

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Elizabeth Heatley, Neal B. McCann,)
Jr., David Neil Monk, Thomas V.)
Bessent, and Mariner's Cay Marina)
Council of Co-Owners, Inc.)
)
Plaintiffs,)
)
vs.)
)
Mariner's Cay Marina Condo, LLC)
and Mariner's Cay Fuel Dock, LLC,)
George A. Farmer, Jr., and South)
Atlantic Bank)
Defendants)
_____)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2017-CP-10-3099

**ORDER
GRANTING DECLARATORY
RELIEF**

RECEIVED
OCT 19 2022
SC Court of Appeals

This case was tried before me on March 22 and 23, 2022. Plaintiffs appeared with their attorneys, Capers G. Barr, III and Capers G. Barr, IV of the firm Barr, Unger & McIntosh, LLC; and Tyler E. Cloud of the firm Clawson and Staubes also made his appearance. Defendants appeared with their attorneys G. Hamlin O'Kelley, III of the firm Buist, Byars and Taylor and Whidbee S. Perrin of the firm Luzuriaga Mims, LLP.

Based upon the testimony of the witnesses, the deposition designations, the exhibits offered in evidence, the briefings of counsel and their arguments, I make the following findings of fact and reach the following conclusions of law:

INTRODUCTION.

Plaintiffs in this case seek declaratory relief under the South Carolina Uniform Declaratory Judgments Act, Sections 15-53-10 *et seq.*, of the Code of Laws of South Carolina, to confirm and restore their title interests in certain common elements of a horizontal property regime, Mariner's Cay Marina. Plaintiffs allege that the Declarant under the Master Deed creating the regime

wrongfully converted common elements to individual units after Plaintiffs had acquired vested title interests in those common elements. The Defendant LLC's are the purported purchasers of the disputed property. Defendants contend that they hold good title as bona fide purchasers for value without notice; and that in any event Plaintiffs' claims are barred by the doctrine of judicial estoppel.

The case evokes an observation made by the Florida Court of Appeals in an often-cited opinion: "*Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization.*" (*Hidden Harbor Estates, Inc vs Norman*, 309 So.2d 180, [Ct.App. Fla. 1975].)

PROCEDURAL HISTORY

The original plaintiffs in this case are owners of boatslip units in the Mariner's Cay Marina Horizontal Property Regime. They filed their summons and complaint on June 16, 2017 seeking declaratory relief, and also seeking monetary damages for the alleged tortious acts of the individual Defendant Farmer. An amended summons and complaint was filed July 21, 2017.

Plaintiffs' original complaint sought class action certification, inasmuch as the lawsuit sought relief on behalf of all 88 boatslip unit owners at Mariner's Cay Marina. By order dated June 12, 2019 the circuit court denied class certification.

On June 6, 2020 Plaintiffs filed their fourth amended complaint wherein the four individual Plaintiffs named in the above caption seek declaratory judgment from this Court in their own rights, and also in the interests of all similarly situated boat slip owners. The Defendants timely filed their answer, counterclaim, and third party complaint. (The third party complaint has since been voluntarily dismissed.)

On December 14, 2020 the circuit court referred the declaratory relief issues to this Court for final adjudication, reserving to the circuit court, however, the claims between the parties for damages.

FINDINGS OF FACT

The Mariner's Cay Marina (the "Marina") is located on the north shore of the Folly River in Charleston County. The Marina consists of 90 boat slips and their associated docks, walkways and piers, a boat landing, and a building referred to in this case, and in recorded documents, as the "Ship's Store Building".

The Marina was constructed on an alienable easement in perpetuity created under the Master Deed for Mariner's Cay Racquet and Yacht Club, recorded May 12, 1982. After the Marina was constructed in the 1980s, it leased out 88 of the 90 boat slips to private owners. The two remaining boat slips were used as fuel docks for boat refueling, and are also the location of a waste water pump-out station for the purpose of removing waste water from boats, by pumping into a public sanitary disposal system, as required by the Marina's permit from the Office of Coastal Resource Management ("OCRM").

Whereas the docks, walkways and piers of the marina are constructed on pilings in the waters of the Folly River, the Ship's Store Building is constructed on pilings in the marsh and high ground adjacent to the docks, walkways and piers. The Ship's Store Building is an elevated, frame two story structure. At ground level below the building, in addition to storage space, is located the pump that drives the wastewater disposal system. Also located on the high ground adjacent to the Ship's Store Building is an underground storage tank for the storage of boat fuel. In the elevated, first floor level of the building there are two restrooms, one designated for men and the other for

women. The men's restroom contains a toilet, a urinal, a sink, and a shower; and the women's restroom contains two toilets, a sink, and a shower; as required by the Marina's permit from OCRM

Marina operations in South Carolina are regulated and permitted by the office of Coastal Resources Management (hereinafter "OCRM"), a division of the state Department of Health and Environmental Control (DHEC). OCRM regulations require, for the issuance of a permit for marinas of the size involved in this case, separate men's and women's bathrooms with at least the toilet, urinal and sink components of those provided by Mariner's Cay. OCRM regulations also require that a marina provide wastewater pump-out capabilities such as those provided at Mariner's Cay. Thus, the restrooms and the wastewater pump-out system at Mariner's Cay Marina are conditions required for the issuance and continuance of the Marina's operating permit.

OCRM regulations also require that "an experienced operator" be present and in charge of the Marina and its operation. From the time of its construction in the 1980s until 2016, when the issues in this case came to a head, that operator known as the Dockmaster at Mariner's Cay Marina occupied and controlled the Ship's Store Building; where he maintained his office and kept and stored books and records required by OCRM regulations to be kept on the premises; and where he utilized a VHF radio to regularly communicate with boat operators. Also stored on the first floor level, or under the Ship's Store, were booms, absorbent pads and other emergency equipment required by the OCRM permit to be kept in the case of emergencies relating to fuel spills.

The Ship's Store Building, on its first-floor level, also included, from time to time, retail sales of marine supplies, bait, fishing tackle and food stuffs; although retail use apparently discontinued sometime around 2010.

I. Creation of the Horizontal Property Regime; the 2006 Master Deed

In 2006 the then-operator of Mariner's Cay Marina renovated the Marina and reorganized the property to form a horizontal property regime ("HPR") under the South Carolina Horizontal Property Act, Sections 27-31-10, *et seq.*, of the South Carolina Code of Laws. A Master Deed was recorded May 18, 2006 (the "2006 Master Deed") wherein 88 of the 90 boat slips were designated as "units" (the equivalent of "apartments" in a residential HPR), capable of individual ownership, as described in the 2006 Master Deed, Article VI.¹ The Common Elements of the HPR, described in Master Deed Article VII (e) included the Ship's Store Building, the first floor of which was designated Commercial Unit-1A and the second floor designated as Commercial Unit-1B. The two fuel docks were designated as a Common Element known as Commercial Unit 2. The required, separate men's and women's restroom facilities, are located on the first floor of the Ship's Store Building, Commercial Unit 1-A.

Consistent with the Horizontal Property Act, Article X Section 10.1 of the 2006 Master Deed provides that, subject to the Master Deed and By-Laws, a co-owner of a boat slip unit shall also have "an undivided ownership interest according to the Unit's percentage interest in the Common Elements..."

The 2006 Master Deed also provides, in Article XII Section 16.1, "Amendments," subsection (b) that for as long as the Declarant has the right to appoint and remove directors of the Council of Co-Owners as provided in the Master Deed, the Declarant may unilaterally amend the Master Deed for any purpose, but with the proviso: "However, any such amendment shall not adversely affect the title to any unit unless the owner shall consent in writing." (emphasis added).

¹ These units are often referred to as "dockominiums."

Under the 2006 Master Deed, the Declarant reserved the right to appoint and remove directors, pursuant to Article XII, Section 12.3, until either 18 months passed or the sale of 90% of the units, whichever occurred first.

Between the recording date of the 2006 Master Deed on May 18, 2006, and March 19, 2007, a total of thirty-nine boat slips were sold. During that same period between May 18, 2006 and March 19, 2007, the individual Plaintiffs in this case each acquired their title interests to their boat slips, “together with an undivided interest in the appurtenant common elements”, as follows: Elizabeth Heatley, boat slip unit D-08 on August 15, 2006; Neal B. McCann, boat slip unit B-17 on March 6, 2007; David Neil Monk, boat slip unit B-17 on March 12, 2007; and Thomas V. Bessent, boat slip unit D-1 on August 18, 2006.

The 2007 Amended Master Deed

On March 19, 2007, the Declarant unilaterally signed and recorded an amended Master Deed. (The “2007 Master Deed”). The 2007 Master Deed was recorded without notice to, or the vote of, any of the then thirty-nine boat slip unit owners, including the Plaintiffs, who had purchased boat slip units under the 2006 Master Deed. (emphasis supplied).

However, notwithstanding the proviso of Article XII, Section 16.1 of the 2006 Master Deed, and unknown to the Plaintiffs until later, the 2007 Master Deed divided, separated, and reallocated the Common Elements of the Horizontal Property Regime, by converting the two commercial units CU1-A and CU1-B, comprising the Ship’s Store Building, from Common Elements to individual units; and also by likewise converting the two fuel dock boat slips, unit CU-2 into individual units, capable of being privately owned.

Thereafter, the two Fuel Docks and the Ship’s Store Building were conveyed by the declarant and subjected to mortgages. However, the testimony at trial was that no individual

Plaintiff was aware of the Master Deed's purported conversion of the common elements to individual units. Moreover, the individual Plaintiffs testified that nothing was changed, "on the ground." The fuel docks remained open for use by all boat operators for wastewater pump-out, and at least for a time they provided refueling services. The Dockmaster continued to occupy and to control the Ship's Store Building as his office where files and equipment were stored, and from which he continued to communicate with boat operators via VHF radio.

The Ship's Store Building and decks continued to be a focal point for social activities by boat holders, and regular meetings of the Council of Co-Owners and its Board of Directors continued to be held there.

The individual Plaintiffs in this case learned over time, and to different extents, that the 2006 Master Deed had been amended by the 2007 Master Deed. Because conditions on the ground remained unchanged from 2007 until 2016, none of them appeared to appreciate or understand that the Common Elements to which they held undivided title interests had been alienated, contrary to those title interests, until they were displaced in or about October of 2016, as hereafter discussed.

An action was filed in this court on February 12, 2013 by First South Bank against Tiger River Capital, LLC and others, seeking the foreclosure of mortgages on the commercial units of the Ship's Store (CU 1-A and 1-B) and on the fuel docks (designated as units C-21 and C-22). None of the individual Plaintiffs in this case were named parties to the foreclosure. Plaintiff Mariner's Cay Marina Council of Co-Owners was named as a party, because of two liens it had filed against the property in July of 2010, as a result of past due assessments.

On March 16, 2015 this court filed its order of judgment and foreclosure, directing that the properties be sold. By deed recorded October 14, 2015 this court conveyed the properties here at issue to Emerald Portfolio, LLC; which were thereafter quit-claimed to Emerald McDonough Road

Holdings, LLC. By deeds recorded May 24, 2016 and May 25, 2016, respectively, Emerald McDonough Road Holdings, LLC conveyed the properties to the Defendants Mariner's Cay Marina Condo, LLC (the Ship's Store Building and the two Commercial Units), and to Mariner's Cay Fuel Dock, LLC (the Fuel Docks).

The Defendant George A. Farmer is the single member of the two LLC Defendants, Mariner's Cay Marina Condo, LLC and Mariner's Cay Fuel Dock, LLC. On or about October 1, 2016 the LLC Defendants, through Mr. Farmer, took possession of the Ship's Store Building and the Fuel Docks, displacing the then-Dockmaster, Ed Geiger. Since then, Mr. Geiger and subsequent Dockmasters have had no fixed station at the Marina from which to operate. Books, papers and records relating to Marina operations, which are required by OCRM to be maintained on site, are stored in a storage unit located approximately three miles from the Marina.

This action was commenced June 16, 2017, eight months following the taking of possession by the LLC Defendants of the disputed properties.

Mr. Farmer presently occupies the second floor of the Ship's Store as his residence. He utilizes the first floor for "family," who also share the men's and women's restrooms with boat-slip unit owners of the Marina. His LLC also leases out the two Fuel Docks to private boatowners for compensation.

Orders have been filed by the circuit court in this case following two applications for injunctive relief. One order², relating to the Fuel Docks, directs a "sharing" procedure of those spaces, whereby boat-slip owners of the Marina may utilize the wastewater pump-out system by notifying Mr. Farmer, who arranges with his boat-slip tenants to move the boat docked there in order to permit access to the pump-out. The testimony at trial was that the process is too

² Order of Judge J.C. (Buddy) Nicholson, Jr. filed Dec. 6, 2017.

cumbersome to be of any use, and that boat-slip owners of the Marina take their boats elsewhere for pump-out.

Likewise, injunctive relief was sought during the Covid sequestration to open the restrooms for boat-slip owners, resulting in an order of the circuit court to open the restrooms only during limited, daily hours.³ Prior to Covid, the restrooms had been open to boat-slip owners 24 hours a day, seven days a week, with no limitations. The unlimited open hours of the restrooms had applied from 2006 until 2019, notwithstanding the Master Deed's stated policy fixing the open hours of the restrooms.

Tom Bessent, the immediate past president of the Council of Co-Owners, testified that OCRM was aware of the constraints on the Marina's wastewater pump-out capabilities, and restroom accessibility, and further informed him they were "awaiting the outcome" of this case.

CONCLUSIONS OF LAW

The concept of condominium ownership of real property is codified in South Carolina in the "Horizontal Property Act", Sections 27-31-10, *et seq* of the South Carolina Code of Laws. The statute has been amended over time to encompass the horizontal ownership of "moorage of a boat" as a form of "apartment" under the Act. See Section 27-31-20(a). Under the same Code Section, subsection "(c)" defines "Condominium ownership" as "the individual ownership of a particular apartment of a building (which is also to say, a boat-slip in a marina) and the common right to a share, with other co-owners, in the general and limited common elements of the property".

Code Section 27-31-60(a) provides in part in its first paragraph: "An apartment owner shall have the exclusive ownership of his apartment and shall have a common right to a share, with the

³ Plaintiffs' Motion was filed June 22, 2020.

other co-owners, in the common elements of the property, equivalent to the percentage representing the value of the individual apartment, with relation to the value of the whole property. This percentage shall be computed by taking as a basis the value of the individual apartment in relation to the value of the property as a whole.” (More discussion about the remainder of this Section follows.)

It is clear therefore, and I find and conclude as a matter of law, that upon the acquisition of their boatslip units at Mariner’s Cay Marina, the individual Plaintiffs in this case acquired, in addition to absolute, vested title interests in their boatslip units, undivided vested title interests in common with all of the other boatslip unit owners in the common elements of the regime property, including but not limited to the Ship’s Store Building and the Fuel Docks; designated as Commercial Units 1-A, 1-B, and 2 in the 2006 Master Deed.

1. S.C. Code of Laws Section 27-31-70.

A unit owner’s vested title rights in the common elements of a Horizontal Property Regime are fixed and sacrosanct. Code Section 27-31-70 provides: “Common Elements Shall Not Be Divided. The common elements, both general and limited, shall remain undivided and shall not be the object of an action for partition or division of the co-ownership. Any covenant to the contrary shall be void.”

In the seminal case of *Reyhani v. Stone Creek Cove Condo II Horizontal Property Regime*, 329 S.C. 206, 494 S.E.2d 465 (Ct. App. 1997), the Court of Appeals held that “once common elements are set aside and vested in the co-owners, such co-owners may not be unilaterally deprived of their interests in the common elements by the actions of the developer.” 329 S.C. at 211, citing Code Section 27-31-70.

Reyhani, just like the Defendants in this case, was the purchaser of HPR land from NCNB after it had been foreclosed. The central issue in the case was whether Mr. Reyhani could develop a 1.076-acre parcel, and whether the parcel was a common element of the HPR. The defendant parties in the case were property owners and the homeowner's association. The trial court ruled in Reyhani's favor, holding that he had the right to develop the disputed property.

Just as the Defendants in this case argue that the Plaintiffs "acquiesced" to the amended 2007 Master Deed, Mr. Reyhani pointed to the fact in his case that the homeowners association board "was aware of the transfer of the property to him and acknowledged the same". In effect, although not using the term, arguing that the association, and therefore its members, had "acquiesced" to the transaction.

The Court of Appeals reversed the trial court, holding, as stated above, that once common elements are vested in co-owners, they may not be unilaterally deprived of their interests by the actions of the developer. Moreover, the Court of Appeals held that, whereas the homeowner's association may have assented to an agreement that Reyhani could develop the property, it "was not assented to by the condominium owners". 329 S.C. at 214. This court concludes, as a matter of law, that a homeowners association may not commit or bind the individual title rights and interests held by an individual unit owner.

The sanctity of a unit owner's vested interest in the common elements of an HPR is further affirmed in the decisions of *Eagle Lake & Golf Condo* cases, *Resolution Trust Corporation vs. Eagle Lake Golf & Condos*, 310 S.C. 473, 427 S.E.2d 646 (1993) (the "RTC Case"); and *Heritage Federal Savings & Loan Assn vs Eagle Lake & Golf Condos*, 318 S.C. 535, 458 S.E.2d 561 (Ct. App. 1995) (the "Heritage Federal Case"). In the *RTC Case*, the Supreme Court affirmed the

provisions of Code Section 27-31-230(a): “[N]o lien arising subsequent to recording the Master Deed ...shall be effective against the property.” 310 SC at 476.

In the *Heritage Federal Case*, the Court of Appeals held that because the clubhouse of the regime was a common element, “it may not be sold as a separate property of the mortgagor in foreclosure.” Indeed, the facts of the case presently before this Court are similar. Here, a former common element was converted to a private unit in contravention of Code Section 27-31-70 and in contravention of the plain language of the 2006 Master Deed. It was subsequently sold, and thereafter was foreclosed; and the foreclosure sale became the foundation for the taking of title by the LLC Defendants in this case.

In this case, I conclude as a matter of law that the amended 2007 Master Deed, by converting common elements to individual units after vested title interests in the common elements had been conveyed to thirty-nine boat-slip unit owners including the four Plaintiffs, is a “covenant to the contrary,” squarely contravening the proscription of Section 27-31-70 that common elements may not be divided, “...any covenant to the contrary shall be void.” Just as in *Reyhani*, the statute providing that common elements shall not be divided is controlling.

This Court is not unfamiliar with the import of Section 27-31-70, having applied *Reyhani* and Code Section 27-31-70 in its decision in *Rivers Point Row, et al. v. Palms Property, et al.*, Case Number 2008-CP-10-2279, affirmed at 2013-UP-458 (Ct. App.12/11/2013).

I conclude as a matter of law that the individual Plaintiffs acquired vested title interests in the Ship’s Store Building and its two apartments, CU-1 and CU-2, and the Fuel Docks, CU-2, as common elements. The 2007 Master Deed, to the extent that it divests the individual Plaintiffs of their vested title rights in the Ship’s Store Building and the Fuel Docks, is void as it did not obtain their written consent as required by the terms of the 2006 Master Deed at Art. XII, Sec. 16.1.

2. S.C. Code of Laws Section 27-31-60; acquiescence.

The Defendants' central argument in this case is that, notwithstanding the language of Section 27-31-70, and the holding of the Court of Appeals in *Reyhani*, because of the Plaintiffs' "acquiescence" their title interests in the common elements here at issue were forfeited, relying upon the second paragraph of Code Section 27-31-60.

The second paragraph of Section 27-31-60 provides: "The percentage (interest in the common elements) shall be expressed at the time the horizontal property regime is constituted, shall have a permanent character, and shall not be altered without the acquiescence of the co-owners representing all the apartments of the property." (Emphasis added.)

Defendants argue that Section 27-31-60's provision that the relative percentage interests of units may be altered by "acquiescence," should operate in this case to divest Plaintiffs of their entire undivided title interests in the common elements. The argument that "acquiescence" may divest property owners of their complete, vested title rights to common elements conflicts squarely with Code Section 27-31-70's plain admonition that "*common elements may not be divided.*" On one hand, Section 27-31-70's admonition is plain and clear, that common elements may not be divided and that "any covenant to the contrary shall be void." On the other hand, Defendants argue that "acquiescence" under Section 27-31-60 can divest an owner of his vested title rights.

I conclude that the import of Section 27-31-60 is to define the relative property interests of apartment owners with respect to each other, and with respect to the common elements of a horizontal property regime, as a percentage value, and nothing more. There is no language in 27-31-60 that could reasonably be construed to support the argument that an apartment owner might forfeit the entirety of his or her property interests by "acquiescence". Rather, the term, "acquiescence" modifies only the phrase, "The percentage...shall not be altered without the

acquiescence of the co-owners representing all the apartments of the property”. (Emphasis added.) No reasonable construction of the emphasized terms, above, could substitute the term “forfeited” for the term “altered”. Yet, that is the conclusion urged by Defendants.

Moreover, not only was there no evidence that the four individual Plaintiffs had “acquiesced”, nor was there any evidence that “all” co-owners had acquiesced.

Defendant’s interpretation of Section 27-31-60 cannot be reconciled with the clear proscriptive provisions of Section 27-31-70. On the one hand, although 27-31-70 provides that any covenant purporting to alienate a unit owner’s vested interests in common elements would be void; yet the position is urged that what could not be accomplished by “covenant” may nevertheless be accomplished by mere “acquiescence.” This court concludes that this statutory construction of 27-31-60 cannot be reconciled with the language of statute 27-31-70.

The position urged upon the Court by the Defendant parties reads a conflict between Sections 27-31-60 and Section 27-31-70 where none exists. c.f. *Hodges v. Rainey*, 341 S.C. 79, 88, 533 S.E.2d. 578, 583 (2000). (Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. *Id.* at 341 S.C. 91, 533 S.E.2d 584.) The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd. *Charleston County Assessor v. Universal Ventures, LLC*, 427 S.C. 273, 285, 831 S.E.2d. 412 (2019).

In this case an absurd result would occur if, on the one hand a condominium unit owner could be divested of a title interest in a common element by his mere acquiescence but, on the other hand, the same owner could not be divested of the same vested title interest were it to be accomplished by an express covenant.

The Code Sections may be reconciled by the construction previously stated. Sections 27-31-60's reference to "acquiescence" applies narrowly, and only to the calculation of a unit owner's percentage interest in relation to the value of the whole property. It does not apply to the quality of the underlying title to the property itself. The title interest remains sacrosanct; however, its relative value as a percentage of the regime as a whole may be subject to change where all unit owners acquiesce in the change.

3. Judicial Estoppel.

Defendants also argue that Plaintiffs' claims are barred by the principle of judicial estoppel, arising from the 2013 foreclosure case recited in the Court's findings of fact.

Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceedings. *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004). In *Cothran*, the Supreme Court adopted the following elements necessary for the doctrine of judicial estoppel to apply:

- (1) two inconsistent positions taken by the same party or parties in privity with one another;
- (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other;
- (3) the party taking the position must have been successful in maintaining that position and have received some benefit;
- (4) the inconsistency must be part of an intentional effort to mislead the Court; and
- (5) the two positions must be totally inconsistent.

357 S.C. at 215, 216.

The "position" taken by the Individual Plaintiffs in this case is that their vested title interests were wrongfully and unlawfully divested of them by the unilateral actions of the Declarant in amending the Master Deed, thereby attempting to convert common elements to individual units in contravention of the statute, the case law, and the terms of the 2006 Master Deed.

None of the five elements of judicial estoppel as required in *Cothran* are found in this case. Most fundamentally, none of the four individual Plaintiffs in this case were parties to the first case, the foreclosure case. Therefore, it cannot be concluded that they took a position in the foreclosure case at all; much less that a so-called inconsistent position in the prior case was successful. Neither can it be suggested that the individual Plaintiffs, Elizabeth Heatley, Neal B. McCann, Jr., David Neil Monk, or Thomas V. Bessent acted in any way “to mislead the Court.” No evidence is presented that they acted in any way to mislead anyone - certainly not this Court.

The defense also cannot be supported by the fact that the Council of Co-Owners was a party to the foreclosure. In the first place, as this court has previously held, the Council of Co-Owners cannot act to bind, commit, or prejudice an individual unit owner’s vested title interests in the owner’s unit, or his percentage interests in the common elements. Moreover, there is no evidence that the Council of Co-Owners in the foreclosure case, or in this case, have acted in any way that would prove the requisite elements of judicial estoppel as pronounced in *Cothran*.

I find and conclude that the defense of judicial estoppel has not been proved.

4. Ultimate Conclusions.

Two unambiguous legal principles guide the Court’s ultimate conclusions in this case. They are open, obvious, and apparent in the chain of title to the properties at issue:

The first principle is expressed in the 2006 Master Deed, which was amended in contravention of its own terms. The 2006 Master Deed plainly states in its Article XII, Section 16.1 that, whereas the Declarant could unilaterally amend it, he was prohibited from amending it to “adversely affect the title to any Unit unless the Owner shall consent in writing.”

The construction of an unambiguous deed is a question of law, not fact. *Walters vs. Summey Building Systems*, 311 S.C. 507, 429 S.E.2d 854 (Ct.App.1993). It is clear that the 2007 Master

Deed's conversion of the Ship's Store Building and the Fuel Docks to private units adversely affected the title interests of the four individual Plaintiffs. None of them were aware of the amendment, nor did they or any of the 35 other boat-slip owners (who also purchased before the 2007 Master Deed was recorded) consent to it in writing.

The unambiguous terms of the 2006 Master Deed expressly forbade the Declarant from doing what he did.

The second principle is statutory: the 2007 Master Deed was executed and recorded in direct contravention of Code Section 27-31-70, which provides "*The common elements, both general and limited, shall remain undivided and shall not be the object of an action for partition or division. Any covenant to the contrary shall be void.*" (Emphasis added.) The 2007 Master Deed, converting common elements to individual units, was recorded after thirty-nine recorded deeds which vested title interests in the common elements conveyed to the four Plaintiffs, as well as the thirty-five (35) other boat-slip unit grantees.

South Carolina courts have not been reluctant to declare as void, transactions that plainly invade the statutory sphere that protects individual title interests of owners in a horizontal property regime after the master deed has been recorded. For example, in the case of *Resolution Trust Corporation vs Eagle Lake & Golf Condos, supra*, the Court of Appeals affirmed the decision of the master in equity declaring as invalid a mortgage on an entire condominium project, placed after the master deed had been recorded. Citing the first sentence of Code Section 27-31-230(a) that "No lien arising subsequent to recording the master deed...shall be effective against the property", the Court of Appeals held that the purpose of the statute is to prevent a condominium developer from encumbering the interests of others by giving a lien against the whole property once the master deed is filed. "This limitation on encumbrances is a rational policy decision by the

legislature. The purpose of the statute and public policy are aids in the construction of a statute.”
310 S.C. at 477.

It can be said that no lesser public policy interests apply in this case, where the plain language of Section 27-31-70 is to prevent the developer of a condominium project, not merely from encumbering the condominium property, but from cancelling and eliminating the ownership rights of others altogether.

The plain and unambiguous language of Code Section 27-31-70 forbade the Declarant from doing what he did, in the clearest of terms: “Any covenant to the contrary shall be void.”

Whether or not the Defendant Parties had actual knowledge of the open and obvious title defects found by this court’s ruling, they are charged with knowledge of the defects as a matter of law and public policy. *Binkley vs. Rabon Creek Watershed Conservation Dist.* 348 S.C. 58, 558 S.E.2d 902 (Ct.App.2001). Furthermore, a thorough title search and review would confirm that the Declarant’s conveyance of the common elements into units violated the terms of the Master Deed.

Accordingly, it is,

ORDERED, ADJUDGED AND DECREED, that the 2007 Master Deed for Mariner’s Cay Marina Horizontal Property Regime, recorded March 19, 2007 in the Office of the Register of Deeds for Charleston County in Book X618 at Page 603, as Amended and Restated by document recorded June 12, 2008 in Book Z661 at Page 509 be, and the same is hereby, declared and adjudged to be void, a nullity, and of no effect, to the extent that its provisions converted certain common elements of the horizontal property regime, namely the Ship’s Store Building and its units, Commercial Units 1-A and 1-B, and the Fuel Docks designated as Commercial Unit 2, from common elements to individual units; and it is further,

ORDERED, ADJUDGED AND DECREED, that the said Properties, being the Ship's Store Building and Commercial Unit 1-A, Commercial Unit 1-B and the Fuel Docks, Commercial Unit 2 be, and they are hereby, restored to their status as common elements of the horizontal property regime as they were defined and described in Article VII, Section 7.1 (e) of the 2006 Master Deed for Mariner's Cay Marina, recorded May 18, 2006 in the Office of the Register of Deeds for Charleston County in Book V583 at Page 584; and it is further,

ORDERED, ADJUDGED AND DECREED, that the individual Plaintiffs, Elizabeth Heatley, Neal B. McCann, Jr., David Neil Monk, and Thomas V. Bessent are herewith and hereby declared to own, and they do hold and own, undivided interests in the Ship's Store Building and Commercial Units CU-1A, CU-1B, and the Fuel Docks, CU-2, as tenants in common with each other; and they are furthermore tenants in common thereto with every other owner of a boatslip unit at Mariner's Cay Marina; and it is further,

ORDERED, ADJUDGED AND DECREED, that to the extent that the Defendant South Atlantic Bank holds, or claims to hold, a mortgage lien interest on the Ship's Store Building and its Commercial Units, CU-1A and CU-1B, and on the Fuel Docks, Commercial Unit CU-2, the mortgage lien is ineffective and void, in accordance with Code section 27-31-230(a).

ORDERED, ADJUDGED AND DECREED, that the remaining issues in this case shall be returned to the circuit court for disposition pursuant to the terms of the Order of Reference entered on December 14, 2020.

AND IT IS SO ORDERED!

SIGNATURE PAGE TO FOLLOW



Charleston Common Pleas

Case Caption: Alben D Neighbors , plaintiff, et al VS Mariners Cay Marina Condo
LLC , defendant, et al
Case Number: 2017CP1003099
Type: Order/Other

So Ordered

s/Mikell R. Scarborough 3062