ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2012-211934

King's Grant Homeowners Association, Inc. — Respondent,

v.

Elwood Dixon and Jennifer Dixon, — Appellants.

BRIEF OF APPELLANT

Elwood Dixon and Jennifer Dixon
Summerville, South Carolina
Litigant Pro Se

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN JUDGMENT BASED ON A MATTER OF LAW?

II. DID THE TRIAL COURT ERR IN BASING THE COURT'S DECISION ON THE LOWER COURT'S CONSTRUCTION OF TERMS?

III. DID TRIAL COURT ERR IN HOLDING THAT 2010 BY-LAWS WERE PROPERLY AMENDED BY ONLY CONSIDERING A PORTION OF THE CONTRACT INSTEAD OF THE CONTRACT AS A WHOLE?

IV. DID TRIAL COURT ERR IN JUDGEMENT BASED ON ARTICLE X OF THE DECLARATION WHICH IS AMBIGUOUS TO SECTION IV (6) AND FIND THAT APPELLANTS BREACHED THE CONTRACT BASED ON THIS SECTION?

V. DID THE TRIAL COURT ERR BY NOT CONSIDERING THE INSUFFICIENCY OF THE EVIDENCE WHEN HOLDING AS MATTER OF LAW THAT THE 2010 COVENANCE AGREEMENT SUPERSEDED THE 2002 CONTRACT?

VI. DID TRIAL COURT ERR IN AWARDING REGIME FEES OF $440.00?

STATEMENT OF THE CASE

This case arises from Respondent [King's Grant Homeowners Association, Inc. (hereinafter "KGHOA")], bringing action on March 23, 2011 against Appellants [Elwood Dixon and Jennifer Dixon] alleging non payment of past regime fees in the amount of $406.08. On April 12, 2011, The Appellants answered stating Respondent illegally raised regime fees by illegally changing the 2002 by-laws and therefore breached the contract. On April 19, 2011, the Appellants counterclaimed for: 1) $30.00 for overpaid regime fees in 2006, plus an additional $15.00 of interest of 63 months at 10% daily, and 2) for punitive damages in the amount of $7455.00 for intentional breaching of Homeowners Association documents. On May 19, 2011, Respondent filed an amended

complaint requesting attorney fees and costs and on June 24, 2011answered the Dixons amended counterclaim.

The case was tried and electronically recorded on August 1, 2011, before Judge Charlene C. Snowden in the Summerville Magistrate Court. Both parties were informed that after hearing the arguments and carefully reviewing evidence a decision would be forthcoming. On August 22, 2011, magistrate court ruled that Respondent failed to meet the requirements set forth in the 2002 By-laws by not holding a membership meeting and obtaining the required 51% of the membership and therefore breached the contract with the Appellants. Judgment was entered for the Appellants with no monetary awards to either party.

On September 9, 2011 Respondent filed Notice of Appeal from magistrate court's judgment with the Dorchester County Court of Common Pleas. On September 10, 2011 Appellants received a copy of Respondent's Notice of Appeal and became aware of magistrate court's ruling, and on September 13, 2011 requested a copy of the bench trial recording. On December 9, 2011, appeal was heard by Judge Diane S. Goodstein in the Court of Common Pleas, Dorchester County. Circuit court ruled on March 25, 2012 that the lower court's decision was an error and reversed the lower court's ruling based on errors in law and fact and entered a judgment in favor of Respondent for past owed regime fees of $440.00 plus any late charge and case was further remanded back to magistrate court for determination of reasonable costs including attorney fees. Magistrate court scheduled a hearing for May 7, 2012. However, the Appellants had already begun proceedings to the Court of Appeals and on May 3, 2012, Appellants filed and served Notice of Appeal on Respondent.

ARGUMENTS

The court has jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of the circuit court, family court, a final decision of an agency, a final decision of an administrative law judge, or the final decision of the Workers' Compensation Commission. This jurisdiction is appellate only, and the court shall apply the same scope of review that the Supreme Court would apply in a similar case. An appeal may be taken to the Supreme Court or the court of appeals in the cases mentioned in Sections 14-3-320 and 14-3-330. (Citing under S.C. Code Ann §14-8-200; SC Code Ann § 18-9-10

I. DID THE TRIAL COURT ERR IN BASING THE COURT'S DECISION ON THE LOWER COURT'S CONSTRUCTION OF TERMS?

The transcript of trial court opened with the Respondent delineating to the court why Respondent thought the lower court was confused **(R. p. 36, line 15-p. 37, lines 1-21) (R. pp. 38-40) (R. p. 44, line 10-p. 45, lines 1-4)**. Much time was taken explaining the difference between the 2002 and 2010 contracts and why the lower court had based its decision. In addition, terms such as "rolling contract v separate contract" , "regime fees v maximum maintenance fees" and Consumer Price Index (CPI)" were selectively used as words of confusion **(R. p. 41, line 3-p. 42, lines 1-25) (R. p. 47, line 14-p. 48, lines 1-3)**. "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language."

Schulmeyer v. State Farm Fire and Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

"Construction of; whether contractual term "similar to or capable of being confused with" picked up statutory language "likely to deceive or cause confusion" in ss 10 and 120(1) Trade Marks Act 1995 (Cth); different words used in contractual term indicated statutory test did not apply; ordinary and natural disjunctive meaning applied." *Idameneo (No 789) Ltd v Symbion Pharmacy Services Pty Ltd [2011] FCAFC 164*

II. DID THE TRIAL COURT ERR IN HOLDING THAT 2010 BY-LAWS WERE PROPERLY AMENDED BY ONLY CONSIDERING A PORTION OF THE CONTRACT INSTEAD OF THE CONTRACT AS A WHOLE?

County v. Town of Bay Harbor Island states that a written instrument or contract in a private restrictive covenant should be recorded in the County where the property is located so that others will be put on notice. The last such recorded document which included KGHOA's annual regime fees was 2002 in the amount of $130.00. There has not since been any record with the county indicating any other amount.

As a result, it was not properly amended. We do not argue the validity of whether or not KGHOA's Board could raise "maintenance fees" within the CPI. We argument instead that 1) as a contract, it has never been properly recorded per law so that others will be put on notice concerning the regime fees which is part of the contract, 2) the 51% agreement of the homeowners required for any amended change to the contract was never taken in order to include any other amount to the contract. By virtue of testimony of both magistrate court and trial court judges the $175.00 was not indicated anywhere in the contact **(R. p. 48, lines 4-17)**.

According to the Declaration of Restrictions, "[e]ach owner of a lot within Kings Grant on the Ashley subject to these Restrictions is deemed to covenant and agree to pay to the KGHOA an annual assessment for the continuation of an operation fund. The amounts As the by-laws are not given as a separate entity from the restrictions but as part of a whole contract it cannot be recorded with county as a separate entity, but part of a whole **(R. p. 46, lines 6-21)**. Consequently, we believe the contract was breached. (Thompson & Jay, *supra*, at 404). *Dade County v. Matheson*, (citing *Board of Public Instruction of Dade county v. Town of Bay Harbor Islands)*,51 defines private restrictive covenants as "private promises or agreements creating negative easements or equitable servitudes which are enforceable as rights arising out of a contract." In other words, a private restriction is an enforceable promise made by the landowner to limit its control and use of his or her property for the benefit of others. *Id* at 474. In order to be enforceable, private restrictive covenants must be created by agreement of the burdened landowner. As similarly discussed earlier, private restrictive covenants can be created not only by a written instrument, but also by implication. Again, it is important to note that the written instrument should be recorded in the county in which the property is located so that others will be put on notice.

Id. Dade County v. Matheson, 605 So. 2d 469, 472 (Fla. 3d DCA 1992).

III. DID THE TRIAL COURT ERR IN JUDGMENT BASED ON ARTILCE X OF THE DECLARATION WHICH IS AMBIGUOUS TO SECTION

1V (6) AND FIND THAT APPELLANTS BREACHED THE CONTRACT?

Per both Respondents Exhibit 1 **(R. p. 66)** and Appellants Exhibit 1**(R. p. 98)**, Section IV (6) Amendment states "The Covenants and restrictions of this Declaration may be amended at any time and from time to time by an agreement signed by at least fifty-one (51) percent of the property owners whose lots are within King's Grant on the Ashley. Any such amendment shall not be effective until the instrument evidencing such change has been filed for record in the Office of the Clerk of Court for Dorchester County, South Carolina. Every purchaser or subsequent grantee of an interest acceptance of a deed or other conveyance, agrees that the covenants and restriction of the Declaration may be amended as provided herein." Furthermore, ambiguity exists in ARTICLE X -The ambiguous words in dispute are "regime fee" and "maintenance charge/maximum maintenance charge". Per Exhibit " 1 " **(R. p. 100)** the invoice clearly states "Annual Regime Fees". The ambiguity is that no clear definition of what portion of the annual regime fees can be construed as "maintenance fee/maintenance charge" and can therefore be voted on by KGHOA Board of Governors for an increase based on CPI. Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect.

Schulmeyer, 353 S.C. at 495, 579 S.E.2d at 134.

"A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. *Id.* It is a question of law for the court whether the language of a contract is ambiguous."

S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001).

"Common sense and good faith are the leading touchstones of construction of the provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail". *Parker v. Byrd, 309 S.C. 189, 193-94, 420 S.E.2d 850, 853* (1992) (internal citations omitted)

. . . Our cases have long held that ambiguities must be construed against the party who prepared the contract. . . . [W]e hold "a party to a written contract, where there is no ambiguity or indefiniteness in the essentials, cannot say their minds did not meet." . . . "There exists in every contract an implied covenant of good faith and fair dealing." *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct.App.1997) (citing 17A Am.Jur.2d Contracts § 338, at 345 (1991)).

IV. DID TRIAL COURT ERR IN HOLDING AS A MATTER OF LAW THAT THE 2010 COVENANCE AGREEEMENT SUPERCEDED THE 2002 AGREEMENT?

Appellants content that the Bylaws being changed was illegal without a 51% homeowners vote. However, even if the Appellants contend the Respondents were correct in amending the by-laws, which the Appellants do not, there was no evidence recorded that any vote was ever taken 2002 or afterwards. By-laws of the Association may be amended, modified, suspended, reinstated, repealed and substituted for by other

provision upon the majority vote of the Governors, **provided the** maximum **maintenance charge shall not be increased without the approval of a majority of the members.** (Appellants Exhibit 1 ARTICLE X) **(R. p. 88)**

King's Grant Homeowner's Association Inc. By-Laws (Adopted by the Board of Governors February 12, 2002.)

a. KGHOA amended this article. What they were not supposed to do was amend: **provided the maximum maintenance charge shall not be increased without the approval of a majority of the members.**

b. The CPI is a standard used by the KGHOA to raise the Fees. See Respondents Exhibit 3 **(R. pp. 69-77).** Using CPI is a welcomed decision. However, the Respondents have never clearly established the difference between what the "maximum maintenance charge" is and what a regime fee is. Trial court questioned Respondent whether the explanation for the difference was in evidence. It was not. It was something the Respondents made up. Yet, the Respondent gave an explanation anyway. **(R. p. 42, lines 1-23)** In the restrictions and covenant, it has the responsibility of meeting with the homeowners who will then by 51% vote make the increase an amended contract that will be properly recorded in county. Appellants also argue that if they were to contend that the amendment of Article X was legal, which they do not, since there was no evidence of a vote presented to the courts. **(R. p. 43, lines 2, 3, 11-25).**

Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached.

Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 130, 530 S.E.2d 643, 650 (Ct. App. 2000).

V. DID TRIAL COURT ERR IN AWARDING REGIME FEES OF $440.00?

Evidence from Appellants' Exhibit 2 **(R. p. 100)** as noted in magistrate court proceedings illustrates "0" balance for Regime Fees in 2009. In 2009, the fee paid by Appellants was $130. In 2010 a check for $130 was cashed by Respondents. The trial court concluded the Appellants should follow the 2010 contract. Appellants argue that there is no evidence of anyone voting in 2010 including the Board of Governors. Furthermore, there is no evidence from lower court that demonstrates $175.00 was ever voted on. The last legal documentation for regime fees was $130 as filed in county records. The Respondent evidence Exhibit 4 **(R. p. 78)** demonstrates that the amount sued for includes monies prior to 2010. In 2011, KGHOA sent back Appellants 2011 payment for regime fees. There is no evidence illustrating what the payment was that was remanded. Exhibit 4 **(R. p. 68)** was something typed up by the Respondents and not factual, as noted in magistrate court proceedings. Therefore, the lower court ruled correctly for the Appellants in ruling no monies owed. The standard of proof is by clear and convincing evidence.

Id. at 1191, 988 F.2d 1187, 26 USPQ 2d

Per Circuit Court decision, the $440.00 awarded to KGHOA was based on fees and past

due fees incurred from the 2010 contract. *Yet, Respondents are suing for an amount that includes monies not received prior to 2010.* According to the Respondents invoice Exhibit "4" **(R. p. 80)**, the Appellants invoice **(R. p. 100)** and the original complaint **(R. p. 13)**, the amount is not the same. Both invoices came from the Respondents. Again, per the Respondent's original complaint, the Appellants paid Regime fees of $130.00 from 2009 until 2011 when KGHOA remanded payment back to the Appellants and sought legal action. The Appellants were served in March of 2011 and therefore if the trial court ruling is upheld, late fees should be for 9 months of 2010 and March of 2011 only. Appellants also hold that there should be no late fees. According to Respondents Exhibit "4" **(R. pp. 78-80)**, we have been in dispute with Respondents since 2009 when the fees were changed to $175.00 and in court since March of 2011. Therefore Appellants should not be penalized for finding difference with King's Grant or with accrued late fees once court is in process.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

January 21, 2013

Elwood Dixon and Jennifer Dixon
Summerville, South Carolina 29485
Pro Se

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2011-CP-18-1716
Appellate Case No. 2012-211934

King's Grant Homeowners Association, Inc.,

Respondent,

v.

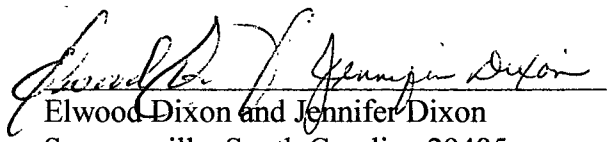
Elwood Dixon and Jennifer Dixon

Appellants.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

January 21, 2013



Elwood Dixon and Jennifer Dixon
Summerville, South Carolina 29485
Pro Se Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2011-CP-18-1716
Appellate Case No. 2012-211934

King's Grant Homeowners Association, Inc. — Respondent,

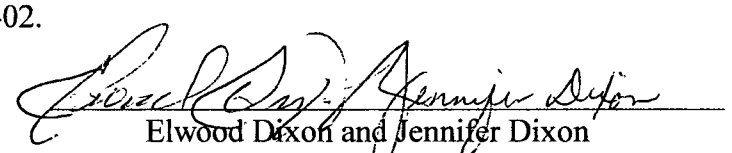
v.

Elwood Dixon and Jennifer Dixon, — Appellants.

PROOF OF SERVICE

We certify that we have served the **Brief of Appellant** on Respondents, King's Grant Homeowners Association, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on January 21, 2013, addressed to their attorneys of record, Nicholas J. Rivera, Joseph E. DaPore, Russell G. Hines, and Stephen L. Brown, of Young Clement Rivers LLP, Post Office Box 993, Charleston, South Carolina 29402.

January 21, 2013



Elwood Dixon and Jennifer Dixon
Summerville, South Carolina 29485
Pro Se Appellants