

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jennifer B. McCoy

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SC Court of Appeals

Trial Court Case No.: 2018-CP-10-00323
Appellate Case No.: 2019-000574

Elizabeth Lofton,.....Appellant,

v.

Berkeley Electric Cooperative, Inc. and
John Lucas Tree Expert, Co.,.....Respondents.

BRIEF OF RESPONDENT
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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT AGAINST LOFTON ON THE GROUNDS THAT SHE WAS NOT A REAL PARTY IN INTEREST WHERE LOFTON FAILED TO TIMELY PRESENT ANY AFFIDAVITS OR ANY OTHER FACTUAL MATERIALS IN OPPOSITION?
- II. DID THE TRIAL COURT ERR IN DISREGARDING LOFTON'S MOTION TO SUBSTITUTE THE TRUST AS PLAINTIFF WHERE SHE NEGLECTED TO TAKE SUCH ACTION FOR YEARS AND FILED HER MOTION TO AMEND ON THE DAY RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT WERE HEARD?

STATEMENT OF THE CASE

This is an appeal from the trial court's grant of summary judgment to Berkeley Electric Cooperative, Inc., ("BEC") and John Lucas Tree Expert, Co., ("Lucas Tree") on February 22, 2019. Record on Appeal (hereinafter, "R."), p. 137. Plaintiff Elizabeth Lofton ("Lofton") initially filed this action against BEC on July 1, 2015, alleging that BEC had fraudulently obtained a right-of-way easement over her property, trespassed on her property, converted her personal property, negligently harmed her real and personal property, illegally cut her timber, and engaged in unfair trade practices. R. pp. 1-11. On December 29, 2015, Lofton moved to amend her complaint to add Lucas Tree as a defendant. R. p. 12. The motion was granted pursuant to consent order and the Amended Complaint was filed on January 19, 2016. R. p. 14; R. p. 16. BEC answered the amended complaint on February 8, 2016. R. p. 29. Lucas Tree filed its answer to the amended complaint on March 14, 2016. R. p. 33.

The trial court executed a consent scheduling order for the case on July 5, 2016. R. p. 51. Pursuant to the order, discovery was to be completed by February 15, 2017, with the case subject to being called to trial after April, 1, 2017. R. p. 51. On October 3, 2016, Lucas Tree filed a motion for summary judgment contending that there was no genuine issue of material fact that it was liable for Lofton's alleged damages. R. p. 53. Contemporaneously with that filing, Lucas Tree also filed a memorandum and exhibits in support of its motion arguing, in pertinent part, that Lofton lacked individual standing as a real party in interest because she did not personally own the property at issue as claimed in her complaint. R. pp. 58-59. On October, 11, 2016, BEC filed a motion for summary judgment incorporating by reference the arguments and authorities set forth in Lucas Tree's supporting memorandum. R. p. 78.

On October 28, 2016, the case was dismissed pursuant to Rule 40(J), SCRCP. R. p. 80.

The case was subsequently restored under a new action number, 2018-CP-10-00323, pursuant to a consent order filed on January 24, 2018. R. p. 89.

On August 13, 2018, Lucas Tree filed a motion for summary judgment and memorandum in support again contending that Lofton lacked standing as a real party in interest because she did not individually own the property at issue as claimed in her complaint, that there was no evidence that Lucas Tree breached any duty owed to Lofton, that Lofton had no claim based on alleged violations of timber cutting statutes. R. p. 91; R. pp. 94-100. On September 19, BEC filed a motion for summary judgment and a memorandum in support likewise contending that Lofton lacked standing as a real party interest because she did not own the property at issue as alleged in her complaint, that Lofton had failed to provide any evidence that BEC violated its easement on her property or that BEC breached any duty owed to Lofton, or that Lofton had any claim under the timber cutting statutes. R. p. 107; R. pp. 110-115.

The motions were heard on November 26, 2018. That afternoon, Lofton filed a response to the motions for summary judgment which attached selected pages from her deposition as an exhibit. R. pp. 123-126. Lofton also filed a motion to amend stating that “Plaintiff intends only to change the named plaintiff in the lawsuit to the Trust for which Plaintiff is the trustee.” R. p. 121.

By order dated February 22, 2019, the court granted respondents’ motions on the grounds that Lofton lacked standing as a real party in interest. Supplemental Record pp. 21-24. Lofton filed a motion to reconsider on March 4, 2019. R. pp. 140-142. The trial court denied the motion without hearing by order dated March 6, 2019. R. p. 143. Lofton filed her notice of appeal on March 29, 2019. R. p. 144.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT AGAINST LOFTON BECAUSE SHE FAILED TO TIMELY PRESENT ANY AFFIDAVITS OR ANY OTHER FACTUAL MATERIALS.

The trial court “shall grant summary judgment if there is not genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Wright v. PRG Real Estate Mgmt., Inc.*, 413 S.C. 276, at 279-80, 775 S.E. 2d 399, at 401 (Ct. App. 2015), *reh’g denied*, (Aug. 20, 2015). When the circuit court grants summary judgment on a question of law, the ruling is reviewed *de novo*. *See id.* When the circuit court grants summary judgment on a question of fact, the evidence, and all reasonable inference which can reasonably be drawn therefrom, is viewed in the light most favorable to the nonmoving party. *Id.* The nonmoving party must offer some evidence that a genuine issue of material fact exists as to each element of the claim. *Id.* It is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine. *Id.* A grant of summary judgment must be affirmed were the nonmoving party fails to establish the existence of an element essential to the party’s case. *Id.*

Rule 56, SCRCP, sets out the requirements and procedures for seeking summary judgement. The procedure for defendants in a case is as follows:

(b) For Defending Party.

A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgement is sought may, at any time move with or without supporting affidavits for summary judgment as to all or any part thereof.

Rule 56(b), SCRCP. Section (c) further provides:

... The adverse party may serve opposing affidavits not later than two days before the hearing. The judgement sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the

moving party is entitled to a judgment as a matter of law.

Rule 56(e) describes the form and substance of the affidavits and other submissions required and the nature of the response in opposition to the motion:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters state therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Finally, Rule 56(f) sets forth the procedure to be followed where a party is unable to submit affidavits in support of his or her opposition:

Should it appear from the affidavit of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Rule 56, SCRCp.

In both her original complaint filed in 2015 and in her first amended complaint filed in 2016, Lofton alleged that she was the owner of the property at issue in this action. R. p. 2, ¶5; R. p. 2, ¶6. Defendant BEC denied that Lofton was the owner of the property. R. p. 29, ¶5. On October 3, 2016, Lucas Tree filed a motion for summary judgment contending, in part, that Lofton did not own the property and therefore lacked standing as a real party in interest. R. pp. 58-59. Shortly thereafter, BEC also moved for summary judgment, adopting and incorporating by

reference arguments and authorities in Lucas Tree's memorandum. R. p. 78. Therefore, by early October of 2016, Lofton was clearly on notice that Respondents objected to her standing as a real party in interest based on the fact that she did not own the property at issue.

On October 28, 2016, Lofton dismissed her claims pursuant to Rule 40(J), SCRPC. Almost a year later, on September 28, 2017, she moved to restore her case to the civil docket. The action was subsequently restored under a new civil case number, 2018-CP-10-00323, by consent order filed on January 24, 2018.

Seven months later, in late August of 2018, Lucas Tree again moved for summary judgment arguing that Lofton lacked standing as a real party in interest, that there was no evidence Lucas Tree breached any duty owed to Lofton, or that Lofton had no claim based on alleged violations of timber cutting statutes. R. p. 91; R. pp. 94-100. BEC followed with its own motion for summary judgment on September 19, 2018, contending that Lofton lacked standing as a real party interest and that there was no evidence that BEC violated its easement, breached any duty owed to Lofton, or that Lofton had any claim against BEC based on alleged violations of timber cutting statutes. R. p. 107; R. pp. 110-115. On November 1, 2018, the Charleston County Clerk of Court notified the parties via the ECF system that the motions had been set for hearing on November 26, 2018.

Respondents' motions were heard on November 26, 2018. On the day of the hearing, Lofton filed and served a response conceding that "she lacks standing to bring her claim in a personal capacity." R. p. 123. Lofton further asserted that she "would show that she is the executrix of the estate and that she is also the trustee of the trust that holds the property at issue" and that she "would show that a simple amendment of the named Plaintiff would remedy this defect." R. p. 123. Lofton advised that she "would request leave of the court to amend" and

“would argue her intention to amend to change the Plaintiff to herself as the named trustee acting on behalf of the trust would not prejudice the Defendants because the Defendants were already aware of the claims against them.” R. p. 123.

In filing and serving her response to respondents’ motions for summary judgment on the afternoon of the hearing, Lofton failed to comply with Rule 56(c) which provides that “the adverse party may serve opposing affidavits not later than two days before the hearing.” Rule 56(c) SCRPC. Lofton’s failure to timely file any affidavits or other materials in opposition to the motion is absolutely fatal to her claim. “The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not 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), SCRPC. More specifically:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), SCRPC.

The court should grant summary judgment against a party who has failed to make a showing sufficient to establish the existence of an essential element of that party’s case. *Harris v. Rose’s Stores, Inc.*, 315 S.C. 344, 433 S.E. 2d 905, 906 (Ct. App. 1993). Lofton failed to respond to respondents’ motions for summary judgment within the specified timeframe allowed under Rule 56(c). It is within the trial court’s discretion to reject the untimely affidavit. *Jernigan v. King*, 312 S.C. 331, 440 S.E. 2d. 379, at 380, n.1 (Ct. App. 1993).

Further, Lofton failed to provide an affidavit offering any explanation why she could not timely provide facts essential to her opposition pursuant to Rule 56(f), SCRPC. Rule 56(f) requires

the party opposing summary judgment to at least present affidavits explaining why additional time is required. “The rule does not apply in the situation presented where no affidavits were filed whatsoever.” *Doe ex. Rel. Doe v. Batson*, 345 S.C. 316, 321, 548 S.E. 2d 854, 857 (2001).

Lofton has admitted that she did not own the property in question and that she lacked standing to bring her claim in a personal capacity. R. p. 123. Lofton failed to timely file any affidavits or materials in opposition to respondents’ motions for summary judgement. Lofton failed to file any affidavit requesting additional time to provide facts essential to her opposition to respondents’ motions. Based on the foregoing, the trial court properly exercised its discretion in granting summary judgment against Lofton on the grounds that she lacked standing as a real party in interest.

Even if Lofton’s response had been timely filed, her response and the deposition pages attached to that response fail to establish the essential elements for each of the claims set forth in her amended complaint. As set forth above, Rule 56(e) requires that the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. “Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” Rule 56(e), SCRCP. Ultimate or conclusory facts and conclusions of law cannot be utilized on summary judgment motion. *See Dawkins v. Fields*, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003) *citing* Charles Allen Wright, Arthur Miller & Mary K. Kane, *Federal Practice and Procedure*, § 2738 (3rd ed. 1998). A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment. *H&H of Johnston, LLC v. Old Republic Nat. Title Ins. Co.* 405 S.C. 469, 477, 748S.E.2d 72, 76 (Ct. App. 2013).

The response submitted by Lofton on the day of the hearing is a memorandum, not an affidavit. *See Jones v. Doe*, 372 S.C. 53, 640 S.E.2d 514, 517 (Ct. App. 2006) (Memoranda not authorized under Rule 56). The response provides some generalized legal conclusions and the following conclusory statement of fact:

Plaintiff concedes that, as named, she lacks standing to bring her claim in a personal capacity; however, Plaintiff would show that she is the executrix of the estate and she has the right to bring the suit as executrix of her mother's estate and that she is also trustee of the trust that holds the property at issue.

R. p. 123. As stated above, ultimate or conclusory facts and conclusions of law cannot be utilized on summary judgment motion. *Dawkins v. Fields, supra*.

The snippets of deposition testimony referenced in Lofton's response fail to *affirmatively show* that she has the requisite personal knowledge and competency to testify regarding the matters stated. *See* Rule 56(e), SCRCF. The proffered testimony fails to provide specific statements of fact that would be admissible in evidence and is conclusory.¹ *See Dawkins, H&H of Johnston, supra*; Rule 56(e), SCRCF. Lofton's tardy deposition submissions, even if allowed, fail to establish the essential elements of trespass, conversion, negligence/gross negligence, violation of South Carolina Timber Statute, fraud/negligent misrepresentation, or unfair trade practices as alleged in her First Amended Complaint. Accordingly, pursuant to Rule 220, SCACR, the trial court's grant of summary judgment should be affirmed on these alternative grounds. Accordingly, the Court has alternative grounds to affirm the trial court's grant of summary pursuant to Rule

1. Lofton's Response to Defendants' Motions for Summary Judgment specifically references pages 5, 9, 20, and 23 from her deposition testimony. R. p. 124. However, Lofton attached pages 5, 9, 12-14, 18, 21-23, and 29 from her deposition to her response. R. pp. 127-136. Page 20 was not attached even though it is specifically referenced in her response. Lofton's intent in attaching the additional unreferenced pages from her deposition is unknown.

220(c), SCACR.

In her motion for reconsideration, Lofton argues that she “will show” that she does have standing because 1) she suffered an injury in fact, 2) that there was a causal connection between the injury and the challenged conduct, and 3) it is likely that a favorable decision will redress the injury. R. p. 140. Lofton never raised this argument with the trial court.² “A party cannot use a motion to reconsider, alter, or amend a judgment to present an issue that could have been raised prior to the judgment but was not so raised.” *Anonymous v. State Board of Medical Examiners*, 323 S.C. 260, 473 S.E.2d 870, 880 (Ct. App. 1996). Furthermore, as discussed above, Lofton failed to timely submit any affidavits or materials establishing that she had standing. See Rule 56(c), SCRCRCP. The time for Lofton to show that she had standing was not on reconsideration but at least two days before the summary judgment hearing—by properly submitting an affidavit or acceptable materials as required by Rule 56(c), SCRCRCP. Lofton failed to do so and the trial court properly granted summary judgment.

Lofton subsequently argued in her motion for reconsideration that the court failed to analyze “whether she had standing as Successor Trustee of the Living Revocable Trust of Irene Lofton” or “statutory standing” pursuant to South Carolina Probate Code § 62-7-816(24). Lofton raises these same arguments on appeal. See Brief of Appellant, pp. 3-4. Again, Lofton failed to raise these issues with the trial court and cannot now do so by motion to reconsider or on appeal. See *Anonymous*, *supra*. See also *Staube v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2010). (“It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised and ruled upon by the trial court to be preserved for appellate review.”)

2. On the contrary, Lofton conceded that she lacked standing to bring her claim in a personal capacity. R. p. 123.

Moreover, as previously indicated, Lofton never submitted any affidavits or materials such as the trust instrument which would have specified Lofton's rights and duties under the trust. Lofton's future-tense claims as to what "she will show" are insufficient under Rule 56(c) and (e), SCRCF. Lofton failed to timely show that she was the current successor trustee of the Living Revocable Trust of Irene Lofton or timely provide facts establishing that she had statutory standing to pursue the claims. Lofton specially alleged in her amended complaint that she owned the property as an individual. R. p. 17, ¶ 6. She failed to take any steps to amend that claim of ownership until the day the motions for summary judgment were heard. Accordingly, the trial court properly granted summary judgment.³

II. THE TRIAL COURT DID NOT ERR IN DISREGARDING LOFTON'S BELATED MOTION TO AMEND.

As indicated above, on the day of the hearing on respondents' motions for summary judgment, Lofton also filed a one-page motion to amend:

Petitioner...will move pursuant to Rule 15 of the South Carolina Rules of Civil Procedure for an Order amending the Petition; wherefore Plaintiff intends only to amend to change the named Plaintiff in the lawsuit to the Trust for which current Plaintiff is the trustee. This motion is based upon the following grounds:

1. That the amendment of the petition shall be freely given when justice so requires and does not prejudice any other party.

R. p. 121.⁴ In her motion for reconsideration and on appeal, Lofton argues that the court abused its discretion by "not allowing appellant a curative amendment." Brief of Appellant, p. 4. Lofton filed and served her motion to amend the day of the summary judgment hearing. Respondents

3. BEC adopts and incorporates by reference the arguments and authorities set forth in the brief of Respondent John Lucas Tree Expert, Co.

4. Lofton, the plaintiff below, refers to herself in the motion as "Petitioner" and to her complaint "the Petition."

had no notice of the motion and it had not yet been set for a hearing. *See* Rule 6(a), SCRPC, (A written motion...and notice of the hearing thereof, shall be served not later than ten days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court.”) Lofton filed nothing in support of the motion—no affidavit, no exhibits—and made no motion to either have the matter heard on shortened time or have the hearing on the summary judgment motions continued to a later date. Contrary to Lofton’s claims, the court did not deny her motion to amend. *See* Brief of Appellant, p. iii. Once summary judgment was granted, Lofton’s last-minute motion to amend became moot. Accordingly, the trial court did not abuse its discretion in “disregarding” Lofton’s motion to amend because the motion had just been filed and was not properly before it on summary judgment.

Furthermore, Lofton’s motion to amend pursuant to Rule 15, SCRPC, is misplaced. The more specific Rule 17(a), SCRPC, governs the substitution of a real party in interest:

(a) Real Party in Interest.

Every action shall be prosecuted in the name of the real party in interest. ... No actions shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification, joinder, or substitution of, the real party in interest, and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Rule 17(a) SCRPC. While Rule 15(a), SCRPC, provides that leave to amend “shall be freely given when justice so requires and does not prejudice the other party,” Rule 17(a) additionally requires that any ratification, joinder, or substitution of a real party in interest occur within a reasonable time after objection. *See* Rule 17(a), SCRPC.

Respondents first objected to Lofton’s standing as a real party in interest by denying that she owned the property in their answers to her first amended complaint. R. p. 34, ¶8; R. p. 29, ¶5. Respondents again objected to her standing in their initial motions for summary judgment filed in

October of 2016. R. pp. 58-59; R. p. 78. Respondents objected yet again to Lofton's standing as a real party in interest in their motions for summary judgment filed in August/September of 2018. R. p. 97; R. pp. 112-113. Despite all of this, Lofton waited until November 26, 2018, to file her motion to substitute the trust as the true real party in interest. Lofton's extended and unexplained delay is unreasonable and the Court did not err in granting summary judgment despite her last minute motion to amend.

Lofton cites *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 531, 594 S.E.2d 455 (2005) for the proposition that "the law favors amendment were possible over summary judgment." The *Helena Chem. Co.* case concerns the appeal of a grant of summary judgment in an insurance coverage case. *Id.*, at 634-646. The South Carolina Supreme Court does not even mention any motion to amend in its decision, much less whether amendment is favored over summary judgment in every circumstance. The simple truth is that the trial court never had to weigh respondents' motions for summary judgment against Lofton's motion to amend because she failed to properly and timely respond to the motions for summary judgment, failed to move to substitute the trust within a reasonable time, failed to support her motion with affidavits or other factual materials, and failed to make any effort to continue the motion for summary judgment or have her motion to amend heard on shortened time. The foregoing clearly establishes additional grounds to affirm the trial court's grant of summary pursuant to Rule 220(c), SCACR.

CONCLUSION

Rule 56, SCRCP, sets forth a specific procedure for defending against a motion for summary judgment. Lofton inexplicably failed to follow that procedure and the trial court therefore properly entered summary judgment against her. For the reasons stated above, BEC respectfully requests that the Court reject Lofton's claims in this appeal and affirm the trial court's order granting summary judgment. Alternatively, pursuant to Rule 220(c), SCACR, BEC asks that the Court affirm the trial court's ruling on any other ground appearing on the record.



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Dated: September 30, 2019

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211 (b),
SCACR.

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