

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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MAY 09 2019

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

R. Lawton McIntosh, Circuit Judge

Appellate (Court of Appeals) Case No. 2016-001653

William Rice Cook, III,Petitioner,

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 WRIT OF CERTIORARI TO THE COURT OF APPEALS

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SC Court of Appeals

Petitioner William Rice Cook, III, who was the appellant below and is hereinafter referred to as “Cook,” hereby moves and petitions this Court, pursuant to Rule 242, SCACR, as well as all other applicable law, for the issuance of a writ of certiorari to review the final decision of the Court of Appeals in this case. Petitioner respectfully submits that this is a proper case for such review by this Court.

In this case, the Court of Appeals relied on what it perceived as the absence of an element of a constructive trust to affirm the grant of summary judgment against Cook on his constructive trust claim and the cancellation of his *lis pendens*. The gist of the problem with that is that the Court of Appeals perceived that there is a necessary element of a constructive trust that has never been held to exist in any previous case. Respectfully, Cook must note that the Court of Appeals’ imposition of this nonexistent requirement is a significant error. According to the Court of Appeals, a constructive trust defendant must have *acquired* the property that is the subject of the constructive trust through fraud, bad faith, abuse of confidence, or violation of fiduciary duty, and a constructive trust will not lie where a defendant *holds*, but did not *obtain*, property under those very same conditions. This is contrary to precedent of this Court. Further, it is contrary to the principles of equity from which the remedy of a constructive trust arises. Constructive trusts are flexible remedies, applicable to numerous and varied situations, but the Court of Appeals used a rigidity in its analysis that is antithetical to what a constructive trust is – and over an element that does not exist.

The Court of Appeals’ ruling, if allowed to stand, will permit Respondent Benny Richard Phillips, Jr. (hereinafter “Phillips”) to do what he has been trying to do all along: sell the subject property, with all of its enhanced value due to Cook’s financial investment, work, and improvements, and beat Cook out of any of the proceeds.

CERTIFICATE OF COUNSEL

The Court of Appeals issued its opinion in this case on December 19, 2018. (Appx. p. 1.) Counsel for the Petitioner certifies that the petition for rehearing was served and filed fifteen days later, on January 3, 2019. (Appx. pp. 4, 14.) The petition for rehearing was finally ruled on by the Court of Appeals by an order filed on April 9, 2019. (Appx. p. 29.) This petition for a writ of certiorari is timely served and filed.

QUESTIONS PRESENTED

The questions presented for review in this case may be succinctly stated as follows:

1) Did the Court of Appeals err in affirming the circuit court as to its grant of summary judgment against Cook on his constructive trust cause of action, especially where its basis for doing so was only that Phillips did not *acquire* the subject property through fraud, bad faith, abuse of confidence, or violation of fiduciary duty?

2) Did the Court of Appeals err in upholding the circuit court's decision to grant summary judgment against Cook on his partition/equitable title cause of action where Cook was party to a contract concerning the property, under which he had performed, that treated Cook as the property's owner and the record owner as the property's mortgagee?

3) Did the Court of Appeals err in upholding the circuit court's decision to cancel Cook's lis pendens where at least one and probably both of two causes of action brought by Cook are proper for the use of a lis pendens?

STATEMENT OF THE CASE

Cook filed a lis pendens, summons, and complaint to begin this case on December 31, 2015. (Appx. pp. 125-166.) He sued the Respondent, Benny Richard

Phillips, Jr. (hereinafter “Phillips”), and, *in rem*, the real property involved in this case. (Appx. p. 131.)

As set out in the complaint, Cook, a licensed residential builder, doing business as Cook Construction Co., entered into a contract with the then-owner of the property, Claudia P. Harden (Phillips’ grandmother), under which Cook was to renovate and remodel the property and Harden was to sell the renovated and remodeled property, with Harden receiving \$155,000.00 from the sale and Cook receiving the remainder of the sales proceeds. (Appx. pp. 133, 148-51). The agreement, as amended, provided that if the property remained unsold by October 1, 2006, Cook would “begin paying an interest-only loan at 6.5% on the outstanding principal of \$155,000 until the house sells.” (Appx. p. 151.) Cook completed the renovation and remodeling, and the appraised value of the property rose to \$260,000.00. (Appx. p. 134.) Cook made such payments to Harden for about a year before the property was listed for sale, at which time Cook and Harden “agreed that in lieu of monthly payments the monthly interest amount would be added to the principal amount (of \$155,000.00) and would be paid when the Property sold.” (Appx. p. 134.)

When the economic recession hit around the end of 2008, Phillips’ father assumed handling Harden’s affairs and unilaterally took the property off the market. (Appx. p. 134.) Cook discovered this and met with Phillips’ father and then Phillips about it. (Appx. p. 134.) Both assured him that taking the property off the market was only a temporary measure and that that the property would be re-listed. (Appx. pp. 134-35.) Phillips, who was fully aware of the agreement between Cook and Harden, assured Cook “that nothing had changed, the he and his father had decided to put

furniture in the home to ‘stage it,’ and that they planned to re-list the Property soon.” (Appx. pp. 134-35.)

Phillips was later appointed conservator for Harden and, as alleged in the complaint, continued to assure Cook that he knew Cook was owed for his work and that he would be paid for it. (Appx. pp. 135-36.)

Harden then died on December 3, 2013, without the property being sold and without Cook having been paid for his work. (Appx. pp. 136, 154-58.) Phillips was appointed as personal representative of Harden’s estate. (Appx. pp. 136, 154-58.)

Phillips’ father then died on February 11, 2015. (Appx. p. 136.) After waiting an appropriate period of time, Cook brought the topic of performing the agreement to sell up to Phillips again, recounting Phillips’ previous assurances. (Appx. p. 136.) Phillips then stated that the agreement was between his father and Cook and that Cook’s “time was up and nothing could be done about it.” (Appx. p. 136.)

The property has not been sold; rather, Phillips issued a deed of distribution of the property from Harden’s estate to himself. (Appx. pp. 136-37, 159-66.) Cook “has never been paid a single cent for the labor, materials and improvements made to the Property.” (Appx. p. 137.)

Cook’s complaint asserts causes of action that the complaint titled unjust enrichment, conversion, constructive trust/equitable title, and partition. (Appx. pp. 137-38)

Phillips made a motion to dismiss the complaint pursuant to Rule 12(b)(6), SCRPC, and for summary judgment. (Appx. p. 167.) Phillips’ motion contended that Cook’s claims were barred by S.C. Code Ann. §§ 62-3-801 and -803, the statute of limitations, the statute of frauds, and the “Dead Man’s Statute,” S.C. Code Ann. § 19-

11-20. (Appx. p. 167.) It further sought the imposition of sanctions pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10. (Appx. p. 167.)

Later, Phillips also moved to quash the lis pendens filed in this case. (Appx. p. 168.) In that motion, Phillips contended “that the action is for money only[.]” (Appx. p. 168.)

Cook swore an affidavit, which states the truth of the facts alleged in the complaint and also specifically notes the following:

I was never paid anything for the labor, materials, renovations and remodeling work to the property. I did not invest my time and money into this project as a gift. The renovations and remodeling to the property greatly increased its value for which I have not been paid anything. I was repeatedly promised I would receive payment and that the property would be re-listed. I had no reason not to believe Benny Phillips, Jr. and I relied on his word and also his representations as the appointed Conservator and Personal Representative of Mrs. Harden’s estate.

(Appx. pp. 208-10.)

The circuit court granted Phillips’ motion for summary judgment and ordered the clerk of court to cancel the lis pendens. (Appx. p. 123.) The court ruled that all of Cooks’ claims were barred by the probate non-claim statute, S.C. Code Ann. § 62-3-803, because they were not presented as claims against the estate of Claudia P. Harden within the earlier of one year after her death or eight months from the publication of the notice to creditors in her estate. (Appx. pp. 120-23.) The court also ruled that the filing of the lis pendens was improper and cancelled it. (Appx. pp. 5, 6.)

Cook timely moved for the court to reconsider its rulings. (Appx. pp. 169-72.) The court denied that motion by form order, without a hearing. (Appx. p. 124.) Cook appealed.

The Court of Appeals reversed as to Cook's unjust enrichment cause of action but affirmed as to all other causes of action. (Appx. pp. 2-3.) The Court of Appeals ruled that the circuit court was wrong to conclude that S.C. Code Ann. § 62-3-803 barred Cook's claims, since "Cook's claims were brought against Phillips in his individual capacity, not against the estate of Phillips' grandmother or Phillips in any representative capacity." (Appx. p. 2.) The Court of Appeals held 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.'" (Appx. p. 2 (citation omitted).) The Court of Appeals then summarily stated 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." (Appx. p. 2.) The court then held that "because Cook has no interest in the Property, we affirm the circuit court's cancellation of the lis pendens." (Appx. p. 3.)

Cook petitioned for rehearing and replied to Phillips' return to his petition. (Appx. pp. 4-28.) The Court of Appeals denied the petition for rehearing, and this petition seeking certiorari followed. (Appx. p. 29.)

ARGUMENT

Viewed in the light most favorable to Cook, the record indicates that he has a cause of action for a constructive trust against Phillips. Viewed in the light most

favorable to Cook, the record indicates that he has an interest in the property under his contract. For each of these independent reasons, Cook's lis pendens was also proper.

I. For a constructive trust claim to lie, Phillips was not required to have *acquired* the property through inequitable conduct, and this Court should grant certiorari, reverse, and remand as to the constructive trust cause of action.

The Court of Appeals 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.’” (Appx. p. 2, quoting Lollis v. Lollis, 291 S.C. 525, 529, 354 S.E.2d 559, 561 (1987).) This seems to be because Phillips acquired title to the property by operation of law, by inheriting it, which happened regardless of his bad acts in holding or retaining the property once he had inherited it.

Respectfully, the Court of Appeals overlooked authority that states that a constructive trust may apply in a situation in which a person *holds* or *retains* property under such inequitable 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 principle is borne out by this 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 proper 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 such means. Id.

If this Court also takes the position 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 added). “[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 the Court of Appeals’ opinion purported 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, and Halbersberg all remain good law, and Briggs remains binding precedent on the Court of Appeals, precedent that should have prevented the decision it reached on this issue.

Cook respectfully submits that, in light of that precedent, the Court of Appeals incorrectly ruled that *acquisition* of property under inequitable circumstances is a required element of a constructive trust. Cook pled and made a factual showing of all of the elements of this cause of action. This Court can and should correct the mistaken course taken by the Court of Appeals in this area of law.

II. Because Cook had an interest in the property regardless of whether Phillips held it in a constructive trust for him, this Court should grant certiorari, reverse, and remand as to the partition/equitable title cause of action.

Respectfully, Cook notes that the Court of Appeals’ opinion gave erroneously 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.” (Appx. p. 2.) There is more to this cause of action

than whether Phillips holds the realty subject of this case in a constructive trust for Cook.

Cook pled, independently of whether there was a constructive trust involved, that “he has acquired an equitable interest in the Property.” (R. p. 139.) 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. 131-42, 208-09.) 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. 151, 208-09.) 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. 151.) The agreement also called for Cook to maintain insurance coverage and pay utility bills for the property. (R. pp. 148-51.)

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.

Cook respectfully submits that the Court of Appeals missed the mark in that, regardless of whether there is a constructive trust involved here, Cook has an interest in the subject real estate, and the conclusion that he does not is incorrect. This Court can and should correct this mistake, as well.

III. Because there are independent proper bases for a lis pendens in this case, this court should grant certiorari and reverse the cancellation of the lis pendens.

The Court of Appeals concluded that the trial court properly cancelled the lis pendens in this case “because Cook has no interest in the property[.]” (Appx. p. 3.) As discussed above, Cook must respectfully note that the 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 this Court should grant certiorari 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 of Appeals 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”).

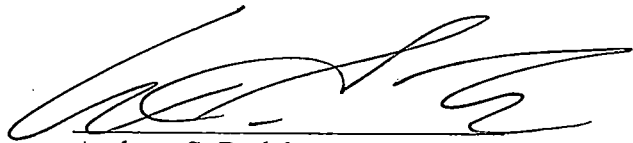
The Court of Appeals’ opinion also does not mention that this action was brought *in rem* with regard to the property at issue. When actions in rem are brought seeking relief with respect to specific real estate, a lis pendens is proper. See Bush v. Aldrich, 110 S.C. 491, 96 S.E. 922 (1918). While Cook’s 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.

Cook respectfully submits that the Court of Appeals erred in determining that the lis pendens Cook filed in this case was not a proper one. Granting this petition for a writ of certiorari would allow this Court to clear up any confusion on this issue, guard against further incorrect decisions in other case, and prevent the injustice that the Court of Appeals’ opinion is poised to allow.

WHEREFORE, Cook prays for an order granting a writ of certiorari to review the final decision of the Court of Appeals in this case.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I served the foregoing petition for writ of certiorari by depositing
a copy of it on the date shown below in the United States Mail, postage prepaid,
addressed as follows:

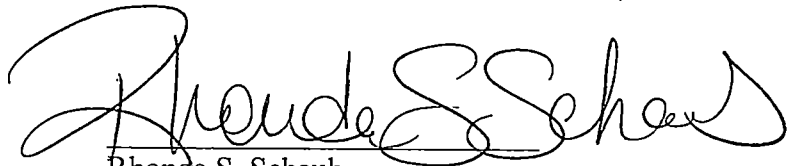
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