

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Roosevelt Simmons)

Plaintiff)

v.)


Mase And Company, Llc Et Al.)

Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.
2011-CP-10-1084

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Edward A. Bertele, Bar No. 72521 Address: 1812 Pierce Street Charleston, SC 29492 phone: 843-471-2082 fax: 843-471-2082 e-mail: ebertele@msn.com other:	Defendant's Attorney: , Bar No. Address: phone: fax: e-mail: other:
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: Alter amend judgment Estimated Time Needed: Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant	December 4, 2012 Date submitted
SECTION III: Motion Fee	
<input checked="" type="checkbox"/> PAID - AMOUNT: \$25. <input type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
JUDGE'S SECTION	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	_____ JUDGE CODE: _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ <input type="checkbox"/> MOTION FEE COLLECTED: _____	Date Filed: _____

CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2011CP10-1084

ROOSEVELT SIMMONS)
Plaintiff)

Vs.)

MASE and COMPANY, LLC,)
J. AL CANNON, JR.,)
CHARLESTON COUNTY)
SHERIFF'S DEPARTMENT,)
CHARLESTON COUNTY,)
CHARLESTON COUNTY)
REVENUE COLLECTIONS)
DEPARTMENT and)
HARRY LONG)
Defendants)

FILED
2012 DEC -6 PM 2:09
JULIE J. ARMSTRONG
CLERK OF COURT
BY [Signature]

PLAINTIFF'S MOTION TO ALTER
OR AMEND JUDGMENT

PLEASE TAKE NOTICE that on the tenth day following service of the within NOTICE of MOTION or as soon thereafter as counsel may be heard, plaintiff Roosevelt Simmons, by his attorney, Edward A. Bertele, Esq. shall move before the Court of Common Pleas for the Ninth Judicial Circuit at the Charleston County Courthouse, 100 Broad Street, Charleston, SC 29401 for an Order pursuant to South Carolina Rules of Civil Procedure 59(e) to alter or amend the Order dated November 20, 2012 dismissing the Second Amended Complaint as to defendant Harry Long. Plaintiff relies upon the pleadings filed heretofore and the reasons set forth herein for the filing of this motion.

BASIS FOR THIS MOTION

This action arises out of the levy, execution and sale of certain real property by Defendants County of Charleston and the Sheriff's Department and Deputy Harry Long. The Fifth Count of the Second Amended Complaint alleges a Tort Claim against the Sheriff's

Department based upon the actions of its employee, defendant Long in executing and levying upon real property owned by Simmons. Second Amended Complaint, para. 33 & 34.

Furthermore, the Fifth Count specifically alleges that Long “exhibited hostility toward Simmons and with malice and intent to injure Simmons, caused a levy to be placed against real property owned by Simmons which resulted in a sale and loss of Simmons interest in the property.” Id. para. 35. Also, the Fourth Count alleges a civil rights violation by the county and Harry Long in that Long arbitrarily and discriminatorily executed on the real property and denied Simmons equal protection of the law. Id. para. 28- 31.

Defendants County of Charleston and Harry Long filed a motion to dismiss as to Long in which they contended that Long was acting solely within the scope of his authority in connection with the levy, execution and sale of Simmons property and thus was immune from suit. See Motion to dismiss Defendant Harry Long, dated February 20, 2012. That was the sole basis for the motion. It was repeated in defendants’ Memorandum in support of defendants’ motion for summary judgment, at page 13, but no further basis for relief was made in any subsequent filing. Plaintiff opposed this motion on the basis that the employee exemption was inapplicable due to the allegation that Long had acted with malice and ill will. See Plaintiff’s Opposition to Motions of County defendants dated August 2, 2012 at page 34-35. Plaintiff also contended that Long was named as a defendant under the Fourth Count for civil rights violations, Id. at 35, and that there were material issues of disputed fact as to these claims. Id at 35-37.

On November 7, 2012, the Court heard the motion to dismiss as well as other motions filed by the plaintiff and the county. By order dated November 20, 2012, the Court denied summary judgment as to the plaintiff and the county but granted dismissal of the Second Amended Complaint as to defendant Harry Long. The decision does not contain any findings

although it indicates that formal order is to follow. Plaintiff contends that the court's decision dismissing the Second Amended Complaint as to defendant Long did not address the legal issues asserted in the plaintiff's opposition, which are more fully discussed below and respectfully requests that the Court reconsider its decision and alter/amend its order to deny this motion.

LEGAL ARGUMENT

In their motion to dismiss, the county defendants relied solely upon the argument that defendant Harry Long is a government employee and immune from suit pursuant to S.C. Code Ann. Section 15-78-70(a). In his opposition to the motion, Simmons asserted that Section 70(b) removes any governmental immunity for an employee "conduct not within the scope of his official duties or that constituted . . . actual malice [or] intent to harm . . ." and cited South Carolina State Budget and Control Bd .v Prince, 304 S.C.241, 403 S.E.2d 643 (1991)(no Tort claim immunity for employee who acted with actual malice). Simmons further contended that he had alleged actual malice by Long as part of the Tort Claim in the Fifth Count, specifically that Long "exhibited hostility toward Simmons and with malice and intent to injure Simmons, caused a levy to be placed against real property owned by Simmons which resulted in a sale and loss of Simmons interest in the property." The county did not respond to this argument in any of its subsequent pleadings. Therefore the court should reconsider its decision because the county did not refute that acts done by an employee out of malice are outside of the statutory exemption and plaintiff had alleged malice. The law is clear that a motion to dismiss is addressed solely to the sufficiency of the complaint and the court must accept all of the allegations to be true. Gressette v. South Carolina Elec. & Gas Co., 370 S.C 377, 378-379 (2006).

Further the court should reconsider its decision because summary judgment was not appropriate either. Under Rule 56(c), SCRCF, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Baughman v A.T.& T, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). The Fifth Count alleged that Long acted out of malice. The county did not address Simmons allegations of malice in its motion or in respond to his opposition papers that the motion record contained evidence sufficient to support a claim of malice and the material facts were in dispute. Plaintiff's Opposition at page 34-35, 37. Therefore, the county did not even argue that there was no evidence of malice.

Simmons did not rely upon mere allegations of malice in opposing defendants' motion. Simmons submitted Long's deposition testimony, attached as Exhibit F to plaintiff's opposition to the county motions. Long stated that he believed Simmons had threatened him in a telephone call. Long stated that he later filed an incident report and "blue flagged" Simmons property meaning that Sheriff's Department employees were to be cautious when entering there. Long admitted that he did not pursue information about all the motor vehicles Simmons owned to determine whether he should levy upon them as required by statute, before levying on real property. See Plaintiff's opposition to defendants' motion at page 7-9. Simmons denied ever making the phone call. Simmons asserted that when Long came to his home in August 2009, he disregarded numerous other items of personal property in plain view such as a boat and trailer, tractor, backhoe and other heavy equipment. See Simmons Affidavit at para. 6&7. "Actual malice [under the Tort Claims Act] refers to common law actual malice, and has been defined by situations where "defendant was actuated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff." Swicegood v. Lott, 379 S.C. 346, 665 S.E.2d 211 (Ct. App. 2008) (quotations omitted).

Plaintiff asserted that Long's testimony supported his contention that defendant Long acted out of malice. Simmons contended that Long was hostile as result of the alleged telephone threat and had already made up his mind to punish Simmons for threatening him when he went to his house; that he ignored the existence of personal property in plain sight on which he could have levied because he was intent on punishing Simmons by levying on real property. Under the summary judgment standard, the court gives every benefit of the doubt to the non-moving party. Watters v. Terminix Service, Inc. 376 S.C.632, 635, 658 S.E. 2d 110,111 (Ct. App. 2008).

In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn there from must be viewed in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). If triable issues exist, those issues must be submitted to the jury. Young v. South Carolina Dept. of Corrections, 333 S.C. 714,718, 511 S.E.2d 413,415 (Ct. App. 1999). Simmons contends that the reasonable inferences support his claim that Long acted out of malice such that summary judgment should be denied.

Simmons also contends that since the court denied the county defendants' motion for summary judgment as to the Fifth Count alleging a tort and that Long has no immunity from suit for a tort, there is no basis to grant it as to defendant Long.

In addition, Simmons had filed a motion to compel discovery against the county for failure to produce portions of defendant Long's disciplinary file pertaining to an earlier incident involving a criminal defendant arrested by Long and for county files relating to other user fee judgments which Long enforced. The basis for these requests was to determine whether there were racial components in these actions that demonstrated a pattern and practice of discriminatory behavior. Plaintiff's Motion to Compel discovery at page 3. In opposition to

defendants motions for summary judgment Simmons had contended that discovery was not complete as to these (and other demands) such that summary judgment should not have been granted. Plaintiff's opposition at defendants' motion for summary judgment at pages 37-38. These discovery demands include Sheriff's Department files relating to enforcement of user fee judgment against those two property owners to determine whether there is a pattern or practice in the manner in which the Deputy Long levies upon real property; and information pertaining to the conduct of Deputy Long that resulted in a reprimand which was contained in his personnel file. These also relate to Simmons claims of ill will and possible bias. Plaintiff also requested a copy of Sheriff's Department arrest file that defendant Long was disciplined for mishandling, which relates to his propensity to violate Department procedures and a possible racial motivation. Simmons asserted he was entitled to have the requested material in order to respond to the county's summary judgment motion as to the Fourth and Fifth Counts; that the requested material is relevant to Simmons allegations regarding Deputy Long's conduct toward him; that the information is solely within the control of the county. The county had known about all these discovery requests for many months; and that Simmons is prejudiced by the county's refusal to provide it. The discovery motion was resolved by the parties at the motion hearing. Since discovery had not been completed as to facts pertaining to Long's pattern and practices involving racial components, summary judgment dismissing defendant Long should not have been granted.

Summary judgment is not appropriate where 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, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). Since

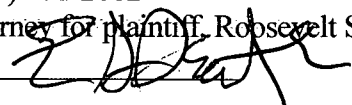
the county did not assert that there was no basis in the record to find malice and since the plaintiff asserted that there was a disputed issue of material fact as to malice summary judgment should not have been granted.

Finally, the court should reconsider its decision because the Fourth Count asserts a civil rights claim against Long which his motion did not address and for which there is no governmental immunity or other basis to dismiss the complaint. The Court denied that summary judgment as to the Fourth and Fifth Counts and there is no basis to grant it to defendant Long individually since the county only alleged the exemption under the Tort Claim Act as the basis for immunity .

CONCLUSION

Simmons respectfully requests the court to reconsider its decision and alter or amend the judgment to denial dismissal of defendant Long.

Respectfully submitted,


Edward A. Bertele, Esq.
1812 Pierce Street
Charleston, SC 29492
(843) 471-2082
Attorney for plaintiff, Roosevelt Simmons
By: 

Dated: December 4, 2012
Charleston, SC

2011-CP-10-1084

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the within motion to alter or amend judgment was personally served upon the defendants' attorneys, Christopher Dorsel, Esq. and Wendy Keefer, Esq. by regular mail postage prepaid at her last known mailing address.


Edward A. Bertele, Esq.

December 4, 2012

FILED
2012 DEC -6 PM 2:09
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

EDWARD A. BERTELE, ESQ.
ATTORNEY AT LAW
1812 PIERCE STREET
CHARLESTON, SC 29492
Email: ebertele@msn.com

Member: SC, NJ & NY bars

Tele: (843) 471-2082
Fax: (843) 471-2082

December 4, 2012

Ms. Julie J. Armstrong
Clerk of the Court
Charleston County Courthouse
100 Broad Street
Charleston, SC 29401

Re: Simmons v. Mase and Company, LLC et al
Case No. 11-CP-10-

Dear Ms. Armstrong:

Enclosed are the Plaintiff's motion to alter or amend the judgment and certificate of service and Case information statement together with the filing fee. Thank you for your kind assistance in this matter.

Very truly yours,

Edward A. Bertele, Esq.

Encl: Chris Dorsel, Esq.
Wendy Keefer, Esq.