

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Keith R. Kelly, Circuit Judge

Case No. 2020-001385

Bhavesh Patel ,

Respondent,

v.

Anjay Patel

Appellant,

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the Court properly interpret the order of the United States District Court for the Western District of Virginia to find that Appellant lacked standing?

II. Did the Court err in granting Summary Judgment to the Respondents when material issues of fact exist?

III. Did the Court err when it granted Summary Judgment to the Respondents when discovery was ongoing and Appellant had not been afforded had the opportunity to fully conduct discovery?

STATEMENT OF THE CASE

Appellant Anjay Patel (“Anjay” or “Appellant”) brought suit against Bhavesh Patel (“Bhavesh” or “Respondent”) and John Doe, seeking to recover the value of his one half interest in Sia Investments, LLC. Anjay and Bhavesh were equal partners in Sia, which was forfeited to the government in a criminal matter, and then repurchased by Sia.

This matter was filed on November 20, 2019. Respondent served his answer and counterclaims on March 9, 2020. Appellant filed his Reply on April 15, 2020. In the meantime Covid hit the United States as well as the South Carolina Court system. Appellant’s counsel also had back surgery which immobilized him in March 2020 and he was granted Court protection until approximately July 2020. That being said, discovery had begun and Appellant was researching additional areas of discovery so that depositions could be carefully planned out due to covid.

On August 6, 2020 Respondent filed a Motion for Summary Judgment, two (2) weeks after parties were given notice this matter was to be subject to ADR. (July 14, 2020).

The Court set the Summary Judgment hearing for August 19, 2020. Both parties filed opposing affidavits on August 18, 2020. Memo’s and exhibits were filed from both parties the day of the hearing, August 19, 2020. Some of the exhibits were items that could have been provided during the discovery phase of this case and were items the Appellant had not been provided until the day of the hearing.

During the hearing Respondent sought Summary Judgment as to their case but also as to the matter of Defendant John Doe (whom they admitted they did not represent). The Respondent gave a long history of the cases prior to this case being litigated and mentioned very little about the claims in this particular case that were different than the previous cases. But Respondent did mention there were new claims in this matter and disputed the validity of those claims.

Appellant gave notice to the Court that they had not had the opportunity to conduct discovery and that based solely on the affidavits, material facts were in dispute. Appellant additionally notified the Court that some of the documents Respondent was providing on that date had never been provided the Appellant therefore not affording them more than a few minutes to review the documents and not the standard time as one would be afforded during the discovery process.

Respondent gave notice to the Court that granting Summary Judgment was premature in light of the inability to conduct discovery. The Circuit Court considered the pleadings and order in prior rulings of that court and other South Carolina courts, and granted Bhavesh's motion. Anjay filed a timely notice of appeal with this Court.

STATEMENT OF THE FACTS

This case is about what happened to Anjay's interest in Sia Investments, LLC, and why he did not receive payment for that interest from his partner. Anjay and Bhavesh formed Sia in 2009, and each held a 50% interest in the company. The company owned and operated convenience stores in four locations in South Carolina.

In November of 2011, federal authorities indicted Anjay for alleged crimes unrelated to Sia. At the time of the indictment, a federal court issued a protective order limiting the transfer or waste of Anjay's assets, including Sia. Bhavesh then "unanimously voted to expel [Anjay] as a member of the company" following the issuance of the protective order. (R. p. 15, at par 11.) Bhavesh then entered into agreements with the government to operate Sia.

Anjay eventually pled guilty to his federal charges. The guilty plea included the award of a money judgment against Anjay in the amount of \$400,000. The government filed a Motion after the plea claiming that no cash could be found to satisfy its judgment, and sought to recover Patel's interest in Sia. Patel responded, agreeing to work with the government on the valuation of his interest in Sia. Assistant United States Attorney Sharon Burnham filed a second motion, which referred to Patel's agreement and agreed that it would work cooperatively with Patel to determine the value of the property.

The government's position and desire regarding Sia changed, however. The government notified Sia of its intent to forfeit Sia and neither Sia nor Bhavesh filed a claim. As a result, AUSA Burnham submitted an order for the Court to that did not limit the forfeiture to only Anjay's interest, but sought all of "the entity known as Sia". The federal court executed the order, and all of

Sia, including both Anjay's interest and Bhavesh's interest, was forfeited to the government. (R. pp. 117 – 121.) Sia purchased the entire entity back in whole shortly thereafter. Bhavesh then transferred all of Sia's assets to a company he controlled.

Bhavesh has told various accounts of what happened to Anjay's interest in Sia and when Bhavesh expelled Anjay from Sia. In a sworn affidavit in prior litigation before the same lower court judge, Bhavesh testified that he kicked Anjay out of Sia immediately following the indictment. Bhavesh also stated, in this action, that he did not expel Anjay from the company until the government sold Sia back to itself. Regardless of Bhavesh's story, he admits that he did not pay Anjay for his interest when he was dissociated.

STANDARD OF REVIEW

The circuit court's finding that Anjay lacked standing based entirely on its interpretation of the forfeiture order signed by the federal court. Review of an order granting summary judgment is typically limited to determining whether issues of fact exist and an appellate court usually applies the same standard applied by the circuit court pursuant to Rule 56(c), SCRPC. *See Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 354, 650 S.E.2d 68, 70 (2007). The review of a circuit court's interpretation of an order, on the other hand, is more similar to the review of a court's interpretation of a statute or ordinance. *Cf. Eagle Container v. County of Newberry*, 666 S.E.2d 892, 379 S.C. 564 (S.C. 2008) (issues involving the construction of ordinances are reviewed as a matter of law under a broader standard of review). "Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, 'a broader and more independent review is permitted when the issue concerns the construction of an ordinance.'" *Charleston County Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) (internal citation

omitted).

As to the question of when Anjay's interest in Sia was terminated, the Court should review a grant of summary judgment in the typical manner. "In determining whether summary judgment is proper, this court must view all evidence in the light most favorable to the non-moving party. Summary judgment is only appropriate when it is clear there is no issue of material fact, and the moving party is entitled to judgment as a matter of law. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 285, 543 S.E.2d 563, 566 (Ct. App. 2001).

The issue below was akin to the review of an unambiguous ordinance or statute, indeed the order of the district court forfeiting all of Sia is unambiguous. This Court's review of the circuit court's determination of the effect of that order is, therefore, broad. In such a situation less deference will be given, in general, and no such deference is given when that interpretation is erroneous.

Regarding the factual questions surrounding Anjay's ouster from Sia, questions of fact exist and discovery should be allowed to proceed.

ARGUMENT

In the case at hand, the Defendant demanded Summary Judgement but failed to address the preverbal "elephants in the room". That herd of elephants are several, including but not limited to the timing of Defendant kicking Plaintiff out of the LLC without fair and just compensation and then stating that 1. Plaintiff was not a member of the corporation in one sworn statement; while 2. Defendant filed multiple tax returns stating both parties own the company 50/50.

The decision of the lower court was based on its finding that Patel lacked standing to bring

suit against his former business partner for failing to pay Patel for his interest in their jointly owned LLC. The finding that Appellant lacked standing relies entirely upon the circuit court's misinterpretation of an order issued by the United States District Court for the Western District of Virginia. The question on appeal regarding that order is whether the circuit court properly interpreted the plain language of that order. If that interpretation was erroneous, the circuit court's grant of summary judgment was also in error.

Patel has standing to bring this suit because his interest was not divested by the forfeiture. Patel's claim to compensation arose either when Bhavesh dissociated him following the indictment, or when Bhavesh liquidated the company after the forfeiture. The timing of that dissociation is very much in question, and was not resolved in any prior proceeding or by any court. Because questions of fact exist regarding the dissociation, discovery must proceed.

I. Did the Court properly interpret the order of the United States District Court for the Western District of Virginia to find that Appellant lacked standing?

The forfeiture of Sia by the federal government does not limit Anjay's standing here because Bhavesh dissociated Anjay in late 2011 or 2012, and when the forfeiture occurred the government took all of Sia – no matter who owned it – and then sold all of it back to the entity. If Bhavesh dissociated Anjay prior to the forfeiture, as he claims in his affidavit filed in 2017, the forfeiture could not have cut short Anjay's interest, which was extinguished in 2012 (but unknown until 2017). If Bhavesh did not dissociate Anjay until after the forfeiture, then Anjay is entitled to payment for his interest from that time.

Bhavesh provided uncontroverted sworn testimony that he voted unanimously to expel Anjay as a member of Sia. Bhavesh then entered into agreements with the government in 2013 to continue

Sia's operation. The forfeiture did not occur until late 2014, long after Bhavesh expelled Anjay from Sia. Accordingly, the forfeiture could not have affected Anjay's interest in Sia.

The order obtained by the government did not divide the company, nor was it limited to only Anjay's interest. The plain language of that order makes clear that all of Sia, and not just Anjay's interest, was forfeited to the government. Anjay, accordingly, was not divested of his interest in Sia by the forfeiture. When it was sold back to Sia, the interest of both members remained intact.

Following the government's notice that it was forfeiting Sia, and without claim filed by Sia or Bhavesh Patel, the district court ordered as follows:

[T]he United States is entitled to an order forfeiting other property of the defendant as a substitute for the unavailable property ordered forfeited. Accordingly, it is hereby ORDERED that the following property is hereby forfeited to the United States:

The entity known as SIA Investments, LLC, and all assets, including, but not limited to, the following properties:

1. 401 Town Center North, McCormick, SC 29835
2. 200 Hammett St., Greenville, SC 29609
3. 699 Arlington Rd/2207 Racing Rd, Greer, SC 29651
4. \$12,648.69 in U.S. Currency

(R. pp. 119 – 120) (emphasis added). The order made no exception for Bhavesh's interest in Sia and did not refer to the forfeiture being limited to a fraction of Sia.

The forfeiture order only came to be after: the government filed a motion seeking to recover Patel's interest in SIA Investments, LLC; notified Sia of its intent to forfeit the entity; and neither Bhavesh Patel, nor Sia made a claim in the forfeiture action to save Sia from forfeiture. After all of this, the government filed a second motion seeking to forfeit the entire entity of Sia and included a draft order for the Court to sign. The order did not grant a forfeiture of only Patel's interest in SIA, but sought the entire entity. Sia and Bhavesh received a copy of this proposed order

by way of electronic filing and made no objection. The order was signed and no party appealed from it.

Sia then negotiated with the government to purchase the entity back. The government quitclaimed the properties listed above, as well as a fourth property it received as a result of the forfeiture. No individual membership interest was split from the company or terminated as a result of the forfeiture.

Although the Respondent successfully confused the circuit court regarding the effect of the district court order, this Court must not be so easily hoodwinked. The forfeiture order in question did not affect Appellant's standing because the plain language of that order shows that the government forfeited all of Sia and then sold all of it back to the company.

Without question, the order forfeited all of Sia's real property plus assets owned by the entity, in lieu of the \$400,000 judgment. After the forfeiture, the government had the authority to "direct the disposition of the property by sale or any other commercially feasible means" as provided by 21 U.S.C. § 853(h). The government then sold the entity and the real property back to Sia for \$136,000, far less than the actual value of the entity. The settlement agreement between the government and SIA, which was made a part of the states:

1. On August 29, 2013, an Amended Preliminary Order of Forfeiture (Dkt 653) was entered providing for the forfeiture of specific property, and on December 6, 2013, an Amended Order of Forfeiture as to Certain Substitute Property (Dkt #717) was entered providing for forfeiture of specific property in partial satisfaction of the forfeiture money judgment.

...

3. Upon receipt of said funds, the forfeited interest in the above listed property conveyed to the United States via the Orders of Forfeiture entered herein on August 29, 2013 and December 6, 2013, Dkt Nos. 653 and 717, will be conveyed to SIA Investments LLC. . .

(R. pp. 135 - 137.) Sia paid the government and the government deeded four parcels of real property to Sia by deed dated November 26, 2014. (R. pp. 151 – 156.)

Following the forfeiture Bhavesh then transferred the assets of Sia to another entity that he owns and controls completely. Bhavesh did not pay Anjay because, according to his sworn testimony, Bhavesh voted unanimously to expel Anjay Patel as a member of Sia either right after the indictment or at some point after the forfeiture.

Moreover regarding standing, Anjay had standing to file the suit he filed. Anjay's Complaint alleges causes of action related to actions taken before the forfeiture and after the forfeiture that rely on his dissociation. Anjay cannot lose standing to sue for what was owed to him for his ownership interest in an LLC if the event triggering payment for that interest predated the forfeiture. The finding of a lack of standing for the individual member to sue for his interest is wholly improper and stands reason on its head. Anjay is not suing on behalf of an organization or for a remedy that requires him to be something other than he is.

Anjay's causes of action – breach of duty of good faith and fair dealing, breach of duty of care, breach of duty of loyalty, breach of fiduciary duty, and quantum meruit – belong to the individual and cannot be lost in this case. Standing, therefore, is a fairly easy hurdle for Anjay to clear in this instance. Anjay unequivocally has standing to sue his former partner regarding his interest in the LLC. Anjay's claim in his Complaint is that he was dissociated prior to the forfeiture and that he is entitled to compensation for his ownership interest in the LLC, he did not lose standing to bring that action. Anjay should be afforded the opportunity to show that his interest was cut short prior to the forfeiture

II. Did the Court err in granting Summary Judgment to the Respondents when material issues of fact exist?

A question of fact exists regarding the Anjay's expulsion from Sia, specifically: When did Bhavesh expel him from the company? Bhavesh has created a question of fact through the discrepancies between his affidavit and his pleadings below. The date of Bhavesh's vote to expel Anjay is in question, and determination of this issue could change the outcome of this case. Because this issue of fact exists, summary judgment was improper.

It is well founded that under South Carolina Rules of Civil Procedure Rule 56 (c), the party seeking summary judgment has the initial burden of demonstrating the *absence* of a genuine issue of material fact. *Regions Bank v. Schmauch* 354 S.C. 648. In the case at hand there were multiple genuine issues of material facts that were overlooked. Those issues include, but are not limited to, the conflicting Affidavits of the Respondent, the conflicting affidavits between the Appellant and Respondent, and unresolved questions from the bench as to the intent of a Federal Court order.

Furthermore, these facts and circumstances must be viewed in light most favorable to the non-moving party. If triable issues exist, then those issues must go to the jury. *Baril v Aiken Reg'l Med. Ctrs.* 352 S.C. 271. In *Moriarty v Garden Sanctuary Church of God*, 341 S.C. 320, the Court held that "Summary Judgment should not be granted even when there is no dispute as to evidentiary facts if there is a disagreement concerning the conclusion to be drawn from those facts." In this case, even IF there were not a dispute as to the facts, there is a dispute as to how the Federal Court order was interpreted and based on that alone, summary judgment should have been denied.

Finally, in *Evening Post Pub Co. v Berkeley County School Dist.* 392 S.C. 76, the court held that 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 in order to withstand a motion for summary

judgment. In the case at hand, Appellant presented multiple issues of material facts as evidence of triable facts.

The lower court's ruling relied, in part, on its previous ruling that Bhavesh had expelled Anjay from Sia. The previous ruling followed a motion for summary judgment, supported by Bhavesh's affidavit that he had expelled Anjay long before the forfeiture. Now, because it is more convenient and aids his position, Bhavesh claims that he did not expel Anjay prior to the forfeiture. This question must be resolved before any court can rule.

Regardless of the language in the forfeiture order, if Bhavesh is to be believed the forfeiture was too late to affect Anjay's interest in Sia. According to Bhavesh's affidavit submitted to Judge Kelly in an earlier action, Bhavesh elected to dissociate Anjay long before the government forfeited Sia. The Answer Bhavesh filed in this case denies the sworn statement. The resolution of this question of fact could make the forfeiture moot. If Respondent did dissociate Anjay after his indictment in order to conduct Sia's business, a fact Anjay did not learn until March of 2017, then Anjay had no interest in Sia to forfeit.

Furthermore, the affidavits between the 2017 case (which Respondent denied making in his answer and counterclaim), and the current case are diametrically opposed to Appellant's affidavit's in both cases. This raises material issues of fact.

The contents of the sworn statement and filed Answer create a question of fact that directly impacts the lower court's grant of summary judgment. If Bhavesh dissociated Anjay prior to the forfeiture, as he claims in his affidavit, he owed Anjay for his interest at that point. Moreover, if such dissociation occurred, Anjay's standing to sue for the money owed at that point could not have been affected by a forfeiture that occurred at some time in the future.

III. Did the Court err when it granted Summary Judgment to the Respondents when discovery was ongoing and Appellant had not been afforded had the opportunity to fully conduct discovery?

As set out above, this case was only just beginning when Respondent filed his motion for summary judgment. Respondent's first pleading was filed just before the first wave of shutdowns caused by the Coronavirus pandemic. Counsel for Appellant was afforded court protection until July of 2020, due to having surgery. With the pandemic still raging, and while counsel was preparing discovery and working to schedule a deposition of Respondent, Respondent filed his motion for summary judgment in early August, 2020.

The lower court's grant of summary judgment over counsel's objections and requests to conduct discovery was improper because the parties had not yet had the opportunity to conduct discovery. "Because summary judgment is a drastic remedy it must not be granted until the opposing party has had a 'full and fair opportunity to complete discovery.'" *Evening Post Publishing v Berkeley County School District* 708 S.E. 2d 745 (2011) citing *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003), South Carolina appellate courts have quoted this rule repeatedly to educate trial courts about the need to allow for time to conduct discovery. See *Schmidt v Courtney*, supra; *Baughman v Am Tel & Tel Co.*, 306 S.C. 101 (1991); *Baughman v American Tel. & Tel, Co* 306 S.C. 101; *Doe v Batson*, 345 S.C. 316, (Summary Judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery); among numerous others.

In *Dawkins v Fields*, 345 S.C. 58, the Court also found that the "nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not engaged in a 'fishing expedition'". In the case at hand, Respondent presented multiple documents at the hearing that Appellant had not been afforded the opportunity to review the documents until that hearing. There were questions from the bench as to clarification of a Federal

Court Order, which counsel explained but about which answers persist. All of these issues could have been addressed during the discovery phase of this case.

The time to conduct discovery in this case was insufficient because of both the Coronavirus outbreak and the health of Appellant's counsel left the discovery process one or two months behind schedule. Neither of these events, which Appellant could not control, should impact his ability to prove his case. Respondent's Answer and Counterclaim was filed in March of 2020, just as the Coronavirus pandemic started to shut down businesses and courts. Counsel for Appellant filed an Answer to the Counterclaim in April of 2020. Counsel then underwent back surgery, for which he received an order of protection from the lower Court until July of 2020, to heal and recover. Coming back to work, counsel had to coordinate work in several cases, including maneuvering around restrictions due to covid. This led to the scheduling of depositions, like Respondents, taking longer than normal. Before that deposition could take place, the lower court had scheduled a hearing on Respondent's motion. On the morning of the hearing, initial discovery requests were served upon the Respondent. The case in and of itself was only months old and this was early in the whole process of discovery.

Many South Carolina cases point out that Summary Judgment is a "drastic remedy" which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. In the case at hand there were multiple disputed factual issues.

Respondent has created an issue of fact with a sworn statement that would make the forfeiture moot. If Respondent did dissociate Anjay after his indictment in order to conduct Sia's business, a fact Anjay did not learn until March of 2017, then Anjay had no interest in Sia to forfeit.

Due to the newness of the case and other underlying factors, Appellant had not had the "full and fair" opportunity to complete discovery. As such, the lower court should have denied Summary

Judgment and allowed this matter to proceed during the discovery phase. Appellant needs the opportunity to conduct discovery and get a sworn deposition from Respondent to address his differing sworn statements regarding the timing of Anjay's dissociation. Similarly, Appellant has questions for Respondent regarding the agreements Sia made with the government to conduct business, Sia's failure to file a claim regarding the government's forfeiture, and regarding the purchase of Sia from the government. The trial court's grant of summary judgment prior to the conduct of discovery was improper and must be overturned.

CONCLUSION

In short, granting of Summary Judgment, Rule 56, is appropriate 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 the moving party is entitled to judgment as a matter of law. This application has been used in multiple cases in South Carolina as the basis for Summary Judgment. But the second part is sometimes left out, and that is the determination of ANY triable fact. IF any triable fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in light MOST FAVORABLE to the nonmoving party. That evidence can be a "mere scintilla" of evidence.

In this case, there were more than a mere scintilla of evidence that should have prevented the granting of Summary Judgment in favor of the Respondent. There were conflicting Affidavits from both the previous case and this one. There were the conflicts in affidavits between the parties in this case. And there were the questions as to the intent of the Federal Government's orders in yet another case. The Honorable Judge Kelly went so far as to ask the Appellants' counsel questions regarding the Federal Court order. Most if not all of the questions could have been answered had

the Court denied summary judgment and allowed parties to continue the case and continue the discovery phase.

Courts have held that Summary Judgment *must not* be granted until the opposing party has had a full and fair opportunity to complete discovery. This matter was pointed out numerous times to the Court in this case. That due to the uniqueness of the pandemic on top of Appellant's counsel having had debilitating back surgery and was not allowed back to work until late Summer, this hindered the ability to move forward with discovery. Multiple items were presented to the Court during the Summary Judgment hearing that Appellant had not seen prior to the hearing. All documents would have been provided or uncovered during the discovery phase of this case.

For all of the foregoing reasons, the Summary Judgment should be reversed, and Appellant allowed to continue the discovery phase in this case in the interest of justice and fairness.

Respectfully submitted,

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