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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Master-in-Equity

Hon. Shannon M. Phillips, Master-in-Equity

Case No.: 2022-001149

Mark Razzano and Carre Razzano….....Appellants,

v.

Derrick S. Hester, Debra Hester, James Nicholls, Emma Viola Nichols, James E. Gregg, Jr., Paulette J. Gregg, Michael Ben Coley, Ashley Coley Grady L. Barnes, Sr., Julia W. Barnes, Ewen Lennon, and Amy Lennon .....Respondents.

INITIAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

I. STATEMENT OF ISSUES ON APPEAL

A. Did the Master-In-Equity err in concluding that Appellants construction constitutes an "outbuilding" despite the word being ambiguous and/or undefined in applicable restrictive covenants and despite no express method of attachment or joining of two structures being prescribed?

II. STATEMENT OF THE CASE

Respondents are a group of certain owners within the Solitude Bay Community in Spartanburg County, South Carolina (the "Community"). (Mot. ¶ 1, March 15, 2022) Appellants are the owners of the real property and improvements located at 149 Whippoorwill Drive, Campobello, SC (the "Subject Property") which are the subject of this appeal and the underlying case. (Mot. ¶ 2, March 15, 2022) The Subject Property is located within the Community and is subject to restrictive covenants made applicable to lots within the Community recorded in the Office of the Register of Deeds for Spartanburg County in Deed Book 39 N, beginning at Page 40 (the "Restrictions"). (Mot. ¶ 3, March 15, 2022)

In anticipation that the Appellants' elderly parents would need assisted living, the Appellants desired to construct an addition to their pre-existing primary home, an attached three-car garage on Subject Property that includes space above the parking/storage/garage area containing basic amenities for living (the "Addition"). (Mot. ¶ 10, March 15, 2022; Aff. of Mark & Carre Razzano, March 7, 2022) The Appellants anticipated that once their elderly parents where in need of assistance, they would be able to move into the finished space of the Addition and that the Appellants would be able to take care of them.

The parties initially engaged in litigating the underlying case in 2018. The Respondents complained, *inter alia*, that the Appellants' construction of the Addition and use thereof constituted a violation of paragraph six (6) of the Restrictions which provides, "[n]o trailer, basement, shack, garage, barn or other outbuilding erected on any lot shall, at any time, be used as a residence temporarily or permanently, nor shall any residence of a temporary character be permitted."

Respondents sought a permanent injunction prohibiting the Appellants from making residential use of the finished living space in the Addition.

The bench trial of the matter was held before the Spartanburg County Master-in-Equity, Honorable Gordon G. Cooper presiding, on February 25, 2020. At the time of trial, the Appellants had not completed construction of the Addition and the Appellants' primary residence had not been connected or attached to the Addition. Despite construction of the Addition being incomplete at the time of trial, the Trial Court's initial order (the "2020 Order") held, in favor of the Respondents, that, *inter alia*:

(i) "At the time of trial, the Garage was not connected to the main residence…" (Order p. 4, April 9, 2020);

(ii) "I find that the Garage is an "outbuilding" within the language of Section 6 of the Covenants which provides that "[n]o trailer, basement, shack, garage, barn or other outbuilding erected on any lot shall, at any time, be used as a residence temporarily or permanently, nor shall any residence of a temporary character be permitted." (Order p. 4, April 9, 2020)

(iii) "Under the terms of the injunction, as long as the Garage remains unattached from the main residence, the Garage, including the living space above, may not be used as a residence, temporarily or permanently. However, I retain jurisdiction over this matter such that, in the event that the structures are joined, I will entertain a motion to rule on whether the construction, in this Court's determination, is such that the Garage no longer has the status of an outbuilding." (Order p. 4-5, April 9, 2020)

(iv) "Defendants are permanently enjoined from using the Garage, including the living space above, as a residence, either temporarily or permanently. This Court retains jurisdiction over this matter and, should the Defendants attach the Garage to the main residence, Defendants may seek a ruling from this Court on whether the construction is such that, in this Court's determination, the Garage no longer has the status of an outbuilding." (Order p. 6, April 9, 2020)

The 2020 Order was entered on April 9, 2020.

While the 2020 Order reserved jurisdiction over whether the Addition remained an "outbuilding" following post-trial completion of construction, the 2020 Order did not prescribe any method of attachment or construction to be used in causing the Addition to be attached or joined to the Appellants' primary residence. Following entry of the 2020 Order, Appellants attempted to receive guidance from the Hon. Gordon G. Cooper as to what the Court would consider adequate attachments such that the Addition would no longer be considered an "outbuilding". The Trial Court declined to entertain the Appellants' inquiries. Accordingly, Appellants caused construction of the Addition to be completed by their contractor, Stephen M. Poole Builders, Inc., without any guidance being provided to them by the Trial Court.

On March 15, 2022, after construction of the Addition was complete and pursuant the Trial Court's reserved jurisdiction, Appellants motioned requesting the Court rule that: (i) the completed Addition does not constitute an "outbuilding" as intended by the Restrictions; (ii) the Appellants may use the finished portions of the Addition for personal and family residential use, including for sleeping, bathing, and eating; and (iii) the use of the finished living space of the Addition as intended by the Appellants is not in violation of the Restrictions (the "Motion"). (Mot. ¶ 17, March

15, 2022) By the time Appellants' filed the Motion, the Hon. Gordon G. Cooper had retired and the Hon. Shannon M. Phillips assumed the role of Spartanburg County Master-in-Equity; the Motion was heard and ruled on by the Hon. Shannon M. Phillips.

The Court heard the Motion across two days on May 19, 2022 and June 28, 2022. At the hearing and in support of their position, Appellants introduced documentary and photographic evidence and presented testimony from Appellant, Carre Razzano and the Appellants' contractor, Stephen M. Poole of Stephen M. Poole Builders, Inc. The evidence presented and testimony provided by and/or on behalf of the Appellants demonstrated to the Court that: (i) construction of the Addition was complete; (ii) that the Appellants' pre-existing main residence had been attached to the Addition (Tr. Pp. _____; Def.[s'] Ex. 1-5). Respondents did not present any witnesses or evidence at the Motion hearing.

Notwithstanding the evidence and testimony presented on behalf of the Appellants, the Court entered its Order on July 22, 2022 (the "2022 Order") finding and ruling:

(i) "I find that the Defendants have constructed a series of trellises or pergolas which have been ***attached*** at one end to the Main Residence and at the other end to the Garage by screws." (2022 Order p. 3) (*emphasis added*)

(ii) "While there does not seem to be a case in South Carolina directly on point, cases from other jurisdictions provide compelling instruction. See, e.g., Barna v. Langendoerfer, 246 A.3d 343, 347 (Pa. Super. Ct. 2021) (finding a failure to comply with restrictive covenant requiring garage to be attached to house when garage was connected to house by pergola breezeway and did not share a wall); Scherer v. Antiquers Aerodome, Inc., 546 So. 2d 103, 104 (Fla. Dist. Ct. App. 1989) (finding two hangars connected by a

breezeway did not comply with a restrictive covenant limiting owner to one hangar)." (2022 Order p. 3)

(iii) "I find the Main Residence and Garage do not share a wall or any interior space, such that one must go outside of the Main Residence to enter the Garage. I find that Garage has not been sufficiently joined to the Main Residence to form one residence building and the Garage remains an "outbuilding"." (2022 Order p. 3-4)

Following entry of the 2022 Order, Appellants pursued appellate review of the Court's 2022 Order and issued their notice of appeal on August 16, 2022. Appellants contend that the lower Court erroneously found and/or held that the completed Addition was not attached in a manner such that the same no longer constitutes and "outbuilding" within the purview of the Restrictions. By virtue of the Addition now being being physically connected, mechanically fastened and attached to the Appellants' residence, it is the Appellants position that the Addition is merely an extension of or an addition to the Appellants' residence, is not an "outbuilding", and the finished space of the Addition may be used for residential purposes without being in violation of the Restrictions.

III. STANDARD OF REVIEW

"An action to enforce restrictive covenants by injunction is in equity." *Seabrook Is. Prop. Owners Ass'n v. Marshland Trust, Inc.*, 358 S.C. 655, 661, 596 S.E.2d 380, 383 (Ct. App. 2004); *see also, Taylor v. Lindsey*, 332 S.C. 1, 3, 498 S.E.2d 862, 864 (1998). "In equitable actions, the appellate court may make findings of fact in accordance with its own view of the preponderance of the evidence." *Grosshuesch v. Cramer*, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005); *see also, Townes Assoc. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "The appellate

court is not required to ignore the findings of the master when the master was in a better position to evaluate the credibility of the witnesses." *Siau v. Kassel*, 369 S.C. 631, 638, 632 S.E.2d 888, 892 (Ct. App. 2006); *see also, Arcadian Shores Single Family Homeowners Ass'n v. Cromer*, No. 4223, 2007 S.C. App. LEXIS 98, at 5-6 (Ct. App. May 17, 2007).

"Restrictive covenants are contractual in nature." *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). "The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution." *Id.* A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation. *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) (citing 17A Am. Jur. 2d Contracts § 338, at 345 (1991)). "A restriction on the use of property must be created in express terms or by plain and unmistakable implication and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of the property." *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) (citations omitted).

"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. The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written. It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of free use of the property, subject, however, to the provision that this

rule of strict construction should not be applied so as to defeat the plain and obvious purpose of the instrument. It follows, of course, that where the language of the restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property. A restriction on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." *Taylor*, 332 S.C. at 4-5, 498 S.E.2d at 863-64 (internal quotations and citations omitted); *see also, S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001).

IV. ARGUMENTS

A. Did the Master-In-Equity err in concluding that Appellants construction constitutes an "outbuilding" despite the word being ambiguous and/or undefined in applicable restrictive covenants and despite no express method of attachment or joining of two structures being prescribed?

While judicial review of disputes regarding interpretation of restrictive covenants is not a novel issue in South Carolina, the specific facts of the matter before this Court do not appear to mirror those of any reported decision in this State. Paragraph six (6) of the Restrictions provides, "[n]o trailer, basement, shack, garage, barn or other outbuilding erected on any lot shall, at any time, be used as a residence temporarily or permanently, nor shall any residence of a temporary character be permitted." (Order p. 4, April 9, 2020) At the time of trial, construction of the Addition was incomplete. (Tr. p. _____) Although construction of the Addition was incomplete at the time of trial, the Trial Court found that the incomplete Addition constitutes an "outbuilding"

such that the same may not be used as a residence either temporarily or permanently. (Order p. 4-6, April 9, 2020)

Pursuant to the Appellants' March 15, 2022 Motion, the lower Court was asked to review the Appellants' completed construction and determine whether the Addition, in its completed form, was attached to the Appellants main residence such that the Addition no longer constitutes an "outbuilding" under paragraph 6 of the Restrictions; as held by the Trial Court. (Mot. ¶ 17, March 15, 2022) In reliance on case law from other jurisdictions, the lower Court held, " while there does not seem to be a case in South Carolina directly on point…I find the Main Residence and Garage do not share a wall or any interior space, such that one must go outside of the Main Residence to enter the Garage. I find that Garage has not been sufficiently joined to the Main Residence to form one residence building and the Garage remains an "outbuilding"." (Order ¶ 4,5, July 22, 2022)

The Restrictions are devoid definitions and/or descriptive provisions which prescribe what type of building or construction constitutes an "outbuilding" nor do the Restrictions set forth any provisions with respect to acceptable methods of construction or attachment. (Tr. p. 41; Def.['s] Ex. 5) Further, the Restrictions do not contain an architectural review or approval process the Appellants could follow to seek approval of their construction instead of blindly constructing improvements only for them to be deemed uninhabitable or unusable upon challenge by the Respondents. Moreover, despite the Appellants requests, the Trial Court failed or was otherwise unwilling to set forth any criteria of what would be considered an adequate form of attaching the two structures to avoid further disputes regarding what does, or does not, constitute an "outbuilding". Thus, the Appellants contend that the Restrictions are ambiguous and uncertain

leaving room for multiple interpretations such that they should be construed in favor of the Appellants free use of the Subject Property rather than the lower Court's inequitable and more restrictive findings.

It is well settled law in this state that the law favors free use of property over restricted use. "The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written. **It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of free use of the property**, subject, however, to the provision that this rule of strict construction should not be applied so as to defeat the plain and obvious purpose of the instrument. It follows, of course, that **where the language of the restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property**. A restriction on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." *Taylor*, 332 S.C. at 4-5, 498 S.E.2d at 863-64. (*emphasis added*)

During the May 19 and June 28, 2022 Motion hearing, the Appellants presented evidence that, *inter alia*:

(i) showed the condition or status of construction at the time of trial and after completion of the Addition. (Tr. p._____; Def.[s'] Ex. 3,4)

(ii) the Addition was defined by Spartanburg County Building Codes department as an "Addition of 2 BR Garage Apartment to Single Family House on New Septic". (Tr. p. _____; Def.[s'] Ex. 2)

(iii) the Addition was incomplete and not connected or attached to the Appellants primary residence at the time of trial. (Tr. p._____; Def.[s'] Ex. 3,4)

(iv) following trial, the Addition had been attached and mechanically connected to the Appellants' primary residence by covered walkway constructed of lumber and screws; the same having been testified to by Stephen M. Poole whom the Court admitted as an expert in the field of residential construction. (Tr. p._____; Def.[s'] Ex. 3,4)

(v) established the Restrictions were absent any definition of what constitutes an "outbuilding" or what constitutes an acceptable attachment method such that a building does not fall into the category of an "outbuilding". (Tr. p._____; Def.[s'] Ex. 5)

Instead of the lower Court relying on the evidence presented at the Motion hearing and the applicable South Carolina case law on interpretation of restrictive covenants in South Carolina, the lower Court looked to the case law of the Superior Court of Pennsylvania (*Barna v. Langendoerfer*, 246 A.3d 343, 347 (Pa. Super. Ct. 2021) and the Florida Fourth District Court of Appeals (*Scherer v. Antiquers Aerodome, Inc.*, 46 So. 2d 103, 104 (Fla. Dist. Ct. App. 1989) to make its determination. (Order ¶ 4-6, July 22, 2022)

The cases relied on by the lower Court relate to building restrictions rather than use restrictions. In *Barna v. Langendoerfer*, a contempt case, the defendants' property was subject to a deed restriction on building providing that "there shall be no other buildings, besides a residence with an *attached garage*, constructed on the property." *Barna v. Langendoerfer*, 246 A.3d at 345.

(*emphasis added*); "attached garage" being the term subject to the judicial review. The defendants in that case constructed a garage next to their residence but the garage initially did not connect to the defendants' residence. *Id*. The Court ordered the defendants to "attach" the free-standing garage to the defendants' residence. *Id.* at 345, 346. In attempting to comply with the court's order, the defendants constructed a pergola/breezeway between their residence and the garage. *Id.* at 346. The court in *Barna* found that the term "attached" was ambiguous but sought to resolve the ambiguity by looking to the prevailing conditions existing when the covenant was made in 1973.

In *Scherer v. Antiquers Aerodome, Inc.* the Florida Fourth District Court of Appeals held the appellants were in violation of restrictive covenants providing "*there shall not exist on any lot at any time more than one residence and one hangar*…" *Scherer v. Antiquers Aerodome, Inc.* 46 So. 2d at 104. (*emphasis added*) In that case the appellants had constructed multiple hangars on their property, thereafter attempting to attach the two hangars by breezeway in order to comply with the one hangar restriction. Notably, in *Scherer* the court alludes to the fact that the appellants had the ability to submit plans for approval by a board of directors governing such functions.

Unlike the *Barna* and *Scherer* cases, the issue before the lower Court did not arise out of the interpretation of a building restriction (what may or what may not be built) established by the Restrictions. There is no dispute, that the Appellants were permitted under the Restrictions to cause the construction of the Addition on the Subject Property. Rather, the issue before the lower Court was that of a use restriction; whether the finished space in the Addition could be used for residential purposes.

Despite the term "outbuilding" being undefined, the Trial Court determined that the incomplete Addition was, at the time of trial an "outbuilding", an undefined or non-descript term within Paragraph six (6) of the Restrictions. (Order p. 4, April 9, 2020) After trial, the Appellants completed construction and provided evidence of having attached the Addition to the Appellants' primary residence on the Subject Property. (Tr. p. _____; Def.[s'] Ex. 2-5) The issue of attachment was not created by the Restrictions. (Tr. p. 41; Def.[s'] Ex. 5) Rather, the Trial Court provided the Appellants the ability to come into compliance with a use restriction on residential use (Paragraph six (6) of the Restrictions) by attaching the Addition to their residence and the Appellants attempted to comply with the 2020 Order by physically and mechanically attaching the Addition to their primary residence in a tasteful and structurally sound manner given topography of the Subject Property. (Order p. 4-6, April 9, 2020); (Tr. p. _____; Def.[s'] Ex. 2-4)

The Trial Court did not prescribe what construction means and methods may be employed to achieve the status of attached or joined nor do the Restrictions provide a process the Appellants could use to ensure the intended method of attachment or joining would be adequate or accepted. Furthermore, the Trial Court did not order the Appellants to perform construction in such a manner to form "one residence building" as the lower Court insinuates in the 2022 Order. (Order ¶ 5, July 22, 2022) In presiding over the Appellants' Motion, the lower Court was left to interpret two ambiguous terms and/or decide what constitutes "outbuilding" and what it means to "attach" or "join" two structures. Appellants contend each of those terms are capable of more than one interpretation or meaning such that they should be construed in favor of the free use of the Subject Property. Despite the ambiguous nature of the "outbuilding" and what it means to "attach" or "join", the lower Court's findings in the July 22, 2022 Order enlarge and/or broaden the restrictions

on the Appellants use of the Subject Property rather than construe the ambiguities in favor of the Appellants free use.

Therefore, it was improper for the lower Court to find that the "Garage has not been sufficiently joined to the Main Residence to form one residence building and the Garage remains an "outbuilding"." (Order ¶ 5, July 22, 2022). The standard established by the Trial Court was to attach (albeit in an undefined or unspecified manner) the Addition to the Appellants' residence, not to "form one residence building". Furthermore, both the 2020 and 2022 Orders leave the term "outbuilding" undefined and continue to construe the ambiguous term in a manner which further restricts the Appellants' use of the Subject Property. In light of the foregoing, and despite the good faith attempts to comply with the ambiguous terms of the Restrictions and 2020 Order, the Appellants have been left to spend substantial sums on constructing improvements that they remain unable to use as intended.

CONCLUSION

For the reasons stated herein, the lower Court erred in construing the Restrictions and ambiguities therein or arising therefrom against the free use of property and the lower Court's order should be reversed.

Respectfully submitted,

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Case No. 2018-CP-42-02247

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PROOF OF SERVICE

The undersigned employee of the law offices of Kenison, Dudley & Crawford, LLC, attorneys for Appellants, hereby certifies that a true copy of the Appellants' Initial Brief and Designation of Matter in the above-referenced case has been served on all parties of record by mailing a copy of same in the United States Mail, postage prepaid this 28th day of November 2022 addressed as follows:

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November 28, 2022

The Honorable Jenny Abbott Kitchings
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RE: Razzano – Hester
Appellate Case No. 2022-001149

Dear Ms. Kitchings:

Enclosed please find Appellants Mark Razzano and Carre Razzano's Initial Brief and Designation of Matter in the above-referenced matter along with our Certificate of Service for the same.

Thank you for your time and consideration. Contact our office should you have any questions.

Sincerely,

Jennifer E. Beckley

JEB/
Enclosures
cc: Jay Anthony, Esq. (via email)
JTC