

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity/Circuit Court Judge

Case No. 2009-CP-07-00036

Madeline R. Arata and Kenneth C. Arata.....Appellants,

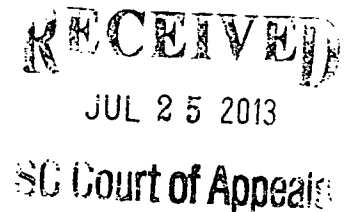
v.

Village West Owners' Association, Inc.
d/b/a Village West Horizontal Property Regime.....Respondent.

APPELLANTS' RESPONSE TO RESPONDENT'S
MOTION TO DISMISS APPEAL

The Appellants, Madeleine R. Arata and Kenneth C. Arata ("Arata") respectfully respond to Respondent's motion to dismiss the appeal with prejudice in the above captioned case upon the following grounds:

Prior to the extension deadline date of December 6, 2012 for the Appellants to file and serve the Record on Appeal, Appellants' attorney, Jack D. Simrill, contacted Respondent's attorney, Brian C. Pitts, requesting copies of specific designated matters to be included in the Record per attorney Pitts' request, including Summons and Complaint



dated December 17, 2008, Affidavit of Ray Dowling dated March 23, 2012, Affidavit of Thomas J. Carlson dated March 23, 2012, All Trial Exhibits, and Defendant's Summons and Amended Complaint in CA# 05-CP-07-475, which the Appellants were not in possession of. Village West's attorney, Mr. Pitts, chose not to respond thus ignoring the request of the Appellants and forcing their attorney, Mr. Simrill, to file and serve the Record on Appeal without the above matters included on December 6, 2012 along with a cover letter to the Court indicating these facts, attached as Exhibit "1". The Appellants did however, comply with the Court's Order by submitting the Respondent's above designated matter in the Supplemental Record on Appeal on July 1, 2013.

In reference to All Trial Exhibits, Village West's counsel alleges that only five of the eleven Trial Exhibits were included in the Record on Appeal, which is false. Six of the eleven Trial Exhibits were included in the December 6, 2012 Record on Appeal and the remaining five included in the July 1, 2013 Supplemental Record on Appeal separately as a result of Village West counsel's non-compliance with Appellant's request for production of designated matter to be included, attached as Exhibit "2". In addition, the Exhibits included in the Supplemental Record on Appeal accompany the subject of each matter in the order Respondent's counsel listed.

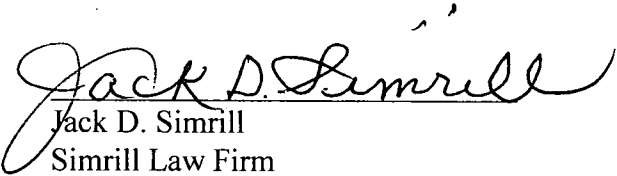
The Respondent's counsel also alleges that Appellants, Arata, failed to delete items from the Record on Appeal not presented to the matter-in-equity, specifically: Plaintiffs' Motion to Reconsider and Amend Judgment and Notice of Motion (R. pp. 94-95); Notice of Motion for Summary Judgment in Civil Action No. 05-CP-07-475

(R.p. 109); and Pages 6 and 7 of Village West's Memorandum in Support of Motion for Summary Judgment (R. pp. 110, 111). Plaintiffs' Motion to Reconsider and Amend Judgment and Notice of Motion (R.pp.94-95) was presented to the master-in-equity in April of 2012 and scheduled for hearing on Wednesday, June 13, 2012 at 10:00 a.m., as is stated in the notice dated May 17, 2012, attached as Exhibit "3". Notice of Motion for Summary Judgment in Civil Action No. 05-CP-07-475 (R.p. 109) and Pages 6 and 7 of Village West's Memorandum were, in fact, presented to the Lower Court, entered into the Record on Appeal, and ruled on, as stated in the May 10, 2013 letter to the Honorable John D. Geathers from Appellants' attorney, Jack D. Simrill, attached as Exhibit "4".

In addition, Respondent's counsel claims that (3) pages of the Defendant's Trial Exhibit 1 were not included in the Supplemental Record on Appeal filed with the Court of Appeals. If this is true, Appellants' will submit their filed copies of the (3) pages of the Defendant's Trial Exhibit 1 and trust the copies they submit will suffice.

On Friday, June 28, 2013, at 3:15 p.m., the Appellants attempted to service on the Respondent, Village West Owners' Association, Inc. d/b/a Village West Horizontal Property Regime, by hand delivery in the manner prescribed by the applicable rules of Civil Procedure to Village West's counsel, Brian C. Pitts, of Smoot & Pitts law firm, the Supplemental Record on Appeal. The law office of Smoot & Pitts was closed with a note on the office door stating the summer Friday hours open from 8:30 a.m. to 12:00 noon p.m. resulting in the Appellants then successfully servicing, by hand, the Supplemental Record on Appeal on July 2, 2013.

Yours Respectfully,

A handwritten signature in black ink that reads "Jack D. Simrill". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

Jack D. Simrill
Simrill Law Firm
5 Pine Field Road
Hilton Head Island, SC 29926-2013
(843)415-5293
ATTORNEY FOR APPELLANTS

July 24, 2013

Brian C. Pitts, Esquire
Smoot & Pitts
15C Lafayette Place
P.O. Drawer 23439
Hilton Head Island, SC 29925-3439
(843)681-3200
ATTORNEY FOR RESPONDENT

JACK D. SIMRILL
Attorney at Law
P.O. Box 5681
Hilton Head Island, SC 29938
Phone (843) 785-2134
Fax (843) 671-4733

December 6, 2012

Honorable Jenny Kitchings, Clerk
South Carolina Court of Appeals
2014 Sumter Street
Columbia, South Carolina 29901-1128

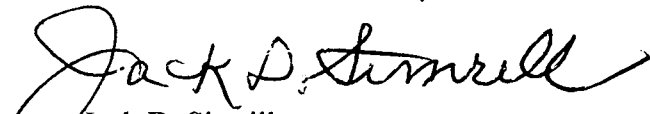
Re: Madeleine R. Arata and Kenneth C. Arata
v. Village West Owners' Association, Inc., etc.
Case No. 09-CP-07-00036

Dear Ms. Kitchings:

In reference to the Designation of Matter to be Included in the Record on Appeal, attached Exhibit 1, submitted to my office by Brian Pitts, the Attorney for the Respondents in the above matter, I wish to respectfully inform the Court that the requests of Mr. Pitts include matters that are irrelevant to the Appeal and do not comply with the South Carolina Court of Appeals Rule 209(b),(c); Rule 210(c); Rule 222(c) and the requirements of Rule 267.

In addition, I attempted to contact Mr. Pitts by telephone to inform him of the specific matters contained in his request that I was not in possession of, attached Exhibit 2, giving him an opportunity to forward these matters to me for inclusion into the Record on Appeal. To date, Mr. Pitts has not returned my telephone call therefore the matters in question could not be entered into the Record in the time allowed to print and file.

Yours Respectfully,


Jack D. Simrill

JDS/ssr

Enclosures: Designation of Matter to be
Included in the Record on Appeal

Appellants' response to Respondent's Matter
to be Included in the Record on Appeal

5
EXHIBIT "1"

STATE OF SOUTH CAROLINA
 COUNTY OF BEAUFORT

Case # 2009-CP-07-036

EXHIBITS

Plaintiff(s) Madeline R Arata + Kenneth C. Arata

vs.
 Defendant(s) Village West Horizontal Property Regime

Already →
 In
 Record

6 - Already In
 5 - To Be
 11 Total

PLAINTIFF'S EXHIBITS	DEFENDANT'S EXHIBITS	COURT'S EXHIBITS
1 Affidavit of Mary Probert	1 Amended Complaint + Summons	1
2	2 Answers to Deft's Interrogatories + depositions	2 ← Already In
3	3 letter dated 8-24-07	3 ← Already In
4	4 letter dated 10-31-07	4 ← Already In
5	5 Incident report 9-17-99	5 ← Already In
6	6 Damage Report	6 ← Already In
7	7 letter dated 11-18-99	7
8	8 General ledger	8
9	9 Chronology of repair work	9
10	10 memo dated 12-6-04	10
11	11	11
12	12	12
13	13	13
14	14	14
15	15	15
16	16	16
17	17	17
18	18	18
19	19	19
20	20	20

Court Reporter Lora L. McDaniel Trial Judge Dukes
 Clerk of Court Diane Cade

Date 3-26-12

6 EXHIBIT "2"



MASTER IN EQUITY

County Courthouse
102 Ribaut Rd., Rm 212
Beaufort, South Carolina 29902
Post Office Drawer 1228
Beaufort, SC 29901

(843) 255-5710
Fax: (843) 255-0505

May 17, 2012

Brian C. Pitts, Esq.
Smoot Pitts Elliott & Biel
Post Office Box 23439
Hilton Head, SC 29925

Jack D. Simrill, Esq.
Post Office Box 5681
Hilton Head, SC 29938

Re: Arata, et al. vs. Village West
Case No.: 2009-CP-07-00036

Please be advised; I scheduled Plaintiff's Rule 60(b) Motion for Relief from Judgment and Motion to Reconsider or Amend Judgment and Defendant's Petition for Attorney's Fees and Cost, in the above-referenced case, for Wednesday, June 13, 2012, at 10:00 A.M. The hearing is before the Honorable Marvin H. Dukes, III, Master In Equity and Special Circuit Court Judge for Beaufort County, and will take place at 102 Ribaut Road, Beaufort, SC, 29902, on the 2nd floor of the County Courthouse, room 212.

Please feel free to contact me if there are any questions regarding the above scheduled time.

Sincerely,

Heather R. H. McLeod
Judicial Assistant to
Hon. Marvin H. Dukes, III
Beaufort County Master In Equity
And Special Circuit Court Judge
hmcleod@bcgov.net

HRHM/mie

7

EXHIBIT "3"

Jack D. Simrill
Simrill Law Firm
5 Pine Field Road
Hilton Head Island, SC 29926-2013
Telephone 843-415-3293
May 10, 2013

Honorable John D. Geathers
P.O. Box 11629
Columbia, SC 29211

**RE: Madeleine R. Arata and Kenneth C. Arata v Village West Owners Association, Inc.,
d/b/a Village West Horizontal Property Regime
Appellate Case No. 2012-212486**

Dear Judge Geathers:

Appellants are in the process of amending the record on appeal as directed by the second paragraph of your order filed March 26, 2013, which did not come to my attention until I was reinstated as a member of the bar the latter part of April 2013, after my membership had lapsed due to my failure to renew my membership, which was due to having pneumonia in both lungs in November and December.

Responding to paragraph three of the March 26, 2013 Order, the notice and motion for Summary Judgment dated October 3, 2005 and filed April 2, 1996 in Book 347, Page 593 and recorded April 17, 1996 in Book PC at Page 371 and Pages 6 and 7 of Village West's memorandum in support of Motion for Summary Judgment were not presented to the Master-in-Equity and designated by the parties to be included in the record on appeal. It was heard and ruled upon by Circuit Judge Jackson Gregory who addressed them in Paragraph 6 of his January 16, 2006 Order Granting Summary Judgment and Judgment of Foreclosure and Sale in the following language at Page 3 of the Record on appeal in Case No. 05-CP-07-475:

" 6. The Defendant in denying liability for paying the sum assessed relied on Article

8

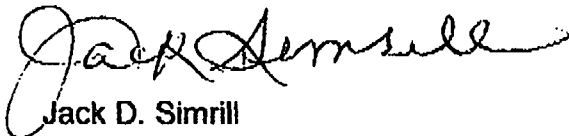
EXHIBIT " 4 "

IX Section (3) of the bylaws which provides that where casualty insurance proceeds are insufficient to effect required reconstruction as a result of a casualty the owner of the apartments being reconstructed must cover the shortfall. The Defendants' reliance on Article IX is misplaced. There has been no casualty, no casualty insurance proceeds have been paid to the association and all of the buildings in the regime are being reconstructed using the net proceeds of the construction defect suit settlements along with an assessment against all owners. The defense is without merit because there had been no casualty and all owners must contribute proportionately to common expenses."

This should suffice to show proof that the above two motions were in fact presented to the Lower Court, entered into the record on appeal, and ruled on.

We attempted to contact the Court of Appeals during both the morning and afternoon Friday, May 10, 2013, but no one answered.

Yours respectfully, →



Jack D. Simrill

CC: Brian C. Pitts

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity/Circuit Court Judge

Case No. 2009-CP-07-00036

Madeline R. Arata and Kenneth C. Arata.....Appellants,

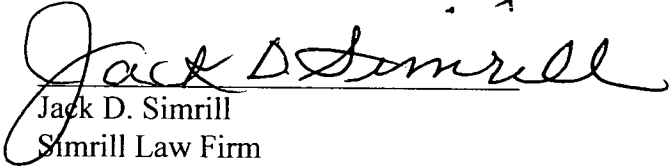
v.

Village West Owners' Association, Inc.
d/b/a/ Village West Horizontal Property Regime.....Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2013, a copy of the Appellants' Response to Respondent's Motion To Dismiss Appeal in the above captioned action was served on the Respondent, Village West Owners' Association, Inc., d/b/a Village West Horizontal Property Regime, by hand delivery in the manner prescribed by the applicable rules of Civil Procedure addressed to its counsel as follows:

Brian C. Pitts, Esquire
Smoot & Pitts
15C Lafayette Place
P.O. Drawer 23439
Hilton Head Island, SC 29925-3439


Jack D. Simrill

Simrill Law Firm

5 Pine Field Road

Hilton Head Island, SC 29926-2013

(843)415-5293

ATTORNEY FOR APPELLANTS

July 24, 2013

JACK D. SIMRILL
ATTORNEY AT LAW
5 PINE FIELD ROAD
HILTON HEAD ISLAND
SOUTH CAROLINA 29926-2013
TELEPHONE 843-415-5293

July 24, 2013

The Honorable Jenny Kitchings, Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

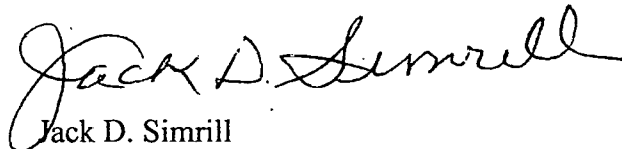
Re: Madeline R. Arata and Kenneth C. Arata v. Village West Owners' Association, Inc.
d/b/a Village West Horizontal Property Regime: Case No. 2009-CP-07-00036

Dear Ms. Kitchings:

In connection with the above referenced matter, enclosed please find the original and six (6) copies of Appellants' Response to Respondent's Motion to Dismiss Appeal, and Certificate of Service. Also enclosed is a check for the sum of \$25.00 to cover the court filing fee.

Thank you for your time in this matter.

Respectfully yours,


Jack D. Simrill

JDS/vs
Enclosure
c: Brian C. Pitts, Esquire (w/encl.)
Mr. and Mrs. Kenneth C. Arata

RECEIVED

JUL 25 2013

SC Court of Appeals