

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2018-CP-26-00120

East Cherry Grove Realty Co., LLC; and)
Ray & Nixon, LLC,)

Plaintiffs,)

vs.)

State of South Carolina; South Carolina)
Department of Health and Environmental)
Control; and Matt Leonhard,)

Defendants.)

AMENDED
FINAL ORDER

RECEIVED

Jan 19 2021

SC Court of Appeals

I. BACKGROUND

This matter is before the court for a trial without a jury. East Cherry Grove Realty Co., LLC received a letter, through its managing member, John David Ray, in which it was advised by the South Carolina Department of Health and Environmental Control (hereinafter referred to as “DHEC”) that it must submit documentation of ownership of certain real property located in Cherry Grove Beach, South Carolina. The basis of the request by DHEC was that Matt Leonhard, an adjoining landowner, had filed a permit application to build a dock consisting of a walkway to a fixed pier with such dock to be built on tidelands adjacent to Leonhard’s property located in North Myrtle Beach, South Carolina.

South Carolina law provides that if a potential owner believes they own the adjacent tidelands they must file a lawsuit pursuant to S.C. Code § 48-39-220 entitled “Legal Action to Determine Interest in Tidelands.” This suit was timely and properly filed by East Cherry Grove Realty Co., LLC and Ray & Nixon, LLC. Ray & Nixon, LLC claims the tidelands over which the dock is to be constructed is owned by it and Leonhard has no legal rights. East Cherry Grove Realty Co., LLC

joined in this action as an additional Plaintiff to obtain a legal determination as to its ownership in certain other tidelands rather than wait for additional litigation by individuals requesting dock permits over its property. The Court tried both claims together and Plaintiff proceeded under the declaratory judgment cause of action only.

Ray & Nixon, LLC requests that the court find it is legal owner of the tidelands in question and that Defendants are not entitled to grant a dock permit to Leonhard because the permit will interfere with its ownership interests.

Plaintiff East Cherry Grove Realty Co., LLC requests that the court declare that it owns in fee simple certain tidelands identified by Horry County Land Records as Horry County Tax Map No. 145-00-01-001 (Exhibit 12).

Plaintiff Ray & Nixon, LLC requests the court declare it is the fee simple owner of tidelands with Tax Map No. 145-02-25-004 (Exhibit 17).

The Plaintiffs seek an order of this court that both East Cherry Grove Realty Co., LLC and Ray & Nixon, LLC prohibit DHEC from granting a dock permit over the Plaintiffs' property now or in the future without Plaintiffs' written consent.

Finally, Plaintiffs also seek an order of this court that these tidelands were derived from a Kings Grant and/or sovereign grant.

This case started in the early 1950s when C.D. Nixon formed East Cherry Grove Realty Company to develop Cherry Grove Beach and sell residential lots. Almost immediately thereafter a dispute arose with the State of South Carolina over ownership of the real property. A lawsuit was filed and Judge Morrison ruled that East Cherry Grove Realty owned to the center of all non-navigable creeks and to the low water mark on navigable creeks.¹ The Order was appealed to the South Carolina

¹ Ray & Nixon, LLC was not a party to this lawsuit.

Supreme Court and was eventually settled. The basis of Judge Morrison's decision was Kings Grants going back to December 4, 1735. (Exhibit 10). Further, Judge Hyman essentially heard a similar case and issued a similar Order filed July 8, 2015 that Plaintiffs owned tidelands derived from a Kings Grant. (See *East Cherry Grove Realty Co., LLC v. State of South Carolina and South Carolina Department of Health and Environmental Control*; C/A No. 2014-CP-26-1412.) This Order was not appealed by the State. (Exhibit 18).

For the reasons set forth below, I find that both Plaintiffs East Cherry Grove Realty Co., LLC and Ray & Nixon, LLC have met their burden of proof by a preponderance of the evidence and that East Cherry Grove Realty Co., LLC is the owner in fee simple of tidelands described as Horry County Tax Map No. 145-00-01-001 and that Ray & Nixon, LLC is the fee simple owner of tidelands described by Horry County Tax Map No. 145-02-25-004. Further, each of these tidelands are derived from Kings Grants or Sovereign Grants as per the testimony of all the experts at trial.² (Exhibits 1, 5, 6, 7, 8 and 9).

II. FINDINGS OF FACT

Plaintiffs offered four witnesses at trial. The first witness who was called to testify was Attorney William DesChamps, Esquire, who was qualified as an expert by the court on real estate title opinions without objection. DesChamps testified that he had handled real estate closings and title searches in Horry County for over 35 years and that he regularly traced Kings Grants and Sovereign Grants back to the early 1700s. He further testified he had written thousands of title opinions to banks, buyers and sellers over the course of his career. DesChamps described the title search in this case as first going to the Horry County Courthouse and searching the back titles for the East Cherry Grove Realty and Ray & Nixon property which are traced back to 1801 when Horry

² This trial was held by WebEx with each attorney presenting his witnesses and exhibits in the same manner as if the trial were held at the courthouse.

County was formed. DesChamps also travelled to the South Carolina Archives Department in Columbia to research Kings and Sovereign grants applicable to the East Cherry Grove Realty Co., LLC and the Ray & Nixon, LLC property. Further, DesChamps reviewed the title records of C.B. Berry, a surveyor and local historian who had extensive firsthand experience concerning the subject property. (Exhibit 11).

DesChamps testified the following Sovereign and/or Kings Grants are applicable to this case:

1. George the Second to John Morrall (435 acres)
2. George the Third to John Alston (300 acres)
3. State Grant to Daniel Morrall (200 acres)
4. State Grant to Daniel Morrall (20 acres)

These grants as noted above apply to the East Cherry Grove Realty Co., LLC and Ray & Nixon, LLC real property and provide a clear, detailed, logical description of the Kings Grants as presented in Plaintiffs' No. 1 (the combined Kings Grants map).

DesChamps also reviewed a 2010 plat of the Kings Grants compiled by Russ Courtney of Russ Courtney & Associates, a registered land surveyor who is the State's expert in this case. (See Plaintiffs' Exhibit 22 and 5). DesChamps testified that he normally reviews surveyors' maps in locating real property and that in his expert opinion to a reasonable degree of certainty, the Courtney map has Kings Grants drawn over the real property of Ray & Nixon, LLC and East Cherry Grove Realty Co., LLC. DesChamps testified to a reasonable degree of certainty that after reviewing all of the title records at the Archives Department in Columbia along with the title records at the Horry County Courthouse and composite survey maps drawn by both Plaintiffs' and Defendant's experts that a Kings Grant and/or Sovereign Grant exists over the real property owned by the Plaintiffs. DesChamps also testified that East Cherry Grove Realty Co., LLC owned the real property described

in Tax Map No. 145-00-01-001 and that such was subject to Kings Grant and/or Sovereign Grant and that Ray & Nixon, LLC owned the real property described as Horry County Tax Map No. 145-02-25-004 and such property was subject to a Kings Grant and/or Sovereign Grant.

The next witness who testified was Joel Floyd, a retired land surveyor. Floyd was qualified as an expert witness by the court and testified that he had been one of the first persons to survey the Cherry Grove marsh in 1968. He initially worked for C.B. Berry, one of the oldest surveyors in the area, who was hired by C.D. Nixon (the original owner of the real property) when lawsuits were brought between Nixon and the State of South Carolina. Floyd said he performed thousands of surveys in the subject area of North Myrtle Beach and had located Kings Grants and other Sovereign Grants in the past as part of his job as a registered surveyor. Floyd said he was very familiar with all of C.D. Nixon's real property in Cherry Grove and it was his opinion to a reasonable degree of certainty that the real property over which Leonhard's dock was to be located was owned by Ray & Nixon, LLC. The Ray & Nixon, LLC and East Cherry Grove Realty Co., LLC real property in his expert opinion are covered by a Kings Grant or other sovereign grant. (See Exhibits 1, 5, 6, 7, 8 and 9).

Floyd described in detail how he located the Kings Grants. (Exhibit 5). He along with two other registered surveyors, Mike Culler and Wendell Powers, met and looked at old pictures of the inlet along with maps and other graphic features. The three surveyors jointly located a corner line of one the old grants and then meticulously pieced additional grants together with a plat that included the Ray & Nixon, LLC real property over which the Leonhard dock would be built. Floyd testified extensively referencing the compiled map (Exhibit 1) which was admitted into evidence which describes the four grants and identifies how those grants covered all the real property owned by the Plaintiffs in this case. (Exhibits 6, 7, 8 and 9).

Floyd also testified he and the other surveyors had reviewed old aerial pictures of the marsh and the creeks from the 1940s and that this commonly used survey technique was to find old maps which showed the location and direction of creeks. This proof enabled all three surveyors to agree on how to locate the boundaries of the sovereign grants in this case. In particular, Floyd stated that one grant was located and pieced together which described the mouth of the old Morralls Inlet. This is shown on Compiled Map No. 1 and through Exhibits 6, 7, 8 and 9, which are the Kings and sovereigns grants in this case. Floyd noted the grants fit together perfectly like pieces to a puzzle.

The next witness to testify was Will Fairey, a registered land surveyor who is employed by Spartina Land Surveying. The court qualified him as an expert witness and he testified that he visited the Ray & Nixon property found on Tax Map No. 145-02-25-004. Fairey said that he had reviewed the Kings Grants (Exhibit 6, 7, 8 and 9), the compiled map of the surveyors prepared by Floyd (Exhibit 1), and the Courtney map offered by the State's expert (Exhibit 22). It was his expert opinion to a reasonable degree of surveying certainty that the proposed dock to be built by Leonhard would be built over tidelands owned by Ray & Nixon, LLC. Fairey also said he had offered similar expert testimony in a prior case tried by Judge Hyman. (*East Cherry Grove Realty Co., LLC v. State of South Carolina and South Carolina Department of Health and Environmental Control*; C/A No. 2014-CP-26-1412).

The final witness offered by the Plaintiffs was the State's witness, registered land surveyor, Russell Courtney, who was qualified as an expert witness. Courtney testified that he had drawn his own map (Exhibit 5) of the Kings Grants which is described in Plaintiffs' Exhibits 6, 7, 8 and 9. Courtney testified that in his opinion there were Kings Grants over East Cherry Grove Realty real property identified as Tax Map No. 145-00-01-001 and real property owned by Ray & Nixon,

LLC identified as Tax Map No. 145-02-25-004. Courtney's opinion to a reasonable degree of surveying certainty was that Kings Grants were located over both properties but that as to the East Cherry Grove Realty property there was some real property that might be outside the Kings Grant he had located on Exhibit 5 and he could only state to a 70% certainty that there were Kings Grants over that particular area.³ As to the other portion of the real property owned by East Cherry Grove Realty, Courtney said he was 100% certain it was covered by a Kings Grant. Thus, Courtney agreed with the testimony of the other surveyors in all other respects except to a small portion of East Cherry Grove property identified on Tax Map No. 145-00-01-001. Courtney also stated to a reasonable degree of certainty that a Kings Grant existed over all the real property owned by Ray & Nixon, LLC (Tax Map No. 145-02-25-004).

On cross-examination Courtney was asked questions by attorneys for East Cherry Grove Realty as to his opinion regarding certain quitclaim deeds between East Cherry Grove Realty and the State of South Carolina (Defendant's Exhibit 23). Courtney admitted on cross-examination that he had not been tasked to locate the particular parameters of the quitclaim deed including the boundary lines. Courtney testified and was cross-examined about his deposition and stated on four separate occasions that he could not offer an opinion about the quitclaim deed between the State of South Carolina and East Cherry Grove Realty Co. (See deposition of Russ Courtney, p. 27, lines 18-21; p. 8, lines 17-18; p. 19, lines 17-18; p. 7 lines 20-21; p. 7, lines 14-15 Exhibit 22).

Finally, in reaching its ruling, the court has reviewed all of the exhibits entered into evidence by the Plaintiffs and Defendant.

³ This testimony alone is consistent with South Carolina law on experts' opinions. (SCRE 703).

III. CONCLUSIONS OF LAW

It is settled law that the State of South Carolina holds presumptive title to all tidelands within its borders which are held in trust for the benefit of the public. See *Coburg Dairy, Inc. v. Lesser*, 318 S.C. 510, 458 S.E.2d 547 (1995). However, the State may grant individual ownership interest in tidelands. *Hobony Club, Inc. v. McEachern*, 272 SC. 392, 252 S.E.2d 133 (1979) (“Despite the special status accorded tidelands, the government, and specifically the King of England, had the power to grant, and did in fact grant, tidelands to subjects, who exercised private ownership.”) (See Exhibit 17). See also *State v. Holston Land Company*, 272 S.C. 65, 248 S.E.2d 922, 924 (1978) (“The law in South Carolina is well settled that a grant conveying 'marshland' can give rise to private ownership of property to the mean low watermark.”). Finally, the party asserting the transfer of title bears the burden of proving its own good title by a preponderance of the evidence.

In this case, Plaintiffs have shown by a preponderance of the evidence that they have acquired title either from the British Crown before the Revolution or from a State grant which vests title to tidelands in East Cherry Grove Realty Co., LLC and Ray & Nixon, LLC. (Exhibits 1, 5, 6, 7, 8 and 9). (In fact, all the experts agree the Plaintiffs’ property is subject to a Kings Grant or sovereign grant.)

Plaintiffs have also established by a preponderance of the evidence fee simple ownership of the tidelands tracts described as Tax Map No. 145-00-01-001 (East Cherry Grove Realty tract) and Tax Map No. 145-02-25-004 (Ray & Nixon, LLC tract).

Plaintiffs have shown by a preponderance of the evidence that its predecessors in title possessed a valid grant from the sovereign, that the grant’s language was sufficient to convey the land below the high water mark to the Plaintiffs and that the grant’s language was sufficient to

convey the land to the low water mark to the Plaintiffs (See Exhibits 1, 6, 7, 8 and 9). I find the evidence presented overwhelmingly supports a ruling by this court that these properties are subject to a Kings Grant and/or sovereign grant and that the State of South Carolina cannot issue a dock permit to Matt Leonhard over property owned by Ray & Nixon LLC. Further, Leonhard may not build a dock over property owned by Ray & Nixon, LLC because Ray & Nixon, LLC has a sovereign grant in its chain of title to that part of the marsh over which the proposed dock is to be built. (Exhibits 5, 6, 7, 8 and 9).

The State of South Carolina nor the South Carolina Department of Health and Environmental Control have no legal right to authorize dock permits to wharf over properties and/or tidelands owned by East Cherry Grove Realty Co., LLC and Ray & Nixon, LLC. (See Tax Map Nos. 145-00-01-001 and 145-02-25-004. A public dock permit does not displace the need to obtain the landowner's consent to wharf on land where title is in one other than the permitting authority. See *Lowcountry Open Land Trust v. State of South Carolina and James Atkins*, 347 S.C. 96, 552 S.E.2d 778 (2001). Since East Cherry Grove Realty and Ray & Nixon own the tidelands in fee simple no permits can be issued on their property without their permission. See S.C. Ann. Regs. R-30-2(I)(4)(Sup. 2000) ("If the final judicial decision determines that the critical area in question is owned by the adjoining critical area landowner and that the critical area landowner has a right to exclude the others as part of the title, the permit will not be issued unless the applicant presents [DHEC] with a copy of a deed, lease, or other instrument from the adjudicated critical area landowner that would allow construction of the proposed project, or written permission from such an owner...").

IV. ORDER

I have exhaustively reviewed all the evidence including the exhibits and the testimony of the witnesses in reaching my ruling. I find that East Cherry Grove Realty Co., LLC and Ray & Nixon, LLC have met their burden by a preponderance of the evidence and that their real properties are derived from a Kings Grant or sovereign grant. Accordingly, I make the following rulings:

1. The State of South Carolina and the South Carolina Department of Health and Environmental Control cannot grant a dock permit or other permit to wharf over any real property owned by East Cherry Grove Realty also described as Tax Map No. 145-00-01-001 or real property owned by Ray & Nixon, LLC also described as Tax Map No. 145-02-25-004.

2. I find that the specific language of the Kings Grants (Exhibits 6, 7, 8, and 9) are sufficient in detail to establish a Kings Grant and that the grants in these cases give rise to private ownership of the tidelands described above to the mean low water mark in navigable creeks.

3. I also hold Judge Hyman's ruling in *East Cherry Grove Realty Co., LLC v. State of South Carolina and South Carolina Department of Health and Environmental Control*; C/A No. 2014-CP-26-1412 is not only instructive but is the law of the case.

4. I find that East Cherry Grove Realty Tax Map No. 145-00-01-001 and Ray & Nixon Tax Map No. 145-02-25-004 own the tidelands to the low water mark in all navigable creeks and own all the tidelands below the low water mark in all non-navigable creeks but that does not include the bottoms of any navigable waters on these properties, and under our Constitution, those waters are public highways subject to Defendant's control.

5. I find that each of the Kings and/or Sovereign Grants in this case (Exhibit 6, 7, 8 and 9); and compiled map of the surveyors (Exhibit 1) along with the State's expert survey (Exhibit 5)) all establish Kings Grants and/or Sovereign Grants over property owned by East Cherry Grove Realty Co., LLC (as Tax Map No. 145-00-01-001 and Ray & Nixon, LLC (Tax Map No. 145-02-25-004).

6. I find the dock permit requested by Matt Leonhard be denied unless express approval is obtained of Ray & Nixon, LLC.

7. I find the State of South Carolina or its political subdivisions shall not issue dock permits over tidelands owned by East Cherry Grove Realty with Tax Map No. 145-00-01-001 and tidelands owned by Ray & Nixon with Tax Map No. 145-02-25-004 without their consent.

AND IT SO ORDERED.

R. Markley Dennis, Jr.
Presiding Judge
Fifteenth Judicial Circuit

_____, 2020
Moncks Corner, South Carolina



Horry Common Pleas

Case Caption: East Cherry Grove Realty Co LLC , plaintiff, et al VS South Carolina State Of , defendant, et al
Case Number: 2018CP2600120
Type: Order/Other

R. Markley Dennis Jr., 2060

R. Markley Dennis Jr., 2060