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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jennifer B. McCoy

Appellate Case No. 2023-000088
Common Pleas Case No. 2022-CP-10-02345

William M. Ross and Kelli S. RossAppellant,

v.

The Preserve II at Fenwick Hall Property Owners Association, Inc.....Respondent,

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF ISSUE ON APPEAL

- I. Whether the circuit court abused its discretion in granting Preserve II POA's motion for preliminary injunction?

STATEMENT OF THE CASE

This is an appeal from the circuit court's grant of The Preserve II at Fenwick Hall Property Owners Association, Inc.'s ("Preserve II POA") motion for preliminary injunction. **Order.**

Kelli and William Ross (collectively "Ross") filed a Complaint on May 23, 2022 followed by their own motion for preliminary injunction on May 27, 2022. **Compl. and Ross Motion for TRO.** Ross' general allegations were that the Preserve II P OA does not have architectural review board authority over the Ross property known as Lot 58. **Compl.** Instead, Ross alleged that a prior owners' association, The Preserve at Fenwick Hall Property Owners Association, Inc. ("Preserve I POA"), is the only association vested with control and authority over Lot 58. **Compl.**

In reply, Preserve II POA filed an Answer generally denying adverse claims, raising relevant affirmative defenses, counterclaiming for Breach of Covenants/Contract, and filed its own motion for preliminary injunction. **Preserve II Answer, Motion, Affidavits and Exhibits.** The circuit court held a hearing on the Ross motion on June 14, 2022 and denied that motion by Form 4 order entered August 9, 2022. **Ross order.** On September 7, 2022, the circuit court held another hearing on Preserve II POA's motion for preliminary injunction and granted this motion enjoining Ross from future destruction of specimen trees by formal order entered September 26, 2022. **Preserve II order.** Ross filed a motion to reconsider which was denied. **Reconsideration order.**

On January 20, 2023, Ross filed a Notice of Appeal. **Notice.**

STANDARD OF REVIEW

Generally, actions for injunctive relief are equitable in nature. *Wiedemann v. Town of Hilton Head*, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct.App.2001). In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of the evidence. *Doe v. Clark*, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995). To obtain an injunction, a party must demonstrate a likelihood of success on the merits, irreparable harm, and the absence of an adequate remedy at law. *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct.App.2002). As to whether the trial court erred in issuing the preliminary injunction: *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011) ("Whether to grant a preliminary injunction is left to the sound discretion of the trial court."); *Peak v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005) ("An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law.").

STATEMENT OF THE FACTS

On December 12, 2019, Preserve I POA, which included Ross' Lot 58, merged into Preserve II POA by way of a special members/owners meeting and a successful vote to approve the merger. **Notice and Special Meeting Minutes; 6/10/22 Bailey Affidavit; Curtin Affidavit.** Lot 58, then owed by True Homes, LLC, was represented by its proxy at the December 12, 2019 special meeting and merger, and an affirmative vote in favor of the merger was cast for True Homes, LLC. **Special Meeting Minutes.** The Plan of Merger was filed with the Secretary of State pursuant to the South Carolina Non-Profit Corporations Act on or about June 13, 2022. **Curtin Affidavit.**

True Homes, LLC conveyed Lot 58 to Ross by deed recorded June 30, 2021. **Compl.** Shortly thereafter, the property manager for Preserve II POA, Cheryl Bailey (“property manager”), began working with Ross on behalf of the Preserve II POA Architectural Review Board (“ARB”) regarding Ross’ submittal and compliance with Preserve II POA’s governing documents for construction of a new home. **6/30/22 Bailey Affidavit.** On or about January 18, 2022, Ross submitted an incomplete and non-compliant Preserve II POA ARB application to the property manager. **6/10/22 Bailey Affidavit; Curtin Affidavit; 5/20/22 Cease and Desist.** Ross’ efforts to comply with Preserve II’s ARB continued for months. **6/10/22 Bailey Affidavit; Curtin Affidavit.** On or about March 28, 2022, Ross began clearing specimen trees from Lot 58 without ARB approval and in violation of Preserve II POA’s covenants. **6/10/22 Bailey Affidavit; Curtin Affidavit; Batchelder Affidavit.** On or about March 29, 2022, the Preserve II POA served Ross its first Cease and Desist letter advising of violations of Preserve II POA’s covenants. **3/29/22 Cease and Desist Letter; 6/30/22 Bailey Affidavit; Curtin Affidavit.** Ross continued to cut trees and clear Lot 58 after receiving the cease and desist letter. **Curtin Affidavit**

On or about April 4, 2022, Ross submitted a revised ARB application to Preserve II POA. **6/10/22 Bailey Affidavit.** On April 12, 2022, Ross again had construction workers back at Lot 58 clearing trees in continued violation of Preserve II POA’s first cease and desist letter. **6/10/22 Bailey Affidavit; Curtin Affidavit.** On May 20, 2022, Preserve II POA issued Ross its second cease and desist letter which, in part, directed Ross to file a new and complete ARB application and assessed fines for violation of the covenants. **6/10/22 Bailey Affidavit; 5/20/22 Cease and Desist.** Ross continued clearing trees from Lot 58 for construction. **6/10/22 Bailey Affidavit; Curtin Affidavit.** Ross was never able to submit a complete and proper ARB application to

Preserve II POA. **6/10/22 Bailey Affidavit.** Ross filed the underlying action alleging his Lot is only subject to Preserve I POA’s authority after pursuing but unsuccessfully completing the ARB process with Preserve II POA. **Curtin Affidavit.**

ARGUMENT

I. The circuit court properly considered the evidence submitted, addressed all elements necessary to grant a preliminary injunction, and properly found Preserve II POA made a *prima facie* showing of entitlement to relief.

To obtain an injunction, a party must demonstrate a likelihood of success on the merits, irreparable harm, and the absence of an adequate remedy at law. *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct.App.2002). Once a *prima facie* showing has been made entitling a party to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits. *See AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 51, 674 S.E.2d 505, 509 (Ct. App. 2009).

a. Likelihood of success on the merits:

In their initial brief, Ross generally argues the December 12, 2019 merger meeting amounted to an “amendment” of Preserve I POA’s governing documents purportedly requiring the merger documents be filed with the RMC office to be effective. However, a merger between two non-profit corporations is simply not controlled by *S.C. Code* § 27-3-130 (“Homeowners Association Act”) as Ross argues. Instead, the merger is controlled by *S.C. Code* § 33-31-1104 (“Non-Profit Corporations Act”). A plain reading of *S.C. Code* § 33-31-1104 simply requires Articles of Merger be filed with the Secretary of State to be effective.

The circuit court properly found Preserve II POA’s pleadings, motions, affidavits, and exhibits make a *prima facie* showing that Preserve II POA is likely to succeed on the merits. The Curtin affidavit and exhibits detail the circumstances surrounding the special meeting and

merger that was properly noticed and held on December 12, 2019. At that meeting, Ross' Lot 58 was represented by proxy, and an affirmative vote was cast for Lot 58 in favor of the merger. Although the Articles of Merger were inadvertently not filed with the South Carolina Secretary of State until June 14, 2022, the circuit court correctly refused to read into the Non-Profit Corporations Act recording requirements that were never intended by the General Assembly. Ross offers mere argument and cites no specific case law or authority supporting his position that the December 12, 2019 merger meeting amounted to an "amendment" of the governing documents as a matter of law requiring filing with the RMC Office to be effective.

Further, Ross never submitted an ARB application to Preserve I POA (because it no longer exists) and never completed the ARB process with Preserve II POA. Ross' voluntary ARB application to Preserve II POA plainly shows he had actual notice of its authority over Lot 58. It was only after Ross failed to complete the ARB process that he alleged for the first time that Preserve II POA does not apply to Lot 58.

b. Irreparable harm:

The circuit court properly found that Preserve II POA demonstrated irreparable harm would occur absent a preliminary injunction. Generally, destruction of trees falls within the class of injuries deemed in equity to be irreparable. The evidence submitted to the trial court, which included tree mutilation photographs and affidavits in support, amply demonstrated Ross had mutilated specimen trees without approval and in violation of Preserve II POA's governing documents. *See generally Crawford v. Atlantic Coast Lumber Corp.*, 77 S.C. 81 (1907) (stating "destruction of the timber and trees on plaintiff's land . . . falls within the class of injuries generally deemed in equity to be irreparable.").

c. Inadequate remedy at law

In tree mutilation cases, South Carolina case law is clear that the remedy at law is not so speedy, full, and complete as to exclude all necessity for equitable interference. *Crawford v. Atl. Coast Lumber Corp.*, 77 S.C. 81, 84, 57 S.E. 670, 671 (1907). Therefore, the circuit court properly found no adequate remedy existed at law.

II. Balancing the Equities

In conclusory fashion, Ross argues in his brief that the circuit court failed to balance the equities. "Balancing of equities is not a separate component in the preliminary injunction analysis." *Poynter Invs. Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (S.C. 2010). Therefore, this argument is plainly without merit.

CONCLUSION

For the foregoing reasons, Preserve II POA respectfully requests the court **AFFIRM** the trial court's order granting its preliminary injunction and **AFFIRM** the trial court's order denying Ross' motion to reconsider.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "J. Barnwell Fishburne, Jr.", is positioned above a horizontal line.

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