

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge
Circuit Court Case No. 2010-CP-10-9305

APPELLATE CASE NO.: 2013-001632

Cambridge Lakes HOA,.....Respondent

v.

Johnson Koola,.....Appellant

[INITIAL] BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT TO RESPONDENT WHEN DISCOVERY WAS NOT COMPLETED, AND APPELLANT'S MOTION TO COMPEL WAS YET TO BE HEARD?
2. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT DISMISSAL OF APPELLANT'S COUNTERCLAIMS AGAINST RESPONDENT FOR CIVIL CONSPIRACY AND BREACH OF FIDUCIARY DUTY?
 - A. DID APPELLANT STATE A SUFFICIENT CLAIM AGAINST THE RESPONDENT FOR CIVIL CONSPIRACY FOR THE PURPOSE OF SURVIVING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT?
 - B. DID APPELLANT STATE A SUFFICIENT CLAIM AGAINST THE RESPONDENT FOR BREACH OF FIDUCIARY DUTY FOR THE PURPOSE OF SURVIVING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT?

STATEMENT OF THE CASE

This is an appeal from Charleston County trial court's order, which dismissed appellant Johnson Koola's ("Koola" or appellant) counterclaims against Cambridge Lakes HOA ("HOA" or respondent) subsequent to granting of Summary Judgment to the HOA, and which was affirmed by denial of appellant's Motion to Reconsider. The Form 4 Order (ROA # 1: Form 4 Order, *Cambridge Lakes HOA v. Koola*, Case No.: 2010-CP-10-9305, March 4, 2013) issued by the Presiding Judge stated that "Plaintiff's Motion for Summary Judgment was granted, therefore Defendant's Counterclaims are dismissed and Plaintiff's Motion to Compel is now moot". The Order ended the case. Appellant appeals the dismissal of his counterclaims against the HOA and prays to the Honorable Court to revoke the Summary Judgment granted to the respondent.

STATEMENT OF FACTS

In January 2004, Koola contracted to purchase a condominium in Cambridge Lakes subdivision in Mt. Pleasant, South Carolina, from Cambridge Two, LLC and Albert Estee (developer/seller). The condominiums under consideration were converted from apartments through condo conversion. Shortly before closing of the sale, Koola received a copy of the Master Deed for Cambridge Lake[s] Horizontal Property Regime (ROA # 2: Master of the HOA at p.1) from Cambridge Two, LLC and Albert Estee, which stated that "Developer submits the Property in Charleston County, South Carolina,, to the provision of the Horizontal Property Act, Section 27-31-10, et seq., South Carolina Code of Laws, 1976 (the "Act"), the provisions of which,, are incorporated herein by reference and form a part of this Master Deed, for the purpose of creating and establishing the Cambridge Lake[s] Horizontal Property Regime (the "Condominium)". Koola and his Mortgagee also received the "Builder's Certification" (ROA # 3: Builder's Certification) from Cambridge Two, LLC and Albert Estee which stated: "For Condo Conversions: The structural, health and safety repairs and remodeling have been completed". In February 2004, Koola purchased the condominium after paying 10% down payment. In September 2010, Koola learnt that developer/seller violated South Carolina Horizontal Property Act § 27-31-430 (1976), ("HPA 27-31-430"), and that the "Builder's Certification" was falsified and fraudulent.

In June/July 2008, Koola was attempting to sell his condominium to enable him to pay off his mortgage related debts, as his income then was only limited Social Security benefits. In June 2008, the HOA initiated construction defects litigation¹

¹Summons and Complaint, *Cambridge Lakes HOA v. Bostic Bros.*, Case No.: 2008-CP-10-3506, June 8, 2008.

against the builder and related entities, Cambridge Two, LLC, and Albert Estee (developer/seller) and one of two real estate agents. After initiating the lawsuit the HOA, through a letter dated June 25, 2008 (ROA # 4: Letter from the HOA at 3, June 25, 2008), informed the homeowners that there are defects "in the buildings at Cambridge Lakes in the foundation, main walls, windows, roofs, trusses, framing or any other part of the structure or building envelope". The HOA added violation of HPA § 27-31-430 in June/July 2010 as a cause of action when it amended the Summons and Complaint. The summons and complaint in the said litigation¹ do not claim most of the defects as stated in this letter (Letter from the HOA, *supra*, at 3); thereby, the HOA exaggerated and stigmatized the Cambridge Lakes condominiums. The HOA did not follow the due process while initiating the litigation¹. The HOA asked the homeowners to assign their claims and rights of action to the HOA and to agree to a collection of regular or special assessment on behalf of the HOA. (Letter from the HOA, *supra*, at 3). The HOA claimed \$8 million as the cost to repair the construction defects¹. This translates into defects worth \$92,307 in the 3-bedroom condominium Koola purchased.

Because of the alleged massive construction defects, the stigmatization of the property and the stated potential liability of \$92,307, Koola could not sell² his unit in 2008. South Carolina law, S. C. Code Ann. § 27-50-65. (2007), obligates Koola to inform the potential buyers of the aforementioned construction defects in the buildings. In 2009 Koola became insolvent and filed for Chapter 7 Bankruptcy. After discharge

² Between 2006 and 2010, the market price of a three-bedroom condominium in Cambridge Lakes fell from approximately \$245,000 to \$125,000 (ROA # 18: Koola, Motion to Reconsider, p.15).

from bankruptcy, Koola made another attempt to sell his condominium in the second half of 2009. Again, Koola could not sell his condominium.

By November 2009, Koola had neither income by means of wages nor any resources to continue to pay mortgage-related payments and defaulted on those payments. In April/May 2010, Koola listed his unit for short sale on the advice of his Mortgagee. When informed of his attempt to sell his unit through short sale by the real estate broker, the HOA filed lien³ on his unit. On August 10, 2010, the HOA filed a civil action (ROA # 5, Summons, Aug. 10, 2010) against Koola in the Small Claims Court alleging failure to pay monthly assessments, which prompted Mortgagees to file foreclosure actions⁴ against Koola. On December 15, 2010, the HOA also initiated foreclosure action (ROA # 6: Summons on Crossclaim of HOA, Dec. 15, 2010) against Koola. Because of these multiple adversarial and judicial actions, Koola cancelled his efforts to sell his condo unit through short sale. The HOA, through its multiple civil actions, obstructed Koola's short sale of his condominium. The HOA's civil action against Koola continues to todate. (Summons, *supra*).

The HOA president's report 2011 (ROA # 7: President's Report 2011 at 3) contains the names of twenty-nine (29) out of one hundred and four (104) Cambridge Lakes homeowners (25%), who have regime assessment dues in 2011 alone. This list does not contain the names of defaulters prior to and after 2011. The HOA's initiation of construction defects litigation¹ had a catastrophic effect on Koola and Cambridge Lakes homeowners, and many lost their homes to short sales and foreclosures.

³ Notice of Lien, May, 24, 2010

⁴ First Mortgagee foreclosure action: *BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP v. Johnson D. Koola et al.* case No.: 2010-CP-10-6060, Sep. 1, 2010; Second Mortgagee filed foreclosure action as a cross claim.

PROCEDURAL HISTORY.

The litigation between the parties initially rose on August 10, 2010, when the HOA filed a Summons (Summons, *supra*) in Charleston County Small Claims Court against Koola for unpaid monthly dues and associated fees. The Hon. Magistrate did not grant Koola's prayer⁵ to transfer the civil case from the Small Claims Court to the Court of Common Pleas to be combined with foreclosure cases⁴ filed by Mortgagees against Koola. The Hon. Magistrate granted Koola permission to file a counterclaim against the HOA; Koola filed a **Counterclaim** against the HOA on Nov. 5, 2010 claiming Civil Conspiracy and Breach of Fiduciary Duty (ROA # 8: Koola, Counterclaim, Nov. 5, 2010). The Hon. Magistrate transferred⁶ the case to the Court of Common Pleas as Koola's counterclaims exceeded the jurisdictional limit of \$7,500; since then the case continued as 2010-CP-10-9305 in the Court of Common Pleas. On December 15, 2010, the HOA filed a foreclosure action (Summons on Crossclaim of HOA, *supra*) against Koola. Koola filed **Answer and Counterclaim** against the HOA in the foreclosure action (ROA # 9: Koola, Answer and Counterclaim, Case No.: 2010-CP-10-6060, Mar. 3, 2011). The motions filed by the HOA to dismiss both of Koola's counterclaims^{7, 8} were denied⁹ by the Court of Common Pleas on July 26, 2011.

⁵ Koola, Answer to Summons, *Cambridge Lakes HOA v. Koola*, Case No. 10-SC-87-1646, Sep. 2, 2010

⁶ Order, Case No. 10-SC-87-1646, Nov. 9, 2010

⁷ HOA's Motion to Dismiss Koola's Counterclaim, Case No.: 2010-CP-10-9305, Jan. 4, 2011

⁸ HOA Motion to dismiss Koola's Counterclaim, Case No.: 2010-CP-10-6060, March 18, 2011

⁹ Form 4 Order, HOA's Motion to Dismiss, July 27, 2011.

In June 2011, the HOA served discovery on Koola. Koola responded to the discovery proceedings in a very timely manner. On July 15, 2011, Koola served discovery on the HOA. The HOA replied to Koola's Request for Admission on Aug. 15, 2011, to Koola's Request for Production on September 26, 2011 and to Koola's First Interrogatories on Sep. 26, 2011. The HOA's responses were mostly *incomplete*; **HOA's responses to Koola's Request for Admission illustrate** this inadequacy. (ROA # 10: HOA's Answers to Koola's Request for Admissions, Aug. 15, 2011). More importantly, the HOA produced certain minutes of the BOD (Board of Directors) meetings while *withholding minutes* of certain critical BOD meetings. Also, the HOA produced copies of financial statements of the HOA for several months while *withholding financial statements for several months*. Many of the statements were *incomplete*. It was painful and frustrating to notice that the HOA *modified several of the financial statements* before production to Koola. Koola filed a Motion to Compel on Aug. 15, 2012 (ROA # 11: Motion to Compel, Aug. 15, 2012).

The HOA's civil case No.: 2010-CP-10-9305 and the foreclosure case No.: 2010-CP-10-6060 against Koola were subsequently combined into a single action, Case No.: 2010-CP-10-9305, through a court order¹⁰ on December 5, 2011. On June 8, 2012, Koola filed an Amended Answer and Counterclaim (ROA # 12: Koola, Amended Answer and Counter Claim, June 8, 2012). The HOA filed an Answer to the Amended Answer and Counter Claim on June 18, 2012 (ROA # 13: HOA, Reply to Defendant's Amended Answer and Counterclaims, June 18, 2012).

¹⁰ Form 4 Order, *Cambridge Lakes HOA v. Koola*, Case No.: 2010-CP-10-9305, Dec. 12, 2012

The HOA filed a new Motion for Summary Judgment to dismiss Koola's counterclaims in case # 2010-CP-10-9305 on August 1, 2012 (ROA # 14: HOA, Motion for Summary Judgment, Aug. 1, 2012). On motion hearing day on November 6, 2012, the Presiding Judge noticed that the HOA and hence Koola also had not filed any Memorandum or Affidavits in support of the Motion for Summary Judgment and ordered both parties to file appropriate documents. The HOA filed a Memorandum in Support of the Plaintiff's Motion for Summary Judgment on Dec. 7, 2013 (ROA # 15: HOA, Memorandum in Support of Motion for Summary Judgment). Koola filed a Response to Plaintiff's Motion for Summary Judgment on Jan. 2, 2013 (ROA # 16: Koola, Reply to HOA's Motion for Summary Judgment, Jan. 2, 2013). The Presiding Judge took the case under advisement. The trial court was aware of the appellant's Motion to Compel in the case docket. Nevertheless, the trial court granted summary judgment to respondent, then proceeded to dismiss the appellant's counterclaims without ruling on his counterclaims whatsoever and then declared the Motion to Compel "now moot" (Form 4 Order, *supra*). The long order granting summary judgment to the HOA and dismissing Koola's counterclaims was posted on March 15, 2013 (ROA # 17: Order Granting Plaintiff's Motion for Summary Judgment). The order prepared by the HOA on behalf of the Court did not address any of the material facts raised by Koola in his Reply to Plaintiff's Motion for Summary Judgment (Koola, Reply to Motion for Summary Judgment, *supra*). On April 5, 2013 Koola filed a Motion to Reconsider in this action (ROA # 18: Motion to Reconsider). The presiding Judge denied the Motion to Reconsider on June 18, 2013 (ROA # 19: Order Denying Defendant's Motion to Reconsider). The Appeal to the Court of Appeals followed.

STANDARD OF REVIEW

In reviewing the grant of a summary judgment motion, appellate courts apply the same standard that governs the trial court under Rules 56(f) and 56(c) of the SCRPC. Under Rule 56(f), SCRPC, the Court may order “a continuance of the case to permit affidavits to be obtained or depositions to be taken or *discovery to be had*, if it appears from the affidavits of a party opposing summary judgment that he cannot, for reasons stated, justify his opposition to the motion for summary judgment”.

Under Rule 56(c), SCRPC, “Summary Judgment is proper when it is clear that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law”. *Nexsen v. Haddock*, 353 S.C. 74, 77, 576 S.E.2d 183, 185 (Ct.App. 2002). In ruling on a motion for summary judgment, “the evidence and inferences that can be drawn therefrom should be viewed in the light most favorable to the nonmoving party”. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394, (1994). “If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury. However, if the evidence is susceptible of only one reasonable inference, the question is no longer one for the jury but one of law for the Court.” *Ward v. Zelinski*, 260 S.C. 229, 232, 195 S.E.2d 385, 387 (1973)

ARGUMENTS

I **IT WAS AN ERROR FOR THE TRIAL COURT TO GRANT SUMMARY JUDGMENT TO THE HOA WHEN DISCOVERY, INCLUDING KOOLA’S MOTION TO COMPEL, WAS STILL PENDING.**

Rule 56(f), SCRPC, implies that dismissal of a defendant’s counterclaim and granting of summary judgment to the plaintiff are not appropriate when the trial court

has not decided on the defendant's Motion to Compel. "Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery". *Baird v. Charleston County*, 333 S.C. 519, 539, 511 S.E.2d 69 (1990); *Baughman v. American Telephone & Telegraph Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of law." *Middleborough v. Montedison*, 320 S.C. 470, 465 S.E.2d 765, 771 (Ct.App. 1995).

In Koola's Motion to Reconsider, Koola expressly stated that the HOA had failed to fully respond to Koola's discovery requests. Koola submitted that in this case there was still outstanding discovery that was dispositive to the facts of the case. (Motion to Reconsider, *supra*, at 23). The HOA's answers to Koola's Request for Admissions to the Plaintiff bear testimony to this statement (Answers to Koola's Request for Admissions, *supra*). The HOA did not produce with several months' of financial statements. Many of the monthly financial statements were incomplete even by the standards set by the HOA. In several statements, a section called "Aging Reports", which provides information about defaulted homeowners, was just removed from the statements. Some of the statements were either modified or altered shortly before submission to Koola, possibly committing perjury. Koola cannot state what changes were made to the financial statements. The HOA intentionally withheld the minutes of BOD meetings for several months, especially those when the BOD discussed Koola's delinquencies in 2010 and 2011, and when the BOD discussed construction defects litigation¹. The HOA also failed to produce the official policy of the HOA to initiate litigation against Koola and other homeowners to collect unpaid dues.

There were unanswered questions about when the HOA knew of the construction defects in Cambridge Lakes and of the violation of HPA § 27-31-430, and whether the HOA officially authorized the HOA attorney to initiate the construction defects litigation in BOD meeting.

Koola cannot state with specificity as to how he was prejudiced by failing to receive a full and fair opportunity to complete discovery because the documents and information at issue were never provided by the HOA. The trial court should have considered the pending issues and the Motion to Compel and afforded Koola sufficient time to develop opposition to summary judgment before making any ruling on HOA's summary judgment dismissal of Koola's counterclaims with prejudice.

II. THE TRIAL COURT ERRED IN GRANTING THE HOA'S MOTION FOR SUMMARY JUDGMENT TO DISMISS KOOLA'S COUNTERCLAIMS AGAINST THE HOA.

Under Rule 56(c), SCRCP, it is well established that "summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that moving party is entitled to a judgment as a matter of law." *Id.* "Summary judgment is inappropriate when further inquiry into the facts is desirable to clarify proper application of the law. Summary judgment is not appropriate if the facts are conflicting, or if the inferences to be drawn from the facts doubtful. Summary judgment should not be granted even when the evidentiary facts are not in dispute, if there is dispute as to the conclusion to be drawn from those facts. In deciding a motion for summary judgment, the evidence and all of its inferences must

be viewed in a light most favorable to the non-moving party. Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial on the disputed factual issues.” *Wade v. Berkeley County*, 339 S.C. 513, 518, 529 S.E.2d 743, 746 (Ct. App. 2000) (citations omitted).

In *Hancock v. Mid-South Management Co.*, 381 S.C.326, 330-31, 673 S.E.2d 801, 803 (2009), the Supreme Court upheld the application of the “scintilla standard” governing the determination of motions for summary judgment where, as here, a plaintiff’s claims must be met by the preponderance of the evidence:

“[W]e hold that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand summary judgment.”

Id.

A IT WAS AN ERROR FOR THE TRIAL COURT TO DISMISS KOOLA’S COUNTECLAIM AGAINST THE HOA FOR CIVIL CONSPIRACY BY SUMMARY JUDGMENT.

Koola’s Amended Answer and Counterclaim plead a claim against the HOA for civil conspiracy (Amended Answer and Counterclaim, *supra*, at 3, 4). Koola has stated here (this Initial Brief, pp 4, 13-15) that the obstruction of Koola’s short sale of his condominium was an act of conspiracy. Koola’s civil conspiracy claim further alleged that the individual board members of the HOA, acting as agents of the HOA, conspired with the HOA management company (Ravenel Associates) and the HOA attorneys and committed the tort in question to injure Koola. (Reply to Motion for Summary Judgment, *supra*, p 15). Koola suffered “special damages” as a result of the said civil conspiracy. (this Initial Brief, pp13-14).

Under South Carolina law, a claim for civil conspiracy is established if the plaintiff can show that the following elements are met:

1. The combination of two or more persons;
2. for the purpose of injuring the plaintiff;
3. causing special damages to the plaintiff.

LaMotte v. Punchline of Columbia, Inc. 296 S.C. 66, 370 S.E.2d 711 (1988); *Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (Ct. App. 2010).

Koola has stated that the members of the BOD conspired among themselves, the Management Company (Ravenel Associates) and the HOA attorneys. This satisfies the first element of civil conspiracy. *Lee v. Chesterfield General Hospital, Inc.*, 289 S.C. 6, 11, 344 S.E.2d 379, 381-82 (Ct. App. 1984). The parties to the conspiracy against Koola were motivated by these factors: (1) All the parties were infuriated with Koola as Koola did not join the HOA's construction defects litigation¹. (2) All parties wanted to take revenge against Koola as he asked the HOA and the Management Company to provide him with the financial statements of the HOA to discover any financial irregularities; they feel that Koola questioned their authority and integrity. Koola, indeed, found irregularities in financial statements. (3) Koola once pinpointed to a member of the BOD of HOA that the annual budgets of the HOA presented to the homeowners are manipulated. (4) Koola once questioned the HOA about the HOA's new policy regarding renting the condominiums, which infuriated all the parties. The HOA threatened Koola with legal actions in this matter, but finally withdrew its threats. Here, Koola expressly plead that all the parties conspired to injure Koola, maliciously singling him out for disparate treatment. That the HOA denies this

allegation is, of course, does not mean that the HOA is entitled to summary judgment. It creates a clear genuine issue of material fact, to which Koola must be entitled to present to a jury to determine.

With regard to the second element of a prime facie claim for civil conspiracy, Koola has expressly alleged that the purpose of the HOA's decision to institute multiple litigations against Koola was to injure Koola by precluding his ability to short sell his condominium. The HOA countered that there was nothing illegal in and of itself in filing a lien or a small claims court case against Koola. The fact that the actions of conspiracy are not per se illegal is not fatal to the ability to state a civil conspiracy cause of action. It is well established that an unlawful act is not a necessary element of the tort. *Lee v. Chesterfield General Hospital, Inc.*, 289 S.C. 6, 11, 344 S.E.2d 379, 383 (Ct. App. 1984). Again, the motive, whether innocent or malicious, of the HOA was in clear dispute at the time of the HOA's summary judgment, and the determination of this issue should have been reserved for a jury to determine.

To meet the final requirement of showing "special damage", Koola has alleged that the objective of the conspiracy was not only to injure Koola, but also to destroy him financially. Koola stated here (this Initial Brief, p 4) that the HOA obstructed Koola's short sale of his condominium. In a short sale, the homeowners associations will be paid out in full in preference to Mortgagees; any loss will be born by the Mortgagee. In a foreclosure action, the Mortgagees will be paid out in full first; usually, the HOAs collect nothing or very little after foreclosure sale S.C. Code Ann. § 27-31-200. The policy of the HOA was/is to collect any unpaid regime dues from (insolvent) homeowners through short sale as recorded in the minutes of the meeting of the BOD

held on August 25, 2009 (ROA # 20: Minutes of the BOD meeting, Aug. 25, 2009 at 1) under the paragraph "Delinquent Report":

"..... If the bank wants to pursue "short sales" in which the bank obtains real estate brokers to sell the property while still in the name of the delinquent owner it works to our benefit. All parties including the bank have to negotiate a settlement to affect the sale. Normally the homeowner's association only has to forgive the late fees" (Emphasis added).

It is quite evident from the statement that a short sale works to the best advantage of the HOA to collect dues from insolvent homeowners. By obstructing Koola's short sale of his condominium, the HOA violated its own policy and that of Federal lending agencies and regulators and financial institutions. (Memorandum in Support of Motion for Summary Judgment, *supra*, pp 6-10).

If Koola could have sold his condominium through a short sale in 2010, he would have received anywhere between \$120,000 and \$125,000 as sales price. This was just sufficient to pay off all the claims of the HOA and the Mortgagee as Koola had more than 20% equity in his condominium. If the Court grants the civil and foreclosure actions of the HOA and the Mortgagee, then these parties will foreclose on Koola. A foreclosure action would bring \$50,000 to \$60,000 to the table, which would result in deficiency judgments of about \$100,000. The psychological pressure of this potential judgment destroys Koola's life. At age 70, Koola has no income or resources to pay off even a small fraction of these judgments. Consequently, the deficiency judgment will follow Koola to his grave. This is the special damage that the HOA conspired to inflict on Koola. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 292 (1981)

The HOA denied any conspiracy against Koola. (Motion for Summary Judgment, *supra*, pp 3-6). It states:

(1) *The HOA has authority to institute an action against Koola for noncompliance with Master Deed to pay the monthly regime and by virtue of S.C. Code Ann. § 27-31-170. id. at 3.*

Koola responds that initiation of civil action to collect unpaid dues is **the option** when the nonpayment is due to temporary financial difficulties, or if the defaulters have additional sources of income or assets. In the case of insolvent homeowners with no income or assets, the best and only option is to collect the dues after a short sale. Pursuing civil actions against insolvent people are comparable to suing a dead person for damages.

Koola has raised the question whether the Master Deed of the HOA is legally valid and enforceable with respect to Koola. Koola has stated here (this Initial Brief, p 2) that Cambridge Two, LLC (developer/seller) and Cambridge Lake[s] Horizontal Property Regime sold a condominium to Koola in violation of S.C. Code Ann. § 27-31-430 and a fraudulent, falsified "Builder's Certification". "Because a condominium is a creature of the statute, strict compliance with Horizontal Property Act is required to create horizontal property regime". *Harrington v. Blackstone*, 319 S.C. 1, 459 S.E.2d 309, 312 (Ct.App. 1955). Strict compliance with the Horizontal Property Act was not met. Therefore, the Master Deed with which Cambridge Two LLC and Albert Estee sold condominium to Koola is statutorily invalid and unenforceable. In *Ryals v. Anderson*, 180 Ga.App. 568, 349 S.E.2d 801 (Ga.App. 1986), the Court of Appeals of Georgia has acknowledged that the purchaser of a condominium has a statutory right

to rescind a sales contract of a condominium if the purchaser did not receive statutorily required documents. The HOA took over the control of the property regime from its predecessor, Cambridge Lake[s] Horizontal Property Regime, in October 2004. Through this action, the HOA inherited the assets and liabilities of its predecessor and is a true successor of its predecessor, Cambridge Lake[s] Horizontal Property Regime. The HOA is liable to Koola under a corporation's successor liability provisions. "*If [the successor] takes the benefit, it must, as has so often been said, take the burden, which equitably attaches with it*". *Simmons v. Mark Lift Industries, Inc.*, 366 S.C. 308, 622 S.E.2d 213 (2005) (Internal citations omitted). The HOA is employing the same Master Deed of its predecessor; this is the best evidence that the HOA is the true successor of Cambridge Two, LLC (developer/seller) and Cambridge Lake[s] Horizontal Property Regime. The appellant and the respondent agree that the HOA's predecessor sold a condominium to Koola in violation of S.C. Code Ann. § 27-31-430 (1976) and a fraudulent, falsified "Builder's Certification". This is a matter of law. The only disagreement between the appellant and the respondent is whether the HOA's Master Deed, inherited from its predecessor, is statutorily valid and enforceable on Koola. This is subject matter that should be decided by the Jury.

(2) *The HOA states: that no individual homeowner can stop making payments for a length of their choosing. id. at 3*

Koola responds that (i) Koola has paid his monthly regime dues from Feb. 2004 through October 2009 without a delay even on a single occasion. (ii) Koola became insolvent because of his inability to sell his condo in 2008 and 2009 and could not pay any dues thereafter. This inability was caused by the HOA's construction defects

litigation¹, which was initiated without due process of law. *Koola did not stop making payments voluntarily or at will.* The HOA is the proximate cause that rendered Koola insolvent. (iii) As an insolvent homeowner, Koola offered the HOA the best opportunity to clear the dues through short sale of his condo. Instead, the HOA opted for civil action leading to foreclosure.

(3) *The HOA states that the HOA has not singled out Koola for nonpayment of assessments. Id. at 3.*

Koola cites *here* specific instances where the HOA singled out Koola in its actions and acted discriminatorily. At the time when Koola was trying to sell his condominium, his neighbor two doors down (#1583 Cambridge Lakes Dr) had also put his unit for short sale. It was sold through short sale in February/March 2010. At that time, the neighbor had regime dues of \$13,673.23. RMC records indicate that the lien placed on his unit is not cleared even today. There are no court records showing any civil action pending against that neighbor. This means that the HOA let the neighbor sell his property without satisfying the lien. The said household was a two-income household; Koola has personal knowledge of this matter.

In 2008/2009, the HOA was pursuing a civil action¹¹ against another Cambridge Lakes homeowner. On April 19, 2009, the case was dismissed as a voluntary nonsuit without prejudice. There are no records to show that the HOA has collected any dues from that homeowner.

Financial statements received from the HOA in its responses to Koola's discovery requests indicate that three homeowners in Cambridge Lakes at 1423, Cambridge Lakes Dr, 1455 Cambridge Lakes Dr and 1491 Cambridge Lakes Dr, had

¹¹ 2008 CP-10-000471

several thousand dollars in unpaid dues. Court and RMC records show that the HOA hasn't collected any dues from these homeowners.

The HOA has not answered Koola whether the HOA took similar multiple civil actions against other defaulters who sold their condominiums through short sale and obstructed those short sales.

(4) *The HOA states that it has obtained judgments against five homeowners. id. at 4.*

Koola responds that the HOA has not stated whether these homeowners defaulted due to some temporary financial difficulties or due to irrevocable insolvency, and whether the HOA **collected** any judgments from them. Koola repeats that initiation of civil action to collect unpaid dues is **the option** when the nonpayment is due to temporary financial difficulties or the defaulters have assets. In the case of insolvent homeowners, the best option is to collect the dues after a short sale.

(6) *The HOA states that Koola has not established conspiracy by the HOA against Koola because Koola has sued only the HOA but not any other parties to the conspiracy in their individual capacities. Id. at 5.*

Koola responds that suing other parties in their individual capacities for conspiracy is not an element of conspiracy. Suing other members in their individual capacities is warranted only if the plaintiff seeks monetary damages from them. On a personal level, Koola will not sue any of the HOA Board members in their individual capacity for the simple fact that they are all his immediate neighbors.

(7) *The HOA further claims that the directors discharged their duties as directors in a manner that the directors reasonably believed to be in the best interest of the HOA. Id. at 6.*

Koola responds that the HOA's actions belie this statement. The HOA's construction defects litigation forced not only Koola but also twenty-nine out of one hundred and four Cambridge Lakes homeowners to default on their regimes dues in 2011 alone. (HOA President's report, *supra*, at 3) This list does not contain the names of defaulters prior to and after 2011. An undisclosed number of homeowners lost their homes to short sale and foreclosures. Evidences show that the HOA attorney filed construction defects litigation without a formal authorization from the BOD (this Initial Brief at 20, 21). The HOA initiated construction defects litigation claiming \$8 million damages, but settled the case for \$1.815 million at the expense of homeowners. Cambridge Lakes, LLC and Albert Estee were prime defendants in the HOA's construction defects litigation¹; in 2011, the HOA dismissed the complaint against them instead of recovering any damages from him at the expense of the homeowners. These actions were not in the best interest of the members of the HOA.

B IT WAS ERROR FOR THE TRIAL COURT TO DISMISS KOOLA'S COUNTERCLAIM AGAINST THE HOA FOR BREACH OF FIDUCIARY DUTY BY SUMMARY JUDGMENT

Koola has also pled claims for breach of fiduciary duty against the HOA in the following instances. (Amended Answer and Counterclaim, *supra*, at 1-3). Koola brings to the kind attention of Appellate Court five most serious Breaches of Fiduciary Duty by the HOA.

(i) The HOA and the Members of the BOD maintain that the BOD first learned of potential construction defects to the HOA's property during March-April 2008, and that the HOA retained attorney John C. Hayes, IV, to file construction lawsuit on its behalf. The HOA filed the lawsuit in June 2008. This *implies* that the HOA authorized Hayes as construction defects litigation attorney during the period between March-April 2008 and June 2008. (ROA # 21: Minutes of the meetings of the BOD, April 2008, May 2008 and June 2008). There are no references in the minutes of the meetings of the BOD during the period April 2008 to June 2008 that the HOA authorized Hayes to file the construction defects litigation. This *implies* that Hayes was not *officially* authorized by the HOA to file the lawsuit. The BOD might have met in a private meeting and outside the domain of HOA and requested Hayes to file the lawsuit; this is a private affair. The HOA, therefore, cannot claim protection under 'business judgment rules'. This is a serious breach of fiduciary duty by the HOA and the BOD to Koola.

(ii) In November 2004, Koola conveyed to Stephen Fisher, member of the BOD of HOA, very reliable information that the rumors of construction defects in Cambridge Lakes might be for real. Koola received this information from Koola's immediate neighbor who was an employee of the architect firm that oversaw the construction of Cambridge Lakes. Koola has alleged that Fisher knowingly lied to Koola when he said that there were no such construction defects in Cambridge Lakes. Koola believed Fisher and trusted him. If he really hadn't any information about construction defects, he should have inquired about it. Fiduciary relationship required Fisher to act on Koola's information. Should the HOA and/or the BOD "..... not uphold its duty to pursue a recovery for any alleged construction defects in the common elements, which

it maintains, it may be liable to the homeowners for its omissions. *Queen's Grant Villas Horizontal Property Regime I_IV v. Daniel Internat'l Corp.*, 286 S.C. 555, 335 S.E.2d 365, 366 (S.C.1985).

(iii) In June 2013, Koola discovered a letter¹² (ROA # 22: Notice of Condominium Conversion and Offer to Purchase) sent by Cambridge Two, LLC and Albert Estee (developer/seller) to the apartment residents¹³ of Cambridge Lakes in early 2003 that they will be provided with "Disclosure of Physical Condition of the Building" report as required by HPA § 27-31-430. However, Cambridge Two, LLC and Albert Estee did not provide disclosure report to any homebuyers. Charleston County RMC records show that three members of the BOD bought their condominiums as follows: Stephen Fisher, 1597 Cambridge Lakes Dr on May 28, 2003; John T. Martin, 1567 Cambridge Lakes Dr. on July 29, 2013 and Margel S. Henning, 1435 Cambridge Lakes Dr on April 4, 2003. All three members of the BOD were, *by all probability*, apartment residents of Cambridge Lakes in 2003, and they were in receipt of the said letter, and they were fully aware of the violation of HPA § 27-31-430 in 2003 and by implication they were aware of construction defects in Cambridge Lakes as early as 2003 or 2004. Any reasonable, ordinary, prudent person would have inferred that, let alone knowledgeable and responsible Board members, Management company specialized in real estate and the HOA attorneys. The HOA did not disclose the

¹² This letter was contained in the Memorandum in Support of its Motion for Summary Judgment filed by Trademark Properties, Inc. on Jan 6, 2011 in the HOA's construction defects litigation

¹³ S.C. Code Ann. §27-31-420 requires a developer/seller of condo conversion projects to offer to convey to the tenant of the apartment occupied by the tenant at a specified price and upon specified terms before condominiums are offered to the public for sale.

violation of HPA 27-31-430 by Cambridge Two, LLC and Albert Estee until 2010. By not disclosing this information to Koola in 2004, they breached fiduciary duty to Koola.

(iv) The HOA breached fiduciary duty when it initiated the construction defects litigation without the approval of two-third majority of the homeowners. The HOA denies this claim by stating that it has the power to sue because it has the "duty to maintain, repair, replace and operate the common elements" of Cambridge Lakes. *Queen's Grant Villas Horizontal Property Regimes I-IV v. Daniel Inetrnat'l Corp.*, 286 S.C. 555, 335 S.E.2d 365 (S.C. 1985). This decision comes with a qualification and severe limitations and does not offer the HOA authority to initiate construction defects litigation without due process. *"The rights and authority of the Regime must be gleaned from the Horizontal Property Act and from the master deed. From these we may determine (1) the property owned by the individual condominium owners and (2) the rights of the Regime."* *Roundtree Villas Association, Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 321 S.E.2d. 46 (1984). *"The Board of Directors may not undertake any action requiring a Referendum without complying with the provisions hereof.....The homeowners association is bound to obtain homeowners approval if the covenants of the association so demands it"*. *Baumann v. Long Cove Club Owners Ass'n*, 380 S.C. 131, 668 S.E.2d 420 (Ct.App. 2008). *"When controversy regarding rights of condominium unit owners arises, court must examine all relevant provisions of Horizontal Property Act, master deed, and allied documents, regarding those provisions together, in relation to each other and harmonized, if possible"*. (Internal citation omitted) *Harrington v. Blackstone*, 319 S.C.1, 459 S.E.2d 309 (Ct.App.1995). (Emphasis added). "A homeowners association is bound to follow the covenants and

its own bylaws". *Seabrook Island Property Owners Ass'n v. Pelzer*, 292 S.C. 343, 356 S.E.2d 411, 414 (Ct.App. 1987). The Horizontal Property Act does not address this issue directly. The Master Deed of the Association Paragraph (16) (6) Special Assessments for Capital Improvements (Master Deed, *supra*, at 12) states as follows:

"In addition to the annual assessments authorized above, the Association may levy, in any fiscal year, special assessments..... provided that any such assessment shall have the assent of two-thirds (2/3) of the vote of the Co-Owners voting in person or by proxy at a meeting duly called for this purpose,....." (emphasis added).

The HOA circumvented this provision of the Master Deed, through a letter dated June 25, 2008, by asking the homeowners to join the lawsuit to agree to assign their rights and claims to the HOA and to agree to any regular or future assessments when called for (Letter from HOA, *supra*, at 3). The homeowners, **who assigned their rights to the HOA, agreed to pay on demand unspecified amount of future special assessments**. This is like signing a 'promissory note'. "The HOA may exercise powers only within the constraints of South Carolina Horizontal Property Act, condominium declaration (Master Deed) and bylaws; where association actions were not in accordance with declaration, assessments were *ultra vires*". *Seabrook Island Property Owners Ass'n v. Pelzer*, 292 S.C. 343, 356 S.e.2d 411 (Ct.App. 1987).

(v) The HOA's income statements for 2010 and 2011, which are part of the annual budgets (ROA # 23: Cambridge Lakes HOA Annual Budgets 2007, 2009, 2010, 2011 and 2013) has recorded that the HOA collected revenue of \$272,400 for 2010 against the budgeted revenue of \$272,400 and revenue of \$284,880 for 2011 against the budgeted revenue of \$282,880. If these income statements are indeed true, then there are no regime dues from Koola and for that matter for any homeowners. The

HOA claims against Koola are then unsubstantiated and should be dismissed. If these income statements are not true, then these false income statements are cover-ups for potential financial misrepresentation.

As stated by the Restatement of Torts, "One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation. Restatement (2d) of Torts, 874 § (1979). In South Carolina, courts have held that a fiduciary relationship exists when "one reposes special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of one reposing the confidence". *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789, 794 (1990).

Uniform Condominium Act § 3-103(a), *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 426 S.E.2d 829 (Ct.App. 1993) and *Anchor Point, Inc. v. Shoals of Anderson, Inc.* 309 S.C. 486, 424 S.E.2d 521 (Ct.App. 1992) define fiduciary responsibilities of the HOA in the context of a Horizontal Property Regime. "A homeowners association is bound to follow the covenants and its own bylaws". *Seabrook Island Property Owners Ass'n v. Pelzer*, 292 S.C. 343, 356 S.e.2d 411, 414 (Ct.App. 1987).

The HOA states that Koola's claim for breach of fiduciary duty fails as a matter of law because the actions of the members of the BOD are protected by the Business Judgment Rules. S.C. Code Ann. § 3-31-830(a); S.C. Code Ann. § 33-31-830(b)(2). The HOA fails to recognize that the judgment of the directors will be set aside by judicial action if bad faith, dishonesty, or incompetence on the part of the members of BOD could be established. *Kuznik v. Bees Ferry Assocs.* 342 S.C. 579, 538 S.E.2d 15

(Ct.App. 2000). *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 414, 426 S.E.2d 828 832 (Ct.App. 1993). It is a matter for the jury to decide whether the HOA breached fiduciary duty to Koola.

In spite of the HOA's repeated claims that the HOA is protected under business judgment rules, and the HOA and the BOD acted in good faith and in the best interest of the association, the HOA carries **Comprehensive Business Liability Insurance** for HOA's directors and officers (ROA # 24: Certificate of Insurance). This insurance protection confirms that HOA's directors and officers are liable if bad faith, dishonesty, or incompetence on their part can be established. Koola's Amended Answer and Counterclaim has claimed damages in excess of one hundred thousand (\$100,000) dollars.

CONCLUSION

Based upon the foregoing points and authorities, Koola respectfully submits that the Order of the trial court granting summary judgment to the HOA should be reversed and appellant's counterclaims against respondent restored and remanded to the trial court for trial.

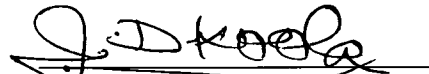
Dated: September 16, 2013
Mt. Pleasant, SC

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SC Court of Appeals

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