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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case Number: 2021-000053

SARAH SHARPER, ET AL..... Appellants,

v.

CITY OF NORTH CHARLESTON, COUNTY OF CHARLESTON,
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, SOUTH
CAROLINA DEPARTMENT OF TRANSPORTATION, BANKS
CONSTRUCTION COMPANY, UNITED CONTRACTORS, INC,
BANKS/UNITED JOINT VENTURE AND HLA, INC, COLEMAN-SNOW
CONSULTANTS, LLC AND ICA ENGINEERING, INC. F/K/A FLORENCE &
HUTCHESON, INC.....Respondents.

FINAL BRIEF OF APPELLANTS

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ORIGINAL

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE TRIAL COURT ERRED IN GRANTING DEFENDANT SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION (“SCDOT”)’S MOTION FOR SUMMARY JUDGMENT BY LOOKING AT SOME, BUT NOT ALL OF THE DOCUMENTS RELATED TO SCDOT’S INVOLVEMENT AND IN DOING SO PRIOR TO THE CLOSE OF DISCOVERY.

STATEMENT OF THE CASE

This appeal results from Defendant South Carolina Department of Transportation (SCDOT)’s Motion for Summary Judgment which was granted by the Honorable Bentley D. Price, on September 22, 2020, in the Charleston County Court of Common Pleas, Consolidated Case No. 2017-CP-10-4820 (R. p. 45).

Full and Fair Opportunity to Complete Discovery

The Appellants retained an expert witness, Mr. Allan Abbata, who prepared an Affidavit that was submitted to the trial court in response to SCDOT’s Motion (R. p. 50). This Affidavit was prepared solely based on Mr. Abbata’s review of documents obtained in response to a Freedom of Information Act (“FOIA”) request and yet still identifies failures of SCDOT. Mr. Abbata remains willing and able to render further opinions about the Defendant’s negligent construction; however, SCDOT has failed to provide any discovery to date despite being served with those requests since February 1, 2018 (R. p. 66). Because Appellants have not been given a full and fair opportunity to conduct discovery and because what little evidence does exist shows negligence on the part of SCDOT, the trial court erred in granting Defendant SCDOT’s Motion for Summary Judgment.

No undue delay on the part of the Appellants

Initially, Appellants' counsel filed the present matter and one other case – Stortz v. State of South Carolina, et. al. (Case No.: 2017-CP-10-4947) - which involved the same flooding event and the same defendants.¹ Because the Stortz case was one singular matter but involved the same issues and proof as the present case, counsel for the parties agreed it would be prudent to focus on discovery and potential resolution of that matter and then proceed with experts' depositions and mediation in the present case.

Once the Stortz case settled, the parties moved onto pushing forward in the present case. However, this case involved 45 Plaintiffs, which makes scheduling, and the matter as whole, far more complicated. Because of the time and resources it would take for Defendants to depose all 45 Plaintiffs, the parties agreed that the deposition of the Plaintiffs' expert should occur first. Unfortunately, due to the COVID-19 pandemic, the Plaintiffs' expert deposition has been rescheduled several times – most recently on January 27 and January 28, 2021.

If any delays in the discovery process have occurred, they were either due to the COVID-19 pandemic or the conduct of the SCDOT and other defendants in failing to participate and cooperate in discovery efforts. The Appellants have, in no way, contributed to the lack of discovery in this case.

Dismissal of SCDOT was improper

Considering this case has had minimal discovery turned over by the Respondents and there has not been one deposition taken, SCDOT's Motion was premature, and the grant of that Motion was improper.

¹ Once it was determined that the Stortz property lied within Dorchester County, the case was transferred and then subsequently settled.

FACTS

In or about the Spring of 2016, the Respondents conceived and began construction of a four-lane highway which is now known as the Palmetto Commerce Parkway (hereinafter “the Parkway”). The alleged purpose of the Parkway was to alleviate traffic around the Boeing Plant and to create attractive commercial space for business interests. A major portion of the Parkway was designed to run through wetlands behind the Pepperhill Subdivision (hereinafter “Pepperhill”) where the Appellants’ homes are located (R. p. 3).

Prior to the construction, public hearings were held wherein affected residents could hear the plans and voice concerns. At these hearings (and with representatives of the Respondents in attendance), the Appellants and many of their neighbors objected to the construction, warning that flooding would occur in their neighborhood if the Parkway was developed. The Respondents ignored such objections and repeatedly assured the Appellants no such flooding would occur, despite having access to pertinent information showing such objections were justified (R. p. 4).

As part of the Respondents’ due diligence, they were required to perform studies regarding the impact of constructing a Parkway through and around wetlands, including but not limited to how it would impact neighboring properties (*Id.*). Despite residents’ concerns and the requirement that Respondents perform their due diligence, Respondents constructed the Parkway by creating a berm through the wetlands which acts as a dam, preventing water from flowing from one area of wetlands to the other and effectively funnels water toward Pepperhill. The Respondents refused to elevate the roadway or build appropriate culverts which would allow for free flow or drainage of water throughout the dissected wetlands, and instead chose to funnel water toward Pepperhill (*Id.*).

Pursuant to S.C. Code Ann. §5-31-450, the Appellants requested that the Respondents take corrective action by providing adequate and sufficient drainage and by restoring the natural condition of the subject land. To date, the Respondents have failed to take any corrective action in response (*Id.*). As a result of the Respondents' concerted actions and failure to correct the condition they created, the Appellants' properties continually flood during water events. The flooding is so severe that the Appellants are forced to vacate their homes for substantial periods of time, replace their personal belongings and make extensive and costly repairs to their structures. The condition that Respondents have created continues to interfere with the Appellants' right to peaceful use and enjoyment of their respective properties (*Id.*).

ARGUMENTS

BECAUSE DISCOVERY HAD NOT YET CONCLUDED, THE TRIAL COURT IMPROPERLY GRANTED DEFENDANT SCDOT'S MOTION FOR SUMMARY JUDGMENT.

SCDOT is a proper party

In moving for Summary Judgment, SCDOT argues that it does not own or maintain the Palmetto Commerce Parkway and therefore, should be dismissed (R. p. 50). However, on February 28, 2020, counsel for SCDOT wrote an e-mail stating as follows: "SCDOT was not involved in the project and asserts no jurisdiction or responsibility over the parkway *except at the tie in at Ashley Phosphate and Ladson Road* as detailed by the attached affidavit" (R. p. 38). Both the e-mail and the attached Affidavit contain an admission of responsibility on the part of Respondent SCDOT. Further, at the hearing on SCDOT's Motion for Summary Judgment, its counsel again confirmed SCDOT is responsible for "140 feet of road" at issue in this case (R. p. 77, lines 16-17). By admitting a portion of the Parkway was under its responsibility and control,

SCDOT also admits it was responsible for discovering and preventing the flooding that has damaged the Appellants.

The grant of SCDOT's Motion is premature

“Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” *Doe v. Batson*, 338 S.C. 291, 525 S.E.2d 909 (S.C. App. 1999) quoting *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). “The gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party.” *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct.App. 2003). Summary Judgment may only be granted where “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 any party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCF; *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003); *Knox v. Greenville Hosp. Sys.*, 362 S.C. 566, 569-70, 608 S.E.2d 459, 461 (Ct.App. 2005); *B & B Liquors, Inc. v. O’Neil*, 361 S.C. 267, 270 S.E.2d 629, 631 (Ct.App.2004); *Smith v. Jones (In re Estate of Smith)*, 419 S.C. 111, 796 S.E.2d 158 (S.C. App. 2016). “The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial. Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show a lack of prejudice, reversal is required.” *Cel Products, LLC v. Rozelle*, 357 S.C. 125, 591 S.E.2d 643 (S.C. App. 2004) quoting *Downey v. Dixon* 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct.App. 1987).

In this case, SCDOT has only provided pleadings. It has answered no interrogatories nor requests for production and none of its witnesses have been deposed. Additionally, Counsel for SCDOT presented evidence during oral argument on its Motion for Summary Judgment that was never previously presented to Appellants or their counsel (R. p. 82, lines 22-25). Because its Motion was granted without further discovery, Appellants' counsel has not had the opportunity to cross-examine witnesses on the validity of these documents and has not been afforded the opportunity to review other requested documents that may contradict or otherwise undermine the accuracy of the same. Therefore, it clear, based on well-founded law, that the trial court erred in granting SCDOT's Motion for Summary Judgment.

The grant of SCDOT's Motion is improper

"To withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." *Froneberger v. Kirkland Dale Smith, Janel Elizabeth Smith, Euro Mortg. Bankers, Inc.*, 406 S.C. 37, 748 S.E.2d 625 (S.C. App. 2013) quoting *Hancock v. Mid-South Mgmt. Co., Inc.*, 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." *Tupper v. Dorchester County*, 326 S.E. 318, 487 S.E.2d 187 (1997); *Baugus v. Wessinger*, 303 S.C. 412, 401 S.E.2d 169 (1991).

Although much of the information needed to determine this case on the merits has not yet been discovered, the little evidence that does exist creates at least a scintilla of evidence in favor of denying SCDOT's Motion for Summary Judgment. Specifically, the Affidavit of Appellants' expert, Mr. Allan Abbata (R. p. 50), states not only that he already has been able to find fault on the part of SCDOT, but also that he will be able to expound on his opinion and draw further

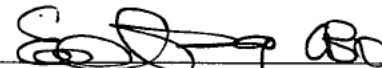
conclusions once there is further discovery.² This opinion, coupled with the admissions by SCDOT that it did in fact maintain the Parkway's "tie in" (R. p. 38) creates more than enough evidence for a reasonable jury to find fault on the part of Respondent SCDOT.

CONCLUSION

SCDOT is a proper party to this case, failed to participate in discovery, and then unfairly sought dismissal. The trial court erred by improperly and prematurely granting its Motion for Summary Judgment, as far more discovery is required to make an informed determination on the merits. Based on the above, the trial judge's misunderstanding of the case and facts resulting in the dismissal of SCDOT constitutes clear error and should be reversed.

Respectfully submitted,

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September 9, 2021

² "It would be helpful to have the benefit of depositions to see who did what before I could render more opinions" (R. p. 50).