THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge
Circuit Court Case No. 2010-CP-10-9305

APPELLATE CASE NO.: 2013-001632

Cambridge Lakes HOA,.....Respondent,

v.

Johnson Koola,.....Appellant.

BRIEF OF APPELLANT

Johnson Koola
1587 Cambridge Lakes Dr
Mt. Pleasant, S.C. 29464
(843) 849-9241

Appellant pro se

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STATEMENT OF THE CASE

This is an appeal from Charleston County Trial Court's order, which dismissed Appellant Johnson Koola's ("Koola") counterclaims against Respondent Cambridge Lakes HOA ("HOA") subsequent to granting of Summary Judgment to the HOA. This was affirmed by denial of appellant's Motion to Reconsider. The Form 4 Order (R. p. 001) issued by the Presiding Judge stated that "Plaintiff's Motion for Summary Judgment was granted, therefore Defendant's Counterclaims are dismissed and Plaintiff's Motion to Compel is now moot". Koola appeals the dismissal of his counterclaims against the HOA and prays to the Honorable Court to revoke the Summary Judgment granted to the respondent.

STATEMENT OF FACTS

In January 2004, Koola contracted to purchase a condominium (converted from apartments through condo conversion) in Cambridge Lakes subdivision in Mt. Pleasant, South Carolina, from Cambridge Two, LLC and Albert Estee ("developer/seller"). Shortly before closing of the sale, Koola received a copy of the Master Deed for Cambridge Lake[s] Horizontal Property Regime from developer/seller, which stated that the Cambridge Lake[s] Horizontal Property Regime (the "Condominium")" was established according to the provisions of South Carolina Horizontal Property Act, § 27-31-10 et seq. (1976) ("HPA"). (R. p. 201, lines 6-12). Koola and his Mortgagee also received the "Builder's Certification" (R. p. 015, lines 39-40) from developer/seller which stated: "For Condo Conversions: The structural, health and safety repairs and remodeling have been completed". In Feb. 2004, Koola purchased the condominium after paying 10% down payment. In Sep. 2010, Koola learnt that developer/seller violated South Carolina Horizontal Property Act § 27-31-430 (1976), ("HPA § 27-31-430"), and that the "Builder's Certification" was falsified and fraudulent.

In June/July 2008, Koola was attempting to sell his condominium to enable him to pay off his mortgage related debts, as his income then was only limited Social Security benefits. In June 2008, the HOA initiated construction defects litigation[1] against the builder and related entities, developer/seller and one of two real estate agents. After initiating the lawsuit the HOA, through a letter dated June 25, 2008, informed the homeowners that there are defects "in the buildings at Cambridge Lakes in the foundation, main walls, windows, roofs, trusses, framing or any other part of the

[1]Summons and Complaint, *Cambridge Lakes HOA v. Bostic Bros.*, Case No.: 2008-CP-10-3506, June 8, 2008.

structure or building envelope". (R. p. 018, lines 5-8). The HOA asked the homeowners to assign their claims and rights of action to the HOA and to agree to a collection of regular or special assessments on behalf of the HOA. (R. p. 018, lines 3-4, 11-13). The HOA did not follow the due process while initiating the litigation[1]. The HOA claimed $8 million as the cost to repair the construction defects[1]. This translates into defects worth $92,307 in the 3-bedroom condominium Koola purchased.

Because of the alleged massive construction defects and the stated potential liability of $92,307, Koola could not sell[2] his unit in 2008. In 2009 Koola became insolvent and filed for Chapter 7 Bankruptcy. In the second half of 2009, Koola made another attempt to sell his condominium, but could not.

By November 2009, Koola had no resources to continue to pay mortgage-related payments and defaulted on those payments. In April/May 2010, Koola listed his unit for short sale on the advice of his Mortgagee. When informed of his attempt to sell his unit through short sale, the HOA filed lien (R. p. 019) on his unit followed by a civil action against Koola alleging failure to pay monthly assessments. The Notice of Lien prompted the Mortgagees to file foreclosure actions[3] against Koola. Koola filed timely responses and counterclaims in these actions. Because of these multiple adversarial and judicial actions in short order – a Notice of Lien, a Lis Pendens, a civil action for the collection of regime dues, and multiple foreclosure actions – Koola was forced to cancel his efforts to sell his condo unit through short sale. The HOA, through its multiple civil actions, obstructed Koola's short sale of his condominium.

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[2] Between 2006 and 2010, the market price of a three-bedroom condominium in Cambridge Lakes fell from approximately $245,000 to $125,000 (R. p. 086, lines 9-11).

[3] First Mortgagee foreclosure action: *BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP v. Johnson D. Koola et al.* case No.: 2010-CP-10-6060, Sep. 1, 2010.

PROCEDURAL HISTORY

The litigation between the parties initially rose on August 10, 2010, when the HOA field a Summons[4] in Charleston County Small Claims Court against Koola for unpaid monthly dues and associated fees. Koola answered and counterclaimed. The Hon. Magistrate transferred the case to the Court of Common Pleas on November 8, 2010. Since then the case was continued as 2010-CP-10-9305 in the Court of Common Pleas. The motions filed by the HOA to dismiss Koola's counterclaims were denied by the Court of Common Pleas on July 26, 2011.

In June 2011, the HOA served discovery on Koola. Koola responded to the discovery proceedings in a very timely manner. On July 15, 2011, Koola served discovery on the HOA. The HOA responded to the discovery proceedings in August and Sep. 2011. The HOA's responses were mostly incomplete; the HOA's responses to Koola's Request for Admission illustrate this inadequacy (R. pp. 022-033). More importantly, the HOA withheld certain critical minutes of the Board of Directors ("BOD") meetings. Also, the HOA withheld financial statements for several months. Many of the statements were incomplete. In several instances HOA modified the financial statements before production to Koola. Because of these inadequacies, Koola filed a Motion to Compel on Aug. 15, 2012 (R. p. 045).

The HOA's two civil cases against Koola were subsequently combined into a single action, Case No.: 2010-CP-10-9305, through a court order on December 5, 2011. On June 8, 2012, Koola filed an Amended Answer and Counterclaim (R. pp. 034-038).

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[4] Summons, Cambridge Lakes HOA vs. Johnson Koola, Case No.: 2010-SC-87-1646, July 7, 2010.

The HOA filed an Answer to the Amended Answer and Counter Claim on June 18, 2012 (R. pp. 039-044).

On August 1, 2012, the HOA filed a Motion for Summary Judgment to dismiss Koola's counterclaims in case # 2010-CP-10-9305. (R. pp. 127-128). The HOA filed a Memorandum in Support of the Plaintiff's Motion for Summary Judgment on Dec. 7, 2013 (R. pp. 130-141). Koola filed a Response to Plaintiff's Motion for Summary Judgment on Jan. 2, 2013. (R. pp. 046-071). The Presiding Judge took the case under advisement. The Trial Court was aware of the appellant's Motion to Compel in the case docket. Nevertheless, the Trial Court granted summary judgment to respondent, then proceeded to dismiss the appellant's counterclaims without ruling on his counterclaims whatsoever and then declared the Motion to Compel "now moot" (R. p. 001, lines 24-26). The long order granting Summary Judgment to the HOA and dismissing Koola's counterclaims was posted on March 15, 2013 (R. pp. 003-013). The Court's order did not address any of the material facts raised by Koola in his Reply to HOA's Memorandum. On April 5, 2013 Koola filed a Motion to Reconsider in this action (R. pp. 072-098). The presiding Judge denied the Motion to Reconsider on June 18, 2013. (R. p. 014) The Appeal to the Court of Appeals followed.

STANDARD OF REVIEW

In reviewing the grant of a summary judgment motion, appellate courts apply the same standard that governs the trial court under Rules 56(f) and 56(c) of the SCRCP. Under Rule 56(f), SCRCP, the Court may order "a continuance of the case to permit affidavits to be obtained or depositions to be taken or *discovery to be had*, if it appears form the affidavits of a party opposing summary judgment that he cannot, for reasons stated, justify his opposition to the motion for summary judgment".

Under Rule 56(c), SCRCP, "Summary Judgment is proper when it is clear that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law". *Nexsen v. Haddock*, 353 S.C. 74, 77, 576 S.E.2d 183, 185 (Ct.App. 2002). In ruling on a motion for summary judgment, "the evidence and inferences that can be drawn therefrom should be viewed in the light most favorable to the nonmoving party". *Koester v. Carolina Rental Ctr. Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394, (1994). "If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury. However, if the evidence is susceptible of only one reasonable inference, the question is no longer one for the jury but one of law for the Court." *Ward v. Zelinski*, 260 S.C. 229, 232, 195 S.E.2d 385, 387 (1973).

ARGUMENTS

I IT WAS AN ERROR FOR THE TRIAL COURT TO GRANT SUMMARY JUDGMENT TO THE HOA WHEN DISCOVERY, INCLUDING KOOLA'S MOTION TO COMPEL, WAS STILL PENDING.

Rule 56(f), SCRCP, implies that dismissal of a defendant's counterclaim and granting of summary judgment to the plaintiff are not appropriate when the trial court has not decided on the defendant's Motion to Compel. "Summary judgment must not be

granted until the opposing party has had a full and fair opportunity to complete discovery". *Baird v. Charleston County*, 333 S.C. 519, 539, 511 S.E.2d 69 (1999); *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of law." *Middleborough Horizontal Property Regime Council of Co-owners v. Montedison S.p.A.*, 320 S.C. 470, 465 S.E.2d 765, 771 (Ct.App. 1995).

Koola expressly stated that the HOA had failed to fully respond to Koola's discovery requests, and that there was still outstanding discovery that was dispositive to the facts of the case (R. p. 094, lines 21-22). The HOA's answers to Koola's Request for Admissions to the Plaintiff bear testimony to this statement. (R. pp. 22-33). The HOA did not produce several months' of financial statements. Many of the monthly financial statements were incomplete even by the standards set by the HOA. Some of the statements were either modified or altered shortly before submission to Koola, possibly committing perjury. (R. p. 069, lines 8-9). Koola cannot state what changes were made to the financial statements. The HOA intentionally withheld the minutes of BOD meetings for several months, especially those when the BOD discussed Koola's delinquencies in 2010 and 2011, and when the BOD discussed construction defects litigation[1] (R. p. 068, lines 23-28, p. 069, lines 1-2). The HOA also failed to produce the official policy of the HOA to initiate litigation against Koola and other homeowners to collect unpaid dues. There were unanswered questions about when the HOA knew of the construction defects in Cambridge Lakes and of the violation of HPA

§ 27-31-430, and whether the HOA officially authorized the HOA attorney to initiate the construction defects litigation in BOD meeting. (R. p. 057, lines 26-30).

Koola cannot state with specificity as to how he was prejudiced by failing to receive a full and fair opportunity to complete discovery because the documents and information at issue were never provided by the HOA. The trial court should have considered the pending issues and the Motion to Compel and afforded Koola sufficient time to develop opposition to summary judgment before making any ruling on HOA's summary judgment dismissal of Koola's counterclaims with prejudice.

II. THE TRIAL COURT ERRED IN GRANTING THE HOA'S MOTION FOR SUMMARY JUDGMENT TO DISMISS KOOLA'S COUNTERCLAIMS AGAINST THE HOA.

Under Rule 56(c), SCRCP, it is well established that "summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that moving party is entitled to a judgment as a matter of law." *Id.* "Summary judgment is inappropriate when further inquiry into the facts is desirable to clarify proper application of the law. Summary judgment is not appropriate if the facts are conflicting, or if the inferences to be drawn from the facts doubtful. Summary judgment should not be granted even when the evidentiary facts are not in dispute, if there is dispute as to the conclusion to be drawn from those facts. In deciding a motion for summary judgment, the evidence and all of its inferences must be viewed in a light most favorable to the non-moving party. Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a

trial on the disputed factual issues." *Wade v. Berkeley County*, 339 S.C. 513, 518, 529 S.E.2d 743, 746 (Ct. App. 2000) (internal citations omitted).

In *Hancock v. Mid-South Management Co. Inc.*, 381 S.C.326, 330-31, 673 S.E.2d 801, 803 (2009), the Supreme Court upheld the application of the "scintilla standard" governing the determination of motions for summary judgment where, as here, a plaintiff's claims must be met by the preponderance of the evidence:

> "[W]e hold that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand summary judgment."

A. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENT AS THE COURT FAILED TO APPREHEND GENUINE ISSUE OF MATERIAL FACTS IN DISPUTE.

(i) The HOA instituted an action against Koola to collect unpaid assessments under the terms of the Master Deed (R. p. 132, lines 1-12). Koola has raised the question whether the Master Deed of the HOA is legally valid and enforceable with respect to Koola. (R. p. 047, lines 22- 30, p. 48, p. 49, lines 1-13 pp; R. p. 076). Developer/seller and Cambridge Lake[s] Horizontal Property Regime sold a condominium to Koola in violation of HPA § 27-31-430. "Because a condominium is a creature of the statute, strict compliance with Horizontal Property Act is required to create horizontal property regime". *Harrington v. Blackstone*, 319 S.C. 1, 459 S.E.2d 309, 312 (Ct.App. 1995). Strict compliance with the Horizontal Property Act was not met. Therefore, the Master Deed is statutorily invalid and unenforceable. In *Ryals v. Anderson,* 180 Ga.App. 568, 349 S.E.2d 801 (Ga.App. 1986), the Court of Appeals of Georgia has acknowledged that the purchaser of a condominium has a statutory right to rescind a sales contract of a condominium if the purchaser did not receive statutorily

required documents. Koola purchased the condominium in 2004 on the express assurance that Cambridge Lakes condominiums were created in strict compliance with HPA § 27-31-430 (R. p. 049, lines 28-31, p. 050, 1-6). The HOA took over the control of the property regime from its predecessor, Cambridge Lake[s] Horizontal Property Regime, in October 2004. Through this action, the HOA inherited the assets and liabilities of its predecessor and is a true successor of its predecessor, Cambridge Lake[s] Horizontal Property Regime. The HOA is employing the same Master Deed of its predecessor to sue Koola; this is the best evidence that the HOA is the true successor of Cambridge Lake[s] Horizontal Property Regime. The HOA is liable to Koola under successor liability provisions. "*If [the successor] takes the benefit, it must, as has so often been said, take the burden, which equitably attaches with it*". *Simmons v. Mark Lift Industries, Inc.*, 366 S.C. 308 (2005), 622 S.E.2d 213 (Internal citations omitted). Koola is entitled to rescission of his condominium purchase. Is the HOA's Master Deed, inherited from its predecessor, statutorily valid and enforceable on Koola? This is a subject matter that should be decided by the Jury. The Trial Court erred when it failed to refer the matter to a jury and granted summary judgment to the HOA without addressing this issue in any manner. (R. p. 003-013). The HOA states that Developer sold condominium with construction defects and is not responsible for the HPA § 27-31-430 violations of its predecessor. After rescission, the HOA can recover any damages from the developer/seller under the theory of loss mitigation.

(**ii**) Koola has presented to the Trial Court that the annual budgets of the HOA presented to the Homeowners for approval during annual meetings show no dues outstanding from any homeowners, which include Koola. (R. p. 065, lines 25-27, p 066, p 067, line 1).

The relevant sections of the annual budget for 2007 provided to the homeowners by the HOA are reproduced below:

Cambridge Lakes Homeowners Association
Year To Date As of September 30,2007
Compared to 2007 Budget

	Current Year to Date				
	Actual	Budget	Variance	Annual Budget	Budget Remaining
Income					
Operating	205,977.29	201,420.00	4,557.29	268,560.00	62,582.71

The actual operating income for nine months from Jan. 1 through Sep. 30, 2007 is actually higher than the budgeted income; the sum total of actual operating income and the budget for the remaining three months equals the budgeted income (R. p. 066, Lines 1-8).

The relevant sections of the annual budget for 2009 provided to the homeowners by the HOA are reproduced below:

CAMBRIDGE LAKES
PROJECT RECAP
9 MOS ACTUAL 3 MOS PROJECTION YEAR ENDING DECEMBER 31, 2009

Cambridge Lakes	Income/ Expense 9/30/2009	3 MOS Projection Oct-Dec 09	Total Projected 12/31/2009	Annual Budget 2009	Budget Variance PROJ 2009
	Actual Income				
4100 Regime Revenue	210,600	70,200	280,800	280,800	0

The sum total of actual regime revenue for nine months from Jan. 1, 2009 through Sep. 30, 2009 and the projected revenue for three months from Oct. 1 through Dec. 31, 2009 exactly equal the annual budget for 2009 and the projected budget variance for 2009 is zero (R. p. 066, lines 9-19).

The relevant sections of the annual budget for 2013 provided to the homeowners by the HOA are reproduced below:

CAMBRIDGE LAKES

APPROVED OPEARTING BUDGET 2013

INCOME	2011 Actuals	2012 8 Months Actual 4 Month Forecasted	2013 Approved
OPERATING			
Regular Assessments	$284,880.00	$136,200.00	$284,880.00

The actual operating income by way of regular regime collection for 2011 is exactly equal to the 2013 budgeted income. The actual operating income by way of regular regime collection for the eight months of 2012 is not provided (R. p. 066, lines 20-28, p. 067, line 1).

HOA's budgets show that there are no outstanding regime dues for the given years from any homeowners, which include Koola. Since the HOA has not established that there are any dues from Koola, HOA has no standing to continue civil action against Koola for the collection of dues.

The statements publicly made by the HOA in the annual budgets for the given years that there are no outstanding dues form any homeowners contradict the HOA's claim that Koola is indebted to the HOA for non-payment of regime assessments. This inconsistency is not a matter of law, but a matter of fact. The Trial Court erred when it

failed to refer the matter to a jury and granted summary judgment to the HOA without addressing this issue in any manner.

B IT WAS AN ERROR FOR THE TRIAL COURT TO DISMISS KOOLA'S COUNTECLAIM AGAINST THE HOA FOR CIVIL CONSPIRACY BY SUMMARY JUDMENT.

Koola has pled a claim against the HOA for civil conspiracy (R. pp. 036-037; R. p. 051-055, R. p. 082-085). The obstruction of Koola's short sale of his condominium was an act of conspiracy. Under South Carolina law, a claim for civil conspiracy is established if the plaintiff can show that the following elements are met:

1. The combination of two or more persons;
2. for the purpose of injuring the plaintiff;
3. causing special damages to the plaintiff.

LaMotte v. Punch Line of Columbia, Inc. 296 S.C. 66, 370 S.E.2d 711 (1988); *Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (Ct. App. 2010).

The members of the Board of Directors ("BOD") of the HOA conspired among themselves, the Management Company (Ravenel Associates) and the HOA attorneys. This satisfies the first element of civil conspiracy. *Lee v. Chesterfield General Hosp. Inc.*, 289 S.C. 6, 11, 344 S.E.2d 379, 381-82 (Ct. App. 1986). The parties to the conspiracy against Koola were motivated by these factors: (1) All parties were infuriated with Koola as Koola did not join the HOA's construction defects litigation[1]: (2) All parties wanted to take revenge against Koola as he asked the HOA and the Management Company to provide him with the financial statements of the HOA to discover any financial irregularities; (3) Koola once pinpointed to a member of the BOD of HOA that the annual budgets of the HOA presented to the homeowners are manipulated.

(4) Koola once questioned the HOA about the HOA's new policy regarding renting the condominiums, which infuriated all the parties. The HOA threatened Koola with legal actions in this matter, but finally withdrew its threats. Here, Koola expressly plead that all the parties conspired to injure Koola, maliciously singling him out for disparate treatment. That the HOA denies this allegation, of course, does not mean that the HOA is entitled to summary judgment. It creates a clear genuine issue of material fact, to which Koola must be entitled to present to a jury to determine.

With regard to the second element of a prima facie claim for civil conspiracy, Koola has expressly alleged that the purpose of the HOA's decision to institute multiple litigations against Koola was to injure Koola by precluding his ability to short sell his condominium. The HOA countered that there was nothing illegal in and of itself in filing a lien or civil case against Koola. The fact that the actions of conspiracy are not per se illegal is not fatal to the ability to state a civil conspiracy cause of action. An unlawful act is not a necessary element of the tort. *Lee v. Chesterfield General Hosp. Inc.*, 289 S.C. 6, 11, 344 S.E.2d 379, 383 (Ct. App. 1986). The motive of the HOA, whether innocent or malicious, was in clear dispute at the time of the HOA's summary judgment, and the determination of this issue should have been reserved for a jury to determine.

To meet the final requirement of showing "special damage", Koola has alleged that the objective of the conspiracy was not only to injure Koola, but also to destroy him financially. The HOA obstructed Koola's short sale of his condominium. In a short sale, the homeowners associations will be paid out in full in preference to Mortgagees; any loss will be born by the Mortgagee. In a foreclosure action, the Mortgagees will be paid out in full first; usually, the HOAs collect nothing or very little after foreclosure sale. S.C.

Code Ann. § 27-31-200. The policy of the HOA was/is to collect any unpaid regime dues from (insolvent) homeowners through short sale as recorded in the minutes of the meeting of the BOD held on August 25, 2009 (R. p. 099, lines 21-30) under the paragraph "Delinquent Report":

> "..... *If the bank wants to pursue "short sales" in which the bank obtains real estate brokers to sell the property while still in the name of the delinquent owner it works to our benefit. All parties including the bank have to negotiate a settlement to affect the sale. Normally the homeowner's association only has to forgive the late fees*". (Emphasis added).

It is quite evident from the statement that a short sale works to the best advantage of the HOA to collect dues from insolvent homeowners. By obstructing Koola's short sale of his condominium, the HOA violated its own policy and that of Federal lending agencies and regulators and financial institutions.

After a short sale in 2010, Koola would have received anywhere between $120,000 and $125,000 as sales price. This was just sufficient to pay off all the claims of the HOA and the Mortgagee as well, as Koola had more than 25% equity in his condominium. A foreclosure action would bring $50,000 to $60,000 to the table, which would result in deficiency and civil judgments of about $100,000. At age 70, Koola has no income or resources to pay off even a small fraction of these judgments. The psychological pressure of this potential judgment destroys Koola's life. This is the special damage that the HOA conspired to inflict on Koola. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 292, 278 S.E.2d 607 (1981).

The HOA denied any conspiracy against Koola. (R. pp. 132-135). It states:

(1) *The HOA has authority to institute an action against Koola for noncompliance with Master Deed to pay the monthly regime and by virtue of S.C. Code Ann. § 27-31-170.* at 3 (R. p. 132, lines 1-12)..

Initiation of civil action to collect unpaid dues is *the option* when the nonpayment is due to temporary financial difficulties, or if the defaulters have additional sources of income or assets. In the case of insolvent homeowners with no income or assets, the best and only option is to collect the dues after a short sale. Koola could have paid off all outstanding dues to HOA after short sale. Pursuing civil actions against insolvent homeowners are comparable to suing a dead person for damages.

(2) *The HOA states that no individual homeowner can stop making payments for a length of their choosing.* (R. p. 132, lines 20-21).

Koola responds that (i) Koola has paid his monthly regime dues from Feb. 2004 through October 2009 without a delay even on a single occasion. (ii) Koola became insolvent because of his inability to sell his condo in 2008 and 2009 and could not pay any dues thereafter. This inability was caused by the HOA's construction defects litigation[1], which was initiated without due process of law. *Koola did not stop making payments voluntarily or at will.* The HOA is the proximate cause that rendered Koola insolvent. (iii) As an insolvent homeowner, Koola offered the HOA the best opportunity to clear the dues through short sale. Instead, the HOA opted for multiple civil actions.

(3) *The HOA states that the HOA has not singled out Koola for nonpayment of assessments.* (R. p. 132, lines 21-22).

At the time when Koola was trying to sell his condominium, his neighbor two doors down (#1583 Cambridge Lakes Dr) sold his unit through short sale in

February/March 2010. The neighbor had regime dues of $13,673.23. RMC records indicate that the lien placed on his unit has not been cleared. There are no court records showing any civil action pending against that neighbor. This means that the HOA let the neighbor sell his property without satisfying the lien (R. p. 082, lines 18-23).

In 2008/2009, the HOA was pursuing a civil action[5] against another Cambridge Lakes homeowner. On April 19, 2009, the case was dismissed as a voluntary nonsuit without prejudice. There are no records to show that the HOA is pursuing this action or has collected any dues from that homeowner (R. p. 083, lines 3-5).

Financial statements received from the HOA in its responses to Koola's discovery requests indicate that three homeowners in Cambridge Lakes at 1423, Cambridge Lakes Dr, 1455 Cambridge Lakes Dr and 1491 Cambridge Lakes Dr, had several thousand dollars in unpaid dues. Court and RMC records show that the HOA hasn't collected any dues from these homeowners, and there are no pending cases (R. p. 083, lines 6-11).

These specific instances confirm that the HOA singled out Koola in its actions and acted discriminatorily.

(4) *The HOA states that it has obtained judgments against five homeowners (R. p. 133, lines 3-12).*

Koola responds that the HOA has not stated whether these homeowners defaulted due to some temporary financial difficulties or due to irrevocable insolvency, and whether they were attempting short sale to pay off the regime dues, and whether the HOA *collected* any judgments from them. Koola repeats that initiation of civil action to collect unpaid dues is *the option* when the nonpayment is due to temporary financial

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difficulties or the defaulters have assets. In the case of insolvent homeowners, the best option is to collect the dues after a short sale (R. p. 083, lines 12-15).

(5) *The HOA states that Koola has not established conspiracy by the HOA against Koola because Koola has sued only the HOA but not any other parties to the conspiracy in their individual capacities.* (R. p. 134, lines 3-18).

Koola responds that suing other parties in their individual capacities for conspiracy is not an element of conspiracy. Suing other members in their individual capacities is warranted only if the plaintiff seeks monetary damages from them in their individual capacity.

(6) *The HOA further claims that the directors discharged their duties in a manner that the directors reasonably believed to be in the best interest of the HOA.* (R. p. 134, lines 19-20).

Koola responds that the HOA's actions belie this statement. The HOA's construction defects litigation forced not only Koola but also many other Cambridge Lakes homeowners to default on their regimes. The HOA has not disclosed number of homeowners who lost their homes to short sale and foreclosures. Koola has stated that approximately 35% of the homeowners lost their homes. (R. p. 051, line 5). The HOA exaggerated construction defects and stigmatized the Cambridge Lakes condominiums making them unmarketable. The HOA initiated construction defects litigation[1] claiming $8 million damages, but settled the case for about $1.815 million at the expense of homeowners (R. p. 086, lines 13-16). Cambridge Lakes, LLC and Albert Estee were prime defendants in the HOA's construction defects litigation[1]; in 2011, the HOA dismissed the complaint against them (R. p. 092, lines 3-14) and did not recover any

damages from them. Prudential Carolina Real Estate c/d/b as Carolina One, sold nearly 60% of the condominiums in Cambridge Lakes. However, the HOA did not pursue any action against Prudential. (R. p. 091, lines 21-23). These actions were not in the best interest of the members of the HOA.

To claim that the HOA did not discriminate against Koola, the HOA has to show that the HOA has taken multiple civil actions – placing a Lien, initiating civil action to collect HOA dues and foreclosure action - against those homeowners who were trying to clear off the HOA dues through short sale; the HOA hasn't done that.

C. IT WAS AN ERROR FOR THE TRIAL COURT TO DISMISS KOOLA'S COUNTERCLAIM AGAINST THE HOA FOR BREACH OF FIDUCIARY DUTY BY SUMMARY JUDGMENT.

Koola has pled claims for breach of fiduciary duty against the HOA in the following instances. (R. p. 036-037; R. p. 058, p. 059 lines 1-3). Koola brings to the kind attention of Appellate Court four most serious Breaches of Fiduciary Duty by the HOA.

(i) The HOA and the Members of the BOD maintain that the BOD first learned of potential construction defects in Cambridge Lakes during March-April 2008. The April 2008 Minutes of the BOD of the HOA (R. p. 102, lines 10-13) makes the following statement: "New Business Development: The water intrusion for unit 1487 will be checked. Ms Moore [property manager] will get estimates to check the damages from inside of the unit as well as the interior of the unit". There are no further references whether the necessary repair was done. Two months later in June 2008 Koola and homeowners learned from HOA's letter (R. p. 016-018) that the HOA filed an $8 million construction defects litigation[1]. The HOA has withheld the minutes of many BOD

meetings from Koola. Therefore, Koola cannot determine whether there were any reports of construction defects before April 2008.

Koola's has stated (R. p. 058 lines 1-23) that on November 20, 2004 Koola met with Mr. Stephen Fisher, Member, BOD of the HOA and asked him about the rumors of construction defects in Cambridge Lakes. Koola's immediate neighbor, who was working for the Architect firm, which oversaw the construction of Cambridge Lakes, told Koola that some of the construction defects may be for real. Koola conveyed this information to Mr. Fisher during the meeting. Mr. Fisher denied any construction defects in Cambridge Lakes and did not act further on the information provided to him. Koola believed Mr. Fisher and was convinced that the rumors of construction defects are without any basis. Koola invested more and more in his condominium toward the principal balance of the mortgage. Four years later, the HOA filed the construction defects litigation[1]; the architecture firm was one of the defendants in the said case. Mr. Fisher was grossly negligent in not pursuing the information provided to him about construction defects. Fiduciary relationship required Mr. Fisher to act on Koola's information. Should the HOA and/or the BOD "..... not uphold its duty to pursue a recovery for any alleged construction defects in the common elements, which it maintains, it may be liable to the homeowners for its omissions. *Queen's Grant Villas Horizontal Property Regime I_IV v. Daniel Internat'l Corp.*, 286 S.C. 555, 335 S.E.2d 365, 366 (S.C.1985).

(ii) The HOA and the Members of the BOD maintain that the BOD first learned of potential construction defects in Cambridge Lakes during March-April 2008 and immediately upon learning the of the defects, the HOA retained attorney John C. Hayes,

IV, to file a construction lawsuit on its behalf. The HOA filed the construction defects lawsuit[1] two months later in June 2008. Koola in his reply to HOA's Memorandum (R. p. 087, lines 9-15) has categorically stated that the minutes for the months of May and June 2008 make no references that the HOA authorized Mr. Hayes to file the construction defects litigation. The HOA has not produced minutes of any of the BOD meetings to show that that the HOA indeed authorized Mr. Hayes to file construction defects lawsuit[1] on its behalf. Koola represents to the Appellate Court that Hayes was not *officially* authorized by the HOA to file the lawsuit. The BOD might have met in a private meeting and outside the domain of HOA and requested Hayes to file the lawsuit; this is a private affair. This is a serious breach of fiduciary duty by the HOA.

(iii) The HOA breached fiduciary duty when it initiated the construction defects litigation without the approval of two-third majority of the homeowners (R. p. 059, lines 4-25). The HOA denies this claim by stating that it has the power to sue because it has the "duty to maintain, repair, replace and operate the common elements" of Cambridge Lakes. Queen's Grant Villas Horizontal Property Regimes I-IV v. Daniel Inetrnat'l Corp., 286 S.C. 555, 335 S.E.2d 365 (S.C. 1985). This decision does not offer the HOA absolute authority to initiate construction defects litigation without due process; in the present case, the HOA has to receive the approval of two-third majority of the homeowners to initiate the construction defects lawsuit as it involved collection of special assessment. "*The rights and authority of the Regime must be gleaned from the Horizontal Property Act and from the master deed. From these we may determine (1) the property owned by the individual condominium owners and (2) the rights of the Regime.*" *Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 321 S.E.2d.

46 (1984). "*The homeowners association is bound to obtain homeowners approval if the covenants of the association so demands it*". *Baumann v. Long Cove Club Owners Ass'n,* 380 S.C. 131, 668 S.E.2d 420 (Ct.App. 2008). "*When controversy regarding rights of condominium unit owners arises, court must examine all relevant provisions of Horizontal Property Act, master deed, and allied documents, regarding those provisions together, in relation to each other and harmonized, if possible*". (Internal citations omitted) *Harrington v. Blackstone*, 319 S.C.1, 459 S.E.2d 309 (Ct.App.1995). (Emphasis added). The Horizontal Property Act does not address this issue directly. The Master Deed of the HOA, Paragraph (16) (6) Special Assessments for Capital Improvements (R. p. 212, lines 42-47, p. 213, lines 1-3)), states as follows:

> "*In addition to the annual assessments authorized above, the Association may levy, in any fiscal year, special assessments..... provided that any such assessment shall have the assent of two-thirds (2/3) of the vote of the Co-Owners voting in person or by proxy at a meeting duly called for this purpose,.....*". (Emphasis added).

The HOA circumvented this provision of the Master Deed by asking the homeowners to join the lawsuit to agree to assign their rights and claims to the HOA and to agree to any regular or future assessments. (R. p. 018, lines 3-5, lines 11-16). The homeowners, who assigned their rights to the HOA, agreed to pay on demand unspecified amount of future special assessments. This is like signing a 'promissory note'. "The HOA may exercise powers only within the constraints of South Carolina Horizontal Property Act, condominium declaration (Master Deed) and bylaws; where association actions were not in accordance with declaration, assessments were *ultra vires*". *Seabrook Island Property Owners Ass'n v. Pelzer*, 292 S.C. 343, 356 S.E.2d 411 (Ct.App. 1987).

(iv) Koola has stated that the HOA spent several thousand dollars to investigate construction defects and to initiate the construction defects lawsuit[1]. The HOA created a Special Reserve Fund in March 2009 for diversion of funds from budgets. (R. p. 064).

Mr. Steve Fisher, President of HOA, has furnished an affidavit attached to HOA's Memorandum, which states: "The Association's budget is reviewed annually.... The annual budget does not change during the year. ..." (R. p.152, lines 1-6). The financial statements for March 2009 and November 2010 attached thereto shows expenditures under the heading 'Property Evaluation/Consulting – Fund 2' and 'Legal Expenses Fund # 2' respectively. (R. p. 103, lines 5-13, R p. 104, lines 5-7, R. p. 108, lines 11-15). There may be any other expenditures. The HOA has not furnished the annual budgets for 2009 and 2010 to show that these two reported expenditures have been budgeted and presented to the homeowners. In its absence, these expenditures are in violation of Section 16 Assessments, Para 4 and 5 of the Master Deed (R. p. 212, lines 42-47, p. 213 lines 1-3) and a Breach of Fiduciary Duty.

As stated by the Restatement of Torts, "One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation. Restatement (2d) of Torts, 874 § (1979). In South Carolina, courts have held that a fiduciary relationship exists when "one reposes special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of one reposing the confidence". *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789, 794 (1990).

Uniform Condominium Act § 3-103(a) and *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 426 S.E.2d 829 (Ct.App. 1993) define fiduciary responsibilities of the HOA in the context of a Horizontal Property Regime. "A homeowners association is bound to follow the covenants and its own bylaws". *Seabrook Island Property Owners Ass'n v. Pelzer*, 292 S.C. 343, 356 S.e.2d 411, 41`4 (Ct.App. 1987).

The HOA states that Koola's claim for breach of fiduciary duty fails as a matter of law because the actions of the members of the BOD are protected by the Business Judgment Rules. S.C. Code Ann. § 33-31-830(a); S.C. Code Ann. § 33-31-830(b)(2). The HOA fails to recognize that the judgment of the directors will be set aside by judicial action if bad faith, dishonesty, or incompetence on the part of the members of BOD could be established. *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 538 S.E.2d 15 (Ct.App. 2000). *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 414, 426 S.E.2d 828 832 (Ct.App. 1993).

The Supreme Court of South Carolina has ruled: "We hold that a member of a condominium association, established pursuant to the Horizontal Property Act, may bring an action in contract or tort against the association". Murphy, Jr. v. Yacht Cove Homeowners Ass'n., 289 S.C. 367, 345 S.E.2d 709 (1986). This is the law in South Carolina.

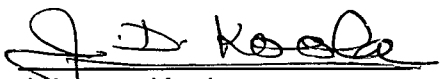
Koola's Amended Answer and Counterclaim has claimed damages in excess of one hundred thousand ($100,000) dollars.

CONCLUSION

Based upon the foregoing points and authorities, Koola respectfully submits that the Order of the Trial Court granting Summary Judgment to the HOA should be reversed and appellant's counterclaims against respondent restored and remanded to the trial court for trial.

Dated: Oct. 28, 2014
Mt. Pleasant, SC

Respectfully submitted,



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In the Court of Appeals

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The Honorable R. Markley Dennis, Jr., Circuit Court Judge
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APPELLANT'S CERTIFICATE

The Appellant pro se certifies that this Final Brief complies with Rule 211(b), SCACR.

October 28, 2014

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PROOF OF SERVICE

I, Appellant pro se, under penalty of perjury, certify that on October 28, 2014, I served a copy of Appellant's Final Brief, Appellant's Certificate and Proof of Service by mailing a true copy of the same to the following counsels of record for the respondent:

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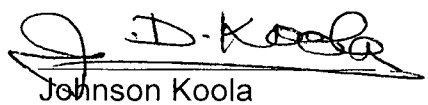

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