

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 Lucille H. Ray,)
)
 Plaintiff,)
)
 vs.)
)
 City of Rock Hill, South Carolina, a)
 Municipal Corporation, and South)
 Carolina Department of Transportation, an)
 agency of the State of South Carolina,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 CASE NO. 2012-CP-46-03928

ORDER GRANTING PARTIAL
 SUMMARY JUDGMENT TO
 THE CITY OF ROCK HILL

RECEIVED

OCT 12 2016

SC Court of Appeals

FILED-RECEIVED
 2014 AUG 12 2 29 AM 9:30
 CLERK OF COURT
 C.C.P. & C.S.
 YORK COUNTY, SC

This matter came before me on June 18, 2014, upon the Motion for Summary Judgment of the Defendant City of Rock Hill ("City"). Representing Plaintiff were Richard B. Fennell and Charles S. Bradford, and representing the City was W. Mark White. Based on the record presented, I make the following findings and conclusions.

FACTUAL BACKGROUND

Plaintiff, Lucille Ray ("Mrs. Ray"), is a resident of the City of Rock Hill ("City"). She lives on College Avenue, a City maintained street, in a house approximately eighty years of age. This action stems from the fact that a 24" storm drain pipe extends from College Avenue directly underneath Mrs. Ray's house and through her property. No evidence has been presented from any party concerning who may have originally installed the pipe, who owns the pipe, or the existence of any easement for piping water across Mrs. Ray's property.

The portion of the City's storm drain system pertinent to this action collects, or receives from collection by others, storm water from an area comprising approximately 29 acres. The water so collected ultimately drains into the 24" pipe running under Mr. Ray's house, and to the rear of her property. The pipe begins at a City maintained catch basin on College Avenue directly in front of Mrs. Ray's property. The applicable portion of the City's system, showing the location of the streets and drainage pipes, is depicted on a map provided the Court as an exhibit in connection with the motion.

STATEMENT OF THE CASE

Mrs. Ray brought suit against the City on November 6, 2012, alleging it to be liable for

trespass and inverse condemnation. She amended her complaint in 2013 to include claims for injunctive relief, and for attorney's fees under S.C. Code Ann. §15-77-300 (1976, as amended). Mrs. Ray alleged that damage had begun to occur to her house as a result of the pipe underneath the house, and the stormwater which flowed through it. She alleged, and it is not disputed, that no easement of record exists giving any party the right to flow water across her property and under her house. Although Mrs. Ray alleged in her Complaint that the City installed the pipe under her house, no evidence supports that allegation. However, the City acknowledges discharging its collected storm water into the pipe.

In 2008, Mrs. Ray and City employees began to communicate on the subject of the storm water pipe on her property. Also, in 2008, Mrs. Ray noticed that her front steps appeared to be sinking, and asked for the City's assistance. She testified that she feared that a storm water pipe was running underneath her house. This action was not filed until 2012.

In response to Mrs. Ray's claims against it, the City's motion asserts that no genuine issue of material fact existed demonstrating a positive aggressive act causing damage to Mrs. Ray's property upon which to base an inverse condemnation claim, that the statute of limitations bars any claim, including the trespass claim, against the City, and that Mrs. Ray is not entitled to injunctive relief based on the facts of the case, as a matter of law.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where there is no genuine issue of material fact, and it is clear that the moving party is entitled to a judgment as a matter of law. Rule 56(c) SCRPC. "In determining whether any triable issues of fact exists, the evidence and all inferences which can be reasonable draw from the evidence must be viewed in the light most favorable to the non-moving party. . . . 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." *Hancock v. Mid-South Management Company, Inc.*, 381 S.C. 326, 329-330, 673 S.E.2d 801 (2009).

DISCUSSION

A. Inverse Condemnation Claim.

"To establish an inverse condemnation claim, a plaintiff must show (1) an affirmative, positive, aggressive act on the party of the governmental agency; (2) a taking; (3) the taking is for a public use; and (4) the taking has some degree of permanence." *Hawkins v. City of Greenville*, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (Ct.App. 2004). The only claim of a positive

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aggressive act by the City is that it has “. . . taken affirmative actions . . .” to collect stormwater into its stormwater system and channel it under her house. It does not allege the construction of any new improvements producing that result.

Hawkins, supra, is dispositive of Mrs. Ray’s inverse condemnation claim. In *Hawkins*, the trial court granted summary judgment to the City of Greenville, ruling that Hawkins’ allegations of affirmative acts would be appropriately characterized as failures to act, and therefore not actionable as inverse condemnation. The Court stated:

Hawkins has failed to allege any affirmative acts by the City which damaged the [plaintiff’s] property or otherwise diminished his rights in the property. Most of the City’s ‘acts’ he avers support his inverse condemnation claim are merely failures to act. Specifically, Hawkins asserts the City improperly allowed the development of neighboring parcels of commercial property which altered the elevation of the area and added strain to the Laurel Creek drainage pipes beyond their capacity and then failed to replaced these pipes. . . . Allegations of mere failure to act are insufficient.” *Id.*, 358 S.C. at 291, 594 S.E.2d at 562-563.

Here, no positive, aggressive act was committed. Mrs. Ray merely claims that the City collects water and causes it to go under her house. Standing alone, such an act does not support a claim of inverse condemnation. Mrs. Ray has pointed to no case which would categorize maintenance of the storm water system as a positive, aggressive act.

B. Trespass Claim.

“To constitute actionable trespass . . . there must be an affirmative act, the invasion of land must be intentional, and harm caused must be the direct result of that invasion.” *Hawkins, supra*, 358 S.C. at 296, 594 S.E.2d at 565-566. I find and conclude that the collection and discharge of water under Mrs. Ray’s house may be considered an affirmative, intentional act, causing damage to Mrs. Ray, leaving a genuine issue for trial as to the trespass claim. This finding is subject to my ruling on the City’s statute of limitations defense, which follows.

C. Statute of Limitations.

I find and conclude that in 2008, Mrs. Ray had sufficient knowledge or notice of the facts pertaining to the pipe under her house, and the City’s use of it, such that she knew, or should have known, of the existence of a claim for her damages against the City. Thus, the three year statute of limitations began to run at some time in 2008. See *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996); and, *Hedgepath v. American Tel. & Tel. Co.*, 348 S.C. 340, 559 S.E.2d 327 (Ct.App. 2001). This action was not commenced until November 6, 2012.

Nevertheless, I also find and conclude, under the standard for consideration of summary

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judgment, that the asserted trespass in this action presents a genuine issue of fact concerning whether it is abatable. Where the offending conduct or injury is abatable, the statute of limitations begins to run with each new invasion of a plaintiff's property. *Hedgepath, supra*. Since abatability is an issue of fact, Mrs. Ray's trespass claim survives as to each new invasion for the three years prior to November 6, 2009.

D. Injunctive Relief Claim.

Mrs. Ray's claim for injunctive relief against the City must fail as a matter of law. A threshold requirement for the right to injunctive relief is the lack of an adequate remedy at law. See *Levine v. Spartanburg Regional Services Dist., Inc.*, 367 S.C. 458, 626 S.E.2d 38 (Ct.App. 2005); and, *MailSource, LLC v. M.A. Bailey & Associates*, 356 S.C. 363, 588 S.E.2d 635 (Ct.App. 2003). The claim against the City for trespass represents an adequate remedy at law. Plaintiff could be made whole by a damage award on the trespass claim.

E. Attorneys' Fees and Costs.

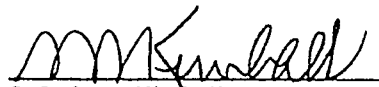
S.C. Code Ann. §15-77-300 (1976, as amended) provides that in actions brought by an agency of government, a party against whom suit is commenced may recover attorneys' fees and costs from the governmental agency, if the agency does not prevail. In this case, Mrs. Ray is the Plaintiff, and the governmental entities are Defendants. Thus, the statute is inapplicable to the posture of the parties in this case. It follows that the cause of action based on §15-77-300 must be dismissed.

CONCLUSION

For the reasons set forth herein, the City's Motion for Summary Judgment is granted as to Mrs. Ray's causes of action for inverse condemnation, injunctive relief, and statutory attorneys' fees and costs, and the same are dismissed with prejudice. As to the cause of action for trespass, the City's motion is denied; however, such ruling is subject to the limits imposed due to the application of the statute of limitations, as set forth above.

AND IT IS SO ORDERED.

August 8, 2014


S. Jackson Kimball
Special Circuit Court Judge
York County

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FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF YORK
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2012 CR 4693928

RECEIVED

Lucille H Ray Marshall A Rogers Rock Hill City Of

OCT 12 2016

SC Court of Appeals

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: W. Mark White Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRCP; Rule 41(a), SCRCP (Vol. Nonsuit);
 Rule 43(k), SCRCP (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRCP; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:
 ORDER INFORMATION

ORDER GRANTING PARTIAL SUMMARY JUDGMENT AS TO THE CITY OF ROCK HILL

This order ends does not end the case.
 Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if an amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

RECEIVED 8/13/14
 JAMES...

sl S. Jackson Kimball
Special Circuit Court Judge

3063
Judge Code

8/12/2014
Date

For Clerk of Court Office Use Only

This judgment was entered on August 12, 2014, and a copy mailed first class or placed in the appropriate attorney's box on August 12, 2014, to attorneys of record or to parties (when appearing pro se) as follows:

Charles S. Bradford
PO Box 977
York, SC 29745

William Mark White
PO Box 790
Rock Hill, SC 29731

Richard B. Fennell
James, Mcelroy & Diehl, PA
600 S. College Street
Charlotte, NC 28202

John Robert Devlin Jr.
PO Box 10387
Greenville, SC 29603-0387

Marshall A Rogers
328 College Avenue
Rock Hill, SC 29730

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP4603928

Lucille H Ray

Marshall A Rogers

REC'D - 15 APR 21

Rock Hill City Of

Restraint #2014CP4604100

COURT CLERK
C.C.C. & G.S.
YORK COUNTY, SC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	<input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
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- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): Affirmed; Reversed; Remanded; Other:

RECEIVED
OCT 12 2016
SC Court of Appeals

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

This matter came before me on April 15, 2015, upon motion of both Plaintiff and Defendant City of Rock Hill pursuant to Rule 59(e), SCRPC, asking the Court to alter or amend the Court's Order filed August 12, 2014. Representing the parties were: Richard B. Fennell and Charles S. Bradford for Plaintiff; and, W. Mark White for Defendant City of Rock Hill.

The purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the trial judge to "reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) (Citations omitted).

Upon reviewing the record presented, and considering the memoranda and arguments of counsel, I find no matter presented that was not addressed expressly or by clear implication in the prior order. I further find no basis for reconsideration or amendment of the court's rulings in the prior order. Therefore, it is ordered that both Plaintiff's and Defendant's motion pursuant to Rule 59(e), SCRPC, be denied.

AND IT IS SO ORDERED.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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OC
1

If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

M. Kenbell 3063 4/17/2015
 Special Circuit Court Judge Judge Code Date

For Clerk of Court Office Use Only

This judgment was entered on ⁴⁻²¹⁻¹⁵ and a copy mailed first class or placed in the appropriate attorney's box on ⁴⁻²¹⁻¹⁵ to attorneys of record or to parties (when appearing pro se) as follows:

Charles S. Bradford PO Box 977 York, SC 29745
 Richard B. Fennell James, Mcelroy & Diehl, PA 600 S.
 College Street Charlotte, NC 28202
 Marshall A. Rogers 328 College Avenue Rock Hill, SC
 29730

William Mark White PO Box 790 Rock Hill, SC 29731

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP460400

RECEIVED

Lucille H Ray Rock Hill City Of
OCT 12 2016

PLAINTIFF(S) DEFENDANT(S)
Submitted by: Attorney for: Plaintiff Defendant
 Self-Represented Litigant

SC Court of Appeals

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
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 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 - Affirmed;
 - Reversed;
 - Remanded;
 - Other: _____

2016 SEP 13 PM 1:08
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DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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D. Garrison Hill
Circuit Court Judge

2138
Judge Code

9-13-16
Date

For Clerk of Court Office Use Only

This judgment was entered on September 13th, 2016, and a copy mailed first class or placed in the appropriate attorney's box on September 13th, 2016, to attorneys of record or to parties (when appearing pro se) as follows:

Charles S. Bradford PO Box 977 York, SC 29745
Richard B. Fennell James, Mcelroy & Diehl, PA 600 S.
College Street Charlotte, NC 28202

William Mark White PO Box 790 Rock Hill, SC 29731

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter: Aileen Butler

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

At the call of the case, and after the court's ruling on the City's motion in limine, the Plaintiff acknowledged that it would not be possible to meet her burden of proof, and the court, concurring, granted directed verdict in Defendant's favor. Given Judge Kimball's ruling on summary judgment, only an abatement trespass remained a viable cause of action. Because the court excluded Plaintiff expert Leonard's opinion testimony as unreliable concerning abatement, the trespass cause of action became unviable, and with no genuine issues of material fact remaining, City was entitled to judgment as a matter of law.