THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Jennifer McCoy

Circuit Court Judge

Charleston County Court of Common Pleas

Case No. 2022-CP-10-02345

WILLIAM M. ROSS and KELLI S. ROSS…….Appellant

v.

THE PRESERVE II AT FENWICK HALL
PROPERTY OWNERS ASSOCIATION INC…….Respondents

APPELLANT's
INITIAL BRIEF

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III. The Circuit Court erred by failing to balance the equities.

STATEMENT OF THE CASE

The Appellate/Plaintiff's purchased a vacant lot for the purpose of building a residence, Lot 58, 1612 Zurlo Way, Johns Island SC 29455 as evidenced by that Deed recorded on June 30, 2021 in Book 1009 Page 255 Charleston County RMC. The Respondent/Defendant is a property management association which governs several lots which are neighboring and adjoining the Plaintiffs' lot. The Respondent/Defendant association possesses authority over certain properties neighboring Lot 58, but excluding Lot 58, by virtue of The Declaration of Covenants and Restrictions for The Preserve II at Fenwick Hall and Provisions for and By-Laws of the Preserve II at Fenwick Hall Property Owners Association Inc filed on December 12, 2019 in Book 0846 Page 099 Charleston County RMC.

The Respondent/Defendant has, by and through its agent, Property Management Services Inc, and through its several attorneys and legal agents, demanded that Appellant/Plaintiff submit to its authority over Lot 58. By and through misrepresentations by Property Management Services Inc, wherein the property management company represented that it was working for "The Preserve", Appellate/Plaintiff was deceived into paying an annual regime fee and providing building plans and an application to the "Architectural Review Board" by delivering them to Property Management Services Inc. The Appellate/Plaintiff believed they were paying money to, and submitting building plans to, "The Preserve at Fenwick Plantation"; a regime that was self-governed by its residual homeowners by virtue of its own set of recorded governing documents. The Appellate/Plaintiff was not aware that their payment of annual assessments and their application to the Architectural Review Board was not delivered to "The Preserve at Fenwick Hall" but was actually redirected to Dennis Curtin, manager of 1776 LLC, the development company developing "The Preserve II at Fenwick Hall", the neighboring regime possessing no rights of self-governance.

When Property Management Services Inc demanded things in relation to application for architectural review that the Appellate/Plaintiff thought were inconsistent with the covenant requirements applicable to Lot 58, he questioned the authority to require them. It was at this point that the Appellant/Plaintiff discovered that his application to the architectural review board and his assessment checks had been diverted by Property Management Services Inc to the Respondent/Defendant, "The Preserve II at Fenwick Hall". The Appellate/Plaintiff filed this lawsuit seeking an order of the Court that Lot 58 is not, nor has it ever been, subject to the declaration of covenants of Preserve II, nor is Lot 58, nor has Lot 58 ever been, subject to the authority of the Respondent/Defendant, "Preserve II" Regime.

The present lawsuit was filed on May 23, 2022. The first hearing in this case was scheduled before the Circuit Court on June 14, 2022. The day before the hearing, on June 13, 2022, the Respondent/Defendant delivered to the South Carolina Secretary of State a document purporting to be

Articles of Merger with regard to "The Preserve at Fenwick Hall Property Owners Association" and "The Preserve II at Fenwick Hall Property Owners Association".

This purported merger did not exist at the time when the Appellate/Plaintiffs purchased their Lot 58, nor did the purported merger exist at the time when the Respondent/Defendant demanded the Appellate/Plaintiffs submit to the Preserve II Regime's authority, nor did the purported merger exist at the time when the Respondent/Defendant issued cease and desist and stop work notices to the Appellate/Plaintiff, nor did the purported merger exist when the Appellate/Plaintiffs filed this lawsuit for damages and declaratory judgment.

The Respondent/Defendant alleges that the merger was voted on December 12, 2019, and was signed and recorded on June 13, 2022. The Appellate/Plaintiff denies that this merger is effective. However, it is undisputed that the Appellate/Plaintiffs purchased their Lot 58 approximately one year prior to the alleged effective date of the merger, ie lot purchase on June 21, 2021 versus articles of merger recorded on June 30, 2022. It is also undisputed that the articles of merger were recorded thirty (30) months after the alleged vote took place; that the Appellate/Plaintiff was not a party to the vote, and that multiple property owners at the time of the December 2019 vote had sold their lots to new property owners prior to June 13, 2022 when the Respondent/Defendant unlawfully recorded the articles of merger.

STANDARD OF REVIEW

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases and shall review upon appeal…any intermediate judgment, order or decree in a law case involving the merits,…an order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, grants or refuses a new trial or strikes out an answer or any part thereof or any pleading in any action; a final order affecting a substantial right made in any special proceeding…an interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver. *See SC Code 14-3-330.*

"We are free to decide questions of law with no deference to the [circuit] court." *Hammer v. Hammer, 399 SC 100, 730 SE2d 874 (S.C.App. 2012).* Generally, 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. a 121, 603 S.E.2d at 908 (2004)*. When a court is requested to issue a temporary injunction it may consider the merits of the case to the

extent necessary to determine whether a temporary injunction is appropriate. *Helse v City of N. Myrtle Beach, 307 S.C. 29, 32 , 413 S.E.2d 824, 826 (1992).*

ARGUMENT

I. The Circuit Court erred by failing consider all of the factors necessary to grant a preliminary injunction, instead focusing singularly on the factor of "irreparable harm".

If the circuit court fails to consider all three of elements for a preliminary injunction, then it is reversable error. The circuit court should articulate the required findings of fact as to all of the elements necessary to establish an injunction." *See Simons v Simons, 263 S.C. 509, 515, 211 S.E.2d 555, 559 (1975)*; (reversing the family court and remanding so that the family court can include specific findings of fact as required by the family court rules); *See also State Bd. Of Med. Exam'rs v Gandy 248 S.C. 300, 306, 149 S.E.2d 644, 646 (1966)* (Where found necessary to a proper review, the case will be remanded on the court's own motion for specific findings of fact); and *Rule 65(d) SCRCP* (stating an order issuing an injunction must set forth the reasons for its issuance in specific terms and shall describe in reasonable detail the act or acts to be restrained.)

II. The Circuit Court erred because the Respondent/Defendant failed to establish a likelihood of success on the merits of the litigation".

The plain language of the documents recorded in the Charleston County RMC Office indicate that Lot 58 is specifically excluded from the Preserve II Regime. It is undisputed that there is no recorded document which purports that Lot 58 is a part of, or subject to, the Preserve II Regime. Lot 58 is subject to the Declaration of Covenants for Preserve, not Preserve II; two separate and distinct corporate entities.

The Respondent/Defendant seeks to sidestep this impediment by asserting that the Preserve Regime and the Preserve II Regime "merged"; thus it is alleged that the Preserve II inherited the obligations, rights, and authority of the Preserve Regime by virtue of the merger.

There are several problems with the Respondent/Defendant's position. Some of the problems are factual, some are legal, and some are equitable; but all of these deficiencies prevent the Respondent/Defendant from establishing a likelihood of success on the merits.

To the contrary, the plain language of several South Carolina statutes mandate that the alleged merger is invalid, as a matter of law. Because the merger is invalid and unenforceable

against the Appellate/Plaintiff as a matter of law, the Respondent/Defendant cannot rely upon the merger to establish a prima facie case.

The Circuit 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." I*d, quoting Crawford v Lumber Co., 77 S.C. 81, 57 S.E 670.*

In the present case, the Appellate/Plainitff'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. This is 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 Respondent/Defendant does not dispute that the Declaration at Book 0846 Page 099 excludes Lot 58 from its governance. Rather it 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. This argument for merger fails for several reasons:

(1) If the Preserve Regime merged into the Preserve II Regime based upon a vote on the evening of December 12, 2019 as alleged by the Defendant; that action would constitute an amendment to the Preserve Regime's governing documents, rules, and regulations. This violates *SC Code 27-30-130*, which 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." *See SC Code Ann. 27-30-130.*

It is undisputed 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. *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.

(2) Even if the Preserve Regime merged into the Preserve II Regime by way of a vote on December 12, 2019, then pursuant to the laws of the State of South Carolina, the merger is not effective until the date the Articles of Merger are filed with the South Carolina Secretary of State's Office. SC Code 33-31-1104(5) states: "Unless a delated effective date is specified, a merger takes effect when the articles of merger are filed". *SC Code Ann. 33-31-1104*. It is undisputed that the Articles of Merger were not filed with the South Carolina Secretary of State's Office until June 13, 2022; thirty (30) months after the vote alleged by the Respondent/Defendant. It is also undisputed that the Appellant/Plaintiff purchased Lot 58 and recorded the Deed during the intervening period of time, specifically on June 30, 2021.

Thus, all of the facts and circumstances plead in the Complaint, as well as all of the facts and circumstances plead in the Answer and Counterclaim transpired prior to the effective date of the merger, ie June 13, 2022, and the merger cannot be retroactively bind the Appellate/Plaintiff.

(3) The Articles of Merger filed on June 13, 2022 are void by virtue of the fact that they were filed with the Secretary of State thirty (30) months after the alleged vote; where the members/property owners entitled to vote have changed in that time period so that the voting membership does not represent the membership at the time the Articles of Merger were filed. Future members, such as the Appellate/Plaintiff cannot be bound by a contract, vote or agreement to which they were not a party. The Association, its prior members, its officers, and its agents are estopped from signing and recording Articles of Merger, thirty months after an alleged vote, and after numerous member/property owners have sold their properties to new persons.

I would like to take a moment to discuss the interaction between the Non-Profit Corporation Act S*C Code 31-33-101 et seq* and the Homeowners Association Act *SC Code 27-30-110 et seq.* The South Carolina Nonprofit Corporation Act of 1994, SC Code 33-31-101 et seq, upon which the Defendant relies in support of its argument; was enacted, not surprisingly, in 1994,. See Act No. 384. SC Code sections 33-31-1101, 33-31-1102, 33-31-1103, 33-31-1104, 33-31-1105, 33-31-1106, and 33-31-1107. This Act which the Respondent/Defendant cites in its memorandum as being the controlling law over the merger of two non-profit corporations were enacted in 1994 and only one of these sections have

been amended by the legislature since 1994, that being *SC Code Ann. 33-31-1101* which was amended in 2004. This Act codifies the basic requirements of merger applicable to all non-profit organizations organized and existing under the laws of the State of South Carolina. Contrary to the argument presented by the Defendant, The SC Nonprofit Corporation Act does not exempt the merger of two companies from the legal requirements of notice and recording instituted by other statutes subsequently enacted by the State of South Carolina.

The South Carolina Homeowners Association Act, *SC Code 27-30-110 et seq,* upon which the Appellate/Plaintiffs rely in support of their argument; was enacted in 2018, See Act no. 245; effective May 17, 2018. When drafting the SC HOA Act, the legislature was aware of the SC Nonprofit Corporation Act's provisions for merger, which existed unaltered for a period of twenty-four (24) years prior to enactment of the SC HOA Act. The intent of the SC HOA Act is to protect members of the public from becoming subject to unknown rules, regulations, and governance that run with the land; by requiring that they are fully accessible via the recorded land records in each county; and to invalidate any rules, regulations, and governance that fail to meet the new public recording requirements created by the Act. The SC HOA Act adds additional requirements specifically targeted at the governance of property owner associations; and these new requirements govern every property owner association, whether they are incorporated or not.

SC Code 27-30-130(A)(1) states:

Except as otherwise provided in this section, 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.

SC Code 27-30-130(A)(2) states:

To continue to be enforceable, any governing document not recorded prior to the effective date of this section must be recorded by January tenth of the year following the effective date of this section in the clerk of court's, Register of Mesne Conveyance (RMC), or register of deeds office in the county where the property is located.

SC Code 27-30-130 (B) states:

(1) Rules, regulations, and amendments to rules and regulations:

a. Are effective upon passage or adoption; and

b. Must be made accessible to a homeowners association member upon the request of that member of the homeowners association, and, at the option of the homeowners association, via electronic mail or through methods provided by the homeowners association's bylaws that ensure actual notice, unless they are:

i. Posted in a conspicuous place in a common area in the community; or

ii. Available on an Internet website maintained by the homeowners association, where they may be downloaded by the homeowner.

(2) In order to remain enforceable, a homeowners association's 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.

SC Code 27-30-120(4) states

"Governing documents" means declaration, master deeds, or bylaws, or any amendments to the declaration, master deeds, or bylaws.

Where not statutorily defined, words are to be given their ordinary meaning.

In order to determine whether the "merger" of the Preserve HOA Inc. into the Preserve II HOA Inc, constitutes an amendment to the governing documents such that it will trigger the recording requirements of *SC Code 27-30-101 et seq,* the Court should consider all available evidence. A few relevant facts are articulated below.

The "plan of merger" includes the following language which constitutes only a few of the many examples of unrecorded changes to the Declaration of Covenants and to the ByLaws as part of the "merger":

1. "The Preserve shall be merged into the Preserve II and the separate existence of The Preserve will have ceased and the existence of The Preserve II shall continue."

2. "The Articles of Incorporation and Bylaws of The Preserve II are amended to the extent provided in this Plan of Merger."

3. "The memberships of The Preserve shall be converted into memberships of The Preserve II, and each membership will be treated equally."

4. "The Board of Directors of The Preserve will assign its rights, powers, and duties conveyed pursuant to its governing documents to the Board of Directors of The Preserve II, including authority under any existing protective covenants."

5. "to do any and all permitted acts suitable or incidental to any of the foregoing purposes and object to the fullest extent permitted by law, and do any and all acts that, in the opinion of the Board and/or Declarant (as defined in the Preserve II Covenants), will promote the benefit and enjoyment of the members within the Association, and to have and to exercise any and all powers, rights, and privileges which are granted under South Carolina law, the applicable community documents, and the laws applicable to a nonprofit corporation in the State of South Carolina."

The “Plan of Merger” which the Defendant alleges was voted upon and approved on December 12, 2019 also includes the following language which this Court should construe as determinative as to the Defendant’s intention that the “merger” constituted an “Amendment” to the governing documents of the Preserve Regime. **It states in paragraph III:**

“If this Agreement is approved by the members of The Preserve, the respective Articles of Incorporation of The Preserve and The Preserve II are to be replaced and superseded by the Amended Articles of Incorporation for The Preserve II (if Approved) and Articles of Merger of The Preserve and The Preserve II to be filed with the South Carolina Secretary of State."

The “Plan of Merger” also states the following in paragraph IV:

“If this Agreement is approved by the members of The Preserve, the respective Bylaws of The Preserve and The Preserve II are to be replaced and superseded by the Amended and Restated Bylaws of the Preserve II (if approved), as amended from time to time.”

The “Plan of Merger” also states the following in paragraph II(i): (emphasis added)

“To eliminate or limit the personal liability of Directors to the Association for monetary damages for breach of fiduciary duty, as allowed by law”

The Preserve II HOA Inc Bylaws which the Plan of Merger seeks to impose upon members of Preserve HOA Inc includes the following language of note: “Declarant shall have the veto power over all actions of the Board of Directors of the Association…No action by the Board shall become effective, nor shall any action, policy or program be implemented until and unless: (a) Declarant shall have been given written notice of the meeting….; and (b)…At such meeting, Declarant shall have, and is hereby granted, a veto power over an such action, policy, or program authorized by the Board of Directors, and to be taken by said Board, the Association or any individual member of the Association if Board approval is necessary for said member’s action.”

There was no declarant veto power applicable to the Preserve Regime at the time of the merger. This constitutes a material amendment to the Preserve Bylaws and governing documents and changes the Preserve HOA from self governance with established covenants to a monopoly of power in the hands of the Preserve II Declarant.

On April 5, 2022, Cheryl Bailey sent an email to the Plaintiffs which stated “there is a new POA which is enforcing the new Declaration and Covenants.” She is referring to the Preserve II Declaration, and the Preserve II HOA Inc.

Of note is the timing, these changes and these actions were taken by the Respondent/Defendant prior to the filing of the Articles of Merger; and are all unenforceable as a matter of law.

On June 10, 2022, Dennis Curtin the manager for 1776 LLC (the declarant for Preserve II) transmitted a document through Derek Dean (the former attorney for Preserve HOA Inc) entitled "The Preserve – ARB Determination". The metadata for the file, which was sent via email, evidences that the creator and sender of this document was Dennis Curtin, who used Derek Dean as his strawman for delivery. This document states in part "Lot 58 is subject to the ARB of The Preserve II, if it is determined that Lot 58 is subject to Preserve I POA as you allege, you failed to file an application and application fee with the ARB of Preserve I POA…" This evidences that the Preserve II declarant is using the Preserve II HOA Inc and the Preserve HOA Inc as an alter ego and as a liability shell for his individual actions.

These two communications are proof that the Preserve II HOA Inc is attempting to subjugate Lot 58 not only to the corporate entity Preserve II HOA Inc; but also to the Preserve II Declaration of Covenants, Rules, Regulations, and ARB guidelines.

These alterations and others constitute "Amendments" to both the Declaration of Covenants and the By-Laws of Preserve HOA Inc. Because the SC HOA Act expressly defines amendments to covenants and bylaws as 'governing documents' in *SC Code 27- 30-120(4)*, and *SC Code 27-30-130* requires 'governing documents' be recorded in the County RMC before they are enforceable; the merger, and every change it encompasses is not enforceable as a matter of law.

III. The Circuit Court erred by failing to balance the equities.

The Circuit Court failed to balance the equities, further it failed to articulate how it balanced the equities; and its failure to do so is reversable error.

CONCLUSION

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." I*d, quoting Crawford v Lumber Co., 77 S.C. 81, 57 S.E 670.* In this instance, the Circuit Court failed to give any consideration to the evidence and law presented by the Appellate/Plaintiff in opposition to the motion for temporary injunction by the Respondent/Defendant; the only thing the Court considered in its decision was "don't cut down trees"; and the Court ignored its duty to consider to what extent the Respondent/Defendant had any legal rights over the Appellate/Plaintiffs real estate.

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