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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
In The Circuit Court

Teasa K. Weaver, Circuit Court Judge

Appellate Case No. 2021-001081

ROBERT H. SARN, Appellant,

v.

JAMES C. RHEA, III,
CITY ELECTRIC SUPPLY COMPANY, and
TÄSCHNER TEXTILE INDUSTRIES, LLC,

of whom

JAMES C. RHEA, III, and
CITY ELECTRIC SUPPLY COMPANY are the Respondents.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: SUPREME COURT

CASES: COURT OF APPEALS

CASES: OTHER JURISDICTIONS

OTHER AUTHORITIES

STATEMENT OF THE ISSUES ON APPEAL

1. SUMMARY JUDGMENT CANNOT ISSUE IN THE ABSENCE OF COMPLETED DISCOVERY.

2. THE DOMINANT ESTATE IS CHARGED WITH UPKEEP OF THE EASEMENT.

3. THE DUTY OF MAINTENANCE HAS NOT BEEN RELEASED AS TO TÄSCHNER TEXTILE INDUSTRIES, LLC.

4. THE DUTY OF MAINTENANCE HAS NOT BEEN RELEASED AS TO JAMES C. RHEA.

STATEMENT OF THE CASE

The Appellant, ROBERT SARN, owns Rental Court, a private road located in Rock Hill off Constitution Boulevard. Rental Court is the remaining property after development of the surrounding tract containing what is now seven (7) tracts, each accessed by Rental Court.

The Respondents JAMES C. RHEA, III and TÄSCHNER TEXTILE INDUSTRIES, LLC are owners tracts abutting Rental Court. The Deed into J.D. Properties of the Carolinas, LLC, TÄSCHNER's predecessor, from SARN states, in relevant part:

> Grantor covenants . . . that Grantor, until such time as the Easement Area is dedicated for use as a public right of way, shall keep the same in such a state of repair and condition as is commensurate with the first class nature of the Grantor's development and as so as to allow the Grantee the full benefit and use of the Easement.
> [RECORD ON APPEAL,].

In a "Grant of Easement and Right of Way", also between SARN and J.D. Properties, that document states:

> By signing this Agreement, Robert H. Sarn, his heirs and/or assigns, hereby agrees to be fully responsible for the total cost and maintenance of said private road.
> [RECORD ON APPEAL,].

The same "Grant of Easement and Right of Way" states:

> Any damage that may occur to the use of this easement or right of way which runs across the land of J.D. Properties of the Carolinas, LLC, shall not be the responsibility of Robert H. Sarn, his heirs and assigns, including, but not limited to trees, natural occurrences, debris, or any other damage that may occur that is not the direct result of J.D. Properties of the Carolinas, LLC, its successors or assigns.
> [RECORD ON APPEAL,].

The Deed from SARN into RHEA does not contain the cited Deed language; no other agreement between SARN and RHEA exists. [RECORD ON APPEAL,].

The Appellant served Requests for Production on TÄSCHNER dated September 3, 2019. On January 11, 2021, the Appellant served new Requests for Production on all Defendants. The Appellant's Requests for Production remain unanswered.

By Order filed March 31, 2021, the Court granted summary judgment to TÄSCHNER and RHEA. The Appellant's Rule 59 Motion was denied by Order filed August 25, 2021.

STANDARD OF REVIEW

The Supreme Court has adequately set out the standard of review as to a grant of summary judgment in *Legette* v. *Piggly Wiggly, Inc.*, 368 S.C. 576, 629 S.E.2d 375 (Ct.App. 2006):

> "Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Cafe Assocs. Ltd.* v. *Gerngross*, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991). In determining whether any triable issues of fact exist, the evidence and all the inferences that can be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Redwend Ltd. P'ship* v. *Edwards*, 354 S.C. 459, 468, 581 S.E.2d 496, 501 (Ct.App.2003). "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court. . . ." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 861 (2002).
> *[Id.*, 629 S.E.2d at 376.]

ARGUMENT:

SUMMARY JUDGMENT CANNOT ISSUE IN THE ABSENCE OF COMPLETED DISCOVERY.

This action was filed April 25, 2019. The Plaintiff served Requests for Production on TÄSCHNER dated September 3, 2019. [RECORD ON APPEAL,]. On January 11, 2021, the Plaintiff served new Request for Production on all Defendants.

Our Supreme Court has held:

> "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). 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." *Dawkins* v. *Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). 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., Inc.],* 349 S.C. at 362, 563 S.E.2d at 333 [2002],
> *[Evening Post Publ'g Co.* v. *Berkeley County Sch. Dist.*, 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011).].

Our Court of Appeals has held:;

> The purpose of summary judgment is to expedite the disposition of a case that does not require the services of a factfinder. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). "Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Id.* at 69, 580 S.E.2d at 439. "Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law." *Brockbank* v. *Best Capital Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000).
> *[Gary* v. *Askew*, 417 S.C. 232, 239, 789 S.E.2d 94, 98 (Ct.App. 2016), *reh'g denied* (Aug 17, 2016)]

Discovery in this matter is not complete, as recited above. Documents were produced at SARN's deposition which were not in the Plaintiff's possession. There is thus every indication that the Defendants may be in possession of other documents relevant to this case.

ARGUMENT:

THE DOMINANT ESTATE IS CHARGED WITH UPKEEP OF THE EASEMENT.

The Appellant as Grantor in the Deed to TÄSCHNER's predecessor quoted from above does not dispute his responsibility under the words as quoted. It is, however, long recognized law in this State that the owner of the easement or dominant estate, has a duty to keep the easement in repair.

> In the absence of an agreement, the . . . owners of the servient tenement, are under no duty to maintain and repair the easement represented by the gravel road for the benefit of the dominant tenement owned by [the Appellant here], *Richardson* v. *Jennings*, 184 N.C. 559, 114 S.E. 821 (1922); *Carson* v. *Jackson Land & Mining Co.*, 90 W.Va. 781, 111 S.E. 846 (1922). Ordinarily, the owner of an easement has the duty to keep it in repair. *Capers* v. *Fripp*, S.C.L. (Rice) 224 (1839); 15 Am.Jur.2d Easements and Licenses § 85 at 491 (1966).
> *[Hayes* v. *Tompkins*, 287 S.C. 289, , 337 S.E.2d 888, 891 (Ct.App. 1985).].

The same principle was stated in the older case of *Capers* v. *Fripp*, 24 S.C.L. (Rice) 224 (1839), the Court approving the charge of the Circuit Judge as follows:

> He who used the way must repair it, or bear the inconvenience;...
> *[Id.*, 24 S.C.L. at 226.].

The redrafted section of AMERICAN JURISPRUDENCE 2D on point states the rule as follows:

> It is not only the right but the duty of the owner of an easement to keep it in repair; the owner of the servient tenement is under no duty to maintain or repair it, in the absence of an agreement therefor. Thus, the duty to maintain an easement in a safe condition to prevent injuries to third

parties generally rests on the owner of the dominant estate, unless:

(1) there is an agreement requiring the servient owner either solely or concurrently to maintain and control the easement; or

(2) the evidence indicates that the servient owner affirmatively and voluntarily assumes responsibility for maintaining the easement in a safe condition as to third parties.

[25 AM.JUR.2D *Easements and Licenses* § 94 (09/2002); formatting and underling added; footnotes omitted.]

ARGUMENT:

THE DUTY OF MAINTENANCE HAS NOT BEEN RELEASED AS TO TÄSCHNER TEXTILE INDUSTRIES, LLC.

By his action, SARN seeks contribution for repairs and maintenance performed. He has, without question, undertaken a duty of repair and maintenance. He has not released TÄSCHNER's predecessor from contribution. This is shown by the additional language quoted from the "Grant of Easement and Right of Way" with that person quoted above:

> Any damage that may occur to the use of this easement or right of way which runs across the land of J.D. Properties of the Carolinas, LLC, shall not be the responsibility of Robert H. Sarn, his heirs and assigns, including, but not limited to trees, natural occurrences, debris, or any other damage that may occur that is not the direct result of J.D. Properties of the Carolinas, LLC, its successors or assigns.
>
> [RECORD ON APPEAL,].

In the leading case of *Three States Coal Co.* v. *Mollohan Mfg. Co.*, 137 S.C. 345, 135 S.E. 380 (1926), our Supreme Court stated the general rule as to interpretation of contracts:

> Certain well-established rules are followed by the courts in the construction of written contracts. The purpose of all rules of construction is to ascertain the intention of the parties to the contract, and In *[sic]* ascertaining this intention the whole instrument should be considered and effect given, if practicable, to every clause and word in it. *Smith* v. *Clinkscales*, 102 S.C. 227, 85 S.E. 1064; and *Stewart* v. *Morris*, 84 S. C. 148, G5 S. E. 1044.

[Id., 135 S.E. at 382.]

In this case, we have two provisions in the "Grant of Easement and Right of Way" dealing with the upkeep of the easement known as Rental Way. These provisions are in apparent contradiction with each other. It is axiomatic that where a contract is open to construction, that construction which makes the contract valid and enforceable will be given to the contract. *Romanus* v. *Biggs*, 214 S.C. 145, 51 S.E.2d 503 (1949); RESTATEMENT, CONTRACTS 2D § 203(a); 17A AM.JUR.2D *Contracts* § 346 (1994).

Equally, where there is an apparent repugnancy between two clauses or provisions of a contract, it is the province or duty of the Court to find harmony between them and to reconcile them if possible. *Jones* v. *Pennsylvania Casualty Co.*, 140 N.C. 262, 52 S.E. 578 (1905); 17A AM.JUR.2D *Contracts* § 393 (1994).

It is also a fundamental rule of contract construction that the entire contract be given meaning, force and effect, if that can be established reasonably and consistently. *Johnson* v. *Glen Falls Ins. Co.*, 131 S.C. 253, 127 S.E. 14, 40 A.L.R. 993 (1925); 17A AM.JUR.2D *Contracts* § 386 (1994).

The resolution here is within the language of the provision applying to J.D. Properties, TÄSCHNER's predecessor. That entity was charged in the "Grant of Easement and Right of Way" with responsibility for "natural occurrences". That phrase must, of necessity, include future wear and tear on Rental Way. Thus the true meaning and reconciliation of the provisions of the "Grant of Easement and Right of Way" becomes clear: SARN was to repair the road at or shortly after the date of the "Grant of Easement and Right of Way", while the future upkeep will be the responsibility of TÄSCHNER's predecessor, and thus of TÄSCHNER. SARN in fact made repairs to Rental Court shortly after the sale to TÄSCHNER's predecessor. [RECORD ON APPEAL, Deposition of Sarn, p.30,11. 18-24.].

Likewise, the Owner's Title Insurance Policy issued by Mr. Hyatt, the closing attorney to TÄSCHNER's predecessor, mentions only of the standard language contained in the deed into J.D. Properties of the Carolinas, LLC; no mention is made and no coverage is stated as to the language of the purported "Grant of Easement and Right of Way". Thus, the certifying attorney did not offer J.D. Properties any coverage for the language of the said "Grant of Easement and Right of Way".

The responsibility of TÄSCHNER's predecessor or of TÄSCHNER for its equitable contribution to future repairs or maintenance of the easement known as Rental Way has never been waived - either expressly or by implication - nor contracted away. The duty of TÄSCHNER for contribution for those repairs exists and must be enforced by our Courts.

ARGUMENT:

THE DUTY OF MAINTENANCE HAS NOT BEEN RELEASED AS TO JAMES C. RHEA.

The responsibility of RHEA for contribution is clearer. The Deed into RHEA by SARN contains no undertaking as to Rental Court by SARN, nor any waiver of SARN's right to contribution. The lower Court's rationale for application of the wording of the "Grant of Easement and Right of Way" would seem to be that quoted language in the agreement with Täschner's predecessor:

> By signing this Agreement, Robert H. Sarn, his heirs and/or assigns, hereby agrees to be fully responsible for the total cost and maintenance of said private road.
> [RECORD ON APPEAL,].

was made without consideration of the other language as to the responsibility of TÄSCHNER's predecessor, and without considering the necessary reconciliation of all terms in the "Grant of Easement and Right of Way" set out above.

Further, it is a general proposition that the rights of a third party, such as RHEA, under a contract, such as the Grant of Easement to TÄSCHNER's predecessor, are determined by the intention of the parties to the contract. 17A AM.JUR.2D *Contracts* § 440 (1994). There is no indication within the four corners of the Grant of Easement as to any intent to benefit third parties. [RECORD ON APPEAL, Deposition of Sarn, p.93,1.9 - 13.].

In addition, the law also holds that estoppel by a deed operates only between parties to the deed and their privies; strangers to the deed are not bound by, nor can they invoke, an estoppel based on that deed. *Robinson* v. *Ortiz,* 6 Boyce 370, 100 A. 408 (Del.Super. 1917); *Carter* v. *Bennett, 4* Fla. 283 (18), *error dismd.* 15 How. 354, 56 U.S. 354, 14 L.Ed. 727 (1853); *Williams* v. *Williams,* 56 So.2d 216 (La.App. 1951); *Pope* v. *O'Hara,* 48 N.Y. 446 (18); *Kitzmiller* v. *Van Rensselaer,* 10 Ohio St. 63 (1859); *Buckingham* v. *Hanna,* 2 Ohio St. Rep. 551 (1833); *Woldert* v. *Skelly Oil Co.,* 202 S.W.2d 706, *error ref. n.r.e.* (Tex.App. 1947). By analogy, the same logic must apply to the recorded "Grant of Easement and Right of Way", all else being equal.

More basically, the "Grant of Easement and Right of Way" binds TÄSCHNER's predecessor to

certain duties of upkeep and repair. [RECORD ON APPEAL,]. As such, that document cannot excuse RHEA as a later buyer from being held to the same duties.

Our Supreme Court has stated the rule as to a grant of summary judgment:

> Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Id.;* Rule 56(c), SCRCR "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860 (citation omitted). In order 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. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In cases requiring a heightened burden of proof, the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment. *Id.* at 330-31, 673 S.E.2d at 803.
>
> *[Turnery. Milliman,* 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011).]

By any standard, the Appellant has met the required burden to defeat a grant of summary judgment in this action. The Appellant requests judgment accordingly.

CONCLUSION

Our Supreme Court has stated the rule as to a grant of summary judgment:

> Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Id.;* Rule 56(c), SCRCR "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860 (citation omitted). In order 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.

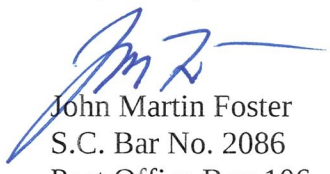
Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In cases requiring a heightened burden of proof, the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment. *Id.* at 330-31, 673 S.E.2d at 803.

[Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011).]

By the quoted standard, the Appellant has met the required burden to defeat a grant of summary judgment in this action. The Appellant requests a reversal of the Order of summary judgment below.

January 14, 2022

Respectfully submitted,



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The undersigned certifies that the Initial Brief of Appellant complies with Rule 211(b), S.C.A.C.R.

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