

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

RYAN MCAVOY, Individually and on)
Of All Others Similarly Situated,)
)
Plaintiff,)
)
vs.)
)
THE TOWN OF HILTON HEAD)
ISLAND, SOUTH CAROLINA,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
CASE NUMBER 2022-CP-07-1625

ORDER DISMISSING COMPLAINT
RULE 41(b), SCRPC

RECEIVED
Jun 10 2024
SC Court of Appeals

This case is before the undersigned as a Non-Jury matter by virtue of Ryan McAvoy’s Complaint seeking Declaratory and Injunctive relief against the Town of Hilton Head Island, South Carolina. This case was tried on September 6, 2023, at the Beaufort County Courthouse. Present were James G. Carpenter, attorney for Ryan McAvoy, and Curtis L. Coltrane, attorney for the Town of Hilton Head Island, South Carolina (herein, the “Town”).

COMPLAINT OF RYAN MCAVOY

In his Complaint, Ryan McAvoy alleged:

1. The Town is a municipality located in Beaufort County, South Carolina.
2. The Town has spent public money for the dredging of the Harbour Town Yacht Basin and Braddock Cove Creek, which are private waterways located in Sea Pines in the municipal limits of the Town.
3. In the year 2022, the Town voted to spend \$600,000 in public money for dredging the Harbor Town Yacht Basin and Braddock Cove Creek in Sea Pines.

4. The expenditures of public money for the dredging is an expenditure of public money for private purposes in violation of S. C. Const, Art. X, § 5 and 11.

On these allegations Ryan McAvoy sought:

1. A declaration that the described expenditures by the Town have been expenditures of public money for private purposes in violation of S. C. Const, Art. X, § 5 and 11;
2. An injunction prohibiting the Town from spending public money for the dredging of the Harbour Town Yacht Basin and Braddock Cove Creek; and,
3. An award of attorney's fees under S. C. Code Ann. § 15-77-300 (Supp. 2023).¹

ANSWER OF THE TOWN

In its Answer, the Town denied the material allegations of the Complaint of Ryan McAvoy and asserted the following defenses:

1. The waters of the Harbour Town Yacht Basin, the entrance channels to it and Braddock Cove Creek are not private property. Rather, they are waters of the State of South Carolina and the United States and are tourism related recreational facilities.
2. The funding source for the Town's allocation to the cost of the dredging project is the Local Hospitality Tax.² The expenditure of local hospitality taxes on tourism related recreational facilities is authorized by both S. C. Code Ann. § 6-1-730 (Supp. 2023), and by § 4-13-80, *Municipal Code of The Town of Hilton Head Island, South Carolina* (1983).
3. To the extent that the Complaint alleges a claim brought as a class action against the Town, the same is barred by S. C. Code Ann. §12-60-80(C)(Supp. 2023).

¹ In his Complaint, Ryan McAvoy also challenged the Town's use of Stormwater Utility Fees for the improvement and maintenance of storm water infrastructure in gated communities in the Town. Mr. McAvoy withdrew this claim at a hearing on the Town's Motion for Summary Judgment that occurred prior to the commencement of the trial.

² Local Hospitality Taxes are authorized by S. C. Code Ann. § 6-1-720 (Supp. 2023).

APPLICABLE LAW

The law that is applicable to the claims of Ryan McAvoy in this case is:

1. S.C. Const. art. X, § 5, which reads:

No tax, subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled. Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied.³

2. S. C. Code Ann. § 48-39-10(A)(1)(a)(Supp. 2023), which reads:

A. Coastal Waters and Tidelands:

- (1) The Department has permit authority over the coastal waters and tidelands critical areas defined in Section 48-39-10 as follows:

(a) “Coastal waters” means the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, shoreward to their mean high-water mark. Provided, however, that the Department may designate boundaries which approximate the mean extent of saline waters until such time as the mean extent of saline waters can be determined scientifically.

3. S.C. Code Ann. Regs. 30-10, reads:

A. Coastal Waters and Tidelands:

- (1) The Department has permit authority over the coastal waters and tidelands critical areas defined in Section 48-39-10 as follows:

(a) “Coastal waters” means the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, shoreward to their mean high-water mark. Provided, however, that the Department may designate boundaries which approximate the mean extent of saline waters until such time as the mean extent of saline waters can be determined scientifically.

4. S. C. Code Ann. § 6-1-730 (Supp. 2023), which reads, in relevant part:

(A) The revenue generated by the hospitality tax must be used exclusively for the following purposes:

³ This text requires that all taxes levied must be used for a public purpose. *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 123, 804 S.E.2d 854, 861 (2017).

- ...
- (2) tourism-related cultural, recreational, or historic facilities;
- ...

5. § 4-13-80, *Municipal Code of The Town of Hilton Head Island, South Carolina* (1983), reads, in relevant part:

- (a) The town council is hereby authorized to utilize the funds collected from the imposition of the local hospitality tax and any other funds deposited into the town hospitality tax account for the following purposes, and no other:
 - (1) To pay, in whole or in part for the current and future construction, enhancement, preservation and maintenance of:
 - ...
 - (b) Tourism-related cultural, recreational, or historic facilities;
 - ...

At the trial, Ryan McAvoy argued that the resolution of his claims were governed by *South Carolina Public Interest Foundation v. South Carolina Department of Transportation, supra*. For the reasons set out below, this case is inapplicable and does not dictate the result in this case.

FINDINGS OF FACT

Having heard the witnesses and reviewed the exhibits offered and received at trial, I find the following to be matters of fact applicable to Ryan McAvoy’s claim.

1. On May 3, 2022, the Town Council for the Town adopted its Resolution 2022-11, which authorized Town Manager to execute a deliver an Agreement between the Town and an entity known as the South Island Dredging Association.⁴

⁴ See Exhibit 1. Exhibit 1 is the affidavit of Ms. Krista Wiedmeyer, Town Clerk. Exhibit A to the Wiedmeyer Affidavit is a certified true copy of Resolution 2022-11.

2. The findings supporting Resolution 2022-11 state that the Town budgeted an allocation of \$600,000.00 for the purpose of assisting with dredging of the Harbour Town Yacht Basin and Braddock Cove Creek.⁵
3. As authorized by Resolution 2022-11, the Town Manager executed the Agreement.⁶
4. Under the Terms of the Agreement, the Town agreed to allocate \$600,000.00 towards the cost of the dredging of the Harbour Town Yacht Basin, the entrance channels to it and Braddock Cove Creek.
5. The dredging of these areas is permitted by both the United States Army Corps of Engineers and the South Carolina Department of Health and Environmental Control.⁷
6. Both the Harbour Town Yacht Basin, its entrance channel and Braddock Cove Creek are open to Calibogue Sound, the water in them is saline and is affected by the tides.
7. The Harbour Town Yacht Basin and Braddock Cove Creek both have private boat slips or marinas in them, and both waterways are bordered by Sea Pines Resort, which is a private, gated community.⁸

⁵ See Exhibit A to Exhibit 1.

⁶ See Exhibit 1. Exhibit 1 is the affidavit of Ms. Krista Wiedmeyer, Town Clerk. Exhibit B to the Wiedmeyer Affidavit is a certified true copy of the Agreement.

⁷ See Exhibits 11 and 18. These are the permits for the dredging work. Both authorize the dredging of the Harbour Town Yacht Basin, the entrance channel to it and Braddock Cove Creek, and that these are navigable waterways of the United States and the State of South Carolina.

⁸ Hilton Head Island itself and the waters around it, and Harbour Town and South Beach Marina Village are areas of tourist activity. Harbour Town can be accessed via the Harbour Town Yacht Basin and South Beach Marina Village can be accessed via Braddock's Cove Creek. Both offer dock facilities for tourists entering on boats. Ryan McAvoy did not dispute this, and it was confirmed by the testimony of his witness Mare B. Deckard. Mare B. Deckard also testified that she observed recreational pleasure boats in the waters, and the photographs entered into evidence also showed this.

8. The Harbour Town Yacht Basin, its entrance channel and Braddock Cove Creek are navigable waterways open to the public.⁹
9. Ryan McAvoy did not challenge the specific funding source for the Town's contribution to the dredging project. Rather Ryan McAvoy's claim was the waterways were privately owned and the use of any public funds for the dredging of them is prohibited by S. C. Const. art. X, § 5.

THE TOWN'S MOTION UNDER RULE 41(b), SCRPC

At the conclusion of Ryan McAvoy's case, the Town moved for dismissal under Rule 41(b), SCRPC, which reads:

(b) Involuntary Dismissal: Non-suit; Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

The Town's motion was that the only evidence in the record established that Harbour Town Yacht Basin, its entrance channel, and Braddock Cove Creek are public waterways. As is stated above, Ryan McAvoy's claim was that public funds would be spent to improve private property, in violation of S. C. Const. art. X, § 5, and having failed to establish that the waterways are private property, the claim failed.¹⁰

⁹ The Plaintiff's witness Mare B. Deckard testified that she was able to pilot her private boat the full length of Braddock Cove Creek and was able to pilot her boat through the entrance channel of the Harbour Town Yacht Basin and into and around the Harbour Town Yacht Basin, and that her navigation of the waterways was not impeded or restricted.

¹⁰ The Town stated other grounds in its motion, which were denied.

Ryan McAvoy's argument was because the waterways are bordered by Sea Pines Resort, which is a private, gated community, and because the waterways have privately owned marinas or boat slips in them that were benefitted by the dredging, the expenditure of public funds on the dredging of the waterways violates S.C. Const. art. X, § 5. Ryan McAvoy also argued that S. C. Const. art. X, § 11 proscribes the expenditure of public funds "for the primary benefit of private parties." *State ex rel. McLeod v. Riley*, 276 S.C. 323, 329, 278 S.E.2d 612 (1981).

Ryan McAvoy's evidence on this point was in the form of photographs of "private property" signs in Sea Pines Resort, and the testimony of Mare B. Deckard who took some of the photographs.

This evidence, though, does not have any bearing on the question of the nature and ownership of the waterways. Whether one can drive on the roads in Sea Pines Resort or whether privately owned property abuts a public waterway does have any bearing on the nature of the waterway.¹¹ The existence of privately owned marinas or docks in the public

¹¹ Ryan McAvoy argued that this case is the same as *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, *supra*. In *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, *supra*., the South Carolina Department of Transportation inspected bridges that were private property. In that case, The Supreme Court stated the facts to be:

- (1) The bridges are neither part of the State highway system nor are they owned or maintained by the City of Aiken;
- (2) The request to inspect the bridges came from a city councilman, not from the City of Aiken;
- (3) Prior to the inspection, SCDOT personnel made a direct inquiry to the City of Aiken and verified that the bridges were private property;
- (4) SCDOT's employees warned Chief Engineer for Operations Clem Watson that it was against SCDOT's policy to inspect privately owned bridges;
- (5) SCDOT had no obligation to inspect the bridges; and
- (6) Walsh and Watson maintained their actions fell within a "grey area" of the law.

South Carolina Public Interest Foundation v. South Carolina Department of Transportation, *id.*, at 421 S.C. 116, 804 S.E.2d 857 (2017). Here, the waterways are open to the public and are publicly owned. For that reason, *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, *supra*., is inapposite.

waterways does not change the nature or ownership of the waterways or prohibit the use of public funds to maintain the waterways.¹²

The witness Mare B. Deckard's testimony regarding her access to the waterways was unequivocal, and her testimony was that she was free to navigate the waterways of the Harbour Town Yacht Basin, its entrance channel, and all areas of Braddock Cove Creek with her boat.¹³

Also, the areas to be dredged are described in the permits issued by the United States Army Corps of Engineers and the South Carolina Department of Health and Environmental Control.¹⁴

CONCLUSION

Because Ryan McAvoy failed to produce evidence to show that the Harbour Town Yacht Basin, the entrance channels to it and Braddock Cove Creek are private, as opposed to public, waterways, he has failed to show a right to relief in this case. For this reason, Ryan McAvoy's Complaint is dismissed under Rule 41(b), SCRPC.

(Signature Page Follows)

¹² Private docks and marinas exist in the public waters of South Carolina, and South Carolina has a detailed statutory scheme for the permitting of such. See, e.g.: S.C. Code Ann. § 48-39-130 (Supp. 2023) and S.C. Regs 30-12. Ryan McAvoy offered no evidence or authority for the proposition that the existence of a private dock or marina in a public waterway has any effect on the ownership of the waterway. This is analogous to arguing that because private property fronting on public road benefits from a repaving of the road, such is prohibited.

¹³ See also Exhibits 11 and 18, and the testimony of Jack Brinkley. The only evidence is that waterways in question are public.

¹⁴ See Exhibits 8 and 11. Both permits describe the areas to be dredged as waters of the United States and the State of South Carolina and show the statutory authority for the permits arising under 33 USC 403, 33 USC 1344, S. C. Code Ann. § 43-39-10 and S. C. Code Ann. § 43-39-150. There is no evidence in the record to show that the waterways are not publicly owned. All of the evidence offered by Ryan McAvoy related to Sea Pines is for property abutting the waterways and roads and subdivisions existing in Sea Pines. This evidence does not address the ownership of the waterways.



Beaufort Common Pleas

Case Caption: Ryan Mcavoy VS Town Of Hilton Head Island , defendant, et al

Case Number: 2022CP0701625

Type: Order/Dismissal

So Ordered

Jocelyn Newman