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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM THE SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Shirley Robinson, Administrative Law Judge

Case No. 2011-ALJ-17-0546-CC

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St. Clements Homeowner's Association, Appellant,

v.

Be Mi, Inc., d/b/a St. Clements Beach
Bar & Grill and South Carolina
Department of Revenue, Respondent,

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# SUPPLEMENT TO RECORD ON APPEAL

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**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The St. Clements Homeowners Association, Inc., Appellant,

v.

BE-MI, Inc., Respondent.



Appellate Case No. 2012-213333

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Appeal From Horry County
Cynthia Graham Howe, Master-in-Equity

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Unpublished Opinion No. 2013-UP-466
Heard November 5, 2013 – Filed December 18, 2013

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**AFFIRMED**

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Michael James Barnett, of McCrackin, Barnett & Richardson, LLP, of Myrtle Beach, for Appellant.

Fred B. Newby, Sr., and C. Scott Masel both of Newby, Sartip, Masel & Casper, LLC, of Myrtle Beach, for Respondent.

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**PER CURIAM:** St. Clements Homeowners Association, Inc. (St. Clements) appeals the Master-in-Equity's order, in which the Master denied St. Clements'

claim for an injunction and ordered that Respondent BE-MI, Inc. (BE-MI) had the right to retain and maintain a certain side deck. We affirm.

"An action to enforce restrictive covenants by injunction is in equity." *S C Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001). "On appeal from an equitable action, an appellate court may find facts in accordance with its own view of the evidence." *Buffington v. T.O E. Enters.*, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009). "While this standard permits a broad scope of review, an appellate court will not disregard the findings of the trial court, which saw and heard the witnesses and was in a better position to evaluate their credibility." *Id.* "A court does not automatically issue a mandatory injunction once it finds a restrictive covenant has been violated." *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 274, 363 S.E.2d 891, 896 (1987) (citing *Hunnicutt v. Rickenbaker*, 268 S.C. 511, 515-16, 234 S.E.2d 887, 889 (1977)). "The court must balance the equities between the parties; and if the harm to the defendant outweighs the plaintiff's benefit, no relief will be granted." *Sea Pines*, 294 S.C. at 274, 363 S.E.2d at 896. "Although the issuance of a mandatory injunction depends upon the equities between the parties, the decision of whether to issue such relief rests in the court's discretion." *Id.* The evidence presented at trial shows an injunction seeking removal of the side deck would cause considerable harm. BE-MI has constructed, maintained, and improved the side deck at BE-MI's own expense. The side deck constitutes a substantial part of BE-MI's business and relieves congestion by the pool and pool bar, allows patrons a place to sit and eat, and provides shade. In contrast, St. Clements asserts an injunction would remedy the loss of two parking spots; however, the record is unclear on the necessity of those two spots. For the foregoing reasons, the decision of the Master is

**AFFIRMED.**

**SHORT, WILLIAMS, and THOMAS, JJ., concur.**

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| **STATE OF SOUTH CAROLINA** ) | **IN THE COURT OF COMMON PLEAS** |
| ) | **FIFTEENTH JUDICIAL CIRCUIT** |
| **COUNTY OF HORRY** ) | **C/A NO. 2007-CP-26-1426** |
| **The St. Clements Homeowners Association, Inc.,** ) | |
| **Plaintiff,** ) | **FINAL ORDER** |
| **Vs.** ) | |
| **BE-MI, Inc.,** ) | |
| **Defendant.** ) | |



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|---|---|
| **TRIAL JUDGE:** | **Cynthia Graham Howe** |
| **PLAINTIFF'S ATTORNEY:** | **Michael J. Barnett** |
| **DEFENDANT'S ATTORNEY:** | **Fred B. Newby** |
| **DATE OF HEARING:** | **September 18, 2009** |
| **COURT REPORTER:** | **Alice Nelson, Prestige Court Reporting** |

This matter came before me for trial, without a jury, pursuant to an Order of Reference signed by the Honorable Edward Cottingham on May 21, 2009, referring the case to me to make Finding of Fact and Conclusions of Law and to render a final judgment with all appeals to the S.C Court of Appeals. Present at the hearing were the attorneys for the parties, officers and representatives of both the Plaintiff and Defendant corporations as well as other witnesses.

Plaintiff is a South Carolina not-for-profit corporation which is the property owners' association for the St Clements Horizontal Property Regime in Myrtle Beach, South Carolina (hereinafter, the "**Plaintiff**"). The St. Clements regime is an ocean-front condominium-hotel project with approximately sixty-three residential units and three commercial units. All owners of units in the St. Clements are members of the Plaintiff Association The Defendant, BE-MI,

Inc (hereinafter, the "**Defendant**"), is the owner of the commercial unit designated as Unit Pool-1 BE-MI operates Unit Pool-1 as a retail establishment that offers food and beverages for sale to the residents of the St. Clements units and to the public (hereinafter the "**Pool Bar**").

This action was commenced by the Plaintiff's filing its Complaint on March 6, 2007, seeking injunctive relief and asking the court for an order requiring the Defendant to remove a wooden deck it had constructed over one and one-half parking spaces adjacent to the Pool Bar (the "**Side Deck**") Plaintiff also is seeking judgment for costs and attorneys fees pursuant to the Master Deed of the regime (the "**Master Deed**"). Defendant raised various defenses to these claims, including Unclean Hands, Estoppel, Balancing of the Equities, Grant of Express Easement or Easement by Prescription, and Res Judicata Defendant also asserted counterclaims based on Breach of Contract, Detrimental Reliance, and Declaratory Judgment asking the Court to find that Defendant had valid easements for the deck and should be allowed to keep the deck in its current location. At the trial, both parties presented sworn testimony from numerous witnesses, various photographs and other documents in support of their positions.

Certain historical facts relating to this matter are undisputed. First, it is undisputed that the Defendant has owned and operated the Pool Bar since August 8, 1988, almost from the inception of the St Clements Regime During that time there have been a number of disputes between the parties regarding the Pool Bar. Likewise, it is undisputed that in 2003, in an apparent effort to put an end to the unresolved issues that existed between Plaintiff and Defendant, the Plaintiff filed a lawsuit, captioned The St. Clements Homeowners Association, Inc vs. BE-MI, Inc., Case No 2003-CP-26-6560 (the "**First Lawsuit**"), seeking injunctive relief to clarify the rights and duties of the parties pursuant to the Master Deed After a non-jury trial

on the merits, the Master-In-Equity issued an "Amended Order Granting Permanent Injunction," dated April 6, 2006, granting some or all of the relief Plaintiff requested in its Complaint.

At the trial of the present case the President of the Defendant testified that in the spring of 1990, the then President and Board Member of the Plaintiff, Marshall Melton, approved Defendant's construction of the Side Deck for the use and enjoyment of not only Pool Bar patrons, but for the overall benefit of all unit owners and guests of the St. Clements. He further testified that the idea to build the Side Deck was put forward by the developer of the St Clements, Dwight Cox, and that he actually assisted Luke Goude, Defendant's principal, in the deck's construction. Mr Melton, testified on behalf of the Defendant, and corroborated that testimony The Defendant's principal witness testified that he spent approximately $11,000 00 in building the original structure and later significantly upgraded the Side Deck at Defendant's own expense adding awnings and other improvements. Defendant has continuously operated the Pool Bar, and the deck in question, since their original construction Defendant also contends that there is no merit in the Plaintiff's claim that the spaces are needed for parking, citing the fact that for years a number of other parking spaces on the property have been occupied by unused autos belonging to members of the Plaintiff Association.

Plaintiff contends, and its witnesses testified, that even if the Defendant's testimony was true, there is no evidence in the minutes of the Plaintiff that the Board approved Mr. Melton's actions, and, therefore, he had no authority to grant such permission Plaintiff further cites portions of the Master Deed that state that the Association has governing authority over all common area, such as the parking areas, and that Plaintiff has the right to force removal of any obstruction on common areas

I have carefully considered all of the evidence submitted, the testimony and credibility of the witness, the history of the relationship between the parties, and the content, and result of the First Lawsuit. Based on the foregoing, I make the following findings of fact and conclusions of law:

**Findings of Fact:**

I find that the following have been proven by the preponderance of the evidence:

1. Defendant is the owner of Unit Pool-1, a commercial unit in the St. Clements Horizontal Property Regime, and has continuously owned and operated the same as a retail food and beverage operation since August, 1988. The Regime is a condominium-hotel, and no members reside permanently on the property

2 In 1990, following Hurricane Hugo, Dwight Cox, president of the developer of the Regime, suggested to the Defendant's president, that he build the deck in question in its current location.

3 Marshall Melton was the President, and a member of the Board of Directors, of the Plaintiff Association in 1990, and in such capacity advised the President of the Defendant that the Defendant had permission to build the deck in question at its present location. As President of the Plaintiff Association, Mr. Melton appeared to the public, and to the Defendant, to be in a position in which third parties could rely on his authority to speak for, and bind, the Plaintiff

4 At Defendant's own expense, and without any cost to the Plaintiff or its members, the Defendant constructed, has maintained and improved, the deck in question, together with associated improvements such as awnings, side curtains, furnishings and other items evident in the photographs.

5. The deck has been used for nearly 20 years by members of the Association, their guests and renters, as well as by members of the general public

6. The deck has become, and remains, an integral and vital part of the Defendant's business, and provides a place not only for its patrons to sit and consume their food and beverages, but it provides perhaps the only shaded area for those using the pool to seek shelter from the sun on the hottest of days. As such, the deck and other improvements provide a benefit for the Plaintiff and its members, as well as the Defendant.

7 There was no reason for the Defendant to believe that the former President of Plaintiff, and the developer of the project, did not have authority to grant him permission to build and maintain the Side Deck, and he relied on that belief, and their apparent authority, to his detriment. See. Watkins v. Mobil Oil Corp., 291 S.C. 62, 67, 352 S.E.2d 284, 287 (Ct. App 1986) (holding that to establish apparent agency, a party must prove that the purported principal by either affirmative conduct or conscious and voluntary inaction has represented another to be his agent or servant and reliance upon the representation and a change of position to his detriment in reliance on the representation )

8 The Plaintiff's response, that there is no evidence in the meeting minutes that reflects approval for the Side Deck, is unconvincing The Defendant's principal obviously thought he had permission to build the Side Deck or he would not have spent more than $11,000 00 in the original construction, or spent additional monies to significantly improve the Side Deck a few years later. Moreover, Mr. Melton, the former President of Plaintiff, has not been a member of the HOA or its Board for years, and he sold his last unit more than ten years ago. Therefore, he was the only witness who did not have a personal interest in the outcome of this action. In these circumstances, it is immaterial whether the Board approved the Side Deck by formal action or

whether Melton had actual authority to grant permission for the Side Deck's construction Melton had apparent authority on behalf of the Plaintiff's Board and the Plaintiff to give permission to the Defendant to build the Deck.

9. Although the Plaintiff asserts that its loss of parking spaces is of great harm to it, the testimony presented indicates otherwise For many years during the life of the Regime and the Plaintiff Association, a number of parking spaces in the parking facility have been used by Plaintiff's members to store unused vehicles, without enforcement action by the Plaintiff. At least one was still being stored there at the time of the trial The effect of this storage is that at least two spaces are used for those owners' unit when their unit is rented Plaintiff should not be allowed to complain now about a lack of parking after sitting on its hands for such an extended period of time. For this reason, I find that there is not a parking problem at the site sufficient to necessitate the removal of the Side Deck. Likewise, I find that the Plaintiff has not enforced the provisions in the Master Deed relating to use of parking spaces for other uses in a consistent manner or uniformly.

10 To require the Defendant to remove the Side Deck and try to maintain its business without it would impose a severe hardship and detriment on the Defendant, causing it to suffer severe damages, and the benefit to be conferred on the Plaintiff if the Side Deck was removed would be minimal and of little significance when compared to that damage.

11 The existence of the Side Deck was known to the Plaintiff when it filed its First Lawsuit Members of the Plaintiff's Board testified that they had actual knowledge that the Side Deck covered parking spaces in the early 1990's, and it was specifically mentioned in more than one affidavit and several letters filed by Plaintiff at that time. Plaintiff failed to secure any relief

on that issue in the First Lawsuit which sought to enforce Master Deed provisions on that and other issues.

12 Plaintiff has not sought to remove the Side Deck for nearly twenty years, and its members have enjoyed the use of those facilities (constructed with Defendant's money) for that period.

**Conclusions of Law**

1 An injunction is an equitable remedy and the remedy of injunction lies within the sound discretion of the trial court Gibbs v Kimbrell, 311 S C 261,428 S E 2d 725, 731 (Ct App 1993). The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction. Strategic Resources Co. v BCS Life Ins Co , 367 S.C 540, 544, 627 S E 2d 687, 689 (2006)(citing Calcutt v. Calcutt, 282 S.C. 565, 320 S.E.2d 55 (Ct App. 1984). The remedy of an injunction is a drastic one and ought to be applied with caution Strategic Resources Co v. BCS Life Ins Co , 367 S C. 540, 544, 627 S E 2d 687, 689 (2006) (citing Forest Land Co v. Black, 216 S.C 255, 57 S E 2d 420 (1950) In deciding whether to grant an injunction, the court must balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant, and grant an injunction which seems most consistent with justice and equity under the circumstances of the case Id

2 In making a determination whether to grant the Plaintiff the relief requested in its Complaint, namely a permanent injunction, the threshold question for the court is essentially an equitable one Although the Plaintiff also asks for attorneys' fees, the court need not rule on that issue unless the court grants the injunction

3. In a case such as this the court is required to look at the relative impact of the requested remedies and to balance the equities between the parties. See: Cedar Cove Homeowners Ass'n, Inc v. DiPetro, 368 S.C. 254, 628 S.E 2d 284 (Ct. App. 2006), involving the construction of a wooden deck built in part on a common area. In that case the court noted that formal permission by the board was not required where the make-up and policies of the board had changed since the defendants had been given permission to build their deck

4 Even if there has been a violation of a restrictive covenant, the court is not necessarily required to issue an injunction to enforce that covenant as a matter of law Instead, the court is required to balance the equities to determine whether, under the circumstances, the restrictive covenant should be enforced. Buffington v. T.O E Enterprises, 383 S.C. 388, 680 S.E. 2d 289 (2009).

5 Accordingly, under a balancing of the equities analysis, I find that it would be inequitable for the court to grant Plaintiff an injunction requiring that Defendant remove the Side Deck

6 *Res judicata* requires proof of three elements: a) that a final, valid judgment was entered on the merits of the first suit, b) that the parties to both suits are the same, and c) that the subsequent action involves matters properly included in the first action. Judy v Judy, 383 S C 1, 8, 677 S.E.2d 213, 217 (Ct App 2009)(citation omitted)

7. Here, the first two elements are unquestionably present. A final, valid judgment was entered on the merits in the First Lawsuit, as evidenced by the "Amended Order Granting Permanent Injunction," and the parties to both suits are identical.

8 The third element of proof is met because the parties actually litigated the issue of their respective rights and duties under the Master Deed in the First Lawsuit When claims

arising out of a particular transaction or occurrence are adjudicated, *res judicata* bars the parties to that suit from bringing subsequent actions on either the adjudicated issues or any issues that ***might*** have been raised in the first suit Hilton Head Center of SC, Inc v Public Serv Commission of SC, 294 S C 9, 362 S.E.2d 176 (1987) (emphasis added) Issues which might have been raised in the prior action applies where the two actions involve the same cause of action See Judy at 8, 677 S E.2d at 217-18 (quoting Lowe v Clayton, 264 S.C. 75, 82, 212 S E.2d 582, 585-86 (1975)).

9. There is no question that the Plaintiff could have raised the issue relating to the Side Deck in the First Lawsuit when it asked the court to issue an injunction clarifying the rights and duties of the parties under the Master Deed In fact, evidence on that point was introduced in that case. Despite that, the Court failed to grant Plaintiff any relief on this issue The legal and factual positions today of the parties are identical to the positions they were in when the First Lawsuit was filed in 2003.

10. The Plaintiff is now seeking an injunction, asking the court to issue a ruling outlining the parties' rights and duties pursuant to the Master Deed, just as it did in 2003 It is, in essence, asking for the same relief a second time.

11 The underlying transaction or occurrence in the both lawsuits is the same, namely the contractual relationship between the Plaintiff HOA and one of its members created by the Master Deed and the Defendant's actions Therefore, the specific issue raised in this case, being the Side Deck covering approximately one and one-half parking spaces, is a matter that should have been and inferentially was, included in the first action.

12 To allow Plaintiff to maintain an action against the Defendant BE-MI for an issue that existed in 2003 and was properly a part of the First Lawsuit, would violate the doctrine of

*res judicata* and be inequitable. See Plum Creek Development Co , Inc. v City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 108 - 109 (1999)

13. Equitable estoppel denies a party the right to plead or prove an otherwise important fact because of something which he has done or failed to do. Parker v Parker, 313 S.C. 482, 487, 443 S E 2d 388, 391 (1994)(citing Lee v. Southern Railway Co , 228 S C 240, 89 S E 2d 431 (1955) It may arise even though there was no intention by the party to relinquish or change any existing rights. The essential element of estoppel is prejudice to the party raising the defense. Id.

14 Estoppel arises when a party, relying upon what another has said or done, changes his position to his detriment Gibbs v Kimbrell, 311 S.C. 261, 268, 428 S.E 2d 725, 729 (Ct App. 1993)(citing Russell v. Drivers Leasing Services, Inc., 282 S C 358, 361, 318 S E.2d 579, 581 (Ct. App 1984) Additionally, estoppel arises when a party observes another dealing with his property in a manner inconsistent with his rights and makes no objection while the other changes his position in reliance on the party's silence; the party's silence is acquiescence that estops him from later seeking relief. Id. (citing McClintic v Davis, 228 S C 378, 383, 90 S E 2d 364, 366 (1955), Seabrook Island Property Owners Association v Pelzer, 292 S.C 343, 348, 356 S E 2d 411, 414 (Ct App 1987)

15 I find that in this case, all of the elements necessary to establish equitable estoppel are present.

16. The Master Deed states, "In any proceeding arising because of alleged default by a unit owner, the Association, if successful, shall be entitled to recover the costs of the proceeding and such reasonable attorney's fees as my be determined by the Court, but in no event shall any unit owner be entitled to such attorney's fees" Under the terms of the Master Deed, the Plaintiff

is only entitled to recover attorneys' fees if it prevails in the action by obtaining the relief sought in its complaint In this case, Plaintiff is precluded from obtaining a ruling in its favor based on the aforementioned and is, therefore, not entitled to an award of attorneys' fees See Baumann v Long Cove Club Owners Ass'n, Inc 380 S C 131, 668 S E.2d 420 (Ct. App 2008) (holding members of homeowners association were not the prevailing party in their action for declaratory judgment against the association, and therefore, were not entitled to attorney fees and costs under the association covenants). In addition, it would be inequitable to award attorneys' fees to the Plaintiff if the Plaintiff does not prevail in the action.

Based upon the foregoing, it is,

**ORDERED**, that the Plaintiff's request for an injunction requiring the Defendant to remove the wooden Side Deck covering one and one-half parking spaces in the parking deck of the St Clements Horizontal Property Regime is denied,

**FURTHER ORDERED**, that the Plaintiff's request for an award of attorney's fees and costs for this action is denied;

**FURTHER ORDERED**, pursuant to the Defendant's Counterclaim, that the Defendant has the right to retain and maintain the Side Deck with its existing improvements, or their replacements, in their current location.

**IT IS SO ORDERED**.

Conway, South Carolina

Dated December 20, 2010

Cynthia Graham Howe
Master-in-Equity for Horry County