Ltr w/app

FILED
SID J. WHITE
AUG 8 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE
SUPREME COURT OF FLORIDA

RONALD GUY McINTOSH,
et al.,

Petitioner,

vs.

L. H. HOUGH,

Respondent.

CASE NO.: 90-1036

78,152

REVIEW OF CERTIFIED QUESTION
FROM THE FIFTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF L. H. HOUGH

DAWSON, GALANT, SULIK,
WIESENFELD & BICKNER

By: _____
CARL D. DAWSON
320 East Adams Street
Jacksonville, FL 32202
(904) 355-5505
Attorney for Respondent
Florida Bar No. 0018597

TABLE OF CONTENTS

TABLE OF CITATIONS

Other Citations

PRELIMINARY STATEMENT

The Appellant will be referred to as "McIntosh". The Appellee will be referred to as "Hough". Les Miles Enterprises, Inc. will be referred to as "Les Miles". Gregory W. Johnson, P.A., will be referred to as "Gregory Johnson". Louise T. Bailey will be referred to as "Bailey". All references to the record will be "R", all references to the transcript will be "T" and all references to the appendix will be "A", each to be followed by the page number.

STATEMENT OF THE CASE

L. H. Hough filed a Complaint to quiet title of real property in the Circuit Court, in and for St. Johns County, Florida on August 14, 1985 (R.30). The Petitioner, Ronald Guy McIntosh, and others answered the Complaint (R.109) raising the defense of equitable estoppel.

McIntosh filed a Motion for Summary Judgment setting forth the unclean hands defense and equitable estoppel (R.886). Hough filed a Cross Motion for Summary Judgment (R.901). The Court entered a Summary Final Judgment for Hough against McIntosh (R.909, 923).

McIntosh appealed to the District Court of Appeal which handed down its opinion on April 11, 1991 (A.1-8). The opinion is a bit unusual in that (a) it overlooks facts such as the November 15, 1979 written agreements (A.9-12) which, in essence, required Hough to "buy back" the property from Bailey; and (b) it finds that McIntosh took title to one-half interest when he received a Quit-Claim Deed from Les Miles on March 1, 1984 (the Lis Pendens expired on February 22, 1984) when this issue was never raised in the Court below. However, the opinion did certify a question as hereafter set forth.

STATEMENT OF FACTS

The chronology of events listed in Petitioner's Brief is correct with the exception that it omits the November 15, 1979 written agreements between Hough and Bailey which set forth the terms by which Hough could reacquire the property from Bailey.

On July 17, 1979, Hendry Communications obtained a $45,000.00 Judgment (mostly punitive damages) against Hough. To circumvent the execution of the Judgment on his property, Hough and his wife, Bailey, conspired to deed the property to her and to go through a "sham" divorce. The deed was executed and recorded on August 17, 1979. About 3 months later, when Hendry Communications began to threaten both Hough and Bailey with another punitive damages lawsuit, Hough and Bailey, on November 15, 1979, entered into two agreements which, in essence, required Hough to buy the property back from Bailey by either posting a Supersedeas Bond or satisfying the Judgment, performing several other conditions precedent, including the payment of certain bills of Bailey. Bailey delivered deeds in which Hough's brother was named as grantee (he was loaning the money to take care of the Judgment) to Eugene Loftin, Esquire, as Escrow Agent. Although

Hough performed his obligations under the agreements, Bailey would not permit Loftin to deliver the deeds.

Hough and his brother in July of 1981 filed suit on the November 15, 1979 agreements against Bailey and Loftin demanding delivery of the deeds and also joined TBF Properties, Inc., (a corporation formed by Bailey and her attorney Gregory Johnson) into which the properties had been transferred. During the litigation in which Gregory Johnson was defending Bailey, and in the face of the Lis Pendens recorded on July 7, 1981, TBF Properties on December 24, 1981 deeded the property in question to Les Miles. Still, during the litigation and in face of a valid Lis Pendens, Les Miles on October 1, 1982, conveyed by Warranty Deed a one-half interest of the property to McIntosh. Les Miles had actual knowledge of the Duval County litigation and actually petitioned to intervene in that litigation but his petition was denied. On January 19, 1984, the jury in the Duval County litigation entered a favorable verdict for Hough requiring Bailey to deliver the deeds to Hough. On March 1, 1984, Les Miles quit-claim deeded his remaining one-half defeasible interest to McIntosh and on that same day a Final Judgment was entered in favor of Hough in the Duval County litigation. This Quit-

Claim Deed was given after the Lis Pendens expired on February 2, 1984.

THE CERTIFIED QUESTION

In the opinion of the District Court of Appeal, State of Florida, Fifth District, Case No. 90-1036, filed April 11, 1991, the Court certified the following question:

> "WHEN A PURCHASER FOR VALUE AFTER LIS PENDENS BUT WITHOUT ACTUAL NOTICE PURCHASES PROPERTY FROM THE FRAUDULENT GRANTEE AND THEN IS DENIED THE OPPORTUNITY TO INTERVENE IN THE PENDING ACTION, MAY HE RAISE EQUITABLE ESTOPPEL BY VIRTUE OF THE UNCLEAN HANDS DOCTRINE IN A SUBSEQUENT ACTION BROUGHT BY THE FRAUDULENT GRANTOR?"

SUMMARY OF ARGUMENT

Issue One

"WHEN A PURCHASER FOR VALUE AFTER LIS PENDENS BUT WITHOUT ACTUAL NOTICE PURCHASES PROPERTY FROM THE FRAUDULENT GRANTEE AND THEN IS DENIED THE OPPORTUNITY TO INTERVENE IN THE PENDING ACTION, MAY HE RAISE EQUITABLE ESTOPPEL BY VIRTUE OF THE UNCLEAN HANDS DOCTRINE IN A SUBSEQUENT ACTION BROUGHT BY THE FRAUDULENT GRANTOR?"

Unless the purchaser was defrauded by the fraudulent grantor, he would have no standing in an action where fraudulent grantor is seeking to enforce a valid contract with fraudulent grantee.

Issue Two

MAY THE APPELLATE COURT ENTERTAIN AN ISSUE NOT RAISED IN THE LOWER COURT AND RULE THEREON?

The opinion of the District Court of Appeal reversed the lower court on an issue that had not been raised or ruled upon below and somewhat chastised the lower court for failing to explain that issue.

Issue Three

WHETHER THE LIS PENDENS FILED BY HOUGH WAS EFFECTIVE AS TO THE CONVEYANCES TO MCINTOSH, MORE THAN ONE YEAR AFTER FILING OF THE LIS PENDENS?

(Raised by Petitioner Les Miles Enterprises, Inc.)

Petitioner Les Miles continues to ignore Section 48.23(04), Florida Statutes, 1981, which abates the running of the one year period during the pendency of appeal.

Issue Four

EXCLUSIVE OF THE AFFIRMATIVE DEFENSES OF "UNCLEAN HANDS" AND ESTOPPEL, THERE WERE ISSUES OF MATERIAL FACT WHICH PRECLUDED ENTRY OF SUMMARY FINAL JUDGMENT IN FAVOR OF THE PLAINTIFF, QUIETING TITLE IN HOUGH.

(Raised by Petitioner Les Miles Enterprises, Inc.)

There were no issues of material fact raised in the trial court which would have precluded entry of the Summary Final Judgment.

ARGUMENT

Issue One

"WHEN A PURCHASER FOR VALUE AFTER LIS PENDENS BUT WITHOUT ACTUAL NOTICE PURCHASES PROPERTY FROM THE FRAUDULENT GRANTEE AND THEN IS DENIED THE OPPORTUNITY TO INTERVENE IN THE PENDING ACTION, MAY HE RAISE EQUITABLE ESTOPPEL BY VIRTUE OF THE UNCLEAN HANDS DOCTRINE IN A SUBSEQUENT ACTION BROUGHT BY THE FRAUDULENT GRANTOR?"

Hough admits that if he had sued Bailey in the Duval County litigation for the return of his property claiming that it was deeded to her simply to circumvent the Hendry County Judgment, the Courts would have left him and Bailey where they were and would not have interfered in their squabble. That is not the case here. As the Appellate Court so aptly and succinctly stated, "The sham divorce, sweetened by the rewards of conspiracy, transcended into a genuine dissolution when Bailey converted the property as her own." Hough and his brother, some three months after Hough's conveyance to Bailey, had to negotiate a contract with Bailey that enabled Hough to recover his property. This contract is in the form of two written agreements dated November 15, 1979 - (T.1-4) and it was to enforce the terms of these written agreements that the Houghs filed their lawsuit against Bailey

and others in Duval County. The agreements were not fraudulent and there was consideration flowing from Hough to Bailey for the delivery of the deeds. Surely, Fred Hough was entitled to his lien by putting up $50,000.00 to take care of the Hendry Communications Judgment.

In March of 1983, Les Miles petitioned to intervene in the Duval County litigation. On April 7 of that year, the Court denied that Petition and this denial was not appealed. Les Miles had purchased the property, with constructive notice of the Duval County litigation concerning the enforcement or non-enforcement of the September 15th agreements. These agreements were executed more than 2 years before Les Miles acquired his interest in the property. Secondly, since he was not the object or target of Hough's fraudulent act in conveying the property to his wife, Bailey, he had no standing to claim that Hough had unclean hands so far as he was concerned. Also, since McIntosh and Gregory Johnson were not the targets of the fraudulent act of Hough in conveying the property to his wife, Bailey, they had no standing in the St. Augustine litigation to complain that Hough had unclean hands. The Court should accept jurisdiction and answer the question for the reasons set forth below.

The first reason the Court should entertain jurisdiction is because the Opinion of the Fifth District Court of Appeal flies into the teeth of this Court's Opinions in Wadkins v. Wadkins, 166 So. 577, Supreme Court 1936 and Miller v. Berry, 78 Fla. 98, 82 So. 764 Supreme Court 1919 and the third District Court of Appeal case of Spike Von Zamft, Appellant v. Herman Cohen, Appellee, Third District Case No. 90-1604, 16 Fla. Law Weekly 568, where it is said:

> "In reaching both of these determinations, we have applied the rule that the fact that a party has engaged inequitable conduct as a general matter or with respect to the public or a third person...does not effect his legal rights as to another person to whom the improper activity was not directed. Miller v. Berry, 78 Fla. 98, 82 So. 764 (1919)." (underscoring added)

This Court in Wadkins v. Wadkins, supra, citing Miller v. Berry, said:

> "This is a suit to establish a title already vested in the complainant as distinguished from one in which a reconveyance is sought. In Kahn v. Wilkins, 36 Fla. 428, 18 So. 584, this court held that a conveyance between a fraudulent grantor and grantee is good as between the parties and vests title in the grantee, except as to those persons actually defrauded. In the case before us no creditor is involved and none complain. As between the parties herein involved, none can be heard to complain that the transfer from John Barr Watkins and Carrier Watkins to Sue D. Barr and the alleged conveyance by Sue D. Barr to John Barr Watkins, Jr. was in fraud of creditors. (underscoring added)

> In Miller, et al v. Berry, 78 Fla. 98, 82 So. 764 Supreme Court 1919, this court held that" 'The maxim, "He who comes into equity must come with clean hands," though not expressly invoked by defendants, has not been overlooked by us, but it seems not to apply in this case. It may be that complainant intended by making the deed to Miller to escape obligations which his wife might lawfully incur against him, and as against such creditors his hands might be unclean, but as against the then judgment creditors of Miller, complainant is guilty of no misconduct. To make the maxim applicable, the misconduct must be connected with the matter in litigation, and must concern the opposite party.' And in the able opinion in that case, which was written by Circuit Judge Reaves, it was said: "A court of equity is not an avenger of wrongs committed at large by those who resort to it for relief, however careful it may be to withhold its approval from those which are involved in the subject-matter of the suit, and which prejudicially affect the rights of one against whom relief is sought."

LES MILES, McINTOSH AND GREGORY JOHNSON WERE NOT DEFRAUDED BY THE DEED FROM HOUGH TO BAILEY.

If there was any fraud, it was by Bailey when she deeded the property to Les Miles during the Duval County litigation; or by Gregory Johnson who assisted in the transfer of the property; or by Les Miles when he quit-claim deeded the property to McIntosh.

Therefore, based upon the above decisions, the Court should answer the certified question in the affirmative only if the purchaser is the object of the act of the fraudulent grantor.

Issue Two

MAY THE APPELLATE COURT ENTERTAIN AN ISSUE NOT RAISED IN THE LOWER COURT AND RULE THEREON?

The opinion of the Fifth District Court of Appeal reads in part as follows:

> "**1984 CONVEYANCE TO McINTOSH**
>
> The trial court did not explain why it failed to distinguish between the conveyance to McIntosh during the pendency of the lis pendens and the subsequent conveyance. The record reflects that McIntosh had no actual knowledge of the Hough claim. The imputed knowledge given by the lis pendens automatically expired on February 2, 1984 and was ineffective for any purpose when McIntosh took title to the one-half interest on March 1, 1984. The summary judgment is reversed as it affects this interest in the property."

First, the subsequent conveyance was a Quit-Claim Deed.

Secondly, the reason the trial court did not explain why it failed to distinguish between the conveyances is that the issue was never raised before that court. A search of the record reveals no pleading, affidavit, deposition testimony, or reference in the transcript of proceedings which raises this issue, nor is there any reference in the transcript to such issue. It was first raised in the Answer Brief of Appellee Les Miles. Appellant McIntosh never raised the issue either

in the court below or in the his Appellant Briefs or Arguments. The Fifth District Court of Appeal citing decisions of this court said in Sparta State Bank v. Pope, 477 So.2d 3 (1985):

> "As a general rule it is inappropriate for a party to raise an issue for the first time on appeal. *Dober v. Worrell,* 401 So.2d 1322 (Fla. 1981); *Mariani v. Schleman,* 94 So. 2d 829 (Fla. 1957). An appellant court cannot consider issues not presented to the trial judge either on appeal from an order of dismissal, *Lipe v. City of Miami,* 141 So.2d 738 (Fla.1962), or on appeal from final judgment on the merits. *Cowart v. City of West Palm Beach,* 255 So.2d 673 (Fla. 1971); *Mariani.* In *Dober v. Worrell,* the Florida Supreme Court extended this rule to include an appeal from a summary final judgment."

Issue Three

WHETHER THE LIS PENDENS FILED BY HOUGH WAS EFFECTIVE AS TO THE CONVEYANCES TO MCINTOSH, MORE THAN ONE YEAR AFTER FILING OF THE LIS PENDENS?

(Raised by the Petitioner Les Miles Enterprises, Inc.)

Petitioner Les Miles continues to argue that the opinion reached in Hough v. Stewart, 543 So.2d 1279 (Fla. 5th DCA, 1989) (A.13-15) is wrong and cites American Legion Com. Club v. Diamond, 561 So.2d 268 (Fla. 1990) as authority for this position. Hough v. Stewart, supra, was

concerned Section 48.23, Florida Statutes, 1981, which provided in pertinent parts:

> "(2) No notice of lis pendens is effectual for any purpose beyond 1 year from commencement of the action...
>
> (4) This section applies to all actions now or hereafter pending in any state, but the period of time above-mentioned does not include the period of pendency of any action in an appellate court." (underscoring added)

The Duval Court action commenced July 1, 1981. The trial court in providently dismissed the lis pendens and the order was "appealed" to the District Court of Appeal, First District, and later to this court. The Supreme Court dismissed the Petition for Certiorari on November 23, 1983. The Court, pursuant to Section 48.23(4), did not include the time when the case was being "appealed". The court in American Legion Com. Club v. Diamond, supra, was not concerned with Section 48.23(4).

Issue Four

EXCLUSIVE OF THE AFFIRMATIVE DEFENSES OF "UNCLEAN HANDS" AND ESTOPPEL, THERE WERE ISSUES OF MATERIAL FACT WHICH PRECLUDED ENTRY OF SUMMARY FINAL JUDGMENT IN FAVOR OF THE PLAINTIFF, QUIETING TITLE IN HOUGH.

(Raised by Petitioner Les Miles Enterprises, Inc.)

Petitioner Les Miles asserts other issues which should have prevented the trial court from entering Summary Final Judgment. Those issues are not described in his brief and it is difficult to discover them. It is clear, however, the counsel for the Petitioner Les Miles made this convincing argument in the trial court, to-wit:

> "Now, Carl takes the position -- and I don't mean to be arguing his case -- Carl[1] takes the position that unclean hands can only be -- only related as between him and Hendry County, because the conveyance was to avoid the Hendry County judgment. And if Carl is right in that regard, we lose and it's just that simple. On the other hand, if Carl is wrong in that regard, and if we, as innocent party, can raise the issue of unclean hands as an affirmative defense because of the bogus conveyance to avoid the Henry County judgment and to go through the bogus divorce between Louise Bailey and Mr. Hough, if that is a defense for us, then we win. And it's just that simple. It's a legal matter. It's not a factual..." (T.931)

CONCLUSION

The Court should take jurisdiction because of the obvious conflict in the decision of the Fifth District Court of Appeal with Wadkins v. Wadkins, supra, Miller v. Berry, supra, and Spike Von Zampf v. Herman Cohen, supra. After accepting jurisdiction the court should reverse the District Court of Appeal on the issue of the Quit-Claim

---

[1]Carl refers to Carl D. Dawson, attorney for Hough who was moving for a Summary Judgment.

Deed which was never raised in the trial court and affirm the judgment of the trial court quieting title into Appellee, Hough.

Respectfully submitted,

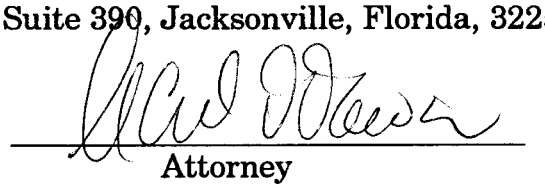
DAWSON, GALANT, SULIK,
WIESENFELD & BICKNER

By: _____

CARL D. DAWSON
320 East Adams Street
Jacksonville, FL 32202
(904) 355-5505
Attorney for Respondent
Florida Bar No. 0018597

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of L. H. Hough has been furnished by U. S. Mail, this 7th day of August, 1991, to **W. Gregg McCaulie, Esquire,** 350 East Adams Street, Jacksonville, Florida, 32202, Attorney for Petitioner; **Tyrie A. Boyer, Esquire,** 3030 Independent Square; Jacksonville, Florida, 32202; **Robert T. Hyde, Jr., Esquire,** 1300 Gulf Life Tower, Jacksonville, Florida, 32207; **Lavinia K. Dierking, Esquire,** Post Office Box 1873, Orlando, Florida, 32802; and **David Ferebee, Esquire,** 4655 Salisbury Road, Suite 390, Jacksonville, Florida, 32256.



Attorney