

STATE OF SOUTH CAROLINA )  
COUNTY OF BEAUFORT )  
THE CALLAWASSIE ISLAND )  
MEMBERS CLUB, INC., )  
Plaintiff, )  
v. )  
MICHAEL J. FREY and GRACE )  
I. FREY, )  
Defendants. )

2014 JUN 21 10:18 AM  
IN THE COURT OF COMMON PLEAS  
FOR THE FOURTEENTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2012-CP-07-03209  
BEAUFORT COUNTY, S.C.  
CLERK OF COURT

ORDER GRANTING SUMMARY  
JUDGMENT IN FAVOR OF PLAINTIFF  
AGAINST MICHAEL J. FREY

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**SC Court of Appeals**

THIS MATTER came before the Court upon the motion of the Plaintiff, The Callawassie Island Members Club, Inc. ("CIMC"), for summary judgment against the Defendants, Michael J. Frey and Grace I. Frey. Present before the Court on Monday, May 19, 2014, were Ehrick K. Haight, Jr., Esquire and William T. Young III, Esquire, Attorneys for the Plaintiff, and Brian D. McDaniel, Esquire, Attorney for the Defendants.

Defendant Grace I. Frey claims she signed the relevant membership documents in her capacity as spouse only and not as an applicant and/or purchaser in her own right; as additional discovery may be warranted with respect to this issue, this Court denies Plaintiff's motion for summary judgment with respect to Mrs. Frey at this time pending the completion of additional discovery, with leave to refile.

This is a breach of contract for indebtedness owed by the Defendants arising from their membership in CIMC. The Plaintiff's motion, made pursuant to Rule 56, SCRPC, is based upon the pleadings, including the verified Complaint, Plaintiff's Memorandum in Support of Motion for Summary Judgment, the relevant governing documents (as cited

therein), the Affidavits of Jeff Spencer, the Affidavits of Ehrick K. Haight, Jr. and the law applicable to the case. Defendants submitted a Memorandum in Opposition to Plaintiff's motion and tendered an Affidavit in support of their position. As this Court declines to grant Summary Judgment as against Defendant Grace I. Frey at this time, the following shall apply only to Defendant Michael J. Frey (hereinafter, "Defendant").

Summary Judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E. 2d 801 (2009), Rule 56 (c), SCRPC.

Defendant argues that his membership was or should have been suspended, or terminated and that he should have been expelled because of non-payment under the terms of the General Club Rules dated August 8, 2001, and other documents. Whether this is true or not is irrelevant. It is clear under all of the relevant documents, from the time Defendant initially acquired his membership until the present, that the obligation to remain a member in good standing and pay dues, fees, assessments and other charges continues until the membership is re-issued to a new member. Moreover, this continuing obligation is consistent with S.C. Code Ann. §33-31-621 (e) (2006), which specifically recognizes a corporation's right to impose obligations on its members beyond termination of the membership as follows: "A member who has been expelled or suspended may be liable to the corporation for dues, assessments, or fees as a result of obligations incurred or commitments made before expulsion or suspension."

By applying for a membership and purchasing same, Defendant became contractually bound by the 1994 Plan for the Offering of Memberships and the Exhibits thereto, which included the By-laws and the General Club Rules (collectively, the "1994 Plan"). Reading these documents as a whole and giving them their plain and ordinary meanings, the Defendant's

obligation to pay dues, fees and assessments until such time as his membership re-issues is clear and unambiguous. The following excerpts leave no room for contrary interpretation:

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 Defendant 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. (*Plan for the Offering of Membership, July 1, 2013, Sec. 6.11(a) "Payment of Dues and Charges By Resigned Members", currently in force*).

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 Defendant acquired Membership*).

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 Defendant acquired Membership*).

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*).

Although Defendant initially entered into these contractual obligations with the Callawassie Island Club, Inc. ("CIC"), Plaintiff has the right to enforce those obligations. Plaintiff's acquisition of the club assets was contemplated by the 1994 Plan; was voted upon and approved by the membership (of which Defendant was a part); and the transaction was closed in 2001. Thereafter, Defendant continued to use the club amenities; paid dues, fees and assessments to CIMC; and was issued a membership certificate evidencing his membership in CIMC. As the obligation to pay dues, fees and assessments until his membership was re-issued was evident in the 1994 Plan, which was in effect at the time he acquired his membership, Defendant's contention that the Plaintiff may have later failed to properly notice and/or meet the voting requirements for subsequent amendments is irrelevant.

Defendant asserts that various representations and warranties were made by CIC that contradict the plain reading of the governing documents. CIC is not a party to this action. Moreover, even if such representations or warranties were made by CIC, they would not avail Defendant as a defense to this action. The 1994 Plan exhorts prospective members to "carefully read all of the attached documents and...consider seeking professional advice to evaluate these documents." It further cautions that "no person has been authorized to give any information or make any representation not contained within [the 1994 Plan] and, if given or made, such information or representation must not be relied upon as having been authorized by the Partnership or the Club." The 1994 Plan makes clear that membership is for recreational purposes only, and that no member should view his membership as an investment or expect to derive any economic profit from club membership.

Plaintiff was not in existence at the time Defendant purchased his membership in 1995. Defendant, therefore, cannot establish the essential elements for a negligent

misrepresentation claim, namely, 1) a false representation made by CIMC to the Member; 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 Member; 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; as against this Plaintiff. Hurst v. Sandy, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997).

Defendant points to S.C. Code Ann. §33-31-620(a), of the South Carolina Nonprofit Corporations Act (the "Act"), for the proposition that imposing liability for continuing obligations following resignation is statutorily prohibited. The Defendant's argument 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 clear that members are to be held accountable for previously agreed-upon continuing obligations, even beyond resignation. Defendant agreed to be bound by the 1994 Plan, including the By-laws and General Club Rules attached thereto, all of which unambiguously and consistently obligate him to pay dues until his membership reissues. Furthermore, this Court can find no violation of the statutory provisions relied upon by Defendant.

Defendant, in further opposition to the summary judgment motion at issue, asserts that granting the motion is inappropriate because discovery has not yet been completed. However, a party opposing summary judgment on this basis "must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is 'not merely engaged in a 'fishing expedition.'" Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (Quoting Baughman v. American Tel. and Tel. Co., 306 S.C.

101, 112, 410 S.E.2d 537, 544 (1991)). Moreover, a failure of proof on an essential element of a claim renders all other facts immaterial. See Gauld v. O'Shaughnessy Realty Co., 380 S.C. 548, 671 S.E.2d 79 (Ct. App. 2008). Defendant has failed to demonstrate the likelihood that further discovery will uncover additional relevant evidence. Consequently, Defendant's argument must be rejected.

In the case at bar, CIMC's claim is premised upon a breach of contract. Because this Court has determined that the agreement between the parties is unambiguous, extrinsic evidence is inadmissible to determine the intent of the parties. See Walters v. Summey Building Systems, Inc., 311 S.C. 507, 509, 429 S.E.2d 854, 856 (Ct. App. 1993). ("The construction of an unambiguous deed is a question of law, not fact. The terms of such a deed may not be varied or contradicted by evidence drawn from sources other than the deed itself.... Extrinsic evidence is admissible to resolve ambiguities but not to create them where none exist."). Accordingly, because Defendant would not be able to introduce any evidence beyond the contents of the documents at issue, any further discovery is unnecessary, superfluous, and would not defeat CIMC's motion for summary judgment. Likewise, Defendant's position on ongoing discovery also fails with regards to his counterclaims. Defendant's claim for negligent misrepresentation fails as a matter of law because CIMC did not exist at the time Defendant undertook his obligation. The instant matter presents a classic example of a failure of proof on an essential element, as it is impossible for CIMC to have made any representation to Defendant prior to its existence. Therefore, further discovery is unnecessary, as Defendant cannot satisfy an essential element of this claim.

The only remaining counterclaim relates to an accounting requested by Defendant. Defendant has presented no evidence to contradict the billing records submitted by CIMC.

Furthermore, because this Court has determined that the agreement unambiguously requires Defendant to remain liable for payment until his membership is transferred, this Court must also find that Defendant cannot demonstrate any right to an accounting, and grants summary judgment in favor of CIMC.

Based upon the foregoing, this Court finds the Plaintiff has established as a matter of law that pursuant to the terms and conditions of the 1994 Plan, the By-laws and General Club Rules (and all subsequent amendments thereto), that there is an unpaid balance due and owing for dues, fees, assessments and other charges, including interest at the contract rate of one and one-half (1.5%) percent per month, for which the Defendant is responsible. The Defendant has failed and refused to make payment in full for dues, assessments, interest and other charges and Defendant is indebted to the Plaintiff in the amount of Fifty Eight Thousand Seven Hundred Forty-Four and 23/100 (\$58,744.23) Dollars as of May 9, 2014; plus reasonable attorneys' fees and costs of Nine Thousand One Hundred Thirty-Two and 23/100 (\$9,132.23) Dollars, as contemplated by the 1994 Plan (and all subsequent amendments).

Based upon the pleadings, the relevant documents, and the affidavits submitted, it appears that there is no genuine issue as to the charges made on the account and the liability of the Defendant for those charges. Therefore, the Plaintiff is entitled to a judgment against the Defendant, as a matter of law, for the sum of Fifty Eight Thousand Seven Hundred Forty-Four and 23/100 (\$58,744.23) Dollars as of May 9, 2014; plus reasonable attorneys' fees and costs of Nine Thousand One Hundred Thirty-Two and 23/100 (\$9,132.23) Dollars.

NOW, THEREFORE, it is hereby ordered, adjudged and decreed that summary judgment be entered for the Plaintiff, The Callawassie Island Members Club, Inc., and

against the Defendant, Michael J. Frey, in the amount of Fifty Eight Thousand Seven Hundred Forty-Four and 23/100 (\$58,744.23) Dollars as of May 9, 2014<sup>1</sup>; plus reasonable attorneys' fees and costs of Nine Thousand One Hundred Thirty-Two and 23/100 (\$9,132.23) Dollars<sup>2</sup>, for a grand total of Sixty Seven Thousand Eight Hundred Seventy Six and 46/100 (\$67,876.46) Dollars.

AND IT IS SO ORDERED.

  
\_\_\_\_\_  
J. ERNEST KINARD, JR.  
Presiding Judge

 \_\_\_\_\_, South Carolina

June 24, 2014

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1 This judgment does not include any dues, fees, assessments or other charges levied by the Plaintiff after April 30, 2014, which must be the subject of a subsequent action.

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The Court has considered the six factors set forth in Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993) in determining the award of attorneys' fees. These factors are: (1) nature, extent, and difficulty of the legal services rendered; (2) time and labor devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in the locality for similar services; and (6) beneficial results obtained. The Callawassie Island Members Club, Inc.'s attorneys have had to draft letters, documents and pleadings, locate and review documentation, serve and respond to discovery, attend various hearings and perform other tasks in pursuing this matter over a period of months. The time involved and anticipated appears reasonable. Counsel have practiced in Beaufort County since 1987 and 2004 respectively and have experience in this type of lawsuit. The hourly rates charged are reasonable for the locality and type of lawsuit.