THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Judge

Appellate Case No. 2020-000056

Sterling Hills Homeowners Association,.....Respondent,

v.

Elliot Hayes,.....Appellant.

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. Did the lower court err reversibly in referring this case to the master-in-equity?

II. Did the lower court err reversibly in dismissing Appellant's breach of contract counterclaim?

III. Did the lower court err reversibly in in dismissing Appellant's Unfair Trade Practices counterclaim?

IV. Did the lower court err reversibly in dismissing Appellant's breach of contract and Unfair Trade Practices counterclaim without allowing Appellant an opportunity to amend?

V. Did the lower court err reversibly in granting summary judgment against Appellant on his *ultra vires* declaratory judgment counterclaim?

ARGUMENT

Appellant, Elliot Hayes (hereinafter "Hayes"), will attempt to limit this reply brief to addressing some major flaws in the Respondent Sterling Hills Homeowners' Association, Inc. (hereinafter "the HOA")'s argument and to responding to assertions now made by the HOA in its brief, including ones offered as proposed additional sustaining grounds. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418 n. 6, 526 S.E.2d 716 (2000) (appellant may address additional sustaining ground arguments in reply brief). Hayes does not respond to every contention made by the HOA, because some responses would simply duplicate what is in his appellant's brief.

I. The HOA plainly brought an at-law breach of contract claim against Hayes, and Thomerson v. DeVito does not help the HOA's position.

As discussed in Hayes' brief, the HOA's primary claim against Hayes is for damages for breach of a contract – the covenants at issue. The HOA has styled its primary claim as "breach of covenants" and seeks a judgment for "actual and consequential damages[.]" (R. pp. 45, 47.)

The HOA argues Thomerson v. DeVito gives support for the idea that its damages claim for of the parties' contract actually sounds in equity, not law. 430 S.C. 246, 844 S.E.2d 378 (2020). The HOA's argument is misplaced. Thomerson analyzed whether a quasi-contractual equitable claim, promissory estoppel, comes within the ambit of a statute of limitations that applies to a breach of contract claim. Id. at 248-60. It has nothing to do with the claim the HOA makes against Hayes here, which seeks damages for breach of an express contract – the covenants. (R. pp. 45, 47.) As our Supreme Court noted in Rodarte v. Univ. of S.C., "quasi-contractual remedies . . . are inapplicable when the parties are bound by an express contract." 419 S.C. 592, 604, 799 S.E.2d 912, 918 (2017) (internal citation and quotation marks

omitted)); accord Thomerson, 430 S.C. at 259 (citing this quotation from Rodarte). Thomerson, 430 S.C. at 248-60, does nothing to change the settled law that a claim seeking damages for breach of an express contract is an action at law. E.g., Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 307, 698 S.E.2d 773, 777 (2010) (action for breach of contract is at law).

A claim seeking damages for breach of a contract carries with it the right of either party to trial by jury. Cooper v. Poston, 326 S.C. 46, 48, 483 S.E.2d 750 (1997). Hayes has the right to trial by jury in this case, and the case should not have been referred to the master-in-equity.

II. The HOA's brief ignores that Hayes' brief lays out a number of ways in which the HOA breached the parties' contract.

Hayes' brief lays out numerous ways in which the record supports his breach of contract counterclaim. That the HOA argues Hayes has failed to articulate a breach is telling. It is a species of straw man argument. See State v. Smith, 298 P.3d 1138 (Kan. App. 2013) ("straw man argument is where the arguer wishes to respond to an argument of his or her choosing and not one that is actually presented"). The HOA believes its best strategy on this issue is to argue that Hayes' argument is missing something it plainly contains. Could the HOA meet Hayes' argument well on its merits, the HOA likely would have done so.

III. Of course the HOA's actions were in trade or commerce. The HOA itself argues that it was providing services in doing the acts subject of Hayes' Unfair Trade Practices claim.

To paraphrase Hayes' appellant's brief, HOAs, including the HOA involved here, distribute services to their members, including the services of covenant enforcement. The HOA speaks out of both sides of its mouth in its counterargument, contending that it is not involved in trade or commerce as defined by the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10 & -20, yet in the next breath stating that its "actions enumerated in

[Hayes'] pleadings are merely actions in furtherance of enforcing the restrictive covenants[.]" (Initial Brief of Respondent p. 12.) The HOA's argument is that its attempts to punish Hayes for violating non-existent rules "are merely actions in furtherance of enforcing the restrictive covenants[.]" (Initial Brief of Respondent p. 12.) One of the HOA's primary functions is to distribute covenant enforcement services, consonantly with how the HOA describes itself and what it states it is doing in this case. That brings it and its actions at issue within the ambit of the Unfair Trade Practices Act's definition of trade or commerce. S.C. Code Ann. § 39-5-10. Indeed, if an HOA does *not* provide services to its members, it has no reason to be; providing services to its members – including, often, covenant enforcement – is what it exists to do. There is at least an issue for trial here on this element of an Unfair Trade Practices Act claim.

IV. The HOA relies on matter not presented to the lower court and asks this to draw inferences in its favor, rather than, as required, in Hayes' favor.

The HOA designated matter for inclusion in the record on appeal, listed as Items 24 through 30 on its designation, that was never presented to the lower court, and it argues extensively from these materials in its brief, especially with regard to its argument on Hayes' *ultra vires* claim. First, inclusion of materials in some other case that were never presented to the lower court in this case is against the Appellate Court Rules, as is argument made on the basis of such materials. Rule 210(c), SCACR, prohibits the inclusion in the record on appeal of "matter which was not presented to the lower court or tribunal." Accord State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007); Sanders v. Salley, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (Ct. App. 1984); see Cobb v. Benjamin, 325 S.C. 573, 581 n. 2, 482 S.E.2d 589, 593 n. 2 (Ct. App. 1997). Making factual contentions in a brief on the basis of material outside the scope of Rule 210(c), SCACR, is similarly prohibited. "The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be

properly included in the Record on Appeal [see Rule 210(c)] to support the salient facts alleged." Rule 208(b)(4), SCACR (bracket in original). The Rule's language regarding what can be referenced in the brief mirrors the language in Rule 209, SCACR, limiting factual references to material that was properly designated for inclusion in the record on appeal. Hayes is making a motion to strike these items from the HOA's designation.

Further, both when it relies on such improperly designated matter and when it does not, the HOA asks this court to draw inferences about what it says must have happened "off stage," outside the matter presented to the lower court. The HOA asks that this court draw inferences in *its* favor. But the standard the law calls on this court to apply does not permit that. E.g., Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008). If "the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]" Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (2008).

V. The record does not establish the futility of amendment.

The HOA argues any amendment of Hayes' pleading would be futile; however, it has never established that, and no record was made before the lower court supporting such a conclusion. If this court agreed with the HOA that Hayes did not plead facts sufficient to constitute one or more of the causes of action at issue, the court would then need to "conduct an analysis to determine whether any amendment would be futile." Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 183, 826 S.E.2d 585 (2019). Only if this court determined it were "certain there is no set of facts upon which relief can be granted" could the court then affirm the dismissal with prejudice entered by the lower court. Id. at 189. The aspects of the record noted in Hayes' brief show that the record does not support such a conclusion.

Hayes should have been allowed an opportunity to amend, and Judge Russo erred in dismissing his claims with prejudice and denying him that opportunity.

CONCLUSION

Respectfully, the lower court erred reversibly and prejudicially in dismissing and granting summary judgment on Hayes' counterclaims, as well as in referring this case to the master-in-equity. This court should reverse these rulings and remand this case for a trial in which a jury will determine questions of material fact that are encompassed within the at-law claims in this case.

Respectfully submitted,

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CERTIFICATE OF COUNSEL
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing final reply brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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