STATE OF SOUTH CAROLINA) COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS
PETROGAS GROUP SC, LLC, Plaintiff, vs. TOWN OF LEXINGTON, SOUTH CAROLINA, Defendant.	)	ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT Case No.: 2018CP3200205

Heard: October 20, 2020, via video conference
Plaintiff's Attorney: S. Jahue Moore, Sr., Esquire
Attorney for the Defendant: Marcy J. Lamar, Esquire
Court Reporter: Steven LeBlanc

The defendant moves for summary judgment, supported by affidavits and deposition testimony. The court is compelled to grant the motion under existing law.

STANDARDS APPLICABLE TO SUMMARY JUDGMENT

Summary judgment is appropriate when there is no genuine issue of material fact, such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. Summary judgment is not appropriate where further inquiry into the facts of the case is desired to clarify the application of the law. *Brockbank v. Best Capital Corp.,* 341 S.C. 372, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts, if there is disagreement concerning the conclusion to be drawn from those facts. *Moriarty v. Garden Sanctuary Church of God,* 341 S.C. 320, 534 S.E.2d 672 (2000). The court must take all evidence, and all reasonable inferences therefrom, in the light most favorable to the party opposing the motion. South Carolina follows a scintilla standard, so the court must deny summary judgment if there is a

scintilla of evidence supporting a defense or theory of recovery being pursued by the defendant.

Rule 56(e), SCRCP, provides, in part:

> When a motion for summary judgment is made and supported [by affidavits, etc.] 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 this 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.

BACKGROUND

This lawsuit arises from the purchase of commercial property on September 9, 2017 and the requirement that the property be annexed into the town limits as a condition for providing water service. At the time of the purchase, the property was contiguous to the Lexington town limits. When the building was originally constructed, the property was not contiguous to the town limits and water was supplied by a common well with an adjoining landowner or landowners. The prior owner arranged through some oral agreement for the Town to connect water service to the property while the property was not contiguous. In or around 2016, the property became contiguous to the town limits, and in March of 2016, the Town notified the prior owner that annexation would be required in order for the water service to continue. The prior owner refused to agree to annexation, and in April of 2016, he told the Town that he would either reconnect to the well or file a lawsuit.

According to the affidavit of the Town Attorney, Bradford T. Cunningham, the Town was never notified which option the prior owner was going to pursue, and it began preparing to address the matter through the courts. Before any legal action was filed, the

property was sold to the plaintiff. The prior owner did not pursue legal action. The only evidence presented to the court is that the prior owner did not tell the plaintiff that the Town intended to discontinue water service, unless the property were annexed.[1]

Prior to the plaintiff's acquisition of the property, there were no communications between any representative of the plaintiff and the Town concerning the availability of water service. In pursuing the acquisition of this property, the plaintiff did not rely on any representations by the Town concerning supplying water to this property.

After the acquisition, the plaintiff hired Robert Keisler, CPA, to assist in getting the necessary permits and utilities transferred.[2] Mr. Keisler was made the Secretary of the plaintiff LLC – the South Carolina entity. He applied to have the water service transferred to the plaintiff, and he signed a document which includes language that the Town may require annexation in order for the plaintiff to have water service. Viewed in the light most favorable to the plaintiff, there was a period of time in September and October of 2017 during which the Town supplied water and the plaintiff paid invoices submitted for water service. Mr. Keisler testified that the contract between the seller and the plaintiff provided that the purchaser was assigned the seller's rights to agreements that the seller had made concerning the property, but the Town was not a party to that contract and there is no evidence as to any specific terms of the connection for water service.

Shortly after Mr. Keisler signed the application on behalf of the plaintiff, which contained the language about annexation, the Town sent to him an application to annex

[1] According to the deposition of the Secretary of the LLC, Mr. Keisler, the seller did not tell the plaintiff that the Town had made the demand for annexation in 2016 or that this was an unresolved issue.
[2] The deposition of Mr. Keisler indicates that the corporate structure of Petrogas involves ownership located in Ireland, and there was apparently a transfer of a number of properties in the Lexington, South Carolina area into different legal entities at or around the same time. So, there were a number of applications to do business being pursued at one time, some of which involved Mr. Keisler in a tangential capacity.

the property into the Town limits. At the time he signed the application for water service, Mr. Keisler was unaware whether the property was inside or outside the corporate limits. He first became aware of the Town's insistence on annexation when he received the application to annex. He contacted the owners in Ireland and communicated to the Town the same basic position that the prior owner had taken: that the plaintiff would not annex and that it would reconnect to the well and/or bring legal action.

The utilities division of the Town called Mr. Keisler the day before water service was to be discontinued and advised him that the meter would be locked the next day. The plaintiff reconnected to the well, without any disruption of business. Mr. Keisler said that this was done around the end of October or first of November, 2017. The plaintiff has been using well water since that time. The only additional expense for the shared well to this point is an upgraded filtration system and some provision to pay for electricity for the well pump. There have been no issues with the well. If mechanical problems arise in the future, the repair expenses are shared between those who use the well. The plaintiff asserts that if the well were to run dry or be closed due to some regulation, the building would have to be abandoned, though how that could be avoided through other means, including annexation, was not pursued in the deposition.

The Town's Utilities Director, Allen Lutz, provided a detailed affidavit concerning the location of water lines and easements. He states that there are no water lines, mains, or pipes owned, placed, or maintained by the Town that are on the plaintiff's property. There is an 8-inch water main under the street, and the affidavit cites to as-built drawings of the utility system showing the location of the lines. The affidavit also counters the assertion that there are no easements over the plaintiff's property. Though

the affidavit indicates that the Town has no water lines on the property at all, it states that the chain of title shows easements for utilities, including water, five feet in width running along each side lot line, and easements ten feet in width running along the front and rear lot lines. Further, the affidavit indicates that the deed by which the plaintiff acquired the property reflects that it was sold subject to the easement for a water mainline and easement for the well lines.

DISCUSSION

The main argument by the plaintiff is that the defendant should not be allowed to require the plaintiff to annex into the Town limits in order to continue to have water service. While that position is understandable and a sympathetic one under these circumstances, the law provides that municipalities may require annexation as a condition for providing water service and that municipalities are allowed to set the terms for providing such service, including charging increased rates for those outside the town limits. There are unique circumstances here because the Town provided water to that location for an extended period, and that caused the court concern under the scintilla of evidence standard applicable to summary judgment motions. However, there is a complete absence of evidence about material terms of the alleged agreement between the prior owner and the Town, and no evidence of an oral or written agreement between the Town and the plaintiff whereby the Town would provide water without annexation. The only possible evidence would be that the Town provided water in September and October of 2017, but that was done based on a written application whereby the plaintiff acknowledged that annexation is a requirement.

Since the initial provision of water to the prior owner was at a time when the property was not contiguous to the Town, annexation was a non-issue. When the property became contiguous, the Town notified the prior owner that annexation would be required in order to continue to supply water. The law recognizes that town officials have a duty in providing service outside the town limits to act in a manner that is in the best interests of the municipality. To deny the Town the right to discontinue service to those who will not assume the responsibilities attendant with being in the town limits flies in the face of the principle of acting in the best interests of the municipality. So, while it is understandable that a property owner would not wish to pay the expense for other municipal services that it does not want and that a business owner does not want to pay the increased licensing costs of operating its business inside the town limits, that does not obviate the requirement that the Town's officials are to act in the best interests of the municipality.

The second major position of the plaintiff is that it thinks that the Town placed and/or uses water lines through the plaintiff's property to supply other customers and profit therefrom, without having a valid easement. The law is clear, as stated above, that when a party moves for summary judgment and supports that motion by sworn statements, the party opposing the motion is not allowed to rely upon mere allegations, but must come forth with evidence to create a genuine issue of material fact. The only sworn statements for the plaintiff are all to the effect that it does not know whether or not there are unauthorized water lines on the property.

The plaintiff presented no as-built plats, no studies, and gave no indication of having found unauthorized water lines on its property. To the contrary, the affidavit from the Town's Utilities Director states not only that there are no such water lines, but also

that the deed into the plaintiff and other documents in the chain of title provide easements for utilities, including water.

The Amended Complaint lists four causes of action, though they seem to recite a number of legal principles. The first cause of action appears to allege an illegal termination of a contract. Both sides agree that there was no written contract between the Town and the prior owner. If the plaintiff is seeking to rely upon assuming the rights of the oral agreement between the Town and the prior owner, there is no evidence of the material terms of that agreement. In addition, the Town notified the prior owner that it was going to require annexation, as discussed above, and this record includes no assertion that any oral agreement with the prior owner would run with the land or be transferrable or have any specific duration.

The Town did nothing to induce the plaintiff to acquire the property. The complaint is unverified. It recites the fact that water service was provided to the property before the plaintiff acquired it, and there is evidence that water was supplied for a brief period thereafter. The only writing presented to the court is the application signed by the plaintiff that made the continued provision of water service contingent upon annexation. Requiring annexation is the same position the Town had taken in the year prior to plaintiff's acquisition of the property.[3]

The second cause of action asserts that the plaintiff has a property right to receive water from the Town and that taking away that right amounts to a condemnation. No authority was presented supporting that the owner of property outside a town's limits has

[3] The record seems to indicate that there were times when the prior owner may have switched back to the well water, but that is unclear, and if it happened, no dates or approximate dates were provided.

a property right to town services, and no authority was cited as to how the actions of the Town – taking away a service that the Town provided – amount to taking the plaintiff's property in any way that is protected under condemnation law.[4] Again, the only way that any such right could be created would be through a contractual agreement with the Town, and there is no evidence of a continuing contractual obligation to provide water service.

The third cause of action mentions declaratory judgment seeking to have the court determine that the conduct of the Town is arbitrary and capricious. It asks the court to grant injunctive relief requiring the Town to continue to provide water service. The statutes and legal precedent do not support a finding that the Town can be required by a court to provide continued service to contiguous property outside the town limits, in the absence of evidence of a contract with terms that require the Town to do so. The Town is allowed to set the terms, and it may deny water service to those outside the town limits, even if it provides water to other similarly situated customers. There being no evidence indicating that the Town contracted to provide water service to this property for any specific period of time, the logical extension of the plaintiff's position is that the Town must do so indefinitely. That position is not supported by the law.[5]

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[4] The averments of the Amended Complaint clearly reference water rights, but if the court were to construe the alleged taking as being the assertion that the Town has water lines on the plaintiff's property, there is no evidence supporting the existence of any such lines.

[5] The court is relying upon precedent and some statutes cited in the body of this order. The court is aware of a number of statutes, many of which have antiquated or possibly unclear provisions, limiting the term of years that a municipality can contract to provide water service to property outside the town limits. There are specific statutory provisions contingent upon the population of the municipality. Those statutes are not being relied upon and the court has not conducted research to see if the appellate courts have construed or limited the applicability or enforceability of these statutes. [See S.C. Code §§5-31-1710, 5-31-1910, 5-31-1920, and 5-31-1920.] In addition, §5-31-1520 uses language that can be read as requiring a municipality to extend both water and sewer

The fourth cause of action asserts that the Town has trespassed and continues to trespass on the plaintiff's property by placing water lines thereon. As stated above, the plaintiff has no evidence that supply lines of the Town's water system are located on the plaintiff's property.

The Constitution of South Carolina grants authority to municipalities to provide water service systems [S.C. Const. art. VIII, § 16]. Municipalities are permitted to provide water service to areas outside their corporate limits, provided that they do not attempt to serve areas covered by other governmental subdivisions, including special service districts. They may charge higher rates. They may set the terms for providing service, which may include an annexation requirement for contiguous properties. Various statutes deal with municipal water systems. They include the following:

> **SECTION 5-7-60.** Municipality authorized to perform any of its functions or to furnish any of its services; charges and financing.
> Any municipality may . . . furnish any of its services, except services of police officers, and make charges therefor . . . in areas outside the corporate limits of such municipality by contract with any individual . . . except within a designated service area for all such services of another municipality or political subdivision, including water and sewer authorities . . . [.]
>
> **SECTION 5-31-610.** Construction and operation of municipal utilities.
> Any city or town may:
> (1) Construct, purchase, operate and maintain waterworks . . . within or without, partially within and partially without, their corporate limits for the use and benefit of such city or town and the inhabitants thereof [.]
>
> **SECTION 5-31-1510.** Extension and assessment therefor.
> Upon the written request of any property owner requesting the city or town to extend to him water and sewer service and agreeing to pay the cost thereof the city or town may provide such service and levy an

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beyond the town limits, if water is extended. ["Any city or town may extend its system to any property beyond the city limits provided that both the water and sewer systems are extended to such property."] If that is current law, it was not raised and is not ruled upon.

> assessment against the property of the owner so requesting such service for the costs thereof. [Emphasis added.]

Section 5-31-880 makes it clear that sewer lines may be located under streets, and general principles of property law permit the holder of an easement to allow others to use the easement in a manner that is consistent with the holder's use. It is common knowledge that utilities in South Carolina, including water lines, are frequently located within the highway right-of-way.

It is clear that there is no genuine issue of material fact that would allow the plaintiff to recover under any theory of trespass or any theory that relies upon a factual determination that the Town has unauthorized water lines on the plaintiff's property. There is no evidence that such water lines exist.

The closer question concerns whether there is a scintilla of evidence requiring the court to permit the case to proceed under some theory that is based on the Town having entered into a contractual obligation to continue to provide service to this property. For the reasons stated above, the court must conclude that these facts do not support recovery. To find otherwise, without specific contractual terms setting the duration of service, would be tantamount to a finding that the Town could never discontinue service to this property if the owner, including any subsequent owner, demanded it. Such a conclusion does not appear to be supported by the law, as harsh as that might be in this situation.

THEREFORE, IT IS ORDERED that the defendant's motion for summary judgment must be granted. This case is dismissed.

[Electronic signature follows on separate page.]

Lexington Common Pleas

Case Caption: Petrogas Group Sc Llc VS Town Of Lexington South Carolina

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Type: Order/Summary Judgment

Circuit Judge (Code #2050)

s/ William P. Keesley