

THE STATE OF SOUTH CAROLINA
COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS
HONORABLE R. MARKLEY DENNIS, JR.

Case No. 2013-CP-10-7203
Appeal Case No. 2014-001907

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SC Court of Appeals

Nationwide Property & Casualty
Insurance Company, Plaintiff/Appellant

V.

Gary McCombs, Ragan McCombs and Robert G Albertt,
Defendants/Respondents

Brief of Appellant

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I. Table of cases, statutes and other authorities.

1. Rule 56 SCRPC [pages 5,]
2. Lord v. D&J Enters. 407 S.C. 544, 757 S.E. 2d 695 (2014) [page 6]
3. Willams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E. 2d 447 (1976) [page 6, 7]

II. Statement of Issues on Appeal

Whether the trial court erred in granting defendants motions for summary judgment on Plaintiff's negligence case.

III. Statement of the Case

Appellant Nationwide Property & Casualty Insurance Company ("Nationwide") filed its subrogation action to recover property damage payments made to its insured Alison Smith Thornly ("Ms.Thornly"). Appellants allege the Appellees Gary McCombs and Ragan McCombs Albert ("Appellees") caused the damage by failing to keep water from leaking from their condominium on December 17, 2013. Amended Complaint para. 10 and 11, R at 25. Plaintiff seeks to recover \$18,923.91 in payments plus interest and costs in its Amended Complaint. The original complaint was amended on February 19, 2014. The defendants answered generally denying the complaint. Discovery was conducted and the parties filed Motions for Summary Judgment. This appeal comes from the granting of summary judgment, prior to trial, to all Defendants. The Appeal was filed on September 4, 2014 and appeals the Trial Court's Order dated August 4, 2014.

A. Background facts relating to the case:

As developed in the pleadings, affidavits and discovery, Ms. Thornly made a claim on its policy with Nationwide for water damage she discovered on December 17, 2010. See Affidavit of Rich Gallion at Para 6 R at 344-345 and Deposition of Ms. Thornly at pages 26-30 R at 182-188.

Ms. Thornly owned a condominium at 1515 Cambridge Lakes Drive Mount Pleasant SC 29462. See Affidavit of Rich Gallion at Para 6a R at 344 and Deposition of Ms. Thornly at pages 6-7, R at 156-158. The Appellee Ragan McCombs Albert owns the unit above Ms. Thornly and Appellee Gary McCombs installed a hot water heater after a leak that occurred in 2009 that may have leaked a second time. See Affidavit of Gary McCombs, R at 393. Ms. Thornly believes, and Nationwide concluded after its investigation, that this was the second time Ms. Thornly's apartment had been harmed by water damage from the Appellees unit. See Affidavit of Rich Gallion at Para 6 R at 344-345 and Deposition of Ms. Thornly at pages 26-30, R at 182-188. Ms. Thornly was told the second leak came from the Appellees unit. Deposition of Ms. Thornly at page 24, R at 180. The Defendants affidavits filed in this case do not deny a leak came from their condominium, only that the leak did not come from the

hot water heater. See Affidavit of Ragan McCombs Albert R at 394-396 and Affidavit of Gary McCombs R at 393. The defendants admit that there had been a previous leak from their condominium. See Affidavit of Ragan McCombs Albert R at 394-396 and Affidavit of Gary McCombs R at 393. Ms. Thornly testified that the same damage occurred again. Deposition of Ms. Thornly at page 22, R at 177 Ms Thornly also testified that the appellant sent a representative over to assess the damage. Deposition of Ms. Thornly at page 25, R at 181. Richard Gallion testified that it was determined that the loss was the result of water intrusion from the above condominium unit for both incidents. Affidavit of Richard Gallion at para 6, R at 344-345.

After filing suit to recover on the claim and before trial, Appellees filed Motions for Summary Judgment. These motions were granted and Appellant now appeals this decision. Based on the above facts and following arguments of law, Appellants asks that this court reverse the trial court ruling and deny the Appellees Motions for Summary Judgment.

IV. Argument

A. Standard of Review:

Summary judgment is only appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56 SCRPC. With respect to a motion for summary judgment, in determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Lord v. D & J Enters., 407 S.C. 544, 757 S.E. 2d 695 (2014). 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 in order to withstand a motion for summary judgment. Id. Because summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. Id. An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to S.C.R. Civ. P. 56. Id.

B. Appellant has alleged sufficient facts to overcome

Appellees Motions for Summary Judgment:

In Williams v. Chesterfield Lumber Co, the South Carolina Supreme court was faced with a factual scenario

similar to this case. In the Williams case, a repairman was injured when he entered a machine to fix it. The machine became unexpectedly operational and the workman was injured. The injured workman was unable to identify who started the machine or who was negligent. The trial court granted summary judgment against the workman and the South Carolina Supreme Court reversed. The Supreme Court held that there was an issue as to whether the Defendants were negligent. Williams v. Chesterfield Lumber Co. 267 S.C. 607, 230 S.E. 2d 447 (1976).

In this case, appellant has alleged that the Appellees negligently allowed water to intrude into its insured's condominium on two occasions. See Affidavit of Rich Gallion at Para 6 and Deposition R at 344-345 of Ms. Thornly at pages 26-30, R at 182-188. Moreover, Ms. Thornly (Appellant's insured) was told the second leak came from the Appellees unit. Deposition of Ms. Thornly at page 24, R at 180. Ms. Thornly testified that the same damage occurred again. Deposition of Ms. Thornly at page 22, R at 177. Ms Thornly testified that the appellant sent a representative over and assess the damage. Deposition of Ms. Thornly at page 25, R at 181. Richard Gallion testified that it was determined that the loss was the

result of water intrusion from the above condominium unit for both incidents. Affidavit of Richard Gallion at para 6, R at 344-345. The defendants have not denied that water came from their condominium on the second occasion, only that it was not from a hot water heater. See Affidavit of Ragan McCombs Albert R at 394-394 and Affidavit of Gary McCombs, R at 393. There is direct evidence of Rich Gallions Affidavit that the Appellant determined that the water came from Appellees condominium. In addition, Ms. Thornly's testimony that the same damage occurred a second time leads to a reasonable inference that the damage was caused by a leak from Appellees condominium. Indeed, Appellees do not deny a leak came from their unit, only that the leak was not from the same hot water heater.

Given this evidence and reasonable inference, there is more than a scintilla of evidence that Appellees are liable for the damage. Construing the facts in the light most favorable to appellant requires that the trial court be reversed and that the drastic remedy of summary judgment be vacated.

Conclusion

Wherefore, for the reasons cited above, Appellant requests this court grant its appeal, deny Defendants Motions for Summary Judgment and remand this case for trial.

Respectfully Submitted this 25 Day of Apr, 2015, by:

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