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CARTERET COUNTY, C.S.C.

NORTH CAROLINA	GENERAL COURT OF JUSTICE
	SUPERIOR COURT DIVISION
CARTERET COUNTY	FILE NO. **02 CVS 1270**
Adams Creek Associates	)
Plaintiff	)
	)
v.	) Order
	)
	)
Melvin Davis & Licurtis Reels	)
Defendants	)

Defendants calendared their Motion to Set Aside Order of Summary Judgment, Motion for Summary Judgment, and Motion to Purge Defendants of Civil Contempt, and Plaintiff calendared its Motion for Rule 11 Sanctions, for hearing on the motion docket on 23 January 2012 before the Honorable Benjamin G. Alford, Senior Resident Superior Court Judge Presiding (the Court).

On 23 January 2012, Terry B. Richardson (Richardson) was present in representation of defendants. L. Lamar Armstrong, Jr. (Armstrong) was present in representation of plaintiff. Richardson and Armstrong are referenced collectively as "counsel".

Richardson estimated that the hearing would take two to three hours. The Court heard several motions on the calendar and was approaching the lunch recess when the Court determined that it could not that day hear the motions in this case based on counsels' estimation of time. The Court was scheduled to start a jury trial estimated to exhaust the remainder of the session. In light of the Court's schedule and the estimated length of the hearing in this case, the Court conferred with counsel.

With the consent of all parties through counsel, the Court retained jurisdiction and continued the hearing to 2:00 pm on 30 January 2012 in Craven County. The Court invited counsel to file any other memoranda or materials that they wanted the Court to consider before noon on Thursday, 26 January 2012, and advised that the Court would review all materials in

the Court File or otherwise provided by counsel prior to the rescheduled hearing.

The Court in fact reviewed all of the parties' motions, all exhibits and materials filed in support of or in opposition to such motions, all memoranda or other legal authorities submitted, the court file in this case, and other files or parts thereof about which the Court may take judicial notice. Having determined from its review of all these materials and authorities that the appropriate resolution of the motions as provided herein is sufficiently clear without further hearing or argument, the Court provided notice of its ruling to counsel on Friday, 27 January 2012 and cancelled the hearing for further argument that was not necessary.

Findings of Fact

1. Defendants' Motion to Set Aside Order of Summary Judgment (Motion to Set Aside) is before the Court for resolution as set forth in this Order.

2. Defendants' Motion to Purge Civil Contempt (Motion to Purge) is not properly before this Court for resolution in that the Honorable Jack W. Jenkins retained jurisdiction in the Order of Civil Contempt that is the subject of Defendants' Motion to Purge.

3. Defendants' Motion for Summary Judgment filed prior to any ruling on Defendants' Motion to Set Aside seeks relief unavailable in light of the 2004 Order of Summary Judgment in plaintiff's favor. Although it was properly noticed for hearing and before this Court, it presents no justiciable issue of law or fact as set forth in this Order.

4. Plaintiff's Motion for Rule 11 Sanctions (Sanction Motion) was properly noticed for hearing and is before this Court. For the reasons set forth in this Order, this Court retains jurisdiction to hear the Sanction Motion at a later session.

5. Based on this Court's review of all of the parties' motions and materials, the history of this litigation conclusively establishes a record that is *law of the case* and *res judicata* as to claims and issues such that further argument or a hearing is unnecessary, and the rulings reflected in this Order are compelled as a matter of law.

6. In 1911, Elijah Reels bought approximately 65 acres adjoining Adams Creek in Carteret County.

7. Mitchell Reels and Shedrick Reels were sons of Elijah Reels.

8. Mitchell Reels died intestate on 11 February 1971.

9. Gertrude Reels was appointed as Administratrix of the Mitchell Reels Estate on 10 February 1976.

10. On 16 June 1976, Gertrude Reels filed a complaint (Carteret County File # 76 CVS 282) seeking a declaration that Mitchell Reels' heirs owned the 65 acre tract and another 45 acre tract.

11. Shedrick Reels was not a party to this lawsuit.

12. On 19 August 1976, and without adjudication of Shedrick Reels' claim of adverse possession that was thereafter involved in the Torrens proceeding, the Honorable Albert W. Cowper entered an order concerning the Mitchell Reels' heirs' ownership of the 65 and 45 acre tracts (the 1976 Judge Cowper Order).

13. Two years later, Shedrick Reels filed a proceeding under N.C. Gen. Stat. Chapter 43 against all of the heirs of his deceased brother, Mitchell Reels (Carteret County File 78-SP-1) (the Torrens proceeding).

14. Plaintiff Adams Creek's title to its 13.25 acre tract (the waterfront property) originates from the conclusive adjudication of Shedrick Reels' title to the waterfront property in the Torrens proceeding.

15. In the Torrens proceeding, Shedrick Reels contended that he owned by adverse possession an 18 acre tract that was part of the larger acreage owned by the Mitchell Reels' heirs.

16. Although Shedrick Reels contended that Elijah Reels had deeded him the 18 acre tract in 1950, Shedrick Reels' claim adjudicated in the Torrens proceeding was based only on Shedrick Reels contention that he had adversely possessed the waterfront property and was not based on Shedrick Reels having obtained superior title by virtue of the 1950 Elijah

Reels deed to Shedrick Reels.

17. In the Torrens proceeding, the examiner determined that Shedrick Reels had in fact adversely possessed a 13.25 acre tract.

18. In the Torrens proceeding, the examiner determined that the Mitchell Reels heirs had title to the remainder of the acreage, excepting Shedrick Reels' ownership of the 13.25 acre waterfront property pursuant to his adverse possession.

19. On 19 March 1979, a Decree of Registration approved by the Resident Superior Court Judge was recorded in Book 4A, Page 241 of the Carteret County Registry.

20. This Decree of Registration provided that in the Torrens proceeding summonses were issued and served properly with the petition on all of the parties and that publication of the required notice was duly made as proved by affidavit and adjudicated by the court.

21. Pursuant to the Decree of Registration, Registered Certificate 79-1 was issued to Shedrick Reels (the Shedrick Reels Registered Certificate).

22. The Shedrick Reels Registered Certificate is the 13.25 acre waterfront property the Torrens proceeding determined Shedrick Reels owned.

23. The Shedrick Reels Registered Certificate is the same 13.25 acre waterfront property that plaintiff Adams Creek as a successor in title owns.

24. The Shedrick Reels Registered Certificate is the same 13.25 acre waterfront property that has been involved in litigation and disputes in the thirty-three years after Shedrick Reels' title was conclusively adjudicated in the Torrens proceeding.

25. Three years after securing his title in the Torrens proceeding, Shedrick Reels on 25 August 1982 brought a lawsuit (Carteret County File # 82 CVS 627) against Melvin Davis and Gertrude Reels, two of the Mitchell Reels' heirs who were trespassing on Shedrick Reels' 13.25 acre waterfront property.

26. On 31 October 1983, Attorney Donald B. Pollock (Pollock) filed a motion in the Torrens special proceeding file to set aside the Shedrick Reels Decree of Registration because Mitchell Reels daughter and heir Classie Reels Curley allegedly was not properly served in the Torrens proceeding and because of alleged failure to consider the 1976 Judge Cowper Order (the 1983 Motion to Set Aside).

27. In the 1983 Motion to Set Aside, Pollock represented the "respondents" in the Torrens proceeding. This included not only Classie Reels Curley, but also the remainder of the Mitchell Reels' heirs named and served in the Torrens proceeding.

28. No further action was ever taken with respect to the 1983 Motion to Set Aside.

29. In an Order filed on 4 January 1984, the Honorable Herbert O. Phillips, III granted summary judgment in favor of Shedrick Reels and against Melvin Davis and Gertrude Reels (the 1984 Judge Phillips Order) and concluded as a matter of law that:

> *"(. . .) that the plaintiff is the owner of the lands described in the complaint and that defendants have no right or title to said lands"*

30. The 1984 Judge Phillips Order directed further that:

> *"The defendants and their agents, servants, and employees shall not enter upon or commit any act of trespass upon the lands described in the complaint."*

31. The "lands described in the complaint" is the 13.25 acre waterfront property Shedrick Reels owned pursuant to the Torrens proceeding and the Registered Certificate.

32. Melvin Davis and Gertrude Reels did not appeal the 1984 Judge Phillips Order which was a final judgment.

33. In violation of the 1984 Judge Phillips Order, Melvin Davis continued to trespass on Shedrick Reels' 13.25 acre waterfront property.

34. Shedrick Reels filed a motion to hold Melvin Davis in contempt.

35. This motion came on for hearing on 20 September 1985 before the Honorable David E. Reid.

36. In his order holding Melvin Davis in contempt (the 1985 Judge Reid Order), Judge Reid found that:

> *(. . .) Melvin Davis, by his own admission, has been upon the [subject property] on many occasions since the Order of this Court [referencing 1984 Judge Phillips Order] ordering him not to do so, that he ordered concrete to be poured for a boat ramp on the property since the order, has caused electric poles to be hooked up on the property to construct the building, and has otherwise committed acts of trespass (. . .)"*

37. Judge Reid found Melvin Davis was in willful contempt of the 1984 Judge Phillips Order, and ordered that Davis be incarcerated in the Carteret County jail until he purged himself of contempt by:

> *". . . signing a statement acknowledging that the [subject property] belongs to plaintiff Shedrick Reels, and that he will not go upon the land for any purpose . . "*

38. Pursuant to the 1985 Judge Reid Order, Melvin Davis signed the following statement:

> *"I, Melvin Davis, do hereby acknowledge that the land described in the complaint in this action belongs to the plaintiff Shedrick Reels, and I will not go upon the land for any purpose."*

39. Based on his signing of this statement, Melvin Davis was released from jail.

40. Melvin Davis did not appeal from the 1985 Judge Reid Order, which was a final judgment.

41. Pursuant to Chapter 43 and a release dated 27 November 1985 and filed in Book 4A, Page 489 of the Carteret County Registry, Shedrick Reels released the Shedrick Reels Registered Certificate for the purpose of conveyance only (the Torrens conveyance release).

42. By deed on 27 November 1985 recorded in Book 529, Page 399 of the Carteret County Registry, Shedrick Reels (and wife Beatrice) conveyed the 13.25 acre waterfront property to Monroe Johnson and Charles Bissette, Jr.

43. By deed on 8 September 1986 recorded in Book 546, Page 330 of the Carteret County Registry, Johnson and Bissette transferred the 13.25 acre waterfront property to plaintiff Adams Creek Associates.

44. Plaintiff Adams Creek obtained the title Shedrick Reels had to the 13.25 acre waterfront property.

45. The Torrens conveyance release did not nullify the title Shedrick Reels obtained through the Torrens proceeding and embodied in the Shedrick Reels Registered Certificate.

46. The Torrens conveyance release merely authorized conveyance of such title by deed as was done when Shedrick Reels passed his title to Johnson and Bissette, and thereafter as Johnson and Bissette passed the same title to Adams Creek.

47. On 30 October 2002, Adams Creek filed a complaint in this case against Melvin Davis and Licurtis Reels alleging their unlawful trespass and seeking to remove any cloud on title created by Davis and Reels' continued claim of an interest in the property.

48. On 16 September 2004, the Honorable Benjamin G. Alford entered partial summary judgment for Adams Creek with detailed findings concerning the above restated history, Shedrick Reels' title acquired in the 13.25 waterfront property through the Torrens proceeding, Adams' Creek's acquisition of this title, the 1984 Judge Phillips Order, the 1985 Judge Reid Order, Melvin Davis and Licurtis Reels' continued trespass on Adams' Creek 13.25 waterfront property including the purported transfer of one acre of Adams Creek's land to Licurtis Reels, and the failure of Melvin Davis and Licurtis Reels to offer any evidence other than the deposition of Melvin Davis (2004 Judge Alford Order).

49. In the 2004 Judge Alford Order, Judge Alford found there was no genuine issue of material fact and as a matter of law:

"(. . .) Plaintiff [Adams Creek] *is the owner of the lands described in the complaint and the Defendants* [Melvin Davis and Licurtis Reels] *have no right or title to said lands."* (name interjected)

" (. . .) Defendants, their agents, servants, and employees will remove any structures, equipment, sheds or trailers that they have placed upon the property. . . and that they will not enter upon or commit any act of trespass upon the lands described in said complaint and further, this action shall be tried by a jury on the issue of damages."

50. On 13 October 2004, the defendants filed a notice of appeal to the North Carolina Court of Appeals of the 2004 Judge Alford Order.

51. Defendants failed to file a record on appeal and failed to perfect this appeal as required by law.

52. On 9 March 2005, plaintiff moved to dismiss the appeal.

53. On 28 March 2005, the Honorable Kenneth F. Crow entered an order dismissing the appeal (2005 Judge Crow Order).

54. In the 2005 Judge Crow Order, Judge Crow found specifically that both Melvin Davis and Licurtis Reels had been served personally with the motion to dismiss the appeal (in addition to their attorney of record) and that neither the defendants nor their attorney appeared for the hearing of the motion to dismiss their appeal.

55. Over a year later, on 6 May 2006, plaintiff filed a motion seeking to hold defendants Davis and Reels in contempt for their continued trespass on Adams Creek's property.

56. On 17 May 2006, defendants David and Reels filed a motion to set aside the 2005 Judge Crow Order dismissing their appeal, a motion to disqualify Attorney C.R. Wheatly from representing Adams Creek, and a motion to set aside the 1979 Decree of Registration on the 13.25 waterfront property now owned by Adams Creek.

57. On 7 July 2006, the Honorable Ernest Fullwood granted Adams Creek's motion and ordered Davis and Reels to appear and show cause as to why they should not be held in contempt (2006 Judge Fullwood Order).

58. On 7 August 2006, the Honorable Gary E. Trawick heard all of these motions and ruled by Order filed on 10 August 2006 that: (1) Davis and Reels were in civil contempt of the 2004 Judge Alford Order for their continued trespass on Adams Creek's property; (2) Davis and Reels were in criminal contempt for testifying in front of Judge Trawick that they did not intend on obeying future orders to stay off the property; (3) Attorney CR Wheatly was not disqualified to represent Adams Creek; and (4) declined to rule on the motion to set aside the 2005 Judge Crow Order dismissing the appeal but expressly invited the defendants to raise that motion before Judge Crow (2006 Judge Trawick Order).

59. Defendants appealed to the North Carolina Court of Appeals from the 2006 Judge Trawick Order.

60. On 6 November 2007, the Court of Appeals filed its opinion affirming the 2006 Judge Trawick Order. *Adams Creek Associates v Melvin Davis and Licurtis Reels*, 186 N.C. App. 512, 652 S.E.2d 677 (2007). (The 2007 COA Opinion).

61. The 2007 COA Opinion specifically and clearly found that the 2004 Judge Alford Order was interlocutory in that it was a "partial" summary judgment and reserved the claim for damages for jury trial, and that the defendants Davis and Reels had not perfected any appeal of the 2004 Judge Alford Order.

62. The 2007 COA Opinion clearly stated that *"Judge Alford's Order remains in effect, is not on appeal, and not subject to our review"*.

63. Adams Creek's claim for damages has never been tried or otherwise resolved.

64. Defendants have not through the present attempted to have Adams Creek's claim for damages calendared or tried, or otherwise objected to the passage of over seven and a half years from the entry of the 2004 Judge Alford Order and the present without disposition of Adam's Creek's damage claim.

65. Defendants have not through the present perfected any appeal of the 2004 Judge Alford Order.

66. Since the 2004 Judge Alford Order, Adams Creek has for the past seven and a half years through the present continued its efforts as documented in this Order and confirmed in the various Court Files and Orders referenced herein to secure its full use and enjoyment of the 13.25 acre waterfront property, free from Melvin Davis and Licurtis Reels' continued trespass and their structures and property thereon.

67. The 2004 Judge Alford Order was and, in fact, remains interlocutory.

68. Although the 2007 COA Opinion found that defendants did not have the 2004 Judge Alford partial summary judgment order before the Court of Appeals, it did affirm the 2006 Judge Trawick Order finding that the defendants' motion to set aside the decree of registration, even if otherwise proper, was properly denied on the grounds that the statute of limitations had long expired.

69. On 11 June 2008, the North Carolina Supreme Court dismissed defendants' attempted appeal and denied defendants' petition for discretionary review. *Adams Creek Associates v Melvin Davis and Licurtis Reels*, 362 N.C. 354, 662 S.E.2d 900 (2008). (The 2008 NC Opinion).

70. On 8 February 2008, within a few months after the 2007 COA Opinion, Classie Reels Curley filed a complaint against Adams Creek Associates in the United States District Court for the Eastern District of North Carolina. The lawsuit was later amended to include as defendants general partners Billie Dean Brown and George H. Ellinwood. (the 2008 Classie Reels Curley Federal Lawsuit).

71. In the 2008 Classie Reels Curley Federal Lawsuit, the central focus was Curley's claim she owned the 13.25 waterfront property by virtue of her adverse possession and also her attack the Torrens proceeding as violating her due process rights because she allegedly was not served with the petition therein.

72. On 29 March 2010, after two years of litigation in the Classie Reels Curley Federal Lawsuit, the Honorable Malcolm J. Howard entered an Order granting Adams Creek's and the general partners' motion for summary judgment and dismissing the lawsuit. (The 2010 Judge Howard Order).

73. The 2010 Judge Howard Order deferred to the previous state court litigation, rejected Curley's claim for adverse possession, and for several alternative reasons confirmed Adams Creek's title to the 13.25 acre waterfront property.

74. Classie Reels Curley appealed to the Fourth Circuit Court of Appeals.

75. On 28 January 2011, the Fourth Circuit Court of Appeals affirmed the 2010 Judge Howard Order (Unpublished Case 10-1465) (the 2011 Fourth Circuit Order).

76. On 28 January 2011, plaintiff Adams Creek filed a Motion for Civil Contempt in this case seeking to enforce previous Court Orders and such other relief as necessary and proper.

77. On 17 March 2011, Adams Creek's Motion for Civil Contempt came on for hearing before the Honorable Jack W. Jenkins.

78. After an extensive hearing wherein defendants were represented by Larry S. Height, and wherein the Court received extensive live testimony, exhibits, legal authorities and argument, Judge Jenkins held that the defendants Davis and Reels were in civil contempt of court and ordered that they be imprisoned until they purged themselves from this contempt by complying with the 2004 Judge Alford Order.

79. On 31 March 2011, Judge Jenkins filed his detailed Order of Civil Contempt with findings of fact and conclusions of law detailing the history of the defendant Davis' and Reels' contemptuous failure to comply with multiple court orders and refusal to leave Adams' Creek's property or remove their structures therefrom. (The 2011 Judge Jenkins Order).

80. On 21 December 2011, Richardson on behalf of defendants Davis and Reels signed as counsel of record and filed Defendants' Motion to Set Aside and Motion to Purge.

81. On 11 January 2012, Richardson on behalf of defendants' Davis and Reels signed as counsel of record and filed Defendants' Motion for Summary Judgment.

82. On 11 January 2012, Richardson on behalf of defendants' Davis and Reels signed as counsel of record and filed a Notice of Hearing of all three of Defendants' Motions for 23 January 2012.

83. On 18 January 2012, plaintiff filed its Sanctions Motion.

84. Defendants Davis and Reels have remained incarcerated pursuant to the 2011 Judge Jenkins Order since 17 March 2011.

85. Defendants' Motion to Purge and all materials filed in support thereof or in support of all three of Defendants' Motions, defendants make no argument and provide no evidence that either Melvin Davis or Licurtis Reels has taken any action to remove structures from the Adams Creek 13.25 waterfront property or otherwise comply with the 2004 Judge Alford Order, or offered any argument or evidence as to why they cannot comply.

86. Defendants' sole contentions are to dispute Adams Creek's title to the 13.25 acre waterfront property or allege improprieties in the 1979 Torrens proceeding.

87. Defendants have made no argument as to why they calendared their Motion to Purge before this Court, when the 2011 Judge Jenkins Order specifically in paragraph 9 on page 6 retains jurisdiction to Judge Jenkins.

88. Defendants' Motion for Summary Judgment seeks an adjudication as a matter of law concerning issues and claims that were adjudicated in favor of Adams Creek in the 2004 Judge Alford Order and have remained *law of the case*.

89. At the time that Defendants through Richardson filed the Motion for Summary Judgment and noticed it for hearing, the claim for which defendants sought summary judgment in their favor was not subject to re-litigation and there was no justiciable issue of law or fact raised by Defendants' Motion for Summary Judgment.

90. With respect to Defendants' Motion to Set Aside Summary Judgment (Request for Reconsideration), defendants failed to make any evidentiary showing or legal argument as to why this Court has jurisdiction pursuant to a Rule 60(b) motion to set aside a partial summary judgment

order that defendants concede is interlocutory, and from which defendants have never perfected an appeal.

91. Defendants further failed to make any evidentiary showing or legal argument as to why their Rule 60(b) motion was brought within a reasonable time of the 2004 Judge Alford order when defendants' arguments essentially attack the 1978 Torrens proceeding and the resulting 1979 Decree of Registration.

92. Defendants further failed to make any showing or legal argument as to why their Rule 60(b) motion involved extraordinary circumstances when the only arguably new evidence presented is an affidavit of surveyor Brent A. Lanier that concludes the Adams Creek 13.25 acre waterfront property is located entirely within the Mitchell Reels alleged 65 acre tract.

93. This evidence changes nothing about Adams Creek's ownership of the 13.25 acre waterfront property, or the thirty-three (33) year history of the property and the 2004 Judge Alford Order that remains *law of the case* and therefore *res judicata* as to the issues defendants attempt to raise.

94. Defendants have failed to present any evidence or legal argument as to why all of their arguments about title to the land or any alleged "failure to disclose" by anyone is newly discovered or different from the positions asserted and documented in the thirty-three year dispute that has continued unabated since 1979.

Based on these Findings of Fact, the Court makes the following:

Conclusions of Law

1. Defendants' Motion to Set Aside is also captioned as "Request for Reconsideration".

2. All motions must be made pursuant to a North Carolina Rule of Civil Procedure. There is no Rule that permits reconsideration other than Rules 59 and 60.

3. Defendants' Request for Reconsideration is properly treated as a Rule 60(b) motion.

4. Defendants' Motion to Set Aside is made exclusively pursuant to Rule 60(b)(6).

5. The 2004 Judge Alford Order that defendants' Motion to Set Aside contests is interlocutory.

6. Because Rule 60(b) applies only to final judgments or orders, and the 2004 Judge Alford Order is not final and remains interlocutory, this Court is without jurisdiction to hear defendants' Motion to Set Aside.

7. Furthermore, and as an alternative basis for denial of the Motion to Set Aside, defendants' have failed to bring their Motion to Set Aside within a reasonable time as required by Rule 60(b).

8. Furthermore, and as an alternative basis for denial of the Motion to Set Aside, defendants' Motion to Set Aside is barred by doctrines of *res judicata* and *law of the case*.

9. Furthermore, and as an alternative basis for denial of the Motion to Set Aside, the Court concludes as a matter of law, and to the extent the conclusion is discretionary then in the exercise of the Court's discretion, that defendants have failed to demonstrate extraordinary circumstances warranting relief pursuant to Rule 60(b)(6).

10. This Court is without jurisdiction to hear Defendants' Motion to Purge because the Honorable Jack W. Jenkins retained jurisdiction over matters embraced by the 2011 Judge Jenkins Order of Civil Contempt.

11. At the time that defendants filed and calendared for hearing Defendants' Motion for Summary Judgment, the claims for which defendants purported to seek summary judgment remained *law of the case* and *res judicata* pursuant to the 2004 Judge Alford Order.

12. There is no justiciable issue of law or fact for which defendants could move for summary judgment.

Based on these Conclusion of Law, the Court Orders that:

1. Defendants' Motion to Set Aside Summary Judgment (Request for Reconsideration) is denied.

2. Defendants' Motion for Summary Judgment is stricken.

3. Defendants' Motion to Purge Civil Contempt is referred to the Honorable Jack W. Jenkins for hearing as defendants may properly notice.

4. The Court retains jurisdiction over Plaintiff's Motion for Rule 11 Sanctions, to be heard before this Court as plaintiff may properly notice.

Benjamin G. Alford

The Honorable Benjamin G. Alford
Senior Resident Superior Court Judge Presiding

This the 7th day of February 2012.