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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS
J. Durham Cole, Circuit Court Judge

Appellate Case No. 2017-001943
Circuit Court Case No. 2016-CP-42-04147

ABB, Inc, and BFP, LP, a/k/a
Bullington Family Partnership, Respondents,

v.

Integrated Recycling Group
Of SC, LLC, John Murphy Armstrong, Jr., and
Michael T. Armstrong, Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

J. Falkner Wilkes (SC Bar #12893)
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(864) 282-1292
(864) 271-6035 (facsimile)

On behalf of Appellants, Integrated
John Murphy Armstrong, Jr., *and*
Michael T. Armstrong, *and*
Integrated Recycling Group of SC, LLC

TABLE OF CONTENTS

Table of Authorities i

Argument

- I. STRIKING OF ANSWER BASED ON LACK OF CORPORATE REPRESENTATION AT HEARING WAS NOT SUPPORTED BY THE FACTS WHERE THE ANSWER WAS FILED BY ATTORNEY WHO REPRESENTED CORPORATION AT THE TIME ANSWER WAS FILED.
- II. THE APPELLANTS' AFFIDAVIT MET THE REQUIREMENTS OF RULE 56.
- III. THE "PERSON STAKE" OF APPELLANTS' AND ISSUE OF STANDING IS NOT PRESERVED FOR APPELLATE REVIEW WHERE THE ISSUE WAS NOT RAISED OR RULED ON BY TRIAL COURT.
- IV. THE APPELLANTS RAISED THE ISSUE OF ATTACHMENT OF MORTGAGE IN THE COURT BELOW.

TABLE OF AUTHORITIES

Cases

Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002)

Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 673 S.E.2d 801 (2009)

R.J. Hendricks, II v. Clemson Univ., 353 S.C. 449, 455, 578 S.E.2d 711, 714 (2003)

Renaissance Enter. v. Summit Teleservices, 515 S.E.2d 257, 334 S.C. 649 (S.C. 1999)

Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998)

Rules

Rule 56(c), SCRCP.

ARGUMENT IN REPLY

I. STRIKING OF ANSWER BASED ON LACK OF CORPORATE REPRESENTATION AT HEARING WAS NOT SUPPORTED BY THE FACTS WHERE THE ANSWER WAS FILED BY ATTORNEY WHO REPRESENTED CORPORATION AT THE TIME ANSWER WAS FILED.

At the time the Corporate Appellant filed its answer in the case it was represented by counsel. The answer of the Corporate Appellant was therefore properly filed. While the corporate defendant did not have counsel of record at the time of the hearing, and no counsel appeared, striking the Answer that was properly filed was unsupported by the facts. Renaissance Enter. v. Summit Teleservices, 515 S.E.2d 257, 334 S.C. 649 (S.C. 1999), cited by Respondent, held only that corporations can not be represented by non-attorneys in the circuit and appellate courts. It did not address nor does it extend to require the striking of an answer otherwise properly filed.

II. THE APPELLANTS' AFFIDAVIT MET THE REQUIREMENTS OF RULE 56.

Under Rule 56(e), an affidavit or verified complaint must meet three criteria to be considered by the court: (1) it must be made upon personal knowledge; (2) it must set forth facts admissible in evidence; (3) it must show that the affiant is competent to testify to the matters stated therein. Here the Appellants' affidavit identified the affiants as parties in the case and owners of the Corporate Defendant. (Aff Par 1). The affidavit further alleges facts that would be admissible in evidence. As the owners of the Corporate leasee, affiants would be competent to testify to concerning the facts and issues involved. To the extent that the affidavit states the terms of the BLC mortgage on the property where the property at issue was installed, it makes reference to the mortgage which is attached as an exhibit. (Aff). The affidavit is sufficient to meet the requirements of Rule 56(e) and be considered by the court.

III. THE “PERSON STAKE” OF APPELLANTS’ AND ISSUE OF STANDING IS NOT PRESERVED FOR APPELLATE REVIEW WHERE THE ISSUE WAS NOT RAISED OR RULED ON BY TRIAL COURT.

The Respondent argues that the Appellants have submitted no evidence of any “personal stake” in their landlord’s lender’s priority to the Pelletizer to establish standing. The issue of standing and any lack of evidence as to the Appellants’ “personal stake” can not be raised for the first time on appeal. The Respondent failed to argue the issue below and obtain a ruling on the issue of standing. Absent the issue being litigated and ruled upon, there is nothing for this Court to review. To preserve an issue for appellate review, a matter may not be raised for the first time on appeal, but must have been both raised to and ruled upon by the trial court. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998).

IV. THE APPELLANTS SUFFICIENTLY RAISED THE ISSUE OF ATTACHMENT OF MORTGAGE IN THE COURT BELOW TO PRESERVE THE ISSUE FOR APPEAL:

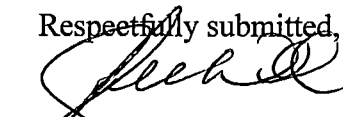
The Appellants presented evidence by way of affidavit and attachments. The affidavit of the individual Appellants provides that on August 30, 2002, BLC Capital Corporation obtained a mortgage on the property where the property at issue is located. (Aff). The mortgage attaches to all fixtures. (Aff). In 2006, the Respondents loaned money to purchase the heavy equipment that was installed in the building encumbered by the mortgage. (Aff). The Respondents did not file a UCC financing statement as to the equipment until 2011. (Aff). There was sufficient evidence offered in the lower court to put the timing and validity of the Respondent’s UCC statement at issue. The circuit court addressed the Respondent’s claim by ruling that the equipment at issue was personal property and therefore not subject to the BLC mortgage. On appeal, Respondent’s

argue that the court erred in finding that the heavy equipment installed in the building constituted personal property. As a fixture, Respondent's argue that the BLC mortgage attached due to the lack of a consistent valid UCC. This is the same issue raised below. Because the issue was ruled on as a motion for summary judgment, any evidence of the BLC mortgage attaching requires the motion be denied. "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRPC." Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). The Court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. R.J. Hendricks, II v. Clemson Univ., 353 S.C. 449, 455, 578 S.E.2d 711, 714 (2003). 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-S. Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). The issue on appeal was adequately raised and ruled on below to be preserved for appellate review.

CONCLUSION

The decision of the circuit court should be reversed and the case remanded for further proceedings.

Respectfully submitted,



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April 18, 2018.

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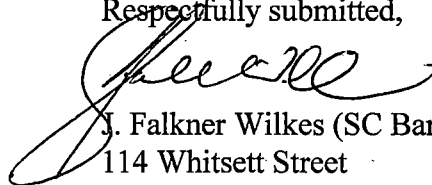
Integrated Recycling Group Of SC, LLC, *and*
John Murphy Armstrong, Jr., *and*
Michael T. Armstrong, Appellants.

CERTIFICATE OF SERVICE

I certify that on April 18, 2018, I served the Appellants' Initial Reply Brief on the Respondents by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record as indicated below and by facsimile if so indicated:

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