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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price, Circuit Court Judge

Case No. 2020-CP-10-00209
Appellate Case No. 2019-001030

Maybank 2754, LLC,Appellant,

v.

Eugene J. Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997; 1776, LLC; Beach Fenwick, LLC; The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny Creek Associates, LLC; John Doe and Mary Roe,

..... Respondents,

INITIAL BRIEF OF RESPONDENT 1776, LLC

Dated: April 6, 2021

Respectfully submitted,

/s/ Brian A. Hellman

Brian A. Hellman (72399)
Jason S. Smith (80700)
HELLMAN YATES & TISDALE, PA
105 Broad Street, Third Floor
Charleston, South Carolina 29401
Telephone: (843) 266-9099
Facsimile: (843) 266-9188
bh@hellmanyates.com
js@hellmanyates.com

Counsel for Respondent 1776, LLC

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STATEMENT OF ISSUES ON APPEAL

1. Did the master-in-equity and the circuit court have jurisdiction to proceed by rule with pre-trial matters unaffected by an interlocutory appeal regarding the mode of trial (specifically, whether a trial would be by judge or jury)?
2. Did the circuit court correctly grant summary judgment because the alleged easement did not survive a foreclosure of unsubordinated bank mortgages, and did not exist to begin with, as a matter of law?
3. Did the circuit court have discretion to deny a futile motion to amend the complaint to add another defendant simultaneously with granting summary judgment?

STATEMENT OF THE CASE

This case follows a fully and finally adjudicated foreclosure proceeding and public auction sale of real property in 2017. (Foreclosure Order; R. pp. __). The foreclosure involved two bank mortgages, recorded in 2000 and 2006. (*Id.*; R. pp. __). The buyer at the public auction was this respondent, 1776, LLC (“1776”). (Complaint, ¶ 30; R. pp. __). Later, 1776 resold a portion of the property to Beach Fenwick, LLC (“Beach”), which is attempting to develop the property. (Complaint, ¶ 37; R. pp. __).

This separate litigation was commenced in 2020. (Complaint; R. pp. __). The plaintiff and appellant, Maybank 2754, LLC (“Maybank”), alleges an easement over the foreclosed property. (Complaint, ¶¶ 47-50; R. pp. __). The easement allegedly arose in 2013, which was *after* the two bank mortgages and *before* the foreclosure sale. (Complaint, ¶ 14; R. pp. __). The two bank mortgages were not subordinated to the alleged easement. (Foreclosure Order; R. pp. __). There was no recording of a subordination agreement or the alleged easement itself. (*Id.*).

The document that purportedly constitutes the alleged easement is an alleged corporate resolution by the mortgagor of the two foreclosed bank mortgages, Penny Creek

Associates, LLC (“Penny Creek”). (Complaint, ¶ 14; R. pp. __).¹ That document states that, upon completion of a certain public road, Penny Creek and Maybank would mutually agree on the location and conditions for an easement and execute and record an easement agreement. (Complaint, ¶ 14; R. pp. __). The foreclosure of the two earlier bank mortgages occurred before the completion of the public road, which is still not complete. (Complaint, ¶ 40; R. pp. __).

Maybank filed this action in the circuit court. (Complaint, R. pp. __). The circuit court referred the case to the master-in-equity. (Order, R. pp. __). Maybank filed an interlocutory appeal of that referral on the ground that it affected the mode of trial, specifically the right to a jury trial. (Notice of Appeal, R. pp. __). The master-in-equity subsequently referred the case back to the circuit court. (Order, R. pp. __). The circuit court granted motions for summary judgment against Maybank. (Order, R. pp. __). Simultaneously, the circuit court denied a motion to amend the complaint to add another defendant. (Order, R. pp. __). This appeal followed. (Notice of Appeal, R. pp. __).

ARGUMENT

Maybank makes three general arguments in its 50-page appeal brief. First, Maybank argues that the circuit court lacked jurisdiction. Second, Maybank argues that its alleged easement could not be defeated as a matter of law. Third, Maybank argues that it should have been allowed to amend its complaint to add another defendant. For the following reasons, all three arguments fail.

1. The Circuit Court Had Jurisdiction

¹ At the time this corporate resolution document was purportedly executed in 2013, Michel Laplante, the manager of Maybank and instigator of this litigation, was also the manager of Penny Creek. Mr. Laplante was also a party to the foreclosure action and appeared during the proceedings and at the public auction sale, never once mentioning the alleged easement.

This Court reviews questions of jurisdiction *de novo*. *Metts v. Mims*, 384 S.C. 491, 498, 682 S.E.2d 813, 817 (2009).

Maybank's jurisdictional argument is based on its prior interlocutory appeal. (Appellant's Brief, pp. 15-16). Maybank contends that both the master-in-equity and the circuit court should have waited for this Court to decide the mode of trial before proceeding with pre-trial matters. (*Id.*).

That argument contravenes the applicable rules. Rules 205 and 241, SCACR, authorize lower courts to proceed with matters unaffected by an appeal. Rule 53, SCRCR, required the master-in-equity to refer the case back to the circuit court because a jury trial had been requested by Maybank. Rule 56, SCRCR, allowed the circuit court to rule as a matter of law, before trial. And Rule 1, SCRCR, implores all courts in this State to efficiently adjudicate cases. The master-in-equity and the circuit court both properly proceeded under these rules.

Additionally, Maybank's jurisdictional argument is unpreserved and inconsistent with its own conduct in both courts below during the pendency of the interlocutory appeal. Conceding jurisdiction, Maybank actually asked the circuit court to proceed with matters unaffected by the appeal, such as compelling burdensome discovery. (Motion to Compel, R. pp. __). Maybank just did not want the circuit court to recognize that its claims have no legal basis and could be disposed of pre-trial. Note also that Maybank couches its jurisdictional argument as one of "subject matter" jurisdiction, which is mistaken. (Appellant's Brief, p. 15). See *Tillman v. Oakes*, 398 S.C. 245, 256, 728 S.E.2d 45, 51 n.3 (Ct. App. 2012).

2. The Circuit Court Correctly Held That The Alleged Easement Is Defeated As Matter Of Law

This Court reviews summary judgment rulings *de novo*. *Wright v. PRG Real Est. Mgmt., Inc.*, 426 S.C. 202, 211, 826 S.E.2d 285, 290 (2019).

Maybank argues that the circuit court erred in concluding that the alleged easement is defeated as a matter of law. (Appellant's Brief, pp. 17-49). The legal grounds supporting the circuit court's decision are strong and clear.

By statute, S.C. Code Ann. § 30-7-20, the alleged easement, assuming it ever existed, did not survive the foreclosure because it was not subordinated to the two bank mortgages, and no subordination agreement was recorded. (Foreclosure Order, R. ___). Accordingly, 1776 purchased the property at the foreclosure sale free and clear of the alleged easement, and 1776 thereafter had the right to sell its good title to Beach. Maybank cannot now seek to undo the foreclosure, rewrite the terms of the sale, and interfere with the development of the property through this litigation. *Ex Parte Johnson*, 640 S.E.2d 887, 889-90 (Ct. App. 2006). Indeed, Maybank admitted, in a separate legal malpractice action, that it lost its alleged easement in the foreclosure. (R. pp. ___).

The legal analysis could end here. Maybank can make no argument to overcome this dispositive statute, S.C. Code Ann. § 30-7-20, as a matter of law. Tellingly, Maybank never even mentions this statute in its 50-page appeal brief.

Continuing on with the legal analysis, nonetheless, the assumption that the alleged easement ever existed can also be defeated, as a matter of law. The alleged corporate resolution, upon which Maybank relies, describes a contingent, future agreement-to-agree, on the location and conditions of an easement and the execution and recording of an easement agreement, upon the completion of a certain public road, which is still not complete. (Complaint, ¶ 14, R. pp. ___). That document did not create an easement, by law. *See BCD LLC v. BMW Mfg. Co., LLC*, 360 F. App'x 428, 435 (4th Cir. 2010); *Binkley*

v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001); and additional caselaw cited in the other respondents' briefs.²

3. The Circuit Court Had Discretion To Deny The Futile Proposed Amendment To Add Another Defendant

This Court reviews the denial of a motion to amend a complaint for abuse of discretion. *Duncan v. CRS Serrine Engineers, Inc.*, 337 S.C. 537, 542, 524 S.E.2d 115, 118 (Ct. App. 1999).

Maybank argues that it should have been allowed to amend its complaint, so as to delay the summary disposition of this case. The proposed amendment principally consisted of adding the City of Charleston as a *seventh* defendant. (Motion to Amend, R. pp. __). The circuit court had discretion to deny that proposed amendment, as futile. (Order, R. pp. __). *See Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010). As discussed above, by statute, S.C. Code Ann. § 30-7-20, there is no way around the absence of a subordination agreement and its recording. Further, the failures of the alleged corporate resolution cannot be cured by an amended complaint that relies on the same document. Maybank's claim that an easement survived the foreclosure, or ever existed to begin with, is fatally flawed and was properly and judiciously disposed of by the circuit court, as a matter of law.

CONCLUSION

This respondent, 1776, the purchaser at the foreclosure sale, adopts and refers the Court to the other respondents' briefs for more detail on the background and legal issues

² Mr. Laplante, moreover, cannot blame anyone else for his own failures, as manager of both Penny Creek and Maybank. He did not obtain a subordination agreement from the bank or record the same. And he was responsible for the ineffective terms of the corporate resolution. There is no civil conspiracy here, as Maybank imagines. It is the application of the law itself that defeats Maybank's alleged easement, not any wrongdoing by any of the respondents.

that it has attempted to succinctly present in a plain and simple manner herein, pursuant to Rule 208(b)(6), SCACR. For these reasons, respectfully, the circuit court's order granting summary judgment in this matter should be affirmed.

Dated: April 6, 2021

Respectfully submitted,

/s/ Brian A. Hellman

Brian A. Hellman (72399)

Jason S. Smith (80700)

HELLMAN YATES & TISDALE, PA

105 Broad Street, Third Floor

Charleston, South Carolina 29401

Telephone: (843) 266-9099

Facsimile: (843) 266-9188

bh@hellmanyates.com

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PROOF OF SERVICE

I hereby certify that on this date I have served the **INITIAL BRIEF OF RESPONDENT 1776, LLC** on Appellant and all other parties to their respective e-mail addresses, pursuant to the Order of the Supreme Court Appellate Case No. 2020-000447(g)(3).

Jason Tarokh, Esq.
jason@tarokhlaw.com

Scarlet B. Moore, Esq.
Scarlet28@msn.com

Cheryl D. Shoun, Esq.
cshoun@nexsenpruet.com

Alexandra Harrington Austin, Esq.
aaustin@nexsenpruet.com

John Patrick Turner Norris, Esq.
pnorris@csl.law

Kent Taylor Stair, Esq.
kstair@cskl.law

Jordan N. Teich, Esq.
jteich@cskl.law

Thomas Bacot Pritchard, Esq.
tpritchard@pnalaw.net

J. Rutledge Young
jry@duffyandyoung.com

Patrick C. Wooten
pwooten@duffyandyoung.com

Dated: April 6, 2021

Respectfully submitted,

/s/ Brian A. Hellman
Brian A. Hellman (72399)
Jason S. Smith (80700)
HELLMAN YATES & TISDALE, PA
105 Broad Street, Third Floor
Charleston, South Carolina 29401
Telephone: (843) 266-9099
Facsimile: (843) 266-9188
bh@hellmanyates.com
js@hellmanyates.com

Counsel for Respondent 1776, LLC