DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

LEE TE KIM,

Appellant,

v.

COURTNEY GALASSO, individually and as Trustee of the CLARENCE E. LEISEY, III REVOCABLE TRUST,

Appellee/Cross-Appellee.

and

ROBERT PITTMAN, JR.,

Appellee,

and

AGP RUSKIN, LLC,

Appellee/Cross-Appellant.

No. 2D20-3313

August 3, 2022

Appeal from the Circuit Court for Hillsborough County; Cheryl K. Thomas, Judge.

Alec D. Russell of GrayRobinson, P.A, Melbourne; and Paul E. Parrish of Parrish Law, P.A., Satellite Beach, for Appellant.

Chance Lyman and Joshua S. M. Smith of Buchanan Ingersoll & Rooney PC, Tampa, for Appellee/Cross-Appellee Courtney Galasso, individually and as Trustee of the Clarence E. Leisey, III Revocable Trust.

Dean A. Morande of Carlton Fields, P.A., West Palm Beach; and Christopher W. Smart of Carlton Fields, P.A., Tampa, for Appellee/Cross-Appellant AGP Ruskin, LLC.

Mark M. Wall and A. Evan Dix of Hill, Ward & Henderson, P.A., Tampa, for Appellee Robert Pittman, Jr., and Appellee/Cross-Appellant AGP Ruskin, LLC.

MORRIS, Chief Judge.

Lee Te Kim appeals an amended final summary judgment entered in favor of defendants Courtney Galasso, individually and as trustee of the Clarence E. Leisey, III Revocable Trust; Robert Pittman, Jr.; and AGP Ruskin, LLC (AGP), on Kim's complaint for declaratory judgment, injunctive relief, conversion, civil theft, and civil conspiracy. AGP cross-appeals the dismissal of its cross-claim against Galasso for indemnification and advancements based on a warranty deed of sale. For the reasons explained herein, we affirm the amended final summary judgment as it relates to Kim's complaint. However, we reverse the amended final summary judgment as it relates to AGP's cross-claim against Galasso.

I. Background

In March 2019, Kim filed the instant action against Galasso, Pittman, and AGP. Kim alleged that he owned over $1 million worth of palm trees that were planted on land sold by Galasso to AGP, an entity created by Pittman for the purchase of the land. Kim alleged that he was friends and business partners with landowner Clarence E. Liesey, III, for twenty years. Around 2004, Leisey and Kim agreed to operate a palm tree nursery on Leisey's land located on 19th Avenue. Leisey would provide the land, and Kim would provide the trees. The partners would each contribute fifty percent of the labor and expense of maintaining the trees and property, and they would each receive fifty percent of the proceeds when the trees were sold. Apparently, this agreement or partnership was never reduced to writing.

In late 2004 or early 2005, Kim and Leisey set up a second tree nursery on Leisey's other property located on Gulf City Road, the property at issue in this case. They maintained the same arrangement for this nursery as they did for the 19th Avenue nursery; Leisey would provide the land, Kim would provide the trees, and they would share the responsibility and the proceeds.

Kim alleged that he had grown and cultivated the trees for years before he transplanted them in the ground on the Gulf City Road property. Again, this second phase of the agreement or partnership was never reduced to writing.

Kim and Leisey managed the two nurseries until September 21, 2011, when they discontinued their partnership. This time, Leisey and Kim signed a letter that provides as follows:

> The partnership between Lee Te Kim and Clarence Leisey III has been dissolved as of September 30, 2011.
>
> Mr. Leisey III will keep his property on 19th Avenue and all the trees on the property. Mr. Lee Te Kim will no long [sic] have any responsibility for any of these trees.
>
> Mr. Lee Te Kim will have sole ownership of only the trees at . . . Gulf Road and Mr. Leisey will still have ownership of the property and be responsible for all taxes on the property. . . . Starting in January 2015, Mr. Lee Te Kim will have to pay $3,000 per year rent on the property.

On May 2, 2016, Leisey conveyed the Gulf City Road property to his trust. Later that month, Leisey died. On June 27, 2017, Galasso, as the successor trustee of the trust, sold the Gulf City Road property to AGP, which was created by Pittman for the purpose of purchasing the property. The deed does not provide that the trees are separate from the land, and AGP and Galasso claimed

that the trees were part of the real estate and that AGP took ownership of the trees as a result of the land purchase.

Kim filed the instant action against the defendants in March 2019 asserting counts for declaratory judgment, injunctive relief, conversion, civil theft, and civil conspiracy.[1] AGP filed a cross-claim against Galasso for indemnification and advancements based on the warranty deed of sale executed when AGP bought the land from the trust.

The defendants filed motions for final summary judgment, joining in each other's motions, arguing that the trees were part of the realty and that no legal exceptions apply to the facts of this case. Lee filed a written response and supporting affidavit, claiming that he had leased Leisey's property and was growing trees on the

[1] The defendants point out that Kim filed an earlier action against the same defendants in 2018, asserting the same counts. In the earlier action, however, Kim did not claim ownership of the trees prior to their planting but alleged that as a result of the 2011 agreement, the parties agreed to transfer ownership of the trees on the Gulf City Road property to Kim. The defendants filed a motion to dismiss for failure to state a cause of action, and the trial court granted the motion and dismissed the action without prejudice in January 2019. Kim did not appeal. At the summary judgment hearing in this second action, the trial court noted that no parties had raised the issue of res judicata and the court made it "clear on the record that it's not a case that is subject to res judicata."

property as a tenant. At a hearing on the summary judgment motions, the defendants argued that the 2011 agreement does not satisfy the statute of frauds and is not legally sufficient to support Kim's theories that the trees do not follow the land and that he leased the land from Leisey to grow the trees. The defendants also argued that to the extent the 2011 agreement served as a license for Kim to grow and use the trees, the license was revoked at the time of Leisey's death. Kim argued that he had an oral lease with Leisey to use the land to plant and grow the trees; Kim claimed that a written lease had recently been discovered but acknowledged that the written lease had not been attached to the complaint. Kim argued that he was not suing for breach of the lease but for conversion.

At the conclusion of the hearing, the trial court granted the defendants' motions for summary judgment, orally ruling that the lease does not satisfy the statute of frauds and that any license terminated at the time of Leisey's death. The court further ruled that the trees became part of the realty when they were planted and that the 2011 agreement did not satisfy the statute of frauds because it was not signed by two witnesses. The court also noted

that while the agreement provided that the trees would be Kim's when they were severed from the land, the trees were never severed from the land. The trial court entered a written order providing, in relevant part, as follows:

> 4. The case proceeded initially as a licensing agreement and, as was argued by counsel, if it were indeed involving a license, the license would terminate at the time of the death of the party granting the license and at the subsequent transfer of ownership.
>
> 5. The Court finds there is no genuine issue of material fact and based upon the holdings in the case of *Jenkins v. Lykes*, 19 Fla. 148 (Fla. 1882)[,] and other cases, that once the trees are planted they become realty.
>
> 6. The agreement between the landowner and [Kim] was not witnessed by two parties and, therefore, could not provide a legal basis as any type of contract pertaining to real estate.
>
> 7. The Court also finds that these trees do not fall within the exception that perhaps was addressed in the case of *Summerlin v. Orange Shores*, 122 So. 508 (Fla. 1929)[,] because these are not fruit-bearing trees, they were regular trees that were planted for the purpose of providing timber, and once they were planted became part of the real estate.
>
> 8. Further, the letter of agreement between the landowner and [Kim] said that the trees will become property of [Kim] once they were severed from the land. At the time of the transfer, there had not been any severance, so, therefore, the trees were owned by the owner of the property.
>
> 9. As such, final summary judgment is hereby entered in favor of Defendants against [Kim].
>
> 10. AGP Ruskin's Counterclaims for unjust enrichment against [Kim] and its cross-claim against Defendant Galasso are disposed of as moot.

AGP moved for rehearing, arguing that its cross-claim against Galasso was not the subject of the summary judgment motions and that it was not moot because AGP is entitled to attorneys' fees incurred in defending Kim's claim. Galasso responded that the warranty deed only applied to lawful claims. After a hearing, the trial court denied AGP's motion for rehearing relating to its cross-claim. The trial court entered an amended final summary judgment.[2]

II. Analysis

On appeal, Kim argues that the trial court erred in applying the ancient rule that "whatever is affixed to the soil belongs to the soil" without considering modern exceptions. He contends that Florida recognizes that the trees do not become part of the realty unless the owner of the trees intends them to become part of the realty.

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a

---

[2] The trial court entered the amended final judgment because it granted AGP and Pittman's motion for rehearing on a minor matter not pertinent to this appeal.

matter of law." *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000) (citing *Menendez v. Palms W. Condo. Ass'n*, 736 So. 2d 58 (Fla. 1st DCA 1999)). "Thus, our standard of review is de novo." *Id.*

Generally, "[a]t common law and by Florida case law[,] standing timber was regarded as an interest in realty." *Ga.-Pac. Corp. v. Dep't of Revenue*, 410 So. 2d 550, 551 (Fla. 1st DCA 1982) (first citing *Walters v. Sheffield*, 78 So. 539 (Fla. 1918); then citing *Richbourg v. Rose*, 44 So. 69 (Fla 1907)). Further, "[c]rops of fruit growing on trees, whether regarded as fructus naturales or fructus industrials, are in general parts of the realty, and, unless reserved, go with the realty in its transfer." *Simmons v. Williford*, 53 So. 452, 453 (Fla. 1910). And where crops are planted on leased property, "until they reach the point of severance at maturity, the crops inhere in the land on which they are growing." *Lee County v. T & H Assocs.*, 395 So. 2d 557, 560 (Fla. 2d DCA 1981); *cf. Dep't of Agric. & Consumer Servs. v. Mid-Fla. Growers, Inc.*, 541 So. 2d 1243, 1244 n.2 (Fla. 2d DCA 1989) (noting that containerized citrus trees at issue were personal property but that the trees "might arguably be classified as real property" if the "case had involved a bare-root

nursery in which the trees were grown for more than a year and were planted in the ground"), *quashed in part on other grounds,* 570 So. 2d 892 (Fla. 1990).

> One claiming that trees and shrubs, whether growing naturally or planted and cultivated for any purpose, are not part of the realty, must show special circumstances which take the particular case out of the general rule; he must show that the parties intended that they should be regarded as personal chattels.

Summerlin v. Orange Shores, 122 So. 508, 510 (Fla. 1929) (quoting 1 *Jones on Mortgages* (7 Ed.) 434); *see also Wright v. McGinley*, 351 So. 2d 1151, 1151-52 (Fla. 1st DCA 1977) (affirming dismissal of complaint for replevin by former tenant to recover crops planted on landlord's land and holding that "[a]lthough growing crops may be treated as personalty for the purpose of sale, they are part of the real estate until severed and follow the real estate unless specifically reserved"). Under Florida law, "a contract for the sale of standing timber [i]s a contract concerning an interest in land within the meaning of the Statute of Frauds." *Ga.-Pac. Corp.*, 410 So. 2d at 551; *see also Walton Land & Timber Co. v. Long*, 185 So. 839, 840 (Fla. 1939) ("A sale of standing timber is a contract concerning an interest in land, within the meaning of the Statute of Frauds.");

Richbourg, 44 So. at 71 ("Sales of growing timber are as likely to become the subjects of fraud and perjury as are the other integral parts of the land, and the question whether such sale is a sale of an interest in or concerning lands should depend, not upon the intention of the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty." (quoting *Hirth v. Graham*, 33 N.E. 90, 92 (Ohio 1893))); *Jenkins v. Lykes*, 19 Fla. 148, 158 (Fla. 1882) (holding that generally, a sale for standing trees is a "contract for an interest in land, standing trees being of the realty").

According to the complaint, the trees at issue were planted on the property in late 2004 or early 2005, and they continued to grow there in 2011 when the property was sold to AGP. Based on the authority cited above, because the trees were planted in the land, the trees are considered part of the realty and any contract taking the trees out of that general rule must clearly show that the parties intended the trees to be personal property and must satisfy the statute of frauds. Kim attempted to show that he and Leisey intended for the trees to be excluded from the realty as Kim's personal property. However, there was no written document

memorializing the agreement when the trees were planted, and the letter signed in 2011 does not satisfy the statute of frauds. The statute of frauds provides the following, in relevant part:

> No estate or interest of freehold, or for a term of more than 1 year, or any uncertain interest of, in or out of any messuages, lands, tenements or hereditaments shall be created, made, granted, transferred or released in any other manner than *by instrument in writing, signed in the presence of two subscribing witnesses* by the party creating, making, granting, conveying, transferring or releasing such estate, interest, or term of more than 1 year, or by the party's lawfully authorized agent, unless by will and testament, or other testamentary appointment, duly made according to law; and no estate or interest, either of freehold, or of term of more than 1 year, or any uncertain interest of, in, to, or out of any messuages, lands, tenements or hereditaments, shall be assigned or surrendered unless it be *by instrument signed in the presence of two subscribing witnesses* by the party so assigning or surrendering, or by the party's lawfully authorized agent, or by the act and operation of law.

§ 689.01, Fla. Stat. (2011) (emphasis added). The letter signed by Kim and Leisey did not contain two witness signatures as required by section 689.01. Thus, it does not satisfy the statute of frauds, and it is not legally sufficient to grant ownership of the trees to Kim. Kim's lease theory also fails because no written document was presented memorializing an earlier lease, and the 2011 agreement

does not contain two witnesses.[3] *See S & I Invests. v. Payless Flea Market, Inc.*, 36 So. 3d 909, 914 (Fla. 4th DCA 2010) (holding that lease failed to comply with 2003 version of section 689.01 because it included only one subscribing witness).

While Kim did not assert a license theory in his complaint, the trial court correctly ruled that any license to use Leisey's land expired. Any license to use Leisey's land expired at his death or upon the transfer of the property to the trust and the subsequent sale of the property to AGP. *See Fowler v. Ramsey*, 61 So. 747, 748 (Fla. 1913) (holding that agreement to cut timber was "a license to cut and remove" timber but that "license was revoked by [landowner's] death"); *Jenkins*, 19 Fla. at 162 (holding that agreement for the sale of trees, which was void as contract for an interest in the land, could operate as a license to remove the trees but that the license expired upon the sale or conveyance of the property); *Devlin v. The Phoenix, Inc.*, 471 So. 2d 93, 95 (Fla. 5th DCA 1985) ("A license, whether express or implied, is not a right

---

[3] Section 689.01 was amended in 2020 to no longer require "subscribing witnesses . . . for a lease of real property or any such instrument pertaining to a lease of real property." Ch. 2020-102, § 1, Laws of Fla.

but is a personal privilege, not assignable without express permission. Not being an interest in land it is not subject to the statute of frauds. . . . A sale or conveyance of property to which a license has been granted effectively revokes the license.").

Having determined that the trial court properly granted summary judgment in favor of the defendants on Kim's claims, we now turn to the cross-appeal. AGP argues that it was denied due process when the trial court dismissed its cross-claim against Galasso for indemnification and advancements when the issue was not noticed, briefed, or argued. AGP further contends that based on language in the warranty deed, it is entitled to attorneys' fees it has already incurred in defending title against Kim's claims.[4]

Neither of the motions for summary judgment mentioned AGP's cross-claim against Galasso, and Galasso did not request dismissal of AGP's cross-claim in her motion. At the summary judgment hearing, neither the parties nor the trial court addressed AGP's cross-claim against Galasso or how it would be affected by a

[4] The warranty deed provides, in relevant part, that "the grantor hereby fully warrants the title to said land and will defend the same against the lawful claims of all persons whomsoever."

summary judgment on Kim's claims against the defendants. Nonetheless, the trial court dismissed the cross-claim as moot in its written order.

It is well established that it is improper for a trial court to dismiss a claim when the parties have not received notice or an opportunity to be heard. *See, e.g.*, *Lawson v. Frank*, 197 So. 3d 1269, 1271 (Fla. 2d DCA 2016) (holding that trial court erred in dismissing amended complaint as legally insufficient where "there was no motion to dismiss pending before the court, no indication from the record that any kind of hearing had been set, and no motion, objection, or defense ever raised as to the sufficiency of the pleading or [the plaintiff's] standing"); *Bank of N.Y. Mellon Corp. v. Hernandez*, 299 So. 3d 461, 463 (Fla. 3d DCA 2020) ("A trial court cannot dismiss a cause of action without a pending motion or objection. It is a due process violation for a trial court to sua sponte dismiss a claim without notice or a hearing." (citing *Lawson*, 197 So. 3d at 1271)). Because AGP's cross-claim was dismissed without notice and an opportunity to be heard, we reverse the amended final summary judgment and remand for further proceedings on AGP's cross-claim against Galasso.

III. Conclusion

We affirm the amended final summary judgment as it relates to Kim's complaint against the defendants, but we reverse the portion of the amended final summary judgment dismissing AGP's cross-claim against Galasso and remand for further proceedings.

Affirmed in part; reversed in part; remanded.

SLEET and SMITH, JJ., Concur.

Opinion subject to revision prior to official publication.