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SC Court of Appeals

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.

PETITION FOR REHEARING

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

MOTION

Pursuant to Rule 221, SCACR, Appellants move this Court for a rehearing based on the following:

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).

"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).

This Court's opinion fails to apply the mere scintilla of evidence rule to the evidence in record. While the evidence as to the nature of the property in question is slight, the Court must consider all reasonable inferences that may be drawn from the record. Here the facts alleged in the affidavits of Defendants Michael T. Armstrong and John Murphy Armstrong provide sufficient evidence to show establish the Defendants' intent to make the machinery in question a fixture by its attachment to the real property. In its opinion this Court found that the Defendants' did not state that they intended the equipment to remain permanently at the location. The Court overlooked the Defendants' express statement in their affidavit that the equipment was a fixture, which clearly implies their intent that the property remain permanently at the location. The Court also overlooks the fact that the real property was owned by a corporation in which at least one of the Defendants was a member, thus creating the presumption that attachment was intended to make the property a fixture. (R. p. 225). *See* Hyman v. Wellman Enterprises, Inc., 337 S.C. 80, 85–86, 522 S.E.2d 150, 152–53 (Ct. App. 1999).

Defendants' statement that the equipment was a fixture, combined with the Pelletizer being described as "large" and "heavy equipment" that was "installed in the building" in which the Defendants had some ownership interest is sufficient to create an inference that the equipment was intended as and became a fixture. (R. p. 220). While the evidence is slight, it meets the mere scintilla of evidence rule sufficiently to create a question of fact as to the nature of the equipment once attached to the real property.

The determination of 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 and 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, when given all favorable inferences taken in light most favorable to the Defendants, reasonably supports 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, this Court's opinion that no undisputable facts exist on which reasonable minds could differ, is in error.

CONCLUSION

This Court should grant a rehearing, reverse the decision of the circuit court, and remand for further proceedings.

[Signature page to follow]

Respectfully submitted,

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January 2, 2021.

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CERTIFICATE OF SERVICE

I certify that on February 2, 2021, I served the Appellants' Petitioner for Rehearing on the Respondents by via AIS email address only to counsel of record as indicated below:

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Respectfully submitted,

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