

JH

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
McGuinn Construction)
Management, Inc.,)
Plaintiff,)
vs.)
Saul Espino and Mara Espino,)
Defendants.)

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IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2005-CP-32-2712

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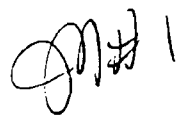
ORDER

SC Court of Appeals

THIS MATTER COMES BEFORE THE COURT on motion of Counsel for Plaintiff on all causes of action alleged by the Plaintiff, including its primary cause of declaratory judgment. Counsel for the Plaintiff further moved for dismissal of the Defendant's fifth counterclaim of Breach of Implied Covenant of Good Faith and Fair Dealing. The court also considered a counter motion of counsel for the Defendant for summary judgment as to the Plaintiffs entire case.

The matter was heard by the court on May 29, 2007, and supporting memoranda and affidavits were submitted by the Plaintiff and Defendant for their respective positions.

Upon hearing the arguments of counsel for the Plaintiff and the Defendant, and considering the facts, affidavits, memoranda and arguments submitted by the parties, the Court grants the Defendant's motion for summary judgment in that the easement in question is limited in scope to the maintenance, repair, and improvement of the sewer, water and drainage systems in Coventry Lake Subdivision. There is no authority for Gates Common Subdivision or any other subdivision to connect to the sewer and/or drainage located on the Defendant's property. Having reached this conclusion,



Defendants' motion for summary judgment on the Plaintiff's slander of title cause of action and tortious interference with a contract cause of action must also be granted. The Court grants the Plaintiff's motion to dismiss the Defendant's fifth counterclaim for breach of implied covenant of good faith and fair dealing. No other motions were properly before the court, and so all other counterclaims of the Defendants are still pending.

I. STATEMENT OF FACTS

In 1992 Saul and Mara Espino purchased property located at 108 Coventry Court in Lexington, South Carolina from the Mungo Company which is part of the Coventry Lake Subdivision. (Saul Espino Dep., pp. 7-8, ll. 7-4) The house was purchased as new construction, although the home was not custom built.

McGuinn Construction Management is the Developer of the neighborhood known as the Gates Common Subdivision. This subdivision backs up to the Espinos' property in Lexington. For years the property, which is now known as the Gates Common Subdivision, was unimproved. However, McGuinn applied to have the property rezoned for a patio home subdivision, and was ultimately granted the zoning for which it had applied. Nonetheless, storm drainage, water and sewer infrastructure for the project had to be installed, and the provision of this infrastructure was designed by McGuinn to be accomplished by connecting to existing infrastructure of the Coventry Lakes Subdivision, where the Espinos owned their property. The installation of the appropriate lines would be required to run through the Espinos' property and connect to existing sewer and drainage installed in the Coventry Lake Subdivision.



The record clearly shows that it was McGuinn Construction Management's intention to install the infrastructure outlined above on the Espinos' property under an easement which purportedly grants the Town of Lexington, its successors and assigns the certain rights in sewer, water lines, and drainage easements for said lines. (See Exhibit 1). Further, it specifically provides an easement for the "maintenance of the aforesaid water and sewer lines..." (Id.) The language of the document purporting to be a deed does not grant any right or easement, express or implied, to the Town to allow for the connection by anyone other than Coventry Lakes to the lines.

II. FACTS IN CONTROVERSY

The Plaintiff asserts that it was operating under the authority of the easement, and that the Town Attorney approved the connection to the sewer based on the easement. The facts show otherwise, and indeed the Town Engineer at the time advised McGuinn that the easement was questionable, and legal authority would be needed to proceed. (Gene Edwards Dep., p. 5, ll. 18-23 and pp. 25-26, ll. 10-14). The Defendants anticipate testimony of the Town Attorney that at no time was he asked to opine as to the legal authority granted to the Town on the easement in question, and what authority, if any, the developer would have derived therefrom.

In his testimony, Edwards indicated that the plans submitted for approval showed that the lines and the manhole were outside of the easement which purportedly existed. (Id. pp. 22-23, ll. 22-14). Mr. Edwards, however, retired from the Town of Lexington prior to the final approval of the plans, which ultimately came from Rosemarie Nuzzo, an engineer with the Town of Lexington who had minimal qualifications at the time. (Id. pp. 23, ll. 12-22). Prior to his retirement, Gene Edwards discussed with Nuzzo the three

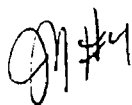
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issues of concern about the project in question – (1) runoff once developed, (2) location of how water would be connected, and (3) sewage. (Id. at p. 23, ll. 5-11). Importantly, he indicated that he had discussed the uncertainty of the easement issue relating to the sewer lines with Nuzzo, and advised her that “it was not definitive enough for me [him] to tell them to go ahead at that time.” (Id. at ll. 12-19). Edwards further indicated that he never saw or reviewed a final legal opinion as to McGuinn’s purported authority to connect to the existing sewer lines on the Espino property. (Id. at p. 25, ll. 4-9).

The testimony of Nuzzo indicates that when the plans were submitted to her for approval, she did not keep the issues Edwards had notified her of in mind in her consideration, and in fact, assumed them away, by giving McGuinn the “benefit of the doubt” in his subcontractor’s installation of the sewer lines on the Espinos’ property. When asked in her review of the plans whether the Town of Lexington approved the plans which were to show the location of infrastructure before allowing connection to existing infrastructure, Nuzzo replied:

No. Because in that ... if there’s ... if the lines exist, then you, you almost have to assume there’s an easement to it. Nobody’s going to want to take care of a public sewer or a public water in there, you know, on their property. (Nuzzo Dep. P. 6, ll. 8-15).

Nuzzo goes on to acknowledge that she reviewed plans which showed the infrastructure installation being within the property boundaries of the Defendants, and that she would have approved the installation of the infrastructure (manhole). (Id. pp. 8-9, ll. 24-21). She then indicates in her testimony that she did not have the authority state where to install infrastructure like the manhole. (Id. at 10, ll. 6-14). **Significantly, she**



indicated that the developer, in this case McGuinn, would have had to secure easements for the installation. (Id.)

Her further testimony indicates that she did not review the easement under which McGuinn was purportedly operating to determine whether it granted McGuinn the authority to install the lines. Further, there is no testimony from the field engineers hired by McGuinn, HB Engineering, that they made any determination of the authority of the easement being offered by McGuinn as authority. Indeed, the authority under which they testified to be operating to install the sewer lines was the approval of the Town of Lexington. Tom Britt, the President of HB Engineering indicated the following in his testimony:

- Q. Okay. And at no time did you opine or give any type of certification that the easement was valid and could be used outside of what authority you thought you already had from the Town?
- A. No. Our plans were solely based on the Town telling us they had an easement and approving our plans. (Britt Dep. at p. 41, ll. 16-22).

Further, Britt indicates that the approval of the plans was an indirect approval of the installation of the sewer lines. (Id. at p. 52, ll. 5-8). Therefore, the approval of the plans is a significant issue, and it appears that the manhole and the infrastructure noted on the most recent plan were outside the scope of any easement shown on the plan, and certainly not validated as being installed in accordance with the easement used by McGuinn as the basis of the authority.

There is also an issue about the negligence of the developer in the development of this project, which has a significant portion of wetlands involved, and which flows directly onto the Espinos property. There is a contention that the developer has been

Mark's

sensitive to ensure that the post construction flow from the development has not exceeded the pre construction flow.

III. LEGAL ISSUES

McGuinn sued the Espinos and alleged in its complaint a Declaratory Judgment action, Slander of Title and Tortious Interference with Contract. The Espinos answered, and counterclaimed alleging Violations of the South Carolina Unfair Trade Practices Act, Negligent Misrepresentation, Constructive Fraud, Negligence, Breach of Implied Covenant of Good Faith and Fair Dealing, Fraud, Conversion, Slander of Title and Trespass. Defendants also amended the Answer and Counterclaim to allege Third Party actions against the Town of Lexington, which was subsequently dismissed.

1. **Summary Judgment Motions Of Plaintiff and Defendants**

Summary Judgment Standard

In reviewing the grant of summary judgment, [an appellate court] applies the same standard that governs the trial court under Rule 56, SCRPC: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law... In determining whether any triable issue of fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party... If triable issues exist, those issues must go to the jury.

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law... On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party. (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law... Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be



drawn from them, summary judgment should be denied... When reasonable minds cannot differ on plain, palpable, and indisputable facts, summary judgment should be granted... The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact... Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. ..The nonmoving party must come forward with specific facts showing there is a genuine issue for trial.

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." Summary judgment is a drastic remedy and should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues.

Joseph H. Moore v. M. M. Weinberg, Jr. and Weinberg, Opinion No. 4209, Court of Appeals of South Carolina, Filed February 20, 2007.

The Plaintiff has alleged causes of action involving (1) declaratory judgment on the easement document in question, (2) slander of title and (3) tortious interference with contract. Plaintiff now moves for summary judgment on all issues associated with the complaint. In the alternative, the Defendants have filed a counter motion on all issues associated with the Plaintiff's complaint specifically including the following in their counter motion:

1. That the allegations of slander of title are not valid as the title to the property alleged to be owned by the Plaintiff was never slandered;
2. That the work conducted by the Plaintiff in the development and construction of the project was never tortuously interfered with, and in fact, the Plaintiff never ceased construction or progress in the development;
3. That the Plaintiff had been advised that it needed to receive a private easement to connect to any existing sewer lines on the Defendant's property, but never obtained said private easement when it in fact connected without authority or

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permission from the Defendants, thereby trespassing on the Defendant's property and converting Defendant's property to its own; and

4. That the easement which serves as the basis of authority for the Plaintiff to have connected to sewer allegedly located on the Defendant's property does not allow for contiguous subdivisions to connect to any sewer, and is in fact limited in the scope to on the maintenance, repair and improvement for the sewer system of Coventry Lakes, not Gates Common Subdivision which is the project sought to receive the benefit by the Plaintiff

A. **Declaratory Judgment**

As indicated, the Plaintiff brings a declaratory judgment cause of action based on a document it asserts should serve as the basis for allowing the installation of sewer and drainage on the Espinos' property. (See Exhibit 1). As the Court in Pond Place Parners v. Poole, 351 S.C. 1, 16 (Ct. App. 2002), 567 S.E.2d 881 stated:

To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." Graham, 319 S.C. at 71, 459 S.E.2d at 845 (citing Brown v. Wingard, 285 S.C. 478, 330 S.E.2d 301 (1985)). "A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party." Graham, at 71, 459 S.E.2d at 845 (citing Power v. McNair, 255 S.C. 150, 177 S.E.2d 551 (1970)). This requirement is satisfied by "[a]ny person interested under a deed . . . written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a contract or franchise may have determined any question of construction or validity arising under the instrument, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. S.C. Code Ann. § 15-53-30 (1977); see also Rule 57, SCRPC. Id at 16.

Here, the Plaintiff claims that it had the right to go onto and install drainage and sewer lines on the Espinos' property and to the Coventry Lake Subdivision infrastructure system under this document. However, the document does not allow for connection to

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the sewer lines and existing infrastructure on its face. This was noted by the Town of Lexington's engineers who were charged with considering this issue as outlined above.

Here, the easement in question does not specifically allow for the connection by any other subdivision to the existing lines.

For these reasons, ruling on the Declaratory Judgment Action, the Court finds and Rules that the Plaintiff had no authority under the easement in question to enter the Espinos' property and/or to connect to drainage and/or sewer lines in the Coventry Lake Subdivision. The Defendants' counter-motion for summary judgment on the issue of the Declaratory Judgment Action is granted.

B. The Slander of Title

The Court also denies the Plaintiff's Motion for Summary Judgment as to its Slander of Title cause of action and grants the Defendants' Counter-motion for Summary Judgment as to the Plaintiff's claim for Slander of Title. The Court has held that "[] to maintain an action for slander of title in South Carolina, the plaintiff must establish: "(1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff's title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties." *Id.* (citing TXO,419 S.E.2d at 879). Pond Place Partners v. Poole, 351 S.C. 1, 22-23 (Ct. App. 2002), 567 S.E.2d 881. As the Court has determined that the Plaintiff did not have the authority to occupy the Espinos' property or to connect to either sewer or drainage lines in Coventry Lake Subdivision, the Court grants the Defendants' Motion for Summary Judgment as to the Plaintiff's Slander of Title allegation.

C. Tortious Interference with Contract

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The Court also denies the Plaintiff's Motion for Summary Judgment as to its Tortious Interference of Contract cause of action and grants the Defendants' Countermotion for Summary Judgment as to the Plaintiff's claim for Tortious Interference of Contract. The elements of this cause of action are (1) the existence of the contract; (2) the wrongdoer's knowledge of the contract, (3) the intentional procurement of the contract's breach; (4) the absence of justification; and (5) resulting damages. South Carolina Requests to Charge, Anderson, p. 485.

As with the Plaintiff's Slander of Title cause of action, because the Court has determined that the Plaintiff did not have the authority to occupy the Espinos' property or to connect to either sewer or drainage lines in Coventry Lake Subdivision, the Court grants the Defendants' Countermotion for Summary Judgment as to the Plaintiff's Tortious Interference with Contract cause of action.

2. Plaintiff's Motion to Dismiss

The Plaintiff also files a motion to dismiss the Defendants' fifth counterclaim for breach of implied covenant of good faith and fair dealing. For the reasons outlined below, this motion is granted.

Standard For Motion To Dismiss

In Overcash v. South Carolina Electric and Gas Company, 25990 (S.C. 2005), the court held:

A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRPC, must be based solely on the allegations set forth on the face of the complaint. The motion will not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). "[A] judgment on the pleadings is considered to be a drastic procedure by our courts." Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Therefore, pleadings in a case should be

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construed liberally and the Court must presume all well pled facts to be true so that substantial justice is done between the parties. Stroud v. Riddle, 260 S.C. 99, 102, 194 S.E.2d 235, 237 (1973).

Under this standard, the facts of the complaint should be construed liberally and considered "true" when considering whether the motion should be granted. The Defendant alleged the following facts:

As the Court has noted, "there exists in every contract an implied covenant of good faith and fair dealing." Williams v. Riedman, 339 S.C. 251, 267 (Ct. App. 2000). Here, considering the facts under the appropriate standard, the Court finds that there is no genuine issue of material fact as to the fact that the Plaintiff did not have a contract with the Defendants. Therefore, the Plaintiff's motion to dismiss is hereby granted.

Based on the foregoing **IT IS HEREBY ORDERED, THAT:**

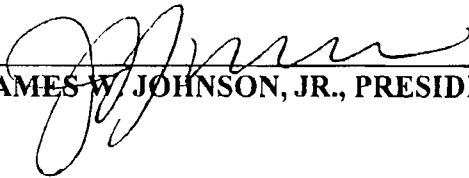
1. The Court DENIES the Plaintiff's Motion for Summary Judgment and GRANTS the Defendants' Countermotion for Summary Judgment in reference to the Declaratory Judgment action filed, and therefore rules that the easement in question does not provide legal authority for the Plaintiff or anyone else to enter the Defendants' property and/or to connect to any sewer and/or drainage lines of Coventry Lake Subdivision;
2. The Court DENIES the Plaintiff's Motion for Summary Judgment and GRANTS the Defendants' Countermotion for Summary Judgment in reference to the Plaintiff's Slander of Title cause of action;
3. The Court DENIES the Plaintiff's Motion for Summary Judgment and GRANTS the Defendants' Countermotion for Summary Judgment in



reference to the Plaintiff's Tortious Interference with Contract cause of action:
and

4. The Court GRANTS the Plaintiff's Motion to Dismiss the Fifth Counterclaim of the Defendants for Breach of Implied Covenant of Good Faith and Fair Dealing.

AND IT IS SO ORDERED.



JAMES W. JOHNSON, JR., PRESIDING JUDGE

Date: June 16, 2008

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STATE OF SOUTH CAROLINA) FILED
 COUNTY OF LEXINGTON,) IN THE COURT OF COMMON PLEAS
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ORIGINAL

McGuinn Construction Mgmt., Inc.)

Plaintiff,)

BETRI A. CARRIGG
 CLERK OF COURT
 LEXINGTON, SC

-vs-)

Case Number 2005-CP-32-02712

Saul Espino, et al.,)

Defendants.)

ORDER ON RECONSIDERATION OF
 THE ORDER OF THE HONORABLE
 JAMES W. JOHNSON, JR., AS THE
 SUCCESSOR JUDGE UNDER RULE 63

Saul Espino, et al.,)

Plaintiffs,)

-vs-)

Case Number 2008-CP-32-04192

Gates Commons, LLC, et al.,)

Defendants.)

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The court's understanding is that the attorneys assert that there are two issues before it: (1) a motion by Saul and Mara Espino (the Espinos) challenging the jurisdiction of the court to rule upon the motion for reconsideration filed by McGuinn Construction Management, Inc. (McGuinn Construction) under Rule 59, SCRPC; and, (2) the motion for reconsideration and to alter or amend under Rule 59. Both motions are denied. The court has certified familiarity with the record and determined that the proceedings may be completed without prejudice to the parties. The court agrees that the parties to the lawsuit at the time that the matter was presented to Judge Johnson (2005-CP-32-02712) are bound by his ruling. However, the court is not determining in this

order whether the June 16, 2008 order is binding upon those who were not parties when Judge Johnson made his ruling.

The attorneys are directed to schedule a status conference with the undersigned judge so that a plan of action can be implemented.

BACKGROUND

This case presents a most difficult procedural history. It has been made more difficult by the fact that the files had been jumbled, which necessitated the court having to spend many hours trying to get the files in proper order.

The original lawsuit was brought by McGuinn Construction against the Espinos in August 2005. In its most basic form, this is a dispute over an easement. The Espinos filed counterclaims, and they also filed a third-party complaint against the Town of Lexington (Lexington). Lexington filed a motion to dismiss the third-party complaint, and that was granted by The Honorable James W. Johnson, Jr. through a memorandum order filed September 18, 2007, and a final order filed October 31, 2007. So, Lexington was a party to the initial lawsuit, but successfully sought and obtained dismissal from that suit.

In the interim between the memorandum order and the final order dismissing Lexington, the attorney for the Espinos filed a motion for reconsideration, and then filed two supplemental documents after the filing of the final order. Judge Johnson denied that motion to alter or amend by order filed December 20, 2007. As of that point, Lexington was not a party to the litigation.

After an attempt to mediate the case, the Espinos filed a motion for summary judgment on April 3, 2008. Judge Johnson issued an order that was filed on April 14,

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2008, dismissing the fifth counterclaim. On June 13, 2008, The Honorable R. Knox McMahon designated the case as complex and assigned it to Judge Johnson.

A second attempt at mediation failed. A principal of McGuinn Construction (Mr. Wade McGuinn) filed an affidavit in support of upholding the actions of McGuinn Construction in tapping into the sewer line on the Espinos' property.

On May 21, 2008, McGuinn Construction filed a motion for summary judgment. It sought summary judgment on the second, third, fourth, sixth, and ninth counterclaims.

On June 16, 2008, Judge Johnson issued an order granting the Espinos' motion for summary judgment and granting McGuinn Construction's motion to dismiss the fifth counterclaim (the dismissal of the fifth counterclaim being included in the previous order filed on May 21, 2008). **This June 16, 2008 order is the order that prompted the filing of the motion to alter or amend that is the essence of the dispute before the court now.**

WPK #3

In the June 16, 2008 order, Judge Johnson ruled: (1) that the Espinos were entitled to summary judgment and that no one, including McGuinn Construction, had the right to enter the Espinos' property to connect to sewer and drainage lines of Coventry Lake Subdivision; (2) that the Espinos were entitled to summary judgment against McGuinn Construction on the slander of title cause of action; (3) that the Espinos were entitled to summary judgment on the cause of action against McGuinn Construction for tortious interference; and, (4) that McGuinn Construction was entitled to dismissal of the fifth counterclaim which alleged breach of an implied covenant of good faith and fair dealing.

On June 26, 2008, the attorney for McGuinn Construction filed a motion for summary judgment regarding the fourth counterclaim (though it had already sought summary judgment on that and other counterclaims in the filing of May 21, 2008).

On July 10, 2008, McGuinn Construction filed its motion for reconsideration and to alter or amend the order of Judge Johnson that was filed on June 16, 2008. That motion recites that a copy of the order was received by counsel for McGuinn Construction on July 1, 2008, which would have been less than 10 days before the filing of the reconsideration motion. The certificate of service indicates that a copy of the motion was served on counsel for the Espinos by hand delivery on July 10, 2008. Part of the dispute here is that the Espinos challenge the authority of the court to entertain the Rule 59 motion because there is no indication that it was served on the court.

Judge Johnson died on July 13, 2008. He had been diagnosed with a rare, aggressive form of cancer in June 2008. The order in this case must have been one of the last he signed.

On October 10, 2008, the Espinos filed another lawsuit, which is designated as case number 2008-CP-32-04192. They sued Gates Commons, LLC (Gates Commons), S. Wade McGuinn, Individually (Wade McGuinn), and the Town of Lexington (Lexington).

On June 10, 2009, Judge McMahan filed an order dealing with the second case. That order ruled, as follows: (1) it denied on the grounds of being premature motions for summary judgment filed by Wade McGuinn and Gates Commons wherein they sought dismissal of the second, third, eighth, tenth and eleventh causes of action; (2) it granted Lexington's motion to strike the claim for punitive damages; (3) it granted Lexington's

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motion to make more definite and certain; and, (4) it granted Lexington's motion to strike the claim for attorney's fees.

On June 25, 2009, an order was issued assigning the cases to Judge McMahon. They were designated as complex litigation. Rule 63, SCRCF, provides as follows:

Disability of a Judge

If at any time after a trial or hearing has been commenced, but before the final order or judgment has been issued, the judge is unable to proceed, a successor judge shall be assigned. The successor judge may proceed upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. In a hearing or a trial without a jury, the successor judge shall, at the request of a party, recall any witness whose testimony is material and disputed and who is available to testify without undue burden. A successor judge may also provide for the recall of any witnesses.

In addition to Rule 63, Chief Justice Toal issues an order each time she designates the Chief Judges for Administrative Purposes. Those orders generally include the following language or the substantial equivalent:

IT IS FURTHER ORDERED that if a trial or hearing has been commenced and the judge is unable to proceed, the chief judge for administrative purposes shall assign the trial or hearing to a successor judge. If the chief administrative judge has a conflict and is thereby prevented from performing this duty, the matter shall be referred to the Chief Justice to assign a successor judge. The successor judge may proceed with the trial or hearing upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. In a hearing or a trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify without undue burden. A successor judge may provide for the recall of any witnesses.

On November 25, 2009, Judge McMahon filed an order. It "incorporates the conclusions of facts and conclusions of law contained in Judge Johnson's Order." It provided that, "The Order and the transcript of the hearing are sufficient to negate the

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need for a new hearing on these motions." It then stated, "The Court will schedule a hearing on Plaintiff's Motion to Reconsider Judge Johnson's Order."

The interpretation that this court gives to the November 25, 2009 order of Judge McMahon is that he determined that a *de novo* hearing was not needed. He was certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. The only hearing he determined to be necessary was the one that Judge Johnson had not ruled upon – the pending motion for reconsideration and to alter or amend filed July 10, 2008.

On December 22, 2009, counsel for the Espinos filed a counter-motion to McGuinn Construction's motion for reconsideration. The Espinos' motion sought to dismiss the pending Rule 59 motion by raising a challenge to the court's jurisdiction. The Espinos argued that there was no evidence that the presiding judge or the Chief Judge for Administrative Purposes was served with the motion. **The attorneys seem to be arguing the same issue again, though it appears to have already been ruled upon.**

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On January 11, 2010, Judge McMahon filed an order denying the Espinos' challenge to the court's jurisdiction and their motion to dismiss the Rule 59 motion. Judge McMahon rejected the argument that a court cannot consider a Rule 59 motion when there was no evidence that the motion was served on the presiding judge or another judge. Though it is a Form 4 order, there is no indication that a more detailed order was to follow. It appears to this court to be a final order.

Judge McMahon's order of January 11, 2010 notes that several status conferences were held, and discussions took place between the litigants and the court, before there was a hearing on the Rule 59 motion on December 22, 2009. He stated that the court had

been on notice of the motion for at least a year, "so the spirit of the service requirement" had been met.

Subsection (g) of Rule 59, SCRCP was added to address the problem that judges were often unaware that reconsideration motions were filed. It reads:

(g) Judge to be Provided with Copy. A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion.

The notes that accompany the rules explain the 1998 amendment adding subsection (g):

This amendment adds Rule 59(g). It is intended to help insure that the judge is promptly notified that the motion has been filed.

In addition to the reasoning expressed by Judge McMahon in his order filed January 11, 2010, the court believes that subsection (g) is a notice provision, which could be handled through sanctions (including dismissal of the motion), rather than a requirement of personal service that would be jurisdictional. Rule 59(e), states: "A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Rule 59(g) requires that a copy be provided to the judge promptly. Subsection (g) does not use the word "serve." It is this court's interpretation, if the issue is still active in the case, that the 10-day requirement under subsection (g) is not absolute and it can be extended by the court. In light of the unique circumstances here, the court agrees with Judge McMahon that it would be improper to dismiss the Rule 59 motion based on the lack of proof that a copy of the motion was sent to Judge Johnson or to another judge. In this court's view, good cause has been shown as

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to why the motion for reconsideration should be heard.¹ Further, it being the court's view that it could sanction an offending party for failing to send notice to the judge of the motion to reconsider, including the sanction of refusing to hear the motion, the court declines to impose any sanction in this case.

Judge McMahon heard arguments on the motion. However, before he issued a final written order, Judge McMahon recused himself on February 11, 2011. The matter was sent back to the undersigned judge as Chief Judge for Administrative Purposes.

On September 6, 2011, an order was issued regarding the status of the case. The undersigned judge was designated as the successor judge under Rule 63, SCRPC, and Chief Justice Toal's administrative order.

At that point, the pending matter was the Rule 59 motion that was filed a few days prior to Judge Johnson's death. The attorneys indicated a desire to file a motion for consolidation of the two cases, but no motion had been filed. The order regarding status set up procedures to be followed. Two days later, on September 8, 2011, Lexington filed a motion to consolidate the cases.

On September 28, 2011, in response to the order regarding status, the Espinos filed a transcript of the hearing on the summary judgment motion before Judge Johnson, a copy of the order of Judge Johnson, a transcript of the hearing before Judge McMahon regarding the Rule 59 motion, and the proposed order that was submitted to Judge McMahon on January 19, 2010.

¹ Moreover, this court has previously stated in an order regarding status filed September 6, 2011, that Judge McMahon had determined that the Rule 59 motion was timely.

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#8

On March 27, 2012, the undersigned judge filed an order consolidating the two cases. On April 5, 2012, counsel for the Espinos filed a motion for reconsideration of the order consolidating the cases. That motion was denied by order filed August 20, 2012.

On September 24, 2013, the Espinos filed a counter-motion and motion to dismiss the Rule 59 motion that was filed shortly before Judge Johnson's death. For reasons discussed above, this court finds that the motion is duplicative and has already been ruled upon. Even if it were not deemed to be so, this court finds that the court has the authority under Rule 59(g) to extend the time for notifying the judge of the motion for reconsideration and, for the reasons stated above, finds that the unique circumstances of this case provide good cause for considering the notice to the court to be timely.

WPC
#9

The undersigned judge has reviewed the file and the written submissions. Similar to the determination of Judge McMahon, as set forth in his order filed November 25, 2009, the court has determined that a *de novo* hearing is not needed on the summary judgment motions that Judge Johnson ruled upon. The court has certified familiarity with the record and determined that the proceedings may be completed without prejudice to the parties. The only hearing determined to be necessary is the one that Judge Johnson had not ruled upon prior to his death – the pending motion for reconsideration and to alter or amend filed July 10, 2008.

ARGUMENTS ON THE MERITS OF THE RECONSIDERATION MOTION

The Rule 59 motion was heard by the undersigned judge on October 7, 2013. Over the objection of the Espinos, the other parties in both lawsuits were allowed to participate.

The parties opposing the Espinos assert that there are genuine issues of material fact related to the nature and scope of the easement in question. McQuinn Construction argues that the Espinos bought their property in a subdivision that makes reference to a plat. The plat shows an easement for a sewer line running across the Espinos' property. The plat was approved and filed before the Espinos purchased the real estate. It is argued that the Espinos obtained a deed that references the plat, and the deed reads that it is subject to easements of record and those that an inspection of the property would show. The sewer line runs underground.

The Espinos had their own plat done before they bought the property. It shows an easement, fifteen feet in width, for sewer, and it references the plat mentioned above. The predecessor in title to the Espinos had issued a deed in favor of Lexington, giving fee simple title to the sewer line. It is the contention of McQuinn Construction and those opposing the Espinos that the sewer line is clearly a spur line and that other property that was being developed was to be allowed to use the line. They note that the language of the easement states that Lexington has all easements necessary to maintain the lines.

It is argued that at least an ambiguity is created and that issues of fact exist. Those opposing the Espinos note that there are many ways to create an easement, and that the plats and deeds here raise a question of fact as to what was granted, what was reserved, and what the language means when it references the right to maintain the line. McQuinn Construction calls attention to the affidavit of Mr. Wade McQuinn that was filed on May 15, 2008, as creating an issue of fact. The affidavit has several attachments.

Lexington was not a party when the matter came before Judge Johnson. Lexington argues that the scintilla rule is not mentioned in Judge Johnson's order, it being

W/M
#10

announced by the South Carolina appellate court in 2009, but made retroactive. The Espinos state that the law in 2008 was clear that the existence of an easement is a matter of law, but the scope of it is equitable. Lexington claims that Judge Johnson went ahead and decided the declaratory judgment action and determined that the easement was not sufficient to allow anyone else to tap onto the line on the Espinos' property. Lexington points out that the layout of the sewer lines clearly shows that this is a spur for development of the property behind the Espinos' land. It is Lexington's contention that reference to the plat itself creates issues of fact that go to the scope of the easement. According to Lexington, the intent of the parties was to allow a means to serve future use of lands that were undeveloped.

WPK
#11

Since it was not a party, Lexington maintains that it was not allowed to present evidence in the summary judgment motion. The complaint in the second action filed after Judge Johnson's death attached a copy of the summary judgment order and pleaded that Lexington is bound by it. Lexington insists that it is not bound by that order and that it should be allowed to present evidence. It is the contention of Lexington that a bench trial is needed to determine the scope of the easement.

In opposition to the motion to alter or amend, the Espinos argue that the question is not whether an easement exists. The question is the scope of the easement. According to the Espinos, Judge Johnson determined correctly that where there is clear and unambiguous language, there is no need to go beyond the language of the document. The easement was put in place in 1988. The deed to Lexington was to maintain the sewer lines and utilities for Coventry Lake Subdivision. No one raised issues about a prescriptive easement or easement by dedication to Judge Johnson. Even if the court

were to consider those issues, the Espinos maintain that the language of the easement was clear and unambiguous, as Judge Johnson found.

The Espinos feel that the parties opposing them are attempting to argue issues that they could have and should have raised before the summary judgment order was issued. They note the inconsistency of McGuinn Construction filing a declaratory judgment action to determine if it had the right to run the line versus the positions taken now. Moreover, they note that McGuinn Construction elected to go ahead and put the lines in place before the judge decided the issue. They assert that Lexington was brought into the case by the Espinos, but that Lexington filed a motion to be dismissed. That is why Lexington was not a party at the time Judge Johnson heard the motion.

As for the affidavit of Mr. Wade McGuinn, the Espinos challenge that the affidavit was properly before the court in 2008 since it was not filed with the motion, but some 30 days later. Nonetheless, Judge Johnson considered it.

Finally, the Espinos maintain that there is no need for a *de novo* hearing.

In response, McGuinn Construction and those aligned with it argue that the affidavit was not late, but was filed in response to the motion for summary judgment that the Espinos filed, which was heard at the same time by Judge Johnson. They point out that the language of the easement has several parts. Those parts include the rights of way to maintain the sewer lines. They assert that there is no prejudice to the Espinos by granting a *de novo* hearing. It is their contention that the sewer line was already in the ground, that it runs underground, and the Espinos are not in any way damaged by taps into the line. They want the matter referred to the Master-in-Equity for a full hearing.

Wade
#12

Lexington responds that relief under Rule 59(e) is not limited to having the court correct an error of law or an abuse of discretion. Judges are allowed to take a fresh look at the evidence. The language of the easement specifically references as-built plans. Therefore, Lexington feels that the court cannot rule on the scope of the easement without considering those plans, and Lexington maintains that the as-built plans clearly show this as a spur line. Since Lexington did not present evidence in opposition to the summary judgment motion, Lexington argues that the most pragmatic thing to do is to let the parties file new cross-motions for summary judgment or allow a hearing on the merits.

The Espinos response is that the as-built plans were not discussed or presented. They argue that Judge McMahon acknowledged that fact in the transcript of the hearing held before him. McGuinn Construction had to cross over the Espinos' property to get to the line. It is the view of the Espinos that the easement was only for the maintenance of Coventry Lake Subdivision and that the easement to maintain the line is limited to that purpose, not an extension into other areas. It is also argued that the facts of the case are clear that Lexington's engineers knew that private easements had to be obtained and that McGuinn Construction also knew. Otherwise, the engineers would not have responded as they did and McGuinn Construction would not have filed this lawsuit.

CONCLUSION

Having reviewed and reconsidered the matter, the court finds no basis for altering or amending Judge Johnson's rulings. His order is very thorough and well-stated. He ruled on what was presented to him. Nothing has been provided to this court indicating that Judge Johnson failed to consider any matters that were placed before him. The court

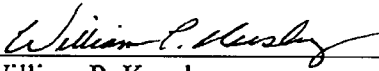
WML
#13

agrees that the parties to the lawsuit at the time that the matter was presented to Judge Johnson (2005-CP-32-02712) are bound by his ruling. However, the court is not determining in this order whether the June 16, 2008 order is binding upon those who were not parties when Judge Johnson made his ruling.

The attorneys are directed to schedule a status conference with the undersigned judge so that a plan of action can be implemented.

AND IT IS SO ORDERED.

June 2, 2014



William P. Keesley
Judge

#14

FILED
2014 JUN -9 P 12:51
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF LEXINGTON
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2008CP3204192

Saul Espino Mara Espino	Gates Commons LLC S Wade McGuinn Lexington Town Of
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PLAINTIFF(S) DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:
ORDER INFORMATION

This order ends does not end the case.
 Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge	Judge Code	6/20/2014 Date
For Clerk of Court Office Use Only		

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on 20th of June 2014, to attorneys of record or to parties (when appearing pro se) as follows:

Andrew A. Aun PO Box 3568 Irmo, SC 29063

Andrew F. Lindemann
PO Box 8568 Columbia, SC 29202-8568
S. Jahue Moore PO Box 5709 West Columbia, SC 29171

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/mh

Court Reporter

Beth A. Carrigg - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
