

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
In The Circuit Court

Teasa K. Weaver, Master in Equity Court Judge

Appellate Case No. 2019-001968

Edgar Bruce Massey,

Respondent,

v.

James Anthony Fanning,
Danny Joseph Baker,
Michael Kaminski d/b/a Michael Kaminsky,
and Republic Finance, LLC,

of whom James Anthony Fanning is the

Appellant

INITIAL BRIEF OF RESPONDENT

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MAY 14 2020

SC Court of Appeals

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STATEMENT OF THE ISSUES ON APPEAL

- I. The STANDARD OF REVIEW ON EQUITABLE MATTERS DEMONSTRATES THAT THE MASTER'S ORDER CANNOT BE CHALLENGED ON EQUITABLE GROUNDS.
- II. ADDITIONAL GROUNDS EXIST TO AFFIRM THE MASTER'S RULING AS TO PARTITION AND ACCOUNTING.
- III. NO BASIS EXISTS TO SUPPORT A FINDING THAT THE APPELLANT'S BREACH OF THE PARTIES' AGREEMENT WAS NOT FUNDAMENTAL AND SUBSTANTIAL.
- IV. NO BASIS EXISTS TO SUPPORT A FINDING THAT THE APPELLANT'S BREACH OF THE PARTIES' AGREEMENT WAS WAIVED BY THE RESPONDENT.
- V. NO BASIS EXISTS TO CHALLENGE THE MASTER'S DETERMINATION THAT THE APPELLANT MUST ACCOUNT FOR RENT RECEIVED FROM A THIRD PARTY.

STATEMENT OF THE CASE

The Respondent EDGAR BRUCE MASSEY filed is to quiet title as to real estate in York County, South Carolina, for partition, and to obtain remedies relating to an alleged partnership between MASSEY and the Appellant JAMES ANTHONY FANNING. MASSEY also sought a partition of the subject real property and a declaration of the parties' respective rights, status and legal relations, pursuant to S.C. Code § 15-53-20.

By Deed dated July 9th, 1980 and recorded July 14th, 1980 in Deed Book 616, Page 430 in the Office of the Clerk of Court for York County, William Holman Rast and Marie M. Rast conveyed to James Anthony Fanning and Edgar Bruce Massey the following real property:

All that certain piece, parcel or lot of land lying, being and situate on the eastern side of Saluda Road in the City of Rock Hill, York County, South Carolina and being more particularly shown and described on plat of property drawn by Leonard H. Patterson as follows: BEGINNING at a point on the eastern edge of Saluda Road joint front corner of within property and property of Massey and Fanning and running thence N. 21-54 E. 137.2 feet to a point; thence in an easterly direction along the edge of Blackmon Street for a distance of 169 feet to a point; thence S. 20-44 W. 186.5 feet to an iron; thence N. 68-06 W. 170 feet to the point of beginning.

Tax Map No. 623-01-01-014

By Deed dated June 15th, 2006 and recorded July 11th, 2006 in Record Book 08193, Page 00017 in the Office of the Clerk of Court for York County, Bettye R. Thomas conveyed to James Anthony Fanning and Edgar Bruce Massey the following real property:

All that certain piece, parcel or lot of land lying, being and situate in the on the eastern side of Saluda Street City of Rock Hill, County of York, State of South Carolina and being more particularly shown and described on plat of property drawn by Leonard H. Patterson, as follows: Beginning at a point on the eastern edge of Saluda Street, joint corner of within property and property now or formerly of W. R. Rast, Jr., said point being 137.2 feet from the southern edge of Blackman [sic, properly Blackmon] Street and running thence S. 68-06 E. 170 feet to a point; thence turning S. 77-00 E. 78.5 feet to a point; thence running S. 83-08 E. 82.5 feet to a point; thence running S. 86-45 E. 145 feet to an old iron; thence running N. 87-03 E. 113.2 feet to an old iron; thence running S. S. [sic] 43-23 W. 270 feet to an iron; thence running N. 53-03 W. 516.1 feet to an iron on the eastern edge of Saluda Street; running thence with said edge of said Street N. 21-54 B. 52.4 feet to the point of beginning; containing 2.03 acres more or less; together with the right and privilege to use a certain 20 foot alley having a depth of 150 feet and leading from the eastern portion of the tract herein described to Marshall Road.

Tax Map No.s 623-01-01-003 and 623-01-01-008

The 1979 Agreement has no application to the second plat referenced above and conveyed by Bettye Y. Thomas in 2006.

MASSEY and FANNING operate a mobile home park and rental area located on the subject real property. MASSEY alleged expenditure of various sums for the upkeep of the property, for the investigation of this matter and the prosecution of this civil action.

MASSEY and FANNING executed an agreement concerning the subject real property on October 5, 1979. That Agreement states in its third expository paragraph:

WHEREAS, the Parties are no longer in business together, but desire to continue their partnership regarding the real property and trailer park located thereon and desire to reduce their agreement to writing; . . .

By his suit, MASSEY also sought an accounting as to sums related to the subject property, and for services rendered.

This matter came on regularly for trial on December 4th, 2008 at 9:30 A.M. before the Honorable Teasa K. Weaver, Master in Equity for York County, sitting as a Special Circuit Court Judge without a jury. By Order entered September 23, 2019, the Court found that no partnership existed

between the parties, granted partition of the subject properties, required a full accounting from FANNING as to the parties' business. This appeal followed.

STANDARD OF REVIEW

“In an action at law, on appeal of a case tried without a jury, the appellate court's standard of review extends only to the correction of errors of law.” [Citing to *Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc.*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct.App.2004).] “The trial judge's findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings.” Id.

[*Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. ___, 705 S.E.2d 76 (Ct.App. 2011).]

The relevant commentary of AMERICAN JURISPRUDENCE 2D states:

Partition, if well-founded, is an absolute right, at least in the absence of an agreement waiving the right. It does not arise out of contract. The right is also not affected by the motive of the person who seeks partition. Practically, the only limit to the right lies in the inherent qualities of the estate to be divided. And in the absence of statutory provisions to the contrary, the absolute right to partition yields to no consideration of hardship, inconvenience, or difficulty.

[59A AM.JUR.2D *Partition* § 4 (09/2003); footnotes omitted.]

The proposition above, as stated by AMERICAN JURISPRUDENCE 2D, leaves the Appellant with two arguments against partition: either a) they have an enforceable agreement waiving the right to partition, or b) some equitable ground exists to prevent partition.

The Respondent acknowledges that there are a small number of cases allowing equitable grounds as a defense against partition. Again, the commentary of AMERICAN JURISPRUDENCE 2D states:

Since the right of partition is limited by the requirement of fairness, the courts will not permit use of the remedy of partition for the accomplishment of a fraudulent, oppressive, or unconscionable purpose. Although the right to partition is generally considered absolute, inequitable hardship and depression may defeat the action to partition property.

[59A AM.JUR.2D *Partition* § 6 (09/2003); footnotes omitted.]

The Appellant has characterized his first and major ground for appeal as an objection to the Master's finding that a prohibition against partition would be inequitable. [Option b) above.] The Master in fact concluded:

The question now turns to whether the Plaintiff should be granted a partition despite his express waiver in the Agreement. Equity should not "lend its aid to one who has been guilty of inequitable conduct in the subject matter." *Masonic Temple, Inc. v. Ebert*, 199 S.C. 5, 18 S.E.2d 584 (1942). Though neither party adhered to the terms of the Agreement, Fanning further ignored its terms by signing both contracts with Baker without Plaintiff's consent, and by withholding rents. It would be inequitable to prohibit Plaintiff from partition based upon the same terms Fanning disregarded.

[RECORD ON APPEAL, Order of 09/23/19, Sec. B.; footnote omitted.]

Thus the Master found the equities to lie with MASSEY and against FANNING. The standard for review of an equitable question is stated as follows:

In an action in equity, the appellate court may resolve questions of fact in accordance with its own view of the preponderance of the evidence. *See Wilder Corp. v. Wilke*, 324 S.C. 570, 577, 479 S.E.2d 510, 513 (Ct. App.1996) (citing *Townes*, 266 S.C. at 86, 221 S.E.2d at 775) (holding that because the master-in-equity heard the action, which was equitable in nature, without appeal to the circuit court, the appellate court could find the facts on appeal in accordance with its own view of the preponderance of the evidence). However, this broad scope of review does not require this Court to disregard the findings at trial or to ignore the fact that the master was in a better position to assess the credibility of the witnesses. *Laughon v. O'Braitis*, 360 S.C. 520, 524-25, 602 S.E.2d 108, 111 (Ct.App.2004).

[*Fesmire v. Digh*, 385 S.C. ___, 683 S.E.2d 807 (Ct.App. 2009).]

Fesmire also holds that partition and accounting are matters in equity. *Id.*

ARGUMENT:

NO EVIDENCE EXISTS TO CHALLENGE THE ORDER IN EQUITY

To succeed on the basis of equity, the Appellant must demonstrate that, in light of all the evidence, a partition cannot be ordered in fairness. To that end, the Appellant has cited one basis: the Respondent's execution of the agreement prohibiting partition. No adequate response is made to the Court's finding that FANNING signed two agreements with third parties without MASSEY's consent and while withholding rents.

The Appellant has failed to show, or to preserve, sufficient evidence to allow this Court to disregard the Master's finding that equity lay on the side of the Respondent.

ARGUMENT:

ADDITIONAL BASIS TO AFFIRM

Rules 208(b)(2) and 220(c), S.C.A.C.R., allow the Respondent to contain in his Brief argument asking this Court to affirm for any ground appearing on the record.

It is uncontroverted that MASSEY and FANNING are, and were doing business as the operators of a mobile home park and rental area located on the real property described herein above, as stated in their 1979 Agreement. The Master finds their arrangement not to be a partnership, despite the express language of the said agreement:

However, it lacks details regarding the control and management of the business, namely the trailer park. Further, the parties' dealings with each other and the public do not align whatsoever with the terms of the Agreement. Each mobile home is owned individually by the parties. They have not and do not share the rents they collect, or the losses and expenses incurred to rent and maintain the homes. The liabilities they share in the payment of taxes on the real property, or utilities and insurance for the business building are not so different from other joint owners of property. They do not share in the control or management of their homes, and in the last few years have had little to no contact with each other. There was also no evidence they interacted with the public in a manner supporting a partnership. The parties simply divided the existing spaces to rent, which at first was uneven thirteen. It was later that Fanning added a mobile home

space to Parcel 2, making the total number of spaces between them an even fourteen. This conduct demonstrates they ignored the terms of the Agreement, setting up separate businesses, not a partnership.

[RECORD ON APPEAL, Order of 09/23/19, Sec. B.]

The Respondent argues, in the alternative, that the Master's finding against the existence of a partnership is too narrow. S.C. Code § 33-41-210 states the general rule:

A "partnership" is an association of two or more persons to carry on as co-owners a business for profit . . .

Even allowing the Master's findings as to the lack of joint actions recited above, the Order of 09/23/19 and its findings clearly acknowledge joint payment of taxes and the rights to joint rents. A partnership can be said to have existed, even if limited in scope.

S.C. Code § 33-41-930 is a part of the Uniform Partnership Act, originally adopted by this State in 1950; it sets out the grounds for dissolution of a partnership, providing as follows:

Dissolution is caused:

. . .

(2) In contravention of the agreement between the partners, when the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

The terms of the 1979 Agreement forbidding dissolution or division of the subject real property are illegal insofar as they contradict S.C. Code § 33-41-930; as such, they cannot be enforced, under either common or Statutory law. Thus, Option a) above (the agreement against partition is not enforceable) does not apply.

In addition, S.C. Code § 33-41-540 provides, in relevant part:

(1) Every partner must account to the partnership for any benefit and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property.

S.C. Code § 33-41-55 provides, in relevant part:

Any partner shall have the right to a formal account as to partnership affairs:

...

(3) As provided by Section 33-41-540; or

(4) Whenever other circumstances render it just and reasonable.

The Respondent has plead for an accounting. The parties have long shared costs and expenses of the subject real property, as acknowledged by the Master's Order. It is manifestly equitable that an accounting accompany and be a part of the dissolution of any partnership between the parties.

Even if a partnership exists between the parties, the relief ordered by the Master is justified.

ARGUMENT:

APPELLANT'S BREACH WAS FUNDAMENTAL

The Appellant argues that his breach of the parties' agreement was not fundamental or substantial enough to defeat its enforcement. This argument was not plead below. As a legal conclusion, and to the extent this defense was raised, it is unsupported by the facts. As a matter in equity, the Respondent references his arguments above as to the lack of evidence to support the argument.

ARGUMENT:
WAIVER OF BREACH

The Appellant argues that any breach of the parties' agreement was waived by MASSEY. This argument was not plead below. As a legal conclusion, and to the extent this defense was raised, it is unsupported by the facts. As a matter in equity, the Respondent references his arguments above as to the lack of evidence to support the argument.

ARGUMENT:
RECEIPT OF RENT

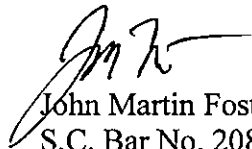
The Appellant argues the lack of evidence to support a finding for receipt of rent by FANNING from Baker, one of the third parties who entered into a contract with him for purchase of the real property. The rent in question was clearly paid toward an attempted purchase of the real property. As such, the Appellant must account for it to the Respondent.

CONCLUSION

The Order of the Master is clearly supported by the law and by the evidence adduced in the case. To the extent there is a partnership between the parties, the Master's findings are enforced upon other grounds. The appeal should be dismissed.

May 7, 2020

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that the final Brief of Respondent complies with Rule 211(b), S.C.A.C.R.

May 7, 2020

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CERTIFICATE OF SERVICE

The undersigned, counsel for Appellants in the civil appeal above, hereby certifies that, on the date written below, he served copies of the following pleadings or documents in the above-captioned and numbered civil action:

Initial Brief of Respondent;
Designation of Matter to Be Included in the Record on Appeal; and
this Certificate of Service,

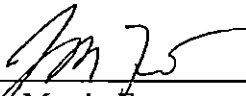
by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a

conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. all pursuant to Rule 262, S.C.A.C.R.

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May 7, 2020

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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Re: Edgar Bruce Massey. Respondent
v. James Anthony Fanning et al.
of whom James Anthony Fanning is the Appellant
Appellate Case 2019-001968

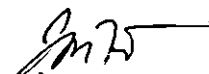
Dear Ms. Kitchings:

Enclosed herewith please find the original and one (1) copy of the Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal, together with Certificate of Service for the same in the above referenced case.

By copy of this letter, I am serving the attorney for the Respondent with copies of the said documents as evidenced by the Certificate of Service.

Please return the extra conformed copy to my office in the enclosed self-addressed, stamped envelope. As always, thank you, and your staff, for your assistance in these matters.

Sincerely,



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jmf/
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