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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Judge

Appellate Case No. 2024-000372

Wilmington Savings Fund Society FSB as Trustee of Stanwich Mortgage Loan Trust I,……..…….....…..Respondent,

v.

Ebonee D. Brown; Georgia M. Brown; South Carolina Department of Motor Vehicles,……...……..……..……Defendants,

of whom Ebonee D. Brown and Georgia M. Brown are the ……Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

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STATEMENT OF ISSUES

I. In the absence of evidence to the effect that the mobile home at issue has ever become part of the real estate, did the circuit court err in granting summary judgment that it is part of the real estate?

II. Where the Respondent's own showing indicates it is pursuing collection of debt barred by res judicata, did the circuit court err in granting summary judgment on Appellant's Fair Debt Collection Practices Act claim?

III. Where the Respondent failed to meet the procedural requirements to assert a claim for possession of the subject mobile home and failed to adduce substantive evidence of those requirements, did the circuit court err in granting summary judgment in Respondent's favor on that claim?

IV. Where the Respondent asserted an at-law claim in its complaint for possession of the mobile home, did the circuit court err in striking Appellants' jury demand and referring this case to a special referee?

ARGUMENT IN REPLY

I. Wilmington Savings appeals to a common but incorrect understanding of how summary judgment works.

In its brief, the Respondent ("Wilmington Savings") argues that it was entitled to summary judgment on all points because the Appellants ("the Browns") did not put in their own affidavits to oppose Wilmington savings' summary judgment motion. Wilmington Savings appeals to a common misconception about the law of summary judgment. That misconception is that, regardless of what factual support or lack thereof the summary judgment *movant* has offered, the movant will always be entitled to summary judgment if the opposing party does not offer its own factual material to oppose the motion.

If that were the law, the law would be absurd. A party could move for summary judgment on a factual showing that plainly does not demonstrate the absence of a genuine factual issue and does not establish the movant's entitlement to win, yet that party would still prevail on its motion if no affidavits are offered by its opponent, and for that sole reason. It is disturbingly common for trial-level courts to employ this illogical reasoning, as it seems the lower court did here. (R. pp. ___; order granting summary judgment and for reference p. 4.)

Thankfully, that absurdity is not the law. The nonmoving party's obligation to provide evidence demonstrating the existence of a genuine issue of material fact does not arise until and unless the moving party puts a record before the court that *does* establish that there is no genuine issue of material fact. South Carolina case law backs this up. Our Supreme Court has held that "the party seeking summary judgment has the initial responsibility of demonstrating the absence of any genuine issue of material fact[,]" Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545-46 (1991), that "[t]he party seeking summary judgment has the burden of clearly establishing by the record properly before the

court the absence of a triable issue of fact[,]" Owens v. Magill, 308 S.C. 556, 562, 419 S.E.2d 786, 790 (1992), and that "[a] party who fails to show the absence of genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials." Standard Fire v. Marine Contracting, 301 S.C. 418, 421, 392 S.E.2d 460, 462 (1990).

As discussed in the Browns' appellants' brief, Wilmington Savings is in the position of "[a] party who fails to show the absence of genuine issue of material fact [and] is not entitled to summary judgment even though his adversary does not come forward with opposing materials." Id. at 421.

It is not only that the Browns are entitled to reversal here in light of the actual law on this point. Given that the lower court's misunderstanding of how summary judgment works is so widespread among the trial bench, this court should correct the result here in a way that reminds the trial judges of this state that the law is *not* that a summary judgment motion must be granted if the opposing party does not offer its own factual material in opposition to it. Owens, 308 S.C. at 562; Baughman, 306 S.C. at 115; Standard Fire, 301 S.C. at 421. That principle comes into play only when the summary judgment movant has first made a showing that establishes the lack of a genuine issue of material fact. Owens, 308 S.C. at 562; Baughman, 306 S.C. at 115; Standard Fire, 301 S.C. at 421.

II. Wilmington Savings *did* bring an action for possession of the mobile home.

Wilmington savings seems to take the position that it did not bring a claim and delivery action. The content of the complaint in this case shows otherwise. The complaint pleads three causes of action: for a declaratory judgment that the mobile home involved in this case is subject to the lien of the mortgage, for possession of the mobile home, and for foreclosure of

the mortgage. (R. pp. ____; summons and complaint.) The claim for possession of the mobile home *is* a claim and delivery action.

Replevin was the common law claim for possession of an item of personal property. Reynolds v. Phillips, 72 S.C. 32, 51 S.E. 523 (1905). By statute, replevin became subsumed within claim and delivery, id., which is the recognized claim to gain possession of specific, identifiable personal property – like the mobile home involved in this case. United Fabrics Corp. v. Delaney, 241 S.C. 268, 128 S.E.2d 111 (1962). There is no *other* kind of claim for possession of a specific item of personal property; claim and delivery is all that Wilmington Savings' claim for "Possession of that Mobile/Manufactured Home" could be. Id.; Reynolds, 72 S.C. at 32.

In its brief and in its complaint, Wilmington Savings concedes that the mobile home is an item of personal property and, thus, that it is not real property. (R. pp. ____; summons and complaint.) Wilmington Savings may now take the position that possession of the mobile home is not what it really wanted, but that position is not material – Wilmington Savings (deficiently) pled a cause of action for claim and delivery and obtained summary judgment on that cause of action. (R. pp. ___; order granting summary judgment and for reference summons and complaint.)

This is important because the record does not demonstrate Wilmington Savings' entitlement to prevail on this cause of action. As discussed in the Browns' appellants' brief, Wilmington Savings failed to meet an indispensable requirement of a claim and delivery cause of action: serving the complaint with an affidavit that testifies to the truth of necessary elements of the claim. S.C. Code Ann. §§ 15-69-30 & -50. The absence of evidence that this requirement was met – and Wilmington Savings does not argue it was met – is an

uncontradicted point that shows that Wilmington Savings did not meet its "initial responsibility of demonstrating the absence of any genuine issue of material fact." Baughman, 306 S.C. at 115. Indeed, the record that was before the court tends to establish that the Browns' insufficient process defense under Rule 12(b)(4), SCRCP, is a good one that may prevail. (R. pp. ___; answer and counterclaim.) Wilmington Savings' showing did not establish the absence of a genuine issue of fact about whether it is entitled to win, and the Browns were therefore under no compulsion to submit factual material to oppose summary judgment on this question. Standard Fire, 301 S.C. at 421.

Also, since claim and delivery is an action at law, this claim's presence in the case is enough to require reversal on the striking of the jury demand and reference to a special referee. "An action in claim and delivery is an action at law for the recovery of specific personal property. Absent a waiver, the issues are triable by a jury." Palmetto State Bank and Trust Co. v. Boyles, 302 S.C. 136, 138, 394 S.E.2d 313, 314 (1990) (internal citation omitted). If a plaintiff's complaint pleads both an equitable and an at-law cause of action, either party is entitled to a jury trial on the at-law claim. Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014); Johnson v. S.C. Nat. Bank, 292 S.C. 51, 54-56, 354 S.E.2d 895 (1987). The Browns demanded a jury trial and are entitled to one.

III. Wilmington Savings concedes the record does not establish that the mobile home is a fixture to the real property; thus, the record does not and cannot establish that the mobile home is subject to a mortgage.

Wilmington savings concedes that the record does not establish all the requirements for the mobile home to be a fixture. Unless it is a fixture, it has never become part of the mortgaged real property. Carjow, LLC v. Simmons, 349 S.C. 514, 519, 563 S.E.2d 359, 362 (Ct. App. 2002).

Wilmington Savings seems to argue that, despite the record not establishing the mobile home is a fixture, the mobile home is somehow subject to the mortgage lien *anyway*, as a function of intent to make the mobile home subject to the mortgage. As a matter of law, that is not right.

"A mortgage is a lien on real property." Resolution Trust Corp. v. Eagle Lake and Golf Condominiums, 310 S.C. 473, 476, 427 S.E.2d 646, 648 (1993). Parties might *intend* to create a mortgage of personal property, but they cannot – a mortgage *is* a lien on real property. Id. Personal property is not real property, and by definition there cannot be a mortgage lien (the only kind of lien at issue in this case) on personal property. Id.

Wilmington Savings' showing did not establish the absence of a genuine issue of fact about whether it is entitled to win its claim seeking a declaratory judgment that the mobile home – conceded to be an item of personal property – and the Browns were therefore under no compulsion to submit factual material to oppose summary judgment on this question. Standard Fire, 301 S.C. at 421.

As the record did not establish Wilmington Savings was entitled to win, reversal of the summary judgment ruling in its favor is required. See id.

CONCLUSION

This court should reverse the grant of summary judgment in the particulars noted in the Browns' appellants' brief, reverse the striking of the jury demand and reference to the special referee, and remand for further proceedings.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the foregoing initial reply brief on the date given below by emailing it to other counsel of record at the address(es) noted below.

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Respectfully submitted,

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