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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge
Case Number 2018-CP-26-03173

Appellate Case No.: 2022-001529

Frederick E. Brown, Charles O. Pakosta, Conrad A. Calvano, Gayle N. Scott, and Philip D. Cox, individually and derivatively on behalf of Myrtle Beach Resort Homeowners' Association, Inc., and on behalf of all other similarly situated Co-owners, and Lori Niedzwiecki, and Robert S. Rosencrans, individually and derivatively on behalf of the Myrtle Beach Resort Homeowners' Association, Inc. for its right and benefit..Appellants,

v.

Jeffery L. Richardson and Nancy L. Moore, individually and as current members of the Board of Directors for Myrtle Beach Resort Homeowners' Association, Inc., and Peter A. Grusauskas and Jim Perkins, individually and as former members of the Board of Directors for Myrtle Beach Resort Homeowners' Association, Inc...Respondents,

Myrtle Beach Resort Homeowners' Association, Inc..............................Nominal Respondent

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ARGUMENTS

I. RESPONDENTS ARGUMENTS ACKNOWLEDGE A FACTUAL ISSUE RENDERING SUMMARY JUDGMENT INAPPROPRIATE.

Respondents claim that both Appellants and Respondents agree that the language of Section 4.1 of Article IV of the Declaration is unambiguous. Respondents then state that the parties disagree as to the interpretation of Section 4.1. If the terms of Section 4.1 are reasonably susceptible of more than one interpretation, as Respondents contend, the terms are ambiguous, rendering the parties' intent a question of fact, thus inappropriate for summary judgment.

"A contract is 'ambiguous' when the terms of the contract are reasonably susceptible of more than one interpretation." S.C. Dep't of Nat. Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 303 (2001) (citing Hawkins v. Greenwood Development Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). If the language of the contract is ambiguous, the determination of the parties' intent is a question of fact. Id.

A question of fact precludes summary judgment. See Lyles v. BMI, Inc., 292 S.C. 153, 355 S.E.2d 282 (Ct. App. 1987); Dorman v. Allstate Ins. Co., 332 S.C. 176, 504 S.E.2d 127 (Ct. App. 1998); Holmes v. McKay, 334 S.C. 433, 513 S.E.2d 851 (Ct. App. 1999). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct.App.2004). Stated differently, "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." Tupper v. Dorchester Cnty., 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

II. RESPONDENTS' ARGUMENTS MISINTERPRET SOUTH CAROLINA LAW REGARDING THE RULES OF CONTRACT INTERPRETATION.

The paramount rule of contract construction is to ascertain and give effect to the intent of the parties as determined from the whole document. RV Resort and Yacht Club Owners Ass'n, Inc. v. BillyBob's Marina, Inc., 386 S.C. 313, 321, 688 S.E.2d 555, 559 (2010) (citing Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863–64 (1998)). The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof. Thomas-McCain, Inc. v. Siter, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977) (citing Bruce v. Blalock, 241 S.C. 155, 127 S.E.2d 439 (1962)). Covenants are construed as a whole, keeping in mind their underlying purpose. 20 Am Jur. 2d Covenants, Conditions, and Restrictions § 15. Specific words and phrases cannot be read exclusive of the other provisions. 20 Am Jur. 2d Covenants, Conditions, and Restrictions § 15. While Respondents acknowledge that the contract should be read as a whole and not in a piecemeal fashion, they still proceed to compare and contrast specific terms without any context. Respondents fail to grasp that the purpose of South Carolina's requirement to take the document as a whole is to determine the intent of the parties. The intent of the Declaration is to create a well-functioning Horizontal Property Regime. The intent can be seen in Subsection 8(e) of Article IV of the Amended By-Laws: "Consistent with these by-Laws and applicable Declarations, the Board shall: carry out all other duties and obligations imposed and exercise all rights granted it by these By-Laws, the Declaration, and the Act."

In Callawassie Island Mbrs. Club, Inc. v. Ennis, 821 S.E.2d 667 (S.C. 2018), the Supreme Court looked to the plain language of membership documents to ascertain the intent with which the provisions were written. In analyzing the documents to ascertain the meaning in accordance with the drafters' intent, the Court made specific note that the provisions at issue were the very feature which enabled the members to sustain a viable Club and ensured that the Club would

remain viable in the future. Id. at 671. Much the same, the drafters of the Declaration and By-Laws at issue drafted these documents with the intent that the provisions would help further the development. Attorney Daniel L. Patrick drafted the Declaration and By-Laws and specifically stated in his May 17, 2018 Affidavit, "The enumerated powers of the Association set out in the DCCR (Article IV) were intended to be mandatory obligations, not optional." This is further evidenced in Article VI of the Declaration which requires the enforcement of the provisions of the Declaration and By-Laws for the effectuation of the general plan of development to protect the present and future owners. Section 6.2.

If the powers of Section 4.1 are discretionary as Respondents and the Trial Court contend, the Board could simply stop maintaining streets and roads, stop all trash collection, stop maintaining the oceanfront, stop maintaining insurance, stop maintaining security, etc. whenever the Board felt convenient, and the members of the Association would have no recourse. The Court in Callawassie Island addressed a similar issue and held that the provisions requiring action were not unfair or unreasonable, but rather the very feature of the membership documents that enables the members to sustain a viable community. See Callawassie Island Mbrs. Club, 821 S.E.2d at 671.

III. THE HORIZONTAL PROPERTY REGIME ACT REQUIRES THE BOARD TO ACT.

Respondents attempt to sweep the mandatory language of S.C. Code Ann. §§ 27-31-160 & 240 under the rug with a semantic argument that the Horizontal Property Regime Act uses the term "council of co-owners" instead of "board of directors". It is abundantly clear that the Board of Directors is the executive and administrative body designated as the governing body of the "council of co-owners".

In the instant case, the "council of co-owners" has incorporated as permitted by S.C. Code Ann. § 27-31-90 to create the Myrtle Beach Resort Homeowners Association, Inc. This incorporated "council of co-owners" is governed by the Board of Directors as set forth in the Declaration. Article I, Section 1.1.4. Therefore, it is the responsibility of the Board of Directors to comply with the Horizontal Property Regime, including S.C. Code §§ 27-31-160 & 240 which mandate the actions set forth in Section 4.1.

Respondents also argue that it is improper for Appellants to raise S.C. Code. Ann. § 27-31-160 & 240 because these statutes were first raised in the Motion to Reconsider, Alter, or Amend. "However, there is a difference between raising an issue for the first time in a post-trial motion and citing supplemental authorities in the post-trial motion on an issue that has already been raised." Jean Hoefer Toal, Amelia Waring Walker, & Margaret E. Baker, Appellate Practice in South Carolina, 189 (3rd ed. 2016); cf. Rule 208(b)(7) (discussing the filing of supplemental citations after initial briefs have been filed with the appellate court). In Appellants' Motion for Partial Summary Judgment, Appellants set forth the argument that the Horizontal Property Regime Act supports the affirmative obligations of the Board of Directors. After the judge's order granting partial summary judgment for Respondents, Appellants renewed their argument regarding the Horizontal Property Regime Act in Appellants' Motion to Reconsider and cited S.C. Code Ann. §§ 27-31-160 & 240 as supplemental authority which comes directly from the Horizontal Property Regime Act. This citation of supplemental authority is not improper.

IV. RESPONDENTS AND THE TRIAL COURT MISINTERPRET THE RELATIONSHIP BETWEEN SUBSECTION 8(e) OF THE AMENDED BY-LAWS AND THE SECTION 4.1 POWERS.

Respondents summarily state that the Trial Court correctly ruled that the language of Subsection 8(e) of the Amended By-Laws, read in conjunction with the Declaration as a whole,

corroborates the discretion granted to the Board in the Section 4.1 powers. Respondents state that the Court correctly held that "any other interpretation eviscerates the Board's ability to take other reasonable action as it deems advisable with respect to the Myrtle Beach Resort for the benefit of the overall property". Respondents do not provide any analysis to support these positions. Respondents fail to address the litany of case law Appellants cite on this topic regarding the law that reasonable, fair, just, and probable interpretation of the contract should be adopted.

Subsection 8(e) of the Amended By-Laws is clear, the Board **shall** "exercise all rights granted it by these By-Laws, the Declaration, and the Act." Section 4.1 lays out powers, which according to Subsection 8(e) of the Amended By-Laws the Board shall exercise. The Trial Court and Respondents claim that the Board does not have to exercise these powers because one subsection of 4.1 (4.1.i) uses discretionary language. After listing numerous other powers that the Board has, Subsection 4.1.i states that the Board also has the power to "take such other reasonable action as the Board shall deem advisable with respect to the Myrtle Beach Resort for the benefit of the overall Property." The Trial Court and Respondents rely upon this single subsection to render all of the other powers discretionary, disregarding the rest of the Declaration and By-Laws as a whole. Furthermore, the Trial Court and Respondents fail to consider that this subsection may also be a mandate, like the other powers, that the Board must take such other reasonable actions when it is deemed advisable. Just as Subsection 8(e) of the Amended By-Laws requires the Board to exercise the right found in Subsection 4.1.a to maintain all streets and roads within the property, Subsection 8(e) of the Amended By-Laws requires the Board to take such other reasonable action as the Board deems advisable to benefit the overall property. Simply because the Board is provided discretion to determine when other action is advisable it does not negate the mandate to take such other reasonable action that the Board deems advisable.

V. RESPONDENTS AND THE TRIAL COURT MISUNDERSTAND APPELLANTS' ARGUMENT REGARDING ARTICLE XVIII OF THE MASTER DEEDS.

It is correct that Article XVIII of the Master Deeds does not make specific reference to Section 4.1. However, Respondents and the Trial Court miss the logical connection between the duties and responsibilities found in Article XVIII and the Section 4.1 powers. The point Appellants make regarding Article XVIII of the Master Deed is that this Article requires the collection of common expenses for the very powers set forth in Section 4.1. If the Section 4.1 powers are not mandatory, there is no reason for the Master Deeds to mandate the collection of common expenses from the MBRHOA for "providing management supervision and control thereof, property taxes, insurance, maintenance and reserve funds and all other costs connected or associated therewith." Rendering the Section 4.1 powers discretionary would deem the mandatory collection of common expenses set forth in Article XVIII of the Master Deeds meaningless.

CONCLUSION

For the foregoing reasons, the Circuit Court's Order granting Respondents Partial Summary Judgment should be reversed and the matter remanded in full to the Circuit Court.

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and

Myrtle Beach Resort Homeowners' Association, Inc.,..............................Nominal Respondent

CERTIFICATE OF COUNSEL

The undersigned attorney for Appellants certifies that the Final Reply Brief of Appellants complies with Rule 211(b), SCACR and is identical to the Initial Reply Brief of Appellants, except for References to the Record and Corrections of Typographical Errors and Misspellings contained in the Initial Reply Brief of Appellants.

June 27, 2023

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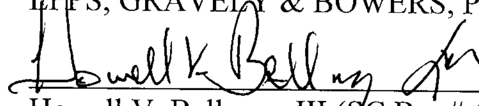

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