THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas
The Honorable R. Keith Kelly, Circuit Court Judge

Case No: 2014-CP-11-0938
Appellate Case No.: 2017-002171

Joey Lemmons, d/b/a Rugs International, ...Appellant,

v.

Macedonia Water Works, Inc., ...Respondent,

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT?

2. DOES THE RECORD CREATE A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE FIRE SPRINKLER SYSTEM USED FOR THE APPELLANT'S PROPERTY FALLS UNDER THE SCOPE OF S.C. CODE ANN. § 58-5-390?

3. DID THE TRIAL COURT PROPERLY APPLY THE SCINTILLA OF EVIDENCE STANDARD IN THIS CASE?

4. DID THE TRIAL COURT PROPERLY VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY (APPELLANT) IN THIS CASE?

5. DID THE APPELLANT TIMELY SERVE THE APPEAL IN THIS CASE?

6. DOES THIS COURT HAVE JURISDICTION TO HEAR THIS MATTER?

STATEMENT OF THE CASE

On November 24, 2014 the Appellant Joey Lemmons, d/b/a Rugs International (hereinafter "Appellant") filed an action in the Cherokee County Court of Common Pleas seeking, *inter alia*, actual and consequential damages from the Respondent for allegedly violating S.C. Code Ann. §58-5-390 (2015). Respondent Macedonia Water Works, Inc. (hereinafter "Respondent") filed a timely Answer to this action on January 15, 2015 with the Cherokee County Clerk of Court's Office. On June 16, 2016, the Respondent filed a Motion for Summary Judgment pursuant to Rule 56, South Carolina Rules of Civil Procedure. On January 6, 2017, the hearing of the Respondent's Motion was heard before The Honorable R. Keith Kelly. On March 23, 2017, an Order granting the Respondent's summary judgment was filed and transmitted electronically to the parties by the South Carolina e-filing system. On April 4, 2017, the Appellant filed and served a Notice of Motion and Motion to Reconsider pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. On September 21, 2017, an Order denying the Motion to Reconsider was filed in the Cherokee County Clerk of Court's Office. On October 15, 2017, the Appellant served his Notice of Appeal in this matter.

ARGUMENTS

Standard of Review

The basis for the current action centers on an Order granting summary judgment in favor of the Respondent from the circuit court pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure. This rule provides that 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 under Rule 56(c), SCRCP." Bovain v. Canal Ins., 678 S.E.2d 422, 425, 383 S.C. 100, 105 (2009), (citing Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000)).

"[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 2565 (1986). Summary judgment expedites the disposition of those cases that do not require a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 422 (2003). When considering a motion for summary judgment, the Court must consider all of the documents and evidence within the record, including pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. Higgins v. Medical University of South Carolina, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997). In its consideration of a motion for summary judgment, the Court views evidence and draws all inferences in the light most favorable to the non-moving party. Tom Jenkins Realty, Inc. v. Hilton, 278 S.C. 624, 300 S.E.2d 594 (1983).

1. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE NO GENUINE ISSUE AS TO ANY MATERIAL FACT EXISTED.

By way of background, this matter centers on a parcel of property and building located in Cherokee County, South Carolina that is owned by the Appellant and known as the Rugs

International building. The Appellant purchased this property in 1999 and has since that time obtained water service from Respondent. (R. p. 15, ¶ 4). Prior to the filing of this case, the Appellant received water service through a compound water meter. (R. p. 16, ¶ 8). The Appellant did not purchase or install the compound water meter described in his Complaint as said compound water meter was already installed when Appellant purchased the Rugs International building in 1999. (R. p. 70, ¶ 5).

S.C. Code Ann. § 58-5-390 (2015), which is entitled "Tap fees for installation and maintenance of fire sprinkler system; exception," was enacted by Act No. 357 of 2008 (effective June 25, 2008), as amended by Act No. 232 of 2010 (effective June 7, 2010).

S.C. Code Ann. § 58-5-390 (2015) states:

> (A) A publicly or privately owned utility may not impose a tap fee, other fee, or a recurring maintenance fee of any nature or however described for the installation and maintenance of a fire sprinkler system that exceeds actual costs associated with the water line to the system.
>
> (B) For purposes of this section, actual costs include direct labor, direct material, the necessity of increased capacity, and other direct charges associated with the separate fire sprinkler line. The direct costs must be documented by either an invoice or work order that specifically assigns the costs to the separate fire sprinkler line. Nothing in this section may be construed as requiring a utility to provide service to support a private fire protection system.
>
> (C) Nothing in this section shall give the commission or the regulatory staff any power to regulate or interfere with public utilities owned or operated by or on behalf of any municipality, county, or regional transportation authority as defined in Chapter 25 of this title or their agencies.

(emphasis added) S.C. Code Ann. § 58-5-390 (2015)

Pursuant to the Bylaws of the Macedonia Water Works, Inc., and S.C. Code Ann. § 33-36-280 (2006), the Respondent has independent rate making authorization and its rates are not

subject to oversight or regulation by any governmental or regulatory body. (R. p. 20, ¶ 6(a)). Since 1999, Respondent has charged Appellant the minimum charge for an eight-inch water meter. (R. pp. 21-22, ¶ 9). Appellant alleges Respondent has violated S.C. Code Ann. § 58-5-390 (2015) by over-billing Appellant for its water meter connection.

Appellant's entire case rests upon whether Appellant's water meter connection constitutes a "separate fire sprinkler line" as contemplated by S.C. Code Ann. § 58-5-390 (2015). As noted below and confirmed by both Appellant's and Respondent's respective experts, the Appellant does not have a separate fire sprinkler line. Appellant's case and his allegations are without merit and no evidence has been produced by Appellant as to the existence of a separate fire sprinkler line.

In Paragraph 7 of Appellant's Complaint, Appellant states: "Appellant's business is housed in very large building which is protected by an interior sprinkler system. This sprinkler system requires an Eight (8) inch water line/water tap for fire protection needs." (R. p. 15, ¶ 7). Moreover, Appellant asserts his business has a compound water meter that is actually two meters in one: an eight-inch meter and a two-inch meter. (R. p. 16, ¶ 8). However, through the discovery in this case, it has been determined Appellant's by-pass line is actually a four-inch line rather than a two-inch line. (R. p. 158)

Appellant and Respondent are in agreement as to the type and configuration of Appellant's water meter. In such a metering arrangement, the single metering apparatus contains both a meter for an eight-inch line and a meter for a four-inch by-pass water line. (R. p. 158). A compound meter arrangement is commonly used where it is expected that the volume of water flowing through a water line may, for any reason, vary dramatically from time to time. A larger water meter, like the Appellant's eight-inch meter, cannot accurately measure low water

volumes. In a compound water meter, water passes through the smaller meter when low volumes of water are required, and automatically engages the larger meter when the customer needs greater volumes of water. (R. pp. 158-159). Within the compound meter assembly there exists a valve that closes when flow is low, forcing all water flow into the smaller, four-inch meter; once the flow increases above a certain level, the valve opens, water ceases to flow through the smaller meter and is directed through the large eight-inch meter. (R. p. 159). The Appellant's compound meter is able to meter all volumes of water flowing through its water line while permitting the volume to vary without the need for any action by the Appellant or Respondent.

Appellant argues that "[w]ater flows through the [four] inch portion of this compound meter for regular water use or consumption. In case of a fire, the higher water flow would open the Eight (8) inch valve of this compound meter to allow the larger flow of water required by the sprinkler system." (R. p. 16, ¶ 9). Appellant fails to acknowledge that the eight-inch line is not limited to fire service only as the eight-inch line serves the entire Rugs International building, and that water capacity is available to the Appellant at any time and for any purpose. (R. p. 159)

A compound meter arrangement does not create and does not constitute a separate fire line as contemplated by S.C. Code Ann. § 58-5-390 (2015). Appellant does not have a separate fire sprinkler line. The use of a compound meter "is purely for improvement in the measurement of flow in the system and has no bearing on whether the water is used for fire sprinklers or other water consumption." (R. p. 159). Further, Appellant's compound meter has "no capability to differentiate between the volume of water consumed by the commercial usage of the facility from the volume of water consumed by the fire sprinkler system." (R. p. 159). Appellant has

misconstrued, misapplied and attempts to abuse the provisions of S.C. Code Ann. § 58-5-390 (2015).

Prior to the filing of this case, with the consent of Appellant and in the presence of Appellant and Appellant's counsel, Respondent's expert, William H. Bingham, Jr., a Professional Engineer with American Engineering Consultants, Inc., inspected the Appellant's metering pit and water service configuration. After Mr. Bingham's physical on-site inspection of the Appellant's system, Mr. Bingham provided the following conclusions in his engineering opinion dated June 8, 2015:

> At the Rugs International site, the installation has a single 8" x 4" compound water meter that serves both commercial water service for several different businesses inside and outside of the building as well as a fire sprinkler system. This configuration is a dual-purpose or compound commercial water and fire sprinkler service meter connection. There is no separate metering of the commercial water and the fire sprinkler water consumption. There are no backflow preventers installed outside between the 8" water meter and the 4" water meter that are a part of the compound meter assembly to separate the fire sprinkler system from the commercial potable water system.
>
> Therefore, it is our professional engineering opinion that (1) the 8" compound meter currently in use by Rugs International is not a separate or dedicated fire service meter, (2) the provisions of SC Code § 58-5-390 limiting the fees that may be charged for fire sprinkler service are not applicable to this installation, (3) the fee structure of Macedonia is typical and rates are reasonable, and (4) the billing for a base charge on an 8" meter by Macedonia to Rugs International is an appropriate and proper interpretation given the current installation.

(emphasis added) (R. p. 163)

At the request of Appellant's counsel, the Appellant's expert Jeffrey A. Walker, the general manager of Inman-Campobello Water District (ICWD), reviewed the report issued by Mr. Bingham and thereafter issued a written statement, dated August 10, 2016, to the parties in this case. In his letter, Mr. Walker states: "since all of the water for this customer flowed

through this meter assembly and therefore, this was not a connection dedicated to fire protection only, the ICWD would not consider this a private fire protection line." (emphasis added) (R. p. 150, ¶ 4) Mr. Walker further states: "[t]herefore, given the same meter and the same or similar industry [model], the ICWD would bill the customer the minimum bill for an 8-inch meter plus any consumption that exceeded the amount that is included in the minimum charge." (R. p. 150, ¶ 5). Mr. Walker further added, "[e]ven though the meter assembly is comprised of two meters, it is still considered an 8-inch meter." (emphasis added) (R. p. 150, ¶ 5).

In answering the question of whether Appellant maintains a separate fire sprinkler line, the Respondent and industry professionals, including the Appellant's own expert, have concluded that the Appellant does not have a separate fire sprinkler line. (R. p. 150, ¶ 4)

The circuit court correctly determined that the outcome of this case turned entirely upon whether Appellant's water meter and line configuration constituted a separate fire service line as a matter of law. If it does not, then S.C. Code Ann. § 58-5-390 (2015) is not applicable to the Respondent in this case. Appellant failed to produce any coherent or cogent argument that S.C. Code Ann. § 58-5-390 (2015) should apply; summary judgment was the appropriate outcome. "To survive summary judgment, the evidence presented must amount to more than mere speculation and conjecture." McKnight v. S.C. Dep't of Corrs., 385 S.C. 380, 684 S.E.2d 566 (Ct. App. 2009). Therefore, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Moore v. Barony House Restaurant, LLC , 382 S.C. 35, 674 S.E.2d 500 (Ct. App. 2009); USAA Property and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 661 S.E.2d 791 (2008). In considering a motion for summary judgment, a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. Gauld v. O'Shaugnessy Realty Co., 380 S.C.

548, 671 S.E.2d 79 (Ct. App. 2008). Accordingly, summary judgment is then appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002).

2. THE COURT OF APPEALS LACKS JURISDICTION TO HEAR THIS MATTER BECAUSE THE APPEAL WAS NOT TIMELY FILED.

As previously stated, an Order granting summary judgment was filed at the Cherokee County Clerk of Court's Office on March 23, 2017 at 11:59 a.m. (R. pp. 1-8). This Order was then sent to the attorneys of record via the Attorney Information System (AIS) at 12:00 p.m. that same day. (Supp. R. p. 1). Twelve days later, the Appellant then filed his Notice of Motion and Motion to Reconsider pursuant to Rule 59(e), South Carolina Rules of Civil Procedure on April 4, 2017, and likewise served his Motion on the parties via the AIS on April 4, 2017. Rule 59(e) of the South Carolina Rules of Civil Procedure states "A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." (emphasis added) Rule 59(e) SCRCP. On September 21, 2017, the circuit court entered an Order denying the Appellant's Motion to Reconsider. (R. pp. 9-11). On October 15, 2017, the Appellant served his Notice of Appeal in this matter.

A party must file a notice of appeal from the order of the circuit court within thirty (30) days after receipt of written notice of entry of the order or judgment. Rule 203(b)(1), SCACR. This rule also states "When a timely motion...to alter or amend the judgment...has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion." (emphasis added) Rule 203(b)(1), SCACR, Coward Hund Constr. Co. v. Ball Corp., 336 S.C. 1, 518 S.E.2d 56 (Ct.App.1999).

In the instant case, the circuit court filed its Order granting summary judgment on March 23, 2017 and served it nearly simultaneously via the AIS. "[A]n e-mail sent from the court, an attorney of record, or a party that provides written notice of entry of an order or judgment triggers the time for servicing a notice of appeal for purposes of Rule 203(b)(1), SCACR." Wells Fargo Bank v. Fallon Props. S.C., LLC Op. No. 27773 (S.C. Sup. Ct. filed Feb. 28, 2018). Accordingly, the Appellant would ordinarily have had until April 2, 2017 to serve their Motion to Reconsider, except that date was a Sunday. Consequently Appellant had until April 3, 2017 (Monday), which was not a federal holiday, to file his motion. Rule 6(a), SCRCP. Appellant failed to serve his Motion to Reconsider, however, until Tuesday, April 4, 2017. Therefore, Appellant's motion was untimely. Accordingly, Appellant's thirty-day time period to file a Notice of Appeal was not stayed pursuant to SCACR 203(b)(1). This thirty-day period began to run on March 23, 2017. Appellant's deadline to file a Notice of Appeal therefor would have been Monday April 24, 2017. The Notice of Appeal was not served until October 15, 2017. Because the Appellant did not timely serve his Notice of Appeal, this Court does not have subject matter jurisdiction to hear this matter. Canal Ins. Co. v. Caldwell, 524 S.E.2d 416, 338 S.C. 1, 6 (Ct. App., 1999)

CONCLUSION

There is no genuine issue of material fact that remains in dispute in this case. Appellant was served by a compound water meter, connected to a single water line that supported both potable water service and Appellant's sprinkler system. The only matter in dispute is whether, as a matter of law, the configuration falls under S.C. Code Ann. § 58-5-390 (2015) as a "separate fire line." The circuit court correctly determined that it does not. Therefore, moving in a light most favorable to the Appellant, Respondent submits, based upon the law that applies in this case

and considering the Appellant's evidence in a light most favorable to the Appellant, there remains no evidence or genuine issues of material fact as to the foregoing issues and the motion for summary judgment was correctly decided by the circuit court. Irrespective of the immense lack of evidence and the plain language of S.C. Code Ann. § 58-5-390 (2015), as discussed *infra*, the Appellant did not timely serve his Notice of Appeal, and this matter should be dismissed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

We certify that the Final Brief of Respondent complies with South Carolina Appellate Rule 211(b).

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