

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County
Court of Common Pleas
James C. Williams, Circuit Court Judge

Appellate Case No. 2014-1915

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 as Trustee of the 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 RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THERE IS ANY RECORD EVIDENCE THAT REASONABLY SUPPORTS THE SPECIAL REFEREE'S FACTUAL FINDINGS THAT THE RESPONDENT'S FORECLOSURE ACTION WAS NOT AN ABUSE OF PROCESS?
2. WHETHER THERE IS ANY RECORD EVIDENCE THAT SUPPORTS THE SPECIAL REFEREE'S FACTUAL FINDINGS THAT THE AWARD OF ATTORNEYS' FEES, LATE FEES, AND COLLECTION COSTS IN FAVOR OF RESPONDENT WAS NOT AN ABUSE OF DISCRETION?

STATEMENT OF THE CASE

The Appellants John T. Lucas, Sr.; as Trustee of the John T. Lucas Revocable Trust dated November 10, 2004 and Carolyn C. Lucas as Trustee of the Carolyn C. Lucas Revocable Trust dated November 2004 (“Appellants”) initially filed a lawsuit against Respondent Bristol Condominium Property Owners’ Association (hereinafter referred to as “Respondent” or “Association”) in Charleston County Circuit Court (Case No.: 2010-CP-10-3240) on April 20, 2010, asserting numerous causes of action¹ arising out of the repair to the Bristol condominium complex due to construction defects.

Respondent later commenced its foreclosure action in Charleston County by filing its Lis Pendens, Summons and Complaint (Case No.: 2011-CP-10-2232) on March 25, 2011, seeking a judgment of foreclosure (with deficiency) and money judgment against Appellants based on unpaid assessments levied by Respondent on behalf of the Bristol Horizontal Property Regime (“Regime”). The Appellants subsequently filed an Answer and Counterclaims to Respondent’s foreclosure Complaint on May 9, 2011. The Appellants asserted all of the same causes of action against Respondent in which they had alleged in their earlier filed case on April 20, 2010. However, Appellants also asserted a counterclaim for abuse of process alleging that the foreclosure action was filed in bad faith and was merely retaliation for Appellants filing suit against Respondent on April 20, 2010. Respondent then filed a Reply to the Counterclaims of Appellants on May 26, 2011.

With the consent of all parties, the two actions were consolidated into one under the case number of the earlier filed case, 2010-CP-10-3240. On May 22 and 23, 2013,

¹ The Appellants asserted causes of action against Respondent for conversion, breach of fiduciary duty, forcible entry and detainer, constructive fraud, fraud and misrepresentation, negligence, trespass, nuisance, unjust enrichment, and declaratory judgment.

James C. Williams, Jr., as Special Referee, tried the consolidated actions nonjury. As of trial, the Appellants' only surviving causes of action against Respondent were for negligence, breach of fiduciary duty, fraud/constructive fraud, and abuse of process (bad faith foreclosure). The parties also consented to Respondent presenting its foreclosure case through written submissions to the Court (reference testimony and related exhibits evidencing the assessment fees debt and attorneys' fees and collection costs) in order to minimize attorneys' fees and collection costs in what was expected to be a multi-day trial.

The Special Referee issued a Final Order dated August 1, 2013, finding in favor of Respondent with respect to each of Appellants' causes of action (which included all causes of action against Respondent asserted in case number 2010-CP-10-3240 and counterclaims originally asserted against Respondent in case number 2011-CP-10-2232) ("Counterclaim Order"). In addition, the Special Referee issued a Special Referee Decree filed on September 6, 2013, finding, inter alia, that Respondent's foreclosure action was lawfully filed and that Appellants were obligated to pay Respondent the outstanding assessment fee debt and associated attorneys' fees and collection costs ("Decree"). Subsequently, Appellants filed their Motion for a New Trial and Motion to Alter and Amend the Decree. By Order dated August 11, 2014, the Special Referee granted, in part, the relief requested by Appellants by reducing Respondent's attorneys' fees award, and denying Appellants' Motion in all other respects, thereby upholding all other findings and rulings adopted in the Decree ("Reconsideration Order"). Appellants

filed their Notice of Appeal on September 10, 2014, and their Amended Notice of Appeal on September 22, 2014².

² The Appellants have also appealed the Counterclaim Order. (Appellate Case No.: 2014-118)

FACTS

The Bristol is a fifty-four unit condominium complex located on the Ashley River in Charleston, South Carolina. (R. pp. 782-857). In 2002, Brittlebank Condominiums, LLC, created the Regime by filing a Master Deed recorded in the Office of the R.M.C. for Charleston County in Book D-417, Page 001, as amended. Simultaneously, the Association was formed as a South Carolina nonprofit corporation pursuant to the South Carolina Nonprofit Corporation Act to act as the governing body of the Regime. See S.C. Code Ann. §§ 33-31-101, et seq.

The Appellants purchased Regime Unit 313 (“Property”) as fee simple owners in 2004. (R. p. 146, ¶ 2 and p. 169, ¶ 2). After the Appellants purchased the Property, the Association and certain Bristol property owners (other than Appellants) each initiated separate construction defect lawsuits against the developer of the Bristol on account of water intrusion to numerous Bristol windows and doors. After the construction litigation was settled in October 2009, the Board of Directors of the Association (“Board”) appointed the Bristol Repair Committee to review competitive bids, make recommendations for repairs, and determine how to most efficiently use the funds from the settlement for the repair of the Bristol. Based on the repair quotes obtained by the Repair Committee, on November 1, 2009, the Association voted on and formally approved a special construction assessment for the repair of the Bristol pursuant to the requirements in the Master Deed. (R. p. 795, § 4.4).

The Appellants refused to pay any special assessments associated with the repair of the Bristol. Consequently, Respondent properly referred the matter to its attorney for enforcement and collection in accordance with the Master Deed. On or about

February 24, 2011, the Association filed a Notice of Lien on the Property for the amounts due and owing by Appellants which was recorded at Book 0173, Page 669, RMC Office, Charleston County, South Carolina ("Lien"). (R. p. 148, ¶ 10 and p. 678 and pp. 759-760). Due to Appellants' significant arrearages and continued refusal to pay the delinquent assessments, the Association initiated foreclosure proceedings on March 25, 2011.

Appellants took title to the Property subject to the terms and conditions of the Master Deed. (R. p. 27 and pp. 782-857). The Master Deed, including the Association's Bylaws ("Bylaws") incorporated therein, provides that the Association has the right to file a Lien against the Property, and enforce its lien rights according to South Carolina law, in order to secure payment of delinquent Association assessments. (R. p. 27 and p. 678 and pp. 782-857). The Master Deed provides that all property owners are members of the Association and that they are obligated to pay assessments levied by the Association on the units owned by them. (R. p. 27 and p. 678 and pp. 782-857). The Master Deed also provides that members of the Association are obligated to pay late charges and interest at the rate established by the Board for assessments that are not paid by the due date, as well as reasonable attorneys' fees incurred in the collection of delinquent assessments. (R. p. 27 and p. 678 and pp. 782-857). The Respondent's ability to impose assessments, file notices of lien and foreclose such liens under the Master Deed arises out of the statutory authority provided in S.C. Code Ann. §27-31-10, et seq., the S.C. Horizontal Property Act.

Trial in the consolidated matter came before James C. Williams, Jr., as Special Referee, on May 22, 2013 through May 23, 2013, to take testimony, hear arguments of

counsel for the parties, and to render final judgment³. (R. pp. 216-675). The Special Referee determined that the Appellants did not present a single fact to support their position that the Association and its Board demonstrated bad faith in its management of Association's business affairs. (R. p. 28). The Special Referee found that the greater weight of the testimony demonstrated that the individual acts complained of by Appellants, including, but not limited to the assessments made by the Association were all: (A) based on decisions made by the Association in compliance with the Association's Master Deed and other governing documents and after considering all reasonable options; (B) made by the Association's Board after consulting with legal counsel; and (C) affected all of the Association's property owners equally and were not made with any bias or prejudice towards the Appellants. (R. p. 28).

In particular, the Special Referee determined that the foreclosure action against the Appellants was filed lawfully and on a good faith basis on account of Appellants' refusal to pay assessments lawfully levied in compliance with the Association's Master Deed and other governing documents. (R. p. 4). The Special Referee did not find any evidence that Appellants were singled out by the Association for any dissimilar or retaliatory treatment. (R. pp. 4-5).

In conjunction with the foreclosure, counsel for Respondent proffered his affidavit with respect to the collection costs and attorneys' fees sought to be recovered in this matter. (R. pp. 680-681 and pp. 767-770). Upon due consideration to the Counsel

³ In addition to two days of live testimony from the Appellant John Lucas, Jan Landry, John DeWitt, and Lona Vest, the Special Referee reviewed the deposition transcripts of numerous witnesses including Appellant John Lucas, and reviewed numerous exhibits consisting of, among other things, Respondent's Master Deed, correspondence between Respondent and homeowners, the minutes of Board meetings, repair estimates, cost estimates for windows and doors, and other documentation offered by each party in support of their respective positions, as more fully would appear in the Record of the proceeding. (R. pp. 8-17).

Affidavit and invoices regarding attorneys' fees and the entire trial Record, the Special Referee found that the award of collection costs and attorneys' fees was both reasonable and appropriate in this case. (R. p. 29).

The Special Referee determined that the following sum represented the total debt due (together with the costs and disbursements of this action) to Respondent under the obligations of the Master Deed and Bylaws which includes the reduction in the attorneys' fees award per the Reconsideration Order. (R. p. 21 and p. 30 and p. 679 and pp. 762-766):

a.	<u>Regular Regime Fees:</u>	\$28,093.75
b.	<u>Capital Reserve Contributions:</u>	\$ 4,496.25
c.	<u>Insurance Assessments:</u>	\$ 8,726.98
d.	<u>Special Assessments:</u>	\$42,354.90
e.	<u>Late Fees:</u>	<u>\$14,104.08</u>
	SUB-TOTAL:	\$97,775.96
	LESS: Payments Received:	<u>\$(49,184.92)</u>
	SUB-TOTAL	\$48,591.04
	Interim Collection Costs:	\$15,990.78
	DEBT:	\$64,581.82
	Awarded Attorneys' Fees:	\$ 1,500.00
	TOTAL DEBT:	<u>\$ 66,081.82⁴</u>

⁴ The Special Referee amended the Decree by the Reconsideration Order as follows: 1. The paragraph in the body of the Decree on page 5, awarding \$3,500.00 in attorneys' fees to counsel for the [Respondent], is amended to reduce that award to \$1,500.00; 2. Paragraph 1, on page 5 and page 6 of the Order, whereby the "Total Debt" owed by the [Appellants] is calculated, is amended to reduce the attorneys' fees awarded from \$3,500.00 to \$1,500.00, and therefore the total indebtedness referenced in that paragraph is reduced from \$68,081.82 to \$66,081.82. In all other respects, the [Decree] previously entered in this matter as it relates to the foreclosure action filed as Case No.: 2011-CP-10-2232 shall remain the [Decree] of this Court, with all findings and rulings from that [Decree] adopted hereby and made a part hereof by reference.

Thereafter, the Appellants made payment on the judgment to Respondent in the amount of \$68,206.82. The Respondent then canceled the foreclosure sale of the Property and filed a Partial Release of Judgment and Notice of Lien on February 26, 2014.

ARGUMENTS

This Court should affirm the Special Referee's Order denying Appellants any relief.

A. Record evidence supports the Special Referee's factual findings that Respondent's foreclosure action was not an abuse of process.

The Appellants' abuse of process counterclaim is not an action in equity brought pursuant to S.C. Code Ann. § 27-31-210(a). "The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." Food Lion v. United Food & Commercial, 351 S.C. 65, 567 S.E.2d 251 (S.C. App., 2002); see also Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 210, 153 S.E.2d 693, 695 (1967) ("[A]n abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect—the improper use of a regularly issued process.").

This Court has jurisdiction to freely correct a Special Referee's errors of law on appeal. MicroClean Technology, Inc. v. EnviroFix, Inc., 404 S.C. 207, 217, 744 S.E.2d 210, 216 (Ct. App., 2013). In contrast, this Court must affirm the factual findings of the Special Referee unless no evidence reasonably supports those findings. Jones v. Leagan, 384 S.C. 1, 12, 681 S.E.2d 6, 12 (Ct. App., 2009). As trier of fact, the Special Referee is charged with assessing the credibility, persuasiveness, and weight of the evidence presented. Evatt v. Campbell, 234 S.C. 1, 6, 106 S.E.2d 447, 451 (1959). As such, "it is not the place of [the Court of Appeals] to substitute its own view as to the facts." Jones,

384 S.C. at 13, 681 S.E.2d at 12 (citing United Farm Agency v. Malanuk, 284 S.C. 382, 385, 325 S.E.2d 544, 546 (1985)).

The Appellants argue that because Respondent was not required to foreclose on the Appellants and Respondent did not foreclose on some other Bristol property owners with arrearages, the Special Referee erred in finding the Respondent did not file the foreclosure in bad faith. Because the Appellants only challenge the Special Referee's factual findings, this Court should reject this argument if there is any Record evidence that reasonably supports the Special Referee's contrary factual findings. Again, any Record evidence that shows Respondent acted in good faith in filing its foreclosure against the Appellants is sufficient to defeat Appellants' argument.

The Record contains ample evidence to support the Special Referee's findings that Respondent took all actions pursuant to its duly constituted authority and properly filed the foreclosure action against the Appellants after the Appellants refused to pay Association assessments and regime fees. Importantly, the Appellants do not dispute the fact that Respondent had the right to foreclose on the Property under the terms and conditions of the Master Deed on account of Appellants' failure to pay Association assessments and regime fees.

Moreover, Record evidence supports the Special Referee's finding that Respondent did not foreclose on the Appellants in bad faith. First, the Appellants admit they owed arrearages on Association assessments/regime fees. (R. p. 296, line 15). Second, Respondent has procedures it uses to collect arrearages, and on occasion, it files foreclosures on delinquent Bristol property owners. (R. pp. 553-556). Third, there is no evidence that the Respondent targeted the Appellants for foreclosure. Rather, when

asked directly, Respondent adamantly denied that it targeted the Appellants. (R. p. 556, lines 13-15). Further, Respondent provided a reasonable explanation as to why it did not foreclose on other Bristol property owners who were also in owed arrearages at the same time the Appellants' unpaid bills were accruing and explained how the Respondent considers each delinquency on a case by case basis in operation of its business judgment. (R. pp. 553-556). There is, therefore, Record evidence that Respondent's foreclosure action against Appellants was not an abuse of process. For these reasons, this Court should affirm the Decree.

B. Record evidence supports the Special Referee's factual findings that the award of attorneys' fees, late fees, and collection costs was not an abuse of discretion.

In this matter, the Appellants argue that the Special Referee erred by finding that the award of attorneys' fees, late fees, and collection costs represents an abuse of discretion. Specifically, the Appellants argue that the \$1,500.00 in fees awarded in this case was not supported by the evidence presented.

The general rule is that attorneys' fees are not recoverable unless authorized by contract or statute. Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). "Restrictive covenants are contractual in nature." Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974); see also Seabrook Island Property Owners Ass'n v. Pelzer, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct.App.1987) ("Restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract."). Such is the case under a master deed pursuant to which a purchaser such as the Appellants takes title.

“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.” Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989). “Where an attorney’s services and their value are determined by the trier of fact, an appeal will not prevail if the findings of fact are supported by any competent evidence.” Id. There are six factors to consider in determining an award of attorneys’ fees: 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. Blumberg, 310 S.C. at 494, 427 S.E.2d at 660. On appeal, an award of attorneys’ fees will be affirmed so long as sufficient evidence in the record supports each factor. Id. “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).

In Seabrook Island Property Owners’ Association v. Berger, Berger appealed the trial court’s award of attorneys’ fees in favor of Seabrook Island Property Owners’ Association (“SIPOA”). See 616 S.E.2d 431, 365 S.C. 234 (2005). The case arose out of a dispute between Berger, who was a resident of Seabrook Island, and SIPOA. Id. The dispute began in 1997 when SIPOA notified Berger that his floating dock and unkempt yard violated SIPOA’s covenants, thereafter alerted him to numerous other violations and informed him of assessments he was incurring for failing to remedy the problems. Id. After Berger neglected to correct the violations, SIPOA referred the matter to its attorney for enforcement and collection. Id. SIPOA eventually filed suit against Berger seeking

recovery of assessments levied for violations of the covenants. Id. The trial judge granted SIPOA recovery of outstanding assessments and attorneys' fees and costs. Id.

The trial judge's order analyzed SIPOA's contractual basis for recovery of attorneys' fees under Seabrook's protective covenants and bylaws which binds all property owners in Seabrook. Id. In addition, the trial judge considered the six factors enumerated in Blumberg in concluding the attorneys' fees were reasonable and customary. Id. Based upon the written findings of the trial court and a review of the record, the appeals court found that the trial court did not abuse its discretion in determining the amount of attorneys' fees and costs. Id. The appeals court determined that there was no evidence that the award was excessive or punitive in nature. Id.

In this case, the Record contains ample evidence to support the Special Referee's award of attorneys' fees and costs. First, the Special Referee determined that collection costs and attorneys' fees are recoverable by Respondent under the terms and conditions of the Master Deed. (R. p. 768, ¶ 2 and p. 794, § 4.1 and pp. 795-796, § 4.6). In addition, the Special Referee considered the Blumberg factors in determining the reasonableness of the award based on the Counsel Affidavit proffered for Respondent. (R. pp. 680-681 and pp. 768-770).

In support of the award of collection costs and attorneys' fees, the Special Referee considered the nature, extent and difficulty of the legal services rendered, the professional standing of counsel for Respondent and the beneficial results obtained by Respondent. (R. p. 29 and pp. 768-770). The Record evidences that prior to the trial, numerous hours were expended on behalf of the Respondent in litigation and settlement negotiations, which was attributable to the foreclosure action filed by Respondent and Respondent's

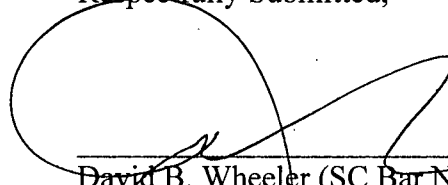
defense of Appellants' claims. (R. p. 29 and pp. 768-770). The Special Referee also noted counsel's good professional standing in this area of practice and that the case has been pending since March 25, 2011. (R. p. 29 and pp. 768-770).

The record contains ample evidence to support the Special Referee's award of attorneys' fees and costs, and therefore, the Special Referee's findings with respect to the award of attorneys' fees and costs in favor of Respondent was not an abuse of discretion. For these reasons, this Court should affirm the Special Referee's attorneys' fees and costs award.

CONCLUSION

The Appellants' attempt to re-state their view of the facts of this case is insufficient to sustain their appeal because all of the Special Referee's factual findings are reasonably supported by record evidence. For these reasons, this Court should affirm the Special Referee's judgment of foreclosure and award of attorneys' fees and costs.

Respectfully Submitted,



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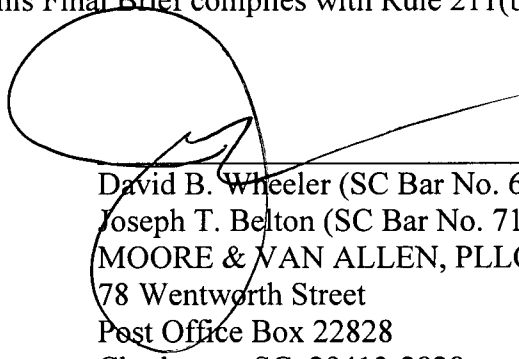
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The Bristol Condominium Property Owners' Association, Counterclaim Defendant.

CERTIFICATE OF COUNSEL

This is to certify that this Final Brief complies with Rule 211(b), SCACR.

February 10, 2015.



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PROOF OF SERVICE

This is to certify that I have this day served counsel for the Appellant in the
foregoing matter with a copy of the foregoing **FINAL BRIEF OF RESPONDENT** by
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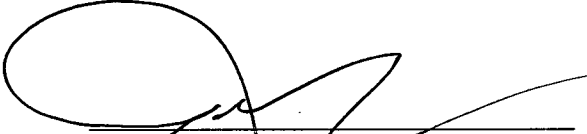
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