THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Case No.: 2018-001605

In the Matter of the Estate of Harriet Kathleen Henry Tims, Decedent,

Samuel H. Tims, individually and as Co-Personal Representative of the Estate of Harriet Kathleen Tims,.....Petitioner,

vs.

Michael Tims, individually and as Co-Personal Representative of the Estate of Harriet Kathleen Tims, ...Respondent,

and

Deborah T. Krane, individually and as Co-Representative of the Estate of Harriet Kathleen Tims, ...Appellant.

APPELLANT'S RELY BRIEF

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Without restating the issue or making arguments which have been set forth in Appellant's Initial Brief, Appellant offers the following points of clarification and rebuttal to the arguments Respondent raised.

I. Appellant takes issue with Respondent's Statement of Facts as they contain matters not in the record or are patently contrary to the evidence presented.

While Appellant contests many of the alleged facts set forth in Respondent's Statement of Facts on the grounds that Respondent failed to provide any documentation whatsoever other than his affidavit, there are several complete misrepresentations. In complete contravention to the Record and express language of the Land Exchange Agreement ("LEA"), Respondent states that the agreement between Respondent and the Decedent included a provision that "when the loan was paid off, Harriet world reconvey the property to Michael." See Respondent's Brief, p. 7. The LEA says nothing of the sort. It states only that the property would be returned to Respondent "upon the acquisition of the contract of sale ....". See Krane Affidavit, Ex. "A" (R. p. 0127, para. 6). Respondent's statement is a complete misrepresentation of the express language of the LEA.

The LEA states that it contains "the entire agreement of the Parties and all oral negotiations [are] merged herewith." See Id. (emphasis added) (R. p. 00127). Nothing in the LEA supports Respondent's contention of getting the property back solely upon paying off the loan. The presence of the merger clause prohibits Respondent from credibly arguing an intent not set forth in the LEA. "A merger clause expresses the intention of the parties to treat the writing as a complete integration of their agreement." Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct.App.1984); see also 11 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 33:21 (4th ed.1999); Black's Law Dictionary 880 (9th ed.2009) (defining an

integration clause, also termed a merger clause, as "[a] contractual provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract."). "The terms of a completely integrated agreement cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing." Wilson, 281 S.C. at 266, 315 S.E.2d at 134. At no time has Respondent argued that the LEA is ambiguous and in need of parol evidence to interpret the LEA.

Additionally, statements that Respondent has owned the property since 1993 and operates a deer processing business on the property are supported only by Respondent's Affidavit that contains no documentation or proof to support the alleged facts. Respondent's deed to the Decedent in 2012 contradicts Respondent's assertion of ownership. See Krane Affidavit, Ex. "A" (R. pp. 0125-0126). Respondent warranted that the Decedent had clear title to the property and that Respondent would defend it. Id. (R. p. 0126). Respondent also alleges that he paid all loan payments, taxes and other expenses associated with the property, but fails to provide one iota of documentation to substantiate these claims. Appellant on the other hand introduced copies of the Decedent's Note and Mortgage on the property as well as evidence of Decedent's payments for the property expenses. See Krane Affidavit, Ex. "C," "D," "E," "F." (R. pp. 0131-0144; 0145-0146; 0147-0148; 0150-0179). Respondent concludes his Statement of Facts by asserting that the Decedent never treated the property as her own, however that is clearly contradicted by Decedent's express representations to Palmetto State Bank in the Note and Mortgage signed in 2012 and her subsequent Personal Financial Statement signed in 2013 wherein she stated that the Cloverdale property was her "wholly owned property." See Krane Affidavit, Ex. "C" & "G" (R. pp. 0131-0144; 0180-0184).

II. Respondent acknowledges that under his theory of the case, there is no deadline to file an action against the Estate which is contrary to the purpose of the nonclaim statute.

The South Carolina Probate Code § 62-3-803, a nonclaim statute, "is to expedite and resolve claims against a decedent's estate with finality." Beach First Nat'l Bank v. Estate of Gurnham, 407 S.C. 194, 884, 754 S.E.2d 875, 879 (2014). Respondent asserts that he does not yet have a duty to make any claim and the time for him making a claim has not "commenced", thereby acknowledging that his position requires the Estate to stay open until he either obtains a contract for sale or supposedly pays off the loan. See Respondent's Brief, pp. 10-11. To allow Respondent's argument to prevail is to "eliminate the time limits of the Probate Code ...." Gurnham, 407 S.C. at ___, 754 S.E.2d at 884, citing and quoting Ocean Nat'l Bank v. Spang, 675 A.2d 983, 984 (Me. 1996). Appellant contests that simply paying off the loan would be sufficient to start the reconvening process, but neither have happened as Respondent admits.

III. There is no legitimate dispute as to the Title to Property.

The Lower Court held and Respondent attempts to argue, that Respondent couched his case as one where the title is in dispute, the nonclaim statute does not apply. Simply calling this a title dispute should not do away with the applicability of the statute. This is not a quiet title action. This is not an heirs' property issue. Respondent fails to show any evidence that there is an actual dispute as to the title. Respondent's own deed to Decedent contains Respondent's warrant that he will defend Decedent's title against any claims. See Krane Affidavit, Ex. "A" (R. p. 0126). Respondent offers no rebuttal to this.

Decedent's Note and Mortgage contain express representations to the Mortgagee that Decedent owned the property outright with no claims to the property by other persons. See Krane Affidavit, Ex. "C" (R. p. 0137, para. 5 & 9). Respondent, as set forth in the LEA, acknowledged

that Decedent would be taking out a Note and Mortgage on the property. He deeded the property to Decedent for the purposes of paying off Respondent's debts. See Krane Affidavit, Ex. "A" (R. p. 0127, para. 3 & 4). He cannot now allege that he did not intend for her to have that authority. Respondent offers no documentation whatsoever to establish that he or anyone for that matter treated the property as owned by Respondent after he deeded it to Decedent.

The only evidence before the Court is that title is held by the Decedent. The express terms of the deed, note and mortgage confirm Decedent's sole ownership of the property and rebut any argument that there is a title issue. The closing attorney confirmed absolute title in Decedent's name. See Krane Affidavit, Ex. "B" (R. p. 0129, para. 3). Decedent herself subsequently represented to the bank that the property was wholly owned by her. See, Id. at Ex. "G" (R. p. 0183). Respondent simply saying that the title is in dispute does not make it so and the claims barring statute should apply.

IV. The presentation of this matter as one for Declaratory Judgment has no bearing on the applicability of South Carolina Probate Code § 62-3-803.

The fact that this action was filed as a Declaratory Judgment action has no bearing on the applicability of the statute. Respondent provides no factual or legal basis for his argument that a Declaratory Judgment action voids the applicability of the statute. "[N]oncompliance eliminates a claimant's right of action against a decedent's estate and, in turn, deprives the court of the power to adjudicate the claim." Gurnham, 407 S.C. at ____, 754 S.E.2d at 882.

V. There is no waiver of the Nonclaim statute by all of the Personal Representatives.

Respondent's attempt to argue that the defense of limitations is waived by the personal representatives is misplaced. First, "the nonclaim statute is not a general statute of limitations as the two statutes are fundamentally and operationally distinct." Gurnham, 407 S.C. at ___, 754

S.E.2d at 881. "An untimely claim filed pursuant to a jurisdictional statute of nonclaim is automatically barred, so that the filing of a claim within the period specified is mandatory." Id. quoting 34 C.J.S. Executors & Administrators sec. 556 (Supp. 2013) (footnotes omitted). This is different than a statute of limitations which is ordinarily barred only if raised as an affirmative defense. See Id. The nonclaim statute takes "away the right of recovery when a claimant fails to present his or her claim as provided in the statute." Gurnham, 407 S.C. at ___, 754 S.E.2d at 881-882.

VI. Respondent's argument that he has ten (10) years to pursue a claim is misplaced.

In Respondent's 4th argument regarding the applicability of § 62-3-803, Respondent argues that he has ten (10) years to bring the action. This also is not supported by any law and is misplaced. However, Respondent's argument does highlight the fact that under his theory of the case there is no deadline or time period in which he would have to put the Estate on notice of claim. He states correctly that under the contract with the Decedent, the Decedent's obligation to deed the property back to him is triggered "[u]pon the acquisition of the contract of sale of the premises ...." Respondent's brief p. 10; Krane Affidavit Ex. "A" (R. p. 0127, para. 6). He then goes on to argue that since he has not acquired a contract for sale there is no need to file a claim.

The Gurnham Court rejected an analogous argument. In Gurnham the Supreme Court barred the mortgagee from making a deficiency claim against the Estate because the mortgagee failed to timely file a claim against the Estate, even though the deficiency claim had not yet been triggered by failure to pay on the mortgage. The Gurnham Court found that, like the Decedent's obligation here, "the mortgage was "unmatured" at the time the Estate was open, [but] liability was certain." Gurnham, 407 S.C. at ___, 754 S.E.2d at 883. Decedent's obligation to deed the property back to Respondent under the LEA was "certain" upon the acquisition of a contract of

sale. Quoting C.J.S., the Gurnham Court recognized that "[a] contingent claim within the meaning of the statutes relating to presentation of claims against a decedent's estate is one under which the existence of any right or liability is not presently certain or absolute, but is dependent on some future event that may or may not happen; if the right or liability exists independent of the event, the claim is absolute, notwithstanding that it may be uncertain in amount or unenforceable until the happening of the event." Id., 407 S.C. at ___, 754 S.E.2d at 883. The Gurnham Court held that although the bank's deficiency judgment was arguably after the decedent's death, it "did not "toll" the time limits of the nonclaim statute as the claim that formed the basis of the deficiency judgment arose long before the deficiency judgment was entered." Id. Likewise, in the present case, the claim that the Decedent may some day have to return the property to Respondent upon acquisition of a contract of sale arose at the time of the LEA. Respondent's right is a contingent right under the LEA and as such had to be filed timely.

VII. Respondent's own arguments contravene the intent of § 62-3-803 and confirm that this is not a dispute over the title of property, but a dispute as to whether or when the Decedent would have to return the property to Respondent.

Respondent specifically states that he "does not have a claim for return of the property until acquisition of a contract of sale ...." See Respondent's Brief, p. 11 (emphasis added). Respondent is admitting that this is a contingency claim with his "claim" contingent on the acquisition of a contract of sale. His right to a return of the property is based on the contract LEA. As set forth in the above argument, and like the mortgagee in Gurnham, Respondent was aware that he had a claim that was contingent on a future event – the acquisition of a contact of sale. As such, he had to timely file the claim pursuant to § 62-3-803 in order to put the Estate on notice.

VIII. Equity does not play a part in the applicability of § 62-3-803.

The Gurnham Court recognized that "even though a decision in favor of the Estate may appear inequitable, equitable considerations are not a factor in the claims-barring analysis." Id. 407 S.C. at ____, 754 S.E.2d at 884 citing Phillips v. Quick, 399 S.C. 226, 230, 731 S.E.2d 327, 329 (Ct. App. 2012) (quotation omitted); 34 C.J.S. Executors & Administrators 547 (Supp. 2013) (quotation omitted); E.W.H., Time Allowed by Statute of Nonclaim, 66 A.L.R. 1415 (1930) (notation omitted). Respondent's reliance on appeal to equity is misplaced when dealing with the nonclaim statute.

IX. The Land Exchange Agreement is not a security interest.

Lastly, in Respondent's 7th argument regarding § 62-3-803, Respondent makes the assertion that the LEA somehow falls within the confines of § 62-3-803(d) covering mortgages, pledges, liens or other security interests. That argument fails.

Respondent offers no support or legal arguments why the LEA would be considered a mortgage, pledge, lien or other security interest. It is not a mortgage, pledge or lien. The Mortgage that Decedent signed when she acquired the property specifically stated that the property was "unencumbered, except of encumbrances of record." See Krane Affidavit, Ex. "C", Mortgage, para. 5 (R. p. 0137, para. 5). The LEA is not recorded. See Id., Ex. "A" (R. p. 0127). It is not a security interest. A security interest "means any conveyance, agreement or arrangement in which personal property is used as security." S.C. Code § 62-1-201(42). Likewise, Respondent's argument that he is entitled to compensation for services rendered to the estate, or that a claim for reimbursement for expenses advanced by the Personal Representative, creates a security interest are also misplaced.

Respondent is absolutely entitled to reimbursement for any funds he advanced to the estate, just as all the personal representatives are entitled to reimbursement and responsible for an

accounting for any funds taken from the estate. This however does not affect who has title to the Cloverdale property, but rather what is Respondent entitled to from the estate.

X. No Clear and Convincing Evidence of a Resulting Trust.

As for Respondent's arguments regarding the Court granting Respondent Summary Judgment on his claim of a resulting trust, Respondent's arguments are based on erroneous facts and facts not contained in the record or supported by case law. This was before the lower court on a Summary Judgment motion and not a trial. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Gecy, et. al v. Somerset Point at Lady's Island HOA, Inc., et al., Opinion No. 5622 (Ct. App. Jan. 30, 2019) quoting Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 329-30, 673 S.C. 801, 802 (2009). The lower Court did not do this, but rather weighed the evidence and improperly viewed it in a light most favorable to Respondent, the moving party.

To prevail at trial on a resulting trust, Respondent would have to prove that a resulting trust existed by clear and convincing evidence. As noted herein and in Appellant's initial brief, Respondent offers no facts whatsoever to support his allegations other than his uncorroborated affidavit. Respondent's unsupported allegations are directly contradicted by Appellant's affidavit and by the documents attached thereto which include Decedent's express statements of absolute ownership as well as Respondent's own public affirmation that he bound himself "to warrant and forever defend ... the said premises unto the said Grantee ... against the [Respondent] ... and against every person whosoever lawfully claiming , or to claim, the same or any part thereof." See Krane Affidavit, Ex. "A," "C," and "G" (R. pp. 0126; 0137, para. 5 & 9; 0183).

The Lower Court, and Respondent, completely ignore Respondent's own express language that he used in deeding the property to Decedent. Id., Ex. "A" (R. p. 0126). Respondent warranted that he would defend Decedent's title. Instead he is now attacking it. At the very least, Respondent's representations in the deed and Decedent's in her note and mortgage and sworn financial statements, along with the closing attorney's representations are facts and inferences that support Appellant's argument that there is no resulting trust, nor an intent to have one, thereby precluding Summary Judgment.

Respondent's arguments in support of Summary Judgment are based only on mere allegations or denials contained in the pleadings and not on any documentation. He claims that all the elements of a resulting trust exist, but ignores the fact that the Court, in looking at this issue must take all the facts and inferences arising therefrom in a light most favorable to Appellant. He returns back to his unsupported arguments that he made all the payments on the property and is or was the sole caretaker, financially and physically, of the property, but offers no proof. No records support the allegations. No documents accompany his affidavit or pleadings. The Lower Court erroneously found that the Decedent had zero investment in the property ignoring Decedent's Note and Mortgage. The Lower Court ignored the Decedent's own subsequent representations as to ownership and ignored that Respondent himself deeded the property to his mother with a warrant of title. In short, Respondent fails to rebut any of Appellant's arguments. Now, the essence of his argument is that despite all the representations to the contrary, Cloverdale was not Decedent's property to mortgage. Respondent cannot make this argument in good faith and the lower Court's Order should be reversed.

XI. Respondent fails to address how his claim of breach of fiduciary duty against Appellant does not give Appellant a right to a jury trial on that claim.

With regard to Appellant's right to a jury trial, Respondent acknowledges that he has sued Appellant for an alleged breach of her fiduciary duties. This is a legal claim that Appellant has to respond to and as such is entitled to a jury trial on that issue.

XII. Appellant provided all the evidence relied upon in the Initial Brief to the Lower Court and all the matters presented are properly before the Appellate Court.

This matter is before this Court in part on appeal from the Lower Court's Summary Judgment in favor of Respondent. As much as Respondent might wish to have this before the Court as a result of a trial, it is not the case. In reviewing the grant of summary judgment motion, "the appellate court applies the same standard that governs the [circuit] court under Rule 56(c), SCRCP:" Gecy, et. al v. Somerset Point at Lady's Island HOA, Inc., et al., Opinion No. 5622 (Ct. App. Jan. 30, 2019) quoting Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

Respondent alleges that Appellant makes a policy claim but does not identify which claim that allegedly is. Appellant argued below that the statute should apply to Respondent's claims. She has not changed that position. Regardless, "[q]uestions of statutory interpretation are questions of law, which [the Appellate Court is] free to decide without any deference to the court below." Gurnham, 407 S.C. at ___, 754 S.E.2d at 879, quoting Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) (citations omitted). The Gurnham Court recognized that "[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." Id. quoting Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). As noted above the legislative purpose of this statute "is to expediate and resolve claims against a Decedent's estate with finality." Id., 407 S.C. at ___, 754 S.E.2d at 884.

As for the taking issue with the loan dates, these are factual errors by the Lower Court. The Lower Court had the documents Appellant referenced, but failed to take them into

consideration or read them properly. Likewise, the Lower Court sua sponte, included an irrelevant argument as to the alleged value of the property. This appraisal was not introduced by either party and is not contained in the record on appeal. Further, Respondent acknowledges in his initial Respondent's brief that the signed LEA, deed, note and mortgage were signed simultaneously. See Respondent's brief p. 7-8. In essence the Lower Court incorrectly took the facts in a light most favorable to Respondent rather than taking them in a light most favorable to Appellant. On this basis, the Lower court's Summary Judgment ruling should be reversed.

XIII. Although the Lower Court made no finding on whether there is a Constructive Trust, Respondent's argument that one exists still fails.

Respondent concludes with the argument that the decision below should be affirmed because if the property was not held in a resulting trust, it was held in a constructive trust. This argument fails for several reasons. First, the lower court specifically did not address a constructive trust. See Order p. 9 (R. p. 0011); Amended Order p. 10 (R. p. 0024). Second, constructive trusts arise when property is transferred by accident, mistake of fact, fraud or breach of trust or violation of a fiduciary duty. None of these elements exist as to the Decedent acquiring the property. Respondent freely and intentionally signed the Deed and warranted title in Decedent's name. He did so in order that Decedent could borrow money to pay off Respondent's debts. Respondent cannot establish that Decedent engaged in any acts warranting a finding of a constructive trust and certainly not by clear and convincing evidence. Respondent goes on to make the spurious and unsupported claim that Appellant's position in this litigation "shows fraud, bad faith, an abuse of confidence and breach of fiduciary duty[,]" and because of that, the principals of a constructive trust should apply. See Respondent brief, p. 17. Not only are the allegations and this argument preposterous, but they are unsupported by any argument below or any fact or law.

CONCLUSION

Because the Lower Court erred in refusing to apply the nonclaim provisions of § 62-3-803 to Respondents' claims and because the Lower Court erred in granting Summary Judgment to Respondent on Respondent's claim of a resulting trust where Respondent offered nothing other than mere allegations and Appellant provided extensive evidence to the contrary, the Lower Court's ruling should be reversed and this Court should hold as a matter of a law that Respondents' claims are barred for failure to timely file a claim pursuant to S.C. Code § 62-3-803 and that there is no evidence of a resulting trust. Further, this Court should reverse the Lower Court on its denial of Appellant's right to a jury trial on Respondent's claims against Appellant for breach of fiduciary duty.

RESPECTFULLY SUBMITTED,

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March 29, 2019

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Pursuant to Rule 211(b) of the South Carolina Appellate Court Rules, the undersigned, attorney in this matter for the Appellant, certifies that the Final Appellant's Reply Brief is identical to the brief previously served under Rule 208 with the revisions allowed under Rule 211 (b) (1) and (2).

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