

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

) FILE NO.: 2022-CP-10-02345

William M. Ross and Kelli S. Ross

)

Plaintiff(s),

)

vs.

)

The Preserve II at Fenwick Hall Property  
Owners Association Inc

)

)

Defendant(s).

)

**PLAINTIFFS' MOTION PURSUANT TO  
RULE 59 TO RECONSIDER / ALTER OR  
AMEND ORDER GRANTING TEMPORARY  
INJUNCTION**

**RECEIVED**

**Jan 20 2023**

**SC Court of Appeals**

COMES NOW the Plaintiffs pursuant to SCRPC Rule 59, who move this Court alter/amend its Order filed September 26, 2022 in this matter. The erroneous order grants a preliminary injunction "prohibiting the Plaintiffs from any further destruction of specimen trees on Plaintiffs' lot as defined in the POA at issue".

This Court erred by failing to properly consider all of the factors necessary to grant a preliminary injunction, instead focusing singularly on the factor of irreparable harm. For a preliminary injunction to be granted, the plaintiff must establish that: (1) he would suffer irreparable harm if the injunction is not granted; (2) he will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. *Scratch Golf Co. v Dunes W. Residential Golf Props., Inc.*, 361 S.C. at 121, 603 S.E.2d at 908 (2004). In the present case, this Court completely ignored the element requiring that the Defendant be likely to succeed on the merits of the litigation.

This Court was uninclined to review the merits when granting the preliminary injunction. While a judge, at chambers, cannot *finally decide* anything as to the merits, he can and ought to look into the merits, whether they present issues of law or fact, and consider them to the extent necessary to enable him to exercise his discretion wisely. *Alston v Ball* 77 S.E. 727, 93 S.C. 553

(S.C. 1913). Even if the complaint states a cause of action for injunction, a temporary injunction should not follow automatically, "for the court should consider the showing made in opposition thereto, and must determine, in view of all the circumstances, whether an injunction is reasonably essential to protect the legal right of the plaintiffs pending the litigation subject to review by this court." *Id*, quoting *Crawford v Lumber Co.*, 77 S.C. 81, 57 S.E 670.

In the present case, the Ross's have established a prima facia case that Lot 58 is not subject to the Preserve II governing documents, nor is Lot 58 subject to the Preserve II Regime. The Ross's case is primarily based upon the recorded documents at the Charleston County Register of Deeds. The Declaration of Covenants and Restrictions for The Preserve II at Fenwick Hall and Provision for and Bylaws of The Preserve II at Fenwick Hall Property Owners Association Inc recorded in Book 0846 Page 099 specifically states in Exhibit A that Lot 58 is not part of the Preserve II Regime. The language of the document recorded on December 12, 2019 includes the following: "PROPERTY SUBJECT TO COVENANTS AND RESTRICTIONS....SAVING AND EXCEPTING the below parcels: Lots 58 and 59 shown on plat at Plat Book L14, Page 0094." This fact is plead in the Complaint and is supported by the Affidavit of Damien S. Sobieraj, dated May 25, 2022; which is a part of this Court's record.

The Preserve II Regime does not dispute that the Declaration at Book 0846 Page 099 excludes Lot 58 from its governance. The Preserve II Regime alleges that on the evening of December 12, 2019, at a special meeting of some property owners, the Preserve II Regime absorbed the Preserve Regime through a merger of the two associations; and as a result, Lot 58 is subject to governance by the Preserve II Regime and its Declaration of Covenants.

In response to the Regime's allegations of authority through merger, the Ross's raise a defense grounded upon South Carolina Code 27-30-130. This statute states in relevant part, "In

order to be enforceable, a homeowners association's governing documents must be recorded in the clerk of court's, Register of Mesne Conveyance (RMC), or register of deeds office in the county where the property is located." The statute continues, "In order to remain enforceable, a homeowners associations rules, regulations, and amendments to rules and regulations must be recorded in the clerk of court's, Register of Mesne Conveyance (RMC), or register of deeds office in the county in which the property is located by January tenth of each year following their adoption or amendment."

It is undisputed by all parties that Lot 58 was, prior to the property owner meeting on the evening of December 12, 2019, subject to the Preserve Regime and its Declaration rather than the Preserve II Regime and its Declaration. It is alleged by the Preserve II Regime that the vote on December 12, 2019 amended the governance of the Preserve Regime (which Lot 58 was a part of) to make it a part of the Preserve II Regime. It is further alleged by the Preserve II Regime that that the vote on December 12, 2019 amended the rules and regulations that Lot 58 was subject to, so that Lot 58 would be subject to the rules and regulations of the Preserve II Declaration from that point forward.

These amendments to the governance, rules, and regulations over Lot 58 were never recorded in the Charleston County Records as is specifically required by SC Code 27-30-130; and are therefore, under the express language of the statute, unenforceable. The application of SC Code 27-30-130 to defeat the "merger of associations" was plead in the Ross's Complaint, raised by way of affidavit, and raised by way of legal memorandum.

Ironically, the Preserve II Regime never responded to this statutory failure in any way. The Preserve II Regime alleged that it recorded articles of merger with the South Carolina Secretary of State's Office on July 13, 2022; several months after this litigation began.

However, SC Code 27-30-130 does not require articles of merger to be filed with the South Carolina Secretary of State. SC Code 27-30-130 requires “amendments to rules and regulations” to be recorded in the clerk of court’s, Register of Mesne Conveyance (RMC), or register of deeds office in the county where the property is located by January tenth of each year following their adoption or amendment.”

The Preserve II Regime, by failing to plead that it recorded a document setting forth the December 12, 2019 amendments to the rules and regulations and governing documents of Lot 58 in the “clerk of court’s, Register of Mesne Conveyance (RMC), or register of deeds office in the county where the property is located”; has failed to plead a prima facie case for compliance with SC Code 27-30-130. As a result of this failure, the Preserve II Regime cannot reasonably be found to have a likelihood of success on the merits, and its request for a temporary injunction must be denied.

I SO MOVE.

Laquiere Legal Services LLC

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