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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Judicial Circuit

The Honorable Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2023-000773

Dustin Grotzke, Christine Grotzke, Leo Cornejo, Steve Falciani Nancy Falciani, Robert St. Louis, Lindsay Layton, Roger Woolf, Roberta Woolf, Nancy Zaj, Meg White, Joey Winchester, Kelly Hill, Mary Thaler, Ed Thaler, Lisa Essig, Brianna Stello, Jennifer Sellars, Dominique Powell, Jennifer Mayo and James Hardy……..Respondents,

v.

Mariner's Cay Racquet & Yacht Club Homeowners' Association, Inc……..…Appellant.

FINAL BRIEF OF RESPONDENTS

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Did the trial judge correctly grant Plaintiff's Motion for Summary Judgment in concluding that short-term rentals to transient lodgers did not violate the subject Master Deed, which permits only "residential uses" and prohibits "business activities"?

SUGGESTED ANSWER: *Yes.*

Did the trial judge correctly follow the majority of cases holding that short-term rentals are residential rather than business/commercial uses of property?

SUGGESTED ANSWER: *Yes.*

Did the trial judge correctly grant Plaintiff's Motion for Summary Judgment in finding that Plaintiffs were not required to bring suit derivatively?

SUGGESTED ANSWER: *Yes.*

Did the trial judge correctly find the business judgment rule as inapplicable?

SUGGESTED ANSWER: *Yes.*

Did the trial judge correctly rule that the Temporary Moratorium was an improper exercise of the HOA Board's authority under the Nonprofit Corporation Act and the HOA's governing documents?

SUGGESTED ANSWER: *Yes.*

Did the trial judge correctly rule that any Plaintiff who owned property prior to July 1, 2019 had standing?

SUGGESTED ANSWER: *Yes.*

Did the trial judge correctly rule that Plaintiffs who purchased property after July 1, 2019 could assert claims notwithstanding record notice of the Temporary Moratorium?

SUGGESTED ANSWER: *Yes.*

Did the trial judge correctly deny the HOA's request to engage in further discovery before granting the requested relief?

SUGGESTED ANSWER: *Yes.*

STATEMENT OF THE CASE

A. Factual Background

Plaintiffs own condominium units in Mariner's Cay Racquet & Yacht Club ("Mariners Cay"), a condominium community located within the City of Folly Beach, South Carolina. When the unit owners acquired title to their units, they became members of the Mariner's Cay Racquet and Yacht Club Homeowner's Association ("Association"). Each unit owner ("Owners") in Mariners Cay is subject to the Master Deed which was recorded on May 12, 1982 at Book J128, Page 300 in the Charleston County Register of Deeds Office.[1] (R. p. 58). Without exception, every mandate that the Owners in Mariner's Cay are required to follow under the recorded governing documents must necessarily be (1) a Covenant in the Master Deed, (2) a By-Law, or (3) a rule or regulation that the Board is authorized to promulgate under Article III, Section 3, subsection (e) of the Master Deed, as these three instruments are the only governing documents of the Association.

Plaintiffs have in the past rented their condominium units on a short-term basis, and to further that purpose, have marketed and advertised their units online on vacation rental websites and/or applications as being available for such short-term rentals. The Master Deed does not prohibit or restrict short-term rentals of condominium units in any manner.

The Master Deed addresses leasing of the units in Article III "Property Rights," Section 2 pertaining to the "Units," and states in relevant part as follows:

> Each Unit, together with its Percentage Interest in the General Common Area and Facilities and the Limited Common Area and Facilities, shall for

[1] A copy of the Master Deed was attached as Exhibit A to the Complaint in this action.

> all purposes constitute a separate parcel of real property which, subject to the provisions of this Master Deed, may be owned in fee simple and which may be conveyed, transferred, ***leased*** and encumbered in the same manner as any other real property. Each Owner, subject to the provisions of the Act and this Master Deed, shall be entitled to the exclusive ownership and possession of his Unit.

(Emphasis added.) (R. p. 66). Also under Article III, in Subsection 3 pertaining to "Common Area and Facilities," in states:

> The Board shall have the right to promulgate rules and regulations limiting the use of the General Common Area and Facilities to Unit Owners and their guests as well as to provide for the exclusive use of a part of the General Common Area and Facilities by a Unit owner and his guests for special occasions which exclusive use may be conditioned, among other things, upon the payment of a fee.

Article IX further goes on to explicitly address "Leasing of Units" in Section 7: "Units may be rented provided the occupancy is only by the lessee and his immediate family unless otherwise provided by the Association's Board of Directors." (R. p. 85).

Plaintiffs, in deciding to purchase their units in Mariner's Cay, knew that the Master Deed allowed for rentals of their units, without any temporal limitation or minimum lease duration. Affidavit of Leo Cornejo, filed July 15, 2022. (R. p. 334).

On October 5, 2018, the Board of Directors of Mariner's Cay Racquet and Yacht Club ("Board") sent an email to the unit owners addressing short-term rentals. (R. p. 105). In the email the Board complained about and criticized what it characterized as the negative effects of short-term rentals of units.[2] In this email, the Board stated that "the best way to maintain the residential quality of Mariners Cay is to amend the Master Deed and to prohibit the Short Term Rental of units." (R. p. 106, lines 12-13).

[2] A copy of this email was attached as Exhibit B to the Complaint in this action.

The language of the Master Deed setting forth the procedure for amendments states as follows: "The Master Deed may be amended at any time and from time to time after notice as hereinabove provided has been given by a vote of not less than seventy-five percent (75%) of the total vote of the Association." Master Deed Article XI, Section 1(b). (R. p. 88).

The Board began the procedure of amending the Master Deed on October 9, 2018 by sending a notice to the Members of a town hall meeting to discuss the options available and what the amendment would mean for the community.[3] (On October 19, 2018, the Board sent another email proposing an amendment to the Master Deed prohibiting the rental of units for terms of less than thirty (30) days.[4] (R. p. 107). Again the Board acknowledged, "[t]his would require a Vote to amend the Mariners Cay Master Deed." (R. p. 107, lines 26-27).

In preparing for the vote, the Board determined that of the 135 units in Mariners Cay, approximately forty-two units intended to vote against the proposed changes, which accounted for approximately 31% of the units. (R. p. 335, ¶7). Recognizing that the vote would likely be 69% in favor of the proposed changes, and thus the proposed amendment would fail under the 75% requirement of the Master Deed, the Board did not proceed with presenting the proposed amendment to the owners for a vote. Affidavit of Cornejo, *supra*. (R. p. 335, ¶8). At no time have the Members taken an official vote in relation to amending the Master Deed regarding short-term rentals.

[3] A copy of this notice was attached as Exhibit C to the Complaint in this action.
[4] A copy of this email was attached as Exhibit D to the Complaint in this action.

On May 28, 2019, the Board announced a "moratorium" on short term rentals.[5] (R. p. 267). The Board claimed that it made this decision based on alleged findings of the Mariner's Cay Livability Committee. The moratorium document stated in part, "Investors and realtors have recently uncovered the beauty of the residential neighborhood, and over the past three and a half years 50% of all new condo purchases have been for investment rental use. Through a survey, the Board found that a majority of the current owners want 'some' rental restrictions." In purporting to impose the moratorium, the Board simply voted on it and announced it, appearing to completely ignore its earlier acknowledgments that prohibiting or restricting short term rentals would require an amendment of the Master Deed.

As a result of the purported moratorium, the current Owners have been deprived of their ability to freely sell their property to prospective purchasers who would be interested in continuing to rent the units on a short-term basis. (R. p. 335, ¶9). Some Plaintiffs have attempted to sell their units subsequent to the purported moratorium, but have been forced to reduce the price substantially after prospective purchasers became aware they would not be able to rent the units short-term. Affidavit of Cornejo, *supra*. (R. p. 335, ¶10-12). Prospective buyers expressed an interest in acquiring Plaintiffs' units, but then rescinded their interest and/or were only willing to make significantly lower offers after being made aware of the existence of a moratorium which would restrict their ability to lease the units on a short-term basis. (R. p. 335, ¶11).

B. Procedural History

[5] A copy of the moratorium document was attached as Exhibit E to the Complaint in this action. The original version of the moratorium was recorded in the Charleston County Register of Deeds office on November 13, 2019 in Book 0839 at Page 332. Three subsequent "renewals" of the "temporary" moratorium were recorded on March 18, 2020 in Book 0867 at Page 848; on April 22, 2021 in Book 0983 at Page 949; and on April 28, 2022 in Book 1104 at Page 750.

Plaintiffs retained the undersigned legal counsel who on their behalf filed the Summons and Complaint in the herein action on June 24, 2019. (R. p. 43). The action was referred to the Master-in-Equity via a consent order filed January 20, 2020. (R. p. 1). On February 21, 2022, Plaintiffs filed a *Motion and Incorporated Memorandum to Quash Discovery or in the Alternative, for Protective Order*. (R. p. 132). On May 13, 2022, Defendant filed a *Memorandum in Opposition to Plaintiffs' Motion to Quash Discovery, or, in the Alternative, for Protective Order*. Plaintiffs and Defendant filed their respective cross-motions for summary judgment on July 8, 2022. (R. pp. 155, 158).

On July 19, 2022, the pending motions, including the parties' cross-motions for summary judgment, were scheduled to be heard before the trial court. Prior to that hearing Plaintiffs filed an affidavit on behalf of Jennifer Sellars, an owner of a condominium unit in Defendant's HOA who bought her unit after the purported moratorium went into effect. Sellars sought to join as a Plaintiff. (R. p. 384). At the July 19, 2022 hearing the trial court made some informal remarks about the procedural posture of the case and some of the issues in dispute, including standing. (R. p. 463). The only determinative decision or ruling the Circuit Court made at that time was that it orally granted Plaintiffs' motion to stay discovery until each parties' cross-motions for summary judgment were heard and ruled upon. (R. p. 485). The trial court continued the hearing on the cross-motions for summary judgment and instructed Plaintiffs to file a Motion to Amend the Complaint to add the new Plaintiff(s). *Id.* On August 8, 2022 Plaintiffs filed a *Motion to Amend Complaint* with a proposed Amended Complaint attached. (R. p. 337). Thereafter, Defendant filed a *Memorandum in Opposition to Plaintiff's Motion to Amend* on August 22, 2022. (R. p. 356). Plaintiffs filed a *Reply* on September 16, 2022. (R. p. 377). A hearing was held on September 19,

2022 on all pending motions. (R. p. 489). In court immediately following the hearing the trial judge made an oral ruling in Plaintiffs' favor and instructed counsel the Plaintiffs to prepare and submit a proposed Order after presenting it to Defendant's counsel's for their review.

In late 2022 counsel for the parties exchanged correspondence via email in regard to the content of the proposed Order but were unable to agree on the language that should be contained in it. Counsel for Plaintiffs emailed a proposed Order to the trial court on January 4, 2023, informing the court of the impasse over the content of the proposed order. The email stated, "counsel for the parties agreed today that the best course would be for me to submit the proposed order to Your Honor as drafted, and Defendant's counsel would follow that up with a letter to the Court detailing their objections and requested changes." Defendant's counsel filed *Objections to Proposed Order on Pending Motions* on January 13, 2023. The trial judge filed its dispositive Order on March 29, 2023. (R. p. 430). In it, the trial court granted Plaintiffs' motion to amend the Complaint, granted Plaintiffs' motion for summary judgment, granted the injunctive relief requested by Plaintiffs, declared that the moratorium purported to be enacted by Defendant was legally impermissible and could not be enforced by Defendant, and denied Defendant's motion for summary judgment. *Id.*

Defendant filed a *Motion to Alter or Amend* on April 10, 2023. (R. p. 386). Defendant filed an Answer & Counterclaim to Amended Complaint on April 12, 2023. (R. p. 403). The trial court denied the *Motion to Alter or Amend* in an Order filed April 17, 2023. (R. p. 461). Plaintiffs filed a *Reply to Counterclaim of Defendant* on May 5, 2023. (R. p. 422). Defendant filed the Notice of the herein Appeal on May 10, 2023. (R. p. 428).

ARGUMENT

A. Standard of Review

In a motion for summary judgment, the movant shall prevail when "the pleadings, depositions, answers and interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56, SCRCP. The construction and enforcement of an unambiguous written contract is a "question of law for the court, and thus can be properly disposed of at summary judgment." *Harbor Town Yacht Club Boat Slip Owners' Ass'n v. Safe Berth Management, Inc.*, 421 F.Supp. 2d 908 (D.S.C. 2006). In granting summary judgment "it must be shown that further inquiry into the facts is not needed to clarify the application of the law." *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 318 S.C. 471, 479, 458 S.E.2d 431, 436 (Ct. App. 1995). "[S]ummary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *Gecy v. South Carolina Bank & Trust*, 422 S.C. 509, 517, 812 S.E.2d 750, 754 (Ct. App. 2018) (quoting *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006)).

This Court should affirm the Circuit Court's March 29, 2023 and April 17, 2023 Orders.

B. The Circuit Court correctly found that the pursuant to the Association's Master Deed, Owners are permitted to rent their units on a short-term basis.

The nature of the relationship between homeowner's associations and their members is contractual. *See Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006) (holding real covenants are "agreements… to do, or refrain from doing certain things with respect to real property") (ellipsis in original) (quoting 20 Am. Jur. 2d *Covenants, Conditions, and Restrictions* §1 (2005))); *id.* ("Covenants, in a sense are contractual in nature and bind the parties thereto in the same manner as would any other

contract.") Restrictive covenants are construed like contracts and may give rise to actions for breach of contract. 17 S.C. Jur. *Covenants* § 2 (2005) (citing *Hoffman v. Cohen*, 262 S.C. 71, 202 S.E.2d 363 (1974) and *Manning v. City of Columbia*, 297 S.C. 451, 377 S.E.2d 335 (1989)). Thus, the issue before the Court is one of straightforward contract interpretation.

1. <u>The clause addressing the Owners' right to lease their units and the clause granting the Board power over use of the common areas must necessarily control over the clause which incidentally mentions the Board's authority over who may occupy the unit.</u>

Under the well-settled canon of contract construction, "where there are two clauses in any respect conflicting, that which is specifically directed to a particular matter controls in respect thereto over one which is general in its terms." *Mutual Life Ins. Co. v. Hill*, 193 U.S. 551, 558, 24 S. Ct. 538, 540 (1904). When, at the time of formation, "parties express themselves in reference to a particular matter, the attention is directed to that, and it must be assumed that it expresses their intent; whereas a reference to some general matter, within which the particular may be included, does not necessarily indicate that the parties had the particular matter in thought." *Id.*, 193 U.S. at 558, 24 S. Ct. at 540-41. "The purpose of all rules of contract construction is to determine the parties' [objective] intention" at the time of contract formation, rather than a "subjective, after-the-fact meaning one party assigns to it." S.C. JUR Contracts 30d § 33 (2019); *North American Rescue Products, Inc. v. Richardson*, 411 S.C. 371, 378 769 S.E.2d 237, 240-41 (2015); see also *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977). In determining such intention, parol evidence may be admissible "to show the true meaning of an ambiguous written contract." *Klutts Resort Realty, Inc.*, 268 S.C. at 89, 232 S.E.2d at 25. When a

contract is capable of being read in more way than one, it is ambiguous and thus the court may look to extrinsic evidence when determining the intent of the drafters. *Id.*

The Master Deed does not prohibit or restrict short-term rentals of condominium units in any manner, and in fact, it specifically and explicitly allows for the leasing of units. As the Master Deed references the Horizontal Property Regime Act (the "Act"), it is appropriate to consider the property rights granted to an owner under the Act. Section 27-31-60 of the South Carolina Code states "[a]n apartment owner shall have the exclusive ownership of his apartment." Consistent with that quoted language of the Act, Article III, Section 2 of the Master Deed explicitly grants an Owner a fee simple interest in his or her unit, and further provides that the unit may be "conveyed, transferred, [and] ***leased***[.]" (Emphasis added.) (R. p. 66). There is no limitation or qualification placed on this right to lease. Article IX, Section 7 of the Master Deed does create a specified restriction on the renting of units, but the only limitation is that the occupants must be the lessee and his immediate family. (R. p. 85). Both of these sections in the Master Deed are inherently directed at the leasing of units, and show not only that at the time of formation the parties intended to allow for leasing of units, but also that they did not intend to include a minimum duration restriction on the leasing of units, as the governing documents do not mention such a limitation in any way.

Article III, Section 3 of the Master Deed directly addresses the Board's power over certain limited areas of Mariner's Cay, those areas being the Common Areas which the Unit Owners hold as tenants in common. (R. p. 64). Subsection (e) provides the Board authority to promulgate rules and regulations. (R. p. 69). However, this subsection explicitly states that the rules and regulations may limit "the use of the General Common Area and Facilities." *Id.* It is therefore unmistakably

clear that rules and regulations promulgated by the Board may not limit or restrict the Owners' use of their units, but rather only the Owners' use of the General Common Areas. The Board's purported moratorium flies in the face of this clear distinction. For these reasons, the Circuit Court's March 29, 2023 and April 17, 2023 Orders should be affirmed.

2. Owners' rental of their units on a short-term basis is a "residential use" and not a "business activity," and thus short-term rentals do not violate the Master Deed.

Defendant contends that Owners' short-term rentals of their units are a business activity in violation of certain provisions of the Master Deed. Specifically, they rely on Article XI, Section 1, which states "Buildings and all Units contemplated in the development shall be, and the same hereby are, restricted exclusively to residential use…" and Article IX, Section 4, which provides "No business activities of any kind whatever shall be conducted in any building or in any portion of the property." (R. pp. 84, 88). The City of Folly Beach, in which Mariner's Cay is located, has established an ordinance requiring "any owner wishing to operate a short-term rental must maintain a current business license, comply with rental registration requirements, and make proper payment of local, county, and state taxes." Folly Beach, SC., Ordinances ch. 117 § 2 (2010).[6]

"A restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of free use of the property." *See Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). The Court is to construe any ambiguity in favor of limited duration and

[6] On February 7, 2023, residents of the City of Folly Beach voted in favor of imposing a cap of 800 Investment Short Term Rental licenses. The cap became law on February 9, 2023 after the vote was certified. Existing licenses, of which there were more than 1,100 at the time the ordinance was enacted, were grandfathered, but are not transferable. If a property with a short-term rental license is sold, or ownership is transferred, the new owner goes to the end of the license waiting list. Brian Hicks, "With some compromises, Folly could've avoided that referendum," *The Post and Courier*, February 12, 2023.

against restricting property. *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). While the South Carolina Court of Appeals has not yet taken up the specific question of whether short-term rentals violate restrictive covenants requiring property to be used only for residential purposes and prohibiting its use for business purposes, courts in a number of other states have considered the issue and the majority of those courts have almost uniformly held that short-term rentals do not violate restrictive covenants similar to those at issue in this case.

"A negative covenant, prohibiting business and commercial uses of the property, does not bar short-term residential vacation rentals." *Russell v. Donaldson*, 731 S.E.2d 535, 539 (N.C. Ct. App. 2012). "Residential use, without more, has been consistently interpreted as meaning that the use of the property is for living purposes, or a dwelling, or a place of abode," and "the transitory or temporary nature of such use does not defeat the residential status." *Lowden v. Bosley*, 395 Md. 58, 68, 909 A.2d 262, 267 (2006). "[R]enting this dwelling to people who use it for the purposes of eating, sleeping, and other residential purposes does not violate the prohibition on commercial and business activity as such terms are commonly understood." *Pinehaven Planning Bd. v. Brooks*, 70 P.3d 664, 668 (Idaho 2003). "So long as the renters continue to relax, eat, sleep, bathe, and engage in other incidental activities… they are using the cabin for residential purposes." *Slaby v. Mountain River Ests. Residential Ass'n, Inc.*, 100 So. 3d 569, 579 (Ala. Civ. App. 2012).

In *Slaby*, a residential association asserted that the property owners' short-term rentals of their cabin violated restrictive covenants prohibiting commercial use. 100 So.3d at 571. However, the court reviewed numerous appellate decisions from other states and agreed with "the majority of other jurisdictions" that rental of the property for eating, sleeping, and other residential purposes did not amount to commercial use. *Id.* at 580-82.

"The owner's receipt of rental income either from short- or long-term rentals in no way detracts or changes the residential characteristics of the use by the tenant." *Ross v. Bennett*, 203 P.3d 383, 388 (Wash. Ct. App. 2008). "[T]he nature of the property's use is not transformed from residential to business simply because the owner earns income from the rentals." *Santa Monica Beach Prop. Owners Ass'n v. Acord*, 219 So. 3d 111, 115 (Fla. Ct. App. 2017), citing *Lowden v. Bosley*, 909 A.2d 261, 262 (Md. 2006). "When the [owners] rent their cabin, they no doubt realize some pecuniary gain, but neither that financial benefit nor the advertisement of the property or the remittance of a lodging tax transforms the nature of the use of the property from residential to commercial." *Slaby*, 100 So. 3d at 580. "While [the owner's] renting of the property as a dwelling on a short-term basis may have constituted an economic endeavor on [the owner's] part, to construe that activity as one forbidden by the language of the deed restrictions is unreasonable and strained." *Mason Family Trust v. DeVaney*, 146 N.M. 199, 201, 207 P.3d 1176, 1178 (N.M. Ct. App. 2009).

In *Mason Family Trust v. DeVaney*, Mr. Devaney rented his property on a short-term basis when he was not occupying the property himself, and he rented the property for many more days than he dwelled there and received substantial rental fees. *Id.* at 200, 1177. Additionally, a property management company advertised and managed the rental of the cabin. *Id.* Nonetheless, the court held "a deed restriction for dwelling purposes only does not demonstrate an intent to prohibit short-term rental for dwelling purposes. Nor, in our view, does this commercial or business use restriction preclude the economic aspect of an owner's vacation home which is also partially used as a short-term rental for dwelling purposes." *Id.* at 202, 1179.

> Adopting Silsby's reading [prohibiting rentals] would result in an affirmative rule of law holding that every single- or multi-family residence that is rented for use by someone other than the owner is a commercial enterprise. Under such a rule of law, innumerable properties would invariably run afoul of local zoning ordinances

> prohibiting commercial uses. The use of this property is residential; the fact that this use may involve income in some fashion does not change a fundamentally residential use to a commercial enterprise.

Silsby v. Belch, 952 A.2d 218, 222-23 (Me. 2008).

In *Mullin v. Silvercreek Condo. Owner's Ass'n, Inc.,* 195 S.W.3d 484 (Mo. Ct. App. 2006), several unit owners had rented their units on a short-term or nightly basis for a long period of time. The Overtons specifically obtained a license from the City and collected and paid sales tax on all of the units used for short-term use. *Id.* at 487. The Condominium Association asserted this violated their restrictive covenants—one limiting use to single-family residential and another stating "no business, trade, occupation, or profession or any kind shall be conducted, maintained, or permitted on any part of the property." *Id.* at 489. The Missouri Court of Appeals affirmed the trial court and held that the short term and nightly rentals did not violate the covenants reasoning that (1) the restrictions read together plainly allowed owners to rent their condominiums from time to time and (2) given that restrictive covenants are not favorites of the law, any ambiguity should be interpreted narrowly in favor of free use of the property. *Id.* at 490-91.

In *Yogman v. Parrott*, 937 P.2d 1019 (Or. 1997), the defendants used their beach house as a vacation home, and when they were not using it themselves, they rented it for short periods of time to others who also used it as a vacation home. Plaintiffs sued for an injunction claiming defendants' rental activity violated the restrictive covenant that limited the lots to be used "exclusively for residential purposes" and stated "no commercial enterprise shall be constructed or permitted on any of said property." *Id.* at 1020. The Oregon Supreme Court concluded that defendants' rental of the property was permissible, because that use was not "plainly within the provisions of the covenant," and held in favor of the owners of the vacation property. *Id.* at 1023.

As in all of the cases above, Plaintiffs in the case at bar have rented their condominium units on a short-term basis. Similar to *DeVaney* and *Slaby*, some Plaintiffs have marketed and advertised units online on vacation rental websites and/or applications as being available for short-term rentals. The renters' use of the units (sleeping, eating, bathing, etc.) are indisputably activities associated with residential use, and thus Plaintiffs' short-term rentals are not and cannot be automatically transformed into business activities simply because Plaintiffs advertise and market their units online and receive income from the short-term rentals. Similarly, as in *Mullin*, the requirement of a business license does not automatically transfer the short-term rentals at issue here into a business activity. Therefore, Owners' short-term rental of their units is a "residential use" and not in violation of the Master Deed. Even if the residential use and business activities restrictions in the Master Deed could be open to more than one interpretation, courts in South Carolina have traditionally favored free use of property when a restrictive covenant is ambiguous. *See Hardy*, 369 S.C. 160, 631 S.E.2d 539. For all these reasons, this Court should affirm the Circuit Court's March 29, 2023 and April 17, 2023 Orders.

C. The Circuit Court correctly found that the business judgment rule does not support, validate or authorize the moratorium.

In South Carolina, courts apply the business judgment rule to protect corporate directors. *Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 415 S.C. 256, 270, 781 S.E.2d 903, 910 (2016). "Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith." *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 599, 538 S.E.2d 15, 25 (Ct.App.2000) (quoting *Dockside Ass'n v. Detyens,* 291 S.C. 214, 217, 352 S.E.2d 714, 716 (Ct.App.1987)). "[A]bsent a showing of bad faith, dishonesty, or incompetence, the judgment of directors will not

be set aside by judicial action. *Goddard v. Fairways Dev. Gen. P'ship,* 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct.App.1993) (citing 4 S.C. Juris. *Condominiums* § 42 (1991)).

Per the rules of contract construction, the court shall look to the language of the contract to determine what powers the Board has and does not have. *Bauman v. Long Cove Club Owners Ass'n*, 380 S.C. 131, 137-38, 668 S.E.2d 420, 424 (2008). The business judgment rule protects a corporation's exercise of its best judgment when deciding between viable options in a given business-related situation. The business judgment rule is not a cloak that protects a corporation from a violation of its own bylaws. *Fisher*, 415 S.C. at 270, 781 S.E.2d at 911.

Here, the Board has violated the Master Deed by imposing the moratorium on short term rentals, and thus it is not protected by the business judgment rule. Explicitly, the governing documents grant the Board power over the common areas, including the right to "establishment and amendment from time to time of reasonable regulations governing the use of the Common Area and Facilities and the Limited Common Area and Facilities." *See* Master Deed Article III, Section 3. (R. p. 67). However, nowhere in the governing documents is the Board granted power to limit an Owner's use and leasing of his or her unit. In fact, the Master Deed explicitly grants an Owner a fee simple interest in his or her unit, and further provides that the unit may be "conveyed, transferred, [and] ***leased***[.]" (Emphasis added.) Master Deed, Article III, Section 2. (R. p. 66). By placing a restriction on the units, on its own accord and without amending the governing documents (as it initially acknowledged it was required to do and attempted to do), the Board has directly breached the Master Deed. Accordingly, the business judgment rule cannot and does not validate or authorize the moratorium. Rather, the Board is bound to follow the covenants included

in the Master Deed as construed by the laws of contract. *See Seabrook Island Property Owners Ass'n v. Pelzer*, 292 S.C. 343 (1987).

For these reasons as well as the others that follow, this Court should affirm the Circuit Court's March 29, 2023 and April 17, 2023 Orders.

D. The temporary moratorium was not a valid and Enforceable Corporate Action of the HOA and is not shielded under the Nonprofit Corporation Act.

"A corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant thereto; acts beyond the scope of the powers so granted are *ultra vires*." *Pelzer*, 292 S.C. at 347, 356 S.E.2d at 414. If a homeowner's association is acting beyond the scope of its powers granted pursuant to the language in the Restrictive Covenants, its bylaws, and the statutes of this state, it will be acting *ultra vires*. *Hinson v. Stafford Park HOA, Inc.*, No. 2010-UP-568, 2010 WL 10088265 (S.C. Ct. App. Dec. 31, 2010).

The South Carolina legislature greatly broadened the powers of nonprofit corporations with the enactment of the South Carolina Nonprofit Corporation Act. For example, the scope of those powers includes the power "to do all things necessary or convenient, not inconsistent with the law, to further the activities and affairs of the corporation." *See* S.C. Code Ann. § 33-31-302 (18). However, the Official Comment states "a distinction should be drawn between the power of the corporation to do all things necessary or convenient to carry out its activities and the question of whether corporate acts are reasonable or otherwise prohibited." *See* S.C. Code Ann. § 33-31-302 (Official Comment). The Official Comment continues, "The fact that a nonprofit corporation has the power to operate a business does not mean that the corporation is acting properly in running the business." *See Id.* The purpose of Section 33-31-302 is to provide a broad grant of powers while setting forth a nonexhaustive list of specific powers—in light of history, it was feared that a

court might improperly conclude that a corporation lacked some power because it was not specifically set forth in the Model Act. *See Id.* Additionally, the Nonprofit Corporation Act requires corporations to adopt bylaws and provides that the bylaws "may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with the law or the articles of incorporation." *See* S.C. Code Ann. § 33-31-206.

Defendant asserts a defense under the Nonprofit Corporation Act. The Act was created in order to ensure that a corporation's powers were not limited only to what was specifically included in the Model Act. It was not created in order to generate an exception to the general rule that a corporation's powers come from the applicable law, its charter, its bylaws, and other governing documents. Further, Defendant has failed to demonstrate how the moratorium imposed was "necessary or convenient" to further the "activities or affairs of the corporation." The Master Deed asserts that Mariner's Cay was "organized for the purpose of carrying out the powers, duties, and obligations of the Council and Co-Owners as defined in the Act." Master Deed Article III, Section 3. (R. p. 67). Defendant purports that the moratorium was in response to the negative effects of short-term rentals. Ex. B to Complaint. (R. p. 105). Even assuming that allegation is true, imposing the mortarium was a direct violation of the Master Deed and Bylaws, and as such it is not and cannot be "necessary or convenient" to further any lawful activities or affairs of the corporation. Thus, Defendant is not protected by the Nonprofit Corporation Act because it has not only failed to show how the mortarium was "necessary or convenient" to further any lawful activities or affairs of the corporation, but most importantly, the moratorium was indisputably a breach of the Master Deed.

For all these reasons, this Court should affirm the Circuit Court's March 29, 2023 and April 17, 2023 Orders.

E. The Circuit Court correctly held that Plaintiffs who owned their properties at the time the temporary moratorium was first enacted possess standing to assert any claims.

The moratorium contained a "grandfathering" provision which indicated that the short-term rental prohibition was applicable only to Owners who purchased their units after the moratorium was enacted ("post-moratorium Owners") and not applicable to Owners who owned their Units before the first version of the moratorium went into effect ("pre-moratorium Owners"). Based on this aspect of the moratorium, Defendant argued that the pre-moratorium Owners lacked standing to bring this action, alleging that they had suffered no injury in fact. Defendant further argued that the post-moratorium Owners should not be able to join as Plaintiffs or that their claims should be dismissed on summary judgment on the basis that they were on record notice of the moratorium before they purchased their units.

The Circuit Court rejected these arguments, finding that all Plaintiffs stated an injury in fact for the purpose of standing analysis. The Circuit Court found that as a result of the purported moratorium, the pre-moratorium Owners have been deprived of their ability to freely sell their property to prospective purchasers who would be interested in continuing to rent the units on a short-term basis, which constitutes an injury in fact. One Plaintiff asserted via a filed affidavit that he sold one of his units subsequent to the moratorium and was forced to reduce the sale price substantially after the purchaser became aware they would not be able to rent the unit short-term. The Circuit Court also found that even assuming the post-moratorium Owners were on record notice of the moratorium prior to their purchases, they were not barred from challenging the

validity and enforceability of the moratorium, which Plaintiffs asserted was impermissible on the basis that it violated the Master Deed.

The Circuit Court found that this was a straightforward contract interpretation issue, and Plaintiffs have standing to bring a breach of contract action against Defendant as well as to seek a declaratory judgment and injunctive relief. Defendant incorrectly attempts to frame Plaintiffs' claims as being required to be brought only derivatively. The Circuit Court disagreed. The Official Comment to S.C. Code § 33-31-304 states, "The focus of section 3.04 is narrow… it does not address actions that… ii) violate federal or state laws, **(iii)** ***breach duties owed by the directors, officers, employees or agents of the corporation…*** or **(vi)** ***breach duties owed by the corporation***." *See* S.C. Code § 33-31-304, Official Comment. (Emphasis added.) Based upon the plain language of S.C. Code § 33-31-304 as explained clearly and unambiguously by the Official Comment, all Plaintiffs have standing to bring this breach of contract action without being required to bring it derivatively.

For all these reasons, this Court should affirm the Circuit Court's March 29, 2023 and April 17, 2023 Orders.

F. <u>The Circuit Court correctly found that even if the post-moratorium Owners had actual or constructive knowledge of the moratorium, they nonetheless had standing to be Plaintiffs in the action, as they claimed the moratorium is in direct breach of the Master Deed, which is a contract between the Association and all Owners.</u>

Even if the post-moratorium Owners purchased their properties with actual or constructive knowledge of the Moratorium, they still have standing because Plaintiffs alleged that Defendant's actions were unlawful and in direct breach of the Master Deed. A Defendant may not claim that an injured party's constructive knowledge of its unlawful actions in violation of the injured party's

contract and property rights somehow bars the injured party from enforcing those rights. There is no authority in South Carolina jurisprudence for such a notion.

Moreover, the Circuit Court instructed Plaintiffs on July 19, 2022 to submit a Motion to Amend the Complaint to add the new Plaintiffs. It was stated openly in the Circuit Court on July 19, 2022 by Plaintiffs' counsel and understood by Defendant and the Circuit Court that Plaintiffs specifically intended to defeat Defendant's standing argument[7] by adding Plaintiffs who had purchased their units after the moratorium went into effect and were thus not grandfathered. After Plaintiffs did exactly that, Defendant asserted that the new Plaintiffs are barred from joining the action due to actual or constructive knowledge of the moratorium prior to purchasing their condo units. That argument has no support in applicable law and was correctly rejected by the Circuit Court.

For all these reasons, this Court should affirm the Circuit Court's March 29, 2023 and April 17, 2023 Orders.

G. The Circuit Court correctly declined to permit the HOA to engage in full discovery prior to the ruling on the cross-motions for summary judgment.

At the hearing on July 19, 2022, the Circuit Court orally granted Plaintiffs' motion to stay discovery until the parties' cross-motions for summary judgment were heard and ruled upon as to the contractual interpretation issue of whether the Board could lawfully prohibit short-term rentals via a unilateral moratorium not voted on by the membership, or if an amendment to the Master Deed was required for such a restriction to be imposed. Amending the Complaint to add new

[7] Defendant has argued that that the original Plaintiffs were not injured by the moratorium due to their being grandfathered, despite the diminution of the original Plaintiffs' property value. The Courted commented informally at the July 19, 2022 hearing that even though the parties' money damages claims are stayed for now and are not before the Master-in-Equity, that does not prevent the original Plaintiffs from citing that alleged injury in fact as a basis for standing as to the original Plaintiffs.

Plaintiffs did not change the question before the Circuit Court on summary judgment, and thus there was no need for fact discovery to be conducted at that time, as there were no material facts in dispute. The Circuit Court correctly ruled that the issue before it on the cross-motions for summary judgment was one of contractual interpretation. No persuasive argument was advanced by Defendant at the July 19, 2022 hearing or in any of its filings as to why there was any material change in the circumstances that had resulted in the Circuit Court previously determining that it would be appropriate and would be the most efficient use of the resources of the court and the parties for the court to rule on cross-motions for summary judgment so as to potentially narrow the issues prior to having the parties and their counsel undertake months of laborious and expensive discovery.

Further, because the post-moratorium Owners had standing to sue regardless of their constructive or actual knowledge of the moratorium, there was no need for Defendant to conduct new or additional discovery directed at the new Plaintiffs prior to the cross-motions for summary judgment being heard and ruled upon. In any event, this ruling by the Circuit Court must be reviewed based on an abuse of discretion standard, and there is no valid grounds for an assertion that this ruling by the trial judge amounted to an abuse of his sound discretion. "[A] party seeking to overturn a discovery ruling [therefore] generally bears a 'heavy burden." ' *Com–Tech Associates v. Computer Associates Inter.*, 753 F.Supp. 1078, 1099 (E.D.N.Y.1990), aff'd, 938 F.2d 1574 (2d Cir.1991). "Our review of questions concerning discovery matters is very deferential. The trial court is afforded great latitude in such matters, and this court will not generally interfere with the trial court's ruling.... Our review of a trial court's determination concerning discovery matters is 'very narrow.' We will not reverse such a determination absent a 'gross abuse of discretion

resulting in fundamental unfairness in the trial of the case.' *SDI Operating P'ship, L.P. v. Neuwirth,* 973 F.2d 652 (8th Cir. 1992)(internal citations omitted). See also *Sallis v. Univ. of Minn.*, 408 F.3d 470, 477 (8th Cir.2005) (review of discovery rulings is narrow and deferential).

For all these reasons, this Court should affirm the Circuit Court's March 29, 2023 and April 17, 2023 Orders.

CONCLUSION

For these and all the foregoing reasons, Respondents respectfully requests that this Court affirm the Circuit Court's March 29, 2023 Order which granted Plaintiffs' motion to amend the Complaint, granted Plaintiffs' motion for summary judgment, granted the injunctive relief requested by Plaintiffs, declared that the moratorium purported to be enacted by Defendant was legally impermissible and could not be enforced by Defendant, and denied Defendant's motion for summary judgment; and affirm the Circuit Court's April 17, 2023 Form 4 Order denying Appellant's Motion to Alter or Amend.

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January 11, 2024

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Judicial Circuit

The Honorable Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2023-000773

Dustin Grotzke, Christine Grotzke, Leo Cornejo, Steve Falciani Nancy Falciani, Robert St. Louis, Lindsay Layton, Roger Woolf, Roberta Woolf, Nancy Zaj, Meg White, Joey Winchester, Kelly Hill, Mary Thaler, Ed Thaler, Lisa Essig, Brianna Stello, Jennifer Sellars, Dominique Powell, Jennifer Mayo and James Hardy……..Respondents,

v.

Mariner's Cay Racquet & Yacht Club Homeowners' Association, Inc……..…Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certified that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have caused the **FINAL BRIEF OF RESPONDENT** to be served on the above-referenced Appellant by directing an authorized contractor (printing company) to deposit a copy of same in the United States Mail, postage prepaid, on January 12, 2024, addressed to their Appellant's attorneys of record:

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