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May 20 2020

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Teasa K. Weaver, Master in Equity Court Judge

2019-001968

Edgar Bruce Massey. Respondent

v.

James Anthony Fanning, Danny Joseph Baker,
Michael Kaminski, a/k/a Michael Kaminsky,
And Republic Finance, LLC,

Of Whom James Anthony Fanning is Appellant Appellant

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENTS

1. **THE TERMS OF THE 1979 AGREEMENT FORBIDDING DISSOLUTION OR DIVISION OF THE SUBJECT REAL PROPERTY WAS NOT ILLEGAL IN CONTRADICTION OF S.C. CODE § 33-41-930.**

As a general rule it is a matter of right for the tenant in common to have partition. That right may be waived by an expressed or implied agreement. *Kayann Properties, Inc. v. Cox* 268 N.C. 14, 149 SE2nd 553, (N.C. 1966); *Chadwick v. Blades*, 210 N.C. 609, 188 SE2nd 198 (N.C. 1936) As stated in Chadwick, “statutes declaring that joint tenants or tenants in common shall have the right to partition were never intended to interfere with contracts between such tenants modifying or limiting their otherwise incidental right or to render it incompetent for parties to made such contracts”. An agreement to refrain from partition must be reasonable. *Michalski v. Michalski*, 142 A2nd 645, 50 NJ Super. 454 (1958).

The question in this case is whether the clause in the agreement waiving partition is unreasonable. To determine unreasonableness, the Courts must inquire into the facts and circumstances surrounding the purpose of the clause in the agreement. The Appellant and the Respondent were in the business of operation Rock Hill Paint and Body Shop.¹ The Respondent left the business and the Appellant was going to continue operating the body shop.² The contract forbidding partition was important to the Appellant because he intended to continue operating the body shop.³ The agreement that was negotiated between the Parties provided that the Parties would continue to operate the mobile home park on the property but the Appellant would continue to operate the body shop. The Parties included in the agreement a clause for termination of the joint ownership in the

¹ Transcript December 4, 2018, Pg. 36, lines 3-12;

² Transcript December 4, 2018, page 37, lines 3-20;

³ Transcript December 4, 2017, page 37, lines 22 – Pages 38, line 22

event of either Parties' death. In the event of death of either Party the decedent estate would sell the decedent Party's interest to the other Parties. The agreement was reached after negotiation between the Parties and drawn up by an attorney. ⁴

The Respondent contends that the non-partition provision of the agreement is a violation of S.C. Code § 33-41-930. S. C. Code Annotated § 33-41-210 defines a partnership as follows, "A "partnership" is an association of two or more persons to carry on as co-owners a business for profit". S.C. Code § 33-41-220(2) provides, "Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property or part ownership does not of itself establish a partnership". S.C. Code § 33-41-930(c) provides, "Dissolution is caused by the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking". Number Two (2) of the agreement provides that, "the party shall equally divide all rents, profits, liabilities, maintenance, taxes and insurance regarding the subject property including any payments on mortgages or similar payments". As a practical matter, the parties have never carried on the business of operating the trailer park as co-owners of a business for profit. The property has certain portions that are designated as spaces for trailers or campers. Each party agreed that they would take certain spaces on the property and receive the rent from units on the property. Each party owns the unit that is on their respective spaces and collects the rent directly from the tenant. Each party pays the taxes on the unit that is on his particular space of property. Each party decides what rent will be charged for the use of the unit he owns. The Parties do not share the profits but keep the rent they received from their respective units. Each party takes care of the repairs of their respective units. The

⁴ Transcript December 4, 2018, page 26, lines 7-9

Parties do not operate as co-owners of a business for profit. The fact that the Parties jointly own the property upon which the units are located does not establish a partnership. The joint ownership of the land is separate and apart from the operation of the rental of the trailers.

2. APPELLANT’S ARGUMENT THAT ANY BREACH BY APPELLANT WAS NOT FUNDAMENTAL WAS ARGUED IN THE COURT BELOW.

The Respondent contends that Appellant’s argument that any breach was not fundamental was not plead below. The Respondent did not allege a breach of the partnership agreement as a grounds for partition in his Complaint therefore there was no reason for Appellant to raise this issue in his Answer. However, the Appellant did raise this issue in his pre-trial brief as well as his Motion to Amend or Alter the Judgement. Therefore, Respondent’s contention that the issue had not been raised is without merit.

3. THE APPELLANT DID RAISED THE ISSUE OF WAIVER OF BREACH IN THE COURT BELOW.

Respondent contend that the Appellant’s contention that any breach of the Party’s agreement was waived by the Respondent was not plead below. The Respondent did not allege a breach of the partnership agreement in his Complaint therefore there was no need for the Appellant to raise this issue in his Answer. However, the Appellant did raise this issue in his pre-trial brief as well as his Motion to Amend or Alter the Judgement. Therefore, Respondent’s contention that the issue had not been raised is without merit.

CONCLUSION

Fore the reason stated, the Court should reverse the judgment of the Circuit Court.

Respectfully Submitted,

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PROOF OF SERVICE

I, certify that I served the Appellant’s Initial Reply Brief on Respondent, Edgar Bruce Massey by depositing a copies of the same in the United States mail, postage prepaid, on May 20, 2020, addressed to its attorney, Mr. John Martin Foster, PO Box 106, Rock Hill, SC 29731-6106.

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