

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson

Case No. 2018-CP-18-01505

Appellant Case No. 2021-000177

Summerville Retail Investment, LLC.,Appellant,

v.

Montebello JTA Group, LLC.....Respondent.

APPELLANT'S FINAL BRIEF

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TABLE OF CONTENTS

Table of Authoritiesi

Statement of Issues on Appeal1

Statement of the Case1

Statement of Facts4

Standard of Review8

Argument9

 I. THE CIRCUIT COURT ERRED IN FAILING TO GRANT A FULL REFUND OF IMPACT FEES PAID TO DORCHESTER COUNTY BY SUMMERVILLE RETAIL INVESTMENT, LLC WHERE THE SOUTH CAROLINA DEVELOPMENT IMPACT FEE ACT AND THE DORCHESTER COUNTY ORDINANCE AT ISSUE CLEARLY STATES THAT THE FEES SHALL BE REFUNDED TO THE RECORD OWNER OF PROPERTY FOR WHICH THE IMPACT FEES WERE PAID AND SUMMERVILLE RETAIL INVESTMENT, LLC PAID THE IMPACT FEES AND WAS THE RECORD OWNER OF THE PROPERTY FOR WHICH THE IMPACT FEES WERE PAID9

 A. THE ACT PREEMPTS THE COUNTY’S ORIDNANCE ON THE ISSUE OF REFUNDS AND PER THE ACT THE REFUND MUST GO TO SUMMERVILLE RETAIL9

 B. THERE IS NO ABMIGUITY IN THE ACT, AND, EVEN IF THERE WERE, THE RULES OF STATUTORY CONSTRUCTION REQUIRE THE FUNDS TO BE REFUNDED TO SUMMERVILLE RETAIL11

 C. THE PURCHASE AND SALE AGREEMENT WAS NOT IN THE RECORD, HAS NO BEARING ON THE INTERPRETATION OF THE ACT AND ORDINANCE, AND THE PURCHASE AND SALE AGREEMENT DID NOT SURVIVE THE SALE OF THE PORPERTY AFTER TITLE TO THE REAL ESTATE WAS CONVEYED.....13

 D. THE REFUNDS WERE NOT PAID IN COMPLIANCE WITH OR CONTEMPLATION OF THE REFUND TRIGGER IN BOTH THE ACT AND THE ORDINANCE, THEREFORE THE OWNER OF RECORD ANALYSIS IS IRRELEVANT13

Conclusion14

TABLE OF AUTHORITIES

CASES

Asmer v. Livingston, 225 S.C. 341, 82 S.E.2d 465 (1954)14

Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999)8

Bennett v. Sullivan’s Island Board of Adjustment, 313 S.C. 455, 458,
438 S.E.2d 273, 274 (Ct. App. 1993)11

Citizens & Southern Nat’l Bank of S.C. v. Langford, 313 S.C. 540, 545,
443 S.E.2d 549, 551 (1994)8

Moore v. Weinberg, 733 S.C. 209, 217, 644 S.E.2d 740, 744 (Ct. App. 2007), *aff’d by*
383 S.C. 583, 681 S.E.2d 875 (2009)8

South Carolina States Ports Auth. v. Jasper County, 3658 S.C. 388, 397,
629 S.E.2d 624, 628 (2006)10

Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 552,
397 S.E.2d 662, 663 (1990)10

Trico Surveying, Inc. v. Godley Auction Co., Inc., 314 S.C. 542, 544,
431 S.E.2d 565, 555 (1993)8

Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000)11

Vermeer Carolina’s Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301
(Ct. App. 1999)8

STATUTES

S.C. Code Ann. §§ 6-1-910 *et seq.*9

S.C. Code Ann. §6-1-930(A)(1)10

S.C. Code Ann. §6-1-102010

S.C. Code Ann. §6-1-1020(A)10

S.C. Code Ann. §6-1-1020(B)10

S.C. Code Ann. § 15-53-10, *et seq.*1

Dorchester County Ordinance No 10-24 11.45, 6, 8, 9, 12

Dorchester County Ordinance No 10-24 15.1(a)1, 5, 6, 8, 9, 12

Dorchester County Ordinance No. 10-24 15.2(a)6

Dorchester County Ordinance No. 10-24 15.2(b)6

Dorchester County Ordinance No. 18-29

OTHER AUTHORITIES

SCRCivP 56(c)8

STATEMENT OF ISSUE ON APPEAL

- I. THE CIRCUIT COURT ERRED IN FAILING TO GRANT A FULL REFUND OF IMPACT FEES PAID TO DORCHESTER COUNTY BY SUMMERVILLE RETAIL INVESTMENT, LLC WHERE THE SOUTH CAROLINA DEVELOPMENT IMPACT FEE ACT AND THE DORCHESTER COUNTY ORDINANCE AT ISSUE CLEARLY STATES THAT THE FEES SHALL BE REFUNDED TO THE RECORD OWNER OF PROPERTY FOR WHICH THE IMPACT FEES WERE PAID AND SUMMERVILLE RETAIL INVESTMENT, LLC PAID THE IMPACT FEES AND WAS THE RECORD OWNER OF THE PROPERTY FOR WHICH THE IMPACT FEES WERE PAID

STATEMENT OF THE CASE

This case commenced with the filing of a Summons and Complaint by Summerville Retail Investment, LLC, (“Summerville Retail”) on August 24, 2018. (RoA pp. 96-137) In its Complaint, Summerville Retail brought a declaratory judgment action against Dorchester County, Cindy Chitty, as Treasurer of Dorchester County, *ex officio*, and Montebello JTA Group, LLC. *Id.* Pursuant to the South Carolina Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10, *et seq.*, Summerville Retail asked that the Court declare that impact fees paid by it to Dorchester County for the development of real property located at 1616 Central Avenue in Summerville be returned to it pursuant to statute. *Id.* The Defendant Montebello JTA Group, LLC (“Montebello”) bought the subject property from Summerville Retail. *Id.* (RoA pp. 199-207) Summerville Retail had paid Dorchester County the sum of Three Hundred and Twenty-Six Thousand and Eight Hundred and Forty-Eight and No/100 (\$326,848.00) Dollars pursuant to Dorchester County Transportation Impact Fee Ordinance #10-24 (the “Ordinance”)(RoA pp. 224-244)(RoA p198). Pursuant to Dorchester County Ordinance Number 10-24, Article XV, Section 15.1(a). “Funds not obligated for expenditure within three (3) years of the date that they are scheduled to be expended in the *Dorchester County Capital Improvement Plan* shall be **refunded**

to the record of owner of property for which the impact fees were paid, with actual interest earned, on a first-in, first-out basis.” (emphasis added)(*Id.* at 224-244)

On September 27, 2018, Dorchester County and Cindy Chitty filed their Answer, Counterclaim, Crossclaim for Inerpleader [sic] of Defendants Dorchester County and Cindy Chitty seeking to pay monies held by the County into the Dorchester County Clerk of Court’s Office pending the Court’s determination of which party was entitled to the funds. (RoA pp. 139-145)

The Defendant Montebello filed its Answer and Counterclaim on October 10, 2018, setting forth affirmative defenses and causes of action against Plaintiff also seeking to obtain the payment of the impact fees paid by Summerville Retail. (RoA pp. 146-159)

The Plaintiff filed its Reply to Counterclaim on November 9, 2018, admitting that it paid the impact fee in the amount of Three Hundred and Twenty-Six Thousand and Eight Hundred and Forty-Eight and No/100 (\$326,848.00) Dollars as required by the Transportation Impact Fee Ordinance #10-24 (the “Ordinance”). (RoA pp. 164-167)

The Defendant Montebello filed its Motion to Dismiss based on its counterclaims and for a Declaratory Judgment on December 13, 2018 *Id.* (RoA pp. 41-42). The Defendant also filed its Memorandum in Support of its Motion to Dismiss on December 13, 2018. (RoA pp. 43-56).

The Defendant’s Montebello’s Motion to Dismiss was denied per the Order Denying the Motion to Dismiss and, in the Alternative, The Motion for Judgment on the Pleadings by The Defendant Montebello JTA Group, LLC and Other Dismissing Dorchester County, a Political Subdivision of the State of South Carolina and Cindy Chitty as Treasurer of Dorchester County, Ex Officio of the Honorable George M. McFaddin, dated October 31, 2019. (RoA pp. 1-8) The Defendants Dorchester County, a Political Subdivision of the State of South Carolina and Cindy Chitty, as Treasurer of Dorchester County, *ex officio*, were dismissed by consent with monies

held by the County to be paid into the Clerk of Court making them no longer necessary parties to this matter. (*Id.*).

The Defendant Montebello filed its Motion to Amend Order dated October 31, 2019, objecting to the recitation of “Findings of Fact and Conclusions of Law” on pages 3-7 thereof. *Id.* (RoA pp. 57-68)

The Plaintiff Summerville Retail filed a Motion for Summary Judgment based on largely undisputed facts that it was rightful owner of the funds to be returned by the Treasurer based upon impact fees charged by the County for the Property pursuant to Dorchester County Ordinance Number 1-24, Article XV, Section 15.1(a) on January 3, 2020. (RoA 69-70)

The Defendant Montebello filed its Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment on January 8, 2020 (RoA pp. 71-72)

A revised Order Denying the Motion to Dismiss and, in the Alternative, The Motion for Judgment on the Pleadings by The Defendant Montebello JTA Group, LLC and Other Dismissing Dorchester County, a Political Subdivision of the State of South Carolina and Cindy Chitty as Treasurer of Dorchester County, *ex officio* was filed by the Honorable George M. McFaddin on January 28, 2020. *Id.* (RoA pp. 9-13).

The parties submitted a Consent Scheduling Order which was denied by the Order of the Honorable Maite Murphy on January 29, 2020 *Id.* (RoA pp. 14-17).

A Consent Scheduling Order of Judge Maite Murphy was filed on February 17, 2020 *Id.* (RoA pp. 17-19).

The parties entered a Consent Amended Scheduling Order of the Honorable Maite Murphy filed on June 1, 2020. (RoA pp. 23-25).

The Defendant Montebello also filed a Motion for Summary Judgment based on its counterclaims on August 18, 2020 (RoA pp. 73-80).

The Plaintiff and the Defendant's Motions for Summary Judgment were heard by the Honorable Edgar W. Dickson, on January 9, 2021, in the Dorchester County Virtual Courtroom on January 19, 2021. (RoA pp. 184 -197).

At the hearing, Judge Dickson took the matter under advisement. (RoA p. 195).

On February 1, 2021, Judge Dickson's Order Granting Motion for Summary Judgment of Defendant Montebello JTA Group, LLC and Denying Motion for Summary Judgment of Plaintiff Summerville Retail Investment, LLC Judge Dickson was filed with the Court. (RoA pp. 29-37)

The Plaintiff filed a Motion to Reconsider on February 2, 2021 (RoA pp. 81-82).

The Defendant filed a Memorandum in Opposition to Plaintiff's Motion to Reconsider on February 4, 2021 (RoA pp. 83-95).

A Form 4 C Order of Judge Dickson Denying Plaintiff's Motion to Reconsider was filed on February 8, 2021 (RoA pp. 38-40).

The case was then appealed to this Court by Notice of Appeal filed on February 16, 2021. (RoA pp. 168-183).

STATEMENT OF FACTS

The Plaintiff, Summerville Retail is a South Carolina limited liability company and was the Owner of certain real property located at 1616 Central Avenue, Summerville, South Carolina, in Dorchester County and bearing TMS Number 135-12-00-012 (hereinafter, "the Property"). (RoA pp. 96-138; pp. 184-197; pp. 199-207).

The Defendant Montebello is a Florida limited liability company which took title to the Property from the Plaintiff by way of deed dated January 11, 2017, and recorded on January 26, 2017, in the Dorchester County Register of Deeds office in Deed Book RB 10631 at Pages 342-350. (*Id.* at 199-207).

On February 1, 2011, Dorchester County passed a Transportation Impact Fee Ordinance #10-24 (the "Ordinance"). The Ordinance required the developers of projects within certain areas within the County to pay an impact fee to the County. (RoA pp. 224-244)

Summerville Retail to develop the Property after the effective date of the Ordinance and paid the required the Impact Fee to the Dorchester County *Id.*

As required by the Ordinance, the Plaintiff paid the County Defendants Three Hundred and Twenty-Six Thousand and Eight Hundred and Forty-Eight and No/100 (\$326,848.00) Dollars by check dated October 31, 2016. (RoA p. 198).

Pursuant to Dorchester County Ordinance Number 10-24, Article XV, Section 15.1(a), "Funds not obligated for expenditure within three (3) years of the date that they are scheduled to be expended in the *Dorchester County Capital Improvement Plan* shall be **refunded to the record owner of property for which the impact fees were paid**, with actual interest earned, on a first-in, first-out basis" (*emphasis added*). (RoA p. 242) The Ordinance uses the word "refunded" specifically. *Id.*

Section 11.4 of the same ordinance governing "Reimbursement" also states that the fees shall be returned to the "record owner of property from which the fees were collected, on a first in first out basis." (RoA p. 238)

The funds were not obligated for expenditure within the three (3) year time frame set forth in the Ordinance, and, therefore, were to be refunded to the record owner of the property for which the impact fees were paid, which was Summerville Retail. *Id.*

Without explanation, the County issued a check to Montebello and Walmart Stores, LP, dated September 27, 2017 for the entire Impact Fee plus interest for a total of Three Hundred Twenty Six Thousand Eight Hundred Ninety Five and 15/100 (\$326,895.15) Dollars which

included a small amount of interest on the original amount paid by Summerville Retail. (RoA p. 208)

The County relied on Section 15.2(a) of the ordinance, which is direct conflict with Sections 15.1(a) and 11.4. Section 15.2 provides that refunds shall be to “the current owner of the property for which a refund is due.” (RoA p. 242) Section 15.2(b) of that ordinance states that the refund shall be sent to “the current owner of record within ninety (90) days after it is determined by County Council that a refund is due.” (*Id.*) They did not refund the party that paid the fee. There could be no refund to Montebello as it did not pay the fee.

Again, this is in direct contradiction of Sections 15.1(a) and 11.4 of the same ordinance that states funds go to the record owner for which funds were paid, being Summerville Retail. (RoA p. 242; RoA p. 238)

The County actually made the refund check payable to the Defendant Montebello and Walmart Stores LP, and not to Summerville Retail, which is in violation of the Ordinance. *Id.*

The Defendant Montebello never made any payments to the County Defendants related to the Impact Fee. *Id.*

The Defendant Montebello and the Plaintiff entered into a Purchase and Sale Agreement for the Property on October 20, 2016. (RoA pp. 199-207). The Purchase and Sale Agreement does not assign impact fee refunds to Montebello. *Id.*

Walmart Stores LP received the funds but returned them to directly to Dorchester County while advising both Summerville Retail and Montebello that it had received the funds and was returning them to Dorchester County. (RoA pp. 208)

Summerville Retail issued a demand to Dorchester County for the return of the funds on June 22, 2018. (RoA pp. 209-217) Instead of returning the funds as required by the applicable

Ordinance, the County required the Summerville Retail obtain permission from the Montebello in order to receive the funds. *Id.*

There is no provision within the Ordinance that requires the permission of subsequent purchasers of property for which impact fees were paid to authorize disbursement of refunds to the payor. However, the County did not wish to disburse disputed funds. (RoA pp. 224-244)

Accordingly, Summerville Retail contacted Montebello by letter dated August 16, 2018, and requested that Montebello authorize the disbursement of the refund. (RoA pp. 218-221)) Montebello refused. (RoA pp. 222-223).

Instead, Montebello claimed the funds held by the County belong to it. *Id.* Prior to receipt of Summerville Retail's letter dated August 16, 2018, the Defendant Montebello made no claim and had no right, title, or interest in those funds paid by Summerville Retail. *Id.* Montebello was unaware of the refund of the impact fees until the Summerville Retail sent a letter requesting information regarding the funds on May 1, 2018. (RoA pp. 222-223)

Thomas Young, a member of Defendant Montebello, advised the Summerville Retail's counsel by email on May 2, 2018, that Montebello had not received the refund check but would keep the Plaintiff informed if it did receive such refund in the future. (*Id.*) Montebello never made any claim to those funds in that email. *Id.* Instead, Montebello only made a claim to the funds upon the realization that the County Defendants required the Defendant Montebello's permission to release the Funds to the Plaintiff in order to not be involved in a dispute. (RoA pp. 146-159)

Dorchester County exercised the right of ownership over the funds paid by Summerville Retail from September of 27, 2017, until Judge McFaddin authorized payment of those sums into the Dorchester County Clerk of Court's Office on January 28, 2020. (RoA p.9-13)

Pursuant to Sections 11.4 and 15.2(a) of the Ordinance, the funds should have gone to Summerville Retail.

STANDARD OF REVIEW

Summary judgment is proper when it is clear that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. SCRCivP 56 (c); *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); *Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a factfinder." *Moore v. Weinberg*, 733 S.C. 209, 217, 644 S.E.2d 740, 744 (Ct. App. 2007), *aff'd* by 383 S.C. 583, 681 S.E.2d 875 (2009).

Summary judgment should be granted when plain, palpable, and undisputed facts exist upon which reasonable minds cannot differ. *Trico Surveying, Inc. v. Godley Auction Co., Inc.*, 314 S.C. 542, 544, 431 S.E.2d 565, 555 (1993). Where there is no dispute over the operative facts, summary judgment is proper as a matter of law. *Citizens & Southern Nat'l Bank of S.C. v. Langford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994).

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Appellate Case No. 2021-000177
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Summerville Retail Investment, LLC,Appellant,

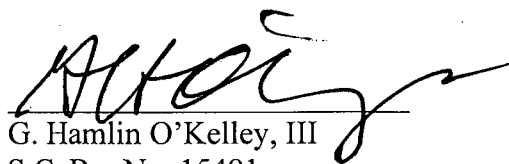
v.

Montebello JTA Group, LLC.....Respondent.

**CERTIFICATION OF COUNSEL
PURSUANT TO RULE 211(b) SCACR**

I certify that I have served the Appellant's Final Reply Brief and the Appellant's Final Brief and that they are in compliance with Rule 211(b) SCACR in that no changes were made excepting references to the Record on Appeal and correction of typographical errors and misspellings.

October 21, 2021



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