STATE OF SOUTH CAROLINA)
)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 08-CP-14-645

Joseph E. Robinson, Lawrence J. Forstner, Dorothy Forstner, Charles A. Beasley, Sr., Charles A. Beasley, Jr., Hardie H. Painter as Trustee of the Hardie H. Painter Revocable Trust dated April 27, 1999, Bobby J. Watford, Mary Harrison, Donnie) Hugh Harrison, Gwendolyn C. Gandy, Robert A. Gandy, Floyd Calhoun Dent, III, FloydCalhoun Dent, Jr. and Jeffrey L. Koblitz,

Plaintiffs,

v.

Carolina King Retreat & Marina, LLC,

Defendant.

ORDER

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DATE 11-29-12
Beulah B. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

BEULAH G. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC
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This action was referred to the undersigned as a special referee by consent pursuant to Rule 53 of the South Carolina Rules of Civil Procedure. A two-day bench trial was held before me on November 2 and 3, 2010. The Plaintiffs were represented by Ian D. McVey of Callison, Tighe & Robinson, LLC of Columbia, South Carolina and Ray E. Chandler and Tara A. Leaphart of Coffey, Chandler, Kent & McKenzie, P.A. of Manning, South Carolina. The Defendants were represented by William H. Johnson of the Law Offices of William H. Johnson of Manning, South Carolina and R. Wayne Byrd of Turner, Padget, Graham & Laney, P.A. of Myrtle Beach, South Carolina. Based upon a thorough and careful review of the evidence presented, I make the findings of fact and determinations of law as provided below.

PROCEDURAL HISTORY

#1

This matter was commenced by the filing of a Summons and Complaint by the Plaintiffs on December 12, 2008 asserting causes of action against Defendant Carolina King Retreat and Marina, LLC (Carolina King) and David S. Bell (Bell) (collectively Defendants) for Declaratory Judgment, Breach of Contract, Specific Performance, Nuisance, Trespass, Conversion, and Accounting. On February 11, 2009, Defendants filed their Answer generally denying the allegations of the Plaintiff's Complaint, asserting various affirmative defenses, and alleging a Counterclaim for Declaratory Judgment.

Further, Carolina King filed on November 12, 2008, three separate actions against Floyd Calhoun Dent, III, Floyd Calhoun Dent, Jr. and Jeffrey L. Koblitz (Dent Defendants).

The matter was mediated and a resolution for a majority of the case was reached. By consent of the parties, an Order was submitted at trial resolving all issues with the exception of the Declaratory Judgment actions plead in the Plaintiffs Complaint and Carolina King's Answer and Counterclaim.

FACTS

"Carolina King Retreat and Marina," or, interchangeably "Carolina King" is the name used to identify a lakeside resort located on a waterfront tract of land on the shores of Lake Marion in Clarendon County ("the resort"). Approximately sixty-six cabins are located on the tract, as well as a store, several docks that extend in to the waters of the lake constructed for the purpose of providing owners of the cabins and others with a place to dock their boat, roads through the tract, and some other amenities available to owners of the cabins in the resort. Prior to its development as the resort in its present state, the land was occupied by a campground. Sometime prior to 2007, a limited liability company known as Carolina King Retreat and Marina, LLC ("the LLC"), purchased the property and redeveloped it.

The structure of the development is unusual. The sixty-six cabins are each located on a small lot of land. The owners of the cabins did not buy the real estate upon which the cabins are located, but instead leased the property for a period of ninety-nine years. In order to do so, purchasers of the cabins each signed a "99 Year Lease Agreement" ("99 Year Lease") which contained the provisions of the agreement between the cabin owner and the LLC, which continues to own the real estate. In addition, each of the "Lessees" signed a "Marina Lease Agreement for Owners of 99 Year Leases" ("Marina License Agreement"), which provided each signer with rights to one boat slip located on the boat docks, or marina. The 99 Year Lease Agreement and the Marina License Agreement each specified the rights and obligations of the parties to the documents. Those who signed a 99 Year Lease Agreement and a Marina License Agreement also signed a document called "Community Rules and Regulations" ("Rules and Regulations"). Among the obligations accepted by the Lessees in the 99 Year Lease Agreement was the obligation to pay a monthly "community services fee" to the LLC. Likewise, the Marina License Agreement required that the Lessees pay monthly to the LLC a "marina services fee."

The individual primarily responsible for developing the resort, and one of the members of the LLC was Hugh Mitchum. Sometime during 2007, all of the membership interests in the LLC were purchased by David Bell. Upon Bell's assumption of ownership of the LLC, he provided notice of changes to the Rules and Regulations, and increases in both the community services fee and the marina services fee.

The 99 Year Lease and the Marina License Agreement require the LLC to perform certain functions and pay certain expenses on behalf of all Lessees. Many of these functions and expenses are similar in nature to the needs of other operations at the resort conducted by the LLC and David Bell individually for the purpose of making a profit. These operations include a store,

where the LLC sells bait and convenience items and rents out boats, and cabins which are owned by David Bell and rented out for a profit. Accordingly, the same providers provide services to all. The same individuals who spend time maintaining the common areas used by the lessees also spend time that benefits only these functions.

The Plaintiffs are each owners (either individually or jointly) of one or more cabins in the resort and have each signed one or more 99 Year Lease Agreements, Marina License Agreements, and Rules and Regulations. Their complaint alleges various causes of action against Bell and the LLC, declaratory judgment actions alleging that the increases in the community services fee and the marina services fee were not authorized by the agreements signed, and that certain changes in the Rules and Regulations by the LLC under Bell's management were not allowed by the documents.

At the close of the evidence, counsel for the parties stipulated to and confirmed the settlement agreement providing for the dismissal of all causes of action against Bell and the LLC except the declaratory judgment actions concerning the increases in the community services fee and the marina services fee.

DISCUSSION

The Plaintiff's Complaint, seeks a determination from this Court that the monthly services fees being charged by the LLC are in violation of the 99 Year Lease and Marina License Agreements, and further seeks a determination as to how much those fees can be increased and for what the fees can be charged. The answers to these questions require the examination of the language of both agreements.

I. 99 Year Lease Agreement.

If a term of a contract could be given two meanings and one of these meanings would

make the contract unusual and extraordinary while the other would make the contract reasonable and fair, the term must be construed to make the contract reasonable and fair. (C.A.N. Enterprises, Inc. V. South Carolina Health and Human servs. Fin. Comm, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) A determination of whether or not the 99 Year Lease has been violated requires the court to both interpret the contract and apply the interpretation to certain facts as determined by the court, after observing all of the evidence. The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties. Chan v. Thompson, 302 S.C. 285, 289, 395 S.E. 2d 731, 734 (Ct.App. 1990). In determining the intention of the parties, a court first looks to the language of the contract and if the language is clear and unambiguous, the language alone determines the contract's force and effect. C.A.N. Enterprises, Inc. V. South Carolina Health and Human servs. Fin. Comm, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988); Conner v. Alvarez, 285 S.C. 97, 101, 328 S.E.2d 334, 336 (1985). There exists in every contract an unspoken, but legally enforceable, promise of good faith and fair dealing. Tadlock Painting Co. v. Maryland Casualty Co., 322 S.C. 498, 473 S.E. 2d 52 (1996). Section 5 (the only section addressing the payment of fees) of the 99 Year Lease signed by all Plaintiffs provides as follows:

> **Section 5. Services, Fees, and Permitted Uses.** Lessor shall be responsible for the following services to the Lessee and to the community: 1. Operation and maintenance of the water and sewer systems servicing the Premises, 2. Maintenance of roads providing ingress and egress from Belser Road to Premises, 3. Upkeep and maintenance of the common area and amenities 4. Obtaining and maintaining fire, casualty, and general liability insurance, and 5. Providing utility services regarding common areas and amenities. For these services Lessee shall pay a monthly Community Services Fee in the initial amount of $20.00 dollars per month throughout the term of this lease. This fee also includes the cost of providing water and sewer to the demised premises. Said fee shall be payable monthly in advance, on the first day of each month during the term of this Lease, to Carolina King Retreat and Marina, LLC, 2498 Belser Road, Summerton, SC 29148. The Community Services Fee may be increased by the Lessor from time to time in the sole discretion of the Lessor, in keeping with increases in the costs

of its providing management, maintenance, and utility services, and insurance to the Carolina King Retreat and Marina.

The Plaintiffs contend that the increase in the community services fee from $20.00 to $113.19 per month, of which they were notified by letter dated November 29, 2007, to be effective as of January 1, 2008, exceeds the amount of increase provided in Section 5 and constitutes a breach of that section. The agreement allows increases, in the sole discretion of the Lessor, and in keeping with increases of the costs incurred by the LLC in the performance of the duties specified in the paragraph. At the outset, this Court notes that no evidence was presented at trial related to the costs incurred by the LLC at the time the various leases were in fact signed. However, the Plaintiffs testified that, prior to the purchase by Mr. Bell, the lessor was providing the services required by Section 5 for $20.00 per month in a satisfactory manner. The court can consider that, as an evidentiary matter in determining the costs of the services at that point in time.

The notice of increase in fees was accompanied by a budget that allocated the funds to be received by the LLC to various line items ("the budget") (See Defendant's Exhibit 2). Each of the items, however, are generated as an allocation of certain expenses shared with one or both of the other enterprises operated at the resort by the LLC or David Bell personally. For the purposes of allocation, the LLC divided the budget between three different business segments which this Court will refer to as "expense centers." The first expense center includes the functions required to be performed by the LLC by the 99 Year Lease. In certain testimony, this center was referred to as "the regime." The second expense center, usually referenced as "the marina," includes the costs of the obligations required by the Marina License Agreement. The third expense center, often referenced as "the store," reflects those costs which are incurred in

functions performed by the LLC and David Bell for profit, and included the maintenance and management of cabins owned by Bell individually.

In order to arrive at a conclusion concerning the existence or non-existence of a breach in regard to the fees, this Court must determine if the amounts provided in the budget that formed the basis of the fee charged are within the reasonable range of the actual costs expended, or whether the amounts are not supportable as expenditures for which reimbursement is allowed by the 99 Year Lease.

A. Labor and Management Expenses.

Approximately fifty percent (48.9%) of the budgeted expenses for the regime are attributable to management and labor. The cost of labor included in the budget was based upon the salary that the LLC agreed to pay its initial manager, and the allocation of that salary among the three expense centers. Prior to July, 2007, there was no paid manager on the property. The then owner and part-time employees performed all of the work subsequently assumed by Mr. Wiggins. The testimony of the Plaintiffs indicated that the work was being performed satisfactorily at that time. At the time of the implementation of the budget, Terry Wiggins was employed as the manager at Carolina King in return for a salary of $78,089.94 annually. The Plaintiffs contend that the salary was excessive, and that the salary was improperly allocated among the expense centers, placing an unreasonable portion of his cost upon the Lessees (the regime and the marina) as opposed to the store.

In return for his salary, Wiggins agreed to be available seven (7) days a week, twenty-four (24) hours a day for any problems that may occur at the resort. He testified that, if he took a day off, he was required to pay David Bell, individually to cover him for that day. (Tr. Page 139, line 25 to Page 140, line 15.) He further testified that, if he needed assistance with work at the

campground, he paid for the additional labor from his salary. (Tr. Page 155, lines 7 - 19.) He was experienced in plumbing, electrical work and small engine repair. (Tr. Page 158, line 15 - Page 159, line 10.) He used his personal vehicle in the course of performing his duties and was only reimbursed for gas. (Tr. Page 163, lines 9 - 24.)

Section 5 of the lease which provides the LLC with the ability to increase the Community Services Fees includes the term "sole discretion". From the use of this term, it is certainly reasonable to determine that the parties intended to provide the LLC with discretion in determining matters such as salary for employees. However, that discretion is not unlimited. Every contract and agreement carries with it a requirement of reasonableness and fair play.

When developing the budget, twenty-five (25%) percent of Wiggins' salary was allocated to the store. The Plaintiffs contend that this allocation unfairly charges the Lessees for significant portions of Wiggins time that actually was spent working for the rental operations to earn a profit for David Bell and the LLC. Lawrence J. Forstner testified that in his opinion Wiggins spent ninety (90%) percent of the time on these projects and not on work for the leaseholders. (Tr. Page 22, lines 12 - 18.) Bobby Watford testified that Wiggins worked on David Bell's cabins from early in the morning until dark just about every day. (Tr. Page 74, lines 16 - 20.) Robert A. Gandy testified that, in his estimation, Mr. Wiggins spent ninety (90%) percent of his time working on David Bell's projects. (Tr. Page 175, lines 3 - 12.) Floyd Calhoun Dent, III testified that Wiggins spent a large majority of his time prepping and getting those (David Bell's) units ready for rent.(Tr. Page 197, line 25 - Page 198, line 2). Larry Forstner admitted that during the last two years he was not at the campground very often, perhaps ten (10%) percent of the time. (Tr. Page 48, line 14 - Page 49, line 3.) Bobby Watford lived in his cabin full time for about a year subsequent to his purchase which was January 18,

2007. He later became unfortunately occupied with the care of his wife who became fatally ill. Wiggins began his full time position in January of 2008 which was during the time that Mr. Watford was phasing out his full time residency at the campground. (Tr. Page 65, lines 3 - 17.) He did not provide information related to the amount of time he spent at the campground after he discontinued his full time residence.

Terry Wiggins testified that he estimated that he spent about seventy (70%) percent of his time working on projects that benefitted the community as a whole and thirty (30%) percent of the time on David Bell's personal projects. (Tr. Page 147, lines 5 - 15.)

The Plaintiffs also called Ms. Blanche H. Brown ("Brown") who is the general manager for Debordieu Colony Community Association ("Debordieu") and has held that position for ten (10) years. (Hr. Tr. p. 225, ll. 11-18). Brown received her undergraduate degree from Eastern Kentucky University and her Masters in Business Administration (MBA) from Xavier University. (Hr. Tr. p. 225, ll. 19-23). Prior to her employment at Debordieu Colony, Brown's employment has spanned management and budgeting in a wide variety of professions and industries from consumer electronics, to managing Jerry's Travel Center, to managing numerous budgets in a chemical company. (Hr. Tr. p. 226, ll. 1-10).

Since being employed with Debordieu, Brown has received certifications as a certified community manager, certified manager of community associations, and association management specialist. (Hr. Tr. p. 226, ll. 11-18). Each of these certifications was obtained through the Community Association Institute. (Hr. Tr. p. 226, ll. 19-22). Brown testified that in her position at Debordieu, she is responsible for maintenance of its Fifty-Two (52) miles of roads, creeks, and canals, management of Thirty-Five (35) employees in the fields of landscaping, maintenance and security, and budgeting for the entire colony. (Hr. Tr. p. 228, l. 16-p. 230, l. 18). Without

objection, Brown was admitted as an expert in the area of property management. (Hr. Tr. p. 231, ll. 16-24).

Brown testified that each property owner at Debodieu was assessed a yearly fee of One Thousand Six Hundred and Seventy Dollars ($1,670.00) to provide services in excess of what is provided by Carolina King. (Hr. Tr. p. 230, l. 19-p. 231, l. 11).

In her capacity as an expert, Brown visited the Premises and reviewed the 2008, 2009, and 2010 Budgets prepared by Bell and Carolina King and the deposition testimony of various witness, including Bell. (Hr. Tr. p. 234, ll. 7-18). After visiting the property and reviewing the Budgets, and other evidence of the case, she was prepared to give an opinion as to the Community Services Fee and Marina Services Fee is this matter. (Hr. Tr. p. 234, ll. 19-24). Brown's opinion was based on her own personal experience in the field of property management and budgeting, and independent research she performed and bids she solicited to confirm pricing. (Hr. Tr. p. 235, ll. 2-12).

She further testified that many of the estimates in the 2010 Budgets are inflated. (Hr. Tr. p. 237, l. 14-p. 240, l. 7).

Brown testified that Carolina King's Budgets included inflated estimates in the areas of waste management as well. (Hr. Tr. p. 249). Further, the amount listed for maintenance of the sewer system is excessive and seems to charge the leaseholders for a repair that occurred in 2007, for which the cost was $17,005.00, in 2008, 2009, and 2010, in effect, charging the lease holders three (3) times for the same service. (Hr. Tr. p. 266-268). However I note that no reserves are set aside for the replacement of the sewer treatment facility nor the water utilities. The cost of these were suggested to be in the $400,000.00 range with a limited useful life.

Brown further stated that her highest paid laborers, who operate heavy equipment such as trackhoes and backhoes, earn Fifteen dollars ($15.00) per hour and the laborers who cut the grass earn Eleven ($11.00) or Twelve ($12.00) dollars per hour. (Hr. Tr. p. 248, ll. 15-24). In addition, Brown testified that an employee in Mr. Wiggins' position should not be paid anywhere near Seventy-Eight Thousand Dollars ($78,000.00). Rather, someone in his position should be paid somewhere in the range of Thirty-Five Thousand ($35,000.00) to Thirty-Seven ($37,000.00) dollars. (Hr. Tr. p. 235, l. 13-p. 236, l. 4).

Brown testified that, in her expert opinion, Fifty-One Dollars ($51.00) per month would be an appropriate monthly Community Services Fee for Carolina King. (Hr. Tr. p. 250, l. 22-p. 251, l. 11). Similarly, Brown testified that, in her expert opinion, Sixteen Dollars ($16.00) per month would be an appropriate monthly Marina Services Fee for Carolina King. (Hr. Tr. p. 252, ll. 6-10).

In support of her testimony, Brown offered a spreadsheet prepared by her reflecting the appropriate cost of providing the services required under the Leases and Licenses at Carolina King which was admitted into evidence. (Hr. Tr. p. 255; Plaintiffs' Exhibit #14). The spreadsheet showed that, if the Community Services Fee and Marina Services Fee were based on the reasonable and necessary expense of operating Carolina King and providing the services required by the Leases and Licenses, the fees would be Fifty-One Dollars ($51.00) per month, per lot, and Sixteen Dollars ($16.00) per month, per lot, respectively.

Jack Mocha ("Mocha") testified on behalf of the Defendants. Mr. Mocha testified that while he had seen improvements at Carolina King since Bell purchased the Premises, he was not happy with the increase in the regime fees and knew that his neighbors were pursuing

litigation surrounding the cost and decided he would pay the fees and wait for the result of the litigation. (Hr. Tr. p. 298, l. 19-p. 299, l. 7).

Wilma Cook ("Cook") also testified on behalf of the Defendants. Ms. Cook testified that she is the bookkeeper for Carolina King and that she is responsible for the general ledger. (Hr. Tr. p. 310, ll. 4-9). Ms. Cook testified that two binders submitted by the Defendants into evidence were filled with copies of invoices and expenditures of Carolina King. (Defendants' Exhibit #4 and Defendants' Exhibit #5). However, Ms. Cook testified that she has no independent knowledge of whether that money had been spent and/or whether that money had been spent for the benefit of the leaseholders or Bell or Carolina King. (Hr. Tr. p. 331-341). Ms. Cook testified that the invoices are organized pursuant to Bell or Collins' instruction and that she has no independent knowledge of their reasonableness or veracity and that she has no knowledge how they should be apportioned. (Hr. Tr. p. 331-341).

Marion Judson Smith ("Smith") testified on behalf of the Defendants. Mr. Smith testified that he currently manages homeowners' associations and a marina for a group out of Charleston. (Hr. Tr. p. 91, ll. 13-16). Mr. Smith testified that his group advises the board of directors in various homeowners' associations as to budgetary issues involving operating costs and reserve costs. (Hr. Tr. p. 92, ll. 14-18). Mr. Smith testified that his company does all of the accounting for his client homeowners' associations, and that once a year, Mr. Smith meets with the board of directors or developer, goes over the costs that were incurred, and plans for future costs. (Hr. Tr. p. 93, ll. 11-24).

With regard to Carolina King, Mr. Smith testified that he was hired to help build a budget structure. (Hr. Tr. P. 95, ll. 6-15). Mr. Smith stated that he visited the premises and spoke with Bell and his staff over the phone, which ultimately led to the development of a budget

structure. (Hr. Tr. p. 96, ll. 1-12). Mr. Smith specifically stated that his only task was to build the structure of the budget, and that all of the information regarding costs of the services provided and apportionment of costs to the community, marina and Bell and Carolina King's personal projects was provided by Bell or a representative of Carolina King. (Hr. Tr. p. 96, l. 13-p. 97, l. 9; p. 98, ll. 8-35; p. 106, l. 21-p. 17, l. 1). Mr. Smith specifically testified that he did not verify whether the pricing was reasonable by soliciting bids, he did not dig through the Carolina King ledger, and he did not verify any purchases that Carolina King or Bell alleged were made by looking at invoices or canceled checks. (Hr. Tr. p. 107, ll. 2-11).

With regard to Mr. Wiggins, Mr. Smith testified that a proper salary for Mr. Wiggins would be closer to $40,000.00 or $45,000.00 per year, rather than the salary he was being paid which was well in excess of $70,000.00. (Hr. Tr. p. 110, ll. 20-25). Mr. Smith further testified that he had never talked to Mr. Wiggins, nor did he have any idea what he was doing every day and how much time Wiggins spent working for the benefit of the leaseholder community and how much time Wiggins spent working for Bell and Carolina's King's personal projects. (Hr. Tr. p. 112, ll. 1-15).

In sum, Mr. Smith testified that he did not independently verify any of the figures provided to him by Bell or Carolina King. Smith created the budget structure, but all amounts and apportionments thereof were done by Bell and Carolina King. Smith also provided no testimony as to the reasonable and necessary expense of operating Carolina King and providing the services required by the Leases and Licenses.

I. <u>Expenses Incurred Other Than Personnel Expenses.</u>

Included within the Plaintiffs' expert's criticism were the components of the budget for depreciation of a tractor, lawnmowers, and smaller equipment, and also a budgeted expense for

the rental of heavy equipment identified as backhoe, trackhoe, longarm, etc She testified in support the Plaintiffs' contentions that the depreciation was based upon an unreasonably short useful life, and that the estimated rental charges in the budget are excessive. In general, giving attention line by line to the budget, she testified that the expenses contained in the budget were not reasonable based upon her expertise.

This Court disagrees with Defendant's contention that reasonableness is not an element of the amount which may be charged pursuant to Section 5 of the 99 Year Lease Agreement. While the language of the Lease Agreement uses the term, "in keeping with increases of the costs" of the specific items mentioned, the Defendants cannot unreasonably increase those charges and pass those expenditures on to the Plaintiffs even if the costs are actually incurred. The test is, in fact, whether the increases were reasonable as a matter of law.

II. Marina License Agreement.

The Marina License Agreement creates a fee structure similar to that created in the 99 Year Lease Agreement to provide funds for the marina. The language of the marina agreement varies from the 99 Lease Agreement to some extent. The relevant portion of the marina agreement states as follows:

> 1. **Rent, Fees and Term:** Upon the execution of this agreement, the occupancy and use of the above-designated slip shall be provided to Licensee as an owner of a 99 year lot lease. Marina shall perform upkeep and maintenance services on the marina, obtain and maintain appropriate insurance, and pay any and all county real estate taxes pertaining to the marina. Licensee shall pay a marina services fee of $10.00 per month throughout the term of this agreement. The monthly marina services fee may be increased by Marina in keeping with increases in the costs of its providing management, utilities, services, insurance, and real estate taxes for the marina....

The right of the LLC to raise the marina services fee in keeping with increases in the costs of its providing management, utilities, services, insurance, and real estate taxes for the

marina is plainly stated. In reliance upon this provision, the LLC has raised the fee payable by Licensees from $10.00 per month to $39.77 per month. Plaintiffs contend that this increase is unreasonable and constitutes a breach of the agreement. The increase was based upon a separate budget that accompanied the previously discussed letter dated November 29, 2007. In addition to contesting the actual expenditure of the amounts collected in the budget, the Plaintiffs contend that one component of the budget, specifically the inclusion of the amount payable for the lease from Santee Cooper, is not authorized to be collected from the Lessees.

An analysis of the amount of the fee collected pursuant to the marina agreement parallels the analysis of the 99 Year Lease, with one difference. The term "sole discretion" is not included in the Marina License Agreement, as it is in the 99 Year Lease. This court must determine if the omission of that term in the Marina License Agreement alters the analysis of the LLC's ability to increase the fees charged to the Lessees.

Again this court looks at whether or not fees were reasonable, and whether or not the fees passed along to the Lessees only recover for the LLC actual costs incurred and allowed to be reimbursed by the marina agreement.

As with the community services budget, a significant component of the costs incurred are attributable to labor. The analysis applied to the community services budget is applicable to the marina services budget as well, except for consideration of the effect of the omission of the term "sole discretion" from the marina agreement. Regarding the manager's salary, the amount was clearly paid, at least as long as Wiggins was the manager. The question "Was the amount of salary reasonable?"

A. <u>Labor and Management</u>.

As with the community services budget, a significant component of the costs incurred are attributable to labor. The analysis applied to the community services budget is applicable to the marina services budget as well, except for consideration of the effect of the omission of the term

"sole discretion" from the marina agreement. Regarding the manager's salary, the amount was clearly paid, at least as long as Wiggins was the manager. The question "Was the amount of salary reasonable?"

B. Other Expenditures.

Aside from the labor and depreciation costs, and other than the Santee Cooper lease, the remaining line items in the budget represent estimates of actual expenditures. Again, according to the testimony of Wilma Cook, which was essentially uncontradicted, the LLC actually spent more than the budgeted amount for the maintenance and upkeep of the marina in both 2008 and 2009.

C. The Santee Cooper Lease.

The marina consists of docks that extend into Lake Marion from a 5.1 acre parcel of land that is not owned by the LLC, but possessed by the LLC pursuant to the terms of a commercial lease from the South Carolina Public Service Authority (Santee Cooper). (Defendant's Exhibit 1). A portion of this Santee Cooper tract lies between the Lessees' cabins and the shore of Lake Marion. The boat ramp at the facility, the store operated by the LLC, and several cabins owned by either the LLC or David Bell individually are also located on this tract. The LLC pays a lease fee annually to Santee Cooper for the right to occupy this tract, which is in turn made available to all Lessees as an amenity associated with the cabins. Without this lease, there would be no access to the waters of Lake Marion.

The marina services budget includes a line item collecting the amount due to Santee Cooper for the lease of this tract. Plaintiffs contend that Carolina King is not authorized to charge the Lessees for the amount of the Santee Cooper lease by the Marina License Agreement.

The LLC contends that the marina's very existence depends upon the existence of the Santee Cooper lease and the authority to collect for it is implied in the Marina License Agreement.

The Marina License Agreement states that, "licensee shall pay a marina services fee of $10.00 per month throughout the term of this Agreement. The monthly marina services fee may be increased by Marina in keeping with the increases in the costs of providing management, utilities, services, insurance, and real estate taxes for the marina." The language of the paragraph does not restrict the use of the initial $10.00 per month to any specified category. Implied within the charge are the basic services necessary to continue the existence of the marina, which includes the Santee Cooper lease fee. The payment of the lease fee is necessary for any services to be provided. Therefore, the LLC is authorized to pass along the cost of the Santee Cooper lease through the marina services fee.

CONCLUSIONS OF LAW

1. The Plaintiffs and Defendants have asserted causes of action of Declaratory Judgment pursuant to S.C. Code Ann. ' 15-53-10, *et seq.* A declaratory judgment action must involve an actual, justiciable controversy. Southern Bank & Trust Co. v. Harrison Sales Co., 285 S.C. 50, 328 S.E.2d 66 (1985). A justiciable controversy is a real and substantial controversy that is ripe and appropriate for judicial termination, as distinguished from a contingent, hypothetical or abstract dispute. Id. All that is required is that the parties demonstrate a justiciable controversy. Brown v. Wingard, 285 S.C. 478, 330 S.E.2d 301 (1985). Where an action is filed for declaratory judgment seeking affirmative relief, the movant must prove his material allegations by a preponderance of the evidence. Vermont Mut. Ins. Co. v. Singleton By and Through Singleton, 316 S.C. 5, 446 S.E.2d 417 (1994) citing Martin v. Cantrell, 225 S.C. 140, 81 S.E.2d 37 (1954).

2. In the matter before this Court, the parties all agree that an actual justiciable controversy exists as it relates to the rights of the parties under the Leases and Licenses. Specifically, the Plaintiffs

assert that the Community Services Fee and Marina License Fee currently being charged by Carolina King are not in keeping with the agreements. Carolina King disputes this assertion.

3. Carolina King, at trial, further asserted that in order to meet its burden, the Plaintiff must show a breach of the covenants of good faith and fair dealing. South Carolina has long recognized that there exists in every contract implied covenants of good faith and fair dealing. Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 147, S.E.2d 481 (1966); See also, Boddie-Noell Properties, Inc. v. 42 Magnolia Partnership, 344 S.C. 474, 544 S.E.2d 279 (Ct. App. 2000).

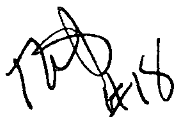
4. However, there is no independent cause of action for breach of the implied covenants of good faith and fair dealing. See RoTec Services, Inc. v. Encompass Services, Inc., 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004). It is merely a breach of contract cause of action. Id.

5. In this matter, the Plaintiff need not prove a breach of contract or the implied covenants contained therein. The only issues before me are: a) what the parties' rights are under the Leases and Licenses and b) whether the fees charged under Leases and Licenses are appropriate. If I find them not to be appropriate, this Court must then determine what the fees should be under the terms thereof.

6. When a contract is clear and capable of legal construction, the Court's only function is to interpret its legal meaning and the intent of the parties as found within the agreement. Blackbaud, Inc. v. South Carolina Dept. of Revenue, 386 S.C. 446, 688 S.E.2d 150 (Ct. App. 2010) citing Smith-Cooper v. Cooper, 344 S.C. 289, 543 S.E.2d 271 (Ct. App. 2001). However, when an agreement is ambiguous, the Court should determine the parties' intent. Id. citing Ellie, Inc. v. Micchi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004).

7. In the matter before me, I find that the parties did not intend to grant Carolina King unlimited discretion to set charges under the Leases and Licenses. The charges must be reasonable, necessary, in keeping with costs and must be, by their nature, for the benefit of the leaseholders.

8. The evidence clearly shows that the fees currently being charged by Carolina King are inflated somewhat. However, with the exception of the salary paid to Mr. Wiggins, I do not find that the remaining fees constitute a Breach of Covenants of good faith and fair dealing.



9. However as to Mr. Wiggins, it is clear from the testimony that Wiggins was being grossly overpaid for his job duties. In fact, both Brown and Smith agreed that an individual of Mr. Wiggins' training and job description should be paid approximately Thirty-Five Thousand ($35,000.00) to Forty-Five Thousand ($45,000.00) dollars per year and not his actual salary of Seventy Eight Thousand, Eighty Nine and 44/100 ($78,089.44) dollars. The average of the salaries testified to by the Plaintiffs' and Defendant's expert is Forty Thousand ($40,000.00) dollars. Further, the evidence before the Court clearly indicates that much of Wiggins time was being spent on projects that provided no benefit to the Plaintiffs or any other leaseholder of Carolina King but rather was to the benefit of Carolina King or Bell.

10. As a result, I find that the allocations of Mr. Wiggins' salary among the 3 profit centers was improperly weighted against the Leaseholders.

11. Of Wiggins's salary of approximately Seventy-eight thousand dollars, ($78,000.00), twenty-five per cent (25 %) was allocated to the operation of the store (described as "miscellaneous duties" in Defendant's Ex. No. 2), and the remaining seventy-five per cent (75%) to the Community Services Budget (75 % of the remaining 75 %) and Marina Services Fee Budget (25 % Of the remaining 75 %).

12. Based on the preponderance of the evidence, I find that Forty per cent (40 %) of the salary should be allocated to the "miscellaneous duties" and the remaining Sixty per cent (60 %) allocated to the Community Services Budget and Marina Services Fee Budget in the same proportions as in paragraph 11 above.

13. I further find that, based on the preponderance of the evidence, including the testimony of the two experts for the parties, the annual salary for the Manager's position should be Forty-two Thousand five hundred dollars, of which Twenty-five thousand five hundred dollars ($25,500.00) will be divided between the Community Services Budget ($19,125.00) and Marina Services Fee Budget ($6,375.00), in accord with the allocations set out in paragraph 12

above.

14. I further find that the above reallocations will reduce the monthly payments attributable to each of the 66 lots to Eighty-one dollars and eighty-seven cents ($81.87) for the Community Services Budget and Twenty-nine dollars and thirty-three cents ($29.33) for the Marina Services Fee Budget.

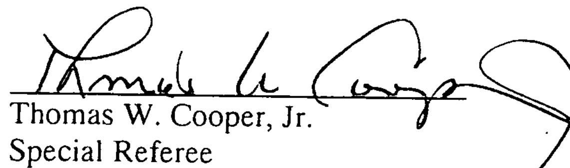
15. I further find that Carolina King is entitled to adjust the fees under Leases and Licenses in keeping with increases costs of providing the services enumerated in Section 5 of the Leases and Section 1 of the Licenses. These increases must be reasonable and necessary in keeping with costs and must be for the benefit of the leaseholders.

16. I further find that each party is responsible for its own attorneys' fees and that the costs of the proceedings shall be equally divided between the Plaintiffs (50%) and Defendant (50%).

AND IT IS SO ORDERED.

At Manning, South Carolina

Nov. 28, 2012



Thomas W. Cooper, Jr.
Special Referee

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2008 CP-14-645

Joseph E. Robinson, et al

PLAINTIFF(S)

Carolina King Retreat and Marina, LLC

DEFENDANT(S)

Submitted by: Special Referee	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: Order on Reconsideration granting attorneys' fees and costs to attorneys for the Plaintiffs.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

2013 JUL 22 AM 10:14
CLARENDON COUNTY CLERK OF COURTS SC

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Joseph E. Robinson, et al	Carolina King Retreat and Marina, LLc	$64, 880. 32 Attorneys' Fees and Costs
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: **Title abstractors and researchers should refer to the official court order for judgment details.**

~~Circuit Court Judge~~ Special Referee	054 Judge Code	July 22, 2013 Date

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of ____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this ____ day of ____, 20 ____ to attorneys of record or to parties (when appearing pro se) as follows:

Ian D. McVey	William H. Johnson
Tara A. Leaphart	R. Wayne Byrd
Ray E. Chandler	
ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.