

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
Civil Action No. 2019-CP-40-01358

AMANDA CREEL GODFREY,

Plaintiff,

v.

CITY OF COLUMBIA, RICHLAND
COUNTY, ALTA PLANNING &
DESIGN, AND AOS CONTRACTORS,
INC.,

Defendants.

ORDER GRANTING AOS
CONTRACTORS, INC.'S MOTION FOR
SUMMARY JUDGMENT

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SC Court of Appeals

This matter came before the Court on the Motion for Summary Judgment of Defendant AOS Contractors, Inc. (properly identified as AOS Specialty Contractors, Inc.) (hereafter "AOS"), filed March 20, 2020. A hearing was held on July 16, 2020, at which all remaining parties were represented by counsel. After careful consideration of the submissions and arguments of the parties, the Court hereby GRANTS Defendant AOS's Motion for Summary Judgment.

FINDINGS OF FACT

Plaintiff is the current owner of the property located at 1715 Gadsden St. in Columbia and has resided there since 2012. This lawsuit concerns an embankment at the rear of Plaintiff's property where Plaintiff's property meets the City of Columbia's property. Plaintiff alleges the embankment has experienced erosion and is unstable.

In 2015, Phase II of the Vista Greenway Project was put out for bid. This project involved the construction of a pedestrian path from Elmwood Avenue to Finlay Park in

downtown Columbia. The project was to be located on City property, and one section of the path ran along the embankment in question.

AOS submitted its bid to construct Phase II of the Vista Greenway Project in August of 2015. Subsequently, in October 2015, the Columbia area suffered historic rainfall and flooding. After this weather event, on November 11, 2015, Plaintiff wrote to the City of Columbia identifying significant erosion occurring on the embankment adjoining her property, stating as follows: “more of the embankment is sliding down the hill with the continued rains we are having. This all started with the historical flooding in October when all of the kudzu was washed to the bottom of the embankment. With nothing there to prevent further wash-outs and the continued rain in our area, the condition is getting worse.” (11/11/2015 Email Exchange between Amanda Godfrey and City officials, Ex. D to AOS’s Motion for Summary Judgment.)

AOS was awarded the contract to construct the Vista Greenway Project, and a Notice to Proceed was issued on November 20, 2015. The Court finds that there is no dispute that AOS began its work on the project *after* Plaintiff documented severe erosion on the embankment and communicated her concern about the embankment to the City.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper when “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Rule 56(c), SCRCP; *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991). “In determining whether summary judgment is proper, the court must view all evidence in the light most favorable to the non-moving party to determine whether any genuine issue of material fact exists to necessitate trial of the case to a jury.” *Barr v. City of Rock Hill*, 500 S.E.2d 157, 158, 330 S.C. 640, 642 (Ct. App. 1998). The court in *Baughman* has further articulated the standard as follows:

Once moving party carries its initial burden, opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial. Indeed, Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings.

306 S.C. at 116, 410 S.E.2d at 545-46 (1991) (internal citations and quotations omitted).

ANALYSIS AND CONCLUSIONS OF LAW

The Court concludes that there is no genuine issue as to any material fact with respect to whether Defendant AOS has violated the standard of care or caused damage to Plaintiff's property.

It is undisputed from the factual record that Plaintiff's complaint with respect to the embankment at issue pre-dated Phase II of the Vista Greenway Project. Indeed, Plaintiff acknowledged in her deposition that the remedy she seeks now is identical to the remedy she sought prior to the beginning of the Project:

Q: And if the embankment behind your house had been just totally untouched, nothing had been done to it at all, is it fair to say you would still be sitting here today because you believe there needs to be a permanent fix to the embankment behind the house?

A. After the flood, yes. That is why we notified the City.

(Godfrey Dep. at 101:5-11, Ex. A to AOS's Motion for Summary Judgment.) Based on Plaintiff's own testimony and admissions, the Court finds that Plaintiff's damages, if any, were not caused by Defendant AOS's construction of the Project.

Moreover, during the course of discovery, the parties took the deposition of Plaintiff's expert witness, Bill Matthews, P.E., a geotechnical engineer. Mr. Matthews was asked extensively about AOS's construction activities in relation to the embankment at issue. Mr. Matthews testified he did not have any opinion that construction activities had caused damage to Plaintiff's property:

Q. So given the historical background of when Ms. Godfrey first identified and notified the city of this erosion problem and then the documents we looked at with respect to construction -- do you have any opinion that any particular construction activity has caused the issues you've identified with Ms. Godfrey's property?

A. No.

Q. You can't testify to a reasonable degree of engineering certainty, for example, that any clearing and grubbing of any particular portion of the slope has caused a crack in the patio, correct?

A. I cannot.

Q. Or has caused a portion of the brick wall's foundation to be undermined, correct?

A. Correct.

(Mathews Dep. at 41:8 – 41:24, attached as Ex. I to AOS's Motion for Summary Judgment.)

AOS quoted Mr. Matthews' deposition testimony in detail in its Motion for Summary Judgment, arguing that after conducting his engineering investigation, he was not able to identify any violation of the standard of care by AOS or damage to Plaintiff's property caused by the construction of the Project. Instead of citing to other portions of his deposition transcript or the discovery record, Plaintiff sought to rebut the argument by submitting an affidavit of Bill Matthews on July 9, 2020, the week prior to the hearing on AOS's Motion for Summary Judgment. AOS contends Mr. Matthews' new affidavit contains opinions which contradict his deposition testimony and seeks to have the affidavit excluded based on the "sham" or "competing" affidavit rule. The Court agrees.

The following comparison of Mr. Matthews' affidavit and deposition testimony illustrates the contradictory nature of his affidavit:

NEW AFFIDAVIT TESTIMONY

In my opinion, and to a reasonable degree of engineering certainty, the removal of the kudzu and the vegetation from the eastern slope by AOS contributed to the erosion that has occurred on the eastern slope.

(Matthews' Aff., filed 7/9/20, ¶ 35.)

PRIOR DEPOSITION TESTIMONY

Q. So given the historical background of when Ms. Godfrey first identified and notified the city of this erosion problem and then the documents we looked at with respect to construction – do you have any opinion that any particular construction activity has caused the issues you've identified with Ms. Godfrey's property?

A. No.

(Matthews' Dep. at 41:8-15, Ex. I to AOS's Motion for Summary Judgment.)

NEW AFFIDAVIT TESTIMONY

The plaintiff's brick wall had been damaged as a result of the acts and omissions of the City and AOS. This is my opinion to a reasonable degree of engineering certainty,

(Matthews' Aff., filed 7/9/20, ¶ 37.)

PRIOR DEPOSITION TESTIMONY

Q. You can't testify to a reasonable degree of engineering certainty, for example, that any clearing and grubbing of any particular portion of the slope has caused a crack in the patio, correct?

A. I cannot.

Q. Or has caused a portion of the brick wall's foundation to be undermined, correct?

A. Correct.

(Matthews' Dep. at 41:16-24, Ex. I to AOS's Motion for Summary Judgment.)

NEW AFFIDAVIT TESTIMONY

In my opinion, and to a reasonable degree of engineering certainty, AOS was negligent in removing the kudzu and the vegetation on the slope adjacent to the plaintiff's property and in removing the kudzu and vegetation from the slope when there was no plan in place to protect the stability of the slope and in removing vegetation outside the area that was supposed to be cleared under the terms of the contract.

(Matthews' Aff., filed 7/9/20, ¶ 38.)

PRIOR DEPOSITION TESTIMONY

[d]o you have any opinion that any particular construction activity has caused the issues you've identified with Ms. Godfrey's property?

A. No.

(Matthews' Dep. at 41:11-15, Ex. I to AOS's Motion for Summary Judgment.)

....

Q. Okay. Based on this, do you have any criticisms of AOS as the contractor for not reshaping slopes in accordance with the Alta plans?

A. No.

Q. Do you have any criticisms of AOS for not installing erosion control measures based on this?

A. No.

Q. The contractor, from what you reviewed, basically did exactly what you would have expected them to do; is that fair?

A. Based on what I've reviewed, yes.

(Matthews' Dep. at 33:14 – 33:25, Ex. I to AOS's Motion for Summary Judgment.)

A trial court may exclude an affidavit when it was submitted “to contradict that party's own prior sworn statement” in “an attempt to create a sham issue of material fact.” *McMaster v. Dewitt*, 411 S.C. 138, 149, 767 S.E.2d 451, 456 (Ct. App. 2014) (quoting *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004)). The following considerations delineate between a “sham affidavit” and a “correcting or clarifying affidavit”:

(1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; (6) when, in relation to summary judgment, the second affidavit is submitted.

Id.

The Court has reviewed the deposition testimony of Mr. Matthews in relation to the affidavit submitted the week of the hearing and finds that each of the foregoing elements are satisfied, as follows:

(1) Mr. Matthews offers no explanation for the statements that contradict his prior sworn testimony. In fact, his prior deposition testimony is not acknowledged at all in his affidavit. “A deponent ‘cannot create a conflict and resist summary judgment with an affidavit that ... does not give a satisfactory explanation of why the testimony is changed.’” *McMaster*, 411 S.C. at 149,

767 S.E.2d at 457 (quoting *Torres v. E.I. Dupont De Nemours & Co.*, 219 F.3d 13, 20 (1st Cir.2000)).

(2) The contradictory testimony goes to the crux of the theory of liability against AOS. Mr. Matthews testified that he had no opinion about any construction activity causing damage to Plaintiff. In his affidavit submitted before the hearing, he opines that construction activities did cause damage to Plaintiff. His affidavit expresses a contradictory opinion about the central issue in the case as it pertains to AOS.

(3) Mr. Matthews was deposed in May of 2018. This case was originally filed November 17, 2016, bearing Civil Action No. 2016-CP-40-06901.¹ Mr. Matthews had ample time to prepare for his deposition. Moreover, his affidavit reflects that prior to his deposition he had performed a site inspection and issued an expert report. Mr. Matthews' affidavit does not explain that his testimony changed based on documents produced subsequent to his deposition. The Court finds that there is no issue of Mr. Matthews' access to information prior to his deposition.

(4) Mr. Matthews' deposition testimony is compared to his affidavit testimony above. He previously testified that he had no opinion concerning AOS's work causing damage to Plaintiff's property. The week before the summary judgment hearing, his opinion now contradicts his prior sworn testimony.

(5) Mr. Matthews is a professional engineer and an expert witness, specially retained by Plaintiff for this litigation, to testify within his area of expertise. His affidavit makes no suggestion that he was inadequately prepared or confused at the time of his deposition.

¹ The case was dismissed pursuant to Rule 40(j), SCRCPP, on July 30, 2018 and later restored and given the current civil action number.

(6) Mr. Matthews' contradictory affidavit was submitted a week before the hearing on AOS's motion for summary judgment, more than two years after his deposition testimony and three months after AOS quoted his testimony in its motion for summary judgment.

Based on the foregoing, the Court finds that each of the elements of the "sham" or "competing" affidavit rule is satisfied in this matter. I find that this case is analogous to *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, in which the Supreme Court rejected a plaintiff's efforts to "rescue" its claim by submitting post-deposition affidavits by its experts. 390 S.C. 275, 289, 701 S.E.2d 742, 749 (2010).

The Court therefore finds that Mr. Matthews' July 9, 2020 affidavit is excluded. Based on the remaining record before the Court, there is no genuine issue of material fact with respect to whether defendant AOS has violated the standard of care or caused damage to Plaintiff's property. AOS is entitled to judgment as a matter of law.

IT IS SO ORDERED.

[Electronic signature of the Honorable Robert E. Hood to follow.]



Richland Common Pleas

Case Caption: Amanda Creel Godfrey vs City Of Columbia , defendant, et al

Case Number: 2019CP4001358

Type: Order/Other

So Ordered

s/ R.E. Hood #2164

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