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Dav. Co. Chancery Court

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

FILED
2014 JUL 31 PM 1:43
DAVIDSON CO. CHANCERY CT

JOSEPHINE PHELPS and ROY SMITH)
)
Plaintiffs,)
)
v.) Case No.: 13-283-I
)
VERN BENKE, JR.)
)
Defendant.)

ORDER SETTING ASIDE DEFAULT JUDGMENT

This matter came on for hearing on July 11, 2014 on the Motion of Defendant, Vern Benke, Jr., pursuant to Tennessee Rules of Civil Procedure, Rules 55.02 and 60.02, asking for the Court to set aside the Default Judgment entered in this case on April 4, 2014; upon hearing the evidence and arguments of counsel and from the record as a whole, the Court states the following facts and Orders as follows:

1. Plaintiffs filed a Petition to Quiet Title on March 5, 2013; after Defendant was served by publication and no answer filed, the Court granted a Final Judgment on April 4, 2014.

2. The Final Judgment granted Plaintiffs possession of the real estate described on Exhibit A attached hereto and incorporated herein by reference.

3. Defendant filed his Motion to Set Aside Final Judgment on June 9, 2014 and at the hearing on said Motion, Defendant demonstrated that he fulfilled each of the three factors that are to be considered by the Court relevant to this Motion.

BILL GARRETT, Davidson County
Trans:T20140060329 ORDER
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Fees:22.00 Taxes:0.00
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4. The Supreme Court has adopted a three part test for evaluating a motion to set aside a default judgment based upon the grounds set forth in Rule 60.02(1). The applicable test requires a consideration of the following factors: (1) whether the default was willful; (2) whether the defendant has a meritorious defense; and (3) whether the non-defaulting party would be prejudiced if relief were granted. *Patterson v. SunTrust Bank, 328 S.W. 3d 505 (Tenn. App. 2010); Discover Bank v. Morgan, 363 S.W.3d 479 (Tenn., 2012).*

5. After considering the factors set forth above, the Court has determined that Defendant's conduct in this matter was not willful; the Defendants failure to provide the taxing authority with a current address or his absence and unavailability for service of process may be negligent, but not willful.

6. The Court further finds that Defendant has a meritorious defense to the Petition to Quiet Title; the Court has considered Plaintiff's adverse possession claims and based on the findings in the case of *Vincent v. Johnston, 2014 WL 279682* which discusses the four types of adverse possession and color of title, Defendant has a meritorious defense to the lawsuit.

7. The Court finds that Plaintiffs have demonstrated no prejudice that will exist by granting the relief sought.

Therefore, based on the foregoing, the Court finds that excusable neglect is present in this case and Defendants Motion to Set Aside the Final Judgment is granted; hence, the real property described in Exhibit A attached hereto is reinvested in Defendant, until further order of this Court.

ENTERED: _____

Chancellor Bonnyman

Davidson County, Tennessee

I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF ORIGINAL INSTRUMENT FILED IN THIS OFFICE
THIS 8th DAY OF August 2014
CRISTI SCOTT, CLERK & MASTER
BY _____ DEPUTY CLERK

Approved for Entry:

Keith H. Solomon, BPR #024040
Attorney for Petitioner
8119 Isabella Lane, Suite 104
Brentwood, Tennessee 37027
(615) 574-7310
keith@solomonparks.com

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order has been sent to the attorney for Plaintiffs, via US MAIL, postage prepaid, to the address noted below on the 24 day of July, 2014.

Jean Dyer Harrison
Harrison Law Group, P.C.
1105 16th Ave S. Ste D
Nashville, TN 37212

Keith H. Solomon

EXHIBIT "A"

Property in Davidson County, Tennessee, described more particularly as follows:

Property located on the North side of Smith Springs Road in the City of Antioch, 29th Councilmanic District of Davidson County, Tennessee. Being described according to a survey by J. Bruce Rainey, Surveyor #823, dated April 12, 2012 and revised on April 17, 2012 and known as Job No. 12-0034, as follows:

BEGINNING at an iron pin set at the Southwest corner of the herein-described tract. Said pin being the Northwest corner of Tract 1 of same survey being located N 10°55'03"E – 447.72' from an iron pin set in the northerly right-of-way of Smith Springs Road at the Southwest corner of the herein-described tract and the Southeast corner of Peninsula Point Section One of record in Plat Book 9700, Page 98, R.O.D.C., TN. Said pin being approximately 62 feet east of the centerline of Milbridge Road. Thence from said POINT OF BEGINNING, with the easterly line of Peninsula Point Section One, N 10°55'03"E 376.16' to an iron pin set in the southerly line of Lot 91 of Peninsula Point Section One; Thence along the southerly line of Peninsula Point Section One, S 81°08'33" E – 35.58' to a P.K. nail set in a post; Thence S 88°15'59" E – 152.00' to an iron pin set; Thence N 52°13'04" E – 35.38' to an existing iron pin; Thence S 87°06'54" E 81.06' to an existing angle iron; Thence S 88°14'17" E – 43.25' to an existing fence corner at the Northwest corner of the James H. Carothers, Jr. property of record in Book 10276, Page 633, R.O.D.C., TN, Thence with Carothers' westerly line, S 10°41'59" W – 445.20' to an iron pin set; Thence with the northerly line of Tract 1 of same survey, N 79°18'01" W – 333.62' to the POINT OF BEGINNING, containing 3.11 acres, more or less.

Being the same property conveyed to Vern Benke, Jr.et ux by deed of record in Book 6367, Page 691, R.O.D.C., TN.