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.

BRIEF OF APPELLANTS

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

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the circuit court err in granting summary judgment?

2. Did the circuit court err in classifying the equipment at issue as personal property rather than a fixture?

3. Did the circuit court err in failing to find that the Plaintiffs' lost priority to mortgage holder when the Plaintiffs' UCC-1 lapsed?

STATEMENT OF THE CASE

This action was initiated by Gregory Jacobs English, Esq., in Spartanburg County on behalf of ABB, Inc., and BFP, LP filing a Summons and Complaint on November 21, 2016. Koger M. Bradford, Esq., and W. McElhaney White, Esq., of Holcombe Bomar, LLC, filed an answer on behalf of Integrated Recycling Group of SC, LLC. Richard Stewart, Esq., filed an answer on behalf of John Murphy Armstrong, Jr., and Michael T. Armstrong. Counsel for Integrated Recycling Group of SC, LLC, was subsequently relieved as counsel of record. Plaintiffs filed Motions for Summary Judgment and to Strike the Answer of Integrated Recycling Group of SC, LLC. A hearing was held on July 31, 2017, before the Honorable J. Derham Cole, Circuit Court Judge. As a result of the hearing an Order was entered granting the Plaintiffs' motions. An appeal was timely filed. J. Falkner Wilkes has substituted as counsel for Richard Stewart and represents all Appellants.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE FACTS IN RECORD, TAKEN IN LIGHT MOST FAVORABLE TO THE APPELLANTS, WERE SUFFICIENT TO CREATE A MATERIAL QUESTION OF FACT.

The parties presented this case in the posture of a motion for summary judgment; thus, it is governed by Rule 56(c) of the South Carolina Rules of Civil Procedure. This rule provides a motion for summary judgment shall be granted "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 reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000).

"Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). This initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the non-moving party's case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent's claim. *Id.* Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial. *Id.*; Rule 56(e), SCRCP.

"In determining whether any triable issues of fact exist, the court must view the evidence

and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (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 S.C., 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002). Moreover, because summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. Madison *ex rel.* Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006). Lord v. D & J Enterprises, Inc., 407 S.C. 544, 552–53, 757 S.E.2d 695, 699 (2014).

Here the circuit court erred in holding that there was no material question of fact as to the characterization of certain industrial equipment (60 Ton Air Cooled Pelletizing Machine/Cooler) as personal property. In doing so the court overlooked facts alleged by the Defendants in their affidavits and attachments. The affidavit of Defendants Michael T. Armstrong and John Murphy Armstrong provided that the Pelletizer is "large" and "heavy equipment" that was "installed in the building" such that it constitutes a fixture. (R. p. 219-220). Plaintiff alleged only that the equipment was personal property because it "can be removed from the real property without damaging it."

The nature of the equipment as a fixture is important, as the Defendants' affidavit further alleged that the Plaintiff's UCC-1 was not filed until 2011, and that the mortgage on the real

estate attached to the equipment as a fixture. (R. p. 219-220). Plaintiffs alleged an earlier filing but admitted a lapse in 2011. (R. p. 239). The record shows that at the time of the lapse the mortgage on the property where the equipment was installed was in effect and provided for the attachment of any fixtures. (R. p. 211-236). Although the evidence is sparse, it is sufficient to create a question of fact as to the nature of the equipment once attached to the real property.

In this case the trial court failed to state the standard by which it determined the property in question was a fixture, nor did it state the facts on which it relied. But by any standard, the evidence is sufficient to create a question of fact as to the nature of the equipment as a fixture. The equipment at issue, a 60 Ton Air Cooled Pelletizing Machine/Cooler, was anchored to the ground on property used as a recycling plant. (R. p. 219-220). Here, the nature of the equipment as a fixture is established by its attachment, purpose, and intent as related to the property. "Fixtures" means goods that have become so related to particular real property that an interest in them arises under real property law. S.C. Code Ann. § 36-9-102 (41). Defendants had an ownership interest in the real property. (R. p. 219-236). Intent to make the equipment a fixture is inferred by its attachment:

> There are roughly two classes into which the parties may be divided: (1) where the subject matter of the controversy has been placed on the premises by the owner of the fee simple title, and (2) where it has been so placed by one owning less than a fee simple title. To the first class belongs the relationship of vendor and vendee, while to the second class belongs the relationship of landlord and tenant. The rules applicable to the two classes are not the same:It is considered more probable that an improvement, placed on the premises by the owner of the fee, was placed there for the betterment of his estate and during its continuance, which is deemed perpetual. On the other hand, it is considered more probable that an improvement, placed on the premises by one who did not own the fee, was placed there for his personal convenience and during the limited term of his estate.

Planter's Bank v. Lummus Cotton Gin Co., 132 S.C. 16, 128 S.E. 876, at 878 (1925); Hyman v. Wellman Enterprises, Inc., 337 S.C. 80, 85–86, 522 S.E.2d 150, 152–53 (Ct. App. 1999)." By attaching the 60 Ton Air Cooled Pelletizing Machine/Cooler to the real estate the Defendants made an improvement to property in which they held an ownership interest. Accordingly, the intent is presumed to be for the betterment of the property which, in this case was an industrial site. *See* Hyman v. Wellman Enterprises, Inc., 337 S.C. 80, 85–86, 522 S.E.2d 150, 152–53 (Ct. App. 1999).

In further examination of the intent of the Defendants in attaching the equipment to the property, the very nature of the equipment, a 60 Ton Air Cooled Pelletizing Machine/Cooler, being attached to industrial property used as a recycling plant is evidence that its prospective use corresponds to the land's intended use:

> In their quest for intention, the modern cases lay greatest stress on the character of the annexed property 'as related to the uses to which the land has been appropriated; it being regarded as a fixture only in case there is a correspondence between its character, and consequently its prospective use, and the use to which the land is devoted.' Planter's Bank v. Lummus Cotton Gin Co., supra, at p. 24, 132 S.C., at p. 879, 128 S.E. Gilbert v. Easterling (1950) 217 S.C. 267, 276, 60 S.E.2d 595, is an apt illustration of this 'use factor' as evidence of intention.

Am. Tel. & Tel. Co. v. Muller, 299 F. Supp. 157, 160 (D.S.C. 1968).

The determination whether or not an item is a fixture is a mixed question of law and fact. Carson v. Living Word Outreach Ministries, Inc., 315 S.C. 64, 70, 431 S.E.2d 615, 618 (Ct.App.1993). "It is incumbent on the court to define a fixture, but whether it is such in a particular instance depends upon the facts of that case, unless the facts are susceptible of but one inference." *Id.* Here the 60 Ton Air Cooled Pelletizing Machine/Cooler was installed on the property it was bolted to the floor. In a similar case, although removed from the property of a

church, church pews that were built for a church and bolted to the floor were held to be fixtures. *See* Sims v. Williams, 441 S.W.2d 385 (Mo.Ct.App.1969) *cited by* Carjow, LLC v. Simmons, 349 S.C. 514, 519–21, 563 S.E.2d 359, 362–63 (Ct. App. 2002). Here the 60 Ton Air Cooled Pelletizing Machine/Cooler became a fixture when installed and bolted to the floor to serve the purpose to which the property was dedicated.

In the present case the evidence offered at the motion for summary judgment, and all resulting inferences, when taken in light most favorable to the Defendants, could reasonably support a finding that the equipment became a fixture when it was anchored to the ground and attached to the building. In light of the standard applicable for summary judgment, the circuit court erred in finding that the property in question was personal property.

As a result of the error in characterizing the equipment as personal property the court failed to address the facts concerning whether the lapse of the Plaintiffs' UCC-1 in 2011 caused a loss of priority, such that the fixture provision of the mortgage primed that of Plaintiffs' claim. Here, the equipment was attached to property subject to a mortgage containing a fixture provision. (R. p. 219-236). "That an annexation to the property covered by a mortgage, if a fixture, becomes subject to the lien of the mortgage, notwithstanding the fact that it took place after the mortgage was executed, appears to be settled." Planter's Bank v. Lummus Cotton Gin Co., 132 S.C. 16, 128 S.E. 876, 878 (1925). The equipment at issue being a fixture, gives rise to the question of whether the Defendants' action was then affected by loss of priority to the mortgage's fixture clause once the UCC-1 lapsed. (R. p. 219-236).

Plaintiffs' action relies on a priority established by the filing of a UCC-1. Plaintiffs admitted that their UCC-1 lapsed in 2011, but allege that a UCC-1 was subsequently filed. (R. p.

239). Once lapsed, the refiling of a UCC-1 by the Plaintiffs' is only effective as of the date of the subsequent filing and does not relate back to a prior filing of the lapsed UCC-1, thus allowing the mortgage fixture clause to prime the Plaintiffs' claim. S. C. Code § 36-9-515. *Duration and effectiveness of financing statement; effect of lapsed financing statement* provides:

> (a) Except as otherwise provided in subsections (b), (e), (f), and (g), a filed financing statement is effective for a period of five years after the date of filing.
> (b) Except as otherwise provided in subsections (e), (f), and (g), an initial financing statement filed in connection with a public-finance transaction or manufactured-home transaction is effective for a period of thirty years after the date of filing if it indicates that it is filed in connection with a public-finance transaction or manufactured-home transaction.
> (c) The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless before the lapse a continuation statement is filed pursuant to subsection (d). Upon lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise. If the security interest or agricultural lien becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value.

S.C. Code Ann. § 36-9-515.

In interpreting similar provisions of its UCC the Maine court held:

> Except as provided in subsection (6)5, a filed financing statement is effective for a period of 5 years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of the 5–year period unless a continuation statement is filed prior to the lapse ... Upon lapse, the security interest becomes unperfected, unless it is perfected without filing. If the security interest becomes unperfected upon lapse, it is deemed to have been unperfected as against a person who became a purchaser or lien creditor before lapse.
>
> The commentary following this section notes that "[u]nder subsection (2) the security interest becomes unperfected when filing lapses. Thereafter, the interest of the secured party is subject to defeat by purchasers and lienors even though before lapse the conflicting interest may have been junior." U.C.C. § 9–403 cmt. (1972). This is true even where the originally junior creditor had actual knowledge of the previously superior interest. State Savings Bank v. Onawa State Bank, 368 N.W.2d 161, 166 (Iowa 1985); General Electric Credit Corp. v. Isaacs, 90 Wash.2d 234, 581 P.2d 1032, 1035–37 (1978). Thus, Pepperell

> lost its priority as against Mountain Heir when its original filing expired without the statutorily required continuation statement.

Pepperell Tr. Co. v. Mountain Heir Fin. Corp., 1998 ME 46, ¶ 8, 708 A.2d 651, 654.

Other jurisdictions have held similarly: "That the filing of a second financing statement, with or without the debtor's signature, in an effort to revive a lapsed financing statement, does not permit the continuous perfection of the lapsed financing statement." In re Abell, 66 B.R. 375, at 381 (Bankr.N.D.Miss.1986). The court went on to state that "since there was no continuous perfection, this date [filing of second financing statement after lapse] cannot relate back to the date of the filing of the original financing statement." Abell, at 381. In the present case, once Plaintiffs' UCC-1 lapsed in 2011, the BLC mortgage fixture clause attached and moved ahead in priority over the Plaintiffs' claim. BLC's priority remained unaffected by any subsequent filings of UCC-1s by the Plaintiffs. Therefore, at the time of this action, the Plaintiffs' claim was junior to that of BLC Capital Corporation under BLC's mortgage fixture clause. The circuit court therefore erred in holding that BLC's mortgage had not attached to the equipment at issue.

CONCLUSION

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

Respectfully submitted,

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July 8, 2018.