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IN THE CIRCUIT COURT OF MONROE COUNTY, WEST VIRGINIA

THOMAS H. JOHNSON AND
TERESA S. JOHNSON,
PETITIONERS,

V. CIVIL ACTION NO. 09-C-71

BERTHA KIRBY, INDIVIDUALLY AND
AS ADMINISTRATRIX OF ESTATE OF
JESSE FRANCES KIRBY,
RESPONDENT.

AGREED AMENDED ORDER GRANTING PARTIAL SUMMARY JUDGMENT

On this day came the Plaintiffs, Thomas H. Johnson and Teresa S. Johnson, by Counsel, Barry L. Bruce, Barry L. Bruce and Associates, L. C., and Defendant, Bertha Kirby, Individually and as Administratrix of the Estate of Jesse Frances Kirby, by Counsel, Jeffry A. Pritt, requesting that the Court enter an amended Order for the purpose of making the issue decided in the Order Granting Partial Summary Judgment a final, appealable Order. Since the decision made as to who was the sole heir of the Estate of Jesse Frances Kirby disposes of the issue of who was the true owner of the real estate which is the subject of this action, which is a completely separate and distinguished from the equitable suit for unjust enrichment count, the Court has determined there is no just reason for delay. Therefore, the Court is in agreement that this Agreed Amended Order Granting Partial Summary Judgment shall be a final order and, thus, not interlocutory and is appealable because there is nothing left to determine in regard to the sole heir of the estate of the decedent.

On March 21, 2011, the Petitioners, Thomas Johnson and Teresa Johnson, appeared by Counsel, Barry L. Bruce, and the Respondent, Bertha Kirby, appeared by Counsel, Jeffry A. Pritt,

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for a hearing on Respondent's Motion for Summary Judgment. The Petitioners filed a Response to the Motion for Summary Judgment on or about March 17, 2011.

The Court has considered the motion, the Petitioners' response, the memoranda of law and exhibits submitted by the parties, heard the arguments of counsel, and considered the pertinent legal authorities. As a result of these deliberations, the Court has concluded that there is no genuine issue as to any material fact on the issue of whether the Respondent, Bertha Kirby, is the sole heir to the Estate of Jesse F. Kirby and, therefore, summary judgment is **GRANTED** on that issue. The Court further concludes that genuine issues of material fact exist on the issue of whether the Petitioners are entitled to a claim for unjust enrichment and, therefore, the Respondent's Motion for Summary Judgment is **DENIED** on that issue.

I. FACTS

This case involves two tracts of land located on Dark Hollow Road in the Wolf Creek District of Monroe County, West Virginia. These two tracts of land were owned by Jesse F. Kirby as of the date of his death on November 26, 2007. Prior to his death, Jesse F. Kirby was divorced from Brenda Kirby.

On or about December 5, 2007, the Monroe County Clerk's office, in vacation, admitted the Last Will and Testament of Jesse F. Kirby to probate, and qualified Brenda Kirby as Executrix of the Estate of Jesse F. Kirby. Brenda Kirby filed for the appraisement of the Estate of Jesse F. Kirby on December 7, 2007 and on or about December 20, 2007, the Monroe County Clerk caused to be published the notice of the administration of the Estate.

On or about June 1, 2008, Brenda Kirby listed the real property owned by Jesse F. Kirby at the time of his death for sale through the Petitioner, Thomas Johnson, agent for Coldwell

Banker Real Estate. The property was listed for $39,000.00. On or about July 11, 2008, Brenda Kirby sold the property to Petitioners for $11,500.00. The Petitioners received a title opinion indicating Brenda Kirby was the sole heir of the Estate of Jesse F. Kirby. After purchasing the property, Petitioners made improvements to said property in the amount of $18,198.63,

On or about August 2, 2008, the Respondent and mother of Jesse F. Kirby, Bertha Kirby, filed an Objection to Final Settlement and a Petition for Removal of the Executrix of the Estate of Jesse F. Kirby and Demand for Full Accounting. On or about April 1, 2009, the Monroe County Commission filed an Order removing Brenda Kirby as Executrix of the Estate of Jesse Frances Kirby and finding that any property would go to her as his sole heir.

The Respondent is seeking summary judgment and requests that the Court quiet title in her favor to the two tracts of real estate which are the subject of this action. The Respondent argues that the subject tracts of land were deeded to the Petitioners by Brenda Kirby as sole heir of the Estate of Jesse F. Kirby on July 1, 2008; however, it is undisputed that the Appraisement of the Estate of Jesse F. Kirby clearly indicated that he was divorced at the time of his death and therefore Brenda Kirby could not have been his wife when he died. Consequently, Brenda Kirby was not the sole heir of the Estate. Since Bertha Kirby did not join in the deed to Petitioners, title should be quieted in her favor.

In response, the Petitioners argue that the will of Jesse F. Kirby should stand as it is and Brenda Kirby should be reinstated as Executrix of the Estate because Bertha Kirby's objection to Brenda Kirby's appointment as Executrix was not timely filed within the ninety day requirement set forth in W. Va. Code §44-1-14a(10). The Petitioners also argue that Bertha Kirby did not comply with the procedure set forth in W. Va. Code §41-5-11, which states that a complaint shall

be filed within six months of the date of an order entered by the County Commission while in vacation. The Petitioners have also made a claim for unjust enrichment for the value of the improvements and expense to maintain and protect the subject property.

II. DISCUSSION OF AUTHORITY

Rule 56 (c) of the *West Virginia Rules of Civil Procedure* requires summary judgment to be granted when the record reveals that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A "material fact" is one that has the capacity to sway the outcome of the litigation under the applicable law.

Summary judgment is a device designed to effect a prompt disposition of controversies on their merit without resort to a lengthy trial, if in essence there is no real dispute as to salient facts or if only a question of law is involved. *Hanks v. Beckley Newspapers Corp.,* 153 W. Va. 834, 172 S.E,. 2d 816 (1970).

The standard for granting a Motion for Summary Judgment has been often stated by the West Virginia Supreme Court of Appeals as, "[a] motion for Summary Judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarity the application of the law." *Williams v. Precision Coal, Inc.,* 194 W. Va. At 59, 459 S. E. 2d 329 (1997), quoting Syl. Pt. 1, *Andrik v. Town of Buckhannon,* 187 W.Va. 706, 421 S.E. 2d 247 (1992), quoting Syl. Pt. 3, *Aetna Casualty & Surety Co. V. Federal Insurance Co. Of New York,* 148 W. Va. 160, 133 S.E. 2d 770 (1963).

The first issue in this case is whether title to the subject property should be quieted in favor of the Respondent, Bertha Kirby. W. Va. Code §41-1-6 states : "if after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any

disposition or appointment of property made by the will to the former spouse ... unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent."

After a review of the facts of this case, it is clear that Brenda Kirby was not the sole heir of the Estate of Jesse F. Kirby as his "wife", and this fact was, or should have been known to the Petitioners at the time of their purchase. Jesse F. Kirby's marital status at the time of his death was a matter of public record prior to the date that Brenda Kirby executed a deed to the Petitioners for the subject tracts of property. By the Order of the County Commission of Monroe County, West Virginia, entered April 1, 2009, the Respondent, Bertha Kirby, as the mother and only surviving heir of Jesse F. Kirby was acknowledged to be the sole heir to his Estate and replaced Brenda Kirby as the Executrix of the Estate. Bertha Kirby did not join in the deed to the Petitioners and the Court believes title to those two tracts of land should be quieted in her favor.

The Petitioners argue the Jesse F. Kirby's will must stand as it exists and that Brenda Kirby must be reinstated as Executrix of the Estate because the Respondent did not timely object to Brenda Kirby's appointment as Executrix pursuant to W. Va. Code §44-1-14a(10) and W. Va. Code §41-5-11. The Court disagrees with the Petitioners and believes an inquiry into those provisions is not necessary because W. Va. Code §41-1-6 is clear. Jesse F. Kirby's will is ineffective to pass title to Brenda Kirby since they were divorced. She consequently had no title to convey to the Petitioners.

The second issue is whether the Petitioners are entitled to recover on their unjust

enrichment claim. The West Virginia Supreme Court of Appeals recognizes the doctrine for unjust enrichment. Under the law of unjust enrichment, if benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefore, the law requires the party receiving the benefits to pay their reasonable value. *Realmark Developments, Inc. V. Ranson,* 208 W. Va. 717, 542 S.E. 2d 880 (2000), citing *Copley v. Mingo County Board of Education,* 195 W. Va. 480, 466 S.E. 2d 139 (1995).

The Court believes the Petitioners may be entitled to unjust enrichment; however, the Court believes further inquiry into the facts is necessary. Questions of fact exist as to what the Petitioners' beliefs were at the time they made the improvements to the property and also on whether Bertha Kirby knew of the improvements. The Court believes that further inquiry concerning the facts is desirable to clarify whether it would be inequitable or unconscionable to permit Bertha Kirby to avoid payment for the improvements placed on the property by the Johnsons.

III. CONCLUSION

In the following the standard for a Motion for Summary Judgment, this Court finds there is a genuine issue of material fact to be tried in this matter on the Petitioners' claim for unjust enrichment and the Respondent's Motion for Summary Judgment is **DENIED** on that issue. It appearing proper to do so, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. The Respondent's Motion for Summary Judgment is **GRANTED** on the issue of whether Bertha Kirby is the sole heir to the Estate of Jesse F. Kirby, and she is hereby found to be vested with title to the subject real estate, and the Petitioners are found to have no title.

2. The Respondent's Motion for Summary Judgment is **DENIED** on the unjust enrichment claim made by the Petitioners.

3. The Circuit Clerk is directed to provide a copy of this order to counsel of record.

ENTERED this the 23 day of June, 2011.

Robert A. Irons, Circuit Judge

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ATTEST
Clerk, Circuit Court
Monroe Co., W.Va.