

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2010-CP-10-00250

Eugene Gathers.....Respondent,

v.

Ernest McKnight.....Appellant.

FINAL BRIEF OF RESPONDENT

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SC COURT OF APPEALS

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S.C. Code Ann. § 15-61-251, 3, 4 and 6
S.C. Code Ann. § 27-7-106
S.C. Code Ann. § 27-7-406

STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ERR IN FINDING APPELLANT TO BE A CREDITOR HOLDING A SECURITY INTEREST IN THE PROPERTY?
2. A. DID THE COURT ERR IN FINDING APPELLANT HAS NO RIGHTS UNDER S.C. CODE ANN. § 15-61-25 SINCE HE IS NEITHER A JOINT TENANT OR TENANT IN COMMON?

B. IS THERE A STATUTORY RIGHT OF FIRST REFUSAL UNDER S.C. CODE ANN. § 15-61-25 IN A QUIET TITLE ACTION IN WHICH NO PETITION FOR PARTITION IS FILED?
3. DOES APPELLANT HAVE STANDING TO CHALLENGE AN ORDER AS TO OTHER DEFENDANTS WHICH PRESERVED APPELLANT'S CLAIMS?

STATEMENT OF CASE

On January 12, 2010, Respondent filed a Lis Pendens, Summons and Suit to Quiet Title seeking an order declaring Respondent to be the owner of the property identified in the Lis Pendens. On January 12, 2010, an order was issued appointing Marcus W. Meetze, Esquire, as Guardian ad Litem Nisi.

On January 12, 2010, an Order for Publication was issued. On February 17, 2010, an Affidavit of Publication was filed reflecting the publication of the Summons. On March 18, 2010, Appellant filed an Answer and Counterclaim. On March 30, 2010, an Affidavit of Default was filed as to all Defendants except Appellant. On April 1, 2010, an Order of Default was issued as to all Defendants except Appellant.

On May 19, 2010, Respondent filed a Motion for Judgment on the Pleadings Pursuant to SCRPC Rule 12(c) or in the Alternative, a Motion for Summary Judgment as to Appellant's Counterclaim for Adverse Possession. On August 2, 2010, a Consent Order of Dismissal was issued dismissing Appellant's counterclaim for adverse

possession with prejudice and preserving Appellant's counterclaims for foreclosure of mortgage and reimbursement of taxes.

On October 8, 2010, Respondent filed a Motion for Summary Judgment as to all defendants except Appellant. On April 6, 2011, a Notice of Hearing was forwarded to the Guardian and Appellant's counsel relative to Respondent's Motion for Summary Judgment which was to be heard on April 21, 2011.

On April 20, 2011, the Guardian provided a letter to Respondent's counsel advising that he had had no contact or communication with any of the named Defendants and had no objection to the relief sought in Respondent's Motion for Summary Judgment. On April 21, 2011, Respondent's Motion for Summary Judgment was heard by the Honorable J.C. Nicholson, Jr. Neither Appellant nor his counsel attended. Judge Nicholson issued an order granting Respondent's motion and preserving Appellant's counterclaims.

On September 27, 2011, Appellant filed a Motion to Set Aside Summary Judgment under SCRCP Rule 59 along with affidavits of Appellant and Anna M. Porcher. On January 11, 2012, Respondent filed a Memorandum in Opposition to Appellant's Motion to Set Aside Summary Judgment. On January 11, 2012, Porcher filed a Motion to Intervene and Join Appellant's Motion to Set Aside Summary Judgment.

Respondent's filed an affidavit on February 9, 2012. On February 13, 2012, Judge Nicholson heard Appellant's Motion to Set Aside Summary Judgment and Porcher's Motion to Intervene and Join in the Motion to Set Aside Summary Judgment. Counsel for Porcher and Respondent advised the Court that Porcher claimed no

ownership interest in the property, but agreed that Porcher would be allowed to intervene as a creditor to pursue claims arising from her purported payment of property taxes.

On February 24, 2012, Judge Nicholson issued an order substituting Respondent for his predecessor in title, John Wright. On March 8, 2012, Respondent filed an Offer of Judgment in the amount of Six Thousand One Hundred Eighty-Seven Dollars (\$6,187.00) as to Appellant's claims. An order allowing Porcher to intervene as a creditor was issued on March 15, 2012.

On May 4, 2012, Judge Nicholson denied Appellant's Motion to Set Aside Summary Judgment. The Court found Appellant's motion was untimely and improper and also found Appellant to be a creditor with no statutory right of first refusal under S.C. Code Ann. § 15-61-25.

On May 17, 2012, Appellant filed his Notice of Appeal. On June 14, 2012, Respondent filed a Motion to Dismiss Appeal. Appellant's Memorandum Addressing Appealability was filed on June 21, 2012. On July 6, 2012, Respondent filed a Memorandum Addressing Appealability.

FACTS

Appellant initially asserted claims for adverse possession, reimbursement of taxes and foreclosure of a mortgage (R.pp. 18-23). The dismissal of his counterclaim for adverse possession narrowed Appellant's claims (R.pp. 31-32). Under his surviving claims, Appellant sought monies purportedly owed to him by Respondent under a note and mortgage and for reimbursement of property taxes Appellant claimed to have paid.

At his deposition, Appellant addressed the relief he was seeking:

A: I was seeking my money back
Q: Okay

A: --from your client.
Q: That isn't what your answer says.
A: I was seeking my money back from your client.
Q: Okay.
A: But if your client doesn't pay me my money, I think I am rightfully—
should be awarded ownership of it.
Q: Okay. So it's your position that if you didn't get repaid your money, then
you should be awarded the property? Yes or no.
A: Yes. Why not?
Q: Okay. The answer is yes?
A: Yes.
(R.pp. 190, Lines 6 through 21)

Respondent's Motion for Summary Judgment expressly excluded Appellant (R.pp 33-34). Despite receiving notice of the hearing, Appellant nor his counsel appeared or contested this motion (R.pp 35-37). No Defendants appeared at this hearing or have since disputed the order issued by Judge Nicholson.

Although the Court specifically preserved Appellant's claims, Appellant filed a Motion to Set Aside Summary Judgment over five (5) months after the order's issuance (R.pp 42-43). In support of his motion, Appellant filed an Affidavit in which he asserted that his statutory right of first refusal had been violated under S.C. Code Ann. § 15-61-25 (R.pp 44-45). Appellant also filed Porcher's affidavit (R.pp. 46-47).

On February 13, 2012, Porcher consented to the issuance of an order affirming that she held no ownership interest in the property but may have interest as a creditor (R.pp 113-114). In denying Respondent's motion to set aside, the Court found that as a creditor, Appellant had no statutory right of first refusal under S.C. Code Ann. § 15-61-25 (R.pp. 115-118).

ARGUMENTS

1. BECAUSE APPELLANT IS A MORTGAGEE HOLDING A SECURITY INTEREST IN THE PROPERTY, THE COURT CORRECTLY FOUND HIM TO BE A CREDITOR

In his counterclaims and deposition testimony, Appellant alleges and states that he is owed monies by Respondent. In his Initial Brief, Appellant now argues that he has an ownership interest in the property. In support of this contention, Appellant cites certain language in a mortgage dated September 25, 2003¹. Appellant contends that “*the Mortgage by its terms conveyed to the Appellant the interest of the Mortgagors in the subject property*”². A cursory review of the mortgage confirms it does not.

Under South Carolina law, a mortgage is an instrument that creates a lien on a particular piece of land as collateral for the repayment of a debt. By definition, “*a mortgage cannot exist without an underlying debt or obligation for which the mortgage stands as collateral*,” *Bartles v. Livingston*, 282 S.C. 448, 319 S.E.2d 707, (Ct.App.1984). The subject mortgage states that it was given “*in consideration of the said debt and for the better securing of payment thereof*.” In addition, it makes specific reference to a “*certain note or obligation*” to Appellant. Appellant’s contention that this mortgage provided anything other than collateral for a debt is contrary to South Carolina law. Furthermore, Appellant did not raise this issue before the Lower Court and is precluded from doing so on appeal.

2. A. BECAUSE APPELLANT IS NEITHER A JOINT TENANT OR TENANT IN COMMON, HE HAS NO RIGHTS UNDER S.C. CODE ANN. § 15-61-25.

¹ Respondent filed an Offer of Judgment in the amount of \$6,187.00 on March 8, 2012, the amount of the debt set forth in the mortgage.

² The mortgage was executed by Respondent’s father and predecessor in title, John Wright, as well as Anna Michelle Porcher and Harold L. Wright. By Consent Order, Porcher affirmed that she holds no ownership interest in the property. Harold L. Wright was subject to the Order of Default and Order granting Summary Judgment and also has no interest in the property. He has made no appearance in this case.

B. BECAUSE RESPONDENT DID NOT BRING AN ACTION FOR PARTITION, HIS SUIT TO QUIET TITLE DID NOT TRIGGER THE RIGHT OF FIRST REFUSAL SET FORTH IN S.C. CODE ANN. § 15-61-25.

S.C. Code Ann. § 15-61-25 confers a right of first refusal upon a non-petitioning joint tenant or tenant in common when a petition for partition of real property is filed by a joint tenant or tenant in common. Appellant contends that the Lower Court erred in failing to recognize his statutory right of first refusal.

The conveyance of land in South Carolina is governed by S.C. Code Ann. § 27-7-10. The creation of a joint tenancy is addressed in S.C. Code Ann. § 27-7-40. As the holder of a note and mortgage, Appellant is neither a co-tenant, joint tenant, or tenant in common. He is simply a creditor. Appellant's contention that he is a non-petitioning co-tenant is inconsistent with his own testimony and surviving counterclaims in which he seeks "*his money back.*"

The filing of a petition for partition of real property gives rise to the right of first refusal claimed by Appellant. In this case, Respondent filed a suit to quiet title. Respondent's complaint contained no reference to the partitioning of the property. Appellant's contention that "*quiet title actions result in several owners implicating a petition action by default*" is without support. In many quiet title cases, including the case at hand, the result is the issuance of an order recognizing ownership by a single person. Quiet title actions are also brought to clear the title for parties who have no interest in the partitioning of their property.

Since the commencement of this case, Appellant has attempted to acquire title to Respondent's property. Initially, Appellant asserted a claim for adverse possession. Despite the dismissal of his adverse possession claim and having testified as to his status

as a creditor, Appellant now argues that his mortgage constitutes an assignment of rights. Appellant's contention is without basis and is in conflict with his own counterclaims and the mortgage on which he relies.

3. BECAUSE THE COURT PRESERVED APPELLANT'S CLAIMS, APPELLANT LACKS STANDING TO CHALLENGE ORDER GRANTING SUMMARY JUDGMENT AS TO THE OTHER DEFENDANTS.

Appellant does not have standing to challenge the Court's order granting summary judgment. Appellant was expressly excluded from Respondent's motion and the Court's order. Neither Appellant nor his counsel appeared at the hearing at which the order granting summary judgment was issued. Appellant did not contest this order for more than five (5) months after its issuance.

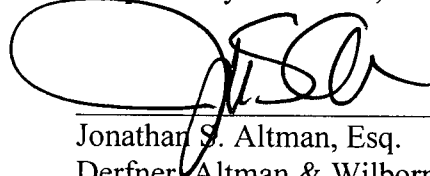
Prior to the filing of Respondent's Motion for Summary Judgment, an Order of Default had been issued as to all Defendants except Appellant. Under South Carolina law, by suffering a default, "*the defaulting party is deemed to have admitted the truth of Plaintiff's allegations and to have conceded liability,*" Roche v. Young Brothers, Inc. of Florence, 332 S.C. 75, 504 S.E.2d 311 (1998). No Defendant has challenged Judge Nicholson's order. Under South Carolina law, "*A party cannot raise on appeal a ruling or issue that does not pertain to the appealing party,*" Duke Power Company v. South Carolina Public Service Commission, 284 S.C. 81, 326 S.E.2d 395 (1985). "*A party cannot appeal from a decision which does not affect his interest, however erroneous and prejudicial it may be to the rights and interest of some other person,*" Ballington v. Paxton, 327 SC 372, 488 S.E.2d 882 (1997), Bivens v. Knight, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970). Appellant's claims were unaffected by the Court's order. Accordingly, he lacks standing to challenge the orders on appeal.

CONCLUSION

For the reasons stated herein, Respondent respectfully requests that this Court affirm the judgment of the Lower Court.

Date: March 8, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'JSA', is written over a horizontal line.

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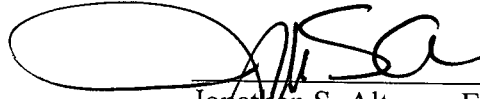
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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b),
SCACR.

March 8, 2013



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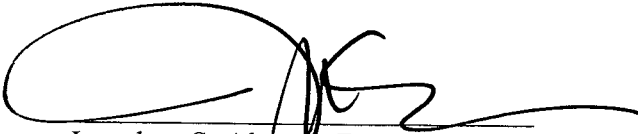
v.

Ernest McKnight.....Appellant.

PROOF OF SERVICE

I certify that I have served Respondents' Final Brief on Appellant Ernest McKnight by depositing a copy of it in the United States Mail, postage prepaid, on March 12, 2013, addressed to his attorney of record, Willie B. Heyward, Esq.

March 12, 2013



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