STATE OF SOUTH CAROLINA	)	BEFORE THE MASTER IN EQUITY
	)	CASE NO. 2011-CP-10-9513
COUNTY OF CHARLESTON	)	
AMH-ASHLEY MARINA, LLC and AMH MANAGEMENT, LLC,	)	
Plaintiffs,	)	
vs.	)	FINAL ORDER
THE HARBORAGE AT ASHLEY MARINA HORIZONTAL PROPERTY REGIME, THE HARBORAGE AT ASHLEY MARINA CONDOMINIUM ASSOCIATION, and EDDIE MCCOY, STUART REEVES, BRIAN SWAN, RICH CONE, and ED MISKOTTEN, individually	)	
Defendants.	)	

This matter is before the Court to determine whether a provision contained in a master deed grants the Plaintiffs a perpetual right to manage a condominium association's affairs and related claims. Having considered the entire record, stipulated facts,[1] depositions, exhibits, the Court's record, and applicable law, this Court finds and concludes no perpetual right exists, barring Plaintiffs' claims, and JUDGMENT is hereby entered for Defendants as set forth herein.

FACTS / BACKGROUND

The Harborage at Ashley Marina (the "Marina") is a horizontal property regime located in Charleston County. The Marina was developed pursuant to The Master Deed of The Harborage at Ashley Marina Real Property Regime, recorded April 29, 2005 (the "Master Deed"). (Jt. Exhibit 1). The Harborage at Ashley Marina Condominium Association, Inc. (the "Association") is the owners' association for the Marina. The individually named defendants

[1] The Court adopts the Joint Stipulation of Facts and Exhibits thereto submitted by the parties. The parties also submitted complete copies of all depositions taken in the case and exhibits thereto.

are members of the Association Board of Directors (the "Board") at times relevant to this action. (Jt. Stipulation, ¶¶ 1, 8, and 9).

AMH Ashley Marina, LLC ("Declarant") developed the Marina and is the Declarant under the Master Deed. It remains a member of the Association. On April 30, 2006, while under the Declarant's control, the Association entered into a contract with AMH Management, LLC, an affiliate of the Declarant, to manage the marina operations (the "2006 Agreement"). (Jt. Stipulation, ¶¶ 3, 10-13).

In December 2007, the Declarant turned over control of the Association to a Board comprised of members of the Association. In December of 2008, the Board notified AMH Management the 2006 Agreement would not be renewed after its expiration on April 29, 2009. The Board then initiated a request for proposals from potential managers to provide services from May 1, 2009 to April 30, 2010. (Jt. Stipulation, ¶¶ 16, 20; Jt. Exhibit 5, p. 210). AMH Management submitted a proposal, and in April of 2009, the Board entered into a new management agreement with AMH Management (the "2009 Agreement). (Jt. Stipulation, ¶¶ 18, 21 Jt. Exhibit 4). The 2009 Agreement expanded the services previously provided by AMH Management to include management of the Association's affairs, in addition to overseeing the marina. The term of the agreement was for 18 months, with a single 12-month extension through December 31, 2011. (Compare Jt. Exhibit 2, Jt. Exhibit 4).

THE DISPUTE OVER PERPETUAL MANAGEMENT RIGHTS

Prior to the expiration of the 2009 Agreement, the Board again initiated a request for proposals for management services and invited AMH Management to participate. (Jt. Stipulation, ¶ 23; Complaint, ¶¶ 26, 27). This time, Plaintiffs claimed any attempt by the

Association to hire a manager that is not an affiliate of the Declarant violates the Master Deed and is prohibited. (Complaint, ¶ 30, Jt. Stipulation, ¶ 24).

Section 2.3 of the Master Deed provides as follows on the issue of management:

> 2.3 Agreements.
>
> The Association will and hereby is authorized to enter into such contractual agreement, including without limitation, management contracts, as it may deem necessary or desirable for the administration of and operation of the Condominium and maintenance, repair, and replacement of the Common Elements, subject, however, to the following limitations:
>
> (a) Property Manager; Agreement With Declarant Or Affiliate; Termination Only For Cause.
>
> On or before the date of recording this Master Deed, the Declarant shall cause the Articles of Incorporation of the Association to be filed with the Secretary of State of South Carolina, the appointment of a Board of Directors and Officers of the Association to be made, the Bylaws to be ratified, confirmed and adopted, and an initial budget for the Association to be adopted. Additionally, the Association shall enter into an agreement for the management of the Condominium with the Declarant or an affiliate of the Declarant, which management agreement shall provide that it may be extended in the sole discretion of the "Manager" under said agreement and may not be terminated by the Association except in the event it is terminated by the Association for cause as a result of the Manager's gross negligence or criminal activity in the discharge of such management duties assigned to it under the management agreement.

(Jt. Exhibit 1, pp. 12-13) (emphasis added).

After the Association declined to enter into another contract with AMH Management, Plaintiffs commenced this action on December 22, 2011, nine days before the 2009 Agreement expired. (Complaint, ¶ 26). The Complaint seeks a declaration that under Section 2.3(a) of the Master Deed, the Plaintiffs have a right to continue to manage the Marina and the Association. (Complaint, Prayer for Relief, ¶ A). Plaintiffs further ask this Court to reform the 2009 Agreement to comport with Section 2.3(a) and assert claims for breach of contract, civil conspiracy, and injunctive relief. (Complaint). Defendants denied the material allegations and

asserted counterclaims seeking a declaration that: (i) the 2009 Management Agreement has expired and Plaintiffs have no rights arising thereunder, and (ii) the Plaintiffs have no perpetual management rights. Defendants also seek to enjoin Plaintiffs from interfering with the Association's efforts to hire with a manager of its choosing. (Answer and Counterclaims). The parties consented to a trial before the Charleston County Master-In-Equity.

LAW/ANALYSIS

"In construing a deed, the intention of the grantor must be ascertained and effectuated unless that intention contravenes some well-settled rule of law or public policy." *Gardner v. Mozingo*, 293 S.C. 23, 358 S.E.2d 390 (1987) (emphasis added). The intention of the grantor must be found within the four corners of the deed. *Id.* The construction of a clear and unambiguous deed is a question of law for the court. *Id.* To the extent Plaintiffs' claim the entitlement to perpetual management is a covenant that runs with the land, the covenant must be strictly construed against the grantor and all persons seeking to enforce it, with all doubts resolved in favor of the free use of the property. *Hardy v. Aiken*, 369 S.C. 160, 631 S.E.2d 539 (2006); *Hoffman v. Cohen*, 262 S.C. 71, 202 S.E.2d 363 (1974).

A. Section 2.3(a) of the Master Deed does not create a perpetual right to manage the Marina.

Section 2.3 is not, itself, a management contract. It contains none of the material terms necessary to the formation of a contract, such as the scope of the services to be rendered or the price to be paid. *See W.E. Gilbert & Associates v. SC Nat'l Bank*, 285 S.C. 421, 423, 330 S.E.2d 307 (Ct. App. 1985) ("In a contract for services two essential elements are the scope of the work to be performed and the amount of compensation."). Instead, Section 2.3 is a provision within the Master Deed that, if enforceable, mandates that the "Association shall enter into an agreement for the management of the Condominium with the Declarant or an affiliate of the

Declarant...." (Emphasis added). Thus, agreement as to the duties, scope of services, and rates of compensation, and other essential terms under the management agreement to be formed is left to future settlement between the parties. This is the fatal flaw in Plaintiffs' case.

South Carolina will not enforce a mere "agreement to agree." In *Fici v. Koon*, 372 S.C. 341, 347, 642 S.E.2d 602 (2007), the South Carolina Supreme Court found unenforceable an agreement to convey land where the boundaries of the property were to be determined based on an agreement to a subsequent survey. The Court explained, "The signed form contract dated February 27 is nothing more than an agreement to agree which is unenforceable under the Statute of Frauds." *Id.* (emphasis added). *See also Trident Constr. Co. v. Austin Co.*, 272 F. Supp. 2d 566, 575-76 (D.S.C. 2003) (finding no oral contract when the plaintiff alleged the defendant told it if the defendant won the bid to build an airplane hangar, it would give the plaintiff the supplier subcontract, because the parties never agreed on price). *See also* 1 Arthur L. Corbin, Corbin on Contracts § 2.8 (Joseph M. Perillo ed., rev. ed. 1993) ("If the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; the so-called 'contract to make a contract' is not a contract at all.").

The cornerstone of whether an agreement creates a binding contract or is an "agreement to agree" rests upon whether the underlying agreement itself contains the requisite terms necessary to the formation of an enforceable contract. *See Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 396 S.C. 338, 346-347, 721 S.E.2d 455 (Ct. App. 2011) ("Rather than focusing on whether the MOU calls for the parties to reach future agreements, the proper inquiry is to determine whether the MOU meets the elements of a contract."). *See also Farr v. Barnes Freight Lines, Inc.*, 97 Ga. App. 36, 37, 101 S.E.2d 906 (Ga. App. 1958)("If any portion of the proposed terms is not settled, or no mode is agreed on by which it may be settled, there is no

agreement."). Section 2.3 contains none of the essential terms necessary to the formation of a management agreement. Deposition testimony from Plaintiffs' 30(b)(6) witnesses proves that future negotiations were required in order to finalize the terms of any agreement. For example, AMH's Joe Miller testified:

> ... And we would certainly try and work with the Board and negotiate and discuss all the details. Anything that needed to be massaged or tweaked or changed, we would certainly have a back and forth discussion on. You know, scope of services, levels of insurance, you know, fees, numbers of employees, hours, you know, all those things were always subject to, you know, -- you know, the board – its always their duty and right to set the terms of the management agreement within reason. And we're going to – you know, we work for them [the Association]. So, it – this has to be a two way street."

(Miller Depo., p. 24-25) (emphasis added). When asked what would happen if the Association and AMH Management reached an impasse in negotiating a particular term, such as compensation, Mr. Miller testified, "Well, I don't know. I assume we would have to be reasonable and get things figured out." (Miller Depo., p. 26). Bruce Wallace, who was involved in the negotiation of the 2009 Agreement for AMH Management, similarly testified that any management agreement would have to be renegotiated after the 2009 Agreement expired. (Wallace Depo., pp. 30-31). These facts underscore the conclusion that no enforceable agreement existed after December 31, 2011, when the 2009 Agreement expired. *Shealy v. Fowler*, 182 S.C. 81, 188 S.E. 499 (1936)("If one of the parties has not agreed, then a prerequisite to formation of the contract is lacking.").

Section 2.3 merely provides that the Association will contract with the Declarant or its affiliate, leaving the essential terms of any purported agreement unresolved. In this way, it is nothing more than an unenforceable agreement to agree that cannot be relied upon as a basis to support Plaintiffs' claims. *See, e.g., Ford Motor Co. v. Kahne*, 379 F. Supp. 2d 857, 869-871

(E.D. Mich. 2005) (finding unenforceable a services contract in light of certain material terms that were left open to subsequent agreement between the parties).

In their Complaint, Plaintiffs allege the right to manage is a valuable property right. (Complaint ¶ 29). This is a distinction is unavailing. First, the record does not support this conclusory allegation. Further, the evidence reveals Mr. Miller viewed the management right as an "economic" interest. (Miller Depo., p. 27; Depo. Exhibit 15). Regardless, an instrument affecting an interest in real property must, like all other contracts, contain the essential terms. South Carolina's Statute of Frauds specifically applies to "any contract or sale of lands, tenements or hereditaments or any interest in or concerning them[.]" S.C. Code Ann. 32-2-10(4) (emphasis added). *See also Cash v. Maddox*, 265 S.C. 480, 220 S.E.2d 121 (1975); *Speed v. Speed*, 213 S.C. 401, 49 S.E.2d 588 (1948). Thus, the outcome is the same either way.

The same logic applies to restrictive covenants, which not only are "contractual in nature" but are strictly construed against the grantor and all persons seeking to enforce them. *Hardy*, 369 S.C. 160, 631 S.E.2d 539; *Hoffman*, 262 S.C. 72, 202 S.E.2d 363. Restrictive covenants are Here, Section 2.3 is silent as to what services are required, for what price, and for how long. The Court resolves this ambiguity in favor of the Association and finds Section 2.3(a) does not create an enforceable perpetual management right.

Regardless of the Declarant's intent, Section 2.3 does not create or provide for a perpetual management right. It is, at best, an unenforceable agreement to agree. See *Gardner*, 293 S.C. 23, 358 S.E.2d 390 (noting the intention of the grantor must be ascertained and effectuated "unless that intention contravenes some well-settled rule of law or public policy") (emphasis added). For the reasons cited herein, and based upon the evidence in the record, this Court finds and concludes plaintiffs do not have an enforceable right to continue to manage the

Marina and the Association. The Court's ruling does not invalidate Section 2.3 of the Master Deed except as necessary to find that it does not allow for perpetual management rights.

B. The 2009 Agreement has expired and should not be reformed

Plaintiffs claim the 2009 Agreement should be reformed to comply with Section 2.3 of the Master Deed. (Complaint, ¶ 33). This claim under the 2009 Agreement is unavailing.

"Reformation is the remedy by which writings are rectified to conform to the actual agreement of the parties. It is available on the ground of [mutual] mistake or misunderstanding as well as duress and related misconduct." *Crewe v. Blackmon*, 289 S.C. 229, 234 (Ct. App. 1986) (internal quotations and citations omitted). The existence of a contradiction, alone, is not sufficient to warrant reformation, unless the contradiction is the result of a mutual mistake. *Id.*. "To entitle the plaintiff to a reformation of the contract, he must prove that it was the intention of both parties to make a contract such as he sought to have established and that this intention was frustrated, either from some fraud, accident, or mutual mistake of the parties." *Jumper v. Queen Mab Lumber Co.*, 115 S.C. 452 (S.C. 1921). Evidence of a mutual mistake must be shown by clear and convincing evidence." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 51 (S.C. 2013) (*citing Crosby v. Protective Life ins. Co.*, 293 S.C. 203, 206 (Ct. App. 1987).

The Court finds there is no basis to reform the 2009 Agreement. First, the record fails to demonstrate the presence of a mutual mistake. On the contrary, Bruce Wallace testified the 2009 Agreement was the product of bilateral negotiations. (Wallace Depo., p. 25). In South Carolina "[w]here the contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention." *McPherson v. J. E. Sirrine & Co.*, 206 S.C. 183, 204 (1945). The 2009 Agreement contains several references indicating it would have a limited duration. Paragraph 2 provides for the 18-month term and single extension. Paragraph 1states:

"AMH agrees to provide the Association, for so long as this Agreement is in effect, full marina management support...." (Jt. Exhibit 4, p. 193) (emphasis added). The agreement also provides that had the Board determined not to grant the 12-month extension in any respect, "this [decision] will constitute a termination of this agreement in its entirety." (Jt. Exhibit 4, p. 194). Moreover, Paragraph 21provides: "This Agreement constitutes the entire agreement pertaining to the subject matter hereof, and supersedes all prior oral and written agreements and understandings in connection herewith. No covenant, representation or condition not expressed in this Agreement will affect or be effective to interpret, change, or restrict the express provisions of this Agreement." (Jt. Exhibit 4, p. 199)(emphasis added).

Further, the evidence demonstrates the Association historically adhered to the termination language used in its two agreements with AMH Management, rather than focusing on Section 2.3. (Jt. Stipulation, ¶¶ 18, 20-22). For example the Association gave notice per its terms that it would not renew the 2006 Agreement. (Jt. Stipulation, ¶¶ 20, 21 Jt. Exhibit 2, p.180; Jt. Exhibit 5, p. 210). Thereafter, AMH Management was awarded the 2009 Agreement, which also provides for a limited term. Any ambiguity in the number of contract extensions the Declarant sought to reserve under Section 2.3(a) must be resolved in favor of Defendants. *See Hardy*, 369 S.C. 160, 631 S.E.2d 539; *Hoffman*, 262 S.C. 71, 202 S.E.2d 363 (strictly construing restrictive covenants against the grantor and all persons seeking to enforce them).

No matter what arguments Plaintiffs advance, the record falls short of the clear and convincing evidence standard required for the remedy of reformation. As such, the Court finds that the 2009 Agreement should not be re-written to provide AMH Management a right to infinite extensions that was not part of the negotiated agreement. *See e.g., York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 90 (Ct. App. 2013) ("South Carolina's general principle is that it is

not the function of the court to rewrite contracts for the parties.") (internal citations and quotations omitted). *See also S. Atl. Fin. Servs.*, 356 S.C. 444, 447 ("Generally, if the terms of a contract are clear and unambiguous, this Court must enforce the contract according to its terms regardless of its wisdom or folly.").

The Court finds and concludes that Plaintiffs are not entitled to reform the 2009 Agreement. Instead, Defendants are entitled to a finding that the 2009 Agreement has expired and its terms no longer have any force or effect.

C. Plaintiffs claim for breach of contract fails as matter of law

For the reasons set forth herein, Plaintiffs' claim for breach of contract also fails. This Court finds and concludes that Section 2.3 lacks the terms necessary to form an existing contract and that the 2009 Agreement has expired. Accordingly, the Court finds the 2009 Agreement has not been breached, and judgment is hereby entered in favor of the Defendants.

D. Plaintiffs' claims for civil conspiracy and injunctive relief fail as a matter of law

Having disposed of the Plaintiffs' claims relative to its asserted management rights and the management contract, it logically follows that Plaintiffs have no viable claims for civil conspiracy or injunctive relief. Each of these claims necessarily relies upon the existence of a perpetual management right. Having found no such right exists and the 2009 Agreement has expired, these claims must fail.

E. Defendants' counterclaims for declaratory judgment

For the reasons set forth herein, the Court finds and concludes that Defendants are entitled to a declaratory judgment finding that the 2009 Agreement has expired and Plaintiffs have no enforceable rights arising thereunder. As stated above, the Court also finds that Plaintiffs do not have an enforceable right to perpetually manage the Marina and the Association.

F. Defendants' claim for permanent injunction is not ripe

Defendants seek to enjoin Plaintiffs from interfering with the Association's efforts to enter into a contract with a manager of its choosing. During the pendency of this action, the Association has continued to employ AMH Management as its manager without waiver of either parties' legal rights. For this reason, the Court concludes Defendants' request for injunctive relief is not yet ripe, as it has not attempted to engaged a new manager during this litigation. This determination is without prejudice to Defendants' rights to seek injunctive relief hereafter if their efforts to hire and utilize a new manager are improperly frustrated by Plaintiffs.

NOW, THEREFORE this Court hereby enters JUDGMENT IN FAVOR OF DEFENDANTS, specifically finding as follows:

1. That Plaintiffs have no perpetual right to manage the Marina and the Association;

2. That the 2009 Agreement expired on December 31, 2011 and should not be reformed, and Plaintiffs have no enforceable rights thereunder subsequent to that date;

3. That Plaintiffs failed to establish a claim for breach of the 2009 Agreement;

4. That Plaintiffs claims for civil conspiracy and injunctive relief have not merit; and

5. That Defendants' request for injunctive relief is dismissed without prejudice for lack of ripeness;

IT IS SO ORDERED!

The Honorable Mikell R. Scarborough
Charleston County Master-in-Equity

Charleston, SC

This 18th day of Sept., 2014.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

AMH-ASHLEY MARINA, LLC and AMH MANAGEMENT, LLC,

Plaintiffs,

vs.

THE HARBORAGE AT ASHLEY MARINA HORIZONTAL PROPERTY REGIME, THE HARBORAGE AT ASHLEY MARINA CONDOMINIUM ASSOCIATION, and EDDIE MCCOY, STUART REEVES, BRIAN SWAN, RICH CONE, and ED MISKOTTEN, individually

Defendants.

BEFORE THE MASTER IN EQUITY
CASE NO. 2011-CP-10-9513

ORDER DENYING PLAINTIFFS' MOTION TO ALTER OR AMEND AND GRANTING DEFENDANTS' MOTION FOR TAXATION OF ATTORNEY'S FEES AND COSTS

Before the Court are two post-trial motions: (1) Plaintiffs' Rule 59(e) motion to alter or amend the Final Order, filed October 2, 2014; and (2) Defendants' motion for taxation of attorney's fees and costs against Plaintiffs, filed September 30, 2014. Having fully considered the motions, the arguments of counsel, and the applicable law, the Court rules as follows:

1. Plaintiffs' motion to alter or amend the Final Order is hereby DENIED.

2. The Court finds Defendants' motion establishes the right to recover reasonable attorney's fees and costs from the Plaintiffs and, therefore, GRANTS Defendants' motion in an amount to be determined. The determination of the amount of reasonable attorney's fees and costs to be taxed against Plaintiffs shall be stayed pending the outcome of any appeal in this action, or if no appeal is taken, upon request by Defendants.

IT IS SO ORDERED!

This 20 day of Nov, 2014
Charleston, SC

The Honorable Mikell R. Scarborough
Charleston County Master-in-Equity