

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM YORK COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Teasa K. Weaver, Master In Equity

Case No. 2020-CP-46-00549

LB PARK, LLC,Respondent,

v.

San Juan Holdings, Brett Osborne, the trustee; Bret Osborne as Trustee of San Juan Holdings; Ryan Powell; and John Doe and Mary roe, representing all unknown persons having or claiming to have any right, title, or interest in or to, or lien upon the real estate described as 25056 Timberlake Drive, York County, South Carolina, TMS 643-10-0001-023, their heirs and assigns, and all other persons, firms, or corporations entitled to claim under, by or through the above named Defendant(s), and all other persons or entities unknown claiming any right, title, interest, estate in, or lien upon the real estate described as 25056 Timberlake Drive, York County, South Carolina, TMS 643-10-01-023 Defendants,

OF WHOM Ryan Powell is the Petitioner.

MOTION TO DISMISS PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 240, SCACR, LB PARK, LLC (“LB PARK” or “Plaintiff”) hereby moves for the dismissal of the Petitioner’s petition for a writ of certiorari (“Petition”) on the grounds that it seeks relief from an order of the Court of Appeals dismissing this appeal because the underlying orders are not immediately appealable. In the alternative, LB PARK asks that the Petition be summarily denied. LB PARK requests that all appellate deadlines be stayed while this motion is pending.

LB PARK further asks that this motion be decided on an expedited basis such that title to the property involved can be quickly determined consistent with the procedures in place for clearing tax title. LB Park began this process in January 2019. The case was scheduled for a final hearing on October 21, 2021 before the York County Master In Equity (“Master”); however, that date has been put on hold as a result of Ryan Powell’s continuing efforts to prevent this case from being heard on its merits

BACKGROUND¹

I. This is an action to quiet tax title.

On February 12, 2020, LB PARK filed this action to quiet tax title to real property located in York County (the “Property”), pursuant to S.C. Code Ann. §§ 12-61-10 to -60. (9/9/2020 Motion to Dismiss attached as Ex. A at Ex. 1). LB PARK’s interest in the property is explained in the Complaint as follows:

11. SB MUNI CUST % LBSC-11 LLC (“SB MUNI”) purchased the Property at the York County tax sale held on **November 6, 2017**, with a bid of \$171,000.00. York County conveyed tax title to SB MUNI by tax deed dated and recorded on **December 26, 2018**, in the ROD in Book 17337, page 73 (the “Tax Deed”).

12. SB MUNI subsequently conveyed the Property to Plaintiff by quitclaim deed dated January 7, 2019, and recorded in the ROD on January 10, 2019, in Book 17361, page 145.

(Emphasis added). LB PARK was entitled to bring this action pursuant to S.C. Code Ann. § 12-61-10 which provides in pertinent part, “any person or the executors, administrators, successors, assigns or grantees thereof, which has purchased at or acquired through a tax sale and obtained title to any real or personal property, may bring an action in the court of common pleas of such county for the purpose of barring all other claims thereto.”

The other parties to this matter are described as follows in the Complaint:

¹ For the sake of completeness, the Public Index and C-Track Index for each of the referenced actions and appeals are attached as Exhibit I.

3. Defendant San Juan Holdings, Brett Osborne, the trustee (“San Juan”) obtained title to the Property by deed dated June 1, 2000, and recorded on June 27, 2000, in the York County Register of Deeds Office (the “ROD”) in Book 3173, page 343.

4. By virtue of the foregoing deed, Plaintiff is informed and believes that San Juan owned 100% of fee simple title to the Property prior to the tax sale. Accordingly, Plaintiff has named San Juan as a party to extinguish and eliminate any and all interests that San Juan has or may claim to have in, to, or upon the Property.

5. Plaintiff named Defendant Brett Osborne as Trustee of San Juan Holdings (“Osborne”) as a party due to the Notice of Sale, Transfer or Exchange dated December 20, 2012, and recorded on December 26, 2012, in the ROD in Book 13103, page 241 (the “Osborne Notice”).

6. Plaintiff is informed and believes that the Osborne Notice did not convey title or any other interest in the Property and that, after the Osborne Notice was recorded, title to the Property remained vested in San Juan. However, Plaintiff has named Osborne as a party to extinguish and eliminate the Osborne Notice as a cloud, impediment, or encumbrance upon the title to the Property.

7. Plaintiff is informed and believes that Defendant Ryan Powell has claimed to possess an unrecorded ownership interest in the Property. While Plaintiff denies that Defendant Ryan Powell has any interest in the Property, Plaintiff has named Defendant Ryan Powell as a party to provide him with notice of this proceeding and the opportunity to protect any interest he claims to have in the Property.

8. Defendants John Doe and Defendant Mary Roe and the other unknown defendants (collectively the “Unknown Defendants”) represent and include all unknown persons or entities having or claiming any right, title, or interest in or to, or lien upon, the Property.

It has now been more than three years since the issuance of the Tax Deed, and LB PARK still has not been able to quiet tax title due to the legal maneuverings of Powell. LB PARK simply asks that this matter be remitted immediately to the Master for a determination on the merits.

II. Powell has filed multiple notices of appeal to prevent a determination on the merits of this action.²

A. The First Notice of Appeal and Remand to the Circuit Court

LB PARK originally sought to vindicate its rights by filing a Complaint to quiet tax title on January 25, 2019 (“2019 Action”). (6/19/19 Motion to Dismiss attached as Exhibit B at Ex. 1). On April 8, 2019, Powell, a non-party to that action, filed a motion to dismiss or intervene. (*Id.* at Ex. 2). On May 1, 2019, LB PARK filed a motion for an order of reference. (*Id.* at Ex. 3). The Circuit Court denied the motion to dismiss and granted the motion for order of reference in separate orders filed May 31, 2019. (*Id.* at Exs. 4 and 5).

Powell appealed (AC# 2019-000979, “Appeal 1”). LB PARK moved to dismiss. (Ex. B). The Court of Appeals denied the motion by order dated July 31, 2019 on the grounds that the denial of Powell’s motion to intervene was immediately appealable. (7/31/19 Order attached as Ex. C).

LB Park moved to remand to the Circuit Court “in order for LB PARK to dismiss the underlying action without prejudice pursuant to Rule 41(a), SCRCF. If the motion for remand is granted, LB PARK will dismiss the underlying action and refile a new action to include Ryan Powell as a named defendant.” (8/13/19 Motion attached as Ex. D). The Court of Appeals granted the motion by order dated October 15, 2019, and Appeal 1 has been held in abeyance since that time.³ (10/15/19 Order attached as Ex. E).

² LB Park’s counsel has had no *ex parte* communications with the Court of Appeals, much less made some kind of agreement with the Court that predetermined the outcome of this litigation, as suggested on pages 15 and 19 of the Petition. The full history of all three of Powell’s appeals before the Court of Appeals is as reflected in the record for each of those matters.

³ Powell unsuccessfully sought rehearing, contempt, and “an emergency motion to revive appeal” with respect to the order remanding this matter, all of which were denied by the Court of Appeals. (2/10/20, 3/19/20, and 5/20/20 Orders attached as Ex. F). Appeal 1 prevented LB PARK from proceeding with its action to quiet tax title from June 2019 until February 2020, approximately eight months.

Consistent with its request for remand, LB PARK filed a stipulation of dismissal of the 2019 Action and filed the instant action on February 12, 2020 (“2020 Action”). (Stipulation attached as Ex. G; Ex. A at Ex. 1)

B. The Second Notice of Appeal

Following the filing of the 2020 Action, Powell filed a motion to dismiss. (Ex. A at Ex. 2). On June 23, 2020, LB PARK filed a motion for an order of reference. (*Id.* at Ex. 3). The Circuit Court denied Powell’s motion to dismiss and granted LB PARK’s motion for an order of reference by order dated August 20, 2020. (*Id.* at Ex. 4). The order reads: “[a]fter careful consideration, Plaintiff’s Motion for Order of Reference to the Master in Equity is GRANTED. Defendant’s Motions to Dismiss are DENIED.”

Powell appealed that order (AC# 2020-001228, “Appeal 2”). LB PARK moved to dismiss the appeal on the grounds that there was not an appealable order because there is no right to a jury trial in an action to quiet tax title. (Ex. A). The Court of Appeals granted the motion by Order filed on September 15, 2020, finding as follows:

Because the underlying orders are not immediately appealable, we dismiss this appeal. *See Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d. 242, 243 (1975) (“Ordinarily the granting or refusal of an order of reference is not appealable unless the granting of the reference deprives a party of a mode of trial to which he is entitled by law, or the trial judge in refusing a reference did so upon the erroneous belief that the cause of action was a legal one.”); *id.* (“In equity the parties are not entitled, as a matter of right, to a trial by jury.”); *Millvale Plantation, LLC v. Carrison Family Ltd. P’ship*, 401 S.C. 166, 173, 736 S.E. 286, 289 (Ct. App. 2012) (“An action to quiet title to property is an action in equity.”); *McLendon v. SC Dep’t of Highways & Pub. Transp.*, 313 S.C. 525, 526, 443 S.E.2d 539, 540 (1994) (“The denial of . . . a motion [to dismiss] is not immediately appealable under section 14-3-330 of the South Carolina Code (2017).”).

(9/15/2020 Order and Remittitur attached as Ex. H). In other words, in dismissing the appeal, the Court of Appeals determined that there was no right to a jury trial in this matter. If there were an issue triable by a jury, the appeal of the Order of Reference would have been allowed to proceed.

Appeal 2, which Powell claims on page 3 of his Petition was “mistakenly appealed,” delayed resolution of the 2020 action for an additional two months.

C. The Third Notice of Appeal

Powell filed a motion to return the 2020 Action from the Master to the Circuit Court on July 9, 2021. (App. at 10, Ex. 2). LB PARK submitted a memorandum in opposition to the motion, arguing that this matter had already been determined by the order dismissing Powell’s earlier appeal and because Powell has no right to a jury trial on any claims because this is an action to quiet tax title brought pursuant to S.C. Code Ann. §§ 12-61-10 to -60. (*Id.* at Ex. 3). The Master denied Powell’s motion on the grounds that he is not entitled to a jury trial. (*Id.* at Ex. 4). The 2020 Action was set for final hearing before the Master on October 21, 2021.

Powell again appealed on October 15, 2021 (“Appeal 3”), attaching the order denying a jury trial as well as earlier orders denying a motion to dismiss/ for judgment on the pleadings and discovery. LB Park again moved to dismiss. (App. at 10). The Court of Appeals again dismissed the appeal. (App. at 80). Powell unsuccessfully sought rehearing (App. at 96), and this Petition followed. To date, Appeal 3 has delayed a trial on the merits of this matter by an additional five months and counting.

ARGUMENT

As noted by former Chief Justice Jean H. Toal, “[b]ecause motions are used in the appellate courts to seek specific relief, there is no limit to the type of motion that could be filed in the appellate courts.” Jean H. Toal *et al.*, *Appellate Practice in South Carolina* 379 (3d ed. 2016). This saga has already dragged on for more than three years. LB PARK is simply trying to get this matter heard on the merits as soon as possible.

LB PARK is damaged each and every day Powell retains physical possession of the property. Given the time and legal fees involved in responding to all of Powell’s appellate and

trial court filings, LB PARK has in no way received any benefit from the process outlined by the General Assembly to clear tax titles. As set forth there, “[t]his chapter shall be liberally construed to the end that it shall afford a complete remedy to any plaintiff claiming property by forfeiture unto him for nonpayment of taxes or by acquisition at or through a tax sale, so that he can under this chapter obtain a final and complete adjudication of the nature and extent of the title thereto and, in any event, procure a valid sale of the property from the proceeds of which the unpaid taxes shall be paid.” S.C. Code Ann. § 12-61-60. Rather than receiving a complete remedy and a final and complete adjudication, LB Park has been forced to deal with years of Powell’s filings made solely for the purposes of delay.

The Court of Appeals correctly dismissed this appeal for want of an appealable order. This Court should grant this motion, or alternatively, summarily deny the Petition for the same reasons.

“The right of appeal arises from and is controlled by statutory law.” *N.C. Fed. Sav. & Loan Ass’n v. Twin States Dev. Corp.*, 289 S.C. 480, 481, 347 S.E.2d 97, 97 (1986). Appealability is generally governed by S.C. Code Ann. § 14-3-330, and interlocutory orders are otherwise not immediately appealable. *See, e.g., Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000); *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 533 S.E.2d 575 (2000); *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2000). Here, the underlying orders are not appealable under any of the categories provided in S.C. Code Ann. § 14-3-330.

Generally, the denial of a motion to dismiss under Rule 12(b) is not immediately appealable. *Burkey v. Noce*, 398 S.C. 35, 726 S.E.2d 229 (Ct. App. 2012) (noting that generally the denial of motions to dismiss based on failure to state a claim, statute of limitations, lack of subject matter jurisdiction, and to change venue are not immediately appealable); *Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995); *McLendon v. South Carolina Dept. of Highways and*

Public Transportation, 313 S.C. 525, 443 S.E.2d 539 (1994); *Moyd v. Johnson*, 289 S.C. 482, 347 S.E.2d 97 (1986). The same should apply here with respect to “Order #2 on Appeal.” (App. at 6). The order merely denies the motion to dismiss. The Court of Appeals has now twice denied Powell’s efforts to appeal these orders. (*Id.* at 80; 10, Ex. 1).

With respect to the denial of Powell’s motion to return case to Circuit Court, the order does not deprive Powell of any mode of trial to which he might otherwise be entitled. (*Id.* at 4). “Ordinarily the granting or refusal of an order of reference is not appealable unless the granting of the reference deprives a party of a mode of trial to which he is entitled by law, or the trial judge in refusing a reference did so upon the erroneous belief that the cause of action was a legal one.” *Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d 242, 243 (1975). “Hence, the issue before the Court is whether the appellant is entitled to a jury trial as a matter of right. If [h]e is not, the appeal should be dismissed.” *Id.* Here, the Court of Appeals has twice determined that Powell is not entitled to a jury trial, and therefore, the order is not immediately appealable. (App. at 80; 10, Ex. 1).

With respect to actions to quiet tax title, this Court has made it clear that there is no right to a jury trial, even if the defendant asserts a counterclaim stating a cause of action at law. *Rosenbaum v. S-M-S 32*, 311 S.C. 140, 427 S.E.2d 897 (1993). As stated there:

Considering the unique circumstances existing in a tax forfeiture acquisition, and the prevailing statutory provisions governing suits to clear tax titles, we conclude that the appellant may not evade the intent of the legislature and obtain the right to a jury trial by interposing a counterclaim designed to thwart the reasonable and practical implication of Chapter 61.

Id. Therefore, the order denying the motion to return case to Circuit Court is not immediately appealable, and the Court of Appeals correctly dismissed Appeal 3.

Additionally, an action concerning the validity of a tax sale is an action in equity. *Johnson v. Arbabi*, 355 S.C. 64, 69, 584 S.E.2d 113, 115 (2003) (citing *Bryan v. Freeman*, 253 S.C. 50, 51, 168 S.E.2d 793, 793-94 (1969) (“An action to remove a cloud on and quiet title to land is one in equity.”)); *see also Godfrey v. Webb*, 277 S.C. 246, 247, 285 S.E.2d 883, 884 (1982) (holding that an action to set aside a tax deed and an action to confirm the same tax sale were both actions in equity); *Cathcart v. Jennings*, 137 S.C. 450, 135 S.E. 558, 562 (1926) (“A court of equity has jurisdiction to remove a cloud upon title.”) (internal citations omitted). Accordingly, there is no right to a jury trial in this case and there is no immediate appeal.

As such, this motion should be granted so that this matter can proceed on the merits as soon as possible.

CONCLUSION, REQUEST FOR EXPEDITED CONSIDERATION, AND REQUEST FOR SANCTIONS

For all of these reasons, this Petition must be dismissed or summarily denied. LB PARK asks that this motion be given expedited consideration so that this case can be resolved on the merits.

In addition, given the successive nature of Powell’s appeals and the fact that this Petition was filed in hopes of further delaying a trial on the merits, LB PARK asks the Court to impose a sanction pursuant to Rule 269, SCACR.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

s/ Sarah P. Spruill

Sarah P. Spruill (SC Bar No. 68337)

ONE North Main Street, 2nd Floor

P.O. Box 2048 (29602)

Greenville, SC 29601

(864) 240-3200

sspruill@hsblawfirm.com

A. Parker Barnes III (SC Bar No. 68359)

P.O. Box 11889

Columbia, South Carolina 29211-1889

(803) 779-3080

pbarnes@hsblawfirm.com

Attorneys for Respondent

LB PARK, LLC

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