

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS
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CIVIL ACTION NO: 2011-CP-07-03322

JERRY R. ROSENEAU
BEAUFORT COUNTY, S.C.
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SC Court of Appeals

THE CALLAWASSIE ISLAND)
MEMBERS CLUB, INC.,)
)
Plaintiff,)
)
vs.)
)
RONNIE D. DENNIS and JEANETTE)
DENNIS,)
)
Defendants,)

AMENDED ORDER GRANTING
THE CALLAWASSIE ISLAND
MEMBERS CLUB, INC.'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DENNIS' MOTION TO
RECONSIDER

This matter originally came before the Court upon motion of the Plaintiff, The Callawassie Island Members Club, Inc. ("CIMC"), seeking summary judgment on its claims against the Defendants, Ronnie and Jeanette Dennis, for recovery of unpaid dues, fees, assessments, and other charges the Defendants incurred as members of CIMC¹. CIMC also seeks summary judgment on the Defendants' counterclaims, which are asserted as negligent misrepresentation, breach of fiduciary duty, and violations of various provisions of the South Carolina Nonprofit Corporations Act.

An order granting summary judgment against the Defendants was entered on January 15, 2014. Defendants' Motion to Reconsider was heard before the Court on May 27, 2014. For the reasons discussed herein, the Court finds summary judgment in favor of CIMC is appropriate in both regards, amends its original order herein, and respectfully denies Defendant Dennis' Motion to Reconsider.

¹ For the sake of brevity, any reference to "dues" shall be considered to include all monies sought by CIMC.

FACTS

Callawassie Island is a private island, located between Beaufort and Hilton Head Island. Since 2001, The Callawassie Island Members Club, Inc. has owned the club assets and operated the club amenities, which include tennis and golf facilities, a swimming pool, a river house, and a clubhouse. It is a 501(c)(7), mutual benefit nonprofit corporation, and is registered with the State of South Carolina. It was formed following a vote by the members to organize, acquire the club assets, and operate the club themselves.

In 1999, the Defendants purchased property on Callawassie Island. Although not required to do so, they also joined the then-existing club, known as the Callawassie Island Club, which was operated by The Callawassie Island Company, L.P. ("CIC")². In so doing, they agreed to be bound by the terms and conditions of the Plan for Offering of Memberships in the Callawassie Island Club, of April 1, 1994 ("The CIC Plan")³.

The CIC Plan, to which the Defendants originally agreed to be bound, imposed numerous obligations on its members. Chief among them was a requirement that a resigned member must continue to pay dues until his membership was reissued by the Club. The CIC Plan also urges potential members to "carefully read all of the attached documents and...consider seeking professional advice to evaluate these documents." Further, it states that "no person has been authorized to give any information or make any representation not contained within [the CIC Plan] and, if given or made, such information or representation must not be relied upon as having been authorized by the

² CIMC and CIC are unrelated entities.

³ Although this Court may make specific references to portions of various documents at issue in the instant matter, each separate document is considered as a whole.

Partnership or the Club.” The CIC Plan also states that membership is for recreational purposes only, and that no member should view his membership as an investment or expect to derive any economic profit from club membership. It further anticipates the eventual takeover by the members of the club's assets and operation, and provides that amendments to the CIC Plan following transfer to the members may be accomplished in accordance with club bylaws.

Upon transfer of the club assets to CIMC in 2001, the Defendants were issued a membership certificate to CIMC and continued to enjoy the club for a number of years. In August 2001, and in conjunction with this transfer, CIMC amended the Plan for Offering of Membership (The CIMC Plan) and established its own General Club Rules and Bylaws. Accordingly, the CIMC governing documents include the CIMC Plan for Offering of Membership, Club Bylaws, and General Club Rules, and all amendments to each. These documents have been amended since being initially enacted in 2001. Specifically, CIMC amended its Plan for Offering of Membership in 2007, 2008, and 2012, while the Board of Directors amended the CIMC General Club Rules in 2007, 2008, and 2009. Despite amendments to these documents during the Defendants' membership in CIMC or the previous CIC, the requirement that a member is obligated to pay dues until that membership is reissued remains consistent.

In particular, Article X of the CIMC Bylaws of June 29, 2001, requires the CIMC Board of Directors to “adopt, and administer as appropriate, a Plan of Membership for the Club,” which is to include “membership transfer provisions” and “dues fees, charges and assessment rules and procedures.” (CIMC Bylaws). Article XI of the Bylaws authorizes CIMC to pursue legal action against its members for unpaid dues, fees,

charges, or assessments. (CIMC Bylaws). This provision is repeated in Section 5.5 of the Plan for Offering of Membership. (Plan for Offering of Membership).

The Plan for Offering of Membership contains the following requirement (all bold print is included in original):

2.4.9 PAYMENT OF DUES BY RESIGNED EQUITY MEMBERS

An equity member who is on the waiting list to sell their Club membership will be obligated to continue to pay all Charges to the Club until his or her equity membership is reissued by the Club...A resigned member will be entitled to use the Club Facilities so long as the resigned member is obligated and continues to pay all Charges on the resigned membership.

The CIMC General Club Rules also addresses a member's ongoing obligation to pay dues, fees, assessments, and other charges until the membership is reissued:

14.2.1 Any member may terminate membership in the Club by delivering to the Membership Director written notice of termination in accordance with the Plan for Offering of Club Memberships. Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges (including any food and beverage minimums) until the membership is sold.

14.2.3 Notwithstanding any termination or suspension of membership, the member shall remain liable for any unpaid club account or membership dues, fees, charges, and assessments, and such member shall not be entitled to a refund of any part thereof paid by a member to the Club.

(CIMC General Club Rules, amended 2007)

Article VI of the CIMC Bylaws establishes the wide powers of the Board of Directors. Included within the Board's mandate to "exercise all powers of the Club and do all acts and things necessary to carry out the purpose of the Club," the Board is empowered to "[a]dopt, alter, amend or repeal the General Club Rules"; suspend or terminate members; take any action permitted by law, statute, Certificate of Incorporation, or Club Bylaws; and to have the final say in the interpretation and construction of the Club Bylaws.

As referenced above, the governing documents have been subject to amendment since 2001. The Plan for Offering of Membership, the CIMC Bylaws, and the CIMC General Club Rules maintain separate and distinct processes for amendment. The CIMC General Club Rules may be amended at the discretion of the Board of Directors. The Bylaws, however, may only be amended upon a majority vote of the Board of Directors and a majority vote of the Equity members voting once quorum is established. Finally, the CIMC Plan may be amended by the Board of Directors in its sole discretion, unless the amendment(s) "materially and adversely affect the rights of the Equity Members." In those instances, amendments to the CIMC Plan are required to be approved by "a majority of the votes held by the Equity Members so affected."

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law. Rule 56(c), SCRPC. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 511 S.E.2d 699 (Ct. App. 1999). "It is not sufficient that one create an inference [that] is not reasonable or an issue of fact that is not genuine." Priest v. Brown, 302 S.C. 405, 408, 396 S.E.2d 638, 639 (Ct. App. 1990).

"A complete failure of proof concerning an essential element of the [nonmoving] party's case necessarily renders all other facts immaterial." Gauld v. O'Shaughnessy

Realty Co., 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008) (internal citation and quotation marks omitted).

"Where a motion for summary judgment presents a question as to the construction of a written contract, the question is one of law if the language employed by the agreement is plain and unambiguous." MGC Management of Charleston, Inc. v. Kinghorn Ins. Co., 336 S.C. 542, 546, 520 S.E.2d 820, 822 (Ct. App. 1999).

ANALYSIS

CIMC's breach of contract claim

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) (quoting Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)). A contract must be read as a whole document so that ambiguity is not created by a single sentence or clause. Id. Importantly, whether the contract is ambiguous is a question of law for the court. Id. An unambiguous contract may not be varied or contradicted by evidence drawn from sources other than the contract itself. Walters v. Summey Building Systems, Inc., 311 S.C. 507, 509, 429 S.E.2d 854, 856 (Ct. App. 1993).

Accordingly, in a contract dispute, if the contract is determined to be unambiguous, there is no triable issue of fact for a jury. Correspondingly, the court itself is required to interpret the contract and apply the plain and ordinary meaning of its terms.

After giving due consideration to the plain language of the contracts, this Court finds that the documents are unambiguous. The governing documents clearly and

consistently require a member to pay dues until his membership is reissued. Furthermore, the governing documents expressly bind a member to ongoing liability even if he is suspended, terminated, or expelled.

In defense of the claim against them, the Defendants allege that CIMC violated various provisions of the South Carolina Nonprofit Corporations Act, thereby relieving them of any further obligation to CIMC. The Defendants further contend that the Nonprofit Act allows a member to resign at any time without any ongoing obligation. These arguments are not persuasive.

The Defendants contend that CIMC has treated members differently, in violation of S.C. Code Ann. § 33-31-610. This contention is premised upon the assertion that CIMC has allowed some resigning members to be relieved of their dues obligation while continuing to assess dues against similarly-situated members. The Defendants also contend CIMC has violated members' rights under § 33-31-611 relating to transfers of memberships as well as §33-31-620 and -621 regarding resignation, termination, and expulsion of members. However, the record demonstrates that to the extent members were treated differently, such treatment was in furtherance of the negotiated settlements of debts owed to CIMC. The CIMC Board is authorized, both by its governing documents and S.C. Code § 33-31-302 to take such actions. Therefore, this Court will not review the *intra vires* corporate action by CIMC, where it was exercising its business judgment, and there has been no evidence suggesting self-dealing, fraud, or bad faith on the part of the Board of Directors. See Dockside Ass'n, Inc. v. Detyens, 291 S.C. 214, 352 S.E.2d 714 (Ct. App. 1987).

Additionally, the assertion that the Defendants are entitled to relief from their contractual obligations pursuant to § 33-31-620 or § 33-31-621 is betrayed by the plain language of each statute. Section 33-31-620(b) states: "The resignation of a member does not relieve the member from any obligations the member may have to the corporation as a result of obligations incurred or commitments made before resignation." Likewise, § 33-31-621(e) provides that "a member who has been expelled or suspended may be liable to the corporation for dues, assessments, or fees as a result of obligations incurred or commitments made before expulsion or suspension." These provisions plainly demonstrate that a member may not void a contractual undertaking simply by leaving a club. Rather, an obligation undertaken by a member remains effective in accordance with the provisions of that agreement regardless of that member's continuing involvement with the club. Therefore, because the CIMC governing documents (and before it, the CIC governing documents) require the Defendants to continue paying dues until their membership is reissued, they are liable for the payment of such ongoing dues until that condition is met.

Finally, any contention that CIMC failed to comply with its governing documents in amending them is not supported by the evidence. The Defendants, in arguing that the General Club Rules were amended without a vote of the membership, fail to address power of the Board of Directors to amend the General Club Rules without any approval by the membership. The Court rejects the Defendants' attempt to apply the requirement for amendment of the Plan for Offering of Membership to the General Club Rules.

Accordingly, this Court is required to enforce the provisions of the governing documents and grants summary judgment in favor of CIMC on its claim against the

Defendants. CIMC is entitled to recover all outstanding dues, plus interest, owed by the Defendants, as well as attorneys' fees, in accordance with the CIMC governing documents. As reflected in the affidavit submitted by Jeff Spencer, general manager of CIMC, the dues owed, as of November 7, 2013, total \$40,889.76. Additionally, attorneys' fees and costs, as reflected in an affidavit submitted by Ehrick K. Haight, Jr., total \$10,242.00, which this Court deems justified, reasonable and appropriate based on the experience of the attorneys involved and the type of action. Therefore, judgment shall be entered against the Defendants in the amount of \$51,131.76⁴.

Dennis Breach of Fiduciary Duty Claim

Among the counterclaims asserted is a breach of fiduciary duty by CIMC. In South Carolina, a breach of fiduciary duty claim against a corporation is typically a derivative claim. The Court of Appeals has recognized that "[t]he fiduciary obligation of dominant or controlling stockholders or directors is ordinarily enforceable through a shareholder derivative action." Brown v. Stewart, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001). Brown demonstrates that a breach of fiduciary claim must be enforced derivatively. Brown at 49, 557 S.E.2d at 684.

South Carolina Code § 33-31-304 mandates that any action premised upon the contention that a nonprofit corporation was pursuing actions outside its authority must be brought as a derivative action. The South Carolina Reporters' Comment to this section specifically states that a member of a nonprofit corporation cannot assert a direct action against a nonprofit corporation, and further specifically distinguishes this limitation from the Business Code, where some direct actions may be maintained by

⁴ This judgment does not include any dues, fees assessments, or other charges levied

shareholders against the corporation. Additionally, S.C. Code Ann. § 33-31-630 expressly authorizes derivative actions against nonprofit corporations, as long as the claim is asserted in accordance with the relevant Rules of Civil Procedure. The requirements for a derivative action are provided in Rule 23(b)(1), SCRPC:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.

The breach of fiduciary duty claim, which, under Brown, must be asserted as a derivative action, fails to meet the specific pleading requirements of Rule 23. Moreover, the counterclaims were not set forth in a verified pleading, rendering them fatally defective. Therefore, summary judgment in favor of CIMC on this counterclaim must be granted. See Clearwater Trust v. Bunting, 367 S.C. 340, 626 S.E.2d 334 (2006) ("A derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRPC, is properly dismissed pursuant to Rule 12(b)(6).") (quoting Carolina First Corp. v. Whittle, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000)).

Dennis Negligent Misrepresentation Claim

The elements of a negligent misrepresentation claim are as follows: 1) a false representation made by the defendant to the plaintiff, 2) a pecuniary interest by the

by CIMC after November 7, 2013, which must be the subject of a subsequent action.

defendant in making the statement, 3) a duty of care owed by the defendant to see that truthful information was communicated to the plaintiff, 4) the defendant breached that duty by failing to exercise due care, 5) the plaintiff justifiably relied on the representation, and 6) the plaintiff suffered a pecuniary loss as a direct and proximate result of reliance on the representation. See Hurst v. Sandy, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997).

Dennis failed to offer, in support of his claim, any specific statement made by CIMC. To the extent he contends any such statements were made, they occurred in conjunction with his acquisition of a membership in CIC. Even assuming some statement was made that would give rise to a cause of action for negligent misrepresentation, liability for such a statement cannot be transferred to CIMC. CIMC did not own or operate the club at the time the Defendants became members, and therefore had no pecuniary interest in any statement made at the time. Moreover, the Defendants voluntarily entered into the contractual agreement, and there is no indication that the Defendants were in an unequal bargaining power that would allow for justifiable reliance on any statement. Therefore, CIMC is entitled to summary judgment on the claim for negligent misrepresentation.

Dennis claims under the South Carolina Nonprofit Corporations Act

The Defendants have asserted violations of the South Carolina Nonprofit Corporations Act both as defenses and counterclaims. As discussed above, the statutes asserted do not allow the Defendants to avoid their contractual undertaking to CIMC. Additionally, these statutes do not establish a private right of action against a nonprofit

corporation. Therefore, CIMC is entitled to summary judgment on any counterclaim premised upon an alleged violation of the Nonprofit Corporations Act.

CONCLUSION

Following a full review and consideration of the relevant pleadings, case law, and arguments of counsel, this Court finds that summary judgment, in favor of CIMC, is appropriate. Therefore, judgment shall be entered against the Defendants, jointly and severally, in the amount of \$51,131.76. CIMC is entitled to summary judgment on the counterclaims asserted by the Defendants. Defendants' Motion to Reconsider is denied.

IT IS SO ORDERED.



Carmen T. Mullen
Judge, Fourteenth Judicial Circuit

Beaufort, South Carolina

June 10, 2014