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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

J. Cordell Maddox Jr., Circuit Court Judge

Appellate Case No. 2024-000027
Case No. 2022-CP-40-06509

The Lofts at Printers Square Condominium Association, Inc., Respondent,

v.

M Gourmet Group, LLC, Appellant.

INITIAL BRIEF OF APPELLANT

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II. Did the circuit court err by granting Respondent's motion for judgment on the pleadings based upon Appellant's responses to requests for admission despite Appellant's meritorious motion for leave to amend those responses?

STATEMENT OF THE CASE AND FACTS

On or about June 14, 2011, the Master Deed and Declaration of Covenants, Conditions, Restrictions, Easements, Charges, and Liens for The Lofts at Printers Square Horizontal Property Regime was executed by The Lofts at Printers Square, LLC (the "Master Deed")[1]. (Master Deed; R.___.) The By-Laws of and Articles of Incorporation for The Lofts at Printers Square Condominium Association, Inc. (the "Association" or "Respondent") are attached as Exhibit B to the Master Deed. The Lofts at Printers Square Horizontal Property Regime includes a condominium property comprised of two (2) Commercial Units[2] and eleven (11) Residential Units. (*Id.* at Article II, § 2.3; R.___.) The Commercial Units are at ground level and the Residential Units are on levels two and three, directly above the Commercial Units. (*Id.*)

Pursuant to the Master Deed, the owner of each residential unit was assigned use rights for one (1) parking space in the Residential Parking Area. (*Id.* at Article II, § 2.14; R.___) Additionally, all residential and commercial owners, along with their guests and customers, were authorized to park in the Additional Parking Area which has twenty-two (22) parking spaces, subject to the terms of the Parking License Agreement, which is attached as Exhibit F to the Master Deed. (*Id.* at Article II, § 2.1; R.___.) As its name suggests, Commercial Suites A and B were specifically designed for commercial use. The Master Deed expressly provides, "[a]ll Commercial Units shall be used for commercial, non-residential purposes and for ancillary commercial uses in conformity with all applicable codes and ordinances including, without limitation, governmental zoning restrictions, business regulations, and licensing requirements." (*Id.* at Article V, § 5.3; R.___.)

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[1] On or about July 7, 2011, the Master Deed was recorded in the office of the Richland County Register of Deeds. (Compl. ¶ 6; R.___.)

[2] Commercial Suite A and Commercial Suite B.

Pursuant to the Master Deed, "**the permitted uses and prohibited uses of the Commercial Units set forth in this Section *shall not be amended or modified by the Board* and *no Rules and Regulations* which exceed the terms and conditions of this Section, restrict the permitted hours of operation to less than 8 a.m. through 11 p.m., or otherwise unreasonably restrict the commercial use of the Commercial Units *shall be effective against the Commercial Units, without the prior written consent of the Owners of the Commercial Units***." (*Id.* at Article V, § 5.3.2 (emphasis added).)

On or about April 6, 2012, M Gourmet Group, LLC ("MGG" or "Appellant") purchased Commercial Suite A and Commercial Suite B in The Lofts from The Lofts at Printers Square, LLC. (Compl. ¶ 9; R.___.) The Master Deed was incorporated into the Deed for the conveyance of Commercial Suites A and B to Appellant. (Deed at 2; R.___.) As part of the transaction and inducement for MGG to purchase Commercial Suites A and B, The Lofts at Printers Square, LLC executed a First Amendment to the Master Deed. (MGG's Proposed Amended Answer ¶ 33; R. ___.) Pursuant to the First Amendment to the Master Deed dated April 6, 2012, six (6) parking spaces within the Additional Parking Area were deemed limited common elements of Commercial Suite A and five (5) parking spaces within the Additional Parking area were deemed limited common elements of Commercial Suite B. (First Amendment to the Master Deed ¶ 7; R.___.) The remaining eleven (11) parking spaces within the Additional Parking Area were deemed limited common elements of the eleven (11) residential units. (*Id.*) Pursuant to the First Amendment to the Master Deed, "Declarant and the Association reserve the specific right to reassign parking spaces that constitute a Limited Common Element for each Unit; provided, however, that **the number of parking spaces assigned to each Unit shall not be altered**." (*Id.* ¶ 12 (emphasis added); R.___.) The First Amendment to the Master Deed also added the following language to

the end of Section 5.3 (Article V) in the Master Deed:

> However, notwithstanding anything to the contrary in the foregoing or in this Master Deed, nothing in this Master Deed shall be deemed to prohibit the use of any Commercial Unit as a restaurant or test kitchen, nor shall any Rules and Regulations of the Board unreasonably restrict the use of the Commercial Units so as to preclude their use as a restaurant or test kitchen.

(*Id.* ¶ 9; R.___.)

The First Amendment to the Master Deed did not purport to make any changes to Article V, Section 5.3.2 of the Master Deed. (*See generally* First Amendment to the Master Deed; R.___.) The First Amendment to the Master Deed was executed contemporaneously with the Deed for the conveyance of Commercial Suites A and B to MGG and was an integral part of MGG's purchase of Commercial Suites A and B. (MGG's Proposed Amended Answer ¶¶ 12, 35; R.___.)

On or about May 19, 2016, Respondent executed the Second Amendment to the Master Deed. (Second Amendment to the Master Deed; R.__.) Pursuant to the Second Amendment to the Master Deed (which is the most recent amendment to the Master Deed), Plaintiff made several changes to the Master Deed, including but not limited to significantly reducing the number of parking spaces assigned to Appellant in direct contravention of the First Amendment to the Master Deed. (*Id.* ¶ 3; R.___.) Pursuant to the Second Amendment to the Master Deed, nine (9) parking spaces were taken away from Appellant, leaving one (1) parking space within the Additional Parking Area as a limited common element of Commercial Suite A, and one (1) parking space within the Additional Parking Area is deemed a limited common element of Commercial Suite B. (*Id.*) The eleven (11) parking spaces within the Additional Parking Area remained unchanged as limited common elements of the eleven (11) Residential Units, but the remaining nine (9) parking spaces that were taken from Appellant within the Additional Parking Area were then deemed general common elements. (*Id.*) Further, the Second Amendment to the Master Deed provides,

"The Board may, in its discretion, adopt Rules and Regulations governing the use of all parking spaces in the Additional Parking Area, including but not limited to spaces constituting Limited Common Elements." (*Id.*) The Second Amendment to the Master Deed does not purport to make any changes to Article V, Section 5.3.2 of the Master Deed. (*See generally* Second Amendment to the Master Deed; R.____.)

On or about December 29, 2021, Respondent executed Rules and Regulations for The Lofts at Printers Square Condominium Association, Inc. and Rules Enforcement and Fine Policy, which purports to establish various new requirements and restrictions/prohibitions and establish penalties (i.e., fines) for violations of the Rules and Regulations. (*See generally* Rules and Regulations; R. __.) For example, the Rules and Regulations, require "proper attire" to be worn in the common areas, and outrightly prohibit the following activities: (1) amplified music in the form of disc jockeys, live bands, karaoke machines, vocalists, etc.; (2) smoking and vaping in all common areas and within twenty-five (25) feet of the building; and (3) the discharge of fireworks or other explosive devices of any type in or around building by owners, tenants, occupants, guests, invitees, licensees, agents and contractors of owners; (4) renting units for nonresidential uses, such as special events, functions, and parties. (*Id.* at 2-4; R.___.)

The Complaint

On December 13, 2022, Respondent initiated the underlying action by filing its Complaint for Declaratory Judgment. (Compl.; R.___.) In its Complaint, Respondent alleged that Appellant was in violation of the Master Deed, Bylaws, and Rules and Regulations regarding the Commercial Units and asserted a single cause of action for declaratory judgment seeking an order declaring that the Master Deed, Amendments to it, Bylaws, and Rules and Regulations are valid and enforceable. (*Id.* ¶¶ 24, 28; R.___.)

MGG's Initial Answer to the Complaint

On February 16, 2023, Appellant, represented by Haynsworth Sinkler Boyd, PA ("Appellant's First Counsel"), filed its initial answer to the Complaint. (Answer; R.__.) Notably, in its Answer, Appellant admitted on information and belief that the Commercial Units are subject to the terms of the First and Second Amendment to the Master Deed. (*Id.* ¶¶ 16, 18 (emphasis added); R.___.) In response to Respondent's allegations that "[a] valid and enforceable" First and Second Amendment to the Master Deed was executed and recorded in the Office of Richland County Register of Deeds, Appellant admitted only Respondent's allegations consistent with the public records of Richland County, South Carolina and expressly denied the remaining allegations inconsistent therewith. (*Id.* ¶¶ 15, 17; R.____.) In its Answer, Appellant stated that it was "***without information sufficient to form a belief*** as to whether the Rules and Regulations were enacted in compliance with the Master Deeds [sic], Plaintiff's Bylaws, and other governing documents." (*Id.* ¶¶ 20, 22 (emphasis added); R.___.) Appellant also affirmatively alleged that "to the extent the Rules and Regulations are enforceable against M Gourmet, they have been inconsistently, wrongfully, and unfairly enforced against M Gourmet." (Answer ¶ 22; R.____.) Appellant disputed Respondent's allegations that it was in violation of the Master Deed, amendments to it, the Bylaws, and the Rules and Regulations (the "Regime Documents"). (Compl. ¶ 26; Answer ¶¶ 24, 26; R._____.)

MGG's Responses to Requests for Admissions

On February 16, 2023, Appellant also served its responses to Respondents' Rule 36 requests for admissions which included admissions that the Master Deed, amendments to it, and the Rules and Regulations are valid and enforceable and that the Commercial Units are subject to the terms of the Master Deed, amendments to it, and the Rules and Regulations. (MGG's

Responses to Requests for Admission ¶¶ 3-8; R. ___.)

Respondent's Motion for Judgment on the Pleadings

On March 13, 2023, Respondent filed its motion for judgment on the pleadings or in the alternative, for summary judgment based on the allegations in the Complaint, the admissions in Appellant's Answer, and Appellant's responses to Respondent's requests for admission. (Respondent's Motion for Judgment on the Pleadings; R.___.) In its motion, Respondent argued that the pleadings and the admissions made in Respondent's responses to Rule 36 requests show that there is no genuine issue as to any material fact. (*Id.* ¶ 10; R.___.) Three days after Appellant filed its motion for judgment on the pleadings, Appellant's First Counsel moved to be relieved as counsel of record and the following day, March 17, 2023, the circuit court entered a consent order relieving Appellant's First Counsel. (Consent Order; R. __.)

MGG's Proposed Amended Answer and Responses to Requests for Admission

On April 14, 2023, Tobias G. Ward, Jr. ("Appellant's Second Counsel") made an appearance on behalf of Appellant. Thirteen (13) days later, he emailed counsel for Respondent a copy of Appellant's proposed amended answer and amended responses to requests for admission. (MGG's Motion to Amend at 1; R.___.) In its proposed amended answer, Appellant made certain changes which included: (1) a stronger denial of the validity and enforceability of the Second Amendment to the Master Deed (MGG's Proposed Amended Answer ¶ 16; R.___), (2) qualifying its response to paragraph 22 of the Complaint regarding the enforceability and binding effect of the Rules and Regulations on Appellant (*Id.* ¶ 20; R.___), and (3) adding claims seeking court protection over unfair, prejudicial, and oppressive action by Respondent against Appellant, a minority member, and a declaration that the Second Amendment to the Master Deed is not valid or enforceable and that Respondent may not unreasonably restrict the use of the Commercial Units.

(*Id.* ¶¶ 40-54; R.___.) Appellant also revised its responses to Respondent's Rule 36 requests for admission to be consistent with its proposed amended answer. (*See generally* MGG's Proposed Amended Responses to Requests for Admission; R.____.)

MGG's Motion to Amend

After receiving no response to Appellant's proposed amendments to its Answer and responses to Rule 36 requests, on August 18, 2023, Appellant moved the circuit court, pursuant to Rule 15, SCRCP, for leave to amend its answer and, pursuant to Rule 36, SCRCP, for leave to serve amended responses to Plaintiff's requests for admission. (*See generally* MGG's Motion to Amend; R.____.) In its motion to amend, Appellant argued that because (1) the amendments in the proposed amended answer and amended responses to Rule 36 requests corrected inaccurate statements made by Appellant's First Counsel and were provided to Respondent almost four months ago, (2) Appellant was represented by new counsel who had a different interpretation of the case than former counsel, and (3) the case had not yet been scheduled for trial, the circuit court should grant Appellant's motion to amend and allow Appellant to amend its Answer and responses to requests for admission. (*See id.*)

MGG's Opposition to Respondent's Motion for Judgment on the Pleadings

On August 30, 2023, Appellant filed its opposition to Respondent's motion for judgment on the pleadings, asserting, *inter alia*, that (1) even if the circuit court only considered the allegations in Appellant's Answer (and not its proposed amended answer), Appellant's defenses (latches, waiver, consent, estoppel, and unjust enrichment) could bar the enforceability of the Regime Documents, which is enough to deny judgment on the pleadings; and (2) that the proposed amendments to the Answer and responses to requests for admission, if permitted or considered by the circuit court, create issues that must be decided before judgment can be granted. (MGG's

Return to Plaintiff's Motion or Judgment on the Pleadings at 5, 7; R.___.)

On September 7, 2023, the circuit court heard oral arguments for Respondent's motion for judgment on the pleadings only. (September 7, 2023 Transcript of Record; R.___.) Subsequently, on December 4, 2023, the circuit court issued an order granting Respondent's motion for judgment on the pleading. (Order at 9; R. __.) In the order, the circuit court also found that "MGM's [sic] motion to amend should be denied." (*Id.*) This appeal followed.

STANDARD OF REVIEW

A. Amendment of Pleadings

Rule 15(a) of the South Carolina Rules of Civil Procedure ("SCRCP") provides:

> A party may amend his pleading once as a matter of course at any time before or within [thirty] days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within [thirty] days after it is served. Otherwise **a party may amend his pleading only by leave of court or by written consent of the adverse party; ... leave shall be freely given when justice so requires and does not prejudice any other party**.

Rule 15(a), SCRCP (emphasis added). "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Curry v. Carolina Ins. Grp. of SC, Inc.*, 428 S.C. 60, 75-76, 832 S.E.2d 760, 768 (Ct. App. 2019) (internal quotation marks and citations omitted). "The prejudice contemplated in Rule 15 is not that the non-moving party is forced to defend the merits of a valid claim." *Patton v. Miller*, 420 S.C. 471, 491, 804 S.E.2d 252, 262 (2017). Rather, "Rule 15 prejudice is some result flowing from the amendment that puts the non-moving party at a disadvantage in defending the merits, which disadvantage the party would not have faced if the amended claim had been included in the original pleading or a timely motion to amend." *Id.* at 491, 804 S.E.2d at 262-63.

The Supreme Court of South Carolina has opined,

> '[Rule 15(a), SCRCP] **strongly favors** amendments and the court is encouraged to freely grant leave to amend.' 'Rule 15(a) is substantially the same as the Federal Rule,' Rule 15(a), SCRCP notes, and the Supreme Court of the United States has referred to the Rule's 'freely given' provision as a 'mandate' that 'is to be heeded[.]'"

Patton, 420 S.C. 471, 489-90, 804 S.E.2d 252, 261-62 (2017) (emphasis added) (citations omitted). Thus, [i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" *Id.* at 490, 804 S.E.2d at 262 (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962)). "[T]he party opposing the motion has the burden of establishing prejudice." *Curry*, 428 S.C. at 76, 832 S.E.2d at 768.

"While a motion of this kind is addressed to the sound discretion of the trial court, 'this does not give the trial judge an entirely free hand in what might be termed discretionary matters.'" *Elrod v. Elrod*, 230 S.C. 109, 115, 94 S.E.2d 237, 239 (1956) (citations omitted). Moreover, "a court's failure to exercise its discretion is itself an abuse of discretion." *Patton v. Miller*, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017). "The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Curry*, 428 S.C. at 76, 832 S.E.2d at 768 (internal quotations marks and citation omitted).

B. <u>Amendment of Responses to Requests for Admission</u>

Rule 36(a), SCRCP provides: "A party may serve upon any other party a written request for the admission . . . of the truth of any matters within the scope of Rule 26(b) . . ." However, an admission may be withdrawn upon application to the court:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admissions fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

Rule 36(b), SCRCP. ***See also*** *Com. Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc.*, 347 S.C. 545, 554, 556 S.E.2d 718, 723 (Ct. App. 2001).

"The trial court may allow a party to amend or withdraw its answers to a request to admit when: (1) the presentation of the merits is furthered by the amendment; and (2) the party who obtained the admission cannot demonstrate prejudice because of the amendment." *Com. Ctr. of Greenville, Inc.*, 347 S.C. at 557, 556 S.E.2d at 724 (citing Rule 36(b), SCRCP). The first requirement is satisfied where the admission, if not dispositive, involves a "crucial issue" or "key factual elements of [a party's] causes of action." *Barber v. Hobbs*, 313 S.C. 319, 321, 437 S.E.2d 409, 410 (Ct. App. 1993) (citing *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 110, 410 S.E.2d 537, 542 (1991)). "In assessing whether withdrawal and amendment would promote the presentation of the merits of the action, courts look at whether the proposed amendments will facilitate the development of the case in reaching the truth, as in those cases where a party's admission[s] are inadvertently made. Courts often find that this prong is met when the deemed admissions effectively resolve the case and upholding the admissions would eliminate any need for a presentation on the merits." *McGrew v. ASM Glob.*, No. CV 2:20-00086-RMG, 2020 WL 6566462, at *3 (D.S.C. Nov. 9, 2020) (internal quotation marks and citations omitted).[3]

[3] Although the District of South Carolina Court cases cited throughout Appellant's Initial Brief analyze Rule 36 of the Federal Rules of Civil Procedure, "[t]he federal rule on requests for admissions is substantively similar to [South Carolina's] rule." *Scott v. Greenville Hous. Auth*, 353 S.C. 639, 649, 579 S.E.2d 151, 156 (Ct. App. 2003)

The second requirement demands the nonmovant prove that it would be prejudiced by the requested amendment. *Com. Ctr. of Greenville, Inc.*, 347 S.C. at 557, 556 S.E.2d at 724. "For purposes of Rule 36(b), prejudice results where a party faces difficulty in proving its case because of a sudden need to obtain evidence required to prove the matter that had been admitted." *Kelly v. Equifax, Inc.*, No. 8:12-CV-03095-MGL, 2013 WL 5954799, at *4 (D.S.C. Nov. 7, 2013) (internal quotation marks and citations omitted). "The fact that the [nonmovant] will now have to meet the burden of proving his case and convincing the fact finder of its truth does not constitute prejudice, even though it will be time consuming and cost additional money." *Wellin v. Wellin*, No. 2:13-CV-1831-DCN, 2015 WL 5785709, at *5 n.6 (D.S.C. July 31, 2015), *report and recommendation adopted as modified,* No. 2:13-CV-1831-DCN, 2015 WL 5781383 (D.S.C. Sept. 30, 2015). The circuit court's failure to consider the Rule 36(b) factors in ruling on a motion to amend responses to requests for admission constitutes an abuse of discretion. *See McGrew*, 2020 WL 6566462 at *2. *See also Scott*, 353 S.C. at 652, 579 S.E.2d at 158 (holding the circuit court committed an abuse of discretion in allowing the withdrawal of admissions for lack of response where the circuit court failed to address the prejudice that would be suffered by the plaintiff).

ARGUMENT

I. The circuit court erred by granting Respondent's motion for judgment on the pleadings based upon Appellant's Answer despite Appellant's meritorious motion for leave to amend its answer.

The circuit court did not consider Appellant's motion to amend in its decision to grant Respondent's motion for judgment on the pleading. Although there are two paragraphs in its order that purport to support the circuit court's finding that "MGM's [sic] motion to amend should be denied," the order falls short of *actually* denying Appellant's motion to amend. (Order at 6-8; R.___.) As evident from a review of the transcript of the hearing on September 7, 2023,

Appellant's motion to amend was not actually considered by the circuit court because, as first pointed out by counsel for Respondent, it was "not on the roster for [September 7, 2023]." (September 7, 2023 Transcript of Record at 6.)

In this case, since the circuit court ultimately granted Respondent's motion for judgment on the pleadings without first considering Respondent's motion to amend, the circuit court undoubtedly failed to exercise its discretion. "[A] court's failure to exercise its discretion is itself an abuse of discretion." *Patton v. Miller*, 420 S.C. at 490, 804 S.E.2d at 262 (citation omitted). On the contrary, *if* the circuit court did consider the motion to amend, the circuit court erred in refusing to allow Appellant to amend its answer and responses to requests for admission for several reasons.

First, under Rule 15(a), SCRCP, the circuit court should have considered whether the defendants were prejudiced by the amendment, or whether there was some other substantial reason to deny it, but the circuit court failed to do so in its order. Whether or not the proposed amendments are based upon "any newly discovered fact or evidence" should not be a consideration of the circuit court. (*See* Order at 6; R.___.) Moreover, the burden is on Respondent to establish prejudice, not Appellant. *See Curry*, 428 S.C. at 76, 832 S.E.2d at 768. That Respondent would be forced to prove its claim and defend the merits of valid claims and defenses asserted by Appellant is not the kind of prejudice contemplated under Rule 15, especially early in the case when trial has not yet been scheduled. *See Patton*, 420 S.C. at 491, 804 S.E.2d at 262-63.

Appellant first provided its proposed amended Answer to Respondent on April 27, 2023, and thus provided Respondent with adequate notice of the new issues that would be tried and an opportunity to refute it. *Cf. Curry*, 428 S.C. at 75-76, 832 S.E.2d at 767-68 (holding the circuit court did not err in allowing the defendant to amend their answer at trial to assert an affirmative

defense of release because the plaintiff was not prejudiced by it since the plaintiff knew the contents of the release and the circuit court allowed the plaintiff time to brief and argue the issue of the release). The assertions in the order that "the pleadings raise no dispute regarding the validity and enforceability of the Master Deed, First Amendment and Rules and Regulations[,]" (Order at 4; R.___), and that "MGM [sic] admits in its initial answer . . . that the Second Amendment is enforceable[,]" (Order at 5; R.___), are erroneous. In its Answer, Appellant did not admit that the Second Amendment to the Master Deed was valid and enforceable, nor did it admit that the Rules and Regulations were enacted in compliance with the Master Deed, the Bylaws or other governing documents or enforceable against Appellant. (Answer ¶¶ 15, 17, 20, 22; R._____.) Thus, since the earliest time possible, Respondent had notice of Appellant's defenses in this case, regardless of any contradictory admissions inadvertently made in response to Rule 36 requests for admissions. "'Allegations in a [c]omplaint denied in [an] answer are evidence of nothing.'" *Curry*, 428 S.C. at 71, 832 S.E.2d at 765 (quoting *Griffin v. Van Norman*, 302 S.C. 520, 522, 397 S.E.2d 378, 379 (Ct. App. 1990)).

Second, the circuit court made several inaccurate factual determinations that unsurprisingly supported its decision to grant Respondent's motion for judgment on the pleadings. The circuit court's order provides, ***"[a]s noted above**, **even if the amendments were allowed**,* they would not create a genuine dispute of material fact regarding the validity and enforceability of the regime documents." (Order at 6 (emphasis added).) The alleged undisputed facts "noted above" in the circuit court's order, however, *are* disputed. Only the following facts are "undisputed":

- The Master Deed provides, "the permitted uses and prohibited uses of the Commercial Units set forth in this Section *shall not be amended or modified by the Board* and *no Rules and Regulations* which exceed the terms and conditions of this Section, restrict the permitted hours of operation to less than 8 a.m. through 11 p.m., or otherwise unreasonably restrict the commercial use of the Commercial Units *shall be effective against the Commercial Units, without the prior written consent*

of the Owners of the Commercial Units." (Master Deed at Article V, § 5.3.2 (emphasis added); R.___.)

- On April 6, 2012, the same day Commercial Suites A and B were conveyed to Appellant, Lofts at Printers Square, LLC executed the First Amendment to the Master Deed which implemented the following: (1) six (6) parking spaces within the Additional Parking Area were deemed limited common elements of Commercial Suite A; (2) five (5) parking spaces within the Additional Parking area were deemed limited common elements of Commercial Suite B; and (iii) the remaining eleven (11) parking spaces within the Additional Parking Area were deemed limited common elements of the residential units. (First Amendment to the Master Deed ¶ 7; R.___.)

- The Second Amendment to the Master Deed dated May 19, 2016 (the most recent amendment) took away nine (9) of the eleven (11) parking spaces within the Additional Parking Area specifically assigned to Appellant as limited common elements of Commercial Suites A and B and left Appellant with only two (2) parking spaces within the Additional Parking Area as limited common elements of Commercial Suites A and B. (Second Amendment to the Master Deed ¶ 3; R.___.) The remaining eleven (11) parking spaces within the Additional Parking Area remained unchanged as limited common elements of the eleven (11) Residential Units. (*Id.*)

The circuit court's assertion that "the Second Amendment did not remove or take away any spaces" is erroneous. (Order at 5; R.___.) Appellant's proposed amendments to its Answer added affirmative allegations that "[t]he Second Amendment and reallocation of the parking spaces also unreasonably restricts the use of the Commercial Units as a restaurant or test kitchen in violation of the Master Deed and First Amendment to the Master Deed" and that Respondent "is enforcing the Rules and Regulations against the Commercial Units in an unfair, oppressive and disproportionate manner which unreasonably restricts the use of the commercial space." (MGG's Proposed Amended Answer ¶¶ 39, 45; R.___.) These well-pled allegations, presumed to be true as they must at this stage, *Just. v. The Pantry,* 335 S.C. 572, 576-77, 518 S.E.2d 40, 42 (1999), create a genuine dispute of material fact regarding the validity and enforceability of the Regime Documents as to the Commercial units. What is clear is that the circuit court granted the motion

for judgment on the pleadings based on certain mischaracterizations of Respondent's counsel about what facts are "undisputed." The circuit court granted Respondent's motion (and thus, by default, denied Appellant's motion to amend) based on its *perception of the merits* of the amended claims, not under the criteria for amendment the court was required to consider under Rule 15(a). *See Patton*, 420 S.C. at 490-91, 804 S.E.2d at 262 (finding the circuit court erred in denying "the motion to amend based solely on its mistaken belief that the amendments could not relate back under Rule 15(c) . . . This was error, regardless of the soundness of the Rule 15(c) analysis").

Third, the circuit court states that denying leave to amend a pleading is proper here because allowing the amendment would be futile. (Order at 7; R.___.) Again, this assertion is based on a misstatement of certain facts: (1) that "[t]he proposed amendments admit the *validity* and *enforceability* of the Master Deed, First Amendment, and Rules and Regulations." (Order at 7 (emphasis added); R.___) and (2) that "the Master Deed allows for amendments without MGM's [sic] consent." (Order at 7-8; R.____.) Both statements are inaccurate. While the proposed amendments to the Answer and responses and requests for admissions do admit the *validity* and *enforceability* of the ***Master Deed*** and ***First Amendment*** because those were entered as part of the contract of sale and formed the basis of the parties' bargain, (MGG's Proposed Amended Responses to Requests for Admission at ¶¶ 5-6; MGG's Proposed Amended Answer at ¶¶ 10-11, 15-16; R._____), Appellant denies the validity and enforceability of the Second Amendment to the Master Deed and admits only that the Commercial units are subject to the Rules and Regulations *provided* they are: (1) lawfully promogulated and lawfully, fairly and equitably enforced and (2) that they do not unreasonably restrict the use of the Commercial Units[4] (MGG's Proposed Amended Responses to Requests for Admission at ¶¶ 7-8; MGG's Proposed Amended

[4] Even in its original Answer, Appellant affirmatively alleged that the Rules and Regulations have been inconsistently, wrongfully, and unfairly enforced against Appellant. (Answer ¶ 22.)

Answer at ¶¶ 20, 24, 45; R._____.) Furthermore, while consent is required under Article V, Section 5.3.2 of the Master Deed for the Rules and Regulations to be effective against the Commercial Units, consent does not validate an otherwise invalid amendment or modification by the Board because *any* amendment or modification that changes the permitted uses or prohibited uses is strictly forbidden, regardless of consent. Article V, Section 5.3.2 of the Master Deed provides:

> "[T]he permitted uses and prohibited uses of the Commercial Units set forth in this Section *shall not be amended or modified by the Board* and *no Rules and Regulations* which exceed the terms and conditions of this Section, restrict the permitted hours of operation to less than 8 a.m. through 11 p.m., or otherwise unreasonably restrict the commercial use of the Commercial Units *shall be effective against the Commercial Units, without the prior written consent of the Owners of the Commercial Units*."

(Master Deed at Article V, § 5.3.2 (emphasis added); R.____.) Accordingly, the Second Amendment is ineffective as to Commercial Suites A and B because the Board ***never*** had any power to amend or modify the permitted uses or prohibited uses of the Commercial Units under any circumstances, which this amendment effectively does. Thus, whether Appellant consented to the Second Amendment to the Master Deed is immaterial, but for reasons not expressed in the circuit court's order. In addition, because the Rules and Regulations were created without the prior written consent of the owners of the Commercial Units, it is also not effective against the Commercial Units and are invalid and unenforceable as to the owners of the Commercial Units. The circuit court's assertion that "clearly the Master Deed allows for amendments without MGM's [sic] consent" is simply inaccurate. (Order at 7-8 (citing Master Deed at Article XII); R.___.) Article XII, Section 12.2 of the Master Deed does not override the specific limitations and prohibitions set forth in Article V, Section 5.3.2 of the Master Deed. Instead, Article XII, Section 12.2 of the Master Deed provides only the procedures for the Board to propose amendments to the

Master Deed that are otherwise *authorized* and *permitted* under the Master Deed or amendments thereto that are *lawfully* promulgated.

Simply put, this is not the rare case where it would be appropriate for the circuit court to deny a motion to amend. *Cf. Santos v. Harris Inv. Holdings, LLC*, 439 S.C. 214, 221, 886 S.E.2d 483, 486 (Ct. App. 2023), *reh'g denied* (May 15, 2023) (affirming circuit court's dismissal of the case with prejudice without allow the plaintiff the opportunity to amend because any amendment by the plaintiff would have been futile as the entire premise for the plaintiff's complaint does not warrant relief). Here, Appellant's proposed amended answer solidifies its defenses as well as sets forth claims against Respondent that would entitle Appellant to relief. (*See generally* MGG's Proposed Amended Answer ¶¶ 40-54; R.___). Therefore, the circuit court erred by taking the drastic step of granting judgment on the pleadings in this circumstance. *See Just. v. The Pantry*, 335 S.C. 572, 577, 518 S.E.2d 40, 42 (1999) (noting that judgment on the pleadings is "considered to be a drastic procedure by our courts").

II. The circuit court erred by granting Respondent's motion for judgment on the pleadings based upon Appellant's responses to requests for admission despite Appellant's meritorious motion for leave to amend those responses.

As stated *supra*, the circuit court failed to consider Appellant's motion to amend its responses to requests for admission in its decision to grant Respondent's motion for judgment on the pleadings. In its order, the circuit court references only Rule 36's purpose and ignores the discretionary factors established by Rule 36(b). (Order at 7; R.___.) The discretionary factors set forth by Rule 36(b), SCRCP requires the circuit court to consider (1) whether the presentation of the merits is furthered by the amendment and (2) whether Respondent has established prejudice because of the amendment. *Com. Ctr. of Greenville, Inc.*, 347 S.C. at 557, 556 S.E.2d at 724. The circuit court's failure to consider the Rule 36(b) factors when presented with Appellant's motion

to amend is an abuse of discretion. *See McGrew*, 2020 WL 6566462 at *2; *Scott*, 353 S.C. at 652, 579 S.E.2d at 158.

The first prong of Rule 36(b) weighs in favor of Appellant. Here, Appellant's First Counsel inadvertently made admissions that Appellant's Second Counsel sought to amend. It is undisputed that the admissions Appellant sought to amend involve crucial issues and key factual elements of Respondent's declaratory judgment action. *See Barber*, 313 S.C. at 321, 437 S.E.2d at 410. As evident by the grant of Respondent's motion for judgment on the pleadings, the admissions in Appellant's original responses to requests for admission effectively resolved the case, and thus, upholding the admissions would eliminate the need for Respondent to prove its claims based on the merits. This is precisely the circumstance contemplated by Rule 36(b) that support a court's approval of an amendment. *See id.* at 321, 437 S.E.2d at 410; *McGrew*, 2020 WL 6566462 at *3.

The second prong of Rule 36(b) also weights in favor of Appellant. That Respondent would have to prove its claims based on the evidence if the amendment is granted does not rise to the level needed to show the prejudice contemplated by Rule 36(b). *See Wellin*, 2015 WL 5785709 at *5 n.6. In its motion for judgment on the pleadings, Respondent does not allege that there are any evidentiary challenges, e.g. the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions. *See Kelly*, 2013 WL 5954799 at *4. As stated *supra*, Respondent had notice of Appellant's defenses in this case, regardless of any contradictory admissions inadvertently made in response to Rule 36 requests for admissions, since the earliest time possible with the filing of Appellant's Answer. For these reasons, Respondent cannot meet its burden in demonstrating that it would be prejudiced by the requested amendment.

CONCLUSION

For the reasons stated above, the Court should reverse the circuit court's order denying Appellant's motion to amend its answer to Respondent's complaint and responses to Respondent's requests for admissions.

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Respectfully Submitted,

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