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.

REPLY BRIEF OF APPELLANT

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

Appellant pro se

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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 PENDING.

Koola (Appellant) expressly stated in his Initial Brief, pp. 6-8, that the HOA (Respondent) had failed to fully respond to Koola's Discovery requests, and that there was outstanding Discovery that was dispositive to the facts of the case, the Trial Court should have considered the pending Discovery issues and the Motion to Compel, and afforded Koola sufficient time to develop opposition to Summary Judgment before making the ruling that Plaintiff's Motion to Compel is now moot". (R. p. 001, lines 24-25).

If this Court applies the decision in *CEL Products, LLC v. Rozelle*, 357 S.C. 125, 591 S.E.2d 643 (Ct.App. 2004) to Koola's case, this Court will find that the formal Order (R. pp. 003-013) issued by the Trial Court does not refer to 'Plaintiff's Motion to Compel' and 'Motion to Compel is now moot' at all, and that the Trial Court did not exercise discretion before ruling the 'Motion to Compel is now moot'. The HOA's argument that the Trial Court exercised discretion in ruling 'Motion to Compel is now moot' is not substantiated (Respondent's Brief, pp 9-10).

Respondent's Initial Brief, pp. 9-10, argues further that Koola had ample time to complete Discovery between filing of the Answer and Counterclaim and motion hearing. In fact, the HOA's responses to Koola's Discovery were mostly incomplete, raised numerous objections, and the HOA refused to answer many of the Interrogatories and failed to produce many of the Requests for Production (R. pp. 022-033). In response to Koola's Request for Admission that "money spent by the plaintiff HOA to investigate construction defects and to initiate the lawsuit # 2008-CP-10-3506 was not a budgeted

item", the HOA responded: "Investigation is still on going and Defendant will supplement its Answer shortly. In the event an answer is required at this time, Defendant denies Request to Admit 26" (R. p. 029, lines 1-5). Koola believed that the HOA will supplement its Answer shortly, but it never happened.

This Court have held that "a defendant will be estopped to assert the statute of limitations in a bar of a plaintiff's claim when the delay that would otherwise give operation to the statue has been induced by the defendant's conduct." *Magnolia North Property Owner's Ass'n v. Heritage Communities,* Inc. 397 S.C. 348, 372, 725 S.E.2d 112, 125 (Ct.App. 2012).

The Motion for Summary Judgment filed by the HOA on Aug. 1, 2012 (R. pp. 127-128) did not include any grounds for the Summary Judgment. Hence, Koola could not elaborate his Motion to Compel with any specifics. The HOA filed its Memorandum in support of its Motion for Summary Judgment only on Dec. 7, 2013 (R. pp. 130-141) delaying Koola's efforts to complete Discovery even further.

These statements would satisfy this Court why Koola could not complete the Discovery, as it should be. Aggressive steps to complete the Discovery like taking Depositions, Motion to Compel etc. in the HOA's two cases would cost Koola approximately $3000 additionally; Koola could not afford to pay for them.

The HOA argues further that Koola did not demonstrate how further discovery would be beneficial, and how the information sought by Koola would be necessary to make a material claim in the case (Respondent's Brief, pp. 10-11). Koola responds that the HOA intentionally withheld minutes of BOD meetings of the HOA for several months. The production of all the withheld minutes of the BOD meetings would help

Koola to determine when the HOA knew about the construction defects in Cambridge Lakes, when the HOA knew about violation of HPA § 27-31-430 (S.C. Horizontal Property Act § 27-31-430) by the developer (developer/seller and the HOA's predecessor), and whether the BOD (Board of Directors) of the HOA authorized attorney John Hayes, IV, to file the construction defects litigation. In turn, these information would help Koola to determine whether the HOA was negligent to investigate the construction defects, whether the HOA is liable for the violation of HPA § 27-31-430 by the developer, and whether the HOA breached Fiduciary Duty and whether the HOA is liable to Koola for negligence and negligence per se.

Had the HOA produced all the financial statements, it would have helped Koola to determine how many homeowners had defaulted on their regime dues, when the HOA filed lawsuits to collect unpaid regime dues from individual homeowners, whether the HOA filed lawsuits to collect regime dues against all defaulters without discrimination, and how many judgments were satisfied, and whether the HOA's obstruction of Koola's short sale of his condominium was discriminatory.

The HOA has stated in the Respondent's Brief, p 6, that the BOD discussed Koola's defaults of the regime dues before filing the lawsuit to collect the dues. Koola was probably the only homeowner in Cambridge Lakes who voluntarily offered to clear the regime dues through short sale of his condominium, which the HOA rejected. Did the HOA take into consideration Koola's offer to clear the regime dues through short sale? Or, did the HOA opt for the expensive litigation route? The receipt of HOA's official policy to file civil actions against Koola would help Koola to clarify this issue. The information sought through Discovery was necessary to establish material claims.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENT AS THE COURT FAILED TO APPREHEND GENIUNE ISSUES OF MATERIAL FACTS IN DISPUTE.

A. Obstruction of Koola's short sale of his condominium by the HOA

Koola has detailed in his Initial Brief, p. 3, pp. 14-15, how the HOA rejected Koola's voluntary offer to sell his condominium short, which was the only way for Koola to clear off all debts. The HOA's Notice of Lien (R. pp. 19-21) caused multiple adversarial and judicial actions against Koola in short order – a Notice of Lien by the HOA (May 25, 2010), a Lis Pendens by the first mortgagee (July 27, 2010), a civil action by the HOA for the collection of regime dues (July 29, 2010), the foreclosure action by the first mortgagee (Sep. 1, 2010), a second foreclosure action by the second mortgagee and a third foreclosure action by the HOA (Dec. 15, 2010). Koola was forced to cancel his efforts to sell his condominium through short sale. The HOA, through its multiple civil actions, obstructed Koola's short sale of his condominium.

Had the HOA not obstructed Koola's short sale, Koola would have sold his condominium by the end of summer of 2010 and cleared off the HOA's regime dues. Instead, the HOA preferred to collect the regime dues through litigation.

Koola has detailed in his Initial Brief, pp. 14-15, the policy of the HOA to collect any unpaid regime dues from insolvent homeowners through short sale as recorded in the minutes of the meeting of BOD held on August 25, 2009 (R. p. 099, lines 20-29). 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.

In a footnote # 8 to Respondent's Brief, p 16, the HOA states that satisfying the regime dues through short sale is not the accepted practice of the HOA.

Respondent's Brief has repeatedly stated that Koola owes regime dues to the HOA. The HOA does not state why the HOA rejected Koola's voluntary offer to clear off the dues to the HOA through a short sale of his condominium. The HOA has allowed short sale previously in Cambridge Lakes (Appellant's Initial Brief, pp 16-17).

Does the HOA have a claim for action against Koola for collection of unpaid dues when Koola voluntarily offered to clear off his dues through short sale? This is not a question of law, but a genuine issue of material fact and is reserved for the jury. The Trial Court failed to refer this question to a jury for a trial. The Trial Court did not address this issue in its formal Order (R. pp. 003-013).

B. An *ab initio* invalid Master Deed and a contract to buy condominium induced by fraud.

The HOA instituted a civil action in 2010 against Koola to collect unpaid assessments of HOA regime dues under the terms of the Master Deed. The Master Deed of the HOA states:

> *"Developer submits the Property in Charleston County, State of South Carolina, described herein and on Exhibit A attached hereto and made a part hereof, including the improvements now or hereafter thereon, to the provision of the Horizontal Property Act, Section 27-31-10, et seq., South Carolina Codes of Laws, 1976, (the "Act"), the provisions of which, unless expressly provided otherwise herein, are incorporated herein by reference and form a part of this Master Deed, for the specific purpose of creating and establishing the Cambridge Lake Horizontal Property Regime (the "Condominium").*

(R. p. 142, lines 8-14).

In due course of time the HOA established (Respondent's Brief, p 24)), and Koola learned (Appellant's Initial Brief, p 2) that the Developer violated a key provision of the Horizontal Property Act, HPA § 27-31-430, "Disclosure of physical condition of the building". A condominium is a creature of the statute, strict compliance with HPA Is required to create horizontal property regime. S.C. Code Ann. § 27-31-30, § 27-31-100.

Harrington v. Blackstone, 311 S.C. 459, 429 S.E.2d 826 (Ct.App. 1993), 319 S.C. 1, 459 S.E.2d 309 (Ct.App. 1995) (reversed in part on other grounds) and the references cited therein.

Koola represents to this Court that the Master Deed of the HOA is *ab initio* invalid and therefore unenforceable on Koola for the statutory violation of HPA § 27-31-430.

Koola has detailed in Appellant's Initial Brief (pp 9-10) that the HOA's legal action against Koola has no legal standing as its Master Deed, inherited form its predecessor, is *ab initio* invalid

Koola has detailed in Appellant's Initial Brief (p 2,) that in 2010 Koola learned that developer falsified the Builder's Certification issued to Koola and his mortgagee due to his non-compliance with HPA § 27-31-430 and thereby committed fraud.

Koola purchased the condominium in 2004 on the express assurance that the Cambridge Lakes condominiums were created in strict compliance with § HPA 27-31-430, and that the Builder's Certification is not fraudulent. The developer induced Koola into a contract to buy the condominium through fraud and using an *ab initio* invalid Master Deed. Koola is entitled to rescission of his condominium purchase. Alternatively, the HOA buys back the condominium from Koola and can later resell the condominium to others to recoup any losses and sue the developer for the remaining losses, if any. The HOA can also try to recover from the developer under the theory of Loss Mitigation.

In footnote # 9 to Respondent's Brief, p 16, the HOA denies that the Master Deed is invalid. The HOA argues that Koola has not submitted 'competent evidence' to establish that the Builder's Certification was fraudulent due to violation of SC Code Ann.

§ 27-31-430. This is in spite of the fact that the HOA itself detailed statute violations of the developer in Respondent's Brief, p 24. Fraud was a cause of action by the HOA against the developer in HOA's construction defects lawsuit.

That the Master Deed is invalid is a matter of fact. Is the *ab initio* invalid Master Deed of the HOA enforceable on Koola? Is Koola entitled to rescission of his condominium? Is the contract to buy the condominium induced through an *ab initio* Master Deed and fraud valid? These questions are reserved for the jury. The Trial Court did not make a ruling on this cause of action by Koola (R. pp. 003-013).

C. The Annual Budgets presented by the HOA to the Homeowners show no dues from any homeowners, and the HOA has no legal standing to sue Koola

The relevant sections of the HOA's budgets for the years, 2007, 2009 and 2013 (R. p. 065, lines 23-25, p. 066, p.067, line1) and Appellant's Initial Brief, pp 11-12) show that there are no outstanding regime dues from any homeowners including Koola. Since the HOA has not established that there are any dues from Koola, the HOA has no claims to continue the civil action against Koola.

The official statements publicly made by the HOA in the annual budgets for the given years that there are no outstanding dues from any homeowners, including Koola, 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 did not rule on this cause of action by Koola. The Trial Court erred further when it failed to refer the matter to a jury and granted Summary Judgment to the HOA.

In a footnote # 11 to the Respondent's Brief, the HOA states that these budgets are not contained in the lower court's record and cannot be raised in this Court. Koola

responds that Koola presented these budget data in his Reply to HOA's Motion for Summary Judgment (R. p. 065, lines 23-25, p. 066, p. 067 line 1) to the Trial Court. Therefore, Koola presents to this Court that he can raise this issue in this Court.

D. Business Judgment Rule and Best Interests of the HOA

The HOA states (Respondent's Brief, p. 6) that since the HOA was established it has filed multiple liens and lawsuits and obtained judgments against different owners. In support, the HOA has stated that it has obtained Judgments in the following cases: 2010-CP-10-9146, 2011-CP-10-39, 2011-CP-10-2767, SC 872010002259, and 2012-CP-10-4714. (Koola does not reveal the identities of the homeowners). (Footnote 4 to Respondent's Brief, p 6). The HOA has not stated anywhere that the HOA has collected any of these judgments. The legal conclusion is that the HOA has not collected on any judgments it has received.

In the Respondent's Brief, the HOA has stated repeatedly and repeatedly that Koola has defaulted on his regime dues, and the HOA filed the civil action against Koola in the best interest of the HOA and in accordance with better Business Judgment Rules. At no time the HOA had admitted that Koola offered to clear off his regime dues through short sale.

What is the priority of the HOA and the best interest of all homeowners? Is it to obtain judgments and not to collect the judgments or to collect Koola's dues through the voluntary short sale of his condominium without any legal costs? This is a genuine issue of material fact reserved for the Jury.

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

South Carolina Non-profit Corporation Act, S.C. Code Ann. § 33-31-830(a) (1976) states that a director shall discharge his duties as a director in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances and in a manner the director reasonably believes to be in the best interests of the corporation. The members of BOD of HOAs elected by unit owners are required to exercise ordinary and reasonable care. Uniform Condominium Act § 3-103(a).

Statute established Duty of Care on the HOA vis-à-vis BOD. When an ordinary person reposes special confidence in another ordinarily prudent person, [who has a Duty of Care,] 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, and fiduciary relationship is established. (Breach of Fiduciary Duty, S.C. Bar Continuing Legal Education).

Generally, the principles of fiduciary obligation and business judgment applied to corporate directors also apply to the governing board of a condominium[1].

Koola has pled claims for breach of fiduciary duty against the HOA (Appellant's Initial Brief, pp. 19-24; R. pp. 034-035). Koola brings to the kind attention of Appellate Court some of the most serious Breaches of Fiduciary Duty by the HOA.

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[1] Condominium Law in South Carolina, D. S. MacGregor, Esq., Third Ed., South Carolina Bar, 2013.

A. Did the HOA investigate Construction defects in Cambridge Lakes diligently?

The HOA has claimed that the BOD of the HOA first learned of the potential construction defects in Cambridge Lakes during March-April, 2008. (R. p. 102, lines 7-11). The HOA did not seek information from all homeowners whether they experienced water leaks or construction defects in their units before filing the lawsuit. The HOA did not investigate water leaks and construction defects diligently.

Appellant's Initial Brief, p. 20, makes a detailed reference to a meeting between Koola and Stephen Fisher, Member, BOD of the HOA, on November 20, 2004. During this meeting Koola conveyed reliable information to Fisher that the rumors of construction defects in Cambridge Lakes may be for real. Fisher denied any construction defects in Cambridge Lakes and did not act further on the information provided to him. The HOA filed the construction defects lawsuit four years later.

Duty of Care, which Fisher had to Koola, required Fisher to act on the information about construction defects. Fisher breached Fiduciary duty and was negligent when he failed to act on the information about construction defects that Koola provided to him in 2004 (R. p. 058, lines 1-23).

The HOA responds that Fisher joined the Board in Jan. 2005, therefore discussions between the two occurred prior to his involvement with the Board, and are not binding on the HOA. The developer handed over the control of the HOA to the BOD in Oct. 2004. Fisher became a Board member and Vice president in Oct. 2004.

The Appellate Court of South Carolina has ruled in *Fisher et al. v. Shipyard Village Council of Co-owners, Inc.*, Op. No. 5241 (S.C.Ct.App. filed June 25, 2014) that the Council [HOA] is charged with maintaining common elements, and the

duties created by the Bylaws and South Carolina law also support a duty by the Council [HOA] to investigate who is responsible for damage to the common elements. Koola holds Fisher liable for breach of Fiduciary Duty to Koola and negligence.

B. Did the BOD of the HOA authorize attorney John C. Hayes, IV, to file the construction defects litigation in a BOD meeting?

Certain members of the BOD of the HOA filed sworn affidavits with the HOA's Memorandum in Support of Motion for Summary Judgment (R. p. 057, lines 26-30) in which they stated that the BOD retained attorney John C. Hayes, IV, to file the construction defects lawsuit on its behalf when learned of water leak in just one Cambridge Lakes unit. The HOA has not produced the minutes of any BOD meeting to confirm that the BOD authorized Hayes to file the construction defects lawsuit, and it should be concluded that these BOD members lied in their affidavits.

Koola represents to the Appellate Court that in the absence of supporting minutes of the BOD meeting, Hayes was not officially authorized by the HOA to file the lawsuit, the BOD might have met in a private meeting and outside of the domain of the HOA, and requested Hayes to file the lawsuit. This is a private affair, not an official business. This is a serious breach of fiduciary duty by the HOA.

C. The HOA filed the construction defects lawsuit without the approval of the two-third majority of the Cambridge Lakes Homeowners.

Appellant's Initial Brief, pp. 21-22, details how the HOA filed the construction defects lawsuit without the approval of the two-third majority of the homeowners in contravention of the mandate of the HOA's Master Deed, Paragraph (16)(6) (R. p. 212, lines 43-48, p. 213, lines 1-3). The HOA circumvented the mandate of the Master Deed as follows: HOA filed the lawsuit on June 18, 2008. On June 25, 2008, the HOA,

through a letter (R. p. 018, lines 1-5, lines 11-16), asked the homeowners to join the lawsuit by assigning their rights to the HOA and to agree to pay any regular or future assessments The very fact that the HOA demanded that the homeowners assign their rights to the HOA to pursue the lawsuit confirms that the HOA has to receive approval of two-third majority of the homeowners. 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', which is a binding contract.

The HOA counters by stating (Respondent's Brief, p 5) that (1) assigning the rights of the homeowners to the HOA was voluntary, (2) the litigating attorney would be paid out from the proceedings of the lawsuit, (3) the HOA did not actually collect the special assessment. The HOA did not reveal its intention that it will collect the special assessments from the homeowners if the HOA lost its construction defects lawsuit.

Koola agrees with the HOA that the HOA has the duty to maintain the common elements and has power to file lawsuits to recover in construction defects litigation. But this power to file lawsuits is subject to "due process of law", which includes informing the homeowners of the construction defects, informing the homeowners that they will be assessed a special assessment in case the HOA loses the lawsuit, receiving approval from two-third majority of the homeowners to file the lawsuit and to collect the special assessments when necessary.

South Carolina Appellate Court and South Carolina Supreme Court have categorically ruled that the homeowner associations do not have the power or right to collect special assessments without the approval of the Homeowners in contravention of the provisions of the Master Deed. *Lovering v. Seabrook Island Property Owners Ass'n*,

289 S.C. 77, 344 S.E.2d 862 (Ct.App. 1986), 291 S.C. 210, 352 S.E.2d 707 (1987) (affirmed and modified).

The appellate courts have ruled on the issues of construction defects and recovery of damages in many decisions: *Queens' Grant Villas Horizontal Property Regimes I-IV v. Daniel Internat'l Corp.*, 286 S.C. 555, 335 S.E.2d 365 (1985), *Roundtree Villas Ass'n Inc. v. 4701 Kings Corp.*, 282, S.C. 415, 321 S.E.2d 46 (1984), *Bauman v. Long Cove Club Owners Ass'n*, 380 S.C. 131, 668 S.E.2d 420 (Ct.App. 2008), *Harrington v. Blackstone*, supra, *Seabrook Island Property Owners Ass'n v. Pelzer*, 292 S.C. 343, 356 S.E.2d 411 (Ct. App. 1987)

That the HOA filed the construction defects litigation without the approval of two-third majority of the homeowners is a serious Breach of Fiduciary Duty by the HOA.

D. Diversion of funds to pursue construction defects litigation

Appellant's Initial Brief, pp 23, has detailed how the HOA spent several thousand dollars to investigate construction defects and to pursue the construction defects lawsuit by creating a special fund in March 2009 in the middle of the budget year (R. p. 177, lines 5-7, p. 180, lines 30-34, p. 181 lines 9-15) and without the approval of homeowners and without informing the homeowners of the diversion of funds from other budget head. This is a plain Breach of Fiduciary Duty. The HOA itself states in the Respondent's Brief, p 4: "The HOA budget is reviewed and adjusted annually and does not change during the calendar year" (R. p. 187, lines 10-16).

E. Business Judgment Decisions of the BOD in bad faith, dishonesty, or incompetence

For nearly three years the HOA held the developer liable to the HOA for construction defects and violation of HPA § 27-31-430 in HOA's construction defects

litigation. In March 2011, the HOA quietly dismissed the case against the Developer with prejudice. In the same litigation, the HOA did not file lawsuit against Prudential Carolina Real Estate c/d/b as Carolina One, who sold nearly two-thirds of the condominiums, for recovery. In the construction defects litigation, HOA claimed damages worth $8 million; in June 2011, the HOA settled the case and received nearly $1.815 million as damages. Nearly one-third of the funds was paid to the attorney as his fees. Did the HOA receive enough funds to repair the damages as claimed in HOA's letter (R. p. 018, lines 7-9)? If the case is remanded to the Trial Court, Koola can establish with reasonable confidence that the BOD acted in bad faith and dishonesty and incompetently.

The HOA states that Koola's claims for Breach of Fiduciary Duties fail as a matter of law (Respondent's Brief, p 15, 19, 23) 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 decisions of the directors will be set aside by judicial action if bad faith, dishonesty, or incompetence on the part of the members of the BOD could be established. *Kuznik v. Bees Ferry Ass'n*, 342 S.C. 579, 538 S.E.2d 15 (Ct.App. 2000) and *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 of South Carolina.

IV. IT WAS AN ERROR FOR THE TRIAL COURT TO DISMISS KOOLA'S COUNTERCLAIM AGAINST THE HOA FOR CIVIL CONSPIRACY BY SUMMARY JUDGMENT.

A. Obstruction of Koola's short sale of his condominium by the HOA was a discriminatory act.

Koola's Reply to HOA's Motion for Summary Judgment, (R. p. 053, lines 26-31, p. 054, lines 1-2) has detailed the case of a Cambridge Lakes homeowner (# 1583 Cambridge Lakes Dr) who sold his condominium in or around February/March 2010 through short sale. The HOA allowed that homeowner to sell his condominium through short sale without satisfying the lien ($13,673.23). Koola has also detailed the cases of three homeowners at 1423 Cambridge Lakes Dr, 1455 Cambridge Lakes Dr, and 1491 Cambridge Lakes Dr, who had several thousand dollars in unpaid dues (R. p. 054, lines 6-11). RMC records show that the HOA hasn't collected any dues from these homeowners. There are no court records showing any civil action pending against them. The HOA does not address these specific instances.

These specific instances would show to this Court that the HOA applies different standards to different people, and that the HOA singled out Koola in its actions and acted discriminatorily in spite of the fact that Koola voluntarily offered to clear his dues through short sale. Koola has further alleged that the actions of the HOA toward Koola were discriminatory and prejudiced based on race, color and national origin (R. p. 055, lines 3-9). Two members of the BOD know Koola personally, as they live in the same building; the directors know that Koola belongs to a different race, color and national origin.

The HOA denies that it has not discriminated against Koola (Respondent's Brief, pp 14 -15). The formal Order of the Trial Court does not address these facts (R. p. 003-013).

The question before the jury is whether the HOA treated Koola differently from the homeowners at #1583 Cambridge Lakes Dr, #1423 Cambridge Lakes Dr, #1455 Cambridge Lakes Dr and #1491 Cambridge Lakes Dr, and if so, whether it was discriminatory, and if yes, whether the discriminatory action was based on race, color and national origin.

B. Civil Conspiracy

Koola has pled a claim against the HOA for civil conspiracy for its obstruction of Koola's short sale of his condominium (R. p. 036, lines 21-30, p. 037, lines 1-13; R. p. 051, lines 25-27, p. 052-054, p. 055, lines 1-2; R. p. 082, lines 16-23, p. 083-084, and Appellant's Initial Brief, pp 13-19). 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, and (3) Causing special damages to the plaintiff.

The members of the BOD of the HOA conspired among themselves, the Management Company (Ravenel Associates) and the HOA's attorneys. This satisfies the first element of civil conspiracy.

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 (Lien, Civil action to collect regime dues and Foreclosure action) was to injure Koola by precluding his ability to short sell his condominium.

To meet the third element to claim "special damage", Koola has alleged that the objective of the conspiracy was to injure Koola as well as to destroy him financially.

Appellant's Initial Brief, p. 15, has stated that after short sale in 2010, Koola would have received anywhere between $120,000 and $125,000 as sale price. This was sufficient to pay off all mortgage-related debts, as Koola had more than 25% equity in his condominium. A foreclosure action would bring about $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 and its consequences destroy Koola's life. This is the special damage that the HOA conspired to inflict on Koola.

The infliction of special damage has the following adverse, detrimental effects on Koola. (1) After foreclosure and civil judgment, Koola will be evicted form his condominium. Because of poor credit resulting from foreclosure and civil judgments, and no wage income and other resources, Koola would not be able to rent an apartment. That Koola will become homeless is a possibility. (2) Koola is a professional chemist and was unemployed since 2007. In 2010, Koola was under the retirement age. He could have moved to elsewhere and sought a professional chemist's job. Koola could not move out due to the prolonged litigations and remains unemployed since 2007. The resulting damage from these civil actions is enormous. (3) The cost of litigation is beyond Koola's affordability. Koola borrows money on credit card to pay for the litigation cost. These are the aftereffects of special damage that the HOA inflicted on Koola due to conspiracy. *Allen v. Columbia Fin. Mgmt. L*td., 279 S.C. 481, 377 S.E.2d 352 (Ct.App. 1988). Lawful acts may become actionable as a civil conspiracy when the

"object is to ruin or damage the business of another". *Charles v. Texas*, 199 S.C. 156, 170, 18 S.E.2d 719, 724 (1942).

That the HOA denies conspiracy, 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. The HOA denies conspiracy against Koola on the following counts:

(1) The HOA argues further that Koola sued only HOA, but not the members of the BOD in their individual capacities and its agents (Respondent's Brief, pp.13-14). A theoretical consideration of conspiracy would show to this Court that conspiracy and suing the conspirators for the crime committed are two fundamentally different but successive steps. "A conspiracy is an agreement between two or more persons to commit an unlawful act coupled with intent to achieve the agreement's objective, and an action or conduct that furthers the agreement. Conspiracy is a separate offense from the crime that is the object of conspiracy"[2]. A conspiracy can take place only between two or more people. Once conspiracy is conceived or completed, conspirators can be sued to recover for damages either singly or in groups at will (of the plaintiff). Sometimes, some of the conspirators could not be apprehended, or they may be absconding. In that case only the conspirator left behind is sued. The HOA's argument that Koola's conspiracy case fails, since he has sued only the HOA, has no standing.

(2) The HOA denies conspiracy claims (Respondent's Brief, p. 18) because Koola has not presented competent evidence to support the condominium sales prices in Cambridge Lakes, which he presented in Appellant's Initial Brief, p. 15. A property owner is competent to estimate his property's value as a matter of law. *Rogers v.*

[2] Black's Law Dictionary, Ninth Ed., B.A. Garner, Ed. in Chief, West Publishing Co., 2009.

Rogers, 280 S.C. 205, 311 S.E.2d 743 (Ct.App. 1984). RMC records show that two two-bed room units in Cambridge Lakes, 1455 and 1599 Cambridge Lakes Dr, were sold for $116,500 and $116,000 respectively in 2011. Koola can estimate with reasonable certainty the potential sales price of a three-bedroom condo in the range of $120,000 to $125,000. The HOA's denial does not hold as a matter of law in a court room.

(2) The HOA's claim that it has authority to institute an action against Koola for noncompliance with Master Deed to pay the monthly regime has no standing as Koola has shown to this Court that the HOA's Master Deed is *ab initio* invalid and unenforceable on Koola. (Appellant's Initial Brief, pp. 9-10).

(3) The HOA's claim that it has authority to institute an action against Koola by virtue of S.C. Code Ann. § 27-31-170 at 3, and that no individual homeowner can stop making payments for a length of their choosing is redundant and has no merit because Koola has voluntarily offered to clear his dues (Appellant's Reply Brief, supra, at 10).

(4) The HOA's statement that it has obtained judgments against five homeowners has no merit at all as the HOA has not documented that these five judgments have been satisfied (Appellant's Reply Brief, supra, at 10).

(5) The HOA's argument that it has not singled out Koola for nonpayment of assessments, has been discredited by Koola. Koola has established his conspiracy claim against HOA beyond reasonable doubt (Appellant's Reply Brief, supra, at 17-18)

(6) The HOA claims that the directors discharged their duties in a manner that the directors reasonably believed to be in the best interest of the HOA, have no merit because Koola has detailed how the HOA acted in bad faith and dishonesty, and incompetently (Appellant's Reply Brief, supra, pp. 11-16).

Conclusion

Koola has shown to this Court that notwithstanding the legality of claims and counterclaims of both parties to this case, Koola offered to clear off his regime dues through short sale of his condominium voluntarily. The HOA rejected this offer and opted for litigation. The HOA has not provided any evidence to this Court that the HOA has collected on any of the judgments that the HOA has obtained in the past.

Koola has shown to this Court that the Trial Court granted Summary Judgment to the HOA when Discovery, including Motion to Compel, was pending. The Trial Court did not exercise discretion before ruling the 'Motion to Compel is now moot'.

Koola has shown to this Court that the Trial Court failed to apprehend genuine issues of Material Fact in dispute, that the HOA breached Fiduciary Duty, and dismissed Koola's counterclaim against the HOA for Civil Conspiracy without due consideration.

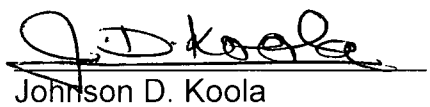
The Appellant and the Respondent see the relevant issues as glass half full or half empty, offering contradicting explanations.

It troubles the Appellant that the Respondent's Brief is often unethical. It was very troubling when the Respondent made the inflammatory statement: "Lashing out at the lower court because it is getting closer to a judgment against him for the money owed, is not proper or supported in his arguments". Respondent's Brief, p, 25. This creates a hostile environment for the Appellant in the Court of Appeals and a more hostile environment in the lower court, if the case would be remanded. In a footnote to the Respondent's Brief, p. 25, Appellant states further: "After this motion was granted the collection action moved forward handled by the attorney who filed the original complaint. A judgment was entered in favor of the HOA. Appellant filed a second notice of appeal

as to the judgment. On June 25, 2014 Appellant filed for an extension of time to file his initial brief in that matter". Appellant prays to this Court to review these statements by the Respondent.

For all the foregoing reasons, and any others this Court may deem proper, Appellant pro se Koola respectfully prays to this Court to reverse the Trial Court's Order granting Summary Judgment to the Respondent and to remand the case to the Trial Court.

Respectfully submitted,



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Oct. 27, 2014

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.

APPELLANT'S CERTIFICATE

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

October 27, 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 Reply 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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