

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Hon. Daniel D. Hall, Circuit Court Judge
S. Jackson Kimball, Special Circuit Court Judge

Case No.: 2013-CP-46-00246

Morningstar Fellowship Church,

Appellant-Respondent,

v.

York County, South Carolina

Respondent-Appellant.

RESPONDENT/APPELLANT'S FINAL REPLY BRIEF

July 1, 2016

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Respondent/Appellant York County (“York County” or the “County”) respectfully submits this brief in reply to the Initial Respondent’s Brief of Appellant/Respondent Morningstar Fellowship Church (“Morningstar”), and in support of York County’s appeal from the Order for Partial Summary Judgment of the Honorable S. Jackson Kimball, entered on July 17, 2014 (the “July 17, 2014 Order”) and the September 29, 2014 Order denying reconsideration (the “September 29, 2014 Order”).

ARGUMENT

I. THE SUFFICIENCY OF THE NOTICE OF SITE PLAN APPROVAL YORK COUNTY PROVIDED TO MORNINGSTAR IS A QUESTION OF LAW, NOT OF FACT.

Morningstar erroneously argues that the sufficiency of the notice given by the County to Power Engineering of the approval of Morningstar’s commercial site plan is a question of fact, and that therefore Judge Kimball was correct to refrain from granting summary judgment. Morningstar Br. at 6. In support of this position, Morningstar cites two cases, Southern Cotton Oil Co. v. Schafer 140 S.C. 445, 452, 138 S.E. 882, 884 (1927) and Brown v. Goodman Mfg. Co., L.P. 2015 WL 1006319 (D.S.C. March 5, 2015). A review of these cases reveals that they do not stand for the proposition offered by Morningstar, and they should be disregarded in the Court’s analysis of this appeal.

In the 1927 case, the Supreme Court did not address the sufficiency or “reasonableness” of a notice, *per se*. Rather, Schafer considered whether a precursor to modern discovery tools, a “notice to produce,” sufficiently described a document to elicit its production by the opposing party. 138 S.E. 882, 884. The question presented in Schafer dealt with the court’s discretion to admit or exclude evidence at trial based on whether the discovery request sufficiently described the evidence in question, not whether a party had “notice” of a particular fact.

Judge Kimball twice found that the County, in fact, gave notice of site plan approval. The issue in this case therefore centers around whether such notice was legally sufficient. As in Bower v. National Gen'l. Ins. Co., 342 S.C. 315, 318, 536 S.E.2d 693, 695 (Ct. App. 2000), the question of the sufficiency of notice is question of law, not of fact, because the material facts are not in dispute. Nor is this rule a new rule or a novel interpretation. Thompson v. Bank of SC, 21 S.C.L. 77, 83 (Ct. App. L. 1838)(sufficiency of notice of dishonor is question of law); see also Benton v. Mut. of Omaha Ins. Co., 500 N.W.2d 158, 160 (Minn. Ct. App. 1993) (“courts consistently have held that the factfinder determines whether notice was given, but the courts determine as a question of law whether a written notice was adequate”). Morningstar’s reliance on Schafer is therefore misplaced.

Morningstar simply misquotes Brown v. Goodman Mfg. Co., L.P. 2015 WL 1006319 (D.S.C. March 5, 2015). Brown was filed as a putative class action, alleging that Goodman manufactured and sold defective air conditioners and heat pumps. Rather than answer the plaintiffs’ complaint, Goodman filed several motions to dismiss pursuant to Federal Rule 12(b)(6). As the U.S. District Court addressed each motion, it first summarized “the Parties’ Arguments” and then set forth separately “The Court’s Ruling.” The quote that Morningstar attributes to the District Court is merely the Court’s synopsis of Brown’s argument, and not the District Court’s holding.¹

¹ Morningstar quotes the Brown Court as holding “[A]ny question about the reasonableness of the notice is a question of fact for the jury.” Appellant Respondent’s Response Brief at 6. In fact, that sentence is set forth under the heading “The Parties’ Arguments” and reads, in context:
In response to Defendants’ notice contentions, Plaintiff argues that he was not required to provide notice to Defendants under South Carolina law because they were manufacturers rather than direct sellers of the heat pump. (ECF No. 22 at 12). However, even if notice to Defendants was required, *Plaintiff asserts* that his communications to Defendant in November and December 2011 satisfy the lenient standard applicable in South Carolina and any question about the reasonableness of the notice is a question of fact for the jury. (Id. at 12-13).

Brown, 2015 WL 1006319, at *9 (emphasis added).

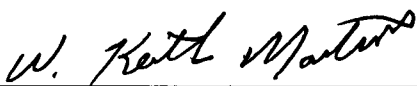
Morningstar can point to no material facts that are in dispute regarding the notice of site plan approval that was given by County staff. Rather, the County contends (1) that Gerald Lee, Morningstar's designated agent, understood through the review process and through direct communications with County staff that the plan had been approved, and (2) that such understanding was received and shared by Pat Selvey and imputed to Morningstar under agency principles. Fundamentally, Morningstar argues that it was entitled to ignore its agency relationship with Power Engineering, and was entitled to notice of approval by certified or registered mail to Rick Joyner, with copies to his attorney, the County Manager and the County Attorney as per Section XI.H of the Development Agreement. The trial court found no such requirement existed in the Agreement, but despite finding that the County informed Morningstar's engineers that the plan was approved, and that the engineers in fact understood the plan had been approved, declined to grant summary judgment.

Neither these facts nor the language of the Agreement are in dispute. Morningstar offers no factual dispute, but simply urges a different interpretation of these facts, i.e., that notwithstanding actual notice of approval to its engineer, the Agreement required that formal notice be sent pursuant to Section XI.H in order for its time for performance to commence. Inherently, Morningstar raises a question of law, not of fact, and since notice to an agent is binding upon the principal, Judge Kimball erred in refusing to grant summary judgment.

CONCLUSION

Judge Kimball's Orders contains findings of fact that should have led him to the conclusion that summary judgment was proper. No genuine issues of material fact exist as to notice of approval that was binding upon Morningstar, and the trial court erred in denying the County's motion for summary judgment.

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PROOF OF SERVICE

The undersigned certifies that she has served this Respondent/Appellant's Final Reply Brief by depositing a copy of it in the United States Mail, postage prepaid, on July 5th 2016, addressed to its attorney of record, Richard B. Fennell, James, McElroy & Diehl, PA, 600 South College Street, Charlotte, North Carolina 28202.

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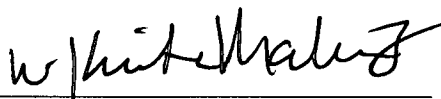
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Respondent/Appellant's Final Reply Brief complies with Rule 211(b).

July 5, 2016



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