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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.

REPLY BRIEF OF APPELLANT

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ARGUMENT

In its brief, The Lofts at Printers Square Condominium Association, Inc. ("the Association" or "Respondent") misconstrues the circuit court's order as well as the arguments presented in Appellant's initial brief. As a preliminary matter, M Gourmet Group, LLC ("MGG" or "Appellant") does not contend that the circuit failed to issue a ruling on the arguments raised in Appellant's motion for leave to amend (the "motion to amend"). Rather, Appellant's opening brief asserted that the circuit court did not fully and properly consider the impact of Appellant's motion to amend prior to finding that there were no genuine issues of material fact and Respondent was entitled to judgment on the pleadings and summary judgment. After noting that Respondent's motion would be granted, the circuit court nevertheless considered the arguments raised in Appellant's motion to amend and rejected them, holding that amendment would be futile and Respondent would be entitled to summary judgment even if leave to amend was granted. (Order p. 8; R. 10.) Respondent attempts to invoke the issue preservation rules to avoid meaningfully responding to the issues presented by Appellant for this appeal.[1]

All of Respondent's arguments are without merit. *First*, the issues presented by Appellant on appeal were raised to and ruled on by the circuit court and, as such, were properly preserved for appeal without filing a motion under Rule 59(e), SCRCP.

Second, Appellant has disputed the validity and enforceability of the Master Deed as amended and supplemented by the Second Amendment and disputed the Rules and Regulations as against Appellant since the very beginning. (Answer ¶¶ 15, 17, 20, 22; R. 153-54.) The circuit court's findings that "[t]he proposed amendments [to Appellant's Answer] admit the validity and enforceability of the Master Deed, First Amendment, and **Rules and Regulations**" and "MGM

[1] Notably, Respondent's Brief included only three paragraphs related to the merits of this appeal.

[sic] admits in its initial answer . . . that the Second Amendment is enforceable[,]" are simply not correct. (Order pp. 5, 7; R. 7, 9.) Likewise, Respondent's assertion in its Brief that Appellant has conceded to the validity and enforceability of Rules and Regulations in its appellate brief is also inaccurate. Respondent attempts to persuade this Court to ignore clear and unambiguous language because Appellant's "qualified concessions as to the Rules and Regulations . . . is of no moment here because this is not an enforcement action" is critically important. (Br. of Respondent at 13-14.) Respondent knows just how important the circuit court's findings concerning the validity and enforceability of the Second Amendment to the Master Deed and the Rules and Regulations is to ***this*** declaratory action, particularly considering Respondent has already filed a second action seeking to enforce the order on appeal.

Third, the two-issue rule is inapplicable here because Appellant has appealed the entirety of the circuit court's findings, including its holdings that "the Second Amendment did not remove or take away any [parking] spaces" and that "clearly the Master Deed allows for amendments without MGM's [sic] consent." (Order pp. 5, 7-8; R. 7-9.) This appeal encompasses the circuit court's grant of summary judgment as to the validity and enforceability of the Master Deed, amendments to it, the Bylaws, and the Rules and Regulations (the "Regime Documents") and grant of judgment on the pleadings as to the enforceability of the Master Deed, First Amendment to the Master Deed the Rules and Regulations because both rulings are based on the same inaccurate factual determinations that supported the circuit court's denial of Appellant's motion to amend.

Finally, Appellant's proposed amended Answer included not only counterclaims but also corrected inaccurate statements made by Appellant's former counsel. Thus, the propriety of the amendment to Appellant's Answer did not rise or fall on Appellant asserting viable counterclaims. Moreover, Appellant also sought to amend its responses to requests for admission.

For the reasons stated in Appellant's opening brief and herein, this Court should reverse the circuit court and remand for further proceedings.

I. Appellant's issues were raised to and ruled on by the circuit court and properly preserved for this Court's review.

Respondent first argues that Appellant failed to raise the issues on appeal to the circuit court. (Br. of Respondent at 7.) Respondent, however, ignores the fact that the circuit court addressed the arguments raised in Appellant's motion to amend and rejected them. In its brief, Respondent acknowledges that "the trial court's order did consider and note the prejudice that would result from allowing the amendments, as well as the futility in allowing them given M Gourmet's inability to identify any evidence creating a genuine dispute of fact." (Br. of Respondent at 18 (citing Order pp. 6-8).) Appellant seeks reversal for those very reasons—that the circuit court's findings on *prejudice* and *futility* were predicated on facts that are disputed in the record and on other improper considerations.

While the amendment of pleadings and the amendment of responses to requests for admission are governed by different legal standards, both Rule 15(a) of the South Carolina Rules of Civil Procedure ("SCRCP"), applicable to the amendment of pleadings, and Rule 36(b), SCRCP, applicable to the amendment of responses to requests for admission, require the court to consider prejudice to the non-movant, among other things. *See, e.g.*, *Com. Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc.*, 347 S.C. 545, 557, 556 S.E.2d 718, 724 (Ct. App. 2001); *Curry v. Carolina Ins. Grp. of SC, Inc.*, 428 S.C. 60, 75-76, 832 S.E.2d 760, 768 (Ct. App. 2019). There simply cannot be any resulting "prejudice" to Respondent as contemplated by Rules 15(a) and Rule 36(b), SCRCP through the amendment because Appellant disputed the validity and enforceability of the Master Deed as amended and supplemented by the Second Amendment and disputed the Rules and Regulations in its Answer. That Respondent must prove the merits of its

claims, especially here where Respondent filed its motion for judgment on the pleadings, or in the alternative, for summary judgment (the "motion for judgment on the pleadings"), ninety (90) days after it filed the Complaint and twenty-five (25) days after Appellant filed its Answer, does not constitute prejudice.

Rule 15(a), SCRCP also expressly provides that leave to amend a pleading should be "freely given," and the Supreme Court of South Carolina has interpreted such provision to be a mandate subject to limited exceptions such as the futility of the proposed amendment. *See Patton v. Miller*, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017). The circuit court's order addressing the arguments presented raised by Appellant in its motion to amend, and rulings on those arguments preserved the issues for appeal. *See Sloan v. S.C. Dep't of Revenue*, 409 S.C. 551, 555 n.4, 762 S.E.2d 687, 689 n.4 (2014) (concluding that the circuit court's denial of "all requested relief and 'ending' the case, the Form 4 order necessarily ruled on Sloan's request for attorney's fees and costs, as well as his request for injunctive and declaratory relief" despite not explicitly referring to the issue); *State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) ("'[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court.'" (quoting *Hubbard v. Rowe*, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939))).

Here, Respondent tries to use issue preservation rules as a "gotcha game," which is not the intended purpose of the rules. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Here, the circuit court had a fair

opportunity to rule on the issues presented by Appellant, addressed the substance of Appellant's arguments regarding amendment, and rejected them by finding that amendment would be futile. Therefore, Appellant's arguments are preserved for review by this Court.[2]

Contrary to Respondent's assertion, Appellant was not required to file a Rule 59(e) motion here. As this Court has explained, "'[t]he Supreme Court identifies two ways to preserve the issue: 'a ruling by the trial judge or a post-trial motion.'" *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 705, 869 S.E.2d 859, 867 (Ct. App. 2022), *reh'g denied* (Feb. 25, 2022) (quoting *Pye v. Est. of Fox*, 369 S.C. 555, 566, 633 S.E.2d 505, 511 (2006), *overruled on other grounds by Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 861 S.E.2d 774 (2021)) (quotation marks and citations omitted). An appellant is required to file a Rule 59(e) motion to alter or amend the judgment to preserve an issue for review under two circumstances: (i) if the appellant has raised an issue in the lower court and the court fails to rule upon it; or (ii) if the appellant receives an order that grants certain relief not previously contemplated or presented to the trial court. *Palmetto Wildlife Extractors, LLC*, 435 S.C. at 704-05, 869 S.E.2d at 867. In other words, a motion is not required if the circuit court order addresses an issue.

Appellant was not required to file a Rule 59(e) motion here because, as discussed *supra*, the issues presented on appeal were raised to and ruled on by the circuit court. Moreover, unlike the *Gibbons v. Areotek, Inc.* case cited by Respondent, the circuit court did not base its decision to deny Appellant's motion to amend on a *sua sponte* ground. Rather, its decision was based on

[2] Any doubt this Court has should be resolved in favor of preservation because the issues raised on Appeal are consistent with the arguments presented to, and rejected by, the circuit court. *See Johnson v. Roberts*, 422 S.C. 406, 412, 812 S.E.2d 207, 211 (Ct. App. 2018), *aff'd*, 427 S.C. 258, 830 S.E.2d 910 (2019) ("[W]here the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation[.]") (quotation marks and citation omitted).

arguments briefed by Appellant in its motion. *See Gibbons v. Areotek, Inc.*, 441 S.C. 180, 185, 893 S.E.2d 326, 329 (Ct. App. 2023) (concluding Rule 59(e) motion was required where the circuit court's decision to deny the defendant's motion for attorneys' fees was based on an issue the circuit court *sua sponte* raised in its order).

A. The circuit court erred in evaluating the purported "prejudice" to Respondent under Rule 36(b), SCRCP.

Under South Carolina law, the circuit 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 (emphasis added) (citing Rule 36(b), SCRCP).

The circuit court did not directly address the first prong. As the District of South Carolina explained in interpreting the analogous federal rule, courts should consider "whether the proposed amendments [would] facilitate the development of the case in reaching the truth, as in those cases where a party's admission[s] are inadvertently made." *McGrew v. ASM Glob.*, No. CV 2:20-00086-RMG, 2020 WL 6566462, at *3 (D.S.C. Nov. 9, 2020) (internal quotations and citations omitted). For the reasons detailed in its motion to amend and herein, Appellant satisfied this standard.

With regards to the second requirement, the circuit court expressly found that "allowing the amendments now would unduly prejudice the Association because the amendments introduce new claims and defenses (based on facts MGM [sic] knew all along) which would require the Association to introduce additional and different evidence to prevail in the amended action at a time when the case is subject to being called to trial." (Order pp. 6-7; R. 8-9.) It is clear from the circuit court's reasoning for denying the motion to amend that it did not fully consider the

"prejudice" resulting from an amendment as envisioned by Rule 36(b). In interpreting the analogous federal rule, the District of South Carolina has explained that "[f]or 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 plaintiff 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).

As laid out in detail on page 6 of Appellant's opening brief, Appellant has disputed the validity and enforceability of the Master Deed (as amended and supplemented by the Second Amendment and Rules and Regulations) against Appellant since the earliest time possible with the filing of its Answer. (*See* Br. of Appellant at 6 (citing Answer ¶¶ 15, 17, 20, 22).) Accordingly, the circuit court's rationale in finding prejudice (a burden belonging to Respondent, not Appellant) was neither supported by the law nor the record. *See Com. Ctr. of Greenville, Inc.*, 347 S.C. at 557, 556 S.E.2d at 724 (the nonmovant must prove that it would be prejudiced by the requested amendment). The circuit court's error in failing to properly evaluate the Rule 36(b) factors in ruling on Appellant's motion to amend constitutes an abuse of discretion and, for this reason, the order should be reversed. *See Scott v. Greenville Hous. Auth*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003) (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).

B. The circuit court erred in evaluating the purported "prejudice" to Respondent under Rule 15(a), SCRCP.

Rule 15(a), SCRCP declares that leave to amend a pleading "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*, 428 S.C. at 75-76, 832 S.E.2d at 768 (internal quotation marks and citations omitted), "not that the non-moving party is forced to defend the merits of a valid claim," *Patton*, 420 S.C. at 491, 804 S.E.2d at 262. "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. Courts are encouraged to freely grant leave to amend absent 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, [and] futility of amendment[.]" *Id.* at 490, 804 S.E.2d at 262 (citations omitted). Moreover, "the party opposing the motion has the burden of establishing prejudice." *Curry*, 428 S.C. at 76, 832 S.E.2d at 768 (internal quotation marks and citation omitted).

Under Rule 15(a), SCRCP, to properly assess any prejudice to Respondent, the circuit court should have considered whether Respondent had notice that the purported "new issues" would be tried and whether Respondent had an opportunity to refute them. *See id.* at 75-76, 832 S.E.2d at 768. Here, there were simply no *new* issues. In Appellant's Answer originally filed on or about February 16, 2023, Appellant admitted only that the Second Amendment to the Master Deed was executed and recorded in Richland County, South Carolina on or about May 19, 2016, and admitted "on information and belief" that the Commercial Units are subject to the terms of the Second

Amendment to the Master Deed. (Answer ¶¶ 17-18; R. 153.) Appellant, however, unequivocally disputed Respondent's allegations that it was in violation of the Regime Documents, of which the Second Amendment to the Master Deed was definitionally included. (Compl. ¶ 26; Answer ¶¶ 24, 26; R. 21, 154.) In addition, Appellant alleged that it was "without information or knowledge sufficient to form a belief as to whether the Rules and Regulations were in enacted in compliance with the Master Deed, Plaintiff's Bylaws, and other governing documents[,]" (Answer ¶ 22; R. 154), and stated that "*to the extent* the Rules and Regulations are enforceable against M Gourmet, they have been inconsistently, wrongfully, and unfairly enforced against M Gourmet," (*id.* (emphasis added)). By way of an affirmative defense, Appellant also alleged that Respondent was in "violation of the Master Deed and amendments, Bylaws, and Rules and Regulations due to the manner in which it has sought to enforce the same against M Gourmet." (Answer ¶ 32; R. 155.)

Accordingly, since the earliest time possible, Appellant has disputed the validity and enforceability of the Second Amendment to the Master Deed and the Rules and Regulations despite Respondent's and the circuit court's assertions otherwise. Thus, Respondent has had plenty of notice of Appellant's claims and defenses in this case. Respondent did not meet its burden to prove prejudice as contemplated under Rule 15(a), SCRCP. That Respondent must proceed to trial on the strengths of its case as opposed to an early resolution after filing a motion only ninety (90) days after initiating the action and twenty-five (25) days after Appellant filed its Answer, does not constitute prejudice under Rule 15(a), SCRCP. *See Mictronics, Inc. v. S.C. DOR*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (highlighting "South Carolina's policy favoring the disposition of issues on their merits rather than on technicalities").

Therefore, for all these reasons, this Court should reverse the circuit court's order.

II. The proposed amendments to Appellant's Answer and responses to requests for admission preclude both judgment on the pleadings and summary judgment.

The amendments to Appellant's Answer and responses to requests for admission ***would*** create a genuine issue of material fact regarding the validity and enforceability of the Second Amendment to the Master Deed and the Rules and Regulations as applied to Appellant. Appellant agrees with Respondent's assertion that the proposed amendments to Appellant's Answer and responses and requests for admissions do admit the *validity* and *enforceability* of the ***Master Deed*** and ***First Amendment***. (Respondent's Br. at 13.) That is because the Master Deed and First Amendment were entered as part of the contract of sale for the Commercial Units 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. 186-87, 194.)

Through the proposed amendments, however, Appellant denies the validity and enforceability of the ***Second Amendment to the Master Deed*** and, consistent with its original Answer, 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. (MGG's Proposed Amended Responses to Requests for Admission at ¶¶ 7-8; MGG's Proposed Amended Answer at ¶¶ 20, 24, 45; Answer ¶ 22; R. 188, 191, 194.) Respondent's strawman argument that Appellant's "qualified concession as to the Rules and Regulations . . . is of no moment here because this is not an enforcement action" should be disregarded. (Respondent's Br. at 13-14 (citing *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (relying on "an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter," the appellate court found that the plaintiff failed to show that "he was somehow harmed by having been denied a continuance")).) The fact that Respondent seeks a declaration that the Regime Documents are "valid and

enforceable" demonstrates the fallacy of Respondent's position. (Compl. p. 6; R. 22.) Moreover, Respondent has already filed a second action seeking to enforce the circuit court's order on appeal proving the ultimate and immediate purpose of the underlying action is to seek enforcement of the Second Amendment to the Master Deed and the Rules and Regulations, both disputed by Appellant, against Appellant. *See* Amended Complaint filed by Appellant on or about February 15, 2024 in the Richland County Court of Common Pleas in the matter styled: *The Lofts at Printers Square Condominium Association, Inc. v. M Gourmet, LLC et al.*, Civil Action No. 2023-CP-06446.[3]

Therefore, the circuit court's refusal to allow Appellant's proposed amendments was error and improperly resulted in Respondent obtaining judgment on the pleadings and summary judgment instead of the proper result of a trial on the merits. This Court should reverse.

III. The two-issue rule does not apply in this appeal and the circuit court erred by granting summary judgment.

Two-issue rule simply does not apply here. In its brief, Respondent seems to suggest that Appellant's use of "motion for judgment on the pleadings," shorthand for "motion for judgment on the pleadings or, in the alternative, for summary judgment" means that Appellant did not challenge the circuit court's grant of summary judgment on appeal. (Br. of Respondent at 15-16.) Respondent even goes so far as to rephrase the two issues on appeal. (*See* Br. of Respondent at 1.) Appellant, however, has appealed the ***entirety*** of the circuit court's order and ***all*** rulings therein, including the grant of summary judgment. The circuit court's rulings on Respondent's motion for judgment on the pleadings and summary judgment were both premised on <u>not</u> allowing the

[3] The Court may, of course, "take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records." *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984).

amendments, and the order containing the ruling on the motion to amend as well as all other rulings expressed therein are on appeal.

In support of its decision in favor of Respondent on its motion for judgment on the pleadings as to the enforceability of the Master Deed, the First Amendment to the Master Deed, and the Rules and Regulations, the circuit expressly found that "the pleadings raise no dispute regarding the validity and enforceability of the Master Deed, First Amendment and Rules and Regulations [because] MGM's [sic] filed answer, its responses to the Rule 36 requests for admissions, and the proposed amended answer and responses all readily admit the Association's allegations that the Master Deed, First Amendment and **Rules and Regulations** are valid and enforceable."[4] (Order p. 4 (emphasis added); *see also* Order pp. 2, 3; R. 4-6.) As discussed *supra*, this finding is erroneous. In support of its grant of summary judgment as to the validity and enforceability of the Regime Documents, including the Second Amendment to the Master Deed and the Rules and Regulations, the circuit court likewise relied on several inaccurate findings. *First*, the circuit court again erroneously found that "[t]he proposed amendments [to Appellant's Answer] admit the validity and enforceability of the Master Deed, First Amendment, and **Rules and Regulations.**" (Order p. 7 (emphasis added); *see also* Order p. 2; R. 4, 9.)

Second, the circuit court found that "MGM [sic] admits in its initial answer . . . that the Second Amendment is enforceable." (Order p. 5; R. 7.) As discussed in Section I(B) of this Reply

[4] The circuit court's order reflects that it improperly considered matters outside of the pleadings, namely Appellant's responses to requests for admission and Appellant's proposed amended responses to requests for admission. (*See* Order p. 4; R. 6.) The circuit court should have only considered Appellant's responses to requests for admission and proposed amended responses to requests for admission when deciding Respondent's motion for summary judgment, or, alternatively, converted Respondent's motion for judgment on the pleadings into a motion for summary judgment. *See* Rule 12(c), SCRCP.

brief, Appellant did not admit that the Second Amendment to the Master Deed was valid and enforceable in its Answer. (Answer ¶¶ 15, 17, 20, 22; R. 153-54.)

Third, the circuit court found that "the Second Amendment did not remove or take away any [parking] spaces" and that "the commercial units still have use of the [parking] spaces as they did before." (Order p. 5; R. 7.) A comparison of the First and Second Amendments to the Master Deed reveal that the Second Amendment did in fact remove nine (9) of the eleven (11) parking spaces within the Additional Parking Area specifically assigned to Appellant in the First Amendment of the Master Deed (which was entered as part of the contract of sale for the Commercial Units and formed the basis of the parties' bargain) 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. (First Amendment to the Master Deed ¶ 7; Second Amendment to the Master Deed ¶ 3; R. 122-23, 130-31.) The nine (9) parking spaces that were taken from Appellant within the Additional Parking Area were then deemed general common elements. (Second Amendment to the Master Deed ¶ 3; R. 130-31.) Further, Appellant's added affirmative allegations in its proposed amended Answer 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. 190-91.)

Finally, the circuit court found that "***clearly*** the Master Deed allows for amendments without MGM's [sic] consent" (Order pp. 7-8 (citing Master Deed at 37, Article 12) (emphasis

added); R. 9-10.) However, a review of the Master Deed demonstrates the error in this finding. Article V, Section 5.3.2 of the Master Deed provides:[5]

> [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. 45.) Article V, Section 5.3.2 of the Master Deed set outs to protect the commercial use and purpose of the Commercial Units by establishing two separate prohibitions, both relevant to this action. First, it prohibits any amendment or modification that ***changes the permitted uses or prohibited uses of the Commercial Units*, regardless of consent**. Second, it prohibits any requirement established by the Rules and Regulations that restricts 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* without the prior consent of the Owners of the Commercial Units**. Moreover, while consent is required for the **Rules and Regulations** to be effective against the Commercial Units, consent cannot validate an otherwise invalid amendment or modification by the Board.

As such, the Second Amendment to the Master Deed 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. In addition, because the Rules and Regulations were created without the prior written consent of the owners of the Commercial Units, it is also ineffective against the

[5] Neither the First nor Second Amendment to the Master Deed purports to make any changes to Article V, Section 5.3.2 of the Master Deed. (*See generally* First Amendment to the Master Deed; Second Amendment to the Master Deed; R. 121-38.)

Commercial Units and invalid and unenforceable as to the owners of the Commercial Units on that ground.

The circuit court's reliance on Article XII of the Master Deed is misplaced. 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. Rather, 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. Because each ruling in the order, though separate, is based on the same inaccurate factual determinations that supported the circuit court's denial of Appellant's motion to amend, the entire order is encompassed in this appeal.

Therefore, if this Court determines that the circuit court should have granted Appellant's motion to amend because its findings supporting that decision were not supported by the facts and/or the law, this Court must also conclude that the circuit court's grant of judgment on the pleadings and summary judgment in favor of Respondent should be reversed and remanded.

IV. Appellant's proposed amended Answer does more than add allegations challenging the validity and enforceability of the Second Amendment of the Master Deed.

Respondent's final argument asserts that this Court should affirm the circuit court's order because the statute of limitations purportedly "bar[s] M Gourmet's challenge to the Second Amendment." (Br. of Respondent at 17.) Even assuming for the sake of argument that Appellant's challenge to the Second Amendment to the Master Deed is barred by the statute of limitations, that would only affect Appellant's counterclaims and not any of Appellant's defenses to Respondent's claims. Respondent attempts to use the statute of limitations as a sword to preclude Appellant from disputing the actual merits of the validity and enforceability of the Second Amendment to the Master Deed. The statute of limitations, however, should be used only as a shield, not as a

sword and, as such, cannot operate to bar pure defenses. ***See*** *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) ("A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action."); *Weems v. Carter*, 30 F.2d 202, 204 (4th Cir. 1929) ("[T]he statute of limitations is oftentimes a shield, but never a sword. The statute of limitations is available only as a defense and never as a cause of action") (quotation marks and citations omitted). Moreover, Appellant's proposed amended Answer does more than add a counterclaim seeking declaratory judgment on the validity and enforceability of the Second Amendment to the Master Deed. As such, the statute of limitations cannot be the basis for affirming the circuit court's order because it would require this Court to ignore the remaining changes to Appellant's Answer and completely disregard amendments to Appellant's responses to requests for admission.

CONCLUSION

For the reasons stated herein and in the Brief of the Appellant, the Court should reverse the circuit court's order and remand for a hearing on Appellant's motion to amend its Answer and responses to Respondent's requests for admissions and Respondent's motion for judgment on the pleadings or, in the alternative, motion for summary judgment.

Signature on Following Page

September 11, 2024

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM RICHLAND COUNTY
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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.

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough, LLP, attorneys for M Gourmet Group, LLC, do hereby certify I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified in accordance with the Supreme Court Order 2022-05-06-04, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

Documents Served: Final Reply Brief of Appellant

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September 11, 2024