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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Honorable Kristi F. Curtis
Circuit Court Judge

Civil Action No. 2023-CP-22-00210

Appellate Case No. 2023-001776

Kendrick A. Bryant and Keisha Bryant Sherman on behalf of the heirs of Ernest Bryant; Benjamin Dennison and Willie Dereef, Jr. on behalf of the heirs of Limerick Dennison; Lucille Grate; Parkersville Planning & Development Alliance; Keep It Green; and Preserve Murrells Inlets, Inc.,.....Appellants,

v.

Georgetown County and Covington Homes, LLC
.....Respondents.

COVINGTON HOMES, LLC’S REPLY TO APPELLANTS’ RETURN IN OPPOSITION TO MOTION TO DISMISS AND COVINGTON HOMES, LLC’S RETURN IN OPPOSITION TO APPELLANTS’ MOTION TO JOIN TRANSFEREE AS AN ADDITIONAL PARTY

Respondent Covington Homes, LLC (“Covington Homes”) offers this Memorandum of Law in Reply to Appellants’ Return in Opposition to Covington Homes’ Motion to Dismiss and in Response to Appellants’ Motion to Join Transferee as an Additional Party.

ARGUMENT

I. Rule 25(c), SCRCF does not govern the Court’s analysis in ruling on Covington Homes’ Motion to Dismiss.

As an initial matter, Covington Homes cited two Rules in support of its Motion to Dismiss: Rule 240, SCACR, and Rule 21, SCRCR. Covington Homes never cited Rule 25(c), SCRCR in its Motion to Dismiss. In their Return, Appellants argue, “[t]hese rules [Rule 240, SCACR and Rule 21, SCRCR] do not specifically address transfers of interest applicable to the present case.” (**Appellants’ Return, p. 4**). Appellants argue Rule 25(c), SCACR governs the situation before the Court because Rule 25(c) applies to “any transfer of interest.” (*Id.*). Appellants are incorrect.

Appellants cite Rule 25(c) as though it applies when one party (Covington Homes) transfers its interest in real party to a non-party (CAB Investments, LLC). That is not at all how Rule 25(c) works. Instead, “Rule 25(c) applies to the transfer of interest from one corporation to another with which the first merged.” *Bryant v. Waste Mgmt., Inc.*, 342 S.C. 159, 164, 536 S.E.2d 380, 383 (Ct. App. 2000). That is not what happened here. There has been no merger of any kind between Covington Homes and CAB Investments, LLC (“CAB Investments”). Instead, as reflected by the Deed that was attached as **Exhibit A** to Covington Homes’ Motion to Dismiss, Covington Homes entered into an arm’s length transaction with CAB Investments, whereby Covington Homes sold the property in question to CAB Investments for \$275,000. The deed establishes that Covington Homes transferred its entire interest in the subject property to CAB Investments, and Covington Homes maintains no interest whatsoever in the subject property.

Appellants’ Return incorrectly assumes that Rule 25(c) frames the inquiry on how this Court will resolve Covington Homes’ Motion to Dismiss. In making this

assumption, Appellants offer no response to Covington Homes' argument that Rule 21 should guide the Court in ruling on this motion. Because Appellants offer no response to this argument, the Court should deem it as Appellants' "consent ... to the relief sought in the motion." Rule 240(e), SCACR.

The plain language of Rule 240(a), SCACR, specifically states that it applies to motions to dismiss. *See* Rule 240(a), SCACR ("This Rule governs all motions or petitions filed in the appellate court, including but not limited to: ... **motions to remand or dismiss.**") (emphasis added). Thus, by its own text, Rule 240(a), SCACR clearly applies and governs Motions to Dismiss, like the one before the Court. In ruling on this Motion, the Court should look to Rule 21, SCRPC, as it provides guidance as to how courts should rule on such a motion. Rule 21 makes clear it gives courts *sua sponte* power to realign any party at any time on "such terms as are just." Rule 21, SCRPC. Here, it is just that Covington Homes be dismissed from this case because it no longer has any interest whatsoever in the real property that is the subject of this dispute.

II. Covington Homes should be dismissed from this appeal because it does not have an interest in the declaratory relief sought by Appellants.

This is a declaratory judgment action in which the Appellants challenge the validity of Georgetown County's ordinances under the South Carolina Uniform Declaratory Judgment Act ("the Act"). All parties to a declaratory judgment action must have a substantial, direct, and legally protected interest in the relief sought. *Carolina Alliance for Fair Empl. v. South Carolina Dep't of Labor, Licensing, &*

Regulation, 337 S.C. 476, 487, 523 S.E.2d 795, 801 (Ct. App. 1999). Covington Homes' substantial, direct, and legally protected interest in this declaratory judgment action terminated when it sold the property to CAB Investments.

Covington Homes was added as a party to this action so it would be bound if the Court invalidated the Georgetown County ordinances. The practical legal effect of invalidating the Georgetown County ordinances on Covington Homes would be voiding its development application (which was approved by Georgetown County pursuant to the invalid ordinances) to prevent Covington Homes from actually constructing the development on its property. This practical legal effect was terminated when Covington Homes sold the property to CAB Investments. Therefore, Covington Homes no longer has any interest in the Appellants' declaratory relief, much less a substantial, direct, and legally protected interest.

Nonetheless, Appellants contend that Covington Homes is an interested party not only because it owned the property, but separately because it was "the applicant named on the land development application at issue." This is incorrect. Covington Homes' status as the applicant is inextricably related to its ownership of the property, and the Appellants do not contend that Covington Homes, as the applicant, failed to follow the application process or violated the Georgetown County ordinances.

In addition, looking to the Appellants' own Complaint, particularly the series of paragraphs in which they cite the Act and identify Georgetown County and Covington Homes as interested parties, it is clear that the "interest" which Covington

Homes had in the declaratory judgment action arose out its ownership of the property, rather than just its status as the applicant:

47. The South Carolina Uniform Declaratory Judgment Act, S.C. Code, Section 15-53-80 requires that

“[w]hen declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise the municipality shall be made a party and shall be entitled to be heard.”

Accordingly, the following parties are required to be named as Defendants in this action for declaratory relief.

...

50. Defendant, Covington Homes, LLC, owner of the Covington Homes parcel, is a limited liability company organized and existing under the laws of the State of South Carolina, having a business address of 4210 River Oaks Drive, Suite 5, Myrtle Beach, Horry County, South Carolina, 29579, and a registered agent name and address of Gregory B. Harrelson, at 4210 River Oaks Drive, Suite 5, Myrtle Beach, Horry County, South Carolina 29579.

(**R. 33-34** (emphasis added)). The Appellants did not rely on or even mention the fact that Covington Homes was the applicant when identifying the basis for naming Covington Homes as a party to the declaratory judgment action.

Again, Covington Homes’ only interest in this matter (including the application) stemmed from its ownership of the property. This interest indisputably terminated when Covington Homes sold the property to CAB Investments. Because Covington Homes no longer has any interest in this action (much less a substantial,

direct, and legally protected interest), Covington Homes respectfully requests that it be dismissed from this appeal.

III. This Court should dismiss Covington Homes regardless of whether CAB Investments is added as a party.

The Appellants contend that Rule 25(c) and (e) of the South Carolina Rules of Civil Procedure is applicable to this situation, and that Covington Homes can only be dismissed if CAB Investments is substituted as a party. As set forth above in Roman Numeral I, Covington Homes disagrees. Nonetheless, Covington Homes' dismissal is not contingent upon the substitution or addition of CAB Investments as a party to this action. As discussed above, even if the Appellants' requested declaratory relief is granted, it will have no practical legal effect on Covington Homes because it no longer owns the subject property. As a result, Covington Homes no longer has a substantial, direct or legally protected interest and is no longer a proper party to this declaratory judgment action.

This is akin to a mootness argument—when Covington Homes sold the property and ceased to have any interest in the outcome of the Appellants' challenge to the validity of Georgetown County's ordinances, the claims against it were effectively rendered moot. According to this Court and the South Carolina Supreme Court, “[a] case becomes moot when judgment, if rendered, will have no practical legal effect upon an existing controversy. This is true when some event occurs making it impossible for a reviewing court to grant effectual relief.” *Shah v. Richland Mem’l Hosp.*, 350 S.C. 139, 150, 564 S.E.2d 681, 687 (Ct. App. 2002) (quoting *Mathis v. South Carolina State Highway Dep’t*, 260 S.C. 344, 346, 195 S.E.2d 713, 714 (1973) (internal

quotations omitted)). That is exactly what happened in this case as it relates to Covington Homes—there will be no practical legal effect on Covington Homes even if the Court awards the relief requested by the Appellants because it sold the subject property.

While the case may not be entirely moot (Georgetown County will remain as a party), the Appellants should not be allowed to hold Covington Homes captive as a party to this appeal when, even if their declaratory relief is granted, there will be no practical legal effect on Covington Homes. Therefore, regardless of whether the Court grants the Appellants' motion to add CAB Investments as a party, Covington Homes respectfully requests that it be dismissed from this appeal.

IV. This Court should deny Appellants' motion to join CAB Investments as an additional party.

As outlined above, Covington Homes should be dismissed from this action regardless of whether the Court adds CAB Investments as a party. However, the Court should decline to add CAB Investments as a party to this action because the Appellants have not served CAB Investments with a copy of their motion as required by the South Carolina Rules of Civil Procedure.

Appellants move to add CAB Investments as a party under Rule 25(c), SCRPC. As set forth above in Roman Numeral I, Rule 25 is not the appropriate Rule to consider when deciding whether to add a party under the facts of this case. Rule 25 applies to corporate mergers. *Bryant*, 342 S.C. at 164, 536 S.E.2d at 383. No merger occurred here, so Rule 21 is the appropriate Rule to guide the Court's analysis. The Court could deny Appellants' motion to add CAB Investments as a party on that

ground alone. The Court could also deny Appellants' motion to add CAB Investments for failing to follow the dictates of Rule 25 (which is the Rule upon which Appellants seek relief). Rule 25(c) provides that all motions to substitute or add a new party under this rule “**shall** be made as provided in Rule 25(a)(1).” Rule 25(c), SCRCP (emphasis added). Pursuant to Rule 25(a)(1), “[t]he motion for substitution...together with the notice of hearing **shall** be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided by Rule 4 for the service of summons.” Rule 25(a)(1), SCRCP (emphasis added). While there are no South Carolina cases addressing the service requirement under Rule 25(c), South Carolina courts routinely recognize that service is required to exercise personal jurisdiction over a party. *See BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006); *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 474, 609 S.E.2d 286, 295 (2005). Additionally, courts in the Fourth Circuit and other jurisdictions have recognized the “strict” service requirement under the federal Rule 25(c), which is substantially similar to the South Carolina rule. *See Waypoint Consulting, Inc. v. Krone*, 2022 U.S. Dist. LEXIS 52076, *30 (D.Md. March 22, 2022) (“Indeed, the service requirement outlined in Rule 25(c) is a ‘strict’ one.”); *Trs. of the Chi. Reg'l Council of Carpenters Pension Fund v. Conforti Constr. Co.*, 2013 U.S. Dist. LEXIS 99982, *3 (N.D.Ill. July 17, 2013) (“There is a strict requirement for valid service.”).

The Appellants must serve CAB Investments with a copy of their motion (and any hearing notice). Without service, the Court cannot exercise personal jurisdiction over CAB Investments and must decline the Appellants' motion to add it as a party.

CONCLUSION

For the foregoing reasons, Covington Homes respectfully requests that the Court of Appeals dismiss it from this appeal, deny the Appellants' motion to add CAB Investments as a party, and grant such other and further relief as this Court deems just and necessary under the circumstances.

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PROOF OF SERVICE

I, the undersigned legal practice assistant of the law offices of Burr & Forman, LLP, do hereby certify that on September 16, 2024, I have served all counsel in this action with a copy of the following described herein below by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to Rule 262 of the South Carolina Appellate Court Rules and the May 6, 2022 Order of the South Carolina Supreme Court (Appellate Case No. 2023-001776).

Documents Served: (1) Covington Homes, LLC’s Reply to Appellants’ Return in Opposition to Motion to Dismiss and Covington Homes, LLC’s Return in Opposition to Appellants’ Motion to Join Transferee as an Additional Party

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