

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
BENJAMIN C. GECY, RIVER CITY)
DEVELOPERS, LLC and RIVER CITY)
REAL ESTATE, LLC,)

Plaintiffs,)

-VERSUS-)

SOMERSET POINT AT LADY'S)
ISLAND HOMEOWNERS)
ASSOCIATION, INC., f/k/a COOSAW)
RIVER ESTATES HOMEOWNERS)
ASSOCIATION, LLC; HILTON C.)
SMITH, JR., COOSAW INVESTMENTS,)
LLC; HILTON C. SMITH, JR., INC. OF)
SOUTH CAROLINA and)
MANORHOUSE BUILDERS OF SOUTH)
CAROLINA, LLC,)

Defendants.)

IN THE COURT OF COMMON PLEAS)
FOURTEENTH JUDICIAL CIRCUIT)
C.A. NO.: 2014-CP-07-2670)

MAY 25 2016

SC Court of Appeals

**ORDER GRANTING DEFENDANTS
HILTON C. SMITH, JR., COOSAW
INVESTMENTS, LLC AND HILTON C.
SMITH, JR., INC. SUMMARY
JUDGMENT AS TO MALICIOUS**

PROSECUTION
(Not Case Ending)

2015 NOV 12 PM 4: 21
JERRI ANA ROSEHEAD
BEAUFORT COUNTY, S.C.
CLERK OF COURT

On August 4, 2015, Defendants Hilton C. Smith, Jr., Coosaw Investments, LLC, and Hilton C. Smith, Jr., Inc. (hereinafter collectively referred to as "Smith Defendants"), came before the Court on their Motion for Summary Judgment as to Plaintiffs' claim for malicious prosecution. After considering oral arguments and written briefs, the Court grants Smith Defendants' Amended Motion for Summary Judgment as to Plaintiffs' claim for malicious prosecution because the underlying action that gives rise to the claim for malicious prosecution is still pending, and because there was no termination of the *lis pendens* in favor of Plaintiffs.

BACKGROUND AND RELEVANT FACTS

Plaintiffs filed this action against Defendants on October 23, 2014, asserting causes of action for abuse of process and malicious prosecution against all the defendants. Plaintiffs allege that these claims arise out of an underlying action captioned *River City Developers, LLC v. Coosaw Investments, LLC, et al.*, Case Number 2011-CP-07-3945 ("Underlying Action") related to property River City Developers owned in Somerset Point at Lady's Island subdivision. River City Developers, LLC asserted three causes of action in the Underlying Action. Plaintiffs allege that in response to the complaint filed in the Underlying Action, Defendant Somerset Point at Lady's Island Homeowners Association ("SPLIHOA") filed an answer, counterclaim, and cross-claim asserting a claim for injunctive relief. Furthermore, the Complaint alleges that SPLIHOA named as additional parties, Plaintiffs, Benjamin C. Gecy and River City Real Estate, LLC to the Underlying Action and filed a *lis pendens* against a lot owned by River City Developers, LLC.

Plaintiffs moved to have the *lis pendens* removed in the Underlying Action, and the Honorable Marvin H. Dukes, III issued an order dated February 15, 2012, which ordered "that the *lis pendens* filed in [the Underlying Action] shall be and is hereby stricken and removed and shall henceforth be of no further force or effect." After Judge Dukes' order filed on February 15, 2012, SPLIHOA filed an "assessment lien."

SPLIHOA filed a motion to reconsider on February 17, 2012, in response to Judge Dukes order striking the *lis pendens*. SPLIHOA argued in its motion to reconsider that Judge Dukes "misinterpreted the Court of Appeals' Opinion in Pond Place Partners, Inc. v. Poole, 351 S.C. 567, S.E.2d 881 (S.C. App. 2002) in three important ways." SPLIHOA's motion to reconsider noted

that: (1) SPLIHOA's "underlying declaratory judgment action was to 'affirm and validate restrictive covenants and enforce thereof,' not interpret them;" (2) the Court of Appeals in Pond Place did not hold that a *lis pendens* "must involve or affect 'title' to property, but rather it wrote that a *lis pendens* may be filed '... in conjunction with an underlying complaint involving an issue of property,'" and (3) the Court of Appeals "was not ambiguous when it found the *lis pendens* appropriate in the case" and wrote "[r]estrictive covenants, by their very nature, clearly affect a property owner's ownership of their subject land."

On the same date that SPLIHOA filed its motion to reconsider, River City Developers, LLC filed a motion to strike certificate of lien seeking to have the assessment lien removed.

After a hearing on March 5, 2012, on the motion to reconsider and the motion to strike the assessment lien, an order was filed by Judge Dukes on April 6, 2012, that denied both SPLIHOA's motion to reconsider and Plaintiffs' motion to strike the assessment lien.

On July 2, 2012, Coosaw Investments, LLC, Hilton C. Smith, Jr., and SPLIHOA ("Appellants") filed a Notice of Appeal of the May 31, 2012 Order of the Honorable Marvin H. Dukes, III (including all prior orders). On August 8, 2013, Appellants filed a motion to withdraw appeal because the property has since sold to a third party, and the issue presented by the appeal is now moot. On August 12, 2013, an order was filed dismissing the appeals pursuant to Appellants' motion.

SUMMARY JUDGMENT STANDARD

"Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." Etheredge v. Richland Sch. Dist. One, 534 S.E.2d 275, 277 (S.C. 2000). "In ruling on a motion

for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the nonmoving party.” Id. “When reasonable minds cannot differ on plain, palpable, and indisputable facts, summary judgment should be granted.” Singleton v. Sherer, 659 S.E.2d 196, 202 (S.C. Ct. App. 2008).

“The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” Richardson v. The State Record Co., Inc., 499 S.E.2d 824-25 (S.C. Ct. App. 1998). “With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility may be discharged by “showing” –that is, pointing out to the [trial] court – that there is an absence of evidence to support the nonmoving party’s case.” Id. at 825. “The moving party need not support its motion with affidavits or other similar materials negating the opponent’s claim.” Id.; see Milligan v. Liberty Life Ins. Co., 443 S.E.2d 381, 382 (S.C. 1994) (nothing that where record is devoid of evidence, moving party is entitled to summary judgment as a matter of law). “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.” Singleton, 659 S.E.2d at 203. “It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine.” Thompkins v. Festival Centre Group, I, 410 S.E.2d 593, 594 (S.C. Ct. App. 1991).

LAW AND ANALYSIS

“[T]o maintain an action for malicious prosecution, a plaintiff must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in [the] plaintiff’s favor; (4) malice in instituting

such proceedings; (5) lack of probable cause; and (6) resulting injury or damage.” Pallares v. Seinar, 407 S.C. 359, 366, 756 S.E.2d 128, 131 (2014)(quoting Law v. S.C. Dep’t of Corr., 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006)). “An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence, including malice and lack of probable cause.” Id.

In this matter, Plaintiffs are unable to prove the element of termination of such proceeding in plaintiffs’ favor. All the causes of actions in the Underlying Action are still pending. So, there cannot have been any termination of any of the causes of action asserted in the Underlying Action in anyone’s favor. Therefore, Plaintiffs are unable to establish that any of the causes of action were terminated in their favor, and Plaintiffs’ claim for malicious prosecution must fail.

Plaintiffs argued at the motion hearing that the proceeding from which the malicious prosecution arises dealt with the ancillary issue of the *lis pendens*. However, the *lis pendens* issue that was addressed by Judge Dukes is not considered a final determination because Judge Dukes ruling on striking the *lis pendens* was not based on substantive grounds. Judge Dukes ordered the *lis pendens* stricken in his February 15, 2012, order, and readdressed this issue related to the *lis pendens* in his April 26, 2012 order. In his order filed February 15, 2012, Judge Dukes held that the SPLIHOA’s declaratory judgment claim asserted in the Underlying Action did not affect title to real property, and ordered that the *lis pendens* be stricken. In response to that order, SPLIHOA filed a motion to reconsider based on Judge Dukes’ misinterpretation of Pond Place Partners, Inc. v. Poole, *supra*. In response to the motion to reconsider, Judge Dukes filed a second order on April 26, 2012, which clarified his basis for striking the *lis pendens*. In that order, Judge Dukes noted that the *lis pendens* was filed minutes prior to the filing of the construction mortgage on the

property, and stated that “[b]ecause of the timing of the filing of Somerset’s *lis pendens*, it had priority over a construction mortgage on its property.” Judge Dukes also noted that the assessment lien filed by SPLIHOA was recorded after the mortgage, and “is subordinated to the mortgage and does not affect or impair [the mortgage company’s] security interest.” Judge Dukes went on and stated that “[i]n my opinion, leaving the *lis pendens* in place benefits neither party,” and that “[e]quity should always act on a case-by-case basis.” Judge Dukes stated that “once a party establishes an equitable right, the Court may dispense with pure formalities which would otherwise defeat the equity . . .” He concluded by stating that “I find that the harm to River City in granting Somerset’s Motion to Reconsider outweighs the benefit to Somerset if the *lis pendens* [sic] remains in place.”

The general rule is that “termination of underlying civil proceedings, in order to constitute a favorable termination for the purposes of a malicious prosecution action, must be consistent with a finding for the defendant on substantive grounds and must not be based solely upon technical or procedural considerations.” 30 A.L.R. 4th 572 (citing Ferraris v. Levy, 223 Cal. App. 2d 408, 36 Cal. Rptr. 30 (1963, 1st Dist.); Lumpkin v. Friedman, 131 Cal. App. 3d 450, 182 Cal. Rptr. 378 (1982, 2d Dist.); Levy’s Store, Inc. v. Endicott Johnson Corp., 272 NY 155, 5 N.E. 2d 74 (1936); Rounds v. Humes, 7 R.I. 535 (1863).

Judge Dukes’ order denying the motion to reconsider and the motion to strike the lien assessment explained his ruling on the issue of the *lis pendens*. In the order denying the motion to reconsider and the motion to strike the lien, Judge Dukes made it clear that his ruling to strike the *lis pendens* was based on a balancing of the equities, rather than substantive grounds. Therefore, Judge Dukes’ April 6th order on the issue of the *lis pendens* was not a final termination under the

general rule requiring that the ruling must be on substantive grounds. Accordingly, Defendants are entitled to summary judgment because there has been no final determination in favor of Plaintiffs in the underlying action.

THEREFORE, the Court finds that the Underlying Action has not been terminated in favor of Plaintiffs, so, any claim for malicious prosecution must fail, and as conceded by Plaintiffs' counsel at the hearing, the malicious prosecution claim arose out of the ancillary issue of the *lis pendens*, and the Court finds that Judge Dukes resolution of the *lis pendens* issue was based on equitable grounds, not substantive grounds, and thus, cannot be a termination in favor of any party.

IT IS THEREFORE ORDERED that pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Defendants Hilton C. Smith, Jr., Coosaw Investments, LLC, and Hilton C. Smith, Jr., Inc.'s, Motion for Summary Judgment as to Plaintiffs' claim for malicious prosecution is GRANTED!



Judge Carmen T. Mullen
Fourteenth Judicial Circuit

Beaufort, South Carolina

This 10 day of November, 2015