

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
14th Judicial Circuit

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2014-001524

The Callawassie Island Members
Club, Inc.,

Respondent,

v.

Ronnie D. Dennis and Jeanette
Dennis,

Appellants.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. WAS THE TRIAL COURT CORRECT IN CONCLUDING THAT (A) THE DENNISES UNDERTOOK THE OBLIGATION TO REMAIN MEMBERS UNTIL THEIR MEMBERSHIP REISSUED WHEN THEY PURCHASED IN 1999, (B) SUCH OBLIGATION REMAINED CONSTANT THROUGHOUT THEIR MEMBERSHIP, AND (C) SUCH OBLIGATION DID NOT VIOLATE S.C. CODE ANN. §33-31-610 ET SEQ.?
2. CAN THE DENNISES OVERCOME SUMMARY JUDGMENT WHEN THEIR CLAIMS WERE PROCEDURALLY FLAWED, FAILED TO ESTABLISH EITHER A BREACH OF FIDUCIARY DUTY OR NEGLIGENT MISREPRESENTATION ON THE PART OF CIMC, AND THEIR AFFIRMATIVE DEFENSES WERE EITHER BARRED OR LACKED EVIDENTIARY SUPPORT?
3. DID THE TRIAL COURT PROPERLY RELY UPON THE PLEADINGS, GOVERNING DOCUMENTS AND AFFIDAVITS FILED IN THE RECORD, IN REACHING ITS VARIOUS FINDINGS, INCLUDING THE FINDING THAT CIMC SHOULD BE AWARDED ITS REASONABLE ATTORNEYS' FEES?

STATEMENT OF THE CASE

On August 10, 2011, The Callawassie Island Club, Inc. (“CIMC”) brought a breach of contract action against Ronnie D. Dennis and Jeanette Dennis (“the Dennises”) for the collection of delinquent dues, fees and assessments¹. (Complaint, p. 3; Exh. C to Complaint). The action alleged that the Dennises, as club members, had an ongoing obligation to pay dues until such time as their membership was reissued to a new member. The Dennises answered alleging that their resignation relieved them of any further liability for dues, even though their membership had not transferred to a new member. Additionally, the Dennises brought counterclaims for negligent

¹ For purposes of this Brief, the monetary damages sought by CIMC, which include dues, fees, assessments, costs and attorneys’ fees, are hereinafter referred to as “dues” unless more specificity is required by the context.

misrepresentation and breach of fiduciary duty, and asserted a Third Party Complaint against several CIMC Board members. The third party defendants were subsequently dismissed.

CIMC brought a motion for summary judgment arguing that the Dennises' obligation to pay dues until their membership reissued to a new member was clear and that the various defenses and counterclaims were either barred or unsupported by any evidence.² Specifically, CIMC argued it did not own the club at the time the Dennises purchased and therefore was not capable of making any misrepresentation upon which the Dennises could have relied. CIMC further claimed any breach of fiduciary duty claim must be brought derivatively and that the *inter vires* actions cited by the Dennises were not, under the business judgment rule, subject to scrutiny by the court pursuant to *Dockside Ass'n., Inc v. Detyens*, 294 S.C. 86, 362 S.E.2d 874 (1987). (Mot. Summ. Jgmt.). A hearing of the matter was held on November 8, 2013, at which time the Dennises handed up their Memorandum in Opposition to Plaintiff's Motion for Summary Judgment to the trial judge. Following oral and written arguments, CIMC's motion was granted by Order dated January 15, 2014.

The Dennises filed a Motion for Reconsideration pursuant to Rule 59, SCRCP, on January 27, 2014, objecting to the form of the Order and the legal standard employed by the court in reaching its determination. They also challenged several of the court's factual findings; its reading of S.C. Code Ann. §33-31-620; and its findings regarding

² CIMC filed its Motion for Summary Judgment on September 30, 2013, together with a supporting Affidavit of Jeff Spencer (CIMC's General Manager). A Memorandum in Support of Summary Judgment was handed to the trial judge at the November 8th hearing.

Dennises' negligent misrepresentation claims. The parties submitted various memoranda³ and orally argued the matter at a hearing on May 27, 2014. On June 10, 2014, the trial court issued an amended order, once again granting CIMC summary judgment; which the Dennises now appeal.

FACTS

Callawassie Island is a private island community located in Beaufort County, South Carolina, largely developed by Callawassie Island Company, L.P., which was controlled by Messrs. Chafin and Light. ("Developer"). (2001 Declaration, p. 2; Complaint, p. 2; Depo. R. Dennis, p. 20, lines 20-21). As part of the development plan for the Island and prior to CIMC's acquisition in 2001, the majority of the recreational amenities, including the golf course, tennis facilities, swimming pools, clubhouses, and dining facilities, were owned by the Callawassie Island Club, which was controlled by the Developer. Memberships in the Callawassie Island Club were sold to individuals owning property on the Island, including the Dennises, who executed a Membership Application and Membership Purchase Agreement in 1999. (Complaint, Exhibits A & B; Depo. R. Dennis, p. 21, lines 13-18).

As is common in residential communities in the area, the development plan contemplated the transfer of these recreational amenities to a member owned and managed organization following the Developer's control period. (1994 Plan, p. i). To effectuate that intent, CIMC was created and registered as a §501(c)(7) not for profit

³ CIMC submitted its Memorandum in Opposition to Defendants' Motion to Alter or Amend and the Dennises filed a Reply to Plaintiff's Memorandum in Opposition to Defendants Motion to Reconsider on March 19, 2014, followed by a Supplemental Memorandum filed May 27, 2014.

organization under the Internal Revenue Code. (Complaint, p.1, CIMC Memo. Supp. Summ. Jmt., p. 2). In 2001, the Callawassie Island Club's assets were transferred to CIMC and it commenced the maintenance and operation of the club amenities. (Depo. G. Harman Switzer, p. 75, line 24 - p. 76, line 5). At that time, the Dennises' membership transferred to CIMC.

Prior to the radical decline in real estate values, CIMC had "very few delinquencies." (Depo. P. Kilian, p. 71, line 25 - p. 72, line 5). It was not until 2009, well into the recent recession, that members (like the Dennises) complaining of financial hardship, attempted to relieve themselves of their financial responsibilities to CIMC by resigning without selling or otherwise transferring their membership to a new member (Answ., p. 3, Para. 14; Aff. Jeff Spencer, p. 3; Depo. R. Dennis, p. 89, line 16). The Dennises ceased paying dues to CIMC in 2010, and this action was commenced for the collection of the unpaid account.

ARGUMENT

I. CIMC DEMONSTRATED THERE WAS NO GENUINE ISSUE OF MATERIAL FACT BY CONCLUSIVELY ESTABLISHING (A) THE DENNISES WERE MEMBERS (HAVING PAID DUES FOR THE USE OF CIMC'S AMENITIES); (B) THAT THE GOVERNING DOCUMENTS (FROM THE TIME THE DENNISES ACQUIRED THEIR MEMBERSHIP FORWARD) OBLIGATED THEM TO REMAIN IN GOOD STANDING UNTIL THEIR MEMBERSHIP REISSUED; AND (C) THAT THE DENNISES HAD NOT MADE PAYMENT IN ACCORDANCE WITH THEIR AGREEMENT.

A. MEMBERSHIP IN CIMC

When the Dennises acquired their membership in CIMC's predecessor, the Callawassie Island Club, the terms and provisions governing membership were memorialized in the Plan for Offering of Memberships in the Callawassie Island Club, of April 1, 1994 (hereinafter, the "1994 Plan). The 1994 Plan expressly contemplated the transfer of the Callawassie Island Club's assets to the membership, which occurred in 2001, when CIMC assumed control. (1994 Plan, p. i). Following CIMC's acquisition of the club assets, the Dennises paid the \$4,000.00 assessment associated with the transfer, were issued a membership certificate in CIMC (CIMC Memo. Supp. Summ. Jmt., pp. 2-3), admitting to continued use of the CIMC amenities (Answer, p. 2, Para. 6), and admitted that they owed a duty to pay dues to CIMC until the membership is resigned, transferred back to the Club or as otherwise allowed by the governing documents. (Answer, p. 2, Para.4).

B. OBLIGATION TO PAY DUES UNTIL MEMBERSHIP REISSUED.

At all times during the Dennises' membership, the applicable governing documents mandated that members remain obligated for dues, fees and assessments until such time as their membership was reissued.⁴ The following excerpts leave no room for contrary interpretation:

⁴ At the time the Dennises acquired their membership, the governing documents included The Plan for Offering Memberships dated April 1, 1994, Rev. July, 1994, and the By-Laws and General Club Rules issued by CIC. A full copy of the 1994 Plan, 2001 Plan, 2007 Plan and 2008 Plan were provided to the trial judge at the November 8, 2013 hearing. (Trans. 11/8/13, p. 30, line 1 - p. 33, line 6), as were the 1994 General Club Rules and By-laws (Trans. 11/8/13, p. 76, lines 4-7). A complete set of the foregoing documents, together with all later versions, amended and adopted by CIMC during the Dennises' membership, were provided to the trial judge, at her request, at the May 27, 2014 hearing (Trans. 5/27/14, p. 43), the relevant excerpts of which are set forth herein above.

Relevant Plan Excerpts:

An equity member who has resigned from the Club will be obligated to continue to pay dues and food and beverage minimums to the Club **until his or her equity membership is reissued** (*emphasis added*) by the Club. (*Plan for the Offering of Memberships, April 1, 1994, Rev. July, 1994; "Payment of Dues by Resigned Equity Member", Page 9, in force at the time the Dennises acquired Membership*).

An Equity Member who is on the waiting list to sell his/her Membership will be obligated to continue to pay to the Club all Charges associated with his/her Membership **until his/her Equity Membership is reissued by the Club** (*emphasis added*). (*Plan for the Offering of Membership, Amended as of February 1, 2008, 5.11 "Payment of Dues and Charges By Resigned Members", in force at the time of the Dennises' attempted resignation*).

An Equity Member who is on the waiting list to sell his/her Membership will be obligated to continue to pay to the Club all Charges associated with his/her Membership **until his/her Equity Membership is reissued by the Club** (*emphasis added*). (*Plan for the Offering of Membership, July 1, 2013, Sec. 6.11(a) "Payment of Dues and Charges By Resigned Members", currently in force*).

Relevant Excerpt from By-Laws:

Any equity member may resign from the Club by giving written notice to the Secretary. Dues, fees and charges shall accrue against the resigned equity membership **until the resigned equity membership is reissued** (*emphasis added*) by the Club. (*By-Laws, Callawassie Island Club, 9(a), pg. B-11, in force at the time the Dennises acquired Membership*).

The Club shall have a lien against each membership for any unpaid assessments, fees, annual dues or other charges . . .[and] may also, at its option, sue to recover a money judgment for unpaid annual dues or other charges . . .” (*By-Laws, Callawassie Island Members Club, March, 2009, Article XI, pg. 8, in force at the time of the Dennises' attempted resignation - showing Club is not limited to recovery against equity only*).

Relevant Excerpts from the General Club Rules:

Any member may terminate membership in the Club by delivering to the Secretary written notice of termination in accordance with the By-Laws. **Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges** (including food and beverage minimums) (*Callawassie Island Club General Club Rules "Suspension and Termination of Membership, page C-3, in force at the time the Dennises acquired Membership*).

Any member may terminate membership in the Club by delivering to the Membership Director written notice of termination in accordance with the Plan for the Offering of Club Memberships. **Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges** (including food and beverage minimums) **until the membership is sold** (*emphasis added*). (*The Callawassie Island Members Club, Inc. General Club Rules as of February 23, 2009, Sec. 14.2.1, in force at the time of the Dennises' attempted resignation.*

Notwithstanding such resignation, **the Member shall remain liable for all Charges until the Membership is re-issued** (*emphasis added*). If the Member does not resign at the request of the Board, the Member may be expelled by the Board. (*Section 16.4 "Requested Resignation", The Callawassie Island Members Club, Inc. General Club Rules, Effective January 1, 2014, currently in force*).

Notwithstanding such expulsion, **the Member shall remain liable for all Charges until the Membership is re-issued** (*emphasis added*). (*Section 16.5 "Expulsion", The Callawassie Island Members Club, Inc. General Club Rules, Effective January 1, 2014, currently in force*).

The trial court, after carefully reading the documents as a whole and giving the language its plain meaning, concluded the Dennises had a clear and unambiguous obligation to pay ongoing dues until their membership reissued. (Order, p. 6; Final Order, p. 6). In so doing, the trial court correctly applied the cardinal rule of contract interpretation by ascertaining and giving 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).

The clear and unambiguous meaning and consistent application of the these provisions are underscored by the testimony of several CIMC Board members. Former Board member James Carling testified that the Club would continue to try and collect from individuals who simply tried to walk away from their obligations. (Depo. J. Carling, p. 32, lines 17-25). Former Board member Karen Norwood testified that

expulsion meant a permanent loss of privilege (as opposed to a termination of obligations). (Depo. K. Norwood, p. 84, lines 15-23). Longstanding Board member, Philip C. Kilian corroborated Ms. Norwood's testimony, stating "the underlying club documents require that membership in good standing be maintained by even a member who was expelled or suspended." (Depo. P. Kilian, p. 87, lines 4-6). Even the Dennises' own witness clarified that surrender of a membership merely placed it with the Club for resale. (Depo. M. Aulton, p. 50, lines 23-25).

Despite concerted efforts to manufacture ambiguities by reading various other sections of the governing documents in isolation, a contract must be read as a whole document so that ambiguity is not created by a single sentence or clause. *Id.* Whether or not the governing documents are ambiguous is a question of law for the court and does not present any genuine issue of material fact. *Id.* In the face of such clear and unequivocal language, the trial court's determination that dues continue to be the responsibility of a member until such time as his or her membership is re-issued was within the court's discretion, supported by the evidence, and should be upheld.

C. FAILURE TO PAY.

Having established (a) membership in CIMC, (b) an obligation to pay dues, and (c) that the membership had not been reissued; CIMC further presented evidence of the indebtedness owed in the form of its verified Complaint and Affidavits. (Exh. C to Complaint; Aff. of J. Spencer, pp. 1-3 and Exh. A; Supp. Aff. of J. Spencer, pp. 1-3 and Exh. A). The Dennises introduced no evidence challenging the correctness of the charges, other than to assert that through resignation, expulsion or termination they should be absolved of further liability. Rule 56(e), SCRCP provides: "When a motion for

summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.”

II. THE REQUIREMENT TO PAY DUES UNTIL REISSUANCE DOES NOT VIOLATE THE SOUTH CAROLINA NON-PROFIT CORPORATION ACT. AS IS THE CASE WITH NEARLY ALL PROPERTY OWNER ASSOCIATIONS, DENNISES NEED ONLY SELL THEIR PROPERTY AND MEMBERSHIP TO ANOTHER PARTY TO RELIEVE THEMSELVES OF FURTHER OBLIGATION AND THE FACT THAT THEY CHOSE NOT TO DO DOES NOT RENDER THE REQUIREMENT UNLAWFUL.

The Dennises point to S.C. Code Ann. §33-31-620, of the South Carolina Nonprofit Corporation Act (the “Act”), for the proposition that assigning liability for continuing obligations post resignation is statutorily prohibited. The Dennises’ argument conveniently ignores subpart (b) to that section, which specifically obligates a resigning member to meet any obligations incurred or commitments made before the resignation. Likewise §33-31-621 reinforces the notion that members who are terminated or expelled remain liable for obligations or commitments made while members. The official comment to both sections makes the legislative intent patently clear. Members are to be held accountable for previously agreed upon continuing obligations, even beyond resignation.

In determining that these statutes permitted CIMC to charge dues until the membership reissued, the trial court correctly ascertained and effectuated the intent of the legislature. The court gave the words found in the statute their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E. 2d 877, 881 (2011). "In construing statutory language, the statute must be read as a whole, and sections which are a part of the same general statutory law must be construed together and each one given effect. Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Anderson v. S.C. Election Com'n*, 397 S.C. 551, 556-557, 725 S.E.2d 704, 706-707 (2012), *citations omitted*.

The Dennises' contention that the trial court's ruling creates a "perpetual obligation" simply is not true. The Dennises need only sell their property along with their membership to terminate their contractual obligations. The Dennises readily acknowledge this fact in their brief, stating: "[t]he only other way in which a member could possibly attempt to terminate their membership with the Respondent Club is to sale (sic) a piece of Callawassie Island property...". To the extent the Dennises argue that members without property are unable to resign, such argument is irrelevant to this case as the Dennises' own property on Callawassie. Further, CIMC recognizing the difficulty faced by individuals without property to effectively re-sell their membership in the depressed market, made offers of settlement to those members who were otherwise in

good standing. (Depo. J. Carling, p. 17, line 22 - p. 18, line 1). Ironically, these offers to concede are the very *inter vires* actions the Dennises' complain of as a basis for their breach of fiduciary claims.

The Official Comments to §33-31-620 recognize that a “member in joining the organization may promise to use its facilities or services for a specific period of time.” In this case, the specific period of time is “until their membership is reissued.” Such requirements are quite common, particularly in Beaufort County, where nearly all developments utilize non-profit corporations to collect dues for the maintenance of common areas and recreational amenities within their community. A fact the trial judge was intimately familiar with having heard a substantially similar case in the matter of *Davenport v. Dataw Island Owner’s Association, Inc.*, in which she upheld similar covenants, restrictions and mandatory membership provisions. (Trans. Hearing 11/8/13, p. 29, lines 11-12). It is illogical to assert that S.C. Code Ann. §33-31-620, absolves homeowners from liability for dues incurred prior to sale under the rationale that members of a not-for-profit corporation have a “right to resign at any time”. However, that is the tortured conclusion to be drawn from the Dennises’ reading of the statute.

The fact that the Dennises may have found it economically inconvenient to sell their property at 12 Spring Island Drive does not excuse their financial responsibilities. Nowhere in any of the governing documents are the Dennises guaranteed a profitable return on their investment. The 1994 Plan specifically advised that the memberships were for recreational purposes and not to be relied upon as an investment. (1994 Plan, p. 3; Trans. Hearing 11/8/13, p. 62, lines 22-25). No matter how disadvantageous the requirement may prove, in the light of today’s economic climate, the fact remains that

allowing members to unilaterally resign without selling or transferring their membership to a new, dues paying, member, would have devastating consequences to all of the other members on Callawassie Island who rely upon a steady source of funding to maintain their amenities. It is clear from the statutory language and comments that such an application is consistent with the stated purposes and intent of the Act.

III. THE DENNISES' AFFIRMATIVE DEFENSES AND COUNTERCLAIMS ARE INSUFFICIENT TO OVERCOME SUMMARY JUDGMENT AS THEY ARE PROCEDURALLY FLAWED, LACK THE NECESSARY ELEMENTS, AND ARE UNSUPPORTED BY THE EVIDENCE.

A. COUNTERCLAIMS

The Dennises asserted two counterclaims against CIMC. The first, that CIMC breached a fiduciary duty, and the second, that CIMC made negligent misrepresentations upon which the Dennises relied to their detriment. The trial court disposed of the breach of fiduciary duty claim on procedural grounds as the claim: was not brought as a derivative action; failed to meet the specific pleading requirements of Rule 23, SCRPC; and was not set forth in a verified pleading. (Final Order, p.10).

Even in the absence of these procedural flaws, CIMC argued (Memo. in Supp. Summ. Jmt., p.10-11) that to the extent a duty was owed, the Dennises produced no evidence of a breach by CIMC. Following the analysis adopted in *Fisher v. Shipyard Village Council of Co-Owners, Inc.*, 409 S.C. 164, 760 S.E.2d 121 (Ct. App. 2014) the court "must resolve, as a matter of law, whether the law recognizes a particular duty." *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 189, 691 S.E.2d 170, 173 (Ct. App. 2010). To the extent any duty was owed to the Dennises, it is to be found in the Non-

Profit Corporation Act, S.C. Code Ann. §33-31-101, *et seq.*, which generally empowers a non-profit corporation to take all reasonable actions consistent with its governing documents. There is no evidence CIMC acted in contravention of its governing documents in this case. (Final Order, p. 8). The Dennises' allegations of voting irregularities and violations of the documents are red herrings. As the trial court acknowledged, the documents themselves allowed CIMC to make such changes without a vote. (Final Order, p. 8). Further, as CIMC argued, any challenge based on the propriety or adoption of the amendments were barred by the statute of limitations. (Answer to Counterclaim, p. 5; Trans. Hearing 11/8/13, p. 50, lines 7-14).

Unlike the lower court in *Fisher*, the trial court in this case correctly applied the business judgment rule and determined that the actions complained of by the Dennises were *intra vires*. “In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the ‘business judgment rule’ and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action.” *Fisher*, 409 S.C. at 180, 760 S.E.2d at 129-130, *citing: Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993); see also *Dockside*, 294 S.C. at 87, 362 S.E.2d at 874. (“[T]he business judgment rule precludes judicial review of actions taken by a corporate governing board absent a showing of a lack of good faith, fraud, self-dealing[,] or unconscionable conduct.”); *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 599, 538 S.E.2d 15, 25 (Ct. App. 2000) (“Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith.” (internal quotation marks

omitted)). “[T]he burden of proving good faith is not on the governing board; the burden of proving a lack of good faith is borne, rather, by those challenging the board's actions.” *Dockside*, 294 S.C. at 87, 362 S.E.2d at 874. The burden was squarely on the Dennises to show some evidence that CIMC acted without good faith and they failed to do so.

Summary judgment in favor of CIMC is also appropriate as to the negligent misrepresentation claim because CIMC could not have made a representation upon which the Dennises relied when purchasing their membership. The elements of a cause of action for negligent misrepresentation are: 1) a false representation made by CIMC to the Members; 2) a pecuniary interest by CIMC in making the statement; 3) a duty of care owed by CIMC to see that truthful information was communicated to the Members; 4) a breach of the duty owed by CIMC by failing to exercise due care; 5) justifiable reliance on the representation; and 6) pecuniary loss as a direct and proximate result of reliance on the representation. *Hurst v. Sandy*, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997). A false representation must be false at the time it was made. *GSM Dealer Services, Inc. v. Chrysler Corp.*, 32 F.3d 139 (4th Cir. 1994).

The Dennises acquired their membership in October of 1999. (Complaint, pp. 1-2, Para, 3; Exh. B to Complaint); Answer, p.1, Para. 2). At that time, the club was owned and operated by the Callawassie Island Club, which was controlled by the Developer. (Depo. R. Dennis, p.20, lines 16-21). CIMC did not come into existence until November 16, 1999, and did not take over the assets of the club until 2001 and therefore, the representations allegedly relied upon by the Dennises at the time of their purchase cannot be ascribed to CIMC. (Trans. Hearing 11/8/13, p.35, lines 13-14; Depo. R. Dennis, p. 25, lines 8-16; Depo. J. Dennis, p. 17, lines 10-14 and p. 18, line 23 - p. 19, line 2). When

asked if she could recall any representations by CIMC, “No” was Mrs. Dennis’ reply. (Depo. J. Dennis, p. 19, lines 20-25).

The 1994 Plan admonished members to “carefully read all the attached documents” and “consider seeking professional advice to evaluate these documents.” (1994 Plan, p. ii), which the Dennises admit they received and read. (Depo. R. Dennis, p. 56, lines 1-6). Additionally, the Dennises’ own witness, Sandra Aulton, affirmed that to the extent any representations were made by the Developer, they were never incorporated into the written documents. (Depo. S. Aulton, p. 35, lines 7-15). Even when examined in the light most favorable to the Dennises, it is clear they cannot meet their burden. There was no representation by CIMC, no justifiable reliance and therefore no damage, no breach of duty by CIMC, and no pecuniary interest of CIMC. For these same reasons, the various affirmative defenses promulgated by the Dennises likewise fail.

IV. THE AWARD OF DAMAGES AND REASONABLE ATTORNEYS’ FEES WAS APPROPRIATE. IT WAS WITHIN THE TRIAL COURT’S DISCRETION TO ACCEPT AFFIDAVITS FILED PRIOR TO THE COMMENCEMENT OF ARGUMENT AND DISTRIBUTED TO OPPOSING COUNSEL AT THE HEARING.

At the commencement of the hearing on November 8, 2013, CIMC’s counsel tendered a Supplemental Affidavit of Jeff Spencer to the court and opposing counsel for consideration. (Trans. p. 33, line 24 - p. 34, line 2). The purpose of the supplemental affidavit was to bring current the dues owed by the Dennises as stated in the earlier affidavit filed with CIMC’s motion for summary judgment. Although Rule 6(d), SCRCP directs that such supplemental affidavit be provided two (2) days prior to the hearing, the

trial court has the discretion under Rule 6(b)(1) to permit a party to file at the hearing. Opposing counsel's failure to object further evidences a consent to the tendering of supplemental affidavit at the hearing.


Although not expressly mentioned, the attorneys' fee affidavit was also clocked in prior to the hearing and handed up to the trial court judge and opposing counsel. (Aff. E. Haight, Sup. Aff. J. Spencer). The Note to 1986 Amendment to Rule 6, makes clear the court is authorized to permit an act to be done after the expiration of time upon a showing of good cause. Good cause can be inferred by the need to provide a current and accurate statement of the attorneys' fees in the case and the trial court's acceptance and later ratification of the affidavit. Further, under Rule 61, SCRCP, the allowance, if error, proved harmless. Counsel for the Dennises raised the issue in his motion for reconsideration and was given the opportunity, at the hearing thereof, to question CIMC's counsel regarding the charges. (Trans. Hearing 5/27/14, p. 13, line 20 - p. 14, line 3). Furthermore, as counsel for CIMC indicated at that hearing, the amount awarded proved to be an underestimate and if the matter were reconsidered, the charges would have been considerably higher. (Trans. p. 14, lines 4-6). In *GTE Sprint Commc'ns Corp. v. Public Service Comm'n of South Carolina*, 288 S.C. 174, 341 S.E.2d 126 (1986), the South Carolina Supreme Court held, "Where a party shows no prejudice, the error [if any], is harmless." *Id.* at 181, 341 S.E.2d at 129.

CONCLUSION

In the face of clear and unequivocal contractual obligations, which specifically required the Dennises to pay dues until their membership reissued, summary judgment in favor of CIMC is appropriate. The Dennises' counterclaim for breach of fiduciary duty was not brought as a derivative action and therefore failed on procedural grounds. Even if the claim was not required to be brought as a derivative action, the Dennises failed to present any evidence of self-dealing or bad faith on the part of CIMC. Further, the Dennises' negligent misrepresentation claim failed because they did not, and indeed could not, attribute any of the alleged misrepresentations to CIMC. Based on CIMC's showing that no issue of material fact existed as to the Dennises' obligations or the amounts owed, the trial court's award of summary judgment should be upheld.

CIMC also asks this Court, under Rule 220(c), SCRAP, to sustain the trial court's decision on the ground that the statute of limitation for challenging actions taken by CIMC in amending its governing documents has run and therefore, the Dennises cannot contend that they should have been expelled after four (4) months of becoming delinquent on their account.

Respectfully submitted,



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