THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas
Perry M. Buckner, Circuit Court Judge
Case No. 2009-CP-15-469

Appellant Case No.: 2013-001642

The Retreat at Edisto Co-owners Association, Inc., Gerald Bachelor, Lisa Bachelor, James Currell, Rose Marie Currell, Jervey McKelvey, and Barry Smith, Plaintiffs,

Of whom The Retreat at Edisto Co-owners Association, Inc., Gerald Bachelor, Lisa Bachelor, James Currell, Rose Marie Currell, Jervey McKelvey, and Barry Smith are the Respondents.

v.

The Retreat at Edisto, LLC, W. Mark Steedley, individually, Terry Hoff d/b/a Terry Hoff Construction, Handcrafted Homes, LLC, G & S Supply Co., Inc., GeorgiaPacific Building Products, LLC, Georgia-Pacific Wood Products, LLC, General PreCast Manufacturing Co., Inc., Banks Construction Company, Stroble Site Services, LLC, Eugene H. Brislin, P.E., James J. Barlow Engineering, P.C., PFS Corporation, James Glenn, Wayne Reeves and Mike Miller, Defendants,

Of whom The Retreat at Edisto, LLC is the Appellant.

And

G & S Supply Co., Inc., Third Party Plaintiff,

v.

James Pritchard d/b/a Low Country Exteriors and Edson A. Baros d/b/a Sunshine Vinyl Siding, Third Party Defendants.

INITIAL BRIEF OF RESPONDENTS

SMITH, BUNDY, BYBEE & BARNETT, P.C.

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November 25, 2013

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II. **The lower court was correct in ruling that the Appellant Developer no longer has any right to construct or develop Phase II.**

III. **The lower court correctly found that the Amendment does not vest or convey any property interests in Appellant Developer, and, as such, there is no writing to satisfy the statute of frauds.**

IV. **This Court should affirm the decision of the lower court based upon any ground appearing in the Record on Appeal pursuant to Rule 220(c), SCACR.**

Statement of the Case

This is a declaratory judgment action relative to the legal rights of the Appellant Developer and Respondents in certain common elements of real property which comprises The Retreat at Edisto Horizontal Property Regime. The fundamental issue in this appeal is whether or not the lower court, sitting non-jury, erred in finding that the Appellant Developer had no right to develop a Phase II on the common elements of the Property.

This action was originally filed on May 29, 2009. The relevant pleading, however, is the Fifth Amended Complaint filed on January 14, 2011.[1] *See* Fifth Amended Complaint. In response to the Fifth Amended Complaint, the Appellant Developer asserted a counterclaim asking the court to declare that it maintained rights to develop a

[1] The Respondents alleged the declaratory judgment cause of action in each of the pleadings filed. The Appellant Developer did not bring a counterclaim alleging a declaratory judgment cause of action until its Answer to the Fifth Amended Complaint.

Phase II on the property as set forth in the Master Deed and the Amendment to the Master Deed. *See* Answer Cross Claim and Counterclaims. The Respondents filed a Reply to the counter claim. *See* Reply.

This matter was originally before the Honorable Carmen T. Mullen on cross motions for summary judgment. Judge Mullen found for the Respondents. Appellant Developer appealed the order, and the Court of Appeals reversed the order finding summary judgment to be inappropriate because Appellant Developer presented the "requisite scintilla of evidence on the question of its intent." *See* Unpublished Opinion No 2012-UP-558. The Court of Appeals held that the interpretation and construction of the Master Deed and Amendment was a question for the finder of fact. A non-jury hearing was therefore held on April 29, 2013 before the Honorable Perry M. Buckner.

On June 6, 2013, Judge Buckner entered an order in favor of the Respondents. Appellant Developer filed a Rule 59, SCRCP, motion on June 13, 2013. On June 28, 2013, Judge Buckner denied the Rule 59 Motion.

On July 16, 2013, Appellant Developer served a Notice of Appeal appealing the June 6, 2013 and June 28, 2013 Orders.

Statement of the Facts

This is a case concerning a condominium regime located on a 3.724 acre parcel of property on Edisto Island, South Carolina and commonly known as The Retreat at Edisto Horizontal Property Regime (the "Regime").

On or about December 13, 2000, Appellant Developer executed the Master Deed of the Retreat at Edisto Horizontal Property Regime (the "Master Deed"). Plaintiff Exhibit 1. The Master Deed was recorded on January 11, 2001 at the Colleton County

Register of Deeds at Book 924, Page 138. Id. The Master Deed originally contained language creating seven (7) separate apartment buildings, each containing four (4) units, to be located on a 3.724 acre parcel of property. Id. At the time of the filing of the Master Deed, the entire 3.724 acre parcel of property as well as the other property described in Exhibit A of the Master Deed became "common elements" in which each of the twenty eight (28) "apartments" retained an undivided ownership right.[2] Id; Plaintiff Exhibit 3. There is no language in the Master Deed stating that the 3.724 acre parcel is divisible or is comprised of more than one legal lot. Id.

Sometime after the filing of the Master Deed, Appellant Developer encountered problems with zoning and permitting of all seven (7) buildings by the Town of Edisto Beach, the United States Army Corps of Engineers, and the South Carolina Department of Health and Environmental Control's Office of Coastal Resource Management. Plaintiff Exhibit 4. Appellant Developer was not able to develop the twenty-eight 28 units and seven (7) buildings proposed in the Master Deed. There was no evidence presented at the hearing that the Appellant Developer could, as of the time of the trial of this matter, obtain the necessary permits and zoning to develop the property as presented in the Master Deed.

In response to permitting and zoning problems, on or about July 27, 2001, prior to any sales of the units occurring, Appellant Developer filed the First Amendment to the Master Deed for the Retreat at Edisto Horizontal Property Regime (the "Amendment"). Plaintiff Exhibit 2. The Amendment is filed at the Colleton County Register of Deeds at Book 945, Page 140. Id. The Amendment reduced the number of units from twenty

[2] The words "common elements" and "apartments" are terms of art and are defined in the Master Deed as well as the South Carolina Horizontal Property Act, codified at S.C. Code Ann. §§ 27-31-10 *et seq.*

eight (28) units to twelve (12) units. Id. Notwithstanding the reduction in the number of units, the Amendment reaffirmed its submission of the entire 3.724 acre parcel of property to the Regime that now consisted of three (3) buildings, each with four (4) units and each of the units having an undivided interest in the common elements for the entire 3.724 acre property. Id.

Howard Yates, Esq. testified for the HOA. He was qualified as an expert without objection. He was qualified as an expert as follows:

Mr. Bundy: Your Honor, at this point, I'd move to qualify the witness as an expert in real estate transactions, title searches, opinions of title, and marketability of title.
The Court: Very Well, Mr. Haller?
Mr. Haller: Your Honor, we certainly do not contest Mr. Yates' background as an expert witness.
The Court: Right now, I'm dealing just with qualifications, and I understand there may be a subsequent objection from what you told me in pre-trial. But right now, I'm dealing on the issue of qualification.
Mr. Haller: As long as we can—
The Court: And I will let you cross examine this witness, if you so desire, as to qualifications.
Mr. Haller: Mr. Yates' reputation does not need any additional questioning from me, as long as we retain our right as to specific questions asked.
The Court: Absolutely.
Mr. Haller: Thank you, Your Honor.
The Court: Thank you. So I understand there is no objection as to qualifications?
Mr. Haller: No, Sir.
The Court: The witness is qualified without objection, Mr. Bundy. You may proceed.

Trial Transcript, pp. 11-12.

Yates testified that the entire 3.724 acres was submitted to the Regime by the Master Deed and the Amendment, and Appellant Developer did not have any vested property rights in the 3.724 acre property at any time from July 27, 2001 up to the time of the hearing in this matter. Trial Transcript, pp. 24-34; 49-50. W. Mark Steedley testified that Appellant Developer did not have any fee interest in the 3.724 acres after the

property was submitted to the Regime. Trial Transcript, pp. 69-70.

The Amendment did state that the Appellant Developer may develop a second phase, Phase II, if it exercised its "option" by taking certain actions and measures. Plaintiff's Exhibit 2. These measures and actions were included in the Amendment and required by law. Plaintiff's Exhibit 2. Yates testified that these actions and measures were required to be taken by Appellant Developer in order to vest any right to develop Phase II because according to the express language of the Amendment, Appellant Developer was under no obligation to develop any portion of Phase II. Trial Transcript, pp. 20-21; 26-36. Yates testified that because the Amendment did not vest any property rights in Defendants, it was necessary pursuant to the language of the Amendment to have a subsequent filing that was required to vest a property right in the Defendants. Id. Yates testified that title to property must be vested somewhere at all times. Trial Transcript, p. 34. At the time of the filing of the Amendment, the title to the property was with the 12 units. Trial Transcript, p. 25. A subsequent filing never occurred. Id. All property rights, therefore, continue to be vested in the 12 unit owners. Id.

In pertinent part, the Amendment stated as follows:

> "The Grantor hereby adds the following new Article XXXV to read as follows:
>
> EXPANSION OF REGIME
>
> The Town of Edisto Beach (hereinafter the "Town") originally approved a twenty-eight unit condominium project for the real property hereby submitted to the Regime. Due to unforeseen circumstances, the Town has granted final approval for twelve (12) units and the Grantor has agreed to the development of the project in stages or phases as defined herein. **The Town has not granted final approval for Phase II and Grantor is under no obligation to develop Phase II of the Regime.**

Development Stages. The Grantor proposes to develop the real estate shown on the site plan marked Exhibit "C" to the Master Deed as a single regime by constructing seven (7) buildings as depicted on Exhibit "B" and "C" to the Master Deed. **Phase I is compromised of Buildings 6, 7 and 5 and Phase II may include a maximum of four (4) additional buildings containing (4) apartments each, pending approval by the Town and the election of Grantor to proceed with the development with all or a portion of Phase II.**

Maximum Number of Apartments. The maximum number of apartments in Phase II shall be sixteen (16) Apartments. The plot plans and floor plans shall be as depicted in Exhibits "B" and "D" to the Master Deed. **All improvements in Phase II shall be completed prior to submission to the Regime** and shall be used for residential purposes.

Timetable. The Grantor, its successors and assigns, or any person or entity owning the right to develop and construct proposed Phase II, Buildings 1, 2, 3 and 4 as shown on Exhibit "B" to the Master Deed may, at their sole discretion, stage the development and construction of the improvements into two stages, with no guarantee to the purchasers of Apartments in Phase I that subsequent stages or phases will be developed. It is the Grantor's intention to develop the proposed Phase II, Buildings 1, 2, 3, and 4 as Phase II of the regime. **The Grantor, it's successors and assigns on persons/entities owning the adjoining property hereby reserve the right and privilege to determine on or before July 31, 2005, whether or not to proceed with the additional stage of development** and the parties hereto agree that if the Grantor so decides, the Apartments shall be in a regime which consist of two stages or phases. The determination of the Grantor, its successors and assigns or person/entities owning the adjoining property as to the stages of the project may be on, before or after the sale of Apartments in Phase I.

Percentage Interest Chart. The percentage interests in the General and Limited Common Elements of each Apartment owner before and after addition of Phase II of proposed development shall be according to the chart attached hereto as Exhibit "E" to the Master Deed.

****

Master Deed Amendment for Phase II. **To add Phase II pursuant to the option reserved under this article, the Grantor shall prepare, execute, and record an amendment to this Master Deed that shall contain a plot plan showing the location of the Buildings and any other improvements, and a set of floor plans of the Buildings which shall show graphically the dimensions, area, and location of each Apartment therein and the location of General and Limited Common**

Elements affording access to each Apartment. The plans shall show graphically insofar as possible and describe in detail the Common Elements in the Buildings, both Limited and General. The plans shall be certified by an engineer or architect authorized and licensed to practice in this state. Instead of recording new plot plans and floor plans as required, the Grantor may record new certifications by a licensed engineer or architect of plot plans and floor plans previously recorded if those plans show all of improvements required by this section.

****

Easements for Phase II Development. The Grantor hereby reserves unto itself, its successors and assigns, a commercial easement, which shall be transferable to Grantor's successors and assigns, for ingress, egress, access and for the installation of utilities and other improvements over and under common elements to facilitate in all respects the construction of the Phase II buildings. The parties hereto acknowledge that the interest and rights reserved by Grantor herein include the right to exclude any Co-owners, their invitees and licensees, from using the common elements around the proposed building pads (see Exhibit "B" to the Master Deed) during the course of the construction of Phase II Buildings. **This commercial easement shall automatically terminate on July 31, 2005."**

Plaintiff's Exhibit 2.

The Appellant Developer's authorized representative drafted the Master Deed and the Amendment. Plaintiff's Exhibits 1 and 2; Trial Transcript, p. 17. Appellant Developer unilaterally selected the terms of the Amendment including the deadline of July 31, 2005 to "add Phase II pursuant to the option reserved." Id.

There have not been any additional amendments to the Master Deed, either prior to July 31, 2005 or up to the time of the hearing on this matter. Trial Transcript, pp.19-21.

Standard of Review

"Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues." Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). The construction of a clear and unambiguous

deed is a question of law for the court. Hammond v. Lindsay, 277 S.C. 182, 184, 284 S.E.2d 581, 582 (1981); Hunt v. Forestry Comm'n, 358 S.C. 564, 568, 595 S.E.2d 846, 848 (Ct.App.2004); *see also* Vause v. Mikell, 290 S.C. 65, 68, 348 S.E.2d 187, 189 (Ct.App.1986)("The construction of an unambiguous deed is a question of law, not fact."). When a deed is reasonably susceptible to more than one interpretation it is ambiguous, and the question of its construction is for the finder of fact. *See* S.C. Dept. of Natural Resources v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299 (2011).

"In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." K & A Acquisition Grp., LLC v. Island Pointe, LLC, 383 S.C. 563, 682 S.E.2d 252, 262 (2009) (internal quotation marks omitted). "In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law." Id. "The intention of the grantor must be found within the four corners of the deed." Id.

Moreover, the deed must be construed against its drafter. *See* Heritage Federal Savings and Loan Association v. Eagle Lake and Golf Condominiums, 318 S.C. 535, 458 S.E.2d 561 (Ct.App. 1995).

On appeal from an action at law tried with or without a jury, the appellate court's standard of review extends only to the correction of errors of law. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 85-86, 221 S.E.2d 773, 775 (1976). The factual findings of the jury or the trial judge will not be disturbed "unless a review of the record discloses that there is no evidence which reasonably supports [its] findings." Id.

Argument

I. The lower court was correct in admitting the testimony of J. Howard Yates. There was no objection to his qualifications as an expert. There was no objection to any of the testimony of which Appellant Developer now complains. There was no motion for directed verdict made by the Appellant Developer at the close of the Respondent's case or any motion made related to the testimony of Yates. Finally, the testimony was proper in aiding the finder of fact.

The Appellant Developer argues that it was error for the Trial Court to admit the testimony of J. Howard Yates as an expert and asks this Court to strike all of the testimony of Yates. This argument is without merit for at least four reasons.

First, the Appellant Developer did not object to the qualification of Yates as an expert. *See* Trial Transcript, pp. 12. Notwithstanding the Appellant Developer's representation to this Court that "the trial court certified [Yates] as an expert in real estate law over Grantor's [Appellant Developer's] objection" (Appellant's Initial Brief, p. 2), Appellant Developer did not object to the certification of Yates as an expert, and, therefore, the Appellant Developer cannot now argue on appeal that the testimony of Yates should be stricken because he was improperly certified as an expert.[3]

Second, pursuant to the foregoing, the only issue that could possibly be properly considered on this appeal would be an error in admitting certain testimony by Yates over the objection of the Appellant Developer. However, "[e]rror may not be predicated upon a ruling which admits ... evidence unless ... a timely objection or motion to strike appears of record, stating the specific ground of objection...." See Busillo v. City of North Charleston, 404 S.C. 604, 745 S.E.2d 142 (Ct.App. 2013) *citing* S.C.R.E 103(a)(1). "The

[3] As an additional matter, the Appellant Developer made no motion to strike the testimony of Yates to the trial court.

failure to make a timely and proper objection to the introduction of testimony waives the right to object to such testimony on appeal." Calcutt v. Calcutt, 282 S.C. 565, 569, 320 S.E.2d 55, 57 (Ct.App.1984). In this case, Appellant Developer only objected twice during the testimony of Yates. *See* Trial Transcript p. 14, p. 35. As to the first objection, Appellant Developer objected as follows:

> Q. Okay. Does that Horizontal Property Regime Act specify every single thing that has to be in a Master Deed or does it just give you the boundaries and the outlines of what needs be done?
>
> Mr. Haller: Your Honor, we would object to the extent that that question calls for a conclusion of law.
>
> The Court: I think it does, but I think that you did not object to his qualifications as a legal expert, so that objection, obviously is waived and overruled. You may proceed and answer the question, Mr. Yates.
>
> A: Mr. Bundy, the South Carolina Horizontal Property Regime Act has requirements that must be in all of the condominiums.

Trial Transcript p. 14. Regardless of whether the objection was waived, whether or not the Horizontal Property Regime Act has requirements that must be in all condominiums has nothing to do with any error now complained of by Appellant Developer.[4] Therefore, this objection has nothing to do with the present appeal. With regard to the second objection, it was sustained. As such, the second objection has nothing to do with this appeal. There were no further objections made. None of the testimony now complained of by the Appellant Developer was objected to by the Appellant Developer at the trial of this matter. These issues are not preserved for review. Calcutt, 320 S.E.2d 55.

Third, the Appellant Developer did not make any directed verdict motion at the end of the Respondents' presentation of evidence even though the Appellant Developer states "the trial court should have directed a verdict in [its] favor." Appellant's Initial

[4] In fact, the Appellant Developer went on to ask Mr. Yates numerous questions about the Horizontal Property Regime Act on cross examination. *See* Trial Transcript, pp. 41-44; p. 51. Indeed, the only exhibit entered by the Appellant Developer was an excerpt from the S.C. Horizontal Property Regime Act. Defendant's Exhibit 1.

Brief, p. 7.[5] It is clear under South Carolina law that "a directed verdict motion is required to preserve any issue regarding the sufficiency of evidence." 15 S.C. Jur. Appeal and Error § 80 *citing* Barber v. Citizens & Southern Bank, 268 S.C. 16, 231 S.E.2d 295 (1997); *See* Peay v. Ross, 357 S.E.2d 482, 483. The South Carolina Supreme Court has held as follows:

"There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity."

SCDOT v. First Carolina Corporation of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007).

Therefore, any error attributed to the admission of the testimony of Yates is not preserved for review.

Finally, the specific testimony of Yates was properly admitted. Notwithstanding the assertions of the Appellant Developer in its brief, Yates was qualified to testify as an expert in real estate transactions, title searches, opinions of title, and marketability of title without objection. Yates testified that he searched the title to confirm there were no subsequent filings to the Amendment. Trial Transcript p. 25. Yates testified that there were no recorded documents that would comply with the express terms of the Amendment to add Phase II by the time required in the Amendment. Trial Transcript, pp. 20-21; 26-36. Yates further explained the terms of the Master Deed and Amendment to the finder of fact. *See* Rule 702, SCRE (A witness qualified as an expert may testify in the form of an opinion or otherwise to assist the trier of fact); *see also* Busillo, 745 S.E.2d

[5] The Appellant Developer did indicate that it might make a directed verdict motion at the close of all evidence, but did not state any specific grounds that would be asserted if it had made the motion. Trial Transcript, pp. 75-77. Instead, Appellant Developer adopted the grounds asserted in the Respondents' directed verdict motion, which, of course, did not include an assertion of error to any of the testimony of Yates.

142 (a trial court's admission of evidence may only be disturbed by showing an abuse of discretion). Therefore, Yates testimony was proper.[6]

II. The lower court was correct in ruling that the Appellant no longer has any right to construct or develop Phase II.

The foundation of the evidence and the Court's Order is succinctly explained at paragraph 20 of the Order as follows:

> It was the intention of Defendants in the Master Deed and the Amendment to have a right but not an obligation to develop Phase II. It was the intention of the Defendants to have the deadline of July 31, 2005, to exercise the right to develop Phase II. It was the intention of the Defendants to include certain provisions in the Amendment that were required to exercise its right to develop Phase II. The Defendants have not complied with the required provisions to exercise its right to develop Phase II prior to or after July 31, 2005. The Master Deed and Amendment is construed accordingly, and the Defendants have no present rights in the 3.724 acres.

When the language of the Master Deed and Amendment is read as a whole, Appellant Developer was under no obligation to develop Phase II at the time of the filing of the Amendment. Appellant Developer required itself to take certain steps to create and develop Phase II. The Amendment does say that it was Appellant Developer's "intention to develop the proposed Phase II, Buildings 1, 2, 3, and 4 as Phase II of the regime" at the time of the filing of the Amendment, however, when the instrument is read as a whole, it was the Appellant Developer's intention not to be required to develop Phase II. *See* Article XXXV of Plaintiff's Exhibit 2 ("Grantor is under no obligation to develop Phase II of the Regime."); Gardner v. Mozingo, 293 S.C. 23, 25, 358 S.E.2d 390, 391-92 (1987)("In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law."). Therefore, in

[6] Appellant Developer argues that without the testimony of Yates, there is "no evidence to support Respondent's claims." Appellant's Initial Brief, p. 9. This is incorrect. The Master Deed, Amendment, and plat were offered into evidence. Plaintiffs' Exhibits 1-3. Deposition testimony of the Appellant Developer was also entered into evidence. Plaintiffs' Exhibit 4. The Court, sitting as the finder of fact, was clear that it took into account all of the evidence presented. Order at p. 3; p. 10.

order to actually have the right and the obligation to develop Phase II, Appellant Developer was required to comply with the terms of the Amendment as a whole.

To the extent the forgoing provisions created an ambiguity, the Court, sitting as the finder of fact, expressly found that it was the intention of Appellant Developer to have the option to develop Phase II without the requirement to do so. As such, it was the intention of Appellant Developer, as evidenced in the language of the Amendment, to include additional requirements to add Phase II if it so desired. It was also the intention of Appellant Developer to be clear about what obligations it had to develop a Phase II. At the time of the filing of the Amendment, it had none. Appellant Developer included the additional requirements to add Phase II in order to be clear whether or not it assumed the obligation to Develop Phase II and what the exact terms of the obligation it assumed were going to be. This construction is consistent with the language of the Amendment and the evidence presented at the hearing.

There was no evidence presented that prior to or after July 31, 2005 Appellant Developer drafted, created, or filed a second amendment to the Master Deed creating Phase II. Yates testified that he searched the title and there was no subsequent filing to the Amendment. There is no evidence that any construction ever took place for Phase II. There was no evidence presented to the Court of any final approval given by the Town prior to July 31, 2005, for any variation of Phase II. It is undisputed that no building permits were issued for any construction in Phase II prior to July 31, 2005. It is undisputed that prior to July 31, 2005, Defendants did not attain any permits. It is undisputed that prior to July 31, 2005, Defendants did not file the certification of an engineer or an architect for the plans for Phase II or any variation of the plans. It is

undisputed that Defendants did not convey any express intention, oral or written, to HOA, or anyone else, of their intent to develop Phase II prior to July 31, 2005. Plaintiff's Exhibit 4.

It is undisputed that the "Commercial Easement" held by Appellant Developer automatically expired on July 31, 2005. Any construction at the Regime would require a commercial easement over the common elements as they have already been conveyed to in an undivided share to each unit owner. This is further evidence of the intention of Appellant Developer that any right to develop Phase II expired on July 31, 2005 as it expressly chose to have its construction easement, necessary for any development, expire on that date.

Mark Steedley testified that Appellant Developer, prior to July 31, 2005 engaged in some initial efforts to evaluate if and how Phase II could be developed, including hiring an engineer to evaluate permitting. Steedley submits that this is evidence of Appellant Developer intention to develop Phase II. The Court correctly found that the testimony of Steedley does not change the overall and express language of the Master Deed and Amendment.

There was also no evidence presented at the hearing as to any time frame in which Appellant Developer intended to develop Phase II if the July 31, 2005 deadline is read out of the document. Therefore, the intention of Appellant Developer and the language of the Master Deed and Amendment was to have the July 31, 2005 date be a deadline so that all who purchased and all who searched the title would be able to tell what property was part of the Regime and what undivided interest each unit had in the common elements. *See* Order, p. 13.

Based upon the foregoing, the Court correctly ruled that "the Amendment itself did not create any present property rights in the [Appellant Developer]. Order, p. 11. The Amendment merely provided notice that there may be a Phase II in the future if Appellant Developer took certain measures, legal or otherwise. This created an option in Appellant Developer that contained certain conditions precedent for its exercise, including the recordation of an instrument showing the option had been exercised and how Phase II was to be developed. This was to be done by July 31, 2005. In fact, the Amendment expressly states, in pertinent part, as follows:

> **"To add Phase II pursuant to the option reserved under this article, the Grantor [Defendant/Developer] shall..."**

Plaintiff's Exhibit 2, Paragraph 7 (emphasis supplied).

"[S]trict compliance with time limits contained in a contract will not ordinarily be enforced, except with regard to option contracts." Alexander's Land Co., LLC v. M&M&K Corp., 390 S.C. 582, 703 S.E.2d 207 (2010) (citing Faulkner v. Millar, 319 S.C. 216, 220, 460 S.E.2d 378, 380 (1995) ((citing Dargan v. Page, 222 S.C. 520, 73 S.E.2d 705 (1952))). "When an option is subject to a condition precedent, in addition to manifesting acceptance within the stated time, the optionee must satisfy the conditions, and the contract will not be specifically enforced until any such conditions are met. Alexander's Land Co., LLC, 703 S.E.2d at 214 (2010) (citing 25 Richard A. Lord, Williston on Contracts § 67:84 (4th ed. 2002)). "Furthermore, if the option requires performance in a certain manner, time is of the essence and exact compliance with the terms of the option are required." Id.

The Amendment lists a number or actual requirements by which the Appellant Developer might "add" Phase II. This is coupled with the plain language that the

Appellant Defendant was under no obligation to develop Phase II. At the time of the filing of the Amendment, there was no Phase II and there would never be a Phase II unless the Appellant Developer was in express compliance with the requirements of the Amendment relative to adding Phase II. The Amendment states that "[t]he Town has not granted final approval for Phase II and Grantor is under no obligation to develop Phase II of the Regime." Therefore, at the time of the filing of the Amendment the Town had not granted final approval for Phase II. The Amendment goes on to state that "Phase II may include a maximum of four (4) additional buildings containing (4) apartments each, pending approval by the Town **and** the election of Grantor to proceed with the development with all or a portion of Phase II." (Emphasis added). Accordingly, in order for Phase II to be developed there must first be final approval by the Town of a specific Phase II development **and** the election of the Appellant Developer to proceed with the approved Phase II. Each of these occurrences must have taken place prior to the deadline of July 31, 2005. There is no evidence of any final approval by the Town of any specific Phase II configuration prior to the deadline of July 31, 2005. Without final approval from the Town prior to July 31, 2005, Appellant Developer, pursuant to the terms of the Amendment, no longer has the right to develop Phase II.

In addition to the foregoing, the Amendment requires that **"[t]o add Phase II pursuant to the option reserved under this article, the Grantor shall prepare, execute, and record an amendment to this Master Deed that shall contain a plot plan showing the location of the Buildings and any other improvements, and a set of floor plans of the Buildings which shall show graphically the dimensions, area, and location of each Apartment therein and the location of General and Limited**

Common Elements affording access to each Apartment." Plaintiff's Exhibit 2 (emphasis supplied). There is no evidence this was never done. The Amendment also requires that "[t]he plans shall be certified by an engineer or architect authorized and licensed to practice in this state. Instead of recording new plot plans and floor plans as required, the Grantor may record new certifications by a licensed engineer or architect of plot plans and floor plans previously recorded if those plans show all of improvements required by this section." There is no evidence this was never done.

In the Amendment, Appellant Developer gave itself the deadline of July 31, 2005, to complete the conditions precedent required in order to develop Phase II. The terms of a deed must be construed against its drafter. *See* Heritage Federal Savings and Loan Association v. Eagle Lake and Golf Condominiums, 318 S.C. 535, 458 S.E.2d 561 (Ct.App. 1995). It is undisputed that the foregoing requirements were not complied with prior to July 31, 2005. Appellant Developer now argues that the July 31, 2005 deadline was unreasonable. Appellant's Initial Brief, p. 16. This argument is untenable. First, this date was unilaterally selected by Appellant Developer. Next, there is absolutely no evidence in the record of anything that prevented Appellant Developer from complying with the terms of the Amendment it drafted within the time frame it selected. Therefore, there is no evidence the time frame was unreasonable.

Finally, the law demands that covenants that restrict the free use of property must be strictly construed against limitations upon the property's free use. Hyer v. McRee, 306 S.C. 210, 410 S.E.2d 604 (Ct.App.1991). Where there is doubt, the doubt must be resolved in favor of the property's free use. Id. The Trial Court correctly noted and pointed out that in order to grant any relief to Appellant Developer, it would be required

to reform the language of the Amendment and re-draft the Master Deed to add new time frames. Order, p. 9. First, Appellant Developer has not requested this relief in this action. Second, this reality demonstrates the fact that the position of Appellant Developer creates an ongoing and unknown restriction on the property (i.e. an undetermined length of time to right to develop a Phase II) *See* Plaintiff's Exhibit 4. Therefore, the Court was correct in ruling that Appellant Developer has no right to develop Phase II especially since such right would be unknown indefinitely. Order, p. 13.

III. The lower court correctly found that the Amendment does not vest or convey any property interests in the Appellant, and, as such, there is no writing to satisfy the statute of frauds.

Appellant Developer argues that the Trial Court erred in applying the statute of frauds to its claim of the right to develop Phase II. Appellant Developer's sole argument, however, with regard to its continued and future right to develop Phase II, is based upon its alleged "determination" that it had in fact exercised its option or made a decision that it was going to develop Phase II prior to July 31, 2005. Plaintiff's Exhibit 4. Though this argument ignores the plain language and express requirements of the Amendment outlined above, the Trial Court was correct in finding that no written correspondence or filing reflecting the election exists. Therefore, the manner in which the Appellant Developer contends such election was made—without a writing and without any notification to anyone—is itself legally insufficient. In South Carolina, the statute of frauds requires that an interest in property must be manifested by a writing. S.C. Code Ann. § 32-3-10, as amended. Here, it is undisputed that no such writing exists. Plaintiff's Exhibit 4.

The Appellant Developer argues that if a writing is required, then the Amendment itself constitutes the writing required by the statute of frauds. This is incorrect. As presented above, the Amendment expressly states that the Appellant Developer is not required to develop Phase II. Moreover, the Amendment itself requires a second amendment to "add" Phase II and reads as follows:

"[t]o add Phase II pursuant to the option reserved under this article, the Grantor shall prepare, execute, and record an amendment to this Master Deed that shall contain a plot plan showing the location of the Buildings and any other improvements, and a set of floor plans of the Buildings which shall show graphically the dimensions, area, and location of each Apartment therein and the location of General and Limited Common Elements affording access to each Apartment."

Plaintiff's Exhibit 2 (emphasis supplied). Therefore, the lower court was correct in ruling that the statute of frauds prevents the claims of Appellant Developer of a continuing right to develop Phase II.

IV. This Court should affirm the decision of the lower court based upon any ground appearing in the Record on Appeal pursuant to Rule 220(c), SCACR.

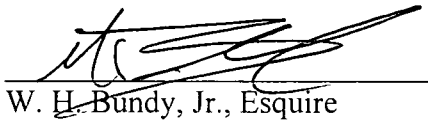
This Court should affirm the decision of the lower court based upon any and all legal conclusions it may draw from any and all evidence appearing in the Record on Appeal. *See* Rule 220(c), SCACR; Rule 208(b)(2), SCACR.

Conclusion

For all the foregoing reasons, the ruling of the Trial Court should be affirmed. The Trial Court heard and considered all the evidence without a jury and made a determination based upon the facts and evidence of the intention of the grantor and the language of the Master Deed and Amendment. This ruling should not be overturned.

[signature page follows]

SMITH, BUNDY, BYBEE & BARNETT, P.C.



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Mt. Pleasant, South Carolina
November 25, 2013

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas
Perry M. Buckner, Circuit Court Judge
Case No. 2009-CP-15-469

Appellant Case No.: 2013-001642

The Retreat at Edisto Co-owners Association, Inc., Gerald Bachelor, Lisa Bachelor, James Currell, Rose Marie Currell, Jervey McKelvey, and Barry Smith, Plaintiffs,

Of whom The Retreat at Edisto Co-owners Association, Inc., Gerald Bachelor, Lisa Bachelor, James Currell, Rose Marie Currell, Jervey McKelvey, and Barry Smith are the Respondents.

v.

The Retreat at Edisto, LLC, W. Mark Steedley, individually, Terry Hoff d/b/a Terry Hoff Construction, Handcrafted Homes, LLC, G & S Supply Co., Inc., GeorgiaPacific Building Products, LLC, Georgia-Pacific Wood Products, LLC, General PreCast Manufacturing Co., Inc., Banks Construction Company, Stroble Site Services, LLC, Eugene H. Brislin, P.E., James J. Barlow Engineering, P.C., PFS Corporation, James Glenn, Wayne Reeves and Mike Miller, Defendants,

Of whom The Retreat at Edisto, LLC is the Appellant.

And

G & S Supply Co., Inc., Third Party Plaintiff,

v.

James Pritchard d/b/a Low Country Exteriors and Edson A. Baros d/b/a Sunshine Vinyl Siding, Third Party Defendants.

RESPONDENTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Respondents proposes the following be included in the Record on Appeal:

1. Order dated June 6, 2013.

2. Order dated June 28, 2013.

3. Plaintiffs' Fifth Amended Complaint filed January 24, 2011.

4. Answer and Counterclaim of The Retreat at Edisto, LLC.

5. Plaintiffs' Reply to Defendants Retreat at Edisto, LLC's and W. Mark Steedley's Counterclaims filed January 17, 2012

6. Defendant The Retreat at Edisto's Motion for New Trial and/or to Alter or Amend dated June 13, 2013.

7. Transcript of Trial dated April 29, 2013.

8. Plaintiffs' Exhibit One: Master Deed of the Retreat at Edisto Horizontal Regime.

9. Plaintiffs' Exhibit Two: Amendment to the Master Deed.

10. Plaintiffs' Exhibit Three: Plat.

11. Plaintiffs' Exhibit Four: Deposition Excerpts for the Use at Trial.

12. Defendant's Exhibit One: LexisNexis S.C. Code 27-31-100

I certify that this designation contains no matter irrelevant to this appeal.

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And

G & S Supply Co., Inc., Third Party Plaintiff,

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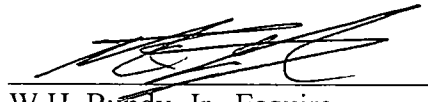
James Pritchard d/b/a Low Country Exteriors and Edson A. Baros d/b/a Sunshine Vinyl Siding, Third Party Defendants.

PROOF OF SERVICE

I certify that I served the Respondents' Initial Brief and Respondents' Designation of Matter to be Included in the Record on Appeal on the Appellant by depositing a copy of said documents in the United States Mail, postage prepaid, on November 25, 2013, addressed to their attorney of record, David K. Haller, Esquire, Haller Law Firm, PC, 115 River Landing Drive, Suite 102, Charleston, South Carolina.



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