IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case Number 61,044

GLORIA DAVIS, :

Appellant :

vs. :

ROSMAN CHARLES DIEUJUSTE, :

Appellee :

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT

BRIEF OF APPELLANT

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CITATIONS OF AUTHORITY

STATEMENT OF THE FACTS AND THE CASE

The parties to this appeal are Gloria Davis, f/k/a Gloria Dieujuste, the Plaintiff in the Court below, the Appellee in the Fourth District Court of Appeal, and the Appellant herein, and Rosman Charles Dieujuste, the Defendant in the Court below, the Appellant in the Fourth District Court of Appeal, and the Appellee herein. The parties will be referred to as they stand before this Court. The page references herein will be to the Record on Appeal (R-page number).

The marriage of the parties was dissolved in Broward County, Florida, in case number 76-19898, in the Circuit Court of the Seventeenth Judicial Circuit, on April 1, 1977 (R-190;191). Appellee was the Petitioner in that case; real estate owned by the parties as tenants by the entireties was not described or even mentioned in the Petition For Dissolution Of Marriage (R-183;184) and final judgment was entered after default. On June 20, 1978, more than one year after the entry of the Final Judgment of Dissolution of Marriage, Appellant filed her Petition for Additional Relief After Dissolution of Marriage. Upon motion of the Appellee, that Court correctly dismissed the Petition for Additional Relief after Dissolution of Marriage noting that the Court's jurisdiction had terminated (R-189). Thereafter on August 29, 1978, Appellee filed her Complaint for Additional Relief After Dissolution of Marriage. That Complaint sought the division of real property formerly owned by the parties as tenants by the entireties and at that time owned by the parties as tenants in common and a determination that the Appellee's share be impressed with a constructive trust in favor of the Appellant (R-93-95). After denying multiple motions to dismiss the Complaint, trial was held and judgment was entered in favor of the Appellant declaring her to be the sole owner of the real estate involved with the Appellee having an equitable lien therein in the amount of $950.00.

The Fourth District Court of Appeal reversed and remanded declaring that "res judicata constitutes a complete defense to the claim of Appellee embodied in the

Complaint on which the judgment on appeal is based". On Motion For Rehearing, Appellant argued that the ruling of the Fourth District Court of Appeal in the case based upon a complaint for dissolution of marriage which did not describe the property or even allege that the parties were property owners was a denial of due process.

The Fourth District Court of Appeal in denying the Motion For Rehearing specifically noted direct conflict between the Supreme Court's holding in Cooper v Cooper, 69 So.2d 881 (Fla 1954) and the decision of the Third District Court of Appeal in Vandervoort v Vandervoort, 277 So.2d 43 (Fla 3d DCA 1973), cert denied 287 So.2d 682 (Fla 1973).

ISSUE PRESENTED FOR REVIEW

I. WHETHER A FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE ENTERED IN A PROCEEDING WHERE PROPERTY OWNED BY THE PETITIONER AND RESPONDENT AS TENANTS BY THE ENTIRETIES IS NOT DISCUSSED OR MENTIONED IS RES JUDICATA ON THE ISSUE OF THE DIVISION OF THE PROPERTY BY ANOTHER COURT.

ARGUMENT

I. A FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE IN AN ACTION WHERE PROPERTY OWNED BY THE PETITIONER AND RESPONDENT IS NOT DISCUSSED OR EVEN MENTIONED IS NOT RES JUDICATA TO THE ISSUE OF DIVISION OF THE PROPERTY.

The Supreme Court in Finston v Finston, 160 Fla 935, 37 So.2d 423 (Fla 1948) announced the general rule "that a final decree *** settles all property rights of the parties and bars any action thereafter brought by either party to determine the qustion of property rights.". In that case, the Court had before it the question of property rights and held that the doctrine of res judicata controlled. In an extension of that case, Cooper v Cooper, 69 So.2d 881 (Fla 1954), an action to set aside a deed based on duress which was alleged to have occurred prior to the dissolution, the Court ruled referring to Finston, supra, said "the property rights were not introduced in the litigation but they could and should have been so the same rule applies ...". The Fourth Distrit Court of Appeal relying upon the last quoted statement in Cooper, supra, has ruled that the decision of the dissolution of marriage court is res judicata to the division of the property by the trial court in the instant action. Such decision conflicts with decisions of other District Courts of Appeal which have produced differing results in cases involving substantially the same controlling facts. In Vandervoort v Vandervoort, 277 So.2d 43 (Fla 3 DCA 1973), cert denied 287 So.2d 682 (Fla 1973), the Court held that " ... matters of property rights of the parties which were dealt with before the Master, and reported by the Master and confirmed by judgment of the Court, are res judicata for the parties. As to matters of that nature which were not so dealt with before the Master and not adjudicated by the judgment of August 9, 1972, the parties are at liberty to litigate them in other separate proceedings.". It is

obvious that the decision in Vandervoort, supra, is the decision which must be followed in the instant case. The rulings in Finston, supra, and Cooper, supra, can not be extended to prevent the division of the property by partition or by the impression of a resulting trust because to so rule would mean that where the parties to a dissolution of marriage have not divided their properties in the dissolution that they must always continue to hold the property as tenants in common. Therefore, the only effect that the ruling of the Fourth District Court of Appeal could have intended by its reversal of the Trial Court was to rule that a division of the property other than by dividing it one-half to the Petitioner and one-half to the Respondent was barred by the doctrine of res judicata. It is submitted that such a rule creates a trap for the unwary by allowing a Petitioner who has no interest in a piece of property (as was the case here according to the finding of fact implicit in the ruling by the Trial Judge) to become the owner of an irrefutable one-half interest simply by filing an action for dissolution without making any mention of the fact that the parties own any property or of his claim to an interest in the property.

Such a ruling by the Fourth District Court of Appeal would be violative of the Appellant's right to due process because the Fourth District Court of Appeal, by reversing and remanding with instructions that judgment be entered in favor of the Appellee, is ruling that the Final Judgment of Dissolution of Marriage, based upon constructive service in which the property was not described or even mentioned, is res judicata is impliedly saying that the Appellant's right to due process has been honored in the dissolution proceeding. Such a decision conflicts with the decisions of the First District Court of Appeal in Nethery v Nethery, 212 So.2d 10 (Fla 1st DCA 1968); with the Second District Court of Appeal in Lahr v Lahr, 337 So.2d 837 (Fla 2nd DCA 1976); and with the Third District Court of Appeal in Hennig v Hennig, 162 So.2d 288 (Fla 3rd DCA 1964), cert denied 166 So.2d 754 (Fla). All of the above cited cases hold that where service on the Defendant is by publication and the Notice of Publication fails to

include a legal description of the property, that the Court does not acquire jurisdiction over the property sufficient to adjudicate it in the dissolution action.

The Appellee in his Reply Brief on jurisdiction dismisses the due process argument by suggesting that it was not raised until the rehearing and not preserved as a point for appeal. We respectfully submit that it was the order of reversal by the Fourth District Court of Appeal which violated the Appellant's right to due process and therefore that issue could not have been argued until the Motion For Reheaing.

It is obvious that jurisdiction to divide the property owned by the parties as tenants in common after the entry of final judgment of dissolution of marriage must exist. If the Fourth District Court of Appeal by its ruling is attempting to state that the doctrine of res judicata requires that the property may only be divided fifty percent to each party, we respectfully submit that this is not the law. Section 64, Fla Stat (1979), Partition, specifically Section 64.041, obviously contemplates that the interests of co-owners may not be equal because it requires an allegation stating the quantity of the interest of each owner. Another method of dividing the property which the Fourth District Court of Appeal has completely failed to recognize is the declaration of resulting trust. The elements of a resulting trust are where one party pays the consideration for a parcel of property and it is deeded in the name of another party. Upon proof of this fact, a presumption arises that the legal titleholder is not the equitable titleholder and that equitable title is vested in the person who paid the consideration. This theory was recognized in the State of Florida in the case of Johnson v Craig, 28 So.2d 696 (Fla 1946). This case is particularly appropriate to a consideration of the case at bar because in addition to approving the theory of resulting trust, it discusses the theory of equitable lien where the party which legal title has actually contributed to the purchase price of the real estate. In the case at bar, the Trial Court, in its Final Judgment, rules that the real estate is the sole and exclusive property of the Appellant and the Appellee was adjudged to have an

equitable lien in the amount of $950.00.

CONCLUSION

As demonstrated by the Appellant's Brief on Jurisdiction, the rulings of the Supreme Court in Cooper, supra, and Finston, supra, as applied by the Fourth District Court of Appeal in this case, are directly contradictory to the rule of the Third District Court of Appeal in Vandervoort, supra, and therefore the jurisdiction is conferred on this Court by virtue of Rule 9.030(2)(A)(iv). It is submitted that the ruling in each of the three cases may continue to stand without modification only when the rule in each case is properly applied. Finston, supra, states the general rule "that a final decree *** settles all property rights of the parties and bars any action thereafter brought by either party to determine the question of property rights.". Cooper, supra, extends the rule by stating "the property rights were not introduced in the litigation but they could and should have been so the same rule applies ...". Vandervoort, supra, states an exception to the rule that where " ... matters of property rights of the parties which were dealt with before the Master, and reported by the Master and confirmed by judgment of the Court, are res judicata for the parties. As to matters of that nature which were not so dealt with before the Master and not adjudicated by the judgment of August 9, 1972, the parties are at liberty to litigate them in other separate proceedings.". This exception to the general rule is required by due process under circumstances such as the instant case where the pleadings in the dissolution of marriage action do not confer subject matter jurisdiction to divide the property, and where the pleadings do not place the Respondent on notice that an action pertaining to property rights is pending.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appellant's Jurisdictional Brief was furnished by U.S. Mail to: JOHN D. KRUSE, Esquire, Attorney for Appellee, 1776 East Sunrise Boulevard, Suite 219, Fort Lauderdale, Florida 33304, this 2nd day of February, 1982.

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