

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
In the Court of Common Pleas

William P. Keesley, Presiding Judge

Appellate Case No. 2014-001519

RECEIVED

APR 09 2015

SC Court of Appeals

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.

FINAL BRIEF

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STATEMENT OF THE CASE

This matter has an unusual and somewhat tortured procedural history. This appeal actually involves two separate cases which were consolidated in the Lower Court and which remain consolidated for purposes of this Appeal. (R. pp. 1, 27). For simplification of argument, Appellant McGuinn Construction Management Inc.'s Brief will only address factual and legal issues raised in the case that it commenced against the Respondents Saul and Mara Espino on or about August 8, 2005. (R. p. 40).

Appellant McGuinn Construction Management Inc., ("McGuinn") commenced an action pursuant to the South Carolina Declaratory Judgments Act for declaratory judgment against Respondents Saul Espino and Mara Espino ("Respondent Espinos") on or about August 8, 2005. (R. p. 40). Appellant's Complaint sought a declaration of its rights declaring that Appellant McGuinn had full rights to utilize and improve an existing easement across Respondent Espinos' property, granted by Appellant's predecessor in title to the Town of Lexington ("Town") on or about April 11, 2008. (R. pp. 40, 233). Appellant's Complaint also sought recovery of actual and punitive damages arising out of causes of action for slander of title and unlawful interference with Appellant's contractual rights. (R. p. 40).

Respondents Espino answered and asserted various counterclaims against Appellant McGuinn (R. p. 43). Appellant McGuinn timely replied to these counterclaims. (R. p. 53). The parties then engaged in extensive discovery. Both parties named fact and expert witnesses. Numerous depositions were taken.

Appellant McGuinn filed a Motion for Summary Judgment and Motion to Dismiss Respondent Espinos' Counterclaim for Breach of Implied Covenant of Good Faith and Fair Dealing on October 2, 2007 (R. p. 115). Countermotions for Summary Judgment were

filed by the Respondent Espinos. (R. p. 150). A hearing was held before Judge James W. Johnson, Jr., Presiding Judge of the Eleventh Judicial Circuit on these outstanding motions on April 14, 2008. (R. p. 238). Judge Johnson signed and filed an Order on June 16, 2008, denying Appellant McGuinn's Motion for Summary Judgment and granting Respondent Espinos' Cross Motion for Summary Judgment as to Appellant's Declaratory Judgment, Slander of Title, and Interference with Contractual Relations causes of action. (R. p. 15). Judge Johnson's Order also granted Appellant McGuinn's Motion to Dismiss the Fifth Counterclaim of the Espinos for Breach of Implied Covenant of Good Faith and Fair Dealing. (R. p. 15).

Appellant McGuinn timely filed a Motion for Reconsideration on July 10, 2008. (R. p. 154). Sadly, Judge Johnson passed away before hearing arguments on this motion. Subsequent to Judge Johnson's death, this matter was designated as complex litigation and assigned to the Honorable R. Knox McMahon. Judge McMahon heard the Appellant's motion to reconsider in December of 2009. However, prior to issuing a ruling on Appellant's Motion, Judge McMahon recused himself from the case.

Appellant's motion was eventually heard by the Honorable William P. Keesley, Rule 63 SCRAP Successor Judge, on October 7, 2013. (R. p. 278). On or about June 9, 2014, Judge Keesley issued his Order denying the Appellant McGuinn's Rule 59 Motion for Reconsideration (R. p. 1). This appeal followed. (R. p. 316).

STATEMENT OF THE FACTS

This case concerns the right of Appellant to access and utilize a sewer easement owned by the Town of Lexington across property owned by the Respondents. There is no question as to the existence of valid easements owned by the Town of Lexington running across the Respondents' property. There is no question that there are sewage/drainage

pipes owned by the Town of Lexington running through and under these easements. The issue before the Court in this case and on this appeal is whether or not the Appellant may tap into and/or utilize this easement and these pipes in the development of property located adjacent to and behind property owned by the Respondents. The Lower Court, relying in part on its construction of the word "maintain" in the deed to the Town of Lexington, found and ruled as a matter of law that Appellant had no authority under the easement in question to enter Respondents' property and/or to connect to drainage and/or sewage lines in Coventry Lake Subdivision. (R. p. 15). Appellant contends that Lower Courts' Orders overlook and ignore questions of fact relating to this issue, and the Order of Judge Johnson, later affirmed by Order of Judge Keesley, is erroneous and should be reversed by this Court with the matter remanded to the lower court for further proceedings.

On or about May 8, 1992, Respondents Saul and Mara Espino, purchased property located at 108 Coventry Court in Lexington, South Carolina. This property consisted of a house and a building lot and was part of the Coventry Lakes Subdivision. (R. p. 284, ll. 1-6). The house was purchased as new construction, although the home was not custom built.

The property description on the deed by which Respondents took title references and incorporates a plat prepared for Saul J. Espino and Mary Y. Espino by Belter & Associates dated April 27, 1992. This plat, which is found at Deed Book 210-G, page 149, clearly shows a 15' sanitary sewer easement running into the Respondents' property, along the side of the Espinos' property and out of Respondents' property into property then identified as "Heritage Hills Subdivision. (R. pp. 197, 213). In addition, the plat also showed the existence of a storm drainage easement running across and through Respondents' property. (R. p. 213).

At the time they purchased their property, the Espinos also received a deed. The Espinos' deed clearly references the plat which shows the sewage easement. (R. p. 284, ll. 18-25). The clear and express language of the Espinos' deed indicates that it was subject to easements of record and those easements which inspection of the property would show. (R. p. 7, ll. 18-25).

Prior to the purchases of their property, the Espinos' predecessor in title constructed a sewage line following the sewage easement and running under the property that would eventually be purchased by the Espinos. This spur line ran into and across the subject property and out of it onto other undeveloped property. On April 11, 1988, prior to the Espinos' purchase of their property, their predecessor in title issued a deed in favor of the Town of Lexington. (R. p. 233). In that deed, the Espinos' predecessor in title gave fee simple title to all sewer lines located on property known as Country Lakes Subdivision along with the express right to maintain those lines to the Town of Lexington. (R. pp. 233; 286 - 287).

Appellant McGuinn Construction Management is the Developer of the neighborhood known as the Gates Common Subdivision. Appellant is the successor in interest to Coventry Associates, Inc., in a deed filed April 11, 1988. (R. p. 197). Gates Common subdivision backs up to the Coventry Lakes subdivision and the Respondent Espinos' property in Lexington. Appellant McGuinn applied to have the property rezoned for purposes of developing a subdivision and was granted the zoning for which he had applied. (R. p. 197). Storm drainage, water, and sewer infrastructure needed to be installed for the Appellant's project. This was to be accomplished by connecting the new underground infrastructure to the spur line running under the existing easement on Respondent Espinos' property. The installation would require connecting the new

infrastructure with the existing infrastructure located under the Respondents' property. The Town of Lexington approved the use of this drainage easement by the Appellant McGuinn. (R. p. 197). Appellant obtained a building permit from the Town of Lexington. (R. p. 201). All necessary permits were obtained to begin Construction. (R. p. 200).

In 2005, Appellant McGuinn was in the process of completing this work. Appellant obtained a building permit from the Appellant Town of Lexington and had all building plans approved by the Town. (R. p. 197). With the Town's permission and after obtaining all necessary approvals, Appellant McGuinn began to use the sanitary system easement to connect Appellant's housing development to the Town's sewer system. (R. p. 197.) Respondents Espino refused to allow Appellant McGuinn to perform this task, asserting, in part, that the easement in question is limited to the maintenance of the sewer system. This dispute led to the action which is presently before this Court on appeal.

STANDARD OF REVIEW

A Trial Court may grant a party's Motion for Summary Judgment, "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 a judgment as a matter of law. (Rule 56(c) SCRCP). An appellate court applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment. *Epstein v. Coastal Timber, Co.*, 393 S.C. 276, 711 S.E.2d 912 (2011). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences that can be drawn from the evidence must be viewed in the light most favorable to the non-moving party. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). Even when there is no dispute as to the evidentiary facts, summary judgment should be denied when there is a dispute as to the

conclusions or inferences that can be drawn therefrom. *Wilson v. Style Crest Prods., Inc.*, 367 S.C. 653, 656, 627 S.E.2d 733, 735 (2006). “[I]n 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.” *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Lanham v. Blue Cross Blue Shield of South Carolina*, 349 S.C.356, 563 S.E.2d 331 (2002).

ARGUMENT

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

Applying the standard(s) set forth above, it is clear that Judge Johnson erred in finding and ruling that there were no genuine issues as to any material, triable questions of fact present in this case and ruling that the Respondents were entitled to Judgment as a matter of law. Judge Keesley continued and affirmed these errors of law in his Order in affirming the granting of summary judgment on behalf of the Respondents. The Lower Courts' rulings overlooked and ignored the facts of this case and applicable South Carolina case law and should be reversed by this Court and this matter should be remanded to the Lower Court for further proceedings.

A. Judge Johnson’s Order Overlooks Issues of Material Fact.

Summary judgment is appropriate only where there are no genuine issues of material fact and it is clear that the moving party is entitled to judgment as a matter of law. (Rule 56(c) SCRAP). In determining whether any triable issues of fact exist, the evidence and all inferences that can be reasonably drawn from the evidence must be viewed in the

light most favorable to the nonmoving party. *Koestler v. Carolina Rental Ctr.*, 313 S.C. 490, 443 S.E.2d 392 (1994); *Hancock v. Mid-South Management Co., Inc.* 381 S.C. 326, 673 S.E.2d 801 (2009). Further, the non-moving party is only required to present a mere scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-South Management Co., Inc.* 381 S.C. 326, 673 S.E.2d 801 (2009); *Rosen v. University of South Carolina*, 398 S.C. 703, 731 S.E.2d 298 (Ct. App. 2011).

Judge Johnson found and ruled as a matter of law that Appellant had no authority under the easement to enter Respondents' property and/or connect to the drainage and/or sewer line in Coventry Lakes Subdivision. In doing so, Judge Johnson very narrowly construed the language contained in the deed, deeding the easements and line to the Town of Lexington. A review of the record on this case demonstrates that there was ample evidence presented before Judge Johnson which should have precluded summary judgment as to the nature of the easement, the scope of the easement and whether or not Appellant had the right to utilize it. The Appellant introduced a Plat dated April 27, 1992. (R. p. 213). This plat, specifically prepared for the Respondents, clearly shows the existence of a drainage and sewage lines across the Respondents' property. These easements do not connect to anything on Respondents' property. They go in and out of the Respondents' property. In fact one of these easements shows water being discharged beyond Respondents' property into property now owned by Appellant. (R. p. 213). It is clear from reviewing this Plat that the easements across Respondents' property were intended as "spur" lines to serve areas not yet developed at the time Respondents bought their property. This is exactly the type of use that Appellant is seeking in this case, that the language of the Plat either creates an easement by dedication or strongly supports Appellant's interpretation of the plat and deed. (R. p. 40). To rule otherwise would clearly contravene

public policy, and the apparent purpose of the easement, to serve the future development of properties adjacent to Respondents' property which were not yet developed. To the contrary, the easement as construed and interpreted by Judge Johnson would serve no purpose whatsoever. Clearly the plat and the deed create questions of fact as to the intent and scope of the easement.

Further, the Appellant presented the affidavit of Wade McGuinn, the principal of McGuinn Construction Management, Inc. (and Gates Common, LLC). (R. p. 197). Mr. McGuinn's affidavit is consistent with the drawings on the 1992 plat of Respondents' property and the deed to Lexington County and provides that permissive use of existing lines and easements, such as he is seeking in this case, are the "standard and common manner of expanding a sewage system." (R. p. 198). The Appellant's affidavit also provides that, "the use of and work planned to occur in the easement is within the scope of the easement, as the operation and maintenance of a sewer system. This was confirmed in a legal opinion obtained by my company, and attached as Exhibit "C." (R. p. 198). Appellant's affidavit also contained, in addition to the legal opinion, documents showing that all necessary permissions and approval were obtained by it prior to the commencement of this work, including from the owner of the easement (and the underground pipes), the Town of Lexington (R. pp. 201 – 205).

In determining the scope of an easement, the Court looks to the intent of the parties and the intent of the parties who created it. See, *Lighthouse v. South Island Public Service District*, 355 S.C. 529, 30 S.E.2d 146 (1993). Appellant submits that the evidence presented before Judge Johnson clearly creates a question of fact, or, at the very least, a scintilla of evidence which precludes the granting of summary judgment in Respondents' favor as to this issue. None of evidence submitted to the Court by Respondents, or relied

upon by the Lower Court, refutes this evidence. At the very least, this evidence creates legitimate, triable, and material issues of fact and constitutes more than a "scintilla" of evidence needed to defeat Respondents' summary judgment and the Order denying reconsideration are clearly erroneous and should be reversed by the Court.

Judge Johnson relied primarily on excerpts of testimony from Gene Edwards, former Town Engineer, and Rosemarie Nuzzo, an engineer from the Town of Lexington, who approved Appellant's plans to tie into the existing easement/sewer lines, and representatives of the field engineers hired by Appellant. (R. p. 15). None of this testimony, which, as construed and interpreted by the Court, conflicts with the Affidavit of Wade McGuinn, submitted to the Court or goes to anyone's intention as to the scope of the Easement granted to the Town. This testimony, as presented to the Court and relied on by the Court in its Order, does not support the restrictive interpretation of the easements granted to the Town of Lexington. At best, it merely creates questions of fact as to these issues. It is not sufficient to grant Respondents a judgment as a matter of law as to Appellant's causes of action for declaratory judgment.

B. The Court and Respondents' Counsel Recognized the Existence of Questions of Fact.

As set forth above, questions of fact precluding summary judgment were presented to Judge Johnson which were ultimately ignored by Judge Johnson in his Order, grants the Respondents summary judgment to Appellant's declaratory judgment cause of action. However, both counsel for Respondents and Judge Johnson specifically recognized the existence of questions of fact at the hearing and in the Order granting Respondents' cross-motion for summary judgment.

Judge Johnson's Order dated June 16, 2008, recognizes a number of facts "in

controversy." (R. p. 15). (Appellant submits that the fact Judge Johnson found there to be facts "in controversy," clearly supports Appellant's argument that summary judgment was inappropriate in this case). Appellant submits that much of the Lower Court's Order is taken up by identifying facts and issues and then attempting to resolve them. (R. p. 15).

Judge Johnson cited several instances/examples of conflicting evidence in his recitation of facts. (R. p. 15). Judge Johnson's Order cites numerous issues, many of which he considered "significant." (R. pp. 19 - 20). Instead of recognizing that these issues were issues in dispute that needed to be resolved by a trier of fact, Judge Johnson either attempted to rule on them as a matter of law or ignore them altogether. In so doing, Judge Johnson misconstrued and misapplied South Carolina Law pertaining to summary judgment. Both his Order granting Respondents' motion and Judge Keesley's Order affirming it are erroneous and should be reversed by this Court and the case remanded for further proceedings in the Lower Court.

Finally, it should be noted that this matter came before Judge Johnson pursuant to cross motions for summary judgment. In his argument before Judge Johnson, counsel for Respondents, strenuously argued that summary judgment to the Appellant was not proper, because there were, "many, many issues of fact" pertaining to whether or not Appellant had the right to use the existing easement over Respondents' property. (R. pp. 254; 258).

C. Judge Johnson Misconstrued the Nature of the Proceedings Before Him.

Judge Johnson erred in treating the motion before him as a bench trial of the case and not as a summary judgment motion. Based upon this error of law, Judge Johnson applied the incorrect standard and ignored evidence in the record. His Order and Judge Keesley's Order denying Appellant's motion for reconsideration are an abuse of discretion,

clearly erroneous and should be reversed by this Court.

As set forth above, this matter came before Judge Johnson pursuant to the parties' Rule (56) SCRCP cross motions for summary judgment and pursuant to various motions to dismiss. (R. pp. 115; 150; 152; 153). At no time did the parties agree or stipulate that this matter was before the Court on any other grounds or for any other reason. At no time did the parties inform the Court that this matter was ripe for any adjudication beyond the scope of the summary judgment motions filed with the Court. Both parties submitted memoranda. Appellant submitted an affidavit of Wade McGuinn. (R. p. 153). Some of the discovery already taken was submitted to the Court, but not all. At no time did the parties inform the Court that discovery had been completed.

At oral argument ample evidence was presented before Judge Johnson. Judge Johnson's Order dated June 16, 2008 set forth a number of facts "in controversy." (R. p. 17). (As set forth above, Appellant submits that the fact Judge Johnson found there to be facts "in controversy," clearly supports his argument that summary judgment was inappropriate in this case.)

In fact, Judge Johnson cited several instances/examples of conflicting evidence in the body of his Order. (R. p. 15). Judge Johnson's Order cites numerous issues, many of which he considered "significant." (R. pp. 19 - 20). Instead of recognizing that these issues were issues in dispute that needed to be resolved by a trier of fact, Judge Johnson either attempted to resolve them, rule on them as a matter of law, or ignore them altogether. There are numerous instances in the Order where the Court appears to make findings as to the weight to be given to deposition excerpts presented by one of the parties. (R. pp. 17 - 19). In addition, Judge Johnson's Order contains findings of fact as to evidence not introduced into the record, but "anticipated" by him. ("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." (R. p. 17). This went well beyond the purview of posture in which this matter was before the Court, a summary judgment motion. Judge Johnson's Order and the findings and rulings contained therein clearly exceeded the motions which brought this matter before the Lower Court. The Lower Court Orders are clearly erroneous and should be reversed by the Court.

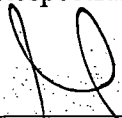
II. THE LOWER COURT ERRED IN GRANTING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT AS TO SLANDER OF TITLE AND TORTIOUS INTERFERENCE WITH CONTRACT.

The Lower Court erred in granting the Respondents' motions for summary judgment as to Appellant's causes of action for slander of title and tortious interference with contract. Although Judge Johnson set forth the elements for each cause of action, he based his rulings as to these causes of action solely on the reasoning that, "as the Court has determined that the Plaintiff (Appellant) did not have the authority to occupy the Espinos' (Respondents') property or to connect to either sewer or drainage lines in Coventry Lakes Subdivision." (R. pp. 23 - 24). As set forth and argued above, the Court clearly committed error(s) of law in its determination as a matter of law that Appellant did not have any rights to enter Respondents' property or to connect to either sewer or drainage. This determination was clearly erroneous and the Court's Orders should be reversed by the Court. Similarly, this erroneous finding, which constitutes a clear abuse of discretion on the part of the Lower Court, cannot be and should not be used as the basis for granting Respondents' Summary Judgment Motions as to either the slander of title or interference with contract causes of action. The Order of Judge Johnson and the Order of Judge Keesley affirming it are clearly erroneous and should be reversed by this 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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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant McGuinn complies with
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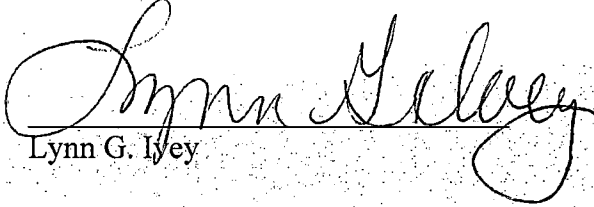
I, Lynn G. Ivey, an employee of the Moore Taylor Law Firm, P.A., certify that I
have served the Final Brief of Appellant McGuinn, by United States mail, in an envelope
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