

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Larry Gregg,)
)
 Plaintiff,)
)
 vs.)
)
 Herman Smalls, III, Izetta Shaw a/k/a)
 Syvetta Smalls, John Doe and Jane Doe,)
 as fictitious names for a class of unknown)
 persons being incompetents, minors, person)
 in military service to the United States of)
 America, imprisoned, and/or under any)
 other form of legal disability, including but)
 not limited to unknown heirs, devisees,)
 distributes, administrators, or personal)
 representatives of deceased persons Herman)
 Smalls, Jr. and Lamont Green and all other)
 persons known or appear of record to have)
 some right, title, interest in or lien upon the)
 real estate described in the complaint herein)
)
 Defendants.)
)
)

IN THE COURT OF COMMON PLEAS
 CASE NUMBER: 2019-CP-10-02342

**ORDER GRANTING DEFENDANTS'
 MOTION FOR SUMMARY JUDGMENT**

RECEIVED
Feb 18 2022
SC Court of Appeals

This matter came before the Court for a hearing on June 22, 2021 on Plaintiff's Motion for Summary Judgment and Defendant's Motion for Summary Judgment. Plaintiff Larry Gregg filed this action against Defendants seeking a judgment from the court that he acquired the subject property by adverse possession. Defendants filed an Answer and Counterclaim setting forth that Plaintiff had not acquired the subject property by adverse possession because he could not prove all of the elements necessary to prove adverse possession. Defendants included in their Answer and Counterclaim an action for Ejectment to have Plaintiff removed from the subject property. Plaintiff filed a Reply to Defendants' Answer and Counterclaim.

After considering the pleadings and exhibits attached to Defendants' Memorandum in Support, as well as arguments presented at the hearing, this Court finds that Plaintiff is unable to prove the necessary elements to acquire the subject property by adverse possession. Accordingly, there are no genuine issues of material facts, and Defendants are entitled to judgment as a matter of law.

FINDINGS OF FACTS

The subject property for this action is known as Lot 4B, 2229 David Green Road, Mt. Pleasant South Carolina (hereinafter "the Property"). A Final Order After Hearing in a Quiet Title Action in Case Number: 2016-CP-10-06964, *Robinson v. Ketchen, et al.* was signed and filed by the undersigned, The Honorable Mikell R. Scarborough, Charleston County Master-In-Equity, on March 4, 2019 (hereinafter the "Order"). In Paragraph 7, Page 11, of the Order, Judge Scarborough ruled that:

"The heirs of Herman Smalls, Jr. are the owners of Lot 4B as described in Exhibit "A" and fee simple title is quieted and confirmed in their names; subject however to the claims, if any, of Larry Gregg with it being the obligation of the Herman Smalls Jr. Heirs and Larry Gregg to undertake such processes as required by law to determine their respective interests and claims to Lot 4B, and further subject, however, to the rights of any mortgagee or lien holder of public record having obtained such encumbrances by such owner's consent or due process of law."

The Property was part of a larger tract owned by Herman Smalls, Jr. and his family. Several years prior to the *Robinson v. Ketchen, et al* case being filed and a final order being signed, Herman Smalls, Jr. and his family divided this larger tract into several lots. The family then determined that Herman Smalls, Jr. and his sister, Ellen Smalls Manigault, were entitled to Lot 4. Herman Smalls, Jr, and his sister, Ellen Smalls Manigault, divided Lot 4 into two lots, Lot 4A and Lot 4B. Ellen Smalls Manigault received Lot 4A and Herman Smalls, Jr. received Lot 4B

(the Property). The Order confirmed ownership of Lot 4A to Ellen Smalls Manigault and Lot B to the heirs of Herman Smalls, Jr. (Herman Smalls, Jr died in 2005), subject to any claim of Larry Gregg.

Herman Smalls, Jr. placed a mobile home on the Property in the early 1980's and used it on vacations and at other times. In 1986, Plaintiff moved his mobile home to the Property based on a conversation he had with Herman Smalls, Jr. Through this conversation, Plaintiff received permission from Herman Smalls, Jr. to place his mobile home on the Property. After Plaintiff moved his mobile home on the Property he made improvements to his mobile home over several years by adding a carport and three rooms.

Herman Smalls, Jr. died in 2005 and his estate has not been probated. He left as his heirs, Syvetta Smalls, Herman Smalls, III and Lamont Green. Lamont Green died in either 2018 or 2019 leaving no spouse and no children. Currently the heirs of Herman Smalls, Jr. are Syvetta Smalls and Herman Smalls, III.

After the death of Herman Smalls, Jr., Syvetta Smalls and Herman Smalls, III knew the Plaintiff was still living on the Property and gave him permission to live on the Property. After the Final Order in Case Number: 2016-CP-10-06964, *Robinson v, Ketchen, et al.* was filed on March 4, 2019 and Defendants were determined to be the owners of the Property, they promptly provided notice to Plaintiff on April 24, 2019 that he did not have permission to reside on the Property and that he needed to vacate the Property.

CONCLUSIONS OF LAW

A. Summary Judgment

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *City of Columbia v.*

American Civil Liberties Union, etc., et al., 323 S.C. 384, 475 S.E.2d 747 (1996). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24 (1988). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991).

The moving party has the burden of establishing that there is no genuine issue of material fact. *McNair v. Rainsford*, 330 S.C. 332 (Ct. App 1998). Once the moving party carries its initial burden, the opposing party “may not rest on mere allegations or denials of his pleadings, but must set forth or point to specific facts showing that there is genuine issue of material fact.” *Bravis v. Dunbar*, 316 S.C. 263 (Ct. App. 1994). Rule 56, SCRCF, requires the entry of summary judgment “against a party who fails to make a showing sufficient to establish the existence of an element essential to the party’s case, and on which that party will bear the burden of proof at trial.” *Etheredge v. Richland Sch. Dist. 1*, 330 S.C. 447 (Ct. App. 1998).

B. Adverse Possession

In South Carolina to establish a claim for adverse possession, the claimant must prove by clear and convincing evidence his possession of the subject property was continuous, hostile, actual, open, notorious and exclusive for the statutory period. *All Saints Parish, Waccamaw v. Protestant Episcopal Church In the Diocese of S.C.*, 358 S.C. 209, 595 S.E.2d 253 (Ct. App. 2004). The statutory period in South Carolina for adverse possession is ten (10) years. S.C. Code Ann. 15-67-210 (2005). In *Knox v. Bogan*, 322 S.C. 64, 472 S.E.2d 43 (Ct. App. 1996), the court explained for the possession to be hostile, the adverse claimant is required to show that his possession was actual, exclusive, open, notorious, and *without the consent* of the title owner.

In *McDaniel v. Kendrick*, 386 S.C. 437, 688 S.E.2d 852 (S.C. Ct. App. 2009), McDaniel owned property that Kendrick was living on for over 19 years. McDaniel's father owned the property and deeded to McDaniel while Kendrick was residing on the property. Kendrick and McDaniel's father were once married and then later divorced. Kendrick continued to live on the property after the divorce. McDaniel was aware that Kendrick was living on the property when she was conveyed ownership and she gave Kendrick permission to reside on the property. Then in 2005 McDaniel provided Kendrick with a notice to vacate. Kendrick failed to vacate and McDaniel filed suit. Kendrick claimed ownership to the property by adverse possession. The trial court ruled that Kendrick failed to prove adverse possession of the property because she had not demonstrated the required element of hostility. Kendrick then appealed.

Kendrick contended that the trial court erred in finding she was required to establish the element of hostility when claiming adverse possession of an entire tract of land. She maintained that the trial court further erred in concluding her possession was not sufficiently hostile. The Court disagreed with her contentions.

The court cited *All Saints Parish, Waccamaw* and *Knox v. Bogan* regarding what must be proven to claim adverse possession and specifically, hostility. Citing *Knox v. Bogan*, the supreme court, addressing the requirement of hostility, stated:

“The only issue is whether the Knoxes' possession was sufficiently hostile. As we read *Perry v. Heirs at Law* (316 S.C. 224, 449 S.E.2d 250 (1994) and *Wigfall v. Fobbs*, 295 S.C. 59, 367 S.E.2d 156 (1988) either there is no longer a hostility requirement where the claim is to an entire tract, or South Carolina does in fact follow the majority view that the mental attitude of the possessor of land is immaterial. Under the majority view an actual, exclusive, open and notorious possession without the consent of the title owner is both wrongful and adverse and will ripen into perfect title in the usual way when the statute of limitations has run. The majority view represents the most practical approach to the hostility requirement of adverse possession and is in keeping with the national trend of authority.”

The Court in *McDaniel* set forth that:

“The supreme court did not, as Kendrick argues, eliminate the hostility requirement when a party claims adverse possession of an entire tract of land. The court simply explained the hostility requirement is not necessarily predicated upon the claimant's conscience intention to possess the property against the true owner's wishes. A claimant may establish adverse possession if he occupies the property under the mistaken belief that it belongs to him. In any case, Knox makes clear the claimant must be on the property without the consent of the title owner.” *Id* at 442.

The Court in *McDaniel* also set forth that Kendrick was given permission by McDaniel for her to occupy the property. The Court then stated:

“Instead, this case is more analogous to those wherein a party entered land with permission of the owner and then claimed adverse possession at a later point. See *Davis v. Monteith*, 289 S.C. 176, 180, 345 S.E.2d 724, 726 (1986) (finding occupation of property with owner's tacit permission was not hostile although such possession may have become hostile when claimant remained on property after being told to vacate); *Fradley v. Ivester*, 118 S.C. 195, 205, 110 S.E. 135, 138 (1921) (“The defendant's entry into possession was permissive, and, as she had a duty to perform, she could not hold adversely to the rights of the mortgagors until she either surrendered the possession or gave notice of an adverse possession.”); *Young v. Nix*, 286 S.C. 134, 136, 332 S.E.2d 773, 774 (Ct. App. 1985) (holding claimant who had farmed tract of land for more than forty years with permission of property owner's widower did not establish claim of adverse possession without a “clear and positive disclaimer of the title under which entry was made”). While a party cannot adversely possess property used with permission, a party may begin to satisfy the requirement of hostility upon a clear disclaimer of the owner's title. *All Saints Parish, Waccamaw*, 358 S.C. at 233, 595 S.E.2d at 266-67.” *Id* at 443-444.

The Court in *McDaniel* affirmed the trial court's ruling stating that Kendrick entered the property with her husband's permission and remained there for the next nineteen years with McDaniel's permission. Kendrick's refusal to vacate the property in 2005 began her time of occupying the property with hostility. However, Kendrick clearly had not satisfied the statutory period for adverse possession because McDaniel commenced her lawsuit just a few months later. The Court held, “Accordingly, the trial court did not err in finding Kendrick was required to

establish the element of hostility and that she failed to do so by clear and convincing evidence.”
Id at 444.

In the instant case, Plaintiff cannot satisfy the elements of adverse possession, specifically hostility. South Carolina case law is clear that in order to prove hostility in an adverse possession claim, the claimant’s possession must be *without the consent* of the owner. It is undisputed that Herman Smalls, Jr. consented to and gave Plaintiff permission to place his mobile home on the Property and live on the Property. It is also undisputed that after the death of Herman Smalls, Jr., his heirs, Syvetta Smalls and Herman Smalls, III, gave Plaintiff permission to stay and live on the Property. South Carolina case law is very specific regarding hostility and states that the claimant’s conscious intention must be to possess the property against the owner’s intentions. Plaintiff cannot prove he had a conscious intention to possess the Property against the intentions of Herman Smalls, Jr or his heirs because he stated in his deposition that he never meant to take the Property away from Herman Smalls, Jr. and his heirs. Because Plaintiff had permission from Herman Smalls, Jr. and his heirs to live on the Property, he lacked the conscious intention to possess the Property without the consent of the owners. Plaintiff is unable to prove he possessed the Property without the consent of Herman Smalls, Jr., and his heirs; therefore, he cannot prove that he occupied the Property with hostility.

The mistaken belief rule does not apply in this instance because Plaintiff did not provide any testimony or evidence that he occupied the Property under the mistaken belief that he owned it. Plaintiff testified in his deposition that he did not know who owned the Property. Furthermore, Plaintiff never paid the property taxes on the Property. Accordingly, Plaintiff is unable to prove that he was under a mistaken belief that he owned the Property.

The facts and circumstances in this case after the death of Herman Smalls, Jr. are similar to the *McDaniel* case. It is undisputed that Plaintiff was given permission to live on the Property by Defendants, just as McDaniel gave permission to Kendrick to live on her property. Once this Court determined that Defendants were the owners of the Property in Case Number: 2016-CP-10-06964, *Robinson v. Ketchen, et al.*, it is also undisputed that Defendants informed Plaintiff on April 24, 2019 to vacate the Property, just as McDaniel informed Kendrick to vacate her property. When Plaintiff received the notice to vacate and failed to move off the Property, his time began to run for occupying the Property with hostility and *without the consent* of the owner. Plaintiff, just like Kendrick, is unable to establish a claim for adverse possession, because he cannot prove by clear and convincing evidence that his possession of the Property was continuous, hostile, actual, open, notorious and exclusive for the statutory period of ten (10) years. Therefore, it is undisputed that the Plaintiff has not satisfied the statutory requirements.

Plaintiff is unable to prove the element of hostility for adverse possession regarding the subject property. Plaintiff had permission to live on the Property and his possession was with the consent of the owners. Only recently did Plaintiff's occupancy of the Property begin to be hostile, but clearly, not for the statutory period of ten (10) years. No material issues of fact remain to be decided. Therefore, when no issues of material fact exist, the appropriate action is summary judgment. *Spencer v. Miller*, 259 S.C. 453, 192 S.E.2d 863 (1972).

THEREFORE IT IS ORDERED that Defendants' Motion for Summary Judgment is granted.

The Honorable Mikell R. Scarborough

Charleston, South Carolina
_____, 2022



Charleston Common Pleas

Case Caption: Larry Gregg VS Herman Smalls III , defendant, et al
Case Number: 2019CP1002342
Type: Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062