

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**John W. Ferguson, Sr., et al.,
Plaintiffs Below, Petitioners**

vs.) No. 101472 (Jefferson County 10-C-25)

**Doris E. Costello, et al.,
Defendants Below, Respondents**

FILED

November 10, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner John W. Ferguson, Sr. and Co-Petitioners John W. Ferguson, Jr., Timothy A. Ferguson, Steven E. Ferguson, Isaac W. Ferguson, and Vicky D. Ferguson (hereinafter collectively “Petitioners”) appeal the circuit court’s Dismissal Order denying their motions challenging the court’s previous orders dismissing the various Defendants from their civil action and striking the action from its active docket. Petitioners seek a remand of the case for further proceedings. The instant appeal was timely filed by the pro se petitioners with the entire record being designated on appeal. The Court has carefully reviewed the written arguments contained in the pro se petition, and the case is mature for consideration.

Pursuant to Revised Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the petition and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present either a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

On January 19, 2010, a Complaint was filed pro se on behalf of petitioners, but only signed by John W. Ferguson, Jr.¹ The circuit court later determined that among petitioners, John W. Ferguson, Sr. was the only real party in interest.

Petitioners’ Complaint sought (1) specific performance upon an oral promise by Jessie E. Clevenger, before her death, that John W. Ferguson, Sr. would have an option to buy

¹ Petitioners’ instant action, Civil Action No. 10-C-25, was subsequently consolidated with a related action, Civil Action No. 06-C-324, that they filed against a different estate. With the dismissal of Civil Action No. 10-C-25, the circuit court rescinded the consolidation order on the ground of mootness.

certain real estate in the Shephardstown District of Jefferson County and (2) damages for the alleged destruction of a mobile home that straddled the property lines. The circuit court later determined that the executors and heirs of Mrs. Clevenger's estate, who are among the Defendants in this case, sold the real estate in question at public auction on June 9, 2007, after notice and publication of the same.² The circuit court found that "John W. Ferguson, Sr. and John W. Ferguson, Jr. had notice and were present at said auction however neither asserted any claim to said real property." The circuit court further found that "neither John W. Ferguson, Sr. nor any person acting on his behalf made a claim upon the Estate for the right to purchase real property or for any other debt due or a contract to be enforced."

The circuit court found that the executors of Mrs. Clevenger's estate duly filed and published their notice of administration of the estate and that the period for making claims against the estate expired on or about December 31, 2002. The circuit court concluded that "to the extent that the complaint alleges claims against or arising from any matter concerning Jessie E. Clevenger, the same are barred as a matter of law and such complaint fails to state a cause of action upon which relief may be granted and must be dismissed." The circuit court also dismissed Petitioners' Complaint because of the following additional grounds: (1) Statute of Frauds; (2) John W. Ferguson, Sr.'s failure to sign the pro se Complaint as the only real party in interest; (3) Doctrine of Laches, to the extent that petitioners sought equitable relief; (4) Statute of Limitations, finding any claims against Mrs. Clevenger accrued before her death in 2002 and that any applicable Statute of Limitations would have run by 2007; and (5) The operation of the Dead Man's Statute.

The circuit court noted that two days before the hearing on the Defendants' Rule 12(b)(6) Motion to Dismiss, petitioners attempted to file an Amended Complaint without leave of court. The circuit court found that they sought to cure the absence of John W. Ferguson, Sr.'s signature on the original Complaint but concluded that "the Amended Complaint fails to address or resolve the numerous problematic issues which make the claims susceptible to dismissal and said Amended Complaint is stricken from the record."

The circuit court entered two additional dismissal orders. First, in an order entered on May 5, 2010, the circuit court granted a Motion to Dismiss by Co-Defendant Anthony W. Householder based upon the following findings of fact: "(1) That there are no allegations in the complaint naming, identifying or discussing Anthony W. Householder and (2) the real estate identified in the complaint is not owned by Anthony W. Householder." Second, in an Order of Dismissal entered on May 17, 2010, the circuit court granted a Motion to Dismiss by Arcadia Development Co. finding Petitioners' claim against it to be "baseless."

² Co-Defendants Doris E. Costello, Sharon C. Symons, and Bruce Bowers are the current executors and heirs of Mrs. Clevenger's estate.

Accordingly, the circuit court awarded Arcadia its attorney's fees in the amount of \$1,200.

Petitioners filed motions challenging the various dismissal orders under Rule 24.01(d) of the West Virginia Trial Court Rules concerning the preparation and submission of orders. The circuit court denied their motions in a brief two-page Dismissal Order entered on July 6, 2010.

ALLEGED VIOLATION OF TRIAL COURT RULE 24.01

Petitioners raise four assignments of error in their Petition for Appeal. Petitioners assert that the dismissal orders submitted by the various Defendants conflicted with each other and that the circuit court ignored repeated written requests by petitioners for a hearing pursuant to Rule 24.01(d) of the West Virginia Trial Court Rules. However, while petitioners may have requested a hearing, the circuit court was not required to hold one. Under Rule 24.01(d), if a party objects to the wording or content of a proposed order, a hearing is required “[only] if the judicial officer determines that a hearing is necessary to resolve the conflict.” Thus, the circuit court did not violate Rule 24.01(d) when it proceeded to enter the various dismissal orders submitted by the Defendants.

STATUTE OF FRAUDS

Petitioners next argue that the Statute of Frauds does not bar the equitable relief they sought in their civil action. Petitioners' civil action sought, inter alia, specific performance upon an oral promise by Mrs. Clevenger, before her death, that John W. Ferguson, Sr. would have an option to buy certain real estate in the Shepherdstown District of Jefferson County. “It has been widely held that an option to purchase real estate is a unilateral contract of sale and must be in writing in order to comply with the Statute of Frauds.” *Quinn v. Beverages of West Virginia, Inc.*, 159 W.Va. 571, 577, 224 S.E.2d 894, 898 (1976) (Citations omitted.). In addition to the Statute of Frauds, the circuit court determined that the Doctrine of Laches also barred petitioners' civil action to the extent that it sought equitable relief. As will be discussed below, the circuit court properly applied laches to this case.

DISMISSAL OF MR. HOUSEHOLDER

Petitioners argue that the circuit court should not have dismissed their civil action with respect to Mr. Householder. They specifically allege in their Petition for Appeal that Mr. Householder is an indispensable party because he owns a parcel of real estate derived from the real estate at issue in their civil action. The circuit court found to the contrary, stating that “there are no allegations in the complaint naming, identifying or discussing Anthony W. Householder” and that “the real estate identified in the complaint is not owned by Anthony

W. Householder.” This Court concludes that the circuit court did not err in granting Mr. Householder’s Motion to Dismiss.

LACHES

Finally, Petitioners argue that the circuit court erred in dismissing their civil action as time-barred and based upon laches. The circuit court found that the executors of Mrs. Clevenger’s estate duly filed and published their notice of administration of her estate and that the period for making claims against the estate expired on or about December 31, 2002. The circuit court determined that “to the extent that the complaint alleges claims against or arising from any matter concerning Jessie E. Clevenger, the same are barred as a matter of law and such complaint fails to state a cause of action upon which relief may be granted and must be dismissed.” The circuit court further found that any claims against Mrs. Clevenger accrued before her death, in 2002, and that any applicable Statute of Limitations would have run by 2007. Petitioners did not file their instant action until January 29, 2010. Although there is a related case (filed against a different estate), the circuit court found that petitioners failed to assert any claim “at the time of the death of Jessie E. Clevenger in 2002, or at the time of the auction of real property in 2007 or even at the time of Plaintiffs’ prior complaint against the Butler Estate in 2006 (Civil Action 06-C-324).” The circuit court found that both John W. Ferguson, Sr. and John W. Ferguson, Jr. “had notice and were present at said auction [of the real property in question] however neither asserted any claim to said real property.” Thus, it clear that petitioners were aware of their claim as to the real estate at issue but failed to timely raise it. This Court concludes that the circuit court did not err in dismissing petitioners’ civil action filed on January 29, 2010.

For the foregoing reasons, we find no error in the decision of the circuit court and the dismissal of petitioners’ civil action is affirmed.

Affirmed.

ISSUED: November 10, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh