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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Carmen T. Mullen, III, Circuit Court Judge
Trial Court Case No.: 2020-CP-27-00495

Case No. 2023-000277

SLF III - HARDEEVILLE, LLC,.....Respondent,

v.

RSV - HARDEEVILLE, LLC,.....Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT

I. SLF'S PROFERRED CONSTRUCTION OF THE REED-HTI ASSIGNMENT LEADS TO AN UNREASONABLE RESULT AND SHOULD BE REJECTED.

It is undisputed that the Development Agreement and the PDD permit the owner of property within the Hardeeville Tract, including the Savannah Tract property owned by RSV, to convert acreage from residential use to any commercial and/or light industrial use. This right, referred to by the parties and the lower court as Conversion Rights, is an attribute of Residential Dwelling Units, as that term is defined in the Development Agreement and PDD. The Reed-HTI Assignment assigned to Reed-HTI rights to develop "up to 2,262 Residential Dwelling Units (as such term is currently defined in the Development Agreement and the PDD)." The question arises, how is the Reed-HTI Assignment to be construed? Did it include the Conversion Rights or did it not?

Before turning to that question, an observation concerning the burden of proof is in order. As an owner of property within the Hardeeville Tract, Reed-HTI has the Conversion Rights established under the Development Agreement and PDD. This is undisputed and was the conclusion reached by Hardeeville's Planning Director in approving the Master Plan for the Savannah Tract. RSV does not bear the burden of establishing that it acquired the Conversion Rights under the assignment. Those are rights to which RSV is entitled as a property owner under the Development Agreement and PDD. Rather, the burden falls upon SLF to show that the Reed-HTI Assignment, in plain and unmistakable terms, prohibits Reed-HTI from exercising the Conversion Rights accorded to it under the Development Agreement and PDD. In express terms, the Reed-HTI Assignment prohibits the conversion of property from commercial to residential use but includes no such prohibition against converting property from residential to light industrial or other commercial use. This alone should be dispositive. The inclusion in the document of a prohibition of a particular type

of conversion precludes a finding that prohibiting other types of conversions, not mentioned in the document, was also intended.

Recognizing the absence of express language eliminating RSV's Conversion Rights under the Development Agreement and PDD, SLF seeks to skin the cat another way. SLF argues that Reed-HTI, RSV's predecessor, never acquired those Conversion Rights. According to SLF, the Reed-HTI Assignment, by which Reed-HTI acquired its development rights, did not include within its scope the Conversion Rights at issue. To address this contention, RSV asks the obvious question. If Reed-HTI did not acquire the Conversion Rights under the Reed-HTI Assignment, what became of these rights? Were the Conversion Rights extinguished? If not, where did those rights go? The answer provided by SLF's proferred construction of the Reed-HTI Assignment leads to an unreasonable result that could not have intended by the parties and which should be rejected by this Court.

SLF argues that because the Conversion Rights associated with the 2,262 Residential Dwelling Units assigned to Reed-HTI were not "specifically set forth" in the Reed-HTI Assignment, those rights were "retained by Assignor to be assigned to" SLF. [Br. p. 14] If this were true, one would expect to see an assignment of those rights from JPR to SLF. One would search in vain. Contemporaneous with the Reed-HTI Assignment, and as part of the same transaction, JPR executed the SLF Assignment. By this instrument, JPR assigned to SLF "all of [JPR's] remaining rights" under the Development Agreement and the PDD, excluding those rights previously assigned to AJA, LLC and Reed-HTI. [Comp., ¶ 20, Ex. H] SLF argues that because the Conversion Rights were not previously assigned to Reed-HTI, having not been "specifically set forth" in that assignment, those rights remained in the hands of JPR and were assigned to SLF under the SLF Assignment. However,

the Conversion Rights associated with the 2,262 Residential Dwelling Units previously assigned to Reed-HTI are not "specifically set forth" in the SLF Assignment. SLF cannot have it both ways. If the Conversion Rights were not assigned under the Reed-HTI Assignment because those rights were not "specifically set forth" in the assignment, then likewise, those rights were not assigned to SLF under the SLF Assignment.

SLF may argue that the language in the SLF Assignment transferring "all" of JPR's "remaining" rights is sufficient to include within its scope the Conversion Rights associated with the 2,262 Residential Dwelling Units previously assigned to Reed-HTI. But the Reed-HTI Assignment, by its terms, assigned to Reed-HTI "all of [JPR's] rights, title and interest under the Development Agreement to develop up to 2,262 Residential Dwelling Units (as such term is currently defined in the Development Agreement and the PDD)." Again, SLF cannot have it both ways. If "all remaining" rights is sufficient to include Conversion Rights under the SLF Assignment, why isn't "all rights" sufficient to include Conversion Rights under the Reed-HTI Assignment?

Moreover, not only are the Conversion Rights not "specifically set forth" in the SLF Assignment, nothing in that assignment suggests that SLF was thereby acquiring the rights to convert permitted uses of the Savannah Tract property owned by Reed-HTI. Such an outcome would be nonsensical and could not have been intended by the parties.

JPR and Reed-HTI are related entities. Under SLF's construction of the Reed-HTI and SLF Assignments, the Conversion Rights with respect to the 2,262 Residential Dwelling Units assigned to Reed-HTI were assigned to SLF. This would mean that neither Reed-HTI nor any subsequent owner of Reed-HTI's property could change the use of its property from residential to light industrial or other uses without first obtaining permission from SLF. As a matter of undisputed fact,

a developer's ability to change uses of property, particularly in large scale properties such as the Hardeeville Tract, is "critical." [Bird Aff., ¶ 16] There is no reason to suppose that JPR and Reed-HTI knowingly and willingly ceded this critical authority to SLF, a neighbor and potential competitor. Had this been their intent, surely they would have dealt with this in express terms, as they did with other issues in numerous instruments executed during their course of dealing with SLF.

The record shows that when the parties did actually agree to impose restrictions on Reed-HTI's ability to develop its property, they did so expressly. The most obvious example of this is included within the Reed-HTI Assignment. There, the parties agreed and expressly provided that Reed-HTI "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." [Comp., Ex. F, Item 1(c)] There are other examples.

In September of 2008, SLF, JPR and Reed-HTI entered into a Post-Closing Agreement. [Bird Aff., ¶ 14, Ex. A] Pursuant to that agreement, Reed-HTI entered into a Covenant and Agreement. [Bird Aff., Ex. B] Therein, Reed-HTI agreed to specific, explicitly defined limitations on the size of parcels it could sell, to whom it could sell them and the period of time in which these limitations would be in effect. As part of the Post-Closing Agreement, Reed-HTI, along with JPR, Reed Development, Inc. and John P. Reed personally, also agreed to a non-compete covenant with respect to another tract of real property not involved in this litigation. [Bird Aff., Ex. A, Item 3]

The Reed-HTI Assignment and these other agreements show that when the parties actually intended to restrict Reed-HTI's development rights, they did so in express terms, in legally binding

instruments prepared by their lawyers. This is further confirmation of the undisputed fact, as attested to by Mr. Bird, that: "No prohibition against converting property from residential use to light industrial use was ever bargained for or agreed to. Had there been such, it would have been expressly included in the documents." [Bird Aff., ¶ 18]

In the absence of express language upon the point, there is no basis for finding that the parties intended that the Conversion Rights with respect to Reed-HTI's property be assigned by JPR to SLF. SLF's proferred construction of the relevant documents that would lead to such a result should be rejected as unreasonable. *See S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) (Supreme Court agreed with Court of Appeals that the deed restriction was unambiguous but nevertheless reversed the Court of Appeals on the ground that the interpretation of the deed restriction by the Supreme Court was the "only reasonable" one).

If the Conversion Rights with respect to Reed-HTI's property were not assigned by JPR to SLF, were they retained by, and remain the property of, JPR? As a result of its conveyances to SLF and Reed-HTI, JPR divested itself of all the property it owned in the Hardeeville Tract. There is no reason to suppose, or language in the relevant documents to suggest, that the parties intended for JPR to retain for its own benefit Conversion Rights with respect to acreage owned by Reed-HTI.

If the Conversion Rights were not assigned to SLF nor retained by JPR, were those rights extinguished by the Reed-HTI Assignment? Nothing in that instrument plainly evidences any intent to eliminate the rights established in the Development Agreement or PDD to convert acreage from residential to light industrial or other commercial uses. In contrast, the parties explicitly extinguished Reed-HTI's rights to convert property from commercial to residential use. Had the parties intended to eliminate the right to convert property from residential to light industrial use, they would have

done so in explicit terms, as they did with the right to convert from commercial to residential. *See, Henry v. Chambron,* 304 S.C. 351, 354, 404 S.E.2d 518, 520 (Ct. App. 1991)("The restriction could have prohibited modular homes by a simple expression of the intent to do so."); *Forest Land Co. v. Black*, 216 S.C. 255, 262, 57 S.E.2d 420, 424 (1950)("If the intention of the grantor had been to utterly prevent the use of any kind of motorboard [sic] on Forest Lake, such intention could have been expressed in very clear and simple terms.")

The parties explicitly agreed that Reed-HTI "shall have no right to convert" any of the commercial acres to residential use. Had the parties also intended to eliminate the right to convert property from residential use to light industrial use they could have done so. That they didn't establishes that these Conversion Rights were not eliminated by the terms of the Reed-HTI Assignment under the maxim, expressio unius est exclusio alterius. "The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000)(quoting Black's Law Dictionary 602 (7th ed. 1999)). The maxim is most often cited as a rule of statutory construction, but has been applied to the interpretation of a contract of life insurance, *Chapman v. Metropolitan Life Ins. Co.*, 172 S.C. 250, 173 S.E. 801 (1934), and to restrictive covenants affecting real property, *Jinks v. Sea Pines Resort, LLC*, 2022 WL 3691391 (D.S.C. August 25, 2022). Here, the inclusion of an explicit prohibition of one type of conversion of use - that from commercial to residential - implies the exclusion of any prohibition against other types of conversion of uses not specified in the assignment.

If the Conversion Rights were not extinguished by the Reed-HTI Assignment and were not assigned to SLF nor retained by JPR, only one possibility remains: that the assignment to Reed-HTI

of the rights to develop up to 2,262 Residential Dwelling Units "as such term is currently defined in the Development Agreement and the PDD," included the Conversion Rights applicable to the property under the Development Agreement and the PDD. This is the "only reasonable" construction of the Reed-HTI Assignment and this Court should so find. *See Town of McClellanville*, 345 S.C. at 623, 550 S.E.2d at 302 (construction of deed was "only reasonable" one).

II. FACED WITH COMPETING INTERPRETATIONS OF THE REED-HTI ASSIGNMENT, THIS COURT SHOULD FIND THE INSTRUMENT TO BE AMBIGUOUS AND RESOLVE ANY DOUBTS AGAINST SLF AND IN FAVOR OF RSV'S FREE USE OF ITS PROPERTY.

In the final analysis, this case turns upon the proper construction of the Reed-HTI Assignment. Both parties assert that the Reed-HTI Assignment is unambiguous and should be construed in their favor. RSV makes the further argument that faced with competing constructions of the document, the lower court should have found the assignment to be ambiguous concerning the intent of the parties with respect to the Conversion Rights at issue. And having done so, the lower court should have resolved that ambiguity against SLF and in favor of RSV's free use of its property. SLF's response? That "a restrictive covenant is not ambiguous merely because the parties construe it differently. If such were the case, all disputed restrictive covenants would be ambiguous." [Br. p. 21] RSV makes no such argument.

The law is clear that a contract is ambiguous when its terms are "reasonably susceptible" of more than one interpretation. *Town of McClellanville*, 345 S.C. at 623, 550 S.E.2d at 302. It is not enough that parties proffer competing interpretations. The contract must be susceptible to "two different but plausible meanings." *McCord v. Laurens Cnty. Health Care Sys.*, 429 S.C. 286, 293, 838 S.E.2d 220, 223 (Ct. App. 2020). Whether the Reed-HTI Assignment is ambiguous is a question of law which is subject to a de novo review by this Court. *McCord*, 429 S.C. at 292, 838 S.E.2d at

223.

The Court has before it two competing interpretations of the Reed-HTI Assignment. RSV submits that the "only reasonable interpretation" of the assignment is that it included the Conversion Rights at issue and did not in plain and unmistakable terms prohibit Reed-HTI's conversion of its property from residential to light industrial use. *See Town of McClellanville* (Supreme Court agreed with Court of Appeals that the deed restriction was unambiguous but nevertheless reversed the Court of Appeals on the ground that the interpretation of the deed restriction by the Supreme Court was the "only reasonable" one). This Court could and should find that RSV's construction of the Reed-HTI Assignment is the only reasonable one. But the Court need not go that far to reverse the lower court in this case. All this Court needs to determine is whether RSV has proferred a reasonable, plausible construction of the Reed-HTI Assignment. If the Reed-HTI Assignment can reasonably be read in RSV's favor, and can reasonably be read in SLS's favor, the document is ambiguous and the benefit of the doubt goes to RSV.

In its brief, RSV has pointed to language in the Reed-HTI Assignment showing that the Conversion Rights were included within its scope. [Br., pp. 11 - 15] RSV has also shown that the Reed-HTI Assignment expressly prohibits conversion from commercial to residential use but contains no such prohibition against converting from residential use to light industrial use. [Br., pp. 15 - 19] RSV has also argued that the broad, general language in the Reed-HTI Assignment relied upon by the lower court is insufficient to create a restrictive covenant in plain and unmistakable terms. [Br., pp. 19 - 23] In summary, RSV argues that the Reed-HTI Assignment, properly construed, included within its scope the Conversion Rights in issue and nothing in the assignment prohibits RSV from exercising those Conversion Rights in plain and unmistakable terms sufficient

to create a restrictive covenant under applicable law. RSV will not rehash all these arguments about the proper construction of the Reed-HTI Assignment in this reply brief. Suffice it to say here, even if RSV's interpretation of the assignment is not the only reasonable interpretation, a position it does not abandon, it is at the very least a reasonably plausible one. Thus, notwithstanding the parties' arguments that the Reed-HTI Assignment unambiguously works in their favor, the assignment is nonetheless ambiguous in respect to its treatment of the Conversion Rights at issue. Once that conclusion is reached, the outcome of this case is inescapable.

Any doubt or ambiguity in a restrictive covenant must be resolved against the party seeking to enforce it and in favor of free use of property. *See e.g.*, *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980)(all doubts resolved in favor of the free use of the property); *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987)(any doubt or ambiguities in a covenant are resolved in favor of the presumption of free and unrestricted land use); *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp*., 368 S.C. 342, 367, 628 S.E.2d 902, 916 (Ct. App. 2006)(ambiguities in restrictive covenants must be strictly construed against the party seeking to enforce them); *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 632 (1992)(where language of restrictive covenant is capable of two or more constructions, the court will adopt that construction that least restricts the property).

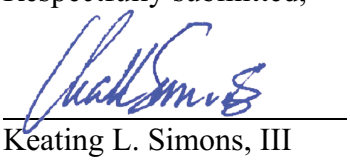
Under the Development Agreement and PDD, RSV, as owner, possesses the right to convert its Savannah Tract property from residential to light industrial use. The Reed-HTI Assignment does not, in plain and unmistakable terms, eliminate this right. SLF's case depends upon the proposition that the Reed-HTI Assignment did not assign to RSV's predecessor the Conversion Rights accorded to the owner under the Development Agreement and PDD. SLF has cast this case as one seeking to

establish a covenant running with the land to restrict RSV's use of its property. As such, the burden of proof falls upon SLF and any doubt or questions about the Reed-HTI Assignment, including those pertaining to the development rights assigned thereunder, must be resolved in RSV's favor.

CONCLUSION

For all the reasons stated, this Court should reverse the lower court's grant of summary judgment to SLF.

Respectfully submitted,



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SLF III - HARDEEVILLE, LLC,.....Respondent,

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RSV - HARDEEVILLE, LLC,.....Appellant.

PROOF OF SERVICE

I certify that the Initial Reply Brief of Appellant has been served upon counsel of record for Respondent SLF III - Hardeeville, LLC via the primary email addresses provided in the Attorney Information System (AIS).

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Subject: RE: SLF III-Hardeeville, LLC vs. RSV-Hardeeville LLC (Case No.: 2023-000277)
Attachments: Initial Reply Brief 7-31-23.pdf; Proof of Service - Initial Reply Brief.pdf; Designation of Matter 7-31-23.pdf; Proof of Service - Designation of Matter.pdf

Dear Counsel,

My apologies – one document was not executed.

Attached is the Initial Reply Brief of Appellant; Proof of Service of Initial Reply Brief of Appellant; Appellant's Designation of Matter and Proof of Service of Appellant's Designation of Matter in connection with the above-referenced matter that will be emailed to the Court of Appeals today for filing.

Thank you,
Brenda

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Subject: SLF III-Hardeeville, LLC vs. RSV-Hardeeville LLC (Case No.: 2023-000277)

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Thank you,
Brenda

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Re: *SLF III – Hardeeville, LLC v. RSV – Hardeeville, LLC*
Appellate Case No.: 2023-000277

Dear Ms. Kitchings:

Enclosed is the Initial Reply Brief of Appellant; Proof of Service of Initial Brief of Appellant; Appellant's Designation of Matter; Proof of Service of Appellant's Designation of Matter and emails to all counsel of record for Respondent serving same in the above case. Upon filing, please return a clocked-in copy to me via email.

With kind regards, I remain

Yours very truly,

Keating L. Simons, III

KLS/bdc
Enclosures
cc: Cheryl D. Shoun, Esquire (via email w/enc.)
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