

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

**LEE PERKINS, HARRY PERKINS, JR.,
REM PERKINS and ANNIE
MARGARET LOU PERKINS,
Plaintiffs,**

v.

**Civil Action No. 16-C-13(D)
Judge Jennifer P. Dent**

**TOBY E. BELL, JANICE JOHNSON and
ANDREW DOUGLAS,
Defendants.**

**ORDER GRANTING PLAINTIFFS' MOTION FOR JUDGMENT ON THE
PLEADINGS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT**

On the 21st day of May 2018, came the Plaintiffs, by and through counsel, Jeffrey A. Pritt, and the Defendants, by and through their counsel, Paul S. Detch, for a hearing on the Plaintiffs' Renewed Motion for Judgment on the Pleadings, or in the alternative, Motion for Summary Judgment. The Court grants the Plaintiffs' Motion for the reasons stated hereinbelow.

Legal Standard

Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is required when the record shows 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. "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Painter v. Peavy, 192 W.Va.189, 451 S.E.2d 755 (1994). "The question to be decided on a motion for summary judgment is whether there is a genuine issue of fact and not how that issue should be decided." Aetna Cas. & Sur. Co.

POCAHONTAS COUNTY
CIRCUIT/FAMILY COURT
RECEIVED 12-7-18
BY: JENNIFER P. DENT

v. Fed. Ins. Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963). Also, according to Belcher v. Wal-Mart Stores, Inc., 211 W.Va. 712, 718, 568 S.E.2d 19,25 (2002), when determining whether there is a genuine issue of material fact, this Court construes the facts most favorable to the nonmoving party.

Findings of Fact

1. In previously filed Civil Action Number 84-C-99, Lucille Bell Perry; Toby Bell and his wife, Lucy Bell; Janice Johnson and her husband, Archie Johnson; and Cuba Jean Douglas and her husband, Andrew Douglas, by counsel, Paul S. Detch, filed a Petition asking the Court to a) determine the ownership rights of each of the parties to the property described therein as Perkarosa-Camp, b) determine that the Petitioners were entitled to a partition of said property, c) refer the matter to Commissioners to obtain a partition either by division in kind or by the appropriate sale of the property, and d) Order that the sums made and profits returned on the property, as well as the value of any personal property removed from the property be determined and distributed equally among the parties who are determined to have an ownership interest in the property.

2. By agreed Order dated January 25, 1989, in Civil Action Number 84-C-99, the Court determined the respective ownership interests of the parties and further Ordered that, a) the parties agreed that the one hundred dollar (\$100.00) annual dues owing for 1986 and thereafter need not be paid until this lawsuit is resolved, b) the Will of Okey Johnson Perkins submitted to the Court was authentic and legally valid, c) the parties thereto were entitled to a partition of the property and upon proper petition to the Court requesting partition or upon agreement of the parties to partition, the property may be partitioned, and d) a disclosure of all records and assets

of the property be made to each party and the personal property, remaining on the property or already removed, be divided among the parties.

3. Specifically in his Order, Judge Jolliffe found that, "the will submitted to this Court is the authentic and legally valid will of Okey Johnson Perkins, and the Court does further find that the parties named in this action represent all the heirs-at-law of the decedent, Okey Johnson Perkins, including all said decedent's living children and grandchildren." Also, he declared the respective interests held by the parties at that time and ordered that, "the parties are entitled to a partition of said property and upon proper petition to the Court requesting partition or upon agreement of the parties to partition the property, said property may be partitioned." Regarding payment of the one hundred dollar (\$100.00) annual maintenance fee, Judge Jolliffe found that, "the parties appearing in this action have agreed that the dues owing for 1986 and thereafter need not be paid until this lawsuit is resolved."

4. No appeal was filed of this Order.

5. Subsequently, the Petitioners in Civil Action No. 84-C-99, by counsel, Paul S. Detch, filed a separate action styled Civil Action No. 90-C-20 seeking a partition of the subject property.

6. Paragraph II of the Complaint in Civil Action No. 90-C-20, contains the statement that "Your petitioners herein are the same petitioners who heretofore in the Circuit Court of Pocahontas County, West Virginia, Civil Action 84-C-99, obtained a declaratory judgment and are entitled to a partition..."

7. The petitioners in Civil Action 90-C-20 failed to prosecute the action and it was ultimately dismissed for inactivity by Order entered on August 21, 1995.

8. In the case *sub judice*, at a hearing held on March 22, 2018, counsel for the

Defendants (Petitioners in the two prior civil action discussed hereinabove), Paul S. Detch, proffered to the Court that an agreement had been reached amongst the parties to Civil Action No. 84-C-99 whereby the Defendants were relieved of their obligation to pay the yearly maintenance fee.

9. On April 3, 2018, the Court entered an Order denying Plaintiffs' Motion for Judgment on the Pleadings, or in the alternative, Motion for Summary Judgment and found that a genuine issue of material fact exists regarding whether the Defendants were under a requirement to pay the one hundred dollar (\$100.00) yearly fee to maintain their interests in the property following the entry of the Order dated January 25, 1989, in Civil Action No. 84-C-99.

10. Subsequent to the March 22, 2018, hearing, counsel for the Plaintiffs filed a Renewed Motion for Judgment on the Pleadings, or in the alternative, Motion for Summary Judgment and Supplemental Exhibits.

11. The Supplemental Exhibits filed by the Plaintiffs included; a copy of the Petition for Summary Judgment, Partition of Real Estate and an Accounting in Civil Action No. 84-C-99; a Letter dated May 6, 1986, from Paul Detch to the Clerk in response to a notice that the action would be dismissed from the docket noting that he and Jesse Guills were "completing the matter" and that it should be set "on the docket for final disposition"; a Notice dated July 15, 1986, whereby Paul Detch scheduled the matter for a "final resolution" on August 18, 1986; and a subsequent Notice scheduling a hearing on August 15, 1988, to "request that an order be entered" in the case. Supplemental Exhibits related to Civil Action Number 90-C-20 included the original Complaint which recites that that the Plaintiffs therein (now Defendants) had already obtained their declaratory judgment in the prior civil action; a Notice of Intended Dismissal of Civil Actions from February 1993 listing this case as one to be dismissed; a Letter from the

Clerk on June 22, 1995, requesting a fee to keep the case on the docket since it was more than three years old; a Notice of Intended Dismissal of Civil Action dated July 14, 1995, noting this case was to be dismissed due to inactivity for more than one year; and an Order dismissing the case on August 21, 1995.

12. Counsel for the parties argued their positions on the Plaintiffs' Renewed Motion at the hearing held on May 21, 2018.

13. At this hearing, counsel for the Defendants argued that pursuant to the Order in Civil Action No. 84-C-99 payments were suspended, but agreed with counsel for the Plaintiffs that the case was dismissed and that the Order was the parties' agreement.

14. The Court took the matter under advisement.

15. Subsequent to the hearing, Defendants, Toby E. Bell and Janice Johnson, by counsel, Paul S. Detch, filed a Response to the Renewed Motion for Summary Judgment and a Memorandum Explaining Defendants' Resistance to Plaintiffs' Renewed Motion for Judgment on the Pleadings or in the Alternative, Plaintiffs' Motion for Summary Judgment as Presented.

16. In counsel's Response and Memorandum, contrary to his prior position that summary judgment was not appropriate at this stage of the proceeding, he requested that, "summary judgment be entered against the plaintiffs." In support of his position, he argued that the parties' interests in the property were vested by Judge Jolliffe's Order and asked that "the language of Judge Jolliffe's order declaring the rights and ownership of the said parties be affirmed as written."

17. Defendant, Andrew Douglas, has not filed an Answer or any pleadings in this matter.

Whereupon, following consideration of the pleadings, exhibits and affidavits submitted by the parties, the argument and proffer of counsel, and the relevant legal authorities, the Court

finds that no genuine issue of material fact exists as to Lucille Bell Perry's obligation and failure to pay the yearly maintenance fee following the entry of the Final Order in Civil Action No. 84-C-99 through the time of her death on August 16, 2004, and therefore, as a matter of law, this case is appropriate for disposition under Rule 56 of the West Virginia Rules of Civil Procedure.

Analysis

The Court **FINDS** that upon the filing of the financial disclosure, by its own terms, the Order entered on January 25, 1989, in Civil Action No. 84-C-99 was a Final Order as the Court ruled upon all requested relief; that following the entry of the that Final Order, which resolved that lawsuit, all parties including Lucille Bell Perry were to resume paying the yearly maintenance fee; that Lucille Bell Perry failed to resume paying the yearly fee and did not resume paying the fee through the date of her death; that being from approximately May of 1986 through August of 1988, counsel for the Defendants filed two Notices of hearing and a letter to the Circuit Clerk which indicated his belief that Civil Action No. 84-C-99 had reached final resolution; that the filing of Civil Action No. 90-C-20 by the Defendants seeking a partition of the subject property and containing the allegation that they had obtained a Declaratory Judgement in the prior civil action, confirms that Civil Action No. 84-C-99 had reached final resolution and was no longer active on the Court's docket; that Civil Action No. 90-C-20 was dismissed by Order entered on August 21, 1995, for inactivity; that pursuant to the Will of Okey Johnson Perkins, in Civil Action No. 84-C-99, the Court found that "as a result of such nonpayment, Kathleen Irene McClung, and her heirs, and James Ross Perkins, and his heirs, have been divested of any legal right or interest in said property" and that "petitioner Lucille Bell Perry has consistently paid the required fees, that respondent Mason Lee Perkins, and after his death his sons, has consistently paid the annual fee" and that "as a result of such payments,

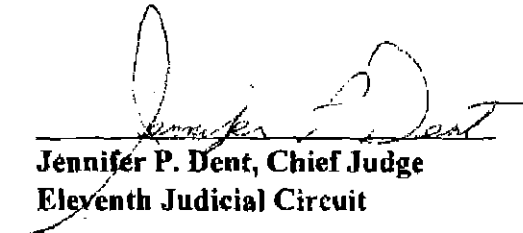
petitioner Lucille Bell Perry and Cecil Rapp Perkins have life interests in said property, and the children of Lucille Bell Perry, Mason Lee Perkins, and Cecil Rapp Perkins...have equal and undivided remainder interest in said property"; that after entry of the final Order in 84-C-99, Lucille Bell Perry did not resume making the yearly payment; that counsel for the Defendants argument that the maintenance fee is not due unless a "demand" for payment is made, or a "due" date declared, is not supported in the record of this proceeding; that counsel for the Defendants argument that, "the prior Court made no finding that these ownership interests were in any way subject to the further payment of any \$100.00 per annum" and that, "The Court made no provision for any contingency of any further payments to be paid," is contradicted by the language contained in the Final Order in Civil Action No. 84-C-99 regarding payments not being due and owing "until this lawsuit is resolved," and the fact that the Will, which had been found valid, contained the provision requiring payment; that counsel for the Defendants argument that the Order excused payment of the yearly fee, thereby effectively altering the Will of Okey Johnson Perkins, after resolution of the case is without merit based on the language from the Order cited hereinabove; that counsel for the Defendants argument that by declaring the interests of the parties, the Final Order in Civil Action No. 84-C-99 invalidated the provision in the Will of Okey Johnson Perkins requiring payment of the yearly fee is without merit; that the Defendants' position that the Will violates the Rule Against Perpetuities has neither been raised in a probate proceeding nor was the Final Order in Civil Action No. 84-C-99, validating the Will, timely appealed; that counsel for the Defendants argument that a "family settlement agreement" has been reached absolving the Defendants' obligation to pay the yearly fee is not supported by the record, specifically by the fact that two additional civil actions regarding the property have been filed since the entry of the Final Order in Civil Action No. 84-C-99; and that counsel for the

Defendants argument that the parties (and their heirs) to previous proceedings were divested of their ownership interests because they failed to file any answer or show any interest in the proceedings is not supported by the record.

It is therefore **ORDERED, ADJUDGED and DECREED** that Plaintiffs' Renewed Motion for Judgment on the Pleadings, or in the alternative, Motion for Summary Judgment be, and the same hereby is, **GRANTED**, and that this matter is disposed of pursuant to Rule 56 of the West Virginia Rules of Civil Procedure as a matter of law since there is no genuine issue of material fact that Lucille Bell Perry failed to pay the required payments. Accordingly, it is **ORDERED** that since Lucille Bell Perry did not make annual payments as required by the terms of the Will, as a result of such nonpayment, Lucille Bell Perry, and her heirs, have been divested of any legal right or interest in said property, known as Perkarosa Camp.

The Clerk is directed to mail a certified copy of this Order to all counsel of record.

ENTERED this 7th day of December, 2018.


Jennifer P. Dent, Chief Judge
Eleventh Judicial Circuit