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Mar 27 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
The Honorable Donald B. Hocker, Circuit Court Judge
Beaufort County
Trial Court Case No. 2020-CP-07-1064

APPELLATE CASE NO. 2022-001547

Turner's Marina LLC,

Respondent-Appellant,

vs.

Paige Lorberbaum, Jeffrey Klapper, and Diane L. Klapper,

Defendants,

Of whom Paige Lorberbaum is the Appellant-Respondent and Jeffrey A. Klapper and Diane L. Klapper are Respondents.

**INITIAL REPLY BRIEF OF RESPONDENT-APPELLANT TURNER'S MARINA LLC
TO THE INITIAL RESPONDENTS' BRIEF OF
JEFFREY A. KLAPPER AND DIANE L. KLAPPER**

s/Thomas C. Taylor

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Bluffton, South Carolina
March 27, 2023

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Judge Hocker erred in failing to award Turner’s Marina LLC its costs of the trial, including reasonable attorney’s fees, from the Klapper Defendants.

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TABLE OF AUTHORITIES

CASES

Seabrook Island Property Owner’s Ass’n v. Pelzer, 292 S.C. 343, 347, 356 S.E.2d 411,414 (Ct.App. 1987).....p. 4

STATUTES - None

RULES – None

TREATISES – None

REPLY ARGUMENT

Judge Hocker erred in failing to award Turner's Marina LLC its costs of the trial, including reasonable attorney's fees, from the Klapper Defendants. In response to Turner's Marina's argument set forth in its Initial Brief, the Klapper Defendants do not dispute that the R.V. Resort Covenants were properly recorded, do not dispute that the Klappers were aware of them, do not dispute that their lot was subject to the Covenants and do not dispute that the recorded Covenants contained Section X, providing that in any proceeding arising from an owner's failure to comply with the terms of the Covenants, "the prevailing party shall be entitled to recover the costs of the proceeding, including reasonable attorney's fees, as they may be awarded by the court...."¹ The Klappers simply maintain that the awarding of attorney's fees was discretionary with Judge Hocker, and that his decision should not be disturbed unless an abuse of discretion is shown. Initial Klapper Respondent's Brief at p. 7.

As is discussed in the Respondent-Appellant's Initial Brief at p. 10, attorney's fees are generally handled post-trial in the Lowcountry, as is recognized in Seabrook Island Property Owners' Association v. Berger, 365 S.C. 234, 616 S.E.2d 431 (2005). That would have been the appropriate time for Judge Hocker to have examined the request for attorney's fees submitted with Affidavits or at a hearing. Judge Hocker's failure to allow recovery of attorney's fees in the face of overwhelming evidence that the Klapper Defendants knowingly and intentionally moved forward with the closing of the sale of their Lot in derogation of Turner's Marina LLC's attempted right of repurchase, exhibits a decision made without reasonable factual support and an abuse of discretion. Section X states that the prevailing party "shall be" entitled to recover the costs of the

¹ However, please note the Klappers' "Adoption by Reference" of Appellant Paige Lorberbaum's attack on the Covenants based on the Rule Against Perpetuities, See p. 8 of the Klappers' Initial Respondents' Brief filed March 15, 2023.

proceedings, including reasonable attorney's fees. While the actual awarding of attorney's fees is admittedly discretionary in South Carolina, the clear intent of the contract (the Covenants) was that attorney's fees shall be awarded to the prevailing party.

The Klapper Respondents inappropriately attempt to bootstrap an affirmative defense to the claim for attorney's fees by "adopting by reference" one of the Appellant-Respondent Paige Lorberbaum's initial arguments that the trial court committed error by failing to rule that subject right of repurchase violated the uniform statutory Rule Against Perpetuities. See Initial Respondent's Brief of the Klappers, p. 8. In reply, the Appellant Respondent Turner's Marina LLC's craves reference in this regard to it's to be filed Initial Respondent's Brief, currently scheduled for filing by April 16, 2023.

Further to this point in an abundance of caution, Turner's Marina LLC notes that it filed its Petition for Reformation of Right of Repurchase in the circuit court on September 16, 2022. (Record on Appeal p. ____.) The filing of that Petition creates a "safe harbor" for the Covenants from any attack premised upon the Rule Against Perpetuities. Further to this point in an abundance of caution, Turner's Marina LLC notes that the Covenants (Record on Appeal p. ____) have an effective life of ninety-nine (99) years, thus removing them from any ramifications of the Rule Against Perpetuities. See Section II (Easement reserved for 99 years); Section VII (Right of rental of all lots reserved to Developer for 99 years; and Section 12.5 (99-year lease of certain recreation property to the Developer). At the expiration of 99 years on June 11, 2080, Turner's Marina LLC will, by the explicit terms of the contract, loose the majority of its assigned rights as the successor to the Developer.

CONCLUSION

For the reasons set forth above, this Court should enter its Order revising the judgment and now granting Turner's Marina LLC a judgment against the Klapper Defendants for reasonable costs and attorney's fees, to be set by Judge Hocker at a new hearing.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that this law firm represents the Respondent-Appellant Turner's Marina LLC in the above-captioned matter and that on the date below, in Bluffton, South Carolina, I served a copy of the forgoing on the following persons via electronic mail to their AIS E-mail address:

Documents Served:

**INITIAL REPLY BRIEF OF RESPONDENT-
APPELLANT TURNER'S MARINA LLC TO THE
INITIAL RESPONDENTS' BRIEF OF JEFFRY A.
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