

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-832

Filed: 7 April 2015

New Hanover County, No. 14 CVS 1506

TONYA M. PRICE, Plaintiff,

v.

ROBERT CALDER, JR., Defendant.

Appeal by plaintiff from order entered 12 June 2014 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 3 December 2014.

Randolph M. James for plaintiff-appellant.

Cranfill Sumner & Hartzog, LLP, by Patrick M. Mincey and Kara O. Gansmann, for defendant-appellee.

BRYANT, Judge.

Because defendant—appointed as a commissioner by a Clerk of Superior Court to oversee the partition of property held by co-tenants—was acting within the scope of his duties as a quasi-judicial official, his actions were covered by the rule of judicial immunity. Accordingly, we affirm the dismissal of the complaint.

On 29 April 2014, plaintiff Tonya M. Price filed a complaint against defendant Robert Calder, Jr., a real estate attorney, for his conduct while serving as a commissioner over a partition by sale of property jointly owned by plaintiff and her co-tenant, Robert M. Hesch.

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Prior to the partition by sale ordered in *Hesch v. Price*, 09-SP-0401, plaintiff had retained defendant as a real estate attorney in at least one real estate transaction. In her complaint, plaintiff alleged that in 2007, she and co-tenant Hesch—with whom she was romantically involved—sold real property in New Hanover County for \$533,000.00. In that transaction, defendant acted on behalf of plaintiff and Hesch.

Plaintiff and Hesch also held other properties as joint tenants with right of survivorship, including property located at 314, 316, and 414 Loder Avenue, Wilmington (the Loder Avenue properties). Plaintiff alleged that Hesch rented the property located at 414 Loder Avenue to a realtor, Jeffery Terry, without accounting to plaintiff for the rent paid by Terry. In addition to being a realtor who had previously listed the property at 414 Loder Avenue for sale, Terry was also Hesch's personal friend.

In a letter to the Wilmington Regional Association of Realtors dated 10 September 2009, plaintiff stated that Terry was residing at the property plaintiff owned jointly with Hesch, that Terry removed a jet-ski lift (a procedure subjecting the property owners to a fine of up to \$10,000.00 if performed without a permit), removed plaintiff's personal belongings from the residence, blocked a boat slip plaintiff had rented out in a commercial venture, had "run up" maintenance fees to be split between the property owners, and was living rent free.

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To represent him in proceedings before the Association of Realtors, Terry retained defendant. In her complaint, plaintiff alleged that during the course of his representation of Terry, defendant acted adversely to plaintiff's interests. Plaintiff also alleged that in the course of the proceedings before the Association of Realtors, defendant expressed the opinion that the Loder Avenue properties jointly owned by plaintiff and Hesch should be partitioned. Shortly, thereafter, defendant accepted an appointment by the New Hanover County Clerk of Superior Court as commissioner over the partition of all the Loder Avenue properties.

Plaintiff alleged that she sought an in-kind partition of the Loder Avenue properties as opposed to a partition by sale, but defendant "endorsed" Hesch's desire to partition the property by sale. Plaintiff alleged that because of prior dealings, defendant was aware that Hesch had sufficient resources to acquire plaintiff's interest in the Loder Avenue properties. Plaintiff alleged that due to defendant's knowledge of the inequitable financial footing between plaintiff and Hesch, defendant should have known that "the Clerk's Order denying a partition in-kind and instead ordering a sale of plaintiff and Robert Hesch's property was improper"

Plaintiff asserted that as a commissioner appointed by the New Hanover Clerk of Superior Court, defendant owed a fiduciary duty to herself and Hesch, including, an obligation to divide rents collected from Terry between them and maximize the recovery from the sale of the Loder Avenue properties. Plaintiff alleged that as a

result of defendant's breach of fiduciary duty during the partition by sale, Hesch and his mother¹ were able to acquire all properties previously held jointly by plaintiff and Hesch, while plaintiff received no money for her interest in the Loder Avenue properties.

Plaintiff sought compensatory and punitive damages against defendant for amounts in excess of \$10,000.00. Defendant answered plaintiff's complaint listing seventeen defenses including judicial immunity.

Following a hearing on the matter in New Hanover County Superior Court before the Honorable Phyllis M. Gorham, Judge presiding, the trial court issued a 12 June 2014 order dismissing plaintiff's complaint pursuant to Rule 12(b)(6) on the basis that "[d]efendant was acting as a judicial official and, thus, had judicial immunity." Plaintiff appeals.

Plaintiff argues that the trial court erred in dismissing her complaint on the grounds that defendant had judicial immunity. Plaintiff contends that defendant was not acting as a judicial official and, thus, had no judicial immunity. We disagree.

"It is well established that 'a judge of a court of this State is not subject to civil action for errors committed in the discharge of his official duties.'" *Sharp v. Gulley*,

¹ In her complaint against defendant, plaintiff makes allegations of collusion between Hesch and his mother, and between Hesch, his mother, and Terry, asserting that they all attempted to interfere with plaintiff's rights regarding the Loder Avenue properties.

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120 N.C. App. 878, 880, 463 S.E.2d 577, 578 (1995) (quoting *Fuquay Springs v. Rowland*, 239 N.C. 299, 300, 79 S.E.2d 774, 776 (1954)) (affirming the dismissal of the plaintiff's action against a court-appointed referee in an underlying equitable distribution proceeding on the basis that such was implicitly an action against the trial judge and barred by judicial immunity). "Quasi-judicial immunity is an absolute bar, available for individuals in actions taken while exercising their judicial function. In effect, the rule of judicial immunity extends to those performing quasi-judicial functions." *Vest v. Easley*, 145 N.C. App. 70, 73—74, 549 S.E.2d 568, 572 (2001) (citations omitted).

Chapter 1, Article 29A of our General Statutes governs the execution of judicial sales. Pursuant to General Statutes, section 1-338.1, codified within Article 29A, "[a] judicial sale is a sale of property made pursuant to an order of a judge or clerk in an action or proceeding in the superior or district court" N.C. Gen. Stat. § 1-339.1(a) (2013). A commissioner may be specially appointed to hold the sale. *See id.* § 1-339.4(1).

When an order of sale of such real or personal property . . . makes no specific provision for the sale of the property as a whole or in parts, the person authorized to make the sale has authority in his discretion to sell the property by whichever method described in subsection (a) of this section he deems most advantageous.

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Id. § 1-339.9(c) (2013) (per subsection (a), the judge or clerk having jurisdiction may direct that the property be sold as a whole, in parts, or offered by each method then sold by the method which produces the highest price).

A commissioner appointed by a court of equity to sell land is empowered to do one specific act, viz., to sell the land and distribute the proceeds to the parties entitled thereto. He has no authority and can exercise no powers except such as may be necessary to execute the decree of the court. Immediately upon his appointment he ceases to be an attorney or agent for either party, but becomes in a certain sense an officer of the court for the specific purposes designated in the judgment.

Peal v. Martin, 207 N.C. 106, 108, 176 S.E. 282, 284 (1934).

The New Hanover County Clerk of Superior Court ordered that the property jointly owned by plaintiff and Hesch was to be partitioned by sale. The trial court order for partition by sale was acknowledged by plaintiff in her complaint. Defendant was appointed by the Clerk of Court as the commissioner for the partition proceeding referenced in *Hesch v. Price*, 09 SP-0401, New Hanover County. Therefore, in carrying out the partition by sale, defendant was acting “in a certain sense [as] an officer of the court.” *See id.* at 108, 176 S.E. at 284. We find no merit in plaintiff’s assertion that defendant was not acting in accordance with his duty as commissioner appointed to carry out a partition by sale of property jointly held by plaintiff and Hesch. Therefore, defendant was immune from suit while engaging in this function. *See Vest*, 145 N.C. App. at 73—74, 549 S.E.2d at 572 (“Quasi-judicial immunity is an

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absolute bar, available for individuals in actions taken while exercising their judicial function. In effect, the rule of judicial immunity extends to those performing quasi-judicial functions.” (citation omitted)). Accordingly, we affirm the trial court’s dismissal of plaintiff’s complaint.

AFFIRMED.

Judges DILLON and DIETZ concur.