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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Please

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2020-001043

Town of Lexington South Carolina,.....Respondent,

v.

Patty Cox Wingard, as Trustee for PLCW Trust,
And Scott's Furniture Company, Inc.....Appellants.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On October 2, 2018, the Town of Lexington (the "Town") commenced this action by the filing of a Summons and Complaint for Declaratory Judgment, seeking declarations that the Town had the right to terminate water service to certain property owned by Defendant Patty Cox Wingard, as Trustee of the PLCW Trust (the "PLCW Trust") if the property were not annexed into the Town.

On November 1, 2018, Defendants answered and counterclaimed, seeking declarations that the Town must provide water service in perpetuity under a 1961 agreement, regardless of whether the property is annexed, and seeking alternative relief related to water lines subject to the 1961 agreement.

On September 30, 2019, the Town replied to the counterclaims, denying that any relief should be granted to the PLCW Trust.

A bench trial was held before the Honorable Alison R. Lee on October 17 and 18, 2019, where testimony was presented by both parties.

On May 4, 2020, the Circuit Court entered its Order, finding that the Town had the right to terminate water service to the property if the PLCW Trust continued to refuse annexation of the property into the Town.

The PLCW Trust moved for reconsideration under Rule 59(e) on May 14, 2020, and the Circuit Court denied that motion by Order entered July 15, 2020.

This appeal follows.

STATEMENT OF FACTS

This case, at its heart, poses the question of whether the Town has a perpetual obligation to provide water service to a privately owned parcel which is outside the Town. [Complaint, R. ___]

On September 30, 1961, the Town and Henry C. Wingard entered into an Agreement by which Mr. Wingard would be allowed to install a 6-inch water main on property he owned, which the Town would thereafter maintain the line and provide water service to property Mr. Wingard was developing. [Def. Ex. 2, R. ___]

On October 13, 1961, the Town passed a resolution which allowed Mr. Wingard to "take up the present 2-inch water main where the new 6-inch water main was put and install the 2-inch on Hamilton Street." [Def. Ex. 1, R. ____] The Resolution also provided "that the Town shall maintain said water line after it is completed and . . . that the Town shall afford water services to [Mr. Wingard], [his] heirs and assigns within the limits of the Town's water system at the prevailing water rates charged by the Town." [*Id.*]

Thereafter, the Town supplied water to property which belonged to Mr. Wingard for more than fifty-five (55) years. Since Mr. Wingard's death in 2006, the Town has supplied water to his heirs, as owners of his property.

The property at 705 North Lake Drive which is the subject of this action (the "Property") was developed into Scott's Furniture Company, Inc. ("Scott's") after 1961; is outside the Town limits; and has been supplied water by the Town since its development. At the time of the 1961 Agreements, the Property was a parking lot for what was then Lexington High School [B. Scott Testimony, Tscpt., R. ____]

The Town's policy for many years has been to require annexation of any property which is or becomes contiguous to the Town in order for such property to continue enjoying water service by the Town. [Complaint, ¶4; Hanson Testimony, Tscpt.; R. ___ and ___]

In 2013, the Town wrote to the Property's owners, asking that they sign a petition for the property to be annexed into the Town, which was now contiguous to the Property. [Plf. Ex. 4] Thomas Wingard, then the Trustee of the PLCW Trust, responded to the Town and refused to allow the Property's annexation. [Def. Ex. 4, R. ___]

The Town brought this action, seeking a declaratory judgment of whether the Town has the right to terminate water service to the Property; what would constitute reasonable notice before doing so; and whether the Town could require annexation of the Property as a prerequisite to the Town's continuing to provide water and/or sanitary sewer services to the Property. [Complaint, ¶10, R. ___]

Defendants answered, taking the position that the 1961 Resolution's provision that the Town would provide water service to Mr. Wingard, "his heirs and assigns" required the Town to continue providing water service to the Property in perpetuity. [Answer, ¶16, R. ___]

Ultimately, the Circuit Court found that there was no provision in the 1961 Agreement or Resolution which set out the duration of any agreement by the Town to provide water service to the Property and, therefore, that the Town could terminate service with reasonable notice if Defendants refused to agree to annexation of the Property. [Order, p. 6, R. ___]

Defendants sought reconsideration, alleging that the Court had not directly addressed their counterclaim for a declaratory judgment that rescission of the alleged contract

requiring the Town to provide perpetual water service to the Property would result in Defendants owning the water lines laid pursuant to the 1961 Agreement and Resolution. [Defs.' Rule 59(e) Motion, R. ___] The Circuit Court issued its final Order confirming its previous rulings and denying Defendants' counterclaim. [Order dtd. 7/15/20, p. 3, R. ___]

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY FOUND THAT THE INCLUSION OF THE WORDS "HEIRS AND ASSIGNS" DOES NOT CONSTITUTE A TERM OF DURATION.

Appellants argue that the Circuit Court's failure to find that the term "heirs and assigns" created a perpetual obligation for the Town to provide water to the Property somehow deprives those words of any meaning. The very history of the parties relationship regarding the Property shows that the words "heirs and assigns" have been given their full and proper meaning. Mr. Wingard died in 2006, and the Property has since been owned by his heirs and assigns, including the PLCW Trust which currently owns the Property. The Town has never taken the position that the devolution of title to the Property to and through Mr. Wingard's heirs and assigns was a basis for requiring annexation and/or terminating water service to the Property.

The cases Appellants cite do support the legal truth that inclusion of the term "heirs and assigns" brings with it transferability of title and/or rights. *See, e.g., Douglas v. Medical Investors*, 256 S.C. 440, 182 S.E.2d 720 (1971).[1] The Circuit Court was not asked to interpret the transferability of any rights related to the Property, as there is no controversy among the

[1] While Appellants assert that *Gressette v. South Carolina Elec. And Gas*, 370 S.C. 377, 635 S.E.2d 538 (2006), "held that the language 'heirs and assigns' indicated an assignable, permanent interest," a review of that case shows that the Court did *not* use the word "permanent" or attribute any other durational meaning to "heirs and assigns." [App. Br. at 6]

parties regarding that right. The Property has been transferred (and, presumably assigned to Scott's, as its current lessee), and the Town does not and has never asserted that the interest of Mr. Wingard's heirs and/or assigns was different from that of Mr. Wingard.

Respondent acknowledges that there appears to be no South Carolina case law which addresses whether "heirs and assigns" indicates a perpetual right. Respondent submits, however, that no such case exists because "heirs and assigns" is not a durational term. As addressed above and in the case law cited by Respondents, courts' review of the meaning of "heirs and assigns" in a given instrument relates to the *alienability* of rights and/or title, not to its *duration*.[2]

The New Mexico Court of Appeals has addressed Appellants' argument in *Marrujo v. Sanderson*, 2008 NMCA 112, 191 P.3d 588 (N.M.App. 2008), holding that "the reference to 'heirs and assigns' . . . does not, in and of itself, establish the duration. . . ."

Because "heirs and assigns" does not indicate a perpetual right, the Circuit Court correctly determined that neither the 1961 Agreement nor the Resolution contain any term indicating duration. Therefore, as held in *Childs v. City of Columbia*, 87 S.C. 566, 70 S.E. 296 (1911), that any contract between Appellants and Respondent could be terminated with reasonable notice.

The Circuit Court further relied on *Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 447 S.E.2d 199 (1994), which affirmed *Childs* and noted that "perpetual contracts

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[2] Respondent notes that Appellants argued to the Circuit Court that the South Carolina Supreme Court had held in *Creswell v. Bank of Greenwood*, 210 S.C. 47, 41, 41 S.E.2d 393 (1947), that "heirs and assigns" indicated a permanent right, but the Circuit Court correctly noted that the *Creswell* Court's analysis was of the term "heirs and assigns *forever*." It was, in fact, the word "forever" which indicated duration in that case. Appellants seem to acknowledge *Creswell*'s inapplicability, as they do not cite that case in their Brief herein.

have not been favored in South Carolina and are generally upheld only where the perpetual nature of the agreement is an express term of the contract." *Id.* at 101, 447 S.E.2d at 201. Respondent submits that it would be error to hold the words "heirs and assigns," which, as argued above, relate to transferability, to be an "express term" creating a perpetual right.

For the same reasons, Appellants' alternative argument that any ambiguity created by the words "heirs and assigns" should be resolved in their favor is a red herring. As shown above, "heirs and assigns" does not relate to duration and could therefore create no ambiguity as to duration. That term simply confirms that any rights of Mr. Wingard were transferrable, and as such the words have been given their full and proper meaning as interests in the Property have been conveyed and assigned since 1961.

II. RESPONDENT HAS NOT RESCINDED ANY CONTRACT WITH APPELLANTS, NOR DID THE CIRCUIT COURT GRANT ANY RESCISSION OF ANY CONTRACT.

Appellants argue that "[t]his case is an example of one party getting to rescind its contract while keeping the benefit that was the consideration for the contract." [App. Br. at 10] Appellants argue that rescission would require the return of the water main(s) installed by Mr. Wingard to his heirs. Appellants' entire argument is a red herring.

Appellants cite *First Equity Inv. Corp. v. United Service Corp. of Anderson*, 386 S.E.2d 245, 299 S.C. 491 (S.C. 1989), for the proposition that rescission of an agreement requires return of any consideration given for the agreement. This is inapposite to the instant case.

This case is not about rescission of any contract, and the Circuit Court did not grant or approve any rescission. The 1961 Agreement and Resolution, read in the light most favorable to Appellants, allowed Mr. Wingard to install certain water mains to serve his properties in exchange for the Town undertaking to maintain those lines and provide water

service. As the Circuit Court found, "Mr. Wingard received the benefit of his bargain." [Order dtd. 7/15/20, p. 2] For more than fifty (50) years, the Town has maintained the water lines and provided service to the affected properties. To rescind would be to declare the contract void *ab initio*. *Black's Law Dictionary* (5th Ed. 1979). Here, the parties have performed under the 1961 Agreement and Resolution, and no one sought or received a declaration that any portion of the 1961 Agreement or Resolution was void.

While an action for rescission might allow the Court to consider how to return the parties to the *status quo ante*, Respondent notes that no party has sought rescission; the Court has not declared a rescission; and neither Appellants nor Respondent would be entitled to rescind their decades-old agreement. As the Circuit Court determined, both parties have given and received consideration; this has no effect on the Town's right to terminate water service to the Property with reasonable notice if Appellants will not agree to annexation of the property.[3]

CONCLUSION

For the reasons set forth above and appearing in the Record herein, Respondent respectfully submits that this Court should affirm the Circuit Court in its entirety and find that Respondent may terminate water service to the Property with reasonable notice if Appellants do not agree to annexation of the Property into the Town.

[3] Respondents further note that evidence was submitted indicating that the actual water lines installed by Mr. Wingard under the 1961 Agreement and Resolution do not service or relate to the Property but, rather, to other property Mr. Wingard was developing in 1961.

Respectfully submitted,

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April 6, 2021