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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No.: 2021-000471

Bull Point Plantation Property Owners Association, Inc.....Respondent,

vs

Bull Point SC, LLC, Bull Point, LLC, Bull Point Plantation Owners Association, Inc., William E. Gavigan, Michael Carey, Christopher J. Quick, James Riordan, Richard Riney,
..... Appellants,

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. IN GRANTING SUMMARY JUDGMENT, DID THE TRIAL COURT FAIL TO CONSIDER FACTUAL MATTERS IN THE LIGHT MOST FAVORABLE TO THE NON-MOVANT?**
- A. THE TRIAL COURT DID NOT PROPERLY CONSIDER EVIDENCE IN THE RECORD THAT THE RESPONDENT WAS NOT THE “REAL PARTY IN INTEREST” AS THE GRANTEE OF THE PROPERTY.**
- B. THE TRIAL COURT DID NOT PROPERLY CONSIDER EVIDENCE IN THE RECORD THAT THE RESPONDENT WAS NOT THE TRUE “ASSOCIATION” AS DEFINED IN THE DECLARATION.**
- 1. THE COVENANTS TO BULL POINT PLANTATION IDENTIFY “BULL POINT PLANTATION OWNERS ASSOCIATION, INC.” AS THE PROPER ASSOCIATION.**
 - 2. RESPONDENT LACKS STANDING TO CHALLENGE THE STATUS OF THE ASSOCIATION UNDER THE DECLARATION.**
 - 3. THE TRIAL COURT SHOULD HAVE CONSIDERED EVIDENCE IN THE RECORD SUPPORTING THE EXISTENCE OF APPELLANT BULL POINT PLANTATION OWNERS ASSOCIATION, INC.**
- C. THE TRIAL COURT DID NOT PROPERLY CONSIDER EVIDENCE IN THE RECORD THAT CREATED A GENUINE ISSUE OF MATERIAL FACT AS TO THE “CONFLICT OF INTEREST” ARGUMENT OF THE RESPONDENT**

STATEMENT OF THE CASE

This appeal addresses the trial court’s order granting Respondents’ Motion for Summary Judgment on April 15, 2021. (ROA, p 1).

In this matter, Respondent is the Bull Point Plantation Property Owners Association, Inc. (“Bull Point POA”), which is a homeowners’ association in Beaufort County. The control of that association has been the subject of litigation in the lawsuit pending in the Beaufort County Court of Common Pleas captioned as *Attridge, et al. v. Board of Directors of Bull Point Plantation Property Owners Association, Inc., et al.*, 2018-CP-07-02345 (“the *Attridge* lawsuit”). The instant

action relies heavily on an Order that granted partial summary judgment to the Plaintiffs in *Attridge*, which is currently on appeal with this appellate Court as Case No. 2019-002038 (“the *Attridge* appeal”).¹

Respondent filed the instant action on April 3, 2020, against several defendants, many of whom were former Board members of the Bull Point POA. In that action, Respondent challenged the actions of some Appellants in transferring certain properties of “common areas” first to Bull Point, LLC, the original declarant, and later to Bull Point Plantation Owners Association, Inc., which is the name of the Association as it is set forth in the Declaration.

Appellants timely answered, and shortly thereafter, on October 23, 2020, Respondent filed a Motion of Summary Judgment.

Approximately four months later, on February 25, 2021, Respondent filed its “Memorandum in Support of Motion for Summary Judgment,” in which it asserted that:

The grounds for this motion are two-fold. First, this Court has entered a final judgment finding that Mr. Gavigan and the other individual Defendants were not authorized to serve as president and directors of the Association’s Board and that their actions taken in those capacities are null and void. The Court’s judgment is on appeal, but it has not been stayed pending appeal and it is binding. Second, should this Court’s order be reversed on appeal and the Defendants be found to have been the rightful directors of the Association’s Board, Mr. Gavigan’s conveyance of the Association’s property to himself would be as clear a breach of fiduciary duty as one could possibly imagine. It would, to say the least, be a “conflict of interest” transaction and an improper distribution. As such it is voidable under the South Carolina Nonprofit Corporation Act if it was not fair to the corporation, which it manifestly was not.

(ROA p 192).

Appellants timely filed responses in opposition to Respondent’s memorandum of law, and the matter was heard before the Honorable Lawton McIntosh on March 1, 2021, who filed an Order

¹ The *Attridge* appeal has been fully briefed and is awaiting oral argument, which has not yet been scheduled.

on April 15, 2021, granting relief as to Respondent's first and second causes of action. As to the first cause of action,

Plaintiffs' request for Declaratory Judgment in its first cause of action is granted. Defendants Gavigan and Riney did not have authority to sign the October 4, 2019 Deeds (recorded in the Beaufort County Register of Deeds at Book 3802, Pages 185-192 and Book 3802, Pages 195-197) and, therefore, the conveyances are void *ab initio*, of no legal effect, and are set aside. Similarly, the March 6, 2020 Deed recorded in the Beaufort County Register of Deeds at Book 3844, Pages 2148-2151) is void *ab initio*, of no legal effect, and is set aside because Bull Point, LLC did not acquire title to the properties it claimed to transfer therein...

(ROA p 4). As to the second cause of action, the trial court ordered as follows:

The Court finds for the Plaintiff as to its Second Cause of Action, that the October 4, 2019 Deeds were conflict of interest transactions and, therefore, are void *ab initio*, of no legal effect, and are set aside. Similarly, the March 6, 2020 Deed is void *ab initio*, of no legal effect, and is set aside because Bull Point, LLC did not acquire title to the properties it claimed to transfer therein.

(ROA p 6). Finally, the order "estopped and enjoined" the Appellants "from taking any action affecting the title to any real property mentioned in the October 4, 2019 Deeds or the March 6, 2020 Deed." (ROA p 6).

Appellants timely filed their Notice of Appeal on April 29, 2021.

STATEMENT OF RELEVANT FACTS

This appeal addresses one part of several lawsuits now pending in our trial and appellate courts between and among residents, developers, and "Association" Board members of the Bull Point development in Beaufort County, South Carolina.

Specifically, this appeal deals with the efforts of the prior Board of Directors of the Bull Point homeowners association to act on the advice of Alysoun Eversole, Esq., a well-known real estate lawyer in Beaufort County, who authored a Title Opinion, in May 2019, addressing the steps necessary to clear title defects which appeared on the deeds of certain "common area" properties in the development. (ROA, p 33). The Title Opinion counseled that the property in question would

to be re-titled back to “Bull Point, LLC” – the original entity granting the titles – and then granted back to the proper name of the “Association.”

The entity that constitutes the proper “Association” continues to be litigated, is on appeal elsewhere, and is most certainly the subject of a genuine issue of material fact. For example, affidavits from the earliest principals of the Bull Point development, Stancel E. Kirkland and Donald W. Barrett, clearly indicate that the entity created in 1995 (the “Bull Point Plantation Property Owners Association, Inc.”), which is the Respondent in this action, was not the non-profit owners’ association referenced in the Declaration. (See Affidavits of Kirkland and Barrett, ROA p 50 - 63).²

In any event, the affidavit filed by William E. Gavigan in the instant matter (ROA p 40), notes clearly that it was “at all times my commitment and duty has been to the ‘Association,’ as defined in the Declaration as Bull Point Plantation Owners Association, Inc.” (ROA, p 48).

For that reason, the trial court prematurely granted the Respondent’s requests for declaratory judgment in this discrete matter. As set forth below in greater detail, there are many issues of fact that should have been submitted to a finder of fact – in this matter, a jury – rather than prematurely decided by the trial court under Rule 56, SCRPC.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court, pursuant to Rule 56(c), SCRPC.” *Turner v. Milliman*, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011). “Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such

² The Declaration of Bull Point Plantation defines Appellant “Bull Point Plantation Owners Association, Inc.” as the “Association.” (Declaration, § 1.01(e).) The covenants do NOT define Appellant as the Association, and do not reference Appellant.

that the moving party must prevail as a matter of law.” *Id.* at 122, 708 S.E.2d at 769. “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.” *Id.* (citation omitted).

Furthermore, even where there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted. *Jamison v. Howard*, 271 S.C. 385, 247 S.E.2d 450 (1978); *Hamilton v. Miller*, 301 S.C. 45, 47, 389 S.E.2d 652, 653 (1990).

ARGUMENT

I. IN GRANTING SUMMARY JUDGMENT, DID THE TRIAL COURT FAIL TO CONSIDER FACTUAL MATTERS IN THE LIGHT MOST FAVORABLE TO THE NON-MOVANT?

A. THE TRIAL COURT DID NOT PROPERLY CONSIDER EVIDENCE IN THE RECORD THAT THE RESPONDENT WAS NOT THE “REAL PARTY IN INTEREST” AS THE GRANTEE OF THE PROPERTY.

At very least, the trial court should have ruled that a genuine issue of material fact existed as to the identity of the “real party in interest.” In this case, evidence in the record indicated that the Respondent *never* had an ownership interest in property at issue.

In this regard, the trial court should have considered evidence in the record that seventy-five (75%) percent of the property (nine parcels) at issue in this motion related to property purportedly transferred in a 2011 *Quit Claim Deed*, as Respondent was NOT a party to that deed.

More specifically, on said deed, the Grantor and Grantee were:

Grantor “Bull Point, LLC”

Grantee “Bull Point Property Owners Association”

(ROA, p 174)

Importantly, the Grantee – the “Bull Point Property Owners Association” – is not an entity registered with South Carolina Secretary of State. Rather, it is an unincorporated association which dates to at least 1997. (ROA, 70) In that regard, the Grantee is not a party to this action. Therefore, Respondent appears to lack standing to assert any rights in connection with the 2011 Quit Claim Deed.

For this reason alone, this Court should reverse and remand to the trial court for further proceedings to resolve this important issue.

B. THE TRIAL COURT DID NOT PROPERLY CONSIDER EVIDENCE IN THE RECORD THAT THE RESPONDENT WAS NOT THE TRUE “ASSOCIATION” AS DEFINED IN THE DECLARATION.

Respectfully, the trial court did not properly consider that evidence in the record included a “scintilla” of evidence supporting the Appellants’ argument that Respondent is not the owners’ association as defined in the Declaration. In fact, Respondent is not the owners’ association enumerated in the Declaration. Rather, that status is reserved for Bull Point Plantation Owners Association, Inc. (the “Association”). Importantly, there is evidence in the record that the person who incorporated both Respondent and Appellant Bull Point Plantation Owners Association, Inc. was Stancel Kirkland, who has sworn that Respondent is not the proper homeowners “Association.” (ROA, 138)

1. THE COVENANTS TO BULL POINT PLANTATION IDENTIFY “BULL POINT PLANTATION OWNERS ASSOCIATION, INC.” AS THE PROPER ASSOCIATION.

“Under South Carolina law restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document.” *S.C. Dept of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001). “Where an agreement is clear and capable of legal

interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Ellie, Inc. v. Miccichi*, 358 S.C. 785 93, 594 S.E.2d 485, 493 (S.C.App. 2004) (emphasis added). The first inquiry is to examine the language of the contract itself. See *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 579 S.E.2d 132 (2003). To do this a court must "...first look to its language -- if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect." See *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973) (emphasis added). The inquiry then becomes "a question of law for the court whether the language of a contract is ambiguous." *McClellanville*, 345 S.C. at 623. A contract is ambiguous only when the language of the contract is reasonably susceptible to more than one interpretation. See *Id.*; *Davis v. Davis*, 372 S.C. 64,76,641 S.E.2d 446,452 (S.C. App. 2006); *Hann v. Carolina Cas. Inc. Co.*, 252 S.C. 518, 524, 167 S.E.2d 420, 422 (1969). "Whether a contract is ambiguous must be determined from the entire contract and not from any isolated clause of the agreement." *Farr v. Duke Power Co.*, 265 S.C. 356, 362,218 S.E.2d 431, 433 (1975).

On January 23, 1995, Metropolitan Properties, Inc. transferred to Bull Point, LLC the first parcel (Phase I) that would become Bull Point Plantation. Subsequently, on September 22, 1995, Bull Point, LLC, with the consent and agreement of Metropolitan Properties, Inc., executed restrictive covenants to Bull Point entitled *Declaration of Covenants, Conditions and Restrictions for Bull Point Plantation* (the "Original Declaration"). (ROA, p 75). The Original Declaration defined an owner's association as follows:

“(e) "Association" shall mean and refer to Bull Point Plantation Owners Association Inc., a South Carolina nonprofit corporation.”

(ROA, p 77) (Emphasis added.)

The Original Declaration further went on to define other terms referencing the “Association” as follows:

“(c) “Articles of Incorporation” shall mean and refer to the Articles of Incorporation of *Bull Point Plantation Owners Association, Inc.* as amended from time to time.

“(g) “By-Laws of the Association” or the “By-Laws” shall mean and refer to those By-Laws of *Bull Point Plantation Owners Association, Inc.* which govern the administration and operation of the Association, as the same may be amended from time to time.”

(ROA, p 75) (Emphasis added.)

The covenants have been amended multiple times, including two restatements, the Third Amendment to Declaration of Covenants, Conditions and Restrictions for Bull Point Plantation, recorded February 14, 1996 (the “Third Amendment”), and the Ninth Amendment to Declaration of Covenants, Conditions and Restrictions for Bull Point Plantation, recorded February 4, 2000. (ROA, p 103) By its terms, the Third Amendment was recorded “[t]o capitalize the initial capital letter of each definition referred to in the Declaration, [and] to correct several scrivener’s errors contained in the Declaration and to make other changes to the Declaration.” (ROA, p 105) Importantly, the definition of the “Association” in the Third Amendment and the Ninth Amendment was unchanged and *identical* to that in the Original Declaration. Thus, the name of the Association is not a “misnomer.”

Further, at no time during Bull Point Plantation’s history has the Declaration referenced “Bull Point Plantation Property Owners Association, Inc.” In short, the Covenants do not refer to Respondent, do not identify Respondent, and do not give any rights or powers to Respondent. Rather, the *sole* owner’s association identified in the Declaration is the “Bull Point Plantation Owners Association, Inc.”

2. RESPONDENT LACKS STANDING TO CHALLENGE THE STATUS OF THE ASSOCIATION UNDER THE DECLARATION.

Respondent has used its motion, and the trial court's subsequent order, to challenge the status of the Bull Point Plantation Owners Association Inc. as the rightful owner's association under the Declaration. The trial court failed to address properly the question that Respondent lacks standing to make this challenge as it is untimely, and lacked the requisite property interest to challenge the covenants. "Restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract." *Seabrook Island Prop. Owners Ass'n v. Peizer*, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (S.C. App. 1987); *Cedar Cove Homeowners Ass 'n v. DiPietro*, 368 S.C. 254 (S.C. App. 2006) (noting that restrictive covenants are *voluntary* contracts between the parties).

To challenge the covenants, a party would need to be an owner at the time the covenant or amendment was adopted. Appellant "Bull Point Plantation Property Owners Association, Inc." did not own any property in Bull Point Plantation (1) in 1995 when the Original Declaration was recorded, or (2) in 1996, when the Third Amendment was recorded, or (3) in 2000, when the Ninth Amendment was recorded. Therefore, Plaintiff cannot now challenge the validity of the covenants as it voluntarily contracted to accept the Declaration, as amended, at the time it acquired a property interest. Accordingly, under the Declaration, as amended, Bull Point Plantation Owners Association, Inc. is the Association.

The trial court did not address whether Respondent's claim in this regard was time-barred. Under S.C. Code Ann. § 15-3-530(1), Plaintiff's claims are barred by the statute of limitations, as the three-year limitation applies to "an action upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520." Here, Appellant first acquired a property interest in Bull Point Plantation in 2007. (ROA, p 152) Accordingly, by its acceptance of

title to its property interest, it ratified the Declaration as amended. Therefore, fourteen years *after* its acquisition, Respondent should have been estopped from challenging the status of Bull Point Plantation Owners Association, Inc. as the true owner's association defined in Section 1.01(e) of the Declaration.

3. THE TRIAL COURT SHOULD HAVE CONSIDERED EVIDENCE IN THE RECORD SUPPORTING THE EXISTENCE OF APPELLANT BULL POINT PLANTATION OWNERS ASSOCIATION, INC.

Respondent argues that the Bull Point Plantation Owners Association, Inc. is a new entity, incorporated in 2020, and not previously involved in the history of Bull Point Plantation. In adopting that view, the trial court erred by failing to give proper weight to evidence in the record that refutes Respondent's argument. Indeed, the development of Bull Point Plantation – and the various entities associated with it – was and is by the design of the Developer as follows:

- Bull Point Plantation Owners Association, Inc. is the homeowners' association defined in the Declaration.
- Bull Point Plantation *Property* Owners Association, Inc. (f/n/a Bull Point Property Owners Association, Inc. f/n/a Bull Point Homeowners Association, Inc.) is the Developer's Holding Company.
- Bull Point Plantation Property Owners Association was the Developer's Transfer Company.

With respect to Appellant Bull Point Plantation Owners Association, Inc., its history is limited to the specific purpose for which the Declaration charges it. It was created as an unincorporated nonprofit association by the recording of the Declaration on September 25, 1995. Thereafter, it changed from an unincorporated nonprofit association to a South Carolina nonprofit corporation with the filing of the Articles of Incorporation on February 5, 2020, by direction of the Declarant. The change from an unincorporated nonprofit association to a nonprofit corporation does not change the fact that, at all times in the history of Bull Point Plantation, the Association

has been and continues to be the sole owner's association active throughout the subdivision history.

The undisputed facts are:

- On September 26, 1995, Bull Point, LLC (the Developer) recorded the *Declaration of Covenants, Conditions and Restrictions for Bull Point Plantation*. This created Bull Point Plantation Owners Association, Inc., an unincorporated nonprofit association.
- On March 12, 2007, the Association engaged legal counsel (Smoot & Pitts) to assist it with the transition of the subdivision from the Developer to the owners. (ROA, p 157)
- On June 16, 2011, the Association conveyed property through a deed although expressly reserved an easement for the maintenance of the drainage areas and at all times subsequent thereto has maintained that drainage easement. (ROA, p 160)
- On March 25, 2017, the Association engaged legal counsel (Nexsen Pruet) to assist it in connection with that federal action entitled *GSI, LLC v. DB Aster, LLC*. (ROA, p 164)
- From 2007 to the present, the Association has maintained Directors & Officers insurance and General Liability insurance (including for the property the subject of the motion).³ (ROA, p 170)

In summary, the Association is not a new entity formed to serve a single individual but rather is the owner's association defined in the Declaration and which for 26 years has served the subdivision.

C. THE TRIAL COURT DID NOT PROPERLY CONSIDER EVIDENCE IN THE RECORD THAT CREATED A GENUINE ISSUE OF MATERIAL FACT AS TO THE “CONFLICT OF INTEREST” ARGUMENT OF THE RESPONDENT.

As set forth above, the trial court ruled that the transactions at issue were “voidable” because they were purportedly infected with a conflict of interest. Respectfully, the trial court ignored evidence in the record that created a genuine issue of material fact on that point.

³Apparently, there have *never* been any insurance policies in the name of Plaintiff “Bull Point Plantation Property Owners Association, Inc.” or its prior names, Bull Point Property Owners Association, Inc. and Bull Point Homeowners Association, Inc.

Notably, Appellants presented evidence to the Court that any suggestion of a “Conflict of Interest” transaction must be rejected because of (1) the nature of the transaction was the result of counsel from Attorney Eversole and (2) the nature of the transaction was fully disclosed to the Board. (ROA p 64)

In fact, the very statute cited in the trial court’s order supports the argument of the Appellants. In fact, the trial court actually cites to the wrong statute – S.C. Code Ann. § 33-31-810. The correct statute – S.C. Code Ann. § 33-31-831 – provides in pertinent part that –

(c) A transaction in which a director of a mutual benefit corporation has a conflict of interest may be approved if:

(1) the material facts of the transaction and the director’s interest were disclosed or known to the board of directors or a committee of the board and the board or committee of the board authorized, approved, or ratified the transaction; or

(2) the material facts of the transaction and the director’s interest were disclosed or known to the members and they authorized, approved, or ratified the transaction.

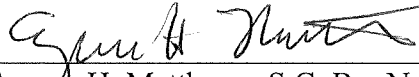
Here, it is clear from the minutes of the Board’s meeting from October 3, 2019, that the details of the transaction and the interests of the parties were explicitly disclosed. Thus, the trial court erred, at very least, in not submitting this issue to a finder of fact rather than granting partial judgment under Rule 56, SCRPC.

CONCLUSION

For the reasons set forth above, Appellants respectfully requests that this Court reverse the Order granting the Motion for Summary Judgment, and for any other such relief as this Court deems just and proper.

August 11, 2022

Respectfully submitted,



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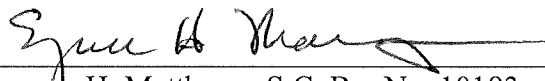
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

Dated this 11th day of August, 2022.

Respectfully submitted,



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