

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Master-in-Equity.

SC Court of Appeals

Mikell R. Scarborough, Master-in-Equity

Case No. 2012-213155

Rivers Point Row Horizontal Property Regime a/k/a Rivers Point
Row Property Owners Association, Inc.....Respondents,

v.

Palms Properties, LLC

Defendant.

Palms Properties, LLC

Third-Party Plaintiff,

v.

Rivers Point Row, LLC, John Hagerty, John Derbyshire, and Linda Derbyshire
.....Appellants

PETITION FOR REHEARING

John A. Massalon
I. Ryan Neville
Wills Massalon & Allen, LLC
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ATTORNEYS FOR APPELLANTS

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STATEMENT OF ISSUE

1. *In affirming the grant of summary judgment, this Court's opinion failed to address the genuine issues of material fact.*

ARGUMENT

1. *In affirming the grant of summary judgment, this Court's opinion failed to address the genuine issues of material fact.*

Viewing the evidence in the light most favorable to Appellants, which this Court is charged to do, there are genuine issues of material fact as to whether the Appellants were still in proper control of the POA on June 27, 2005 because the members of the POA had been unable to elect a successor Board of Directors pursuant to the Master Deed despite their efforts to elect one. (R. at 1445-1446; R. at 1369-1441; R. at 1443-1444). Therefore, there are also genuine issues of material fact as to whether Appellants were in rightful control on the date of the subject transaction, May 12, 2005 and lawfully approved the same. (R. at 1442; R. at 1443-1444; R. at 1365-1368). Additionally, neither the POA nor Palms deposed RPR or its members. The POA never offered an Affidavit of its own, and it was never deposed. So, this Court should accept as true the statements made in the Affidavit of John Hagerty, the Affidavit of W. Gregory Pearce, and Third-Party Defendants' defenses as well as Counterclaims.

Furthermore, Respondent has not met its burden of demonstrating the absence of disputed material facts. Instead, it only created more genuine issue of material fact by directing the Court's attention to a portion of the Master Deed that states control of POA is automatically lost when seventy-five percent of the condominiums are sold, while disregarding the portion of the Master Deed that states how the successor Board shall be selected after the loss of control. (R. at 5-11).

To follow the argument on which Respondent won summary judgment to its end, would be to conclude that there was absolutely no person/entity in control of POA from the date seventy-five percent of the condominiums were sold in December of 2004 until a successor Board was elected per the Master Deed sometime after June 27, 2005 thereby voiding all actions done during that seven month period of time by POA. Respondents' thinking makes little sense because the Master Deed contemplated the subject scenario

and sets forth a process for electing a successor Board – meaning, the current Board maintains its status quo until it is succeeded. (R. at 1369-1441).

Additionally, applying principles of contract construction to this case, the contract is unclear as to whether the developer's representatives were automatically divested of their positions on the POA Board of Directors upon the sale of seventy-five percent of the condominiums, or whether reaching the seventy-five percent threshold just triggered the need for an election to replace them. The Master Deed is unclear and facts show that despite earlier attempts to call an election, the individual defendants were not replaced with duly elected members of the POA until after the sale of the Lot to Palms was authorized/ratified by the POA through the individual Defendants thereto, and Resolutions of the POA.

The Record does not support a finding that Appellants automatically lost control of the POA when it sold seventy-five percent of the condominiums. To the contrary, it evidences that Appellant ran the day-to-day operations of the POA until at least seven months after it sold seventy-five percent of the condominiums. As such, the Record does demonstrate genuine issues of material fact as to the control of the POA on the date of the subject transaction.

This Court did not address the multiple issues of material fact, which necessitates a rehearing of this Court's affirmance of the lower Court's grant of Summary Judgment. This Court focused on the recording of the Master Deed and on the date that seventy-five percent of the subject condominiums were sold to support its conclusion that the subject conveyance should be rescinded, neither of which was set forth in an Affidavit or deposition testimony in support of the POA's Motion for Summary Judgment. Moreover, Respondent continues to seek adherence to the Master Deed when it is favorable to its position, while ignoring that it failed to comply with Master Deed by not electing a replacement Board of Directors after the seventy-five percent mark was reached, which to follow to its logical conclusion, would thereby forfeit all actions by the Property Owners Association from December 2004 until the Fall of 2005 when it reached a quorum.

Additionally, this Court's Order improperly relies on the Reyhani case, which is notably distinguishable from the case at bar. Reyhani v. Stone Creek Cove Condo. II

Horizontal Prop. Regime, 494 S.E.2d 465 (S.C. Ct. App. 1997). Importantly, Mr. Reyhani did not put forth evidence that he was in control of the homeowners' association at the time of his subject conveyance whereas Appellants have put forth ample evidence that they were properly in control of the homeowners' association on the date of the subject conveyance, properly subdivided the subject parcel, and rightly approved the subject conveyance on behalf of the association. Id. at 466-67. In fact, the subject property in Reyhani had been through foreclosure, while in the case at bar, Appellants retained control of the association until it transferred ownership in the Fall of 2005 despite earlier efforts to transfer control of the association to the property owners. Id.

Respondent has not met its burden of demonstrating no genuine issue of material fact. Instead, Respondent glosses over multiple genuine issues of material fact, and seeks adherence to portions of the Master Deed while ignoring the terms with which it did not comply. In addition to the points made herein, Appellants refer this Honorable Court to Appellants' Initial Brief and Reply Brief for the arguments made therein, and requests this Honorable Court to rule accordingly.

CONCLUSION

For the reasons discussed herein, Appellants respectfully request this Court to rehear this matter.

Respectfully submitted,



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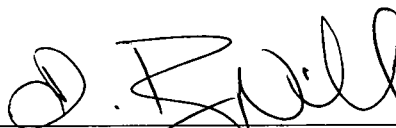
Rivers Point Row, LLC, John Hagerty, John Derbyshire, and Linda Derbyshire

Appellants.

PROOF OF SERVICE

I certify that I served Appellants' Petition for Rehearing on Rivers Point Row Horizontal Property Regime a/k/a Rivers Point Row Property Owners Association, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on December 23, 2013, addressed to its attorneys of record, Michael J. Buhmeyer, Esquire, PO Box 81138, Charleston, SC 29416-1138.

December 23, 2013



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December 23, 2013

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The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Rivers Point Row Horizontal Property Regime et al v. Palms Properties, LLC
Palms Properties, LLC v. Rivers Point Row, LLC et al.

Case No.: 08-CP-10-2279
Appellate Case No.: 2012-213155
Our File No.: 155-16

Dear Ms. Kitchings:

In regard to the above-referenced matter, enclosed for filing, please find the original and one (1) copy of the Appellants' Petition for Rehearing. Please file stamp the originals and the copies; returning a filed copy to me in the enclosed self-addressed, stamped envelope. By way of courtesy copy, I am informing all counsel of record with notice of my communication with the Court. Please do not hesitate contact me with any questions or concerns.

Sincerely,

WILLS MASSALON & ALLEN LLC

I. Ryan Neville
mneville@wmalawfirm.net

Enclosure

cc: Michael J. Buhmeyer, Esquire
Ms. Linda Derbyshire/Mr. John Derbyshire
John B. Hagerty, Esquire

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