeman, 323 S.C. 95, 99-100, 473 S.E.2d 467, 470 (Ct.App.1996). "Ouster is presumed from possession only if it is continued for a period of twenty years. Title by ten years' adverse possession by a cotenant against another may be acquired only after actual ouster of which the latter has notice, or should have in exercise of a reasonable diligence and vigilance." Watson v. Little, 224 S.C. 359, 364-365, 79 S.E.2d 384, 387 (1953).

The Appellant in his Answer and Counterclaim asserted that he paid the property taxes for the subject property for the tax years 2003, 2004, 2005, 2006, 2007, 2008 and 2009. (R. p. 18) There is no discussion in the order when the Respondent exercised possession over the Property nor the fact that the intervening co-tenant, Anna Porcher, alleges that she has also paid taxes on the subject parcel.

The court's order in granting summary judgment and fee simple title to the Respondent also failed to identify the heirs who have an interest in the property and to properly ascertain whether all of the heirs were properly before the court and given an opportunity to assert whatever interest or claims they may have to the property. This refusal to determine the heirs was done even as it was brought to the court's attention during the motion hearing that there was concern that all of the heirs were not reflected in this action. Additionally, the fact that entire branches of the family were incorrect did not deter the finality of the court's reliance on its prior decision to grant fee simple interest to the Respondent.

The named Plaintiff in this action is one "John Wright" is deceased and was deceased at the time of the order granting him, as Plaintiff, fee simple interest to the subject property. John Wright quitclaimed his interest in the subject property to, and the Appellant contends, the real party in interest, one "Eugene Gathers". No probate on the Estate of John Wright was ever probated in Charleston County. The validity of the quitclaim deed to Eugene Gathers was never addressed although the issues was presented during the Motion hearing to set-aside the order granting the Respondent a fee simple interest in the subject property.

The intervening party, Anna Porcher, has partitioned a portion of the original parcel for their family and has claimed this portion has a part of her father's estate, evidenced by a Deed of Distribution from her father's estate that conveyed the portion separated from the original Ten (10 ¼) one-fourths acre parcel to her. (R. p. 135) Anna Porcher is one of the Mortgagors to the subject Mortgage that encumbers the entire Ten (10) acre plus tract as security to ensure repayment of the amount advanced by the Appellant for delinquent taxes.

CONCLUSION

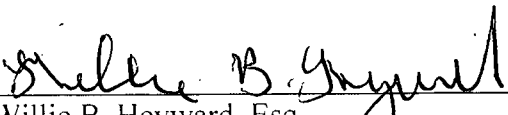
The 4th Order of The Honorable J.C. Nicholson dated May 2, 2012, and filed May 4, 2012, (R. p. 115) is a denial of Appellant's motion for relief from his 2nd Order (re-characterized as a motion under Rule 60(b), improperly quieting title in Respondent based upon a theory of "ouster" when the essential elements of "ouster" (importantly, ouster by "actual" and "exclusive" possession) do not appear in the Order or in the pleadings. The Order also ignores subsequent finding that all of the heirs were not before the court, that a portion of the property was previously partitioned to other heirs, that others, including the Appellant paid property taxes on the property.

The Mortgage unequivocally conveyed the interest of John Wright, Anna Michelle Porcher, and Harold L. Wright ("Mortgagors") to the Appellant and as such gave the Appellant any and all rights afforded to them under pursuant to Section 15-61-25 of the South Carolina Code of Laws. The order granting the Respondent a fee simple interest, even though opining to preserve those rights, essentially eviscerated the Appellant's rights as afforded by the conveyance of those rights by the Mortgagors.

Appellant hereby moves before this Court for leave to file an amended Motion to Set Aside the Summary Judgment (4th Order) to be styled as one under Rule 60(b), and this matter be remanded to the trial court for an Order of Reference to the Master in Equity to take testimony regarding the rights of the parties and to fully adjudicate the facts regarding title to the subject property.

Respectfully submitted,

March 15, 2013


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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr. – Circuit Court Judge

APPELLATE CASE NUMBER 2012-212010

Eugene Gathers Respondent,

v.

Ned Wright, Hattie Wright Gaston, Annie M. Wright, Edward Wright, Samuel Wright, James Wright, Earline Wright Maxwell, Wilmenia Wright, Henry Wright, Oscar Wright, Leroy Wright Harold Wright, Charles Wright, Samuel Wright, Jr., Ernestine Wright, Henry Wright, Jr., Ernest McKnight,, along with John Doe or Mary Roe, fictitious names to designate minors, infants person of unsound mind, under disability or incompetent. Person in prison, persons in the military service within meaning of Title 50, United States Code, commonly referred to as the Soldiers and Sailors Civil Service Act of 1940, if any, and Richard Roe and Sarah Roe, fictitious names to designate the unknown heirs, devisees, distributees, issue, executors, administrators, successors or assigns of Ned Wright, Hattie Wright Gaston, Annie M. Wright, Edward Wright, Samuel Wright, James Wright, Earline Wright, Wilmenia Wright, Henry Wright, Oscar Wright, Leroy Wright, Harold Wright, Charles Wright, Samuel Wright, Jr., Earnestine Wright, and henry Wright, Jr., also all other unknown person claiming any right, title, estate of lien upon the real estate which is the subject of this action, Defendants,

of whom Ernest McKnight is the Appellant.

PROOF OF SERVICE

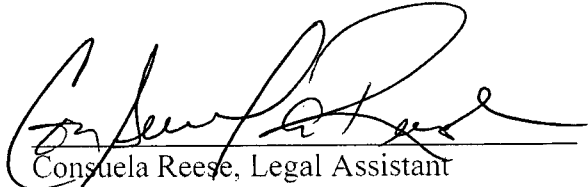
I certify that I have served the Final Brief of Appellant all counsel of record by depositing copies of the same in the United States Mail postage prepaid, on March 17, 2013, addressed as follows:

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SC Court of Appeals

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