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APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Kristi L. Harrington

Case No.: 2016-CP-10-3504

RECEIVED
JUL 09 2019
SC Court of Appeals

Ernest McKnight.....Appellant,

v.

Anna Michelle Porcher, Eugene D. Gathers, Estate of Ned Wright, Estate of Hattie Gasden, Edward Wright, Estate of Samuel Wright, James Wright, Estate of Earline Wright Maxwell, Ida Wright, Estate of Wileminia Wright, Henry Wright, Jr., Estate of Henry Wright, Estate of Ernestine Wright, Estate of Samuel Wright, Edward Wright, Estate of James Wright, Estate of Oscar Wright, Martha Wright, Estate of Leroy Wright, Estate of Edward Wright, Estate of Harold Wright, Estate of Charles Wright, Jr., Estate of Hattie Wright Gaston a/k/a Hattie Wright Gadsden, Estate of Earline Wright, Estate of Annie Wright, Walter Nathaniel Porcher, III, Keisha Kenyatta Porcher, and John Doe and Mary Roe, fictitious names representing unknown minors, incompetents, persons in the military service within the meaning of Title 50, United States Code, commonly referred to as the Service Members Civil Relief Act of 2003, persons imprisoned, and persons under any other legal disability and fictitious names representing unknown heirs, devisees, distributes, of personal representatives of any deceased persons, Respondents.

FINAL BRIEF OF THE APPELLANT

Other Counsel of record:

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TABLE OF AUTHORITIES

1. Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009)
2. Sloan Const. Co. v. Southco Grassing, Inc., 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008)
3. Plum Creek Dev. Co. v. City of Conway, 334 S. C. 30, 512 S.E. 2d 106 (1999)
4. Rogers v. Kunja Knitting Mills, U.S.A., 336, S.C. 537, 520 S.E. 2d 817 (Ct. of App. 1999)
5. South Carolina Code of Laws Section 15-61-25, “*Right of First Refusal of Joint Tenants or Tenants in Common*” (2016).

STATEMENT OF THE ISSUES ON APPEAL

I. ARE THE APPELLANT’S CLAIMS BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL?

II. DID THE APPELLANT HAVE A STATUTORY RIGHT OF FIRST REFUSAL PURSUANT TO SECTION 15-61-25 OF THE SOUTH CAROLINA CODE OF LAWS?

STATEMENT OF THE CASE

Procedural Background

A complaint was filed on January 12, 2010 to quiet title to a 9.5 acre parcel of real property located on John's Island, South Carolina. The Appellant answered the complaint and filed a counter-claim on March 16, 2010. The Plaintiff replied on March 31, 2010. On July 26, 2010 there was a Consent Order of Dismissal, dismissing with prejudice, Ernest McKnight's counter-claim for adverse possession. On April 21, 2011 there was an order granting a motion for summary judgment, in favor of the now deceased Plaintiff, John Wright and quieting title in Eugene Gathers, the substituted party for John Wright. Ernest McKnight was specifically excluded from this order. On September 19, 2011 there was a motion to set aside summary judgment. On March 12, 2012, Anna Porcher's Motion to Intervene as a party defendant was denied but she was allowed to intervene as a creditor only. No creditor claims were ever filed by Anna Porcher. On May 2, 2012, an order denying the Motion to set aside summary judgment by Ernest McKnight was signed by Circuit Court Judge J. C. Nicholson.

Appellant subsequently filed an action for fraud against the Respondent Anna Procher and she then asked that the action be dismissed, pursuant to a 12 (b)(6) motion, alleging that the matter was barred because of the doctrines of res judicata and collateral estoppel. The motion to dismiss was granted and this appeal derives from the order reflecting the court's ruling

confirming the Respondent's claim action that the action for fraud and to quiet title to certain parcels of real property against Anna Porcher be dismissed.

FACTS

With the exception of Ernest McKnight's (hereinafter "McKnight") claim for adverse possession, the trial court's 2nd Order purportedly preserved all of McKnight's allegations and claims in this matter. The Plaintiff, Eugene Gathers, was vested with fee simple title to the subject property, designated in the court's order as having TMS No.: 245-00-00-026 and containing 6.94 acres. The legal description in the order, in part stated"saving and excepting Lot 1 (.88 ac), Lot 2 (7 ac) and Lot 3 (1.0 ac).

Judge Nicholson's order did not state that McKnight's statutory right of first refusal was denied but it was so ruled upon at the hearing. The hearing was conducted without the benefit of a court reporter's transcript being made available to the Appellant nor any scheduling order or notice showing that this evidentiary hearing was scheduled on the court's docket. An appeal of the order by Judge Nicholson was dismissed because it was served one day late.

The court's order granted the Plaintiff, Eugene Gathers, a fee simple interest in the parcel of real property designated as having Tax Map Number: 245-00-00-026. The interest or rights of the Respondent Anna Porcher in Tax Map Numbers: 245-00-00-183, 245-00-00-031 and 245-00-00-169, were not addressed in Judge Nicholson's order. Appellant was not afforded a right of first refusal to purchase the petitioning tenant's interest because McKnight was deemed by the court to have lacked standing to do so.

STANDARD OF REVIEW

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to the non-movant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper. Sloan Const. Co. v. Southco Grassing, Inc., 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008).

ARGUMENTS

I. ARE THE APPELLANT'S CLAIMS BARRED BY THE DOCTRINE OF RES JUDICATA OR COLLATERAL ESTOPPEL?

McKnight 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"). This Mortgage was given to McKnight by John Wright, the Respondent Anna Michelle Porcher, and Harold L. Wright ("Mortgagors"), to secure re-payment of sums that the Appellant paid toward delinquent property taxes on the subject real property to prevent the property being sold the next day at the county tax sale. The mortgage by its terms conveyed to McKnight 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.” McKnight was conveyed an interest in the entire 9.50 acre parcel, including the portion that was expressly excepted from Judge Nicholson’s order and now claimed by the Respondent. 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 own terms, evidences intent by the parties, to convey (emphasis added) an interest in the entire subject property until the debt on the encumbered property was fully satisfied.

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 fully satisfied nor has he been afforded his statutory right of first refusal.

The Respondent attempted to intervene, through her counsel, as a named party defendant, in the action captioned; *Eugene Gathers vs. Ned Wright, et al*; Case No.: 2010-CP-10-0250, and also as a co-tenant with an interest in the subject real property but said motion was denied. Respondent filed various documents Pro Se, before retaining counsel, that clearly show that she had an intimate knowledge of the underlying facts in this matter, the family history of the

deceased title-holder, and the allegations and counterclaims made by the Appellant. The Respondent was never made a party to this action to litigate and defend her claims nor regarding ownership, partition, possession, the Appellants claims regarding the mortgage or her assertions regarding her paying of property taxes on the real property that was the subject of that quiet title action.

Respondents' counsel correctly cites Plum Creek Dev. Co. v. City of Conway, 334 S. C. 30, 512 S.E. 2d 106 (1999) and Rogers v. Kunja Knitting Mills, U.S.A., 336, S.C. 537, 520 S.E. 2d 817 (Ct. of App. 1999) as representative of the doctrine of res judicata in South Carolina.

There is, however, the requirement that the current matter arose out of the same transaction or occurrence that was the subject of a prior action between the same parties. (emphasis added) The prior action from which Judge Nicholson's order derived does not indicate that the Respondent was a party to that action, other than as a creditor and specifically excluded the parcels now at issue from that proceeding.

Although the Ned Wright proceedings were couched as one to foreclose on the note, it is by its language, also an action quieting title and partition of real property. The order describes the property to exclude the specific parcels that are now claimed by the Respondent and it also confirms title in another specific portion of the original parcel in, Eugene Gathers.

The present action by McKnight does not attempt to re-litigate the same issues nor was Anna Porcher allowed to intervene, as a real party in interest, as to the issue of ownership of the parent Lot of the parcel designated as having Tax Map Number 245-00-00-026.

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”). Section 15-61-25 (“Right of First Refusal of Joint Tenants or Tenants in Common” hereinafter “Right of first refusal”), 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 the application of Section 15-61-25 (“Right of First Refusal of Joint Tenants or Tenants in Common”). Appellant is now prevented from exercising this right pursuant to South Carolina Code Section 15-61-25; the Statutory Right of First Refusal states in pertinent part:

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 non-petitioning 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 non-petitioning 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

The court, after hearing the Appellant’s argument that the Appellant was an assignee of those heirs who where signatories to the Mortgage and Note declared that he was not to be accorded the rights as enumerated in Section 15-61-25. Appellant again filed the Right of First Refusal in this action against the real property, now claimed by the Respondent because he was never accorded the opportunity to exercise said right specifically reserved for him in the

Appellate Court's order, filed March 6, 2015 in Appellate Case Number 2015-000471.

CONCLUSION

The order of the Honorable J.C. Nicholson dated May 2, 2012, and filed May 4, 2012, is a denial of Appellant's motion for relief from his 2nd Order (re-characterized as a motion under Rule 60(b)). The court quieted title in favor of the Plaintiff, Eugene Gathers, based upon a theory of adverse possession 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 and the court also ignored subsequent assertions that all of the heirs were not before the court, that a portion of the property was previously partitioned to other heirs and that the Appellant and Anna Porcher, paid property taxes on the property.

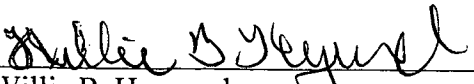
The Mortgage unequivocally conveyed the interest of John Wright, Anna Michelle Porcher, and Harold L. Wright ("Mortgagors") to the Appellant and as such gave the Appellant any and all rights afforded to them pursuant to Section 15-61-25 of the South Carolina Code of Laws. The order granting the Respondent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

Appellant does not attempt to re-litigate those issues in the present action in that the order specifically excludes the real property claimed by the Respondent. The Appellant asks that this

court allow the issues that are asserted against the Respondent to be fully adjudicated because the respondent knew of the falsity of her assertions and claims as to the parcels of real property herein identified to the detriment of the Appellant, Ernest McKnight.

July 5, 2019

Respectfully submitted,



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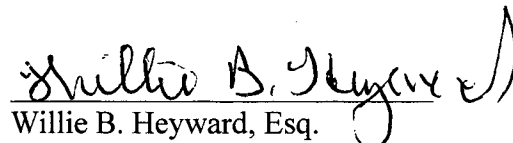
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of the Appellant contains all material proposed to be included by the parties and not any other material under Rule 210, SCACR.

July 6, 2019



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