

Feb 23 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA  
COUNTY OF JASPER

IN THE COURT OF COMMON PLEAS

SLF III – HARDEEVILLE, LLC,

Case No. 2020-CP-27-00495

Plaintiff,

vs.

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT

RSV – HARDEEVILLE, LLC,

Defendant.

This case comes before the Court upon Plaintiff SLF III – Hardeeville, LLC's ("Plaintiff" or "SLF") and Defendant RSV – Hardeeville, LLC's ("Defendant" or "RSV") cross-motions for summary judgment (together, the "Parties"). Specifically, on December 6, 2021, SLF filed its Renewed Motion for Summary Judgment ("SLF's Motion") as to its claim for declaratory judgment and RSV filed its Motion for Summary Judgment ("RSV's Motion") as to SLF's claim for declaratory judgment (together, the "Motions"). The Court has carefully considered the Motions, memoranda of law submitted in support of and in opposition to the Motions, the evidence presented, the record herein and the applicable law. For the foregoing reasons, the Court grants SLF's Motion and denies RSV's Motion.

**INTRODUCTION**

The Parties agree there is no genuine issue of material fact in this matter, and the sole determination for this Court is whether RSV has the right to develop more than 155 acres of the property at issue for light industrial use. This Court finds the undisputed facts establish that the assignments pursuant to which RSV obtained its development rights in the property expressly restrict development to no more than 155 acres for light industrial

use, and clearly and unmistakably prohibit the conversion of property from residential to light industrial use. Accordingly, SLF is entitled to judgment as a matter of law.

### **FINDINGS OF UNDISPUTED FACT**

RSV is the owner of approximately 800 acres of land located in Hardeeville, South Carolina, known as the “Savannah Tract.” The Savannah Tract lies entirely within, and is part and parcel with, a larger tract known as the “Hardeeville Tract.” SLF also owns land within the Hardeeville Tract. The permitted uses and development of the Hardeeville Tract, and thus of the Savannah Tract, are subject to and controlled by that certain Development Agreement and exhibits thereto, including without limitation the Hardeeville Tract PDD Concept Plan, entered into in or about April 2006, by the City of Hardeeville and the owner of the property at the time, Copper Station Holdings, LLC (the “DA”). The DA provides for mixed use, residential and commercial development of the Hardeeville Tract, subject to and limited by the terms and conditions set forth therein. The DA sets a “base overall residential density cap of 9,784 units,” and designates 1,026 acres for light industrial use. The DA also provides “the right to convert residential acreage to any commercial and/or light industrial acreage,” with no cap on the acreage converted (the “Conversion Rights”).

Various assignments of certain development rights in and to the Hardeeville Tract, all of which are of public record, occurred between 2006 and 2015.<sup>1</sup> RSV obtained its development rights pursuant to a chain of assignments from Reed-HTI, LLC (“Reed-HTI”). Reed-HTI had obtained such development rights pursuant to two assignments, referred

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<sup>1</sup> More specifically, the assignments at issue pertain to certain real property known as the “Reed-HTI Property.” The Savannah Tract comprises a portion of the Reed-HTI Property, both of which lie within and are part and parcel of the Hardeeville Tract.

to as the “Reed-HTI Assignment” and the “SLF/Reed-HTI Assignment” (together, the “Assignments”).

The Reed-HTI Assignment. The Reed-HTI Assignment, dated on or about March 6, 2008, was to Reed-HTI, as assignee, from JPR Land Co., LLC (“JPR”), as assignor, and assigned the right to develop up to 2,262 Residential Dwelling Units and up to 75 upland acres of General Commercial. It expressly excluded, and reserved unto JPR to be assigned to SLF, any and all development rights not expressly set forth therein, and provided that such restrictions shall run with the land, to be enforceable against any successor or assign of Reed-HTI, and made SLF a third-party beneficiary to the assignment. Specifically, the Reed-HTI Assignment states:

(a) Assignor does hereby transfer, assign, convey and deliver unto Assignee, its successors and assigns, Assignor’s rights, privileges and obligations under the Development Agreement to develop (i) up to 2,262 Residential Dwelling Units (as such term is currently defined in the Development Agreement and the PDD), and (ii) up to 75 upland acres of General Commercial (including all Permitted Uses set forth under the General Commercial designation) as currently defined in the PDD, except for the Excluded Obligations identified below. Accordingly, Assignee may (i) develop and use up to 75 upland acres of the Property for any and all “Permitted Uses” set forth under the “General Commercial” designation as currently defined in the PDD, and (ii) develop **and use the balance of the Property only for** (A) up to 2,262 Residential Dwelling Units (in the aggregate) of Single-Family Residential, Multi-Family Residential (but only for multi-family units with an average sales price in excess of \$180,000 per unit), and Model Homes/Sales Center, (B) Community Recreation, (C) Institutional/Civic, (D) Maintenance Areas, (E) Open Space, (F) Roads, (G) Setback and Buffers, (H) Signage Control, (I) Silviculture, (J) Wetlands, (K) Utilities, and (L) Recreational Vehicle Parks, as all of the foregoing use categories are currently defined in the PDD, **and for no other use or purpose.** The foregoing rights hereby assigned by Assignor to Assignee shall be subject to the terms, obligations and conditions of and under the PDD and the Development Agreement. Other than those rights assigned hereby as specifically set forth above, the Assignor shall not be required to assign or transfer to Assignee, and **Assignee**

**shall not be entitled to, any other development rights under the Development Agreement or the PDD, all of which are retained by Assignor to be assigned to SLF – Hardeeville, LLC (“SLF”).**

(b) **Assignee hereby covenants and agrees not to develop or use the Property (i) in a manner inconsistent with the foregoing development rights assigned by Assignor to Assignee pursuant to Paragraph 1(a) above, or (ii) for any use not specifically listed in Paragraph 1(a) above, and that such restriction shall be a covenant and restriction running with the Property and shall be binding upon and enforceable against Assignee, its successors and assigns, and any subsequent owner(s) of the Property (or any portion thereof), and shall inure to the benefit of and be enforceable by Assignor and SLF** and their respective representatives, successors and assigns (and by any subsequent owner of all or any portion of the property subject to the PDD owned or to be owned by SLF). The foregoing restriction may be enforced by any remedy available at law or in equity, including without limitation, injunctive relief and/or specific performance, and the prevailing party in such action shall be entitled to recover its court costs and reasonable attorneys’ fees. The failure, in any one or more instances, to insist upon compliance with the foregoing restriction, shall not constitute or be construed as the waiver of such restriction but the same shall continue and remain in full force and effect.

(c) **Notwithstanding anything herein to the contrary, Assignee shall not convert (and shall have no right to convert) any of the 75 upland acres designated for General Commercial to use for Residential Dwelling Units or for the purpose of increasing the number of Residential Dwelling Units. . . .**

(f) **...The rights and obligations hereby assigned and assumed shall be covenants running with the land, binding upon the parties hereto and their successors and assigns.**

(g) **SLF is hereby deemed a third party beneficiary** of this Partial Assignment and Assumption with respect to the rights and remedies of SLF as provided herein.

The SLF/Reed-HTI Assignment. The SLF/Reed-HTI Assignment, dated on or about September 4, 2008, was to Reed-HTI, as assignee, from SLF, as assignor, and assigned the right to develop up to 155 acres for light industrial use. Specifically, it states:

SLF does hereby transfer, assign, convey and deliver unto Reed-HTI, its successors and assigns, SLF's rights, privileges and obligations under the Development Agreement to develop, **on the Reed-HTI Property, up to one hundred fifty-five (155) acres of Light Industrial use**, as currently defined in the PDD. The foregoing assignment is in addition to and supplements those rights previously transferred under the Reed-HTI Assignment, and otherwise **does not amend or modify any term, covenant or restriction in the Reed-HTI Assignment other than to allow Reed-HTI to develop up to 155 acres of Light Industrial on the Reed-HTI Property** (all of which covenants and restrictions in the Reed-HTI Assignment applicable to the Reed-HTI Property shall continue to apply in full force and effect except for allowing up to 155 acres of Light Industrial development on the Reed-HTI Property)...The rights and obligations hereby assigned and assumed shall be covenants running with the land, binding upon the parties hereto and their successors and assigns.

In or about May of 2019, RSV submitted to the City for approval a master plan for the Savannah Tract, which seeks to develop, among other things, over 577 acres for light industrial use (the "Master Plan"). The City approved the Master Plan in or about July of 2019.

### **PROCEDURAL HISTORY**

SLF thereafter initiated this lawsuit on October 12, 2020, seeking a declaratory judgment that RSV only possesses the right to develop up to 155 acres of the Savannah Tract for light industrial use, and seeking an award of its reasonable attorneys' fees and costs. RSV moved to dismiss the action, and SLF moved for summary judgment. The motions were heard at a hearing before Judge Price on February 1, 2021, and were both denied. The case was thereafter assigned to the Business Court for Jasper County, and became subject to the exclusive jurisdiction of this Court.

A hearing on cross-motions to compel discovery was held on October 28, 2021, at which time the Parties agreed that, prior to ruling on the discovery issues raised in the

motions, the Court should determine whether or not the DA and the Assignments are ambiguous, and both parties took the position that such documents are unambiguous in their favor. Accordingly, the Court agreed to consider cross-motions for summary judgment, based upon the controlling documents.

Thereafter, on December 6, 2021, the Parties filed their respective Motions, which are the subject of this Order. In support of its Motion, SLF submitted a certified copy of the DA and certified copies of the deeds and assignments relative to the property at issue. In support of its Motion, RSV submitted the Affidavit of Stephen S. Bird, the attorney for John Reed, who is the principal of Reed-HTI, JPR and RSV, and the Affidavit of Brana Snowden, the Planning Director for the City of Hardeeville. Thereafter, on March 3, 2022, counsel for RSV requested the opportunity to submit a response to SLF's Motion, and the Court permitted both Parties to submit responsive briefing. On March 11, 2022, SLF submitted its Memorandum in Opposition to RSV's Motion, and RSV submitted its Memorandum in Opposition to SLF's Motion and in support of its Motion. This Order follows.

### **STANDARD OF REVIEW**

Pursuant to Rule 56(c), SCRPC, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 25, 630 S.E.2d 474, 477 (S.C.2006) (citing *South Carolina Elec. & Gas Co. v. Town of Awendaw*, 359 S.C. 29, 34, 596 S.E.2d 482, 485 (2004)). In determining whether 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. *Bennett v. Investors Title Ins. Co.*, 2006 WL 2728932 (S.C.App.2006)

(citing *Law v. S.C. Dep't of Corrections*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); *Eagle Container Co., LLC v. County of Newberry*, 366 S.C. 611, 620, 622 S.E.2d 733, 737 (Ct.App.2005).

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. *Id.* (citing *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 228, 612 S.E.2d 719, 722 (Ct.App.2005). The moving party may discharge the burden of demonstrating the absence of a genuine issue of material fact by pointing out the absence of evidence to support the nonmoving party's case. *Id.* (citing *Lanham v. Blue Cross and Blue Shield of South Carolina, Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002)). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Id.* (citing *Wogan v. Kunze*, 366 S.C. 583, 591, 623 S.E.2d 107, 112 (Ct.App.2005). The nonmoving party must come forward with specific facts showing there is a genuine issue for trial. *Id.* (citing *Rife*, 363 S.C. at 214, 609 S.E.2d at 568).

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. *Id.* (citing *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003); *Eagle Container*, 366 S.C. at 621, 622 S.E.2d at 738; *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 393, 593 S.E.2d 183, 186 (Ct.App.2004). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. *Id.* (citing *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644,

594 S.E.2d 455, 462 (2004); *Wogan*, 366 S.C. at 592, 623 S.E.2d at 112; *B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct.App.2004).

### **CONCLUSIONS OF LAW**

The Court finds that the controlling documents at issue are clear, unambiguous, and readily susceptible to judicial interpretation. See *Hawkins v. Greenwood Devel. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) (construction of unambiguous contract “is a question of law for the court”). The SLF/Reed-HTI Assignment assigned only the right to develop “up to” 155 acres for light industrial use. The Reed-HTI Assignment, on the other hand, expressly assigned development rights for only commercial and residential uses (including certain incidental infrastructure uses), “and for no other use or purpose.” RSV argues that the Reed-HTI Assignment nonetheless assigned the right to convert property designated for residential use to light industrial use under the DA. This argument fails because it is contrary to the express terms of the assignment and to the plain and unmistakable restrictions therein, as set forth below. Accordingly, the Court holds that RSV only possesses the right to develop up to 155 acres of the Hardeeville Tract, and thus the Savannah Tract, for light industrial use.

Under South Carolina law, a restriction on the use of property is enforceable when it is created in “express terms or by plain and unmistakable implication.” *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) (citation omitted). “[W]hen ‘the language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning.’” *Community Services Associates, Inc. v. Wall*, 421 S.C. 575, 582-83, 808 S.E.2d 831, 835 (Ct. App. 2017)

(quoting *Shipyard Prop. Owners' Ass'n v. Mangiaracina*, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1992)). Here, the Court finds that the restrictions in the Reed-HTI Assignment satisfy the “plain and unmistakable” requirement of South Carolina jurisprudence, and are enforceable by SLF against RSV.

The Reed-HTI Assignment expressly provides that it is assigning to RSV the right to “(i) develop and use up to 75 upland acres of the Property” for general commercial use, as set forth in the DA, and to “(ii) develop **and use the balance of the Property only for** [ ] up to 2,262 Residential Dwelling Units” and related infrastructure, “**and for no other use or purpose.**” The assignment further states that RSV “**shall not be entitled to, any other development rights under the [DA],**” all of which were retained by the assignor, JPR, to be assigned to SLF, which was expressly made “**a third party beneficiary**” of the assignment. Such covenants were expressly stated to run with the land and to bind the successor and assigns of the parties thereto. This language is unambiguous, and plainly and unmistakably excludes from the assignment all other development rights possessed by JPR under the DA, including the Conversion Rights.

RSV argues that the Reed-HTI Assignment should be construed to include the Conversion Rights because it expressly prohibits the conversion of property to residential use, but does not expressly prohibit the conversion of property from residential use. That is, it suggests the Court should ignore the clear and unequivocal language that the property may be developed “only for” residential uses and “for no other use or purpose,” and instead read a different meaning into the assignment based on the absence of an express prohibition against the conversion of residential to other uses. However, the Court may not create an ambiguity where one does not exist, particularly where doing so

would result in an interpretation that is contradictory to the plain and ordinary meaning of the express terms of the assignment. See *Wall*, 421 S.C. at 582, 808 S.E.2d at 835 (“When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract’s force and effect and the court must construe it according to its plain, ordinary, and popular meaning.”) (quoting *Moser v. Gosnell*, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999)). See also *Lindsay v. Lindsay*, 328 S.C. 329, 337, 491 S.E.2d 583, 587 (Ct. App. 1997) (“Whether or not an ambiguity exists in an agreement. . . must be determined from the language of the instrument.”); *Abu-Shawareb v. S.C. St. Univ.*, 364 S.C. 358, 363, 613 S.E.2d 757, 760 (Ct. App. 2005) (holding silence alone does not create an ambiguity); *U.S. Leasing Corp. v. Janicare, Inc.*, 294 S.C. 312, 318, 364 S.E.2d 202, 205 (Ct. App. 1988) (silence in a contract does not permit the use of parol evidence that is inconsistent with or contradictory to the writing, or that adds a term to an otherwise express agreement).

Moreover, and as is apparent from the undisputed record before the Court, JPR, Reed-HTI, and RSV are related entities. Thus, by way of the Reed-HTI Assignment, the Reed entities entered into an agreement amongst themselves, with full knowledge that SLF was expressly made a beneficiary thereto. Had JPR and Reed-HTI, the parties to the Reed-HTI Assignment, desired to assign the Conversion Rights to Reed-HTI and/or to reserve them unto JPR for the benefit of the Reed entities, they could have done so, but clearly did not. Rather, they expressly provided that all other development rights possessed by JPR under the DA not expressly set forth in the assignment were not transferred thereby, but instead were retained for the benefit of SLF.

Accordingly, the Court holds that the controlling instruments set forth herein, including without limitation the Reed-HTI Assignment, are unambiguous, and rejects RSV's argument as contrary to the expressed terms and clear intent to convey only the development rights expressly set forth therein, to the exclusion of all others, including the Conversion Rights. The Court further holds that the development restrictions set forth in the Reed-HTI Assignment are plain and unmistakable, and that, as a matter of law, SLF is entitled to enforce them against RSV.

Because the Court finds the controlling documents to be unambiguous, it does not consider for purposes of this Order the parol and extrinsic evidence submitted by RSV by way of affidavits. *See, e.g., 56 Leinbach Investors, LLC v. Magnolia Paradigm, Inc.*, 411 S.C. 466, 472, 769 S.E.2d 242, 246 (Ct. App. 2014) ("Extrinsic evidence may only be considered if the contract is ambiguous.") (citation omitted). *See also Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) ("Where the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect.") (citation omitted); *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 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.") (citation omitted).

To the extent RSV argues that certain Post-Closing Documents, defined below, should be construed together with the SLF/Reed-HTI Assignment as part of the same

transaction, even if true, this argument is of no consequence.<sup>2</sup> To the extent they are relevant at all, the Post-Closing Documents pertain to the SLF/Reed-HTI Assignment and transfer restrictions on the 155 acres for light industrial use assigned pursuant thereto. They have no bearing upon whether RSV was assigned Conversion Rights pursuant to the Reed-HTI Assignment, nor do they amend or replace the Reed-HTI Assignment. Accordingly, the Post-Closing Documents are not relevant to the specific issue before the Court and have no impact upon the Court's ruling.

Finally, I decline to award attorney's fees because RSV has not breached any contract as of yet, nor has there been any development of the property for light industrial use. SLF III sought a declaration of rights, not a breach of contract, injunctive relief nor specific performance. As such, I believe an award of attorney's fees would be unjust.

IT IS, THEREFORE,

ORDER, ADJUDGED, AND DECLARED that

RSV, and any individual(s) or entity(ies) who may claim by and through it, is prohibited and prevented from developing more than 155 acres of the Savannah Tract for light industrial use; and it is further

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<sup>2</sup> RSV argues that a certain Post-Closing Agreement, Covenant and Agreement, and Mutual release (together, the "Post-Closing Documents") should be considered part of the SLF/Reed-HTI Assignment because, "[t]he general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together." *Klutts Resort, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977). For purposes of addressing this argument, the Court assumes, without deciding, that all of these elements are met with respect to the Post-Closing Documents and the SLF/Reed-HTI Assignment.

ORDERED, ADJUDGED, AND DECLARED that RSV's Motion for Summary Judgment is DENIED; that SLF's Renewed Motion for Summary Judgment is GRANTED; and no attorneys' fees will be awarded.

AND IT IS SO ORDERED.

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The Honorable Carmen T. Mullen  
Fourteenth Judicial Circuit

Beaufort, South Carolina  
April \_\_\_\_, 2022



Jasper Common Pleas

**Case Caption:** Slf Iii - Hardeeville, Llc VS Rsv - Hardeeville, Llc

**Case Number:** 2020CP2700495

**Type:** Order/Summary Judgment

So Ordered

s/Carmen T Mullen 2142