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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas for the Thirteenth Judicial Circuit

The Honorable Charles B. Simmons, Jr. Master-in-Equity

Civil Action Case Nos.: 2019-CP-23-05954 & 2020-CP-23-04351
Appellate Case No.: 2022-000897

Crescent Homes SC, LLC,

Appellants/Plaintiffs,

v.

CJN, LLC,

Respondents/Defendants.

**APPELLANT’S MEMORANDUM OF LAW IN SUPPORT OF
IMMEDIATE APPEALABILITY**

Crescent Homes SC, LLC (“Crescent” or “Appellant”) respectfully submits the following Memorandum of Law in Support of Immediate Appealability of the Order of the Honorable Charles B. Simmons, Jr., filed May 27, 2022 and subsequent Order Denying Crescent’s Rule 59(e) Motion to Alter or Amend filed June 10, 2022 (collectively, “the Orders”). As the Orders clearly involve a ruling on the merits of a claim for declaratory judgment, they are final orders that are subject to immediate appeal in accordance with applicable law.

BACKGROUND

This matter arises out of two separate cases that were consolidated and then bifurcated so that a claim for declaratory judgment could be issued on the issue of enforceability of a right of

first refusal. On October 11, 2019, Crescent filed a Complaint (the “Crescent Case”) against CJN, LLC, (“CJN”) for breach of contract, seeking specific performance of a Purchase and Sale Agreement (“Agreement”) between Crescent and CJN. On September 18, 2020, CJN filed a separate Complaint against Crescent (the “CJN Case”) alleging a cause of action for declaratory judgment under the Uniform Declaratory Judgments Act, S.C. Code § 15–53–10, *et seq.* Specifically, CJN sought a declaration from the circuit court pursuant to the Uniform Declaratory Judgments Act that the right of first refusal (“ROFR”) in the Agreement was void and unenforceable, or in the alternative, that Crescent’s rights under the ROFR were extinguished by Crescent’s failure to make an offer better or equal to the offer for purchase submitted by others. *See Amended Complaint*, p. 10 (attached as Exhibit A with relevant portions highlighted).

On August 11, 2021, Crescent filed a Motion to Consolidate and Merge the two actions for the purposes of all remaining discovery and trial. By an order of the Honorable Charles B. Simmons, Jr., filed on October 22, 2021, the two cases were consolidated, and the matter was bifurcated, with CJN’s cause of action for declaratory judgment as to the ROFR slated for trial first before the remainder of the causes of action. On October 19, 2021, CJN filed an Amended Complaint against Crescent, adding causes of action for tortious interference with contractual relationship, violations of the South Carolina Unfair Trade Practices Act, and punitive damages.

In an Order filed May 27, 2022, the Court issued a ruling on the merits of CJN’s declaratory judgment claim, concluding that the ROFR was void and unenforceable. *See Order filed May 27, 2022* (attached as Exhibit B with relevant provision highlighted). On June 6, 2022, Crescent filed a Motion to Alter or Amend the First Order pursuant to Rule 59(e) SCRPC. On June 10, 2022, the Honorable Charles B. Simmons, Jr., denied Crescent’s Motion to Alter or Amend, such that the ruling on the declaratory judgment claim was final for purposes of appeal. Crescent then filed a

Notice of Appeal on June 29, 2022. The Orders are final judgments from which Crescent, rightfully, took immediate appeal.

I. THE ORDERS ARE A FINAL RULING ON A CLAIM FOR DECLARATORY JUDGMENT AND THEREFORE, ARE IMMEDIATELY APPEALABLE

Rule 201(a), SCAR provides that, “[a]ppel may be taken, as provided by law, from any final judgment, appealable order or decision.” See Rule 201, SCAR. In declaring the ROFR was unenforceable, the lower court granted declaratory judgment to CJN. The Orders granting declaratory judgment are immediately appealable, final judgments pursuant to both the Uniform Declaratory Judgments Act, S.C. Code §15–53–20 and Rule 72, SCRCF. See S.C. Code § 15–53–20 (attached as Exhibit C); see also *Babb v. Est. of Watson*, Unpublished Opinion No. 2006-MO-030, 2006 WL 7353457 (S.C. Oct. 9, 2006) (attached as Exhibit D). The right to an appeal originates from and is controlled by statutory law. *North Carolina Federal Sav. And Loan Ass’n v. Twin States Dev. Corp.*, 298 S.C. 480, 347 S.E.2d 97 (1986). In this instance, the applicable statutory law is the Uniform Declaratory Judgments Act, which states:

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. **Such declarations shall have the force and effect of a final judgment or decree.**

S.C. Code § 15–53–20 (emphasis added).

This statute, when read in conjunction with Rule 72, SCRCF (which states that “[a]ppel may be taken, as provided by law, from any final judgment or appealable order”), indicates that the Orders are immediately appealable. See Rule 72, SCRCF; see also *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 708 (2005) (“An appeal ordinarily may be pursued only after a party has obtained a final judgment.”); *Mid-State Distributors, Inc. v. Century Importers, Inc.*,

310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993); *Ex parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005) (“As a general rule, only final judgments are appealable.”)

In the case of *Cobb v. Maccaro*, the Court described the rule for appealability, noting “[o]nly final judgments, including those arising from a special or collateral proceeding after judgment, and certain interlocutory orders are appealable.” *Cobb v. Maccaro*, 423 S.E.2d 156, 310 S.C. 303 (1992); citing S.C. Code § 14-3-330; see also *Stroup v. Duke Power Co.*, 216 S.C. 79, 56 S.E.2d 745, 747 (1949) (noting the general rule that “statutes should be construed liberally in favor of the right of appeal”).

II. THE ORDERS “INVOLVE THE MERITS” OF THE CASE AND ARE THEREFORE IMMEDIATELY APPEALABLE

The Orders are also immediately appealable because they involve the merits pursuant to S.C. Code § 14-3-330(1). S.C. Code § 14-3-330(1) extends appellate jurisdiction to: “[a]ny intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions...” See S.C. Code § 14-3-330(1). South Carolina courts have defined, “involving the merits” to mean, “... **one that ‘must finally determine some substantial matter forming the whole or a part of some cause of action or defense.’**” *Ex parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005) (quoting *Mid-State Distribs., Inc.*, 310 S.C. at 334, 426 S.E.2d at 780.) (emphasis added). Case law has established that orders “necessarily affecting the judgment” are equivalent to those “involving the merits” and the phrases can be used interchangeably in § 14-3-330(1). See *Link v. Sch. Dist. of Pickens Cnty.*, 302 S.C. 1, 393 S.E.2d 176 (1990).

The fact the circuit court deemed it proper to bifurcate the ROFR issue evidences the importance of the issue. Certainly, it is a substantial matter as it is the underlying issue upon which the CJN case is based. The determination of the enforceability of the ROFR relates to other causes

of action in the CJN case, as CJN will intend to argue that the declaratory judgment issued by the lower court supports its claims for damages. *See Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868 (2019) (ruling that a family court order, following a bifurcated trial, determining whether common law marriage existed involved the merits because the remaining issues of divorce and distribution of marital property related to that determination).

III. THE ORDERS AFFECT A SUBSTANTIAL RIGHT AND ARE IMMEDIATELY APPEALABLE ON THIS ADDITIONAL BASIS

The Orders are also immediately appealable pursuant to S.C. Code § 14-3-330(2) because the lower court's declaratory judgment that the ROFR is unenforceable affects a substantial right. If Crescent is not allowed to appeal the Orders on an immediate basis, its rights may not be protected through the completion of the litigation. Specifically, if the property that is the subject of the ROFR is sold to a third party, Crescent's property rights would be lost. In the case of *Hagood v. Sommerville*, the Court held that an order granting motion to disqualify party's attorney in a civil case affected a substantial right and was immediately appealable. *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 708 (2005). When conducting its analysis of whether a substantial right was affected by the aforementioned order, the *Hagood* court, noted a factor that influenced its decision in favor of appealability was the fact that, "[i]f a new trial were ordered after an appeal in the distant future, the preferred attorney may not be available or a litigant may not be able to afford the attorney for a second trial." *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005). The *Hagood* court found the Petitioner's arguments on this point persuasive considering that "the right would likely be lost if not immediately appealed." *Id.* In this regard, Crescent's ability to appeal this issue in the future is subject to being lost due to events that could occur in the interim, i.e., a sale of the property. However, at this moment in time, the

property has not been sold and is not under contract, which allows for Crescent's rights to be better protected through pursuit of an immediate appeal.

CONCLUSION

For the reasons set forth above, Appellant Crescent Homes SC, LLC has shown that this Court has jurisdiction over this appeal, as it is a proper appeal of final orders issuing a final judgment on a claim for declaratory judgment that: (i) was brought under the Uniform Declaratory Judgment Act, S.C. Code § 15-53 10, *et seq.*; (ii) involves the merits; and (iii) affects a substantial right.

By: *s/Ellis R. Lesemann*
Ellis R. Lesemann (S.C. Bar No. 15315)
erl@lalawsc.com
Benjamin H. Joyce (S.C. Bar No. 100949)
bhj@lalawsc.com
LESEMANN & ASSOCIATES LLC
418 King Street, Suite 301
Charleston, SC 29403
(843) 724-5155

Attorneys for Appellant Crescent Homes SC, LLC

July 20, 2022
Charleston, South Carolina

EXHIBIT A

CJN's Amended Complaint

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
CJN, LLC,)
)
Plaintiff,)
)
vs.)
)
CRESCENT HOMES SC, LLC)
)
Defendant.)
)
)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2020-CP-23-04351

AMENDED COMPLAINT

COMES NOW Plaintiff CJN, LLC (“**CJN**”), complaining of Defendant Crescent Homes SC, LLC (“**Crescent**”), and states as follows:

1. CJN is a limited liability company organized and existing under the laws of the State of South Carolina and is the owner of real property located in Greenville County, South Carolina.
2. Crescent is a Delaware limited liability company and conducts business in Greenville County, South Carolina.
3. This Court has personal jurisdiction over the parties hereto and has subject matter jurisdiction over this action.
4. Venue is proper in this forum.
5. CJN is the owner of certain real property that is the subject of this dispute and is located at an unassigned address on Standing Springs Road in Greenville County, South Carolina and has been assigned TMS: P/O 0584010102601 (the “**CJN Property**”). The CJN Property is further described in the property description included in Exhibit A hereto.
6. On or about July 10, 2020, Crescent filed a lis pendens on the CJN Property in *Crescent Homes SC, LLC v. CJN, LLC*, Greenville County Case No. 2020-LP-2300343 (“**Lis Pendens 1**”), giving notice of purported pending litigation related to the CJN Property. A copy of Lis

- Pendens 1 is attached hereto as Exhibit A.
7. On or about August 6, 2020, Crescent filed a lis pendens on the CJN Property in *Crescent Homes SC, LLC v. CJN, LLC*, Greenville County Case No. 2020-LP-2300373 (“**Lis Pendens 2**”), giving notice of purported pending litigation related to the CJN Property. A copy of Lis Pendens 2 is attached hereto as Exhibit B.
 8. On or about August 27, 2020, Crescent filed a lis pendens on the CJN Property in *Crescent Homes SC, LLC v. CJN, LLC*, Greenville County Case No. 2020-LP-2300395 (“**Lis Pendens 3**”), giving notice of purported pending litigation related to the CJN Property. A copy of Lis Pendens 3 is attached hereto as Exhibit C.
 9. On or about September 17, 2020, Crescent filed a lis pendens on the CJN Property in *Crescent Homes SC, LLC v. CJN, LLC*, Greenville County Case No. 2020-LP-2300415 (“**Lis Pendens 4**”), giving notice of purported pending litigation related to the CJN Property. A copy of Lis Pendens 4 is attached hereto as Exhibit D. Lis Pendens 1, Lis Pendens 2, Lis Pendens 3, and Lis Pendens 4 are collectively referred to hereinafter as the “**Lis Pendens Filings**.” As of the date of this Complaint, Crescent has not filed suit in relation to the CJN Property or in relation to any of the Lis Pendens Filings, and therefore did not file suit within 20 days of filing Lis Pendens 1, Lis Pendens 2, or Lis Pendens 3.
 10. As of the date of this Complaint, Crescent has not cancelled the Lis Pendens Filings, despite not filing suit in relation to the CJN Property or in relation to any of the Lis Pendens Filings.
 11. Upon information and belief, the Lis Pendens Filings were filed for the purpose of preventing CJN from selling the CJN Property based on Crescent’s invalid claim that it has a right of first refusal on the CJN Property.
 12. On October 8, 2018, CJN and Crescent entered into an Agreement for Purchase and Sale of Developed Lots (“**Agreement**”) in relation to the development of the River Springs Subdivision on raw land owned by CJN and located on Standing Springs Road, Greenville County, South Carolina (“**River Springs Property**”) and to be sold to Crescent as subdivided

lots for the construction of single family houses. A copy of the Agreement is attached as Exhibit E.

13. The CJN Property and River Springs Property are adjacent to one another but are separate and distinct properties.
 14. The Agreement references a potential Future Phase of additional lots, which would be located on the CJN Property, but does not require that either party proceed with development of the "Future Phase" and therefore does not contain any obligation that CJN develop the CJN Property and/or sell the "lots" in the "Future Phase."
 15. Because the parties entered no binding agreement regarding development and sale of the Future Phase lots on the CJN Property, Crescent reserved the right to purchase those lots, in the event CJN elected to develop them, through a right of first refusal ("**ROFR**") as follows:
 19. Right of First Refusal: At the Initial Closing, Seller will grant to Purchaser a right of first refusal with respect to the lots cross-hatched and shown on Exhibit "A-2" as "Future Phase" and any additional lots that may from time to time may be annexed or otherwise included in the Subdivision. A memorandum of such right of first refusal in a form reasonable acceptable to the Parties will be recorded in the public records of Greenville County at the Initial Closing.
- See Agreement, ¶ 19.*
16. The "lots cross-hatched and shown on Exhibit 'A-2' as 'Future Phase'" are located within the CJN Property that has been encumbered with the Lis Pendens Filings.
 17. The ROFR applies to the sale of lots in the Future Phase but does not apply to the sale of the undeveloped CJN Property as a whole.
 18. Because the parties entered no binding agreement regarding development of the Future Phase lots, CJN was free to elect not to proceed with development of the Future Phase and free to sell the undeveloped CJN Property free and clear of the ROFR.
 19. The ROFR contains no time limitation within which it may be exercised.

20. The ROFR does not define the procedures and parameters under which it may be exercised such as the minimum time for due diligence to which Crescent would be entitled upon notice of a purchase offer.
21. Pursuant to the Agreement, an “Initial Closing” of lots was to be scheduled by Crescent and “held on or before fifteen (15) days after the recording of the Subdivision Plat.” *See Agreement*, ¶ 6.
22. CJN recorded the Plat for the Subdivision on August 16, 2019. A copy of the Plat is attached as Exhibit F. Therefore, the Agreement required Crescent to schedule the Initial Closing for no later than September 1, 2019.
23. Despite repeated demands from CJN, Crescent continually failed to conduct the Initial Closing for months after September 1, 2019.
24. As of June 26, 2020, the date of the offer discussed hereinbelow, because of Crescent’s wrongful delay, the Initial Closing had not occurred and the memorandum referenced in Agreement ¶19 had not been agreed to or recorded.
25. On or about June 26, 2020, CJN received a bonified offer for purchase of the CJN Property from Mr. Clark, a neighboring property owner, for \$775,000.00 (“**Clark Offer**”). A copy of the Clark Offer is attached as Exhibit G. The Clark Offer required a closing date of on or before July 15, 2020 in order for Mr. Clark to meet a tax deadline that would make the purchase feasible for Mr. Clark.
26. In response to the Clark Offer, CJN elected to not proceed with development of the Future Phase and instead elected to pursue sale of the undeveloped CJN Property pursuant to the Clark Offer.
27. CJN was not required to provide a right of first refusal to Crescent with respect to the undeveloped CJN Property because the ROFR was only to apply to the sale of Future Phase lots, assuming CJN elected to proceed with development of the Future Phase.

28. Nevertheless, on June 26, 2020, immediately after receiving the Clark Offer and 19 days prior to the July 15 closing deadline, CJN elected to provide a copy the Clark Offer to Crescent and asked if “Crescent would like to exercise a right of first refusal on the property on the terms in the attached offer, including but not limited to the price and closing schedule terms.”
29. CJN made this tender of the Clark Offer in a good faith effort to give Crescent, its partner in the ongoing performance of the Agreement, the benefit of any doubt regarding Crescent’s potential rights to the CJN Property and with the understanding that Crescent’s only options for a good faith response were (1) to make a matching offer to purchase the CJN Property before the July 15 closing date or (2) to decline to make such an offer and thereby terminate any rights it may have claimed to the CJN Property upon the sale to Clark. Instead, Crescent used the tender to assert rights it did not have to prevent the sale to Clark. CJN did not make the tender (1) as an acknowledgement of the validity of the ROFR, (2) to extend or enlarge, beyond the terms of the tender itself, Crescent’s rights to the CJN Property under the ROFR or otherwise, or (3) as a waiver of any defenses to the ROFR or Crescent’s wrongful assertion of rights to the CJN Property under the ROFR or otherwise.
30. Crescent did not respond to CJN’s tender of the Clark Offer. Instead, on July 10, 2020, Crescent filed Lis Pendens 1 to prevent the sale of the CJN Property. Crescent did not notify CJN that it had filed Lis Pendens 1.
31. On or about July 14, 2020, CJN discovered that Lis Pendens 1 had been filed and that Mr. Clark would not be able to close on the sale unless Lis Pendens 1 was cancelled.
32. On July 14, 2020, CJN issued written demand to Crescent giving notice that Crescent had no valid claim to a right of first refusal and no basis to file Lis Pendens 1, demanding immediate cancellation, and giving notice of the damages CJN would incur as a result of the lis pendens.
33. Crescent failed and refused to cancel Lis Pendens 1 prior to the July 15, 2020 closing deadline, preventing the sale to Mr. Clark, and thereby damaging CJN.
34. Despite CJN’s demands, as of the date of this Complaint, Crescent has not cancelled Lis

Pendens 1, and has filed and not cancelled Lis Pendens 2, Lis Pendens 3, and Lis Pendens 4 despite not filing suit in relation to the CJN Property within 20 days of any of the Lis Pendens Filings.

35. After this action was filed on September 18, 2020, Crescent continued to file several additional Lis Pendens (“Additional Lis Pendens Filings”) to cloud the title to the CJN Property. These filings were improper and unnecessary because an action had already been filed by CJN in relation to the CJN Property.
36. Further, the CJN Property has been subject to the Lis Pendens Filings and Additional Lis Pendens Filings since July 10, 2020 and has been unmarketable as a result.
37. On July 26, 2020, CJN sent a proposed an amended ROFR and memorandum of right of first refusal which provided more clarity and specificity for the terms of the ROFR including proposed procedures for exercise and a proposed termination date for the ROFR.
38. In response, on July 31, 2020, Crescent proposed unreasonable terms that were well beyond the requirements of the ROFR, including requiring CJN to provide “a permissible and usable means of access for purposes of vehicular ingress and egress from the Future Phase” which would have required CJN to build a bridge on the CJN Property. As a result, CJN and Crescent did not come to terms on the amended ROFR.
39. On or about May 10, 2021, CJN received a bona fide offer for purchase of the CJN Property from Opus Petrus, LLC (“**Opus**”) for \$1,250,000.00 (“**Opus Offer**”). A copy of the Opus Offer is attached as Exhibit H. The Opus Offer required a closing date of on or before September 15, 2021.
40. Although the ROFR did not apply to this transaction and/or was void, CJN tendered the offer to Crescent on May 18, 2021 and asked if Crescent would like to exercise the ROFR by “purchas[ing] the future phase on terms meeting or exceeding those set forth in the Opus Offer.” The letter provided a twenty (20) day response deadline and stated that Crescent must

exercise the ROFR by June 7, 2021 or the ROFR would terminate automatically.

41. This tender was made in a good faith effort by CJN to resolve the dispute regarding Crescent's purported rights under the ROFR.
42. Crescent failed to accept or reject the Opus Offer terms on or before the June 7, 2021 deadline specified for response to the tender, resulting in a termination of any rights Crescent had under the ROFR.
43. On June 7, 2021, Crescent instead responded with a letter alleging that the Opus Offer was illegitimate and designed to force Crescent to pay an unfair price for the property and/or terminate its rights under the ROFR. Crescent's allegations in the response letter were baseless as the Opus Offer was a genuine offer by a third-party purchaser, made in good faith, without fraud or deceit, and able to be accepted by CJN.
44. Crescent took the following actions in an effort to interfere with the contract between Opus and CJN, prevent a legitimate sale of the CJN Property to Opus, and unfairly extract favorable sale terms for Crescent. These actions were also an abuse of process in that they were an improper use of process to unfairly extract favorable sale terms for Crescent.
 - a. On May 24, 2021, Crescent sent a subpoena to Opus, requesting correspondence between Opus and CJN related to the Opus Offer; all documents related to communications, transactions, meetings, and due diligence conducted by Opus concerning the Opus Offer; appraisals and related materials that were used in determining the purchase price; communications with CJN's counsel relating to the purchase of the CJN Property; communications with realtors concerning the purchase of the CJN Property; submittals to any government entities relating to the CJN Property; documents and proposals exchanged between Opus and CJN relating to seller financing; and documents related to any earnest money deposited in connection with the offer.
 - b. On June 7, 2021, Crescent sent the response letter referenced above falsely alleging the Opus offer was illegitimate.

- c. On June 8, 2021, Crescent sent Requests for Production to CJN seeking CJN's entire file related to CJN's contract with Opus among other things.
 - d. On June 14, 2021, Crescent served the escrow agent under the Opus Offer, Keable & Brown, P.A., with a subpoena requesting the firm's entire file related to CJN's contract with Opus among other things.
 - e. On August 11, 2021, Crescent moved the Court for leave to file an amended answer, counterclaims, and a third-party complaint against Opus. In the proposed third-party complaint, Crescent alleges that Opus tortiously interfered with Crescent's contractual relationship with CJN. Additionally, Crescent seeks to add the following counterclaims against CJN: petition for reformation, declaratory judgment, and breach of contract.
 - f. On August 20, 2021, Crescent issued a subpoena to Nicholas Franchina, member of CJN, seeking his communications related to CJN's contract with Opus among other things.
45. On September 8, 2021, Opus terminated the contract due to Crescent's clouding of the CJN Property's title and the litigation threatened by Crescent. A copy of the Opus termination letter is attached hereto as Exhibit I.
46. Crescent's actions were wrongful because Crescent has no valid interest in the CJN Property pursuant to the ROFR or otherwise because:
- a. The ROFR does not apply to a sale of the undeveloped CJN Property by CJN, and CJN was and is free to sell the undeveloped CJN Property free and clear of any claim under the ROFR;
 - b. The ROFR violates the rule against perpetuities and is therefore void because it is an interest that might not vest either within a life in being at the time of the creation of the interest or until later than 21 years thereafter;
 - c. The ROFR is void as an unreasonable restraint on alienation because it lacks specificity as to duration of the right, the property subject to the right, the purchase price, and the procedures for exercising the right, among other things;
 - d. Because the ROFR was void and/or did not apply to the CJN Property, any rights Crescent had to purchase the CJN Property arose from and were limited by the terms of CJN's tender of the Clark Offer on June 26, 2020, not the invalid ROFR

- itself, and all such rights were terminated and extinguished by Crescent's failure to make an equal or better offer for purchase on or before the July 15 closing deadline in the Clark Offer.
- e. The Opus Offer was a bonified offer.
 - f. Because the ROFR was void and/or did not apply to the CJN Property, any rights Crescent had to purchase the CJN Property arose from and were limited by the terms of CJN's tender of the Opus Offer on May 18, 2021, not the invalid ROFR itself, and all such rights were terminated and extinguished by Crescent's failure to make an equal or better offer for purchase on or before the June 7, 2021 tender response deadline.
 - g. Assuming the ROFR was valid and applied to the CJN Property, which are specifically denied, Crescent was given any and all rights it had under the ROFR when CJN tendered the Clark Offer on June 26, 2020, and all such rights were terminated and extinguished by Crescent's failure to make an equal or better offer for purchase on or before the July 15 closing deadline in the Clark Offer. CJN's tender of the Clark Offer on June 26, 2020 was valid despite being prior to Initial Closing because (1) the Initial Closing would have occurred prior to June 26, 2020 but for delays by Crescent (2) the timing of the tender was not prejudicial to Crescent and (3) Crescent asserted its rights to the CJN Property were ripe by filing Lis Pendens 1 prior to the Initial Closing, among other things, and Crescent should therefore be estopped from asserting those rights did not arise until after the Initial Closing.
 - h. Assuming the ROFR was valid and applied to the CJN Property, which are specifically denied, Crescent was given any and all rights it had under the ROFR when CJN tendered the Opus Offer on May 18, 2021, and all such rights were terminated and extinguished by Crescent's failure to make an equal or better offer for purchase on or before the June 7, 2021 deadline contained in the letter.
47. As a result of Crescent's wrongful actions, CJN has incurred damages, including, but not limited to, the lost sale price, lost investment opportunity, and holding costs, in an amount to be determined at trial.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

48. CJN restates and re-alleges each and every allegation above as if fully set forth herein.
49. CJN is entitled to a declaration from this Court pursuant to the Uniform Declaratory Judgment Act, S.C. Code Ann. §15-53-10, *et seq.*, which provides in relevant part that “courts of record within their respective jurisdiction shall have the power to declare rights, status and other legal relations whether or not further relief is or could be claimed.”
50. CJN and Crescent are interested parties who have a genuine, substantial, and justiciable controversy that exists between them. All necessary parties are joined to this action.
51. CJN is entitled to a declaration that the ROFR is void and of no effect because:
- a. The ROFR does not apply to a sale of the undeveloped CJN Property by CJN, and CJN was and is free to sell the undeveloped CJN Property free and clear of any claim under the ROFR;
 - b. Additionally or alternatively, the ROFR violates the rule against perpetuities and is therefore void because it is an interest that might not vest either within a life in being at the time of the creation of the interest or until later than 21 years thereafter;
 - c. Additionally or alternatively, the ROFR is void as an unreasonable restraint on alienation because it lacks specificity as to duration of the right, the property subject to the right, the purchase price, and the procedures for exercising the right, among other things;
 - d. Because the ROFR was void and/or did not apply to the CJN Property, any rights Crescent had to purchase the CJN Property arose from and were limited by the terms of CJN’s tender of the Clark Offer on June 26, 2020, not the invalid ROFR itself, and all such rights were terminated and extinguished by Crescent’s failure to make an equal or better offer for purchase on or before the July 15 closing deadline in the Clark Offer.
 - e. The Opus Offer was a bonified offer
 - f. Because the ROFR was void and/or did not apply to the CJN Property, any rights Crescent had to purchase the CJN Property arose from and were limited by the terms of CJN’s tender of the Opus Offer on May 18, 2021, not the invalid ROFR

itself, and all such rights were terminated and extinguished by Crescent's failure to make an equal or better offer for purchase on or before the June 7, 2021 tender response deadline.

- g. Assuming the ROFR was valid and applied to the CJN Property, which are specifically denied, Crescent was given any and all rights it had under the ROFR when CJN tendered the Clark Offer on June 26, 2020, and all such rights were terminated and extinguished by Crescent's failure to make an equal or better offer for purchase on or before the July 15 closing deadline in the Clark Offer. CJN's tender of the Clark Offer on June 26, 2020 was valid despite being prior to Initial Closing because (1) the Initial Closing would have occurred prior to June 26, 2020 but for delays by Crescent (2) the timing of the tender was not prejudicial to Crescent and (3) Crescent asserted its rights to the CJN Property were ripe by filing Lis Pendens 1 prior to the Initial Closing, among other things, and Crescent should therefore be estopped from asserting those rights did not arise until after the Initial Closing.
 - h. Assuming the ROFR was valid and applied to the CJN Property, which are specifically denied, Crescent was given any and all rights it had under the ROFR when CJN tendered the Opus Offer on May 18, 2021, and all such rights were terminated and extinguished by Crescent's failure to make an equal or better offer for purchase on or before the June 7, 2021 tender response deadline.
52. CJN is entitled to a declaration that Crescent has no interest in the CJN Property, under the ROFR or otherwise, and has no basis to file any Lis Pendens or other claim on the CJN Property.
53. Accordingly, CJN respectfully submits that the Court should enter a declaratory judgment as set forth hereinabove.

FOR A SECOND CAUSE OF ACTION
(Abuse of Legal Process)

- 54. CJN restates and re-alleges each and every allegation above as if fully set forth herein.
- 55. Crescent improperly used process and legal proceedings against CJN by filing Lis Pendens 1, Lis Pendens 2, and Lis Pendens 3 when it had no valid interest in the CJN Property and

there was no litigation related to the CJN Property pending at the time of the Lis Pendens Filings or within 20 days thereafter.

56. Crescent improperly used process and legal proceedings against CJN by filing Additional Lis Pendens Filings after CJN instituted this action.
57. Crescent improperly used process and legal proceedings against CJN by, among other things, claiming the Opus offer was illegitimate, issuing subpoenas to Opus and various additional parties, and threatening to sue Opus in relation to the offer.
58. Crescent acted with an ulterior purpose, including to prevent CJN from selling the CJN Property to Mr. Clark, Opus and other third parties.
59. Crescent's actions are willful acts in the use of legal process not proper in the regular conduct of the proceeding.
60. As a direct and proximate result of Crescent's acts and omissions, CJN has been damaged.
61. CJN is therefore entitled to judgment against Crescent for actual and punitive damages including, but not limited to, the lost sale price, lost investment opportunity, and holding costs, in an amount to be determined at trial.

FOR A THIRD CAUSE OF ACTION
(Tortious Interference with Contractual Relationship)

62. CJN restates and re-alleges each and every allegation above as if fully set forth herein.
63. CJN and non-party Opus were parties to a valid real estate contract for the sale of property owned by CJN.
64. For the reasons set forth above, Crescent's ROFR contained in the Agreement does not apply to the transaction with Opus and/or the ROFR is void.
65. Despite this, in a good faith effort to resolve the dispute regarding Crescent's purported rights under the ROFR, CJN tendered the Opus Offer to Crescent and gave Crescent an opportunity to match or exceed the terms contained in the Opus Offer.

66. Crescent did not meet or exceed the terms of the Opus Offer by the deadline contained in the tender letter, which terminated any rights Crescent had under the ROFR.
67. Instead, Crescent has tortiously interfered with CJN's contract with Opus in the following ways, among others:
 - a. Crescent filed the latest lis pendens on the CJN Property– lis pendens filed on June 8, 2021;
 - b. Crescent has moved this Court to add Opus as a party and seeks to bring claims of tortious interference against Opus;
 - c. Despite multiple requests by CJN, Crescent has not cancelled the lis pendens filings and has clouded the title for the CJN Property; and
 - d. Serving Opus with overbroad subpoenas related to the CJN's contract with Opus.
68. Crescent's interference with CJN's contract with Opus is intentional, without justification, and is not motivated by a legitimate business purpose.
69. Crescent procured a breach of the contract and Opus has terminated its agreement with CJN.
70. As a direct and proximate result of Crescent's actions, CJN has suffered actual and consequential damages. Moreover, CJN is entitled to an award of punitive damages as a result of Crescent's willful and unjustified interference.

FOR A FOURTH CAUSE OF ACTION
(Unfair and Deceptive Trade Practices)

71. The preceding paragraphs are realleged as if fully set forth herein verbatim.
72. Crescent's conduct constitutes unfair and deceptive trade practices and is a violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, et seq. Furthermore, Crescent's conduct was willful.
73. Crescent's conduct is capable of repetition, and, upon information and belief, has been repeated.
74. Crescent's conduct affects the public interest.
75. Crescent knew or should have known that its actions constituted unfair and deceptive trade practices.

76. As a direct, foreseeable, and proximate result of Crescent's unfair and deceptive trade practices, CJN has suffered an ascertainable loss of money and property.
77. CJN is entitled to recover its actual damages, which amount should be trebled, together with interest and attorney's fees.

FOR A FIFTH CAUSE OF ACTION
(Punitive Damages)

78. CJN restates and re-alleges each and every allegation above as if fully set forth herein.
79. The actions of Defendant set forth above show willful misconduct, wantonness, or recklessness.
80. Plaintiff is entitled to an award of punitive damages to punish, penalize and deter Defendant.

WHEREFORE, Plaintiff CJN, LLC prays for:

- a. a declaratory judgment declaring the respective rights of the parties with respect to the CJN Property;
- b. judgment against Defendant Crescent Homes SC, LLC for damages, including punitive damages, in an amount to be determined at trial;
- c. Treble damages pursuant to S.C. Code Ann. § 39-5-10, et seq;
- d. Attorneys' fees;
- e. Costs of this action; and

Such other and further relief that this Court deems just and proper.

[signature page to follow]

Respectfully submitted,

Kenison, Dudley & Crawford, LLC

/s/ F. James Warmoth

John T. Crawford, Jr., (SC Bar # 69682)

F. James Warmoth (SC Bar # 101072)

704 E. McBee Avenue

Greenville, SC 29601

Telephone: (864) 242-4899

Facsimile: (864) 242-4844

Email: warmoth@conlaw.com

Counsel for Plaintiff

October 19, 2021
Greenville, South Carolina

EXHIBIT B

May 27, 2022 Order

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF GREENVILLE)	C.A. NO. 2019-CP-23-05954
)	
CRESCENT HOMES SC, LLC)	
)	
Plaintiff,)	
)	
v.)	
)	
CJN, LLC,)	
)	
Defendant.)	
)	

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF GREENVILLE)	C.A. NO. 2020-CP-23-04351
)	
CJN, LLC)	
)	
Plaintiff,)	
)	
v.)	
)	
CRESCENT HOMES SC, LLC)	
)	
Defendant.)	
)	

ORDER

A bifurcated portion of the above-captioned consolidated matter was before the Court for a non-jury trial on May 4, 2022. Appearing as counsel were F. James Warmoth for CJN, LLC (“CJN”) and Ellis R. Lesemann for Crescent Homes SC, LLC (“Crescent”). Representatives of each party testified as witnesses.

PROCEDURAL BACKGROUND

The above cases were referred to the undersigned Master in Equity by consent of the parties. The Court consolidated the two matters upon the motion of Crescent and then bifurcated this limited issue for the current trial upon the motion of CJN.

The bifurcated issue for the current trial relates to the enforceability a right of first refusal. In October of 2018, CJN and Crescent entered an agreement related to the development of “Phase 1” of the River Springs subdivision. This agreement contains right of first refusal at issue, which purports to give Crescent a right of first refusal on “lots” in the “Future Phase” (also sometimes referred to as “Phase 2”) using the following language:

19. Right of First Refusal: At the Initial Closing, Seller will grant to Purchaser a right of first refusal with respect to the lots cross-hatched and shown on **Exhibit "A-2"** as “Future Phase” and any additional lots that may from time to time may be annexed or otherwise included in the Subdivision. A memorandum of such right of first refusal in a form reasonable acceptable to the Parties will be recorded in the public records of Greenville County at the Initial Closing.

The Future Phase parcel is adjacent to Phase 1, is owned by CJN, and, to date, remains as a single parcel of undeveloped land. The dispute regarding the right of first refusal first arose in June of 2020 when CJN entered a contract to sell the entirety of the Future Phase. Shortly thereafter, Crescent filed a lis pendens to prevent the sale, contending that the proposed sale violated its right of first refusal. **CJN then filed this action, in relevant part to the bifurcated issue, seeking a declaration from the Court that the right of first refusal is unenforceable and that Crescent has no enforceable rights related to the sale or development of the Future Phase.**

CJN presented multiple theories in support of this claim,¹ including that the right of first refusal creates an unreasonable restraint on alienation of interest in land because it lacks specificity as to duration of the right, the property subject to the right, the purchase price, and the procedures for exercising the right, among other things. Crescent disputes that CJN is entitled to such a declaration, arguing first that the present litigation does not present an active case for controversy and that it is not ready or ripe for resolution by the Court. Alternatively, Crescent argues that the right of first refusal created a binding promise for CJN to develop lots in the Future Phase (and to then give Crescent a right of first refusal on such lots) such that CJN is not

entitled to sell the Future Phase as a single undeveloped parcel. Additionally, Crescent argues that that the right of first refusal is enforceable because it was specifically bargained for by sophisticated commercial entities who were represented by counsel. The parties extensively briefed the above legal theories in memoranda submitted in connection with CJN's Motion for Partial Summary Judgment filed on March 19, 2021.

For the reasons discussed hereinbelow, the Court finds that the right of first refusal is an unreasonable restraint on alienation of interest in land and is therefore unenforceable. Because this conclusion is dispositive, the Court need not address in detail the various additional contentions and theories presented.

FINDINGS OF FACT

CJN and Crescent are both sophisticated entities with extensive real estate experience. Moreover, the parties have had multiple dealings with each other over the years relating to development and sale of both undeveloped real estate and ready to build on lots in Greenville County. In April of 2017, the parties signed a Letter of Intent generally setting forth an intent to buy/sell lots in River Springs, with the Letter of Intent including both "Phase 1" and "Phase 2" (also referred to as the "Future Phase"). However, CJN ultimately decided not to develop Phase 2, despite including Phase 2 in the Letter of Intent and Crescent's continuing desire for CJN to develop buildable lots in Phase 2 (in addition to Phase 1), based on concerns regarding the cost of development of Phase 2.

In October of 2018, the parties then entered into an "Agreement for Purchase and Sale of Developed Lots" (the "Agreement"). This is a lengthy written agreement for the buy/sell of "developed lots" in Phase 1. Aside from the right of first refusal, the Agreement contains no terms related to Phase 2, no obligations for CJN to develop lots in Phase 2 and no obligation for Crescent to purchase any such buildable lots. Crescent concedes there are no such terms but

contends that CJN verbally agreed it would eventually develop Phase 2 in discussions prior to execution of the Agreement. CJN denies that it verbally agreed to develop Phase 2. The Court does not make any finding regarding the existence of a possible verbal agreement. Instead, the Court finds that the written Agreement is the complete and final expression of the parties' agreement and the parties are bound by its terms. The parties are sophisticated entities with extensive real estate experience. Further, the Agreement itself states that it contains all of the terms and conditions agreed to between the parties and there are no oral agreements relating to the transaction.

Subsequent to the execution of the Agreement, there were multiple delays in moving ahead with the "Initial Closing", which was to be the first of several multi-lot closings specified in the Agreement to effectuate the buy/sell of lots in Phase 1. Responsibility for those delays, which were in part caused by CJN, is not at issue in this bifurcated portion of the trial except insofar as the Court finds that the parties did eventually proceed with the Initial Closing in August of 2020, and continued thereafter to transact the buy/sell of lots in Phase 1. For the most part, it appears that Phase 1 has been completed.

To date, Phase 2 remains raw, undeveloped land, and CJN has no current plan to develop lots in Phase 2. The dispute regarding the right of first refusal first arose in June of 2020, when CJN entered a contract to sell Phase 2, as an undeveloped parcel, to Mr. Clark, a neighboring property owner. Crescent filed a lis pendens on the property in response and otherwise contended that the proposed sale violated its rights under the right of first refusal. Likewise, in May of 2021, CJN entered a contract to sell Phase 2, as an undeveloped parcel, to Opus Petrus, LLC. Crescent filed a lis pendens on the property in response in response and otherwise contended that the proposed sale violated its rights under right of first refusal. As of the date of trial, there was no active contract for sale on the property, but CJN was actively marketing the

property for sale. While the parties have asserted claims related to the events surrounding these third party offers,² those claims will be not be addressed here because this Order is focused solely upon the issue of whether the right of first refusal is enforceable under South Carolina law.

As relates to the present issue, the critical and dispositive language in the Agreement is found in paragraph 19, Right of First Refusal, which provides as follows:

19. Right of First Refusal: At the Initial Closing, Seller will grant to Purchaser a right of first refusal with respect to the lots cross-hatched and shown on Exhibit "A-2" as "Future Phase" and any additional lots that may from time to time may be annexed or otherwise included in the Subdivision. A memorandum of such right of first refusal in a form reasonable acceptable to the Parties will be recorded in the public records of Greenville County at the Initial Closing.

Exhibit A-2 referenced in Paragraph 19 is attached to the Phase 1 Agreement and depicts a “Future Phase” with lots shown and crosshatching drawn over those lots.

The language in paragraph 19 is lacking in any number of specific and critical areas. This includes terms and conditions of purchase by Crescent, the time allowed for exercise of the Right of the First Refusal by Crescent, the procedures for exercising the right, the purchase price of the lots, how long the right exists, among other things.

Aside from these shortcomings, the parties also agreed that “a memorandum of such right of first refusal in a form reasonabl[y] acceptable to the Parties will be recorded in the public records of Greenville County at the Initial Closing.” This Initial Closing occurred in August 2020, and while there were discussions between the parties about the terms and conditions of the memorandum, and disagreements about why the memorandum was not entered or recorded, it is undisputed that no memorandum was ever entered or recorded. Even as of the date of trial,

despite the Agreement being executed in October of 2018 and the Initial Closing occurring in August of 2020, no memorandum has been agreed upon or recorded.

ANALYSIS

As an initial matter, Crescent asserts that the present litigation does not present an active case for controversy and that it is not ready or ripe for resolution by the Court. Peoples Fed. Sav. and Ass'n of S.C. v Resources Planning Corp., 596 S.E.2d 51 (SC 2004). Crescent maintains that since there is no active pending sale or offer for sale, there are no issues to currently litigate relating to the right of first refusal.

Under the unique facts of this case, and under the broad language of paragraph 19, the Court finds that the issues are ripe and ready for resolution by the Court. Under the broad and open-ended language of paragraph 19, without a judicial resolution, Crescent would effectively be able to indefinitely have rights relative to CJN's ability to transfer, sell or otherwise develop the lots in the Future Phase. Further, paragraph 19 also relates to the present ability of CJN to sell the Future Phase tract as a whole or being limited to develop and sell the tract as lots only. And, even if CJN developed such lots, Crescent has no obligation to purchase them under the language of paragraph 19. As discussed hereinbelow, paragraph 19 creates an unreasonable restraint of alienation of interest in land, and that issue is ripe and ready for resolution by the Court. Further, the Court concludes that the rule set forth in Peoples Fed. is satisfied under the facts and circumstances of this case, including the prior contracts with Clark and Opus, Crescent's response to those contracts, and CJN's active and ongoing marketing of the property for sale.

A right of first refusal is a pre-emptive right. Webb v. Reames, 485 S.E.2d 384 (SC App 1997). Pre-emptive rights are subject to the rule against restraint of alienation of interest in land. 61 Am Jur 2d Perpetuities and Restraints on Alienation § 110 (2002); Restatement (Third) of

Property (Servitudes) § 3.4 cmt. f (2000). “Under South Carolina common law, any unreasonable limitation upon the power of alienation is against public policy and must be construed as having no force and effect.” Wise v. Poston, 316 S.E.2d 412, 415 (SC. App. 1984). “Whether a right of first refusal is valid depends on the legitimacy of the purpose, the price at which the holder may purchase the land, and the procedures for exercising the right.” Restatement (Third) of Property: Servitude § 3.4 cmt. (f) (2000).

The language of the right of first refusal in paragraph 19 is lacking in any number of specific and critical areas. This includes terms and conditions of purchase by Crescent, the time allowed for exercise of the Right of the First Refusal by Crescent, the procedures for exercising the right, the purchase price of the lots, how long the right exists,³ among other things. Under the broad and open-ended language of paragraph 19, without a judicial resolution, Crescent would effectively be able to indefinitely have rights relative to CJN’s ability to transfer, sell or otherwise develop lots in the Future Phase. Further, paragraph 19 also relates to the present ability of CJN to sell the Future Phase tract as a whole or being limited to develop and sell the tract as lots only. Finally, even if CJN developed such lots, Crescent has no obligation to purchase them under the language of paragraph 19. As a result, paragraph 19 creates an unreasonable restraint of alienation of interest in land.

In addition to these shortcomings, the parties specifically agreed to incorporate and agree upon all such critical terms and set forth the same in a memorandum of right of first refusal, with the memorandum to be “recorded in the public records of Greenville County at the Initial Closing.” This Initial Closing occurred in August of 2020, and while there were discussions between the parties about the terms and conditions of the memorandum, the parties have never been able to agree on terms and no memorandum was entered into and obviously no memorandum has been recorded.

It is well established that where an agreement is clear and capable of interpretation, the Court's function is to interpret its meaning and enforce the same. Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC 649 S.E.2d 494 (SC App 2007). However, based upon the language used in paragraph 19, the Court is unable to interpret and/or give meaning to the parties' agreement without substantially and significantly creating terms and conditions that the parties themselves could have and should have included. While there is authority for a court to determine the parties' intent from the scope and language used (*see, Barnacle Broadcasting, Inc. v. Baker Broadcasting, Inc.*, 538 S.E.2d 672 (SC App 2000)), the Court is unable to do so under the facts herein based upon the language of paragraph 19. Further, in that a right of first refusal is a restraint on alienation, it is to be narrowly construed.

The Court simply concludes that under the language and facts involved herein, the right of first refusal in paragraph 19 is not enforceable. The Court notes that its ruling in no way limits the parties' ability to ultimately reach a deal; both are still free to negotiate upon any terms and conditions that may be mutually agreeable.

The remaining issues between the parties shall move to trial as soon as possible.

AND IT IS SO ORDERED

[COURT'S SIGNATURE PAGE TO FOLLOW]

¹ In Paragraph 51 of its Amended Complaint, CJN asserted the following theories, which the Court lists herein solely for purposes of background relating to the procedural history:

- a. The ROFR does not apply to a sale of the undeveloped CJN Property by CJN, and CJN was and is free to sell the undeveloped CJN Property free and clear of any claim under the ROFR;
- b. Additionally or alternatively, the ROFR violates the rule against perpetuities and is therefore void because it is an interest that might not vest either within a life in being at the time of the creation of the interest or until later than 21 years thereafter;
- c. Additionally or alternatively, the ROFR is void as an unreasonable restraint on alienation because it lacks specificity as to duration of the right, the property subject to the right, the

-
- purchase price, and the procedures for exercising the right, among other things;
- d. Because the ROFR was void and/or did not apply to the CJN Property, any rights Crescent had to purchase the CJN Property arose from and were limited by the terms of CJN's tender of the Clark Offer on June 26, 2020, not the invalid ROFR itself, and all such rights were terminated and extinguished by Crescent's failure to make an equal or better offer for purchase on or before the July 15 closing deadline in the Clark Offer.
 - e. The Opus Offer was a bonified offer
 - f. Because the ROFR was void and/or did not apply to the CJN Property, any rights Crescent had to purchase the CJN Property arose from and were limited by the terms of CJN's tender of the Opus Offer on May 18, 2021, not the invalid ROFR itself, and all such rights were terminated and extinguished by Crescent's failure to make an equal or better offer for purchase on or before the June 7, 2021 tender response deadline.
 - g. Assuming the ROFR was valid and applied to the CJN Property, which are specifically denied, Crescent was given any and all rights it had under the ROFR when CJN tendered the Clark Offer on June 26, 2020, and all such rights were terminated and extinguished by Crescent's failure to make an equal or better offer for purchase on or before the July 15 closing deadline in the Clark Offer. CJN's tender of the Clark Offer on June 26, 2020 was valid despite being prior to Initial Closing because (1) the Initial Closing would have occurred prior to June 26, 2020 but for delays by Crescent (2) the timing of the tender was not prejudicial to Crescent and (3) Crescent asserted its rights to the CJN Property were ripe by filing Lis Pendens 1 prior to the Initial Closing, among other things, and Crescent should therefore be estopped from asserting those rights did not arise until after the Initial Closing.
 - h. Assuming the ROFR was valid and applied to the CJN Property, which are specifically denied, Crescent was given any and all rights it had under the ROFR when CJN tendered the Opus Offer on May 18, 2021, and all such rights were terminated and extinguished by Crescent's failure to make an equal or better offer for purchase on or before the June 7, 2021 tender response deadline.

² CJN contends that any rights Crescent had under the right of first refusal (assuming it was enforceable) were terminated and extinguished by Crescent's failure to make an equal or better offer for purchase and that Crescent improperly prevented these sales. Crescent contends this is not the case with respect to the Clark offer because the Initial Closing had not yet occurred at the time of that offer, and is not the case with respect to the Opus offer because Crescent disputes that the Opus offer was a bona fide offer.

³ With respect to indefinite existence of the Right of the First Refusal, the parties presented extensive arguments regarding applicability of the rule against perpetuities in memoranda submitted in connection with CJN's Motion for Partial Summary Judgment filed on March 19, 2021. The Court has found that the right of first refusal is an unreasonable restraint on alienation applying the indefinite existence of the right as one of many factors. Accordingly, the Court need not address whether or not the right of first refusal is separately unenforceable as in violation of the rule against perpetuities.



Greenville Common Pleas

Case Caption: Crescent Homes SC LLC vs. C J N Llc

Case Number: 2019CP2305954

Type: Master/Order/Other

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)

EXHIBIT C

Uniform Declaratory Judgments Act, S.C. Code Ann. §15-53-20

Code of Laws of South Carolina 1976 Annotated
Title 15. Civil Remedies and Procedures
Chapter 53. Declaratory Judgments

Code 1976 § 15-53-20

§ 15-53-20. Courts of record may declare rights, status and other legal relations.

[Currentness](#)

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

Credits

HISTORY: 1962 Code § 10-2002; 1952 Code § 10-2002; 1948 (45) 2014.

[Notes of Decisions \(67\)](#)

Code 1976 § 15-53-20, SC ST § 15-53-20

Current through 2022 Act No. 239, except Act No. 226, subject to final approval by the Legislative Council, technical revisions by the Code Commissioner, and publication in the Official Code of Laws.

End of Document

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EXHIBIT D

Babb v. Est. of Watson, 2006 WL 7353457 (S.C. Oct. 9, 2006)

2006 WL 7353457

Only the Westlaw citation is currently available.

THIS OPINION HAS NO PRECEDENTIAL VALUE.
IT SHOULD NOT BE CITED OR RELIED ON AS
PRECEDENT IN ANY PROCEEDING EXCEPT AS
PROVIDED BY RULE 268(d)(2), 8(d)(2), SCACR.

Supreme Court of South Carolina.

Brenda R. BABB, Petitioner,

v.

The ESTATE OF Charles L. WATSON and
Eleanor G. Watson and Pamela A. Watson
Fehlig, as personal representatives of the
estate of Charles L. Watson, and [CLW
Investments, Inc.](#), d/b/a [Salt Marsh Cove](#),
and Wilbur M. McLamb, individually,
Little River Campground, Inc., and Carl
Meares, individually, Respondents.

No. 2006–MO–030.

|

Submitted Sept. 19, 2006.

|

Decided Oct. 9, 2006.

ON WRIT OF CERTIORARI TO THE COURT OF
APPEALS.

Appeal from Charleston County; [Daniel F. Pieper](#), Circuit
Court Judge.

Attorneys and Law Firms

[James B. Van Osdell](#), and [Charles B. Jordan, Jr.](#), both of Van
Osdell, Lester, Howe & Jordan, P.A., of Myrtle Beach, for
Petitioner.

[Stephan Victor Futeral](#), of Futeral & Brookshire, LLC, of Mt.
Pleasant, for Respondents.

Opinion

PER CURIAM.

*1 Petitioner has filed a petition asking this Court to review
the Court of Appeals' decision in *Babb v. Est. of Watson, et al.*,

S.C. Ct.App. Orders dated November 4, 2004, and May 24,
2005. We grant the petition, dispense with further briefing,
reverse the Court of Appeals, and remand to proceed with the
appeal.

FACTUAL/PROCEDURAL BACKGROUND

In the underlying action, petitioner alleged civil conspiracy,
unjust enrichment, negligence and gross negligence, breach
of fiduciary duty, and fraud, constructive fraud, deceit,
and misrepresentation by respondents. In their answer,
respondents sought a declaratory judgment by way of
counterclaim that petitioner was not a shareholder in Little
River Campground, Inc. (hereinafter LRCG, Inc.), and should
be barred from claiming any ownership interest in LRCG,
Inc. In a bifurcated trial, the trial judge determined petitioner
had voluntarily and intentionally relinquished her interest in
LRCG, Inc. Petitioner filed a [Rule 59\(e\), SCRPC](#), motion for
the trial judge to alter or amend his order. The trial judge
denied petitioner's motion.

Petitioner appealed the trial judge's order to the Court
of Appeals. Respondents moved to dismiss the appeal as
interlocutory. The Court of Appeals granted the dismissal,
stating that a fundamental rule of appellate procedure is that
a judgment or order must be final before it can be appealed.

ISSUE

Did the Court of Appeals err in dismissing petitioner's appeal
as interlocutory?

DISCUSSION

Petitioner contends the Court of Appeals erred in dismissing
her appeal as interlocutory. Specifically, petitioner argues the
Court of Appeals erred in dismissing her appeal because the
trial judge's order determining that she was not a shareholder
in LRCG, Inc. was a final order involving the merits.

An order generally must fall into one of several categories
set forth in [S.C.Code Ann. § 14–3–330 \(1976\)](#) in order to
be immediately appealable. *Hagood v. Sommerville*, 362 S.C.
191, 607 S.E.2d 707 (2005). These categories include:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action....

[S.C.Code Ann. § 14–3–330](#). This Court has defined “involving the merits” as a ruling which finally determines some substantial matter forming the whole or a part of some cause of action or defense. *Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988). An order may be appealable because it has the effect of striking out a pleading. *Link v. Sch. Dist. of Pickens County*, 302 S.C.1, 393 S.E.2d 176 (1990).

*2 Petitioner's appeal involved the merits of the underlying action. The trial judge's determination that petitioner had waived her interest in LRCG, Inc. had the effect of striking part of petitioner's pleadings. Petitioner alleged breach of fiduciary duty by respondents. The trial judge's order had the effect of declaring that a fiduciary relationship could not exist between petitioner and respondents as minority and controlling shareholders, respectively, because the judge's order declared petitioner was not a shareholder. Therefore, the effect of the trial judge's order was to strike petitioner's cause of action for breach of fiduciary duty.

Additionally, petitioner had alleged in her complaint civil conspiracy occurred within the relationship of *shareholders*, unjust enrichment occurred because respondents failed to honor the commitment to purchase property for the benefit of *shareholders*, respondents acted negligently and grossly negligent in intentionally and voluntarily choosing to ignore their duties and responsibilities to *LRCG, Inc.*, and respondents were guilty of fraud, deceit, and misrepresentation because respondents represented to petitioner that they would act as exclusive agents for *shareholders* and actively seek property to be purchased by and for the benefit of all *shareholders*. By declaring petitioner's status as a non-shareholder of LRCG, Inc., the trial judge effectively struck petitioner's entire complaint against respondents.

Further, the Uniform Declaratory Judgments Act states that declaratory judgments have the force and effect of a final judgment or decree. [S.C.Code Ann. § 15–53–20](#). Appeal may be taken from any final judgment or appealable order. [Rule 72, SCRPC](#).

Therefore, we reverse the Court of Appeals' dismissal of the appeal as interlocutory and remand to proceed with the appeal.

REVERSED AND REMANDED.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

All Citations

Not Reported in S.E.2d, 2006 WL 7353457

RECEIVED

Jul 20 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas for the Thirteenth Judicial Circuit

The Honorable Charles B. Simmons, Jr. Master-in-Equity

Civil Action Case Nos.: 2019-CP-23-05954 & 2020-CP-23-04351
Appellate Case No.: 2022-000897

Crescent Homes SC, LLC,

Appellants/Plaintiffs,

v.

CJN, LLC,

Respondents/Defendants.

PROOF OF SERVICE

I hereby certify that I have on this date e-mailed a true and correct copy in PDF format of the Appellant's Memorandum of Law in Support of Immediate Appealability and attached exhibits dated July 20, 2022, to the following counsel of record at the primary e-mail address listed in the Attorney Information System (AIS):

John T. Crawford (S.C. Bar No.69682)

crawford@conlaw.com

F. James Warmoth (S.C. Bar No. 101072)

warmoth@conlaw.com

KENISON, Dudley, & Crawford, LLC

704 E. McBee Avenue

Greenville, SC 29601

(864) 242-4899

Attorneys for CJN, LLC

LESEMANN & ASSOCIATES LLC

By: _____



Ann G. Cunniffe, Paralegal

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SC Court of Appeals

LESEMANN & ASSOCIATES LLC

CIVIL LITIGATION | BUSINESS DISPUTES

ELLIS R. LESEMANN
EMAIL: erl@lalawsc.com

418 KING STREET, SUITE 301
CHARLESTON, SOUTH CAROLINA 29403

TELEPHONE (843) 724-5155

DIRECT: (843) 724-5156
WEBSITE: www.lalawsc.com

July 20, 2022

VIA E-FILING

Jenny Abbott Kitchings, Esquire
Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211
ctappfilings@sccourts.org

Re: *Appellate Case No. 2022-00897 Crescent Homes SC, LLC v. CJN, LLC*

Dear Ms. Kitchings:

Enclosed for filing are the following documents in the above-referenced matter:

1. Appellant's Memorandum of Law in Support of Immediate Appealability;
2. Exhibit A – Respondent's Amended Complaint filed October 19, 2021;
3. Exhibit B – Judge Simmons' Order filed May 27, 2022;
4. Exhibit C – S.C. Code Ann. §15-53-20 (1976);
5. Exhibit D – *Babb v. Est. of Watson*; and
6. Certificate of Service.

Please do not hesitate to contact me with any questions or concerns about this matter.

With best regards,

s/ Ellis

Ellis R. Lesemann

ERL/agc
Enclosure

cc: John T. Crawford, Esquire (w/ encl. via email only)
F. James Warmoth, Esquire (w/ encl. via email only)