

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen Circuit Court Judge for 14th Circuit

Case No.: 2012-CP-07-03027

Sheetal, LLC of Beaufort..... Appellant

-vs.-

Beaufort Jasper Water and Sewer Authority..... Respondent

APPELLANT'S INITIAL BRIEF

Karl D. Twenge
TWENGE + TWOMBLY LAW FIRM
311 Carteret Street
Beaufort, SC 29902
Telephone: (843) 982-0100
Facsimile: (843) 982-0103
www.twlawfirm.com
ATTORNEYS FOR APPELLANT

RECEIVED

APR 14 2014

SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 1

Facts 2

Standard of Review 4

Summary of Argument 5

Arguments.....5

 I. The trial court erred in granting summary judgment to Beaufort Jasper Water and Sewer as to Sheetal, LLC of Beaufort’s trespass cause of action.....5

 a) Beaufort Jasper Water and Sewer Authority is unable to satisfy the elements for a finding of a prescriptive easement.....5

 i. The original placement of the sewer line was not adverse as it was installed and used , with the original property owner’s permission;.....6

 ii. BJWSA was unable to even identify the location of the sewer line until it was discovered and pointed out by Sheetal, LLC of Beaufort.....8

Conclusion 10

Certificate of Counsel N/A

TABLE OF AUTHORITIES

Cases

<u>Babb v. Lee Cnty Landfill SC, LLC</u> 405 S.C. 129, 747 S.E.2d 468, (2013).....	5
<u>Fleming v. Rose</u> 350 S.C. 488, 567 S.E.2d 857, (2002)	4
<u>Hancock v. Mid-South Mgmt. Co., Inc.</u> 381 S.C. 326, 673 S.E.2d 801, (2009).....	5
<u>Horry Cnty. v. Laychur</u> 315 S.C. 364, 434 S.E.2d 259, (1993).....	6, 9
<u>Jones v. Daley</u> 363 S.C. 310, 609 S.E.2d 297, (Ct.App.1993).....	6
<u>Morrow v. Dyches</u> 328 S.C. 522, 492 S.E.2d 420,(Ct.App.1997).....	6
<u>Paine Gayle Properties, LLC v. CSX Transp., Inc</u> 400 S.C. 568, 735 S.E.2d 528, (Ct. App. 2012), reh'g denied (Dec. 19, 2012)	6, 7
<u>Ravan v. Greenville Cnty</u> 315 S.C. 447, 434 S.E.2d 296, (Ct.App.1993).....	5
<u>Williamson v. Abbott</u> 107 S.C. 397, 93 S.E. 15, (1917)	6, 7, 8

STATEMENT OF ISSUES ON APPEAL

- I. Whether the circuit court erred in granting summary judgment to Beaufort Jasper Water and Sewer as to Sheetal, LLC of Beaufort's trespass cause of action because
- a) Beaufort Jasper Water and Sewer Authority is unable to meet the elements for a finding of a prescriptive easement in that
 - i. the original placement of the sewer line was not adverse as it was installed and used with the original property owner's permission;
 - ii. BJWSA was unable to even identify the location of the sewer line until it was discovered and pointed out by Sheetal, LLC of Beaufort.

STATEMENT OF CASE

This appeal arises from a civil action filed by Appellant Sheetal, LLC of Beaufort, (hereinafter Sheetal) against Respondent Beaufort Jasper Water and Sewer Authority (hereinafter BJWSA).

The Summons and Complaint was filed on August 24, 2012, and BJWSA served their Answer on January 8, 2013. Defendant's Motion to Dismiss and for Summary Judgment was served April 23, 2013. This motion was heard on September 3, 2013, by the Honorable Carmen T. Mullen, Circuit Court Judge for the 14th Judicial Circuit.

The court issued an Order on September 13, 2013, striking Sheetal's two causes of action and granted summary judgment. Sheetal filed a Motion to Reconsider on September 23, 2013. The court issued a Form 4 Order denying Sheetal's Motion to Reconsider on September 27, 2013, which was filed on October 13, 2013

Sheetal filed a Notice of Appeal on November 12, 2013.

FACTS

In 1986 the City of Beaufort planned to install a sewer line near the southern boundary of parcel 2. At the time of the installation (by the City of Beaufort) there was a meeting with the property owner, who owned parcel 1, 2 and 3. (Emminger Aff. pp1; and Exh. A to Patel Affidavit). During that meeting a discussion about the location of the proposed sewer line occurred. (Emminger Aff. pp.1). The owner of the parcels at the time was concerned about the sewer line being installed too close to the existing building on parcel 3. Based upon those concerns the owner, along with the City of Beaufort, agreed to have the sewer line installed five feet north of the proposed initial spot for installation. (Id. pp.1). The sewer line that runs across parcel 2 is not located within any recorded easement. (Pl.'s Req. for Admis.; Def.'s Resp. to Req. for Admis.).

In 1999 the City of Beaufort sold its rights to operate the sewer and water system to BJWSA. (Moss Aff. pp.1).

On August 25, 2010, Sheetal purchased two parcels of land from CBC National Bank. Parcel 1 had an existing structure on it that Sheetal intended to renovate for use as retail space. Parcel 2 was and still remains a vacant lot. Adjacent to parcel 1 and parcel 2 is parcel 3 which was previously purchased by Sheetal. Parcel 3 contains a 35 room hotel. (Patel Aff. pp.1; and Exh. A to Patel Affidavit).

Prior to purchasing parcel 1 and 2, Chet Patel, a member of Sheetal met with George Becker, a surveyor, at the parcels with the intention of locating the sewer line. Mr. Becker brought a metal detector, and together they scanned the property and uncovered several manholes, indicating the path of the sewer line was across Parcel 2.

The manholes had to be dug out from under cover, as they were not visible. (Patel Aff. pp.2).

In September 2010 a pre-construction meeting took place regarding the proposed renovations to the existing structure on parcel 1 at the Beaufort City Hall with Libby Anderson, Planning Director for the City of Beaufort, Donna Alley, Preservation Planner for the City of Beaufort, a representative for the City of Beaufort Public Works Department, Dick Deuel, Development Project Manager for BJWSA, and Chet Patel. (Patel Aff. pp.1-2). During the meeting Mr. Deuel discussed the capacity of the water and sewer for the planned renovation for the structure on Parcel 1. As part of those discussions, Mr. Deuel referred to a survey of the sewer lines for Boundary Street, including Parcel 1, Parcel 2, and Parcel 3. (Patel Aff. pp.2). When Patel reviewed the survey, it showed perimeter lines for the hotel itself and also indicated that a sewer line ran directly beneath the hotel located on Parcel 3 and continuing across the rear of Parcel 1. (Patel Aff. pp.2).

Mr. Patel asked Mr. Deuel about the location of the sewer line and Mr. Deuel denied that the sewer line ran across Parcel 2, and rather conveyed that the sewer line ran across Parcel 3, under the hotel and continued across the rear of Parcel 1. All of which was indicated on the map referred to by Mr. Deuel. (Patel Aff. pp.2).

Through counsel Sheetal informed BJWSA in February 2011, that the sewer line did not run across parcel 1 and 3, but rather travelled across Parcel 2, and further that the line is not located within any recorded easement. (Patel Aff. pp.2; and Exh. B to Patel Affidavit).

In May of 2011 BJWSA sent a work crew to attempt to locate the sewer line. BJWSA mowed the area and had an individual GPS locate the sewer line. It was at this time that BJWSA discovered that the line did not run across Parcel 1 and 3, but rather travelled across Parcel 2. (Patel Aff. pp.3).

The mapping utilized by BJWSA for this particular sewer line changed significantly after the GPS locate was performed. (BJWSA Memo Ex. A; BJWSA Internet Mapping 3 pages). Beaufort Jasper Water and Sewer Authority failed to remove the sewer line from parcel 2, and Sheetal instituted the present action.

Sheetal's Complaint sets forth a cause of action for trespass alleging BJWSA did not have a legal right to have its sewer line on Sheetal's property, and that the sewer line inhibits future development of the property, therefore inhibiting Sheetal's use and enjoyment of the property. (Complaint pp.2). Beaufort Jasper Water and Sewer Authority's primary defenses to this cause of action are the allegation that they had met the requirements for a prescriptive easement and that Sheetal does not have possession of the sewer line. (Answer pp.1and4).

STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCF." Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citation omitted). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Id.* To withstand a motion for summary judgment "in cases applying the preponderance of the evidence burden of proof, the non-

moving party is only required to submit a mere scintilla of evidence.” Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

SUMMARY OF ARGUMENT

For the reasons set forth herein, the trial court erred in granting summary judgment to BJWSA.

ARGUMENTS

I. The trial court erred in granting summary judgment to Beaufort Jasper Water and Sewer as to Sheetal, LLC of Beaufort’s trespass cause of action.

Sheetal alleges trespass on the part of BJWSA across parcel 3. A trespass is any interference with “one’s right to the exclusive, peaceable possession of his property.” Ravan v. Greenville Cnty., 315 S.C. 447, 463, 434 S.E.2d 296, 306 (Ct.App.1993). “[a] trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it.” Restatement (Second) of Torts § 821D (1979) as cited in Babb v. Lee Cnty. Landfill SC, LLC, 405 S.C. 129, 139, 747 S.E.2d 468, 473 (2013).

It is uncontested that Sheetal owns parcel 3 and that the presence of the sewer line across its property inhibits future development of the property, therefore inhibiting Sheetal’s use and enjoyment of the property. (Complaint pp.2). The remaining question is whether or not BJWSA have some other right to maintain the sewer line across parcel 3, and the answer is they do not.

- a. Beaufort Jasper Water and Sewer Authority is unable to satisfy the elements for a finding of a prescriptive easement.**

The trial court granted BJWSA's motion for summary judgment, finding that BJWSA met the elements of a prescriptive easement, allowing the sewer line to be on parcel 3.

To establish a prescriptive easement, the party asserting the right must show: (1) continued and uninterrupted use of the right for twenty years; (2) the identity of the thing enjoyed; and (3) use which is either adverse or under a claim of right. Horry Cnty. v. Laychur, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993). To establish an easement by prescription, one must establish either a justifiable claim of right *or* adverse and hostile use. Jones v. Daley, 363 S.C. 310, 316, 609 S.E.2d 597, 600 (Ct.App.2005) (emphasis added). The burden of proving all of the elements bears on the party claiming a prescriptive easement. Morrow v. Dyches, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct.App.1997).”

- i. **The original placement of the sewer line was not adverse as it was installed and used with the original property owner's permission;**

The South Carolina Supreme Court adopted, and this Court continues to rely upon the following:

[U]se by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription, since user as of right, as distinguished from permissive user, is lacking, if permissive in its inception, such permissive character will continue of the same nature, and no adverse user can arise, until there is a **distinct and positive assertion of a right hostile to the owner, and brought home to him.**
Williamson v. Abbott, 107 S.C. 397, 400-01, 93 S.E. 15, 16 (1917) (emphases added);

Paine Gayle Properties, LLC v. CSX Transp., Inc., 400 S.C. 568, 584, 735 S.E.2d 528, 537 (Ct. App. 2012), reh'g denied (Dec. 19, 2012)

It is uncontested that when the City of Beaufort installed this sewer line in 1986 it did so with the permission of the property owner. Frank Emminger, a City of Beaufort employee, supervised the installation of the sewer line in 1986 and recalled discussions with the property owner. He specifically recalled that the property owner was concerned about the proposed placement of the line and wanted it moved farther north away from the existing structure. (Emminger Aff. pp. 1). Counsel for BJWSA argued through his memorandum in support of the motion,

“At the time of the installation (by the City of Beaufort) there was a meeting with the property owners and a discussion about the location of the sewer pipe...And, apparently, the pipe was then moved five feet north.”

(Memorandum of Authorities pp.1).

Clearly the property was not condemned and an easement agreement was not reached. The only way the City of Beaufort was allowed to install the existing sewer line in 1986 was with the permission of the property owner at the time.

Unfortunately for BJWSA the permissive use is imputed to them through the City of Beaufort. Under the clearly accepted precedent of Williamson and Payne Gail Properties the “[U]se by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription,” *Williamson v. Abbott*, 107 S.C. 397, 400–01, 93 S.E. 15, 16 (1917) as cited in Paine Gayle Properties, LLC v. CSX Transp., Inc., 400 S.C. 568, 584, 735 S.E.2d 528, 537 (Ct. App. 2012), reh'g denied (Dec. 19, 2012).

Assuming *arguendo* that the permissive use by the City of Beaufort ceased upon its transfer of its rights to BJWSA in 1999, it would not change the analysis as to BJWSA. It is required that the use be adverse for twenty (20) years, and BJWSA's use

would only extend for fourteen (14) years and would then fail to meet the elements for a prescriptive easement. The same analysis applies for a claim of right.

“The asking and obtaining of permission...stamps the character of the use as not having been adverse, or under claim of right, and therefore as lacking that essential element which was necessary for it to ripen into a right by prescription.”

Williamson v. Abbott, 107 S.C. 397, 93 S.E. 15, 16 (1917). Plainly BJWSA cannot meet the adverse/claim of right element to succeed in its pursuit of a prescriptive easement.

In looking at this particular element in the light most favorable to Sheetal, the non-moving party in this instance, it is clear that Sheetal has submitted a mere scintilla of evidence to defeat BJWSA’s motion for summary judgment and the trial courts order must be reversed.

ii. BJWSA was unable to even identify the location of the sewer line until it was discovered and pointed out by Sheetal, LLC of Beaufort.

Sheetal went above and beyond to locate the sewer line that travels across parcel 3. It necessitated the hiring of a surveyor as well as the use of a metal detector. (Patel Aff.pp.2). All maps produced by BJWSA prior to being informed of the sewer line location by Sheetal, show the line travelling across the Northern boundary of parcel 1. (BJWSA Internet Mapping 3 pages). All maps produced by BJWSA after being informed of the sewer line location by Sheetal, show the line travelling across Southern boundary of parcel 3. (BJWSA Memo Ex. A). One can only assume that the origin of the mistaken belief occurred during the pipes installation when the owner was concerned that the pipe was going to be too close to the existing structure and the City of Beaufort and the

property owners agreed to install the line further North, placing line on parcel 3 not parcel 1.

While at first glance the inconsistency may seem insignificant. However, once one looks at this error with the eye of trying to determine whether or not BJWSA is entitled to a prescriptive easement, its importance becomes paramount. BJWSA bears the burden of showing that they knowingly utilized the sewer line that runs across parcel 3 for twenty (20) years. The problem is they did not know the sewer line was even located on parcel 3 until 2011. (Patel Aff.pp. 2). How can a party claim an adverse use, or even a claim of right, over its use of a sewer line when they thought it was on parcel 1? The answer is they cannot. The requirement on BJWSA is to be able to “identity of the thing used” Horry Cnty. v. Laychur, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993). BJWSA inability to identify the location of the line is imperative, especially with the nature of this type of use, as it is not visible from the surface. Sheetal would submit to this Court that the burden of identifying its use is heightened with more specificity by the very nature of its use occurring below the surface. BJWSA cannot and did not meet its burden of identifying the use in a prescriptive easement analysis.

In looking at this particular element in the light most favorable to Sheetal, the non-moving party in this instance, it is clear that Sheetal has submitted a mere scintilla of evidence to defeat BJWSA’s motion for summary judgment and the trial courts order must be reversed.

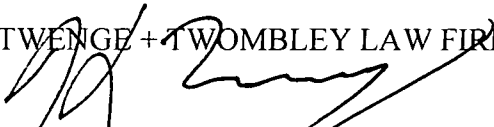
CONCLUSION

For the reasons contained herein and as may be raised in any Reply Briefs or Supplemental Briefs and at oral arguments, the Orders of the trial court should be reversed as stated herein and remanded to the Circuit Court.

Respectfully submitted,

TWENGE + TWOMBLEY LAW FIRM

BY:


KARL D. TWENGE, S.C. Bar #71694
311 Carteret Street
Beaufort, SC 29902
Telephone: (843) 982-0100
Facsimile: (843) 982-0103
www.twlawfirm.com
Attorneys for Appellant

Beaufort, South Carolina
April, 10, 2014