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NO. COA04-49

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2004

SOUTHERN INVESTMENT PROPERTIES,
LLC,

Plaintiff,

v.

Burke County
No. 02 CVS 1538

HENRY DYONIS WATSON, KUNIGUNDA
ROTH WATSON, and BARBARA J.
WATSON (ALSO KNOWN AS BARBARA J.
WATSON RAMSEY),
Defendants.

Appeal by plaintiff from order filed 20 October 2003 by Judge James W. Morgan in Burke County Superior Court. Heard in the Court of Appeals 23 September 2004.

Garlitz & Williamson, by F. Lane Williamson, and Hewson Lapinel Owens, P.A., by H.L. Owens for plaintiff-appellant.

Daniel Law Firm, PA, by Stephen T. Daniel and Warren T. Daniel, for defendants-appellees Henry Dyonis Watson and Kunigunda Roth Watson.

BRYANT, Judge.

Southern Investment Properties, LLC (plaintiff) appeals a summary judgment order dated 20 October 2003 in an action to quiet title on 47.5 acres of land located in Burke County (property).

The issue of proper title to the property was first litigated in *Kunigunda Watson v. Barbara Watson and Southern Investment,*

Inc., (hereinafter *Southern Investment I*)¹. In that case, judgment was entered by default on 2 January 2001 quieting title to property in the name of Kunigunda Roth Watson. Subsequently Kunigunda Roth Watson deeded the property to her son, Henry Dyonis Watson, by Warranty Deed recorded in Burke County on 11 January 2001.

On 6 June 2002, after the entry of default judgment Southern Investment Properties, Inc. (plaintiff) filed an action to quiet title to the property which action was captioned as *SIP LLC, formerly Southern Investment Properties, LLC, trading as Southern Investment v. Henry Dyonis Watson, Kunigunda Roth Watson, et al.*, (hereinafter *Southern Investment II*) in which plaintiff alleged it was a North Carolina corporation. Defendants Henry and Kunigunda Watson served interrogatories, requests for production, and requests for admissions on plaintiff on 2 August 2002. Plaintiff did not respond and thereafter took a voluntary dismissal on 18 October 2002.

On 22 October 2002, plaintiff filed the present action *Southern Investment Properties, LLC v. Henry Dyonis Watson, Kunigunda Roth Watson, et al.*, (hereinafter *Southern Investment III*) to quiet title to the same property and wherein plaintiff alleges it was a Delaware corporation. Defendants filed a motion for summary judgment on the grounds of: (1) *res judicata* based on the default judgment entered on behalf of Kunigunda Watson in *Southern Investment I*, and (2) collateral estoppel based on

¹For clarity, we refer to the actions as *Southern Investment I*, *Southern Investment II*, and *Southern Investment III*, respectively, noting this method differs from the parties' briefs.

admissions made by plaintiff in *Southern Investment II*. In an order dated 20 October 2003 the trial court granted defendants' motion for summary judgment. The trial court found the parties and allegations in *Southern Investment III* to be substantially identical to those in *Southern Investment II*, except that plaintiff in *Southern Investment III* now alleges it is a Delaware corporation, not a North Carolina corporation. The trial court also found Charles Gabriel to be the owner of Southern Investment Properties, LLC. Plaintiff appeals.

The dispositive issue is whether the trial court erred in granting summary judgment to defendant based on *res judicata* and collateral estoppel.

"Summary judgment is appropriate if (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c) (1999)." *Stephenson v. Warren*, 136 N.C. App. 768, 771-72, 525 S.E.2d 809, 811-12 (2000). "Once the movant makes the required showing, the burden shifts to the non-moving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, establishing at least a prima facie case at trial." *Id.* at 772, 525 S.E.2d 812. "Summary judgment is appropriate for the defending party when (1) an essential element of the other party's claim or defense is non-existent; (2) the other party cannot produce

evidence to support an essential element of its claim or defense; **or (3) the other party cannot overcome an affirmative defense which would bar the claim.**" *Caswell Realty Assocs. I, L.P. v. Andrews Co.*, 128 N.C. App. 716, 720, 496 S.E.2d 607, 611 (1998) (emphasis added) (quoting *Gibson v. Mutual Life Ins. Co. of N.Y.*, 121 N.C. App. 284, 465 S.E.2d 56 (1996)).

Plaintiff argues the present action, *Southern Investment III*, is not barred by *res judicata* or collateral estoppel. "The essential elements of *res judicata* are: (1) a final judgment on the merits in an earlier lawsuit; (2) an identity of the cause of action in the prior suit and the later suit; and (3) an identity of parties or their privies in both suits." *Green v. Dixon*, 137 N.C. App. 305, 307, 528 S.E.2d 51, 53 (2000) (citing *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 135, 337 S.E.2d 477, 482 (1985)). *Res judicata* prevents relitigation of "all matters . . . that were or should have been adjudicated in the prior action." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (quoting *Thomas M. McInnis & Associates, Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986)). "In general, 'privity involves a person so identified in interest with another that he represents the same legal right' previously represented at trial." *State v. Summers*, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) (quoting *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 417, 474 S.E.2d 127, 130 (1996)). In determining whether such a privity relationship exists, "'courts will look beyond the nominal party whose name appears on the record [] and consider the legal questions raised as

they may affect the real party or parties in interest.'" *Whitacre P'ship*, 358 N.C. at 36, 591 S.E.2d at 893 (2004) (citing *State v. Summers*, 351 N.C. at 623-24, 528 S.E.2d at 21 (quotation omitted)).

In the original action (*Southern Investment I*) then-defendant Southern Investment was served by certified mail to the last known address of its registered agent; by certified mail to the address listed with the Burke County Tax Office, specifically 10 Quarry Rd, Apt 13, Granite Falls N.C. 28630; and by certified mail to the Agent for Service of Process for the Office of the N.C. Secretary of State. Service of process was received by the Secretary of State's Office on 24 March 2000. The recorded deed and the records of the Burke County Tax Office at all times listed the mailing address for Southern Investment as: 10 Quarry Rd, Apt 13, Granite Falls N.C. 28630. Defendant Barbara Watson could not be located and was therefore served by publication. After determining that both defendants were properly served, the trial court entered a judgment of default against Southern Investment and Barbara Watson, and quieted title to the property in the name of Kunigunda Roth Watson.

In order for a party to be bound by a judgment quieting title, he must have been a party to the suit. *Little v. Barson Fin. Servs. Corp.*, 138 N.C. App. 700, 702, 531 S.E.2d 889, 891 (2000) (citations omitted) (holding a default by one defendant's predecessor in title is not binding upon the answering defendant in a quiet title action). The trial court determined that prior transfers of property from Kunigunda Watson to Barbara Watson and

Barbara Watson to Southern Investment, Inc. were void ab initio. Consequently, a default judgment order was entered on 2 January 2001 against both Barbara Watson and Southern Investment, Inc. as a final judgment quieting title to subject property in Kunigunda Roth Watson's name.

In *Southern Investment II*, plaintiff sought to quiet title to the property. In its complaint filed 6 June 2002, plaintiff stated it was a North Carolina limited liability corporation formerly known as Southern Investment Property, LLC and doing business as Southern Investment. Further, plaintiff stated "[a]t all times alleged herein, the plaintiff has been a North Carolina corporation and is sometimes known as Southern Investment."

Plaintiff thereafter took a voluntary dismissal in *Southern Investment II*. Plaintiff filed another complaint, *Southern Investment III*, dated 18 October 2002, to quiet title to the property. In *Southern Investment III*, pertinent portions of the complaint are as follows:

1. The plaintiff is a Delaware limited liability company converted from a Delaware corporation, formerly known as Southern Investment Properties, Inc. . . .
. . .
5. At all times alleged herein, the plaintiff has been a Delaware Limited Liability Company.

Plaintiff claims it is not the same party, that Southern Investment is a completely different entity and not in privity with the named defendant Southern Investment, Inc. in the first action to quiet title, *Southern Investment I*. However, Charles Gabriel signed the verification for each complaint: in *Southern Investment*

II as member/manager of SIP, LLC; and, in *Southern Investment III* as President. The record clearly indicates that the parties or, at the very least, their privies in all three lawsuits are the same. Therefore, we agree, as the trial court found, that *res judicata* applies. Because a final judgment was entered in *Southern Investment I* against the same parties or their privies as exist in *Southern Investment II* and *Southern Investment III*, the trial court did not err in granting summary judgment based on *res judicata*.

Having determined that *res judicata* applies we need not address plaintiff's argument as to collateral estoppel.

Affirm.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).