

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Presiding Judge

Appellate Case No. 2014-001519

McGuinn Construction Management, Inc.,.....Appellant,

v.

Saul Espino and Mara Espino,.....Respondents,

and

Saul Espino and Mara Espino,.....Respondents,

v.

Gates Commons, LLC, S. Wade McGuinn, Individually,
and Town of Lexington,Defendants,

Of whom Town of Lexington is.....Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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MAR 02 2015

SC Court of Appeals

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STANDARD OF REVIEW

The Respondent argues that in this case the parties "agreed" that this matter was solely to be decided by the Court "as a question of law" because the case came before the Court pursuant to cross motions for summary judgment. This position appears to assert the position that anytime both parties to an action file cross motions for summary judgment they stipulate that the case is one that may be decided at that time, as a matter of law, without any further discovery. This assertion is incorrect and should not be adopted by the Court.

Both of the cases cited by the Respondents are distinguishable from the case before the Court. *Alltel Communications, Inc. v. South Carolina Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012), involved a case of statutory construction in which the parties to the action filed over "63 joint stipulations" as to the facts, making the sole issue before the Court one of statutory interpretation, and making "...a remand to the ALC (lower court) for further factual development futile." The Court held that the joint filing of summary judgment in that case, "...authorize(d) the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties."

Wiegand v. United States Automobile Association, 391 S.C. 159, 705 S.E.2d 432 (2011), involved a question of whether or not the defendant insurer had made a "meaningful offer" of insurance to plaintiff under a policy of insurance. In *Wiegand*, there is no indication that either party argued that there was any evidence to be developed other than what was already in the record. Citing the fact that interpretation of the

contract was a question of law, the Supreme Court construed the policy prior to remanding the case.

Both of these cases are distinguishable from this case. In this case there are numerous facts to be developed. The Appellants have not stipulated that in the event their motion for summary judgment was denied, the case could or should be decided as a matter of law by the Court without any further evidentiary development.

In addition, the Respondent asserts in the "Standard of Review" that the facts in dispute in this case are not "material facts" "because the grant of the easement is so specific and limited, there are simply no facts that either appellant may produce that will make a difference in the final outcome." (Brief of Respondent). As set forth in its brief (as well as below) the undersigned submits that the facts in dispute are certainly material facts, precluding summary judgment in this case.

ARGUMENT

I. THE COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGEMENT AS TO APPELLANT'S DECLARATORY JUDGMENT CAUSE OF ACTION.

In *Hancock v. Mid-South Carolina Management Company, Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009), the South Carolina Court held that in cases applying the preponderance of evidence burden of proof, the non-moving party is only required to submit a "mere scintilla" of evidence in order to withstand a motion for summary judgment. Judge Johnson did not have the benefit of this decision and therefore does not refer to it in his decision granting summary judgment to Respondents. (Order of Judge Johnson; R. ___). This authority is also ignored in Respondents' brief. As set forth in the Appellant's brief, Judge Johnson's Order cited numerous "Facts in Controversy," any of

which should have precluded a grant of summary judgment utilizing the correct “scintilla of evidence” standard. In addition, Judge Johnson’s Order fails to take into consideration the “as built” plans which were specifically referred to in the grant of the easement from the Town of Lexington to Coventry Associates, Inc. (Order of Judge Johnson, R. ____). Consideration of the “as built” plans was necessary to the development of the facts of this case and summary judgment was not warranted. See, *Simmons v. Berkley Electric Cooperative*, 404 S.C. 172, 744 S.E.2d 580 (Ct. App. 2013).

Further, as ably argued in the Brief of the Appellant Town of Lexington, Judge Johnson’s Order fails to take the intention of the parties into consideration. *Lighthouse Tennis Club Village Horizontal Property Regime, LXVI v. South Island Public Service District*, 355 S.C. 529, 586 S.E.2d 146 (Ct. App. 2003). Thus granting of summary judgment was inappropriate and improper in this case.

Further, the Trial Court overlooked substantial evidence in the record when he granted summary judgment to the Respondents. As set forth more fully in the Appellant's Brief, the Trial Judge's Order specifically noted and cited substantial evidentiary conflicts in this case. Yet, Judge Johnson and later Judge Keesley ignored this conflicting evidence and erroneously granted summary judgment to the Respondents.

Summary judgment was also inappropriate in this case as further investigation into the facts by the Court is necessary. Specifically, the Trial Court failed to take into consideration the "as built" plans which are specifically mentioned in the easement deed from Coventry Associates, Inc. (a predecessor in interest to the Espinos) to the Town of Lexington. (Order of Judge Johnson, R. ____). Despite the fact that the easement specifically referred to the "as built plans," for a "more complete and accurate description

of said easements," the Trial Court's Order failed to address and/or consider these plans (there is no evidence that these plans were ever presented to Judge Johnson).

Respondents spend much of their brief focusing on the meaning of "maintenance" in the easement document. They argue that expanding the sewer flow through the pipe across the property is not "maintenance" of the line. The very restrictive meaning that they give to the term "maintenance," if true, shows the ambiguity in the easement. The obvious purpose and intent of the easement was to grant the Town of Lexington the right to operate the sewer system and to have its sewer pipes in the ground traversing Respondents' (and others) property. The strict construction of the term "maintenance" as set forth by the Respondents' brief would not allow the Town to even operate the sewer system. Judge Johnson recognized some ambiguity when he ruled that, "the easement in question is limited in scope to the maintenance, repair, and improvement of the sewer, water, and drainage systems in the Coventry Lake Subdivision." (Order of Judge Johnson, R. ____). Judge Johnson did not limit the easement to "maintenance" and thus he broadened its purpose beyond the "maintenance" of the water and sewer lines as stated in the written instrument. Yet, without considering the "as built plans" specifically referenced in the easement instrument, the plats which were in the record, or any other extrinsic evidence, he then limited the scope of the easement and did not allow for the use of the easement to carry sewage beyond the boundaries of Coventry Lake Subdivision. There is no basis for that limitation as to the scope of the easement. It is an interpretation that is open to debate and for that reason Judge Johnson's ruling construing the easement in such a fashion that it does not allow the sewer line crossing Respondent's property to carry sewage generated beyond the boundaries of Coventry Lake Subdivision should not

be a ruling made on a summary judgment motion. This ruling is clearly based on disputed facts and disputed inferences to be drawn from those facts.

The evidence in the record is that the sewer line across Respondent's property is a spur line for the removal of sewage from the Coventry Lakes subdivision. Until Gates Common subdivision was built, the spur line served no purpose. It did not hold or transport any sewage. The only evidence in the record is that this line was intended to serve the expansion of the sewer system to serve the property located behind Respondents' property. The evidence in this case makes it obvious that the spur line across the Respondents' property was installed and the easement granted to allow for future expansion and a tie in to the existing system when the property adjoining Respondents' was developed, which eventually happened when Gates Common was developed. If that information does not make the intent of the easement obvious with respect to the spur line across the Respondents' property, at the very least it constitutes a "mere scintilla" of disputed evidence that should have precluded summary judgment in the Respondents' favor.

II. THE LOWER COURT ERRED IN GRANTING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT AS TO SLANDER OF TITLE AND TORTIOUS INTERFERENCE WITH CONTRACT.

The Respondents' argument that Appellant abandoned its argument regarding the Trial Court's error in granting summary judgment as to the slander of title and tortious interference with contract is based on an incorrect reading of the language contained in Appellant's brief and lacks merit. As argued by the Appellant in his brief, Judge Johnson based his decision to grant summary judgment as to the claims solely on the grounds that, "...the Court has determined that the Plaintiff [Appellant] did not have the authority to

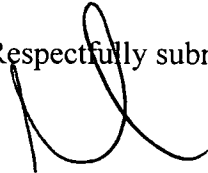
occupy the Espinos' [Respondents'] property or to connect to either the sewer or drainage lines in the Coventry Lakes subdivision." (Order of Judge Johnson, pp. 9-10; R. ____).

As argued by the Appellant throughout its brief, this finding is clearly erroneous and should not and cannot be used as the sole basis to grant summary judgment as to the Appellant's slander of title and tortious interference with contract causes of action. There was no need for the Appellant to reassert each and every argument presented earlier in its brief that the sole grounds the trial court relied on in granting summary judgment as to these causes of action was fatally flawed. Therefore the Appellant did not abandon these arguments in its brief. Once this Court reverses Judge Johnson's determination that Appellant did not have the authority to occupy the Espinos' (Respondents') property or to connect to either the sewer or drainage lines in the Coventry Lakes subdivision, there is nothing to support the grounds for summary judgment as to these causes of action and they should be remanded for further development and consideration by the lower court.

CONCLUSION

Viewing the evidence presented in the light most favorable to Appellant, the non-moving party, the plat and deed clearly indicate the easements at issue in this case were intended to service the Appellant's property and were intended for an expansion of the Town's sewer system. Thus, there is a genuine issue of material fact as to the nature and scope of the easements and whether or not the Appellant has the right to tie into/use/improve them, and it was an abuse of discretion and an error of law for the court to find otherwise.

Respectfully submitted,



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March 2, 2015

West Columbia, South Carolina

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William P. Keesley, Presiding Judge

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and Town of Lexington,Defendants,

Of whom Town of Lexington is.....Appellant.

PROOF OF SERVICE

I, Nancy A. Hazelwood, an employee of the Moore Taylor Law Firm, P.A.,
certify that I have served the Initial Reply Brief of Appellant, by United States mail, in an
envelope with sufficient postage affixed thereto, upon all counsel of record on March 2,
2015.

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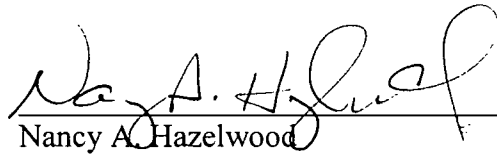
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March 2, 2015

The Honorable Jenny Abbott Kitchings
 Court of Appeals Clerk of Court
 1015 Sumter Street
 Columbia, South Carolina

VIA HAND DELIVERY

RE: McGuinn Construction Management, Inc. v. Saul Espino and Mara Espino
 Appellate Case No. 2014-001519

Dear Ms. Kitchings:

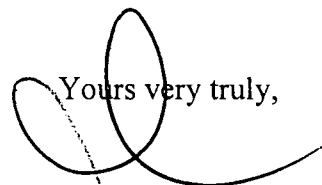
Enclosed for filing please find the original and seven copies of the Initial Reply Brief of Appellant in this matter. Please have the extra copies clocked in and returned to our courier.

The Appellant McGuinn Construction Management, Inc., hereby incorporates the Designations of Matter filed by Respondents and Appellant Town of Lexington.

By copy of this letter I am serving the Respondents' counsel with our Initial Reply Brief.

Thank you in advance for your assistance in this matter.

With kindest regards I am,

Yours very truly,


John C. Bradley, Jr.

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SC Court of Appeals

/nh
 Enclosures
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