THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2012-212842

Litchfield Plantation Association, Inc., Joseph E. Johnson, Thomas Eckard, Carol E. Kirby, Robert F. McMahan, Jr., and Thomas Martin Phillips . . . . . Appellants,

v.

Litchfield Plantation Company, Inc. . . . . .Respondent,

AND,

E. Scott Trotter . . . . . .Intervenor.

INITIAL REPLY BRIEF OF APPELLANTS

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STATUTES AND PROCEDURAL RULES

I. RESPONDENT DEVELOPER HAS ABUSED ITS MAJORITY VOTING POWER OVER THE LITCHFIELD HOMEOWNER'S ASSOCIATION FOR OVER THREE DECADES AND THE HOMEOWNERS SEEK THE ONLY RELIEF AVAILABLE TO THEM.

After thirty years of being victimized by the Respondent Developer's ("Developer") wrongful and illegal actions, the Litchfield Homeowners' only relief lies with the courts. The Developer mischaracterizes the instant case both factually and legally. Appellants did not, as Developer suggests, take advantage of Developer's weak financial condition and "seize control" of the Association. Rather, it was the Developer's failure to meet its financial obligations to the Association that triggered the Litchfield Homeowners' investigation. That investigation uncovered numerous and substantial abuses, including repeated breaches of fiduciary duties. It was these wrongful and illegal acts – not the weakened financial condition of Developer – that caused the homeowners to take action. They had no other choice.

Pursuant to the controlling documents, the Homeowners called the special meeting for the purpose of removing E. Scott Trotter and Jeffery Van Treese from the Association's board. (Article VI, section 5). Developer's suggestion that it was only "a group" of property owners that took action is very misleading. Over ninety (90) homeowners attended the meeting,[1] and the overwhelming majority voted for removal. (Kirby June 7, 2011 Affidavit) The undisputed and well-documented evidence in the record firmly establishes that Developer has continually breached fiduciary duties by making improper loans to itself, transferring property to the Association in disrepair and failing to fund the capital reserve account; violated South Carolina law by operating the Association with only two board members; and otherwise abused its

[1] There are approximately one hundred and twenty-eight (128) property owners at Litchfield Plantation.

majority voting status and control over the Association. (Charles Nation Feb. 25, 2011 Memo; Boselli Affidavits; Kirby Affidavits; Prom. Notes; Accounting; 2005 Covenants and Bylaws; April 19, 2012 Trans. Pg. 24, 27 47). Developer's Brief does not address or even attempt to explain these abuses. Rather, Developer's Brief misconstrues the issues on appeal and relies entirely on the 2005 Amended Covenants and Bylaws. Developer fails to recognize – and indeed ignores – South Carolina precedent.

II. THE CIRCUIT COURT ERRED IN FINDING IT HAD NO AUTHORITY TO GRANT THE EQUITABLE RELIEF REQUESTED.

Developer's Brief fails to even address the main issue on appeal: Whether the circuit court erred in finding it had no authority to grant the equitable relief requested. Developer's entire argument is centered on the basic premise that restrictive covenants are contractual in nature. *See, e.g., Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539 (2006). Contrary to Developer's assertions, Appellants are not asking the court to rewrite the covenants that govern Litchfield Plantation. These covenants do not provide any remedy for repeated breaches of fiduciary duties and substantial abuses that have been inflicted on the Litchfield Homeowners by the Developer.[2] In such circumstances, the appropriate equitable remedy is fashioned by the court. *See generally Holly Hill Lumber Co. v. McCoy*, 201 S.C. 427, 442, 23 S.E.2d 372, 378 (1942) (discussing equitable contract remedy and stating "[w]here the inadequacy does not stand alone, but is accompanied by other inequitable incidents, the [equitable] relief is much more

[2] Developer insists that because the 2005 Amendments to the Covenants and Bylaws were "negotiated," this somehow precludes the court from granting equitable relief in this case. This argument – as flawed as it may be – is predictable. Developer is apparently suggesting that the Litchfield Homeowners have agreed to being abused, including to having their money stolen, simply by agreeing to documents that fail to address such occurrences. Such an argument, however, is contrary to law. The Litchfield Homeowners only remedy lies within the court.

readily granted"). Predictably, Developer failed to put forth any argument concerning the court's authority to grant equitable relief to the Litchfield Homeowners.

The cases the Developer relies on are inapplicable. Both *South Carolina Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001) and *Taylor v. Lindsey*, 332 S.C. 1, 498 S.E.2d 862 (1998) involved deeds restricting the use of real property.[3] The instant case does not. This case involves the contractual relationship between a developer and a homeowner's association in a Planned Unit Development. This court has held this relationship creates a fiduciary relationship between the developer and the association. *See Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 415, 426 S.E.2d 828, 832 (Ct. App. 1993).

More importantly, this court has indicated that where a developer breaches this fiduciary duty, courts are able to craft a remedy not provided for in the controlling documents. *See id.* at 413, 426 S.E.2d at 831; *see also Ex Parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) ("Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible."). The record provides irrefutable evidence that Developer has repeatedly breached numerous fiduciary duties to the Association. This conduct has been ongoing for over three decades. (1986 Circuit Court Order, pg. 18; *Peoples Fed. Sav. & Loan Ass'n of S. Carolina v. Res. Planning Corp.*, 358 S.C. 460, 467, 596 S.E.2d 51, 55 (2004))

Developer's assertion that the instant appeal is not proper because Appellants have not appealed the circuit court's ruling as to the class "B" voting period is absurd. Whether

[3] *See Town of McClellanville,* 345 S.C. at 625, 550 S.E.2d at 303 (finding deed restriction that required property to always be accessible to the public did not prevent town from charging fee); *Taylor,* 332 S.C. at 5, 498 S.E.2d at 864 (finding deed restriction did not prevent placing mobile home on lot).

Developer's class "B" majority voting period should be terminated after well-documented abuses for over thirty years is precisely what this case is about. Of course Appellants are appealing this ruling. This case concerns Developer's voting rights, specifically whether – in light of the substantial fiduciary duty breaches – Developer's class "B" voting rights should be converted to class "A" voting rights.[4] The circuit court had the authority to grant this relief, and it was error for it to rule otherwise. *See Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 415, 426 S.E.2d 828, 832 (Ct. App. 1993).

III. DEVELOPER'S BRIEF FAILS TO ACCOUNT FOR ITS COMPLETE FAILURE TO COMPLY WITH THE CONTROLLING DOCUMENTS.

Developer's assertion that it satisfied its financial obligations to the Association is preposterous. Developer owes the Association nearly a million dollars; it repaid only $149,981.60, leaving a balance of $837,913.94. By its own admission, Developer failed to fund the developments' financial shortfall. (Trotter Letters). Developer contends, however, that it had the authority to change the fiscal year and collect additional assessments from the Litchfield Homeowners, all the while failing to pay any of its arrearage. This argument is completely false. Developer had no authority to change the fiscal year. At that time, Developer was governing the Association in violation of both the controlling documents and South Carolina Law.

During this time period – and indeed for almost two years – Developer was controlling the Association with only two board members, E. Scott Trotter and Jeffery Van Treese. The

[4] Contrary to Developer's suggestion, Civil Action No.: 2012-CP-22-0341 in no way affects the instant appeal. The Association filed that case in an attempt to collect the nearly million dollars owed to it by Developer. The instant case is concerned only with whether Developer should be allowed to continue its domination and control over the Association given its failure to meet its financial obligation and the numerous and substantial breaches of fiduciary duties that have occurred over the past three decades. In any event, because of the circuit court's erroneous rulings, the Developer is once again in control of the Association, seriously compromising the pending collection action.

South Carolina Code mandates that a board contain at least three (3) directors. S.C. Code Ann. 33-31-803(a) (2006). The controlling documents go even further, requiring five Board members. (2005 Covenants/Bi-Laws). Developer was without authority to change the fiscal year. The uncontradicted evidence in the record establishes that Developer continues to owe the Association close to a million dollars. Developer's Brief does not even attempt to dispute this amount.

IV. VOTING RIGHTS ARE NOT PERSONAL PROPERTY AS CONTEMPLATED BY THE RULES OR STATUTES.

The circuit court erred in finding the Notice of Appeal did not trigger the automatic stay, and there are no exceptions that apply. The Developer's class "B" voting rights are not "personal property" as contemplated by the rule or the South Carolina Code. Developer cites to general corporate law to support its proposition that the right to vote is personal property. This, however, is not what the law requires. For the automatic stay to have been properly lifted, an exception must apply.

Section 19-9-150 only contemplates "the assignment or delivery of documents or personal property." S.C. Code Ann. § 18-9-150 (1985); *see also* Rule 241(b)(2). The circuit court's Summary Judgment Order neither "assigns" nor "delivers" Developer the right to vote. The Order only provided that Developer's right to vote was suspended until it paid the Association a small portion of what it owed pursuant to the controlling documents. Rule 241(b)(2) does not contemplate this circumstance.

Regardless, the Injunction order itself was never in effect because Developer failed to post the required $25,000.00 bond. "The granting of supersedeas or the lifting of the automatic stay under this Rule may be *conditioned* upon such terms . . . as the lower court . . . may deem appropriate." Rule 241(c)(3), SCACR (emphasis added); *see also Harman v. Wagner*, 33 S.C.

487, 12 S.E. 98, 101 (1890) (finding order staying further proceedings "by its own terms, became a nullity" were applicant failed to post the required bond). The October 22, 2012 Injunction order required a $25,000.00 bond to be posted. The Developer failed to post the bond as required by that order and Rule 241(c)(3), SCACR. Developer fails to account for its failure to abide by the court's condition.

V. THE CIRCUIT COURT ERRED IN GRANTING THE INJUNCTION.

Developer has not cited to any evidence in the record from which the circuit court could have determined Developer would suffer irreparable harm. The circuit court failed to address the likelihood of success on the merits entirely. No such evidence was produced. The law requires this showing, and the injunction was therefore improperly granted. "A preliminary injunction should issue only if necessary to preserve the status quo ante, *and only upon a showing* by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law." *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010).

The Developer cannot point to any evidence in the record of any likelihood of harm, much less irreparable harm. For three decades Developer has been in control of the Association. Enough is enough. The only evidence in the record is that Developer is the cause of its inability to sell lots. After three decades of serious abuses, this much is clear. Appellants did not "thwart" its ability to sell any lot. There is certainly no evidence in the record of this. The Litchfield Homeowners – not the Developer – are looking out for Litchfield Plantation's best interest. Developer's suggestion that Appellants attempted to "take away [its] right to vote" is perhaps the biggest misconception of this case. The relief Appellants seek from the court would merely give Developer voting rights equal to every other Litchfield Homeowner. Based on the

past thirty years of Developer control and abuse, this equality is precisely what a potential purchaser would want.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I served the Appellants' Initial Reply Brief by depositing a copy of it in the United State Mail, postage prepaid, addressed as follows:

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DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL OF APPELLANTS

Appellants propose the following be included in the Record on Appeal:

ORDERS

1. Circuit Court Form 4 Order Granting Respondent's Motion for Summary Judgment filed December 9, 2011.
2. Circuit Court Order Granting Respondent's Motion for Summary Judgment filed May 25, 2012.
3. Circuit Court Form 4 Order Granting Temporary Injunction filed September 20, 2012.

4. Circuit Court Temporary Injunction Order filed October 22, 2012.

PLEADINGS

5. Summons and Complaint filed March 9, 2011.
6. Defendant-Respondent's Answer filed April 29, 2011.
7. Defendant-Respondent's Amended Answer and Counterclaims filed May 27, 2011.
8. E. Scott Trotter's Motion for Intervenor filed July 29,2011.
9. Plaintiff-Appellants' Motion for Summary Judgment filed June 7, 2011.
10. Defendant-Respondents' Motion for Summary Judgment filed September 9, 2011.
11. Intervenor E. Scott Trotter's Complaint filed September 23, 2011.
12. Defendant's Answer to Intervenor Complaint filed October 21, 2011.
13. Defendant's Second Amended Answer and Counterclaims filed October 24, 2011.
14. Defendant's Motion for Temporary Injunction filed November 7, 2011.
15. Complaint filed on April10, 2012 in Case No: 2012-CP-22-341.
16. Answer filed on June 1, 2012 in Case No: 2012-CP-22-341.
17. Plaintiff-Appellants' Rule 59 Motion to Alter or Amend filed June 6, 2012.
18. Defendant-Respondent's Motion for Temporary Injunction filed September 7, 2012.

TRANSCRIPTS

19. Transcript of Circuit Court Hearing on September 8, 2011.
20. Transcript of Circuit Court Hearing on December 8, 2011.
21. Transcript of Circuit Court Hearing on April 19, 2012.
22. Transcript of Circuit Court Hearing on September 20, 2012.
23. Transcript of Circuit Court Hearing on August 16, 2012.

EXHIBITS

24. 2005 Amendments to Covenants and Restrictions for Litchfield Plantation.

25. Amended Bylaws of Litchfield Plantation Association, Inc.
26. February 6, 2012 Accounting.
27. June 1, 2010 Mortgage
28. February 17, 2010 Mortgage Modification Agreement.
29. February 6, 2012 Letter to Attorney Neil.
30. May 22, 2009 Promissory Note.
31. June 10, 2009 Promissory Note.
32. July 21, 2009 Promissory Note.
33. June 1, 2010 Promissory Note.
34. April 29, 2011 Foreclosure Judgment.
35. December 12, 1986 circuit court order.
36. Assignment of Promissory Notes from Respondent to Litchfield Plantation Buyout Group, LLC.
37. Arrest Warrant J-520966 for Intervenor E. Scott Trotter filed July 11, 2011.
38. Affidavit of Service upon Intervenor E. Scott Trotter filed March 24, 2011.
39. Affidavit of E. Scott Trotter filed May 11, 2011.
40. Notice of Taking Deposition of E. Scott Trotter.
41. Affidavit of Intervenor E. Scott Trotter filed June 7, 2011.
42. Affidavit of E. Scott Trotter filed September 26, 2011.
43. Affidavit of John Miller filed September 26, 2011.
44. Affidavit of Carol E. Kirby filed June 7, 2011.
45. Affidavit of Carol E. Kirby filed November 21, 2011.
46. Affidavit of Joseph E. Johnston filed June 7, 2011.
47. Affidavit of Capers Johnston filed June 7, 2011.
48. Affidavit of Thomas Eckard Filed June 7, 2012.
49. Affidavit of Robert D. Klemme filed December 6, 2011.
50. Affidavit of Robert J. Charnley Jr. filed December 6, 2011.
51. Affidavit of Carol E. Kirby filed December 6, 2011.
52. Affidavit of Edward J. Meehan filed December 6, 2011.
53. Affidavit of James Davies filed December 6, 2011.
54. Affidavit of Angela Lawrimore filed June 7, 2011.

55. Affidavit of John J. Boselli filed September 26, 2011.
56. Affidavit of John Miller filed September 17, 2012.
57. Supplemental Affidavit of John J. Boselli filed December 6, 2011.
58. E. Scott Trotter Letter dated April 30, 2010.
59. E. Scott Trotter Letter dated November 19, 2010.
60. E. Scott Trotter Letter dated December 23, 2010.
61. E. Scott Trotter Memo dated February 25, 2010.
62. Notice of February 26, 2011, Special Meeting.
63. 2008 Litchfield Plantation Maintenance and Operation Fees.
64. Attorney Charles Owen Nations, II Memorandum dated February 25, 2011.
65. Litchfield Plantation Association, Inc. Profit & Loss Sheet (April through Dec. 2010).
66. E. Scott Trotter Memorandum filed February 23, 2011.
67. December 3, 20110 Affidavit of Extension of Class B Membership.
68. Litchfield Plantation Association, Inc. 2011 Projected Budget.
69. Litchfield Plantation Association Abstract Form.
70. February 2005 Declaration of Rights.
71. October 2005 Declaration of Rights.
72. December 2009 Declaration of rights.
73. October 2010 Declaration of Rights.
74. November 2010 Declaration of Rights.
75. December 29, 2010 Declaration of Rights.
76. December 30, 2010 Declaration of Rights.
77. Exhibits C of Plaintiffs' Memorandum in Opposition to Motion to Intervene
78. Affidavit of Robert W. Dibble, Jr.

OTHER MATERIALS

79. Plaintiff-Appellants' Memorandum in Support of Summary Judgment filed June 7, 2011.
80. Plaintiff-Appellants' Supplemental Memorandum in Support of Summary Judgment as to Class B Termination filed October 4, 2011.

81. Plaintiffs' Answers to Defendant's Supplemental Interrogatories dated October 10, 2011.

82. Plaintiff-Appellants' Memorandum in Opposition to Defendant-Respondent's Motion for Summary Judgment filed December 6, 2011. (Date correction for Appellants' Initial Designation).

83. Plaintiff's Memorandum in Opposition to Motion to Intervene.

I certify that this designation contains no matter, which is irrelevant to this Appeal.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I served the Appellants' Designation of Matter on November 1, 2013, by depositing a copy of it in the United State Mail, postage prepaid, addressed as follows:

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