THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

James C. Williams, Circuit Court Judge sitting as Special Referee
Trial Case No. 2011-CP-10-2232

Appellate Case No. 2014-001915

The Bristol Condominium
Property Owners Association,.....Respondent,

v.

John T. Lucas, Sr. as Trustee of the John T. Lucas Revocable
Trust Dated November 10, 2004, and Carolyn C. Lucas
Revocable Trust Dated November 10,
2004,.....Defendants/Counterclaim Plaintiffs,

Of Whom John T. Lucas, Sr. is the Appellant,

v.

The Bristol Condominium
Property Owners Association,.....Counterclaim Defendant.

FINAL BRIEF OF APPELLANT

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Statement of the Issue on Appeal

Did the trial court err when it failed to find that the Bristol Property Owners' Association filed a foreclosure action against Dr. John Lucas in bad faith?

Even if the foreclosure was not filed in bad faith, did the trial court err in its award of attorney's fees, late fees and collection costs to the Bristol Property Owners' Association?

Statement of the Case

The Bristol Condominiums ("Bristol") is a 54 unit development on the Ashley River in Charleston, developed by the Beach Company and Gulf Stream Construction. In 2003, the first unit was sold. Dr. John and Mrs. Carolyn Lucas, hereafter, "Lucas" bought a condominium in the development in 2004.

On February 9, 2007, the Bristol Property Owners Association, hereafter the "Association," through counsel, sued various defendants, alleging defects in the complex's construction, including leakage around windows and doors in the common areas as well as in individual condominiums. The Bristol Condominiums Property Owners' Association v. Brittlebank Condominiums, LLC., et al., 2007-CP-10-0612 (dated February 9, 2007); R. at 49. Individual homeowners filed two lawsuits known as the "Landry lawsuit" and the "Hanger lawsuit." Janice L. Landry, et al., v. Brittlebank Condominiums, LLC., et al., 2007-CP-10-607; R. at 96, Kenneth Hanger, et. al., v. The Beach Company, et. al., 2005-CP-10-3029; R. at 146.

On March 10, 2009, having heard the defendants' challenges to the Association's standing to allege various construction defects to the doors and windows in the complex, the Honorable Clifford Newman ruled that the Association did not have standing to litigate claims arising from the installation of those components. Order 2 (Mar. 10, 2009); R. at 1. The Association's board then voted to change the master deed so that the windows and doors became

common property, and voted to make the change to the master deed retroactive to April 17, 2007. Judge Newman subsequently ruled that the Board could not retroactively change ownership of the windows and doors; R. at 1. Following this ruling, the Association's board organized a meeting with all condominium owners and encouraged each condominium owner to join the lawsuit individually. Compl. ¶ 8 (Apr. 20, 2010); R. at 155.

On March 13, 2009, the Association sent a letter to all homeowners explaining the circuit court's ruling and encouraging those who had not joined the lawsuit to assign their right to litigate to the Association. Lucas never joined the lawsuit, nor did he assign his rights. Compl. ¶ 9, 11, 12. (Apr. 20, 2010); R. at 156.

The Association's lawsuit, as well as the *Hanger* and *Landry* suits, were ultimately settled. However, after payment of costs and fees, there were insufficient funds available to complete the repairs necessitated by the defective construction alleged in the complaints.

Before and following the settlement of the lawsuit, the Association made special assessments on all homeowners, including Lucas, for attorneys' fees, litigation costs, and anticipated short falls in repair costs that would not be covered by the proceeds of the settlement. Compl. ¶ 4 (Apr. 20, 2010); R. at 155.

As a result of his concerns about the sufficiency of the global settlement of the construction litigation and resulting assessments, Lucas filed suit against the Association on April 20, 2010 alleging that the Association had taken his property by unilaterally changing the master deed, and had settled the litigation for a sum insufficient to resolve the issues. (Compl. Apr. 20, 2010); R. at 155. The Association filed a foreclosure action against Lucas on March 25, 2011, based on a condominium lien for unpaid assessments. Compl. ¶ 5-8 (Mar. 25, 2011); R. at

147 – 148. Lucas in turn counterclaimed, alleging that the foreclosure was wrongful and retaliatory. Compl. ¶ 76-85 (May 9, 2011); R. at 175 – 176.

This matter originated as the foreclosure action, designated as Case No.: 2011-CP-10-2232. That case was later consolidated with Case No.: 2010-CP-10-3240, Lucas's action against the Association, for both discovery and trial purposes; R. at 6.

On June 30, 2011, the Association moved for summary judgment as to Lucas' complaint. The motion was heard on August 16, 2012, by the Honorable J.C. Nicholson, Jr., who dismissed some of Lucas's causes of action, but permitted causes of action for breach of fiduciary duty and negligence to proceed. The foreclosure matter continued, as did Lucas's claims for wrongful foreclosure. Form 4 (February 18, 2014); R. at 22.

On May 22 and 23, 2013, the Honorable Jimmy C. Williams heard the parties' remaining claims. Prior to trial the parties submitted extensive portions of the pre-trial discovery in lieu of calling live witnesses. At trial, Lucas testified, as did Lona Vest, Jan Landry, and John DeWitt. By Order entered July 28, 2013, the court ruled in favor of the Association on all Lucas's causes of action. Further, the court later concluded that the foreclosure was proper by Order received by the parties on August 26, 2013; R. at 18. A Special Referee's Decree and Judgment as to the foreclosure were filed on September 6, 2013; R. at 25. Lucas paid the judgment, and partial release of the judgment and notice of lien evidencing payment from Lucas to the Association was filed on February 26, 2014; R. at 34. Lucas timely moved for reconsideration, and that motion was denied in part and granted in part by Order dated August 11, 2014; R. at 20. The Order reduced the award of attorney's fees awarded to the Association. Notice of the entry of that Order was received by counsel on August 15, 2014 and this appeal timely followed.

Statement of the Facts

The Bristol is a fifty-four unit condominium complex located at 3000 Old Bridgeview Lane on the Ashley River in Charleston. The Bristol Horizontal Property Regime was created by Brittlebank Condominiums, LLC and was established by the filing of the regime's Master Deed, on August 26, 2002, with the Register of Deeds for Charleston County. The Property Owners Association, hereafter "Association," was formed as a nonprofit corporation pursuant to the South Carolina Nonprofit Corporation Act, *S.C. Code, Ann.*, §§33-31-101, *et. seq.,* and consists of the owners of units in the regime, referred to as members.

Dr. John T. Lucas and his wife, Carolyn, purchased Unit 313 in 2004. As early as 2004, members noticed water intrusion into their condominiums around doors and windows. In 2005, initial efforts to obtain repairs were unsuccessful, and owners of four units filed suit against various construction defendants and the developers. That matter, styled *Kenneth Hanger, et. al., v. The Beach Company, et. al.,* 2005-CP-10-3029, was joined by two additional members and is known as the *Hanger* lawsuit; R. at 37.

Unable to resolve the ongoing water intrusion issues, the Board retained counsel and filed *The Bristol Condominiums Property Owners' Association v. Brittlebank Condominiums, LLC., et al.,* 2007-CP-10-0612; R. at 49. Simultaneously, an additional group of members filed *Janice L. Landry, et al., v. Brittlebank Condominiums, LLC., et al.*, 2007-CP-10-607; R. at 96. Both the Association's lawsuit and the *Landry* suit sought remediation of the water intrusion issues that remained unresolved. Lucas did not join any of these lawsuits.

In October of 2009, all three lawsuits settled. The Association selected a contractor, and the committee presented three different repair scenarios to the members. In conjunction with the repair scenarios, the Association also presented a special assessment for approval, which

assessment was intended to cover the shortfall in the funds available from the settlement of the construction litigation so that repairs could be completed.

Lucas consistently opposed the transfer of his windows and doors to the Association. Further, he oppposed the construction assessment, reasoning that the litigation should not be settled for an amount that created a shortfall to be covered by the unit owners. Lucas voiced his opposition and concerns about the special assessments to the Association. Further, Lucas requested additional information from the Association through his attorney. *Letter to Vest dated March 11, 2010 from Mooneyham*; R. at 776. Despite his numerous requests, the Association failed to provide Lucas with information. On April 20, 2010, in order to obtain information from the Association, Lucas filed an action against the Association, alleging mismanagement of the condominium regime and disputing the debt that the Association claimed it was owed for various assessments; R. at 155.

On March 25, 2011, the Association, filed a foreclosure action against John and Carolyn Lucas, alleging failure to pay special assessments that Lucas had refused to pay as the result of his objections to the mismanagement of construction litigation brought by the Association to correct leaks and other defects in the Bristol condominium development; R. at 155. This foreclosure complaint was based on debts that were clearly in dispute. *Letter to Vest dated March 11, 2010 from Mooneyham*; R. at 776. On May 9, 2011, Lucas counterclaimed, asserting the claims previously raised in his mismanagement lawsuit; R. at 169. The lawsuits were consolidated for trial and discovery purposes, and all claims that had not otherwise been resolved were tried, nonjury, on May 22, 2013.

Argument

I. The trial court erred when it did not find that the Bristol Condominium Property Owners Association foreclosed on Lucas in bad faith, in an attempt to discourage Lucas's pursuit of pending claims against the Association.

a. In considering an appeal in an equitable matter, this Court is not bound by the trial court's findings or conclusions.

This action was brought pursuant to *S.C. Code Ann. § 27-31-210(a)* of the "Horizontal Property Act" to foreclose a lien for unpaid assessments. That statute provides that "[s]uch lien may be foreclosed by suit ... in like manner as a mortgage of real property." *Dockside Ass'n, Inc. v. Detyens*, 362 S.E.2d 874, 294 S.C. 86 (S.C. 1987).

An action to foreclose a real estate mortgage is one in equity. *Bryn v. Walker*, 275 S.C. 83, 267 S.E.2d 601 (1980). In equity cases, South Carolina's appellate courts may find facts in accordance with their own view of the evidence. *South Carolina National Bank v. Central Carolina Livestock Market Inc.*, 289 S.C. 309, 345 S.E.2d 485 (1986); *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); See also *Peoples Federal Savings and Loan Association v. Edwards*, 286 S.C. 475, 334 S.E.2d 290 (S.C.App.1985).

The present action is an action in equity. South Carolina courts interpret *S.C.Code Ann. § 27-31-210(a)* to necessitate treatment of assessment lien foreclosures as actions in equity. The present foreclosure action was in equity and tried by a judge alone. This court therefore is not bound by the factual findings of the trial judge. *Townes Associates, Ltd. v. City of Greenville*, supra.

b. The Association knew that Lucas disputed the special assessment and had the ability to pay the assessment, so that foreclosure was an inappropriate remedy.

The law governing the Association's right to foreclose is the Horizontal Property Act, specifically:

§ 27-31-210. Lien for unpaid assessments; right of mortgage or purchaser acquiring title at foreclosure sale

(a) All sums assessed by the administrator, or the board of administration, or other form of administration specified in the bylaws, but unpaid, for the share of common expenses chargeable to any apartment shall constitute a lien on such apartment prior to all other liens except only (i) tax liens on the apartment in favor of any assessing unit, and (ii) mortgage and other liens, duly recorded, encumbering the apartment. Such lien may be foreclosed by suit by the administrator, or the board of administration, or other form of administration specified in the bylaws, acting on behalf of the council of co-owners, in like manner as a mortgage of real property. In any such foreclosure the apartment owner shall be required to pay a reasonable rental for the apartment after the commencement of the foreclosure action and the plaintiff in such foreclosure shall be entitled to the appointment of the receiver to collect such rents. The administrator, or the board of administration, or other form of administration specified in the bylaws, acting on behalf of the council of co-owners, shall have the power to bid in the apartment at foreclosure sale and to acquire and hold, lease, mortgage and convey the same. ***Suit to recover a money judgment for unpaid common expenses may be maintainable without instituting foreclosure proceedings.*** (emphasis added).

The Association had a clear remedy to allow resolution of the dispute with Lucas that was less draconian than foreclosure. The evidence showed Lucas was timely in all payments owed to the Association except those which he disputed; R. at 777. Unlike some of the individuals whom the Association could have foreclosed on, Lucas demonstrated his ability to pay the assessments and Lucas continuously paid his undisputed regime fees. Lona Vest, whose company managed the Bristol's day to day and financial operations at the time of the events in question, indicated that during the pendency of this litigation, Lucas paid approximately $49,000.00, the amount owed to the Association less the disputed special assessment fees; R. at 193:1-22. In fact, Lucas had paid regular regime fees in the amount of $28,093.75, capital reserve contributions of $4,496.25, insurance assessments of $8,726.98, and late fees of $14,104.08; R. at 777. Vest verified in her testimony that Lucas "has always paid the insurance, he's paid the operating side of the regime fee, and he paid some money toward the special assessment." R. at 195:19-72. Lucas specifically disputed $42,354.90, which dispute led to the foreclosure. Vest acknowledged that Lucas did not make payments because he thought that the money should have come back from the litigation; R. at 194.

The Association knew that Lucas disputed the nature of the assessments. Further the Association knew that Lucas expressed concerns about the level of communication; R. at 203. Lucas directly demonstrated by a letter from his attorney that he wanted information from the Association prior to paying the special assessment; R. at 776. Rather than responding to Lucas or his attorney, the Association filed a foreclosure action against Lucas; R. at 206. Lucas explains "I had to file a lawsuit, because they wouldn't respond to my attorney or to me. So he wrote a letter. They didn't respond...Then we wrote another letter to make sure they got it. I read it in a meeting...they responded with a letter saying, our foreclosure lawyer will contact you. That's the only response I got." R. at 206. Lucas clearly demonstrated his desire for additional information prior to making payment. Rather than simply providing the information to Lucas, the Association foreclosed on him.

c. The evidence proves that the Association brought the foreclosure action against Lucas in bad faith, as Lucas was the only property owner that was foreclosed on as a result of his not paying the special assessments.

At the time of the foreclosure filed against Lucas, there were eight other condominium owners with outstanding balances for assessments and fees. For example, Jay Harmon owed a substantial balance and had advised the Association that he or she would never make another payment, and no foreclosure action was filed, despite the accumulation of a "very sizeable balance." R. at 503. Ken Nix owed money to the Association, and in lieu of foreclosing, the Association offered him a payment plan; R. at 505. Olga Valledejulia owed $60,000 to the Association. Further, unlike Lucas, she had no assets or independent ability to pay her arrearage. Nonetheless, the Association did not foreclose; R. at 505. Bishop Rembert owed $90,000.00. He made one payment under threat of foreclosure, and then a proposed a payment plan of $150 per month on a $75,000.00 balance, and the foreclosure was "suspended." R. at 506. Bill Smith

owed more than $50,000.00. The Association did not foreclose; R. at 508. Other parties owed money, and no foreclosures were filed. Lucas was the only condominium owner who had formally contested the actions of the Association's Board. He was also the only condominium owner on whom the Board foreclosed to collect unpaid assessments.

Further, the Association elected not to foreclose when various banks instituted foreclosure actions to recover on purchase money mortgages; R. at 212. Brad Sherlock, a board member with the Association, testified that since December 2011 the board had not foreclosed on any properties; R. at 214 – 215. Bank foreclosures would generally have extinguished any claims by the Association, as purchase money mortgages would have been primary to liens acquired pursuant to *S.C. Code Ann. § 27-31-210(a)*, but nonetheless, the Association took no action to protect the interests of its members when banks foreclosed.

The foreclosure action against Lucas was filed with the Association's full knowledge of the disputed claim; R. at 203. Lucas's payments, totaling $55, 421.06 for the time period during which the Association alleged an arrearage had accrued, demonstrated Lucas's ability to pay. Lucas had indicated, through counsel, that he was prepared to escrow funds with which to make payment, once he was satisfied that the assessments were appropriate. There was therefore no legal or business reason to foreclose on Lucas. The only reasonable inference to be drawn from the evidence is that the foreclosure was retaliatory and in bad faith.

II. The trial court erred when it awarded attorney's fees, collection costs and late fees to the Association.

a. Attorneys' fees must be supported by contractual agreement, and an award of fees without evidentiary support is an abuse of discretion.

"The general rule is that attorneys' fees are not recoverable unless authorized by contract or statute." *Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (S.C., 1988) (citing

Hegler v. Gulf Ins. Co., 243 S.E.2d 443, 270 S.C. 548 (S.C., 1978). "Where there is a contract, the award of attorney's fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown." *U.S. Bank Trust Nat. Ass'n v. Bell,* 684 S.E.2d 199, 385 S.C. 364 (S.C. App., 2009). In South Carolina, where a contractual obligation provides only that a party is to pay "reasonable attorney's fees," the amount is unliquidated and, therefore, requires a finding on the reasonableness of the award. On the other hand, where a contractual provision in a note provides for attorney's fees at a specific rate, the amount of attorney fees is governed by the contract. *Dedes v. Strickland*, 414 S.E.2d 134, 307 S.C. 155 (S.C., 1991) see also *Thomas & Howard Co. v. T.W. Graham and Co.*, 457 S.E.2d 340 (1995). *NationsBank v. Scott Farm,* 320 S.C. 299, 465 S.E.2d 98 (S.C. App., 1996).

An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. *Ledford v. Pennsylvania Life Ins. Co.*, 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976), *County of Richland v. Simpkins,* 560 S.E.2d 902, 348 S.C. 664 (S.C. App., 2002).

b. The award of attorney's fees was an abuse of discretion as the Association failed to meet its burden of proof on the issue of fees.

In its foreclosure action, the Association claimed $15,990.78 in interim collection costs as well as $3,500.00 in attorneys' fees. The attorney's fees awarded in this case are not supported by the evidence presented. Lona Vest, property manager for the Association, stated at trial that she did not have an invoice or any documentation to support a $15,000 payment to the lawyers in the case; R. at 196. Vest testified when questioned by the Court that attorneys' fees and costs for the foreclosure matter were paid "along the way." R. at 198 and 199. Vest further testified that the amount being claimed as owed in the foreclosure action was incorrect and an incorrect calculation; R. at 200. Additionally, she stated that she had never sat down and tallied

exactly how much she paid for Dr. Lucas' related legal fees; R. at 197. Vest testified that "I can't speak to the Moore & Van Allen bills. Honestly, I don't know. I can't answer where that $15,000 came from." R. at 197. Vest testified that it is an inaccurate calculation if the attorneys were awarded an additional third or 10 percent or 15 percent of the amount recovered. R. at 199. The amount that the Association claimed Lucas owed also included a 10 to 15 percent collection fee added for legal services, which Vest acknowledged was incorrect; R. at 200. In fact, Ms. Vest testified that there was not any support for the amounts listed as owed in the foreclosure complaint; R. at 197. Further, the fees proposed and awarded constituted a double recovery for the Association and its counsel, as the fees were paid on an hourly basis and additional fees were apparently awarded as a percentage of the foreclosure recovery.

Further, when asked, Vest was unable to identify any specific work performed in the case, other than the filing of the papers, that was performed specifically on the foreclosure matter. For instance, she testified that foreclosure counsel did not attend any depositions, with the exception of Lucas's deposition; R. at 498.

Foreclosure counsel elected not to attend the trial. Counsel did, however, submit a memorandum in support of the Association's position. In that memorandum, Lona Vest was identified as the sole witness who could or would substantiate the charges owed; R. at 192. . Therefore, even if the foreclosure action is viable, which Lucas denies, the calculations used to determine the amount owed were clearly incorrect as evidenced by the uncontradicted testimony of the property manager, Lona Vest and therefore unsupported by the evidence.

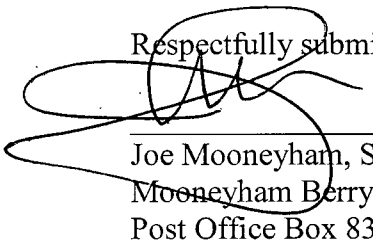
Despite Vest's testimony, the trial court awarded $14,104.08 in late fees and $15,990.78 in interim collection costs, which was exactly the amount requested. On reconsideration, that amount was reduced, but only nominally, by $2,500; R. at 23. If this Court finds that the

foreclosure was appropriate, which Lucas denies, it still should set the fees to which the Association is entitled based on the evidence presented, which evidence does not support the award made at trial.

Conclusion

The Court should rule that the foreclosure against Lucas was filed in bad faith, in an attempt to force Lucas to dismiss or compromise the claims that were pending at the time of the foreclosure against the Bristol Condominium Property Owners Association. In the alternative, the Court should correct the trial judge's award of attorneys' fees on the grounds that the testimony of the sole witness for the foreclosure plaintiff testified at trial that the fees requested in the complaint were incorrect.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies wit Rule 211(b), SCAR.

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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant on The Bristol Condominium Property Owners Association by United States Postal Service, postage prepaid, on February __, 2015, addressed to its attorneys of record, David B. Wheeler and Joseph T. Belton, Post Office Box 22828, Charleston, South Carolina 29413 and K. Michael Barfield and M. Dawes Cook, Post Office Drawer H, Charleston, South Carolina 29402.

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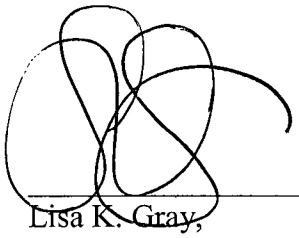

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