

THE STATE OF SOUTH CAROLINA
IN THE Supreme COURT

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APPEAL FROM RICHLAND COUNTY MAR 23 2015
Court of Common Pleas

Allison R. Lee, Circuit Court Judge **S.C. Supreme Court**

Case No. 07-CP-40-8107
Appellate Case No. 2013-001980
Court of Appeals Opinion No. 2013-UP-237

**On Writ of Certiorari
to the South Carolina Court of Appeals**

Place on the Greene Homeowners Assoc., Inc., Petitioner,

v.

W.G.R.Q., LLC, Easy Coin Laundry, Inc.,
Eva Nell Berry, and Jeffrey O. Kenney, Respondents.

REPLY BRIEF OF PETITIONERS

William M. Spillane
S.C. Bar No. 5284
P. O. Box 23037
Columbia, SC 29224
(803) 699-0901

James B. Richardson, Jr.
S.C. Bar No. 4718
1229 Lincoln Street
Columbia, SC 29201
(803) 799-9412

Attorneys for Petitioner.

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ARGUMENT IN REPLY

A. The respondents offer no evidence of prejudice.

Clichés such as “bait and switch” are no substitute for evidence of *prejudice*, an essential element of the laches defense. There is no evidence that any of the respondents paid more than fair market value. There is no evidence that any paid a premium in the hope of profit from future violation. They acknowledge that they made no improvements in reliance.¹

The respondents point to no evidence of prejudice.

B. The non-waiver provision gives protection in the face of slowly escalating violations. The respondents are silent about the statutory policy of strict enforcement.

Violations by the developers began early on, but have gotten slowly worse. The first violation was a laundromat in Stoneburner’s Unit A. Laundromats typically do not generate the kinds of objectionable behavior described in the record of this case. After a shoe store, a jeweler, and several short-lived restaurants, Powell rented Units F and G to the Blue Cactus restaurant in 1994. Although in violation of the restriction, the Blue Cactus closed at 10:00 p.m. [R. 142] and served no alcohol. [R. 180/15-17; R. 193/5-15.] There is no evidence that any of its short-lived predecessors — Drake’s Duck-In, or Bo-D’s — did either.

This progression culminated with a bar, Tavern on the Greene, in Units B, C, and D, and a restaurant, Pita Pit, in Unit A, both opening in 1999. Tavern on the Greene was not a “restaurant and bar,” as the respondents describe it. *It was a bar.*² The two new

¹ In the principal case upon which the respondents rely, the defendants made \$43,000 in improvements in reliance upon past non-enforcement. *Rabon v. Mali*, 289 S.C. 37, 344 S.E.2d 608 (1986). *Accord: Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344-45, 415 S.E.2d 384, 387-88 (1991) (waiver where regime failed to seek enforcement against a known violation until after a substantial amount spent on improvements).

² *See: JOK, Inc., d/b/a Tavern on the Greene v. South Carolina Dep’t of*
(continued...)

violators both stayed open until the wee hours. These operations generated a whole new level of obnoxious conduct, incompatible with residential use of the other sixty-three apartments.

In one of this Court's first cases involving restrictive covenant violation, the Court found that "violation of some of the restrictions by some of the purchasers of lots in the [subdivision], without action by [the plaintiff owner], does not affect his right to enforce the restrictions against the respondents." *Pitts v. Brown*, 215 S.C. 122, 132, 54 S.E.2d 538, 543 (1949). The Court observed this about escalating violations:

Nor does the failure of the appellant to object to the small, petty businesses above mentioned bar him from objecting * * *. It is a matter of common knowledge and human experience that if the restrictive bars are let down in this case, the business encroachment on the remainder of the subdivision would be a matter of gradual yet steady development, against which the home owners would be helpless, and the benefits and protection of the restrictive covenants would eventually be entirely lost.

Id.

The Master Deed provides that a failure to enforce the restrictive covenant is not a waiver of the right to enforce thereafter. The respondents say that waiver applies at law, laches applies in equity, and this is an equity case. Apparently the contention is that the non-waiver provision plays no role in the laches calculus of the equity court. On the contrary, both waiver and laches originated in the *equity* court. Waiver, like laches, has "worked over into law and [is] now regularly used in purely legal cases, along with equitable defenses generally." DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.3, p. 44 (1973).

Again trying to avoid the non-waiver provision, the respondents cite dicta in a 1976

²(...continued)
Revenue, S.C.A.L.C. Docket No. 09-ALJ-17-0010-CC (5/29/2009). The Association had been told that Tavern on the Greene would be a restaurant serving, for example, "a glass of wine with a meal". [R. 180/19 – 181/5.] When Mr. Powell had tried earlier to soften the ban on bars, he promised that no beer or wine would be sold without food consumption. [R. 340, "New Business."] Even this proposal failed to be accepted.

decision, *Circle Square Co. v. Atlantis Devel. Co.*, 267 S.C. 618, 628, 230 S.E.2d 704, 708 (1976), to the effect that waiver is an affirmative act while laches is passive. The apparent contention is that the Homeowners' Association never "affirmatively" permitted violations, and hence never actually waived them. No waiver, no non-waiver provision. The Court in *Circle Square* had in mind *express* waivers when it characterized waiver as affirmative. Waivers are often implied, stemming from silence or failure to act. See, e.g., *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 415 S.E.2d 384 (1991). The focus of the respondents' laches defense is not that the Association waited too long to sue *them*, but that it waived a progression of earlier violations of the restriction — the "bait and switch" contention. The laches defense here is built upon waivers in the case of prior owners. None of these waivers had future significance perforce the non-waiver provision.

The respondents say that if a non-waiver provision is honored, the equity court's discretion is foreclosed and the plaintiff *always* wins. On the contrary, the equity court weighs the equities before enjoining any violation, *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 680 S.E.2d 289 (2009), as the circuit court acknowledged and did here.³ [R. 7, ¶ 9.]

The respondents say that people expect that "lawful use" will be allowed to continue. Condominium restriction violations are *not* lawful use. They are declared *unlawful* by Section 27-31-170. The respondents' brief is entirely silent on this point.

The failure to enforce the restriction against a laundromat or a shoe store or a

³ Circuit court gave no special treatment to this request to enforce a restrictive covenant, although our courts have done so in the past. *Siau v. Kassel*, 369 S.C. 631, 632 S.E.2d 888, 893 (Ct. App. 2006), citing *Houck v. Rivers*, 316 S.C. 414, 418, 450 S.E.2d 106, 109 (Ct. App. 1994), where the court stated:

Although an injunction, like all equitable remedies, is granted as a matter of sound judicial discretion, and not as a matter of legal right, *Metts v. Wenberg*, 158 S.C. 411, 155 S.E. 734 (1930), the right of a plaintiff to an injunction to enforce restrictive covenants has long received special treatment. See *Sprouse v. Winston*, 212 S.C. 176, 46 S.E.2d 874 (1948) * * * .

jewelry shop is not a waiver of the right to put a stop to all-night bars and restaurants. If the respondents can ignore the restriction with this level of detriment to everyone else, there is nothing to stop all eight of the commercial units being converted to all-night bars and restaurants. See: *Pitts v. Brown, supra*.

C. The remaining points raised by the respondents are unsupported.

1. *Rabon v. Mali*.

The respondents' principal reliance is upon the case of *Rabon v. Mali*, 289 S.C. 37, 344 S.E.2d 608 (1986). *Rabon* is a textbook on reasons why a restrictive covenant might not be enforced — reasons entirely absent here. In *Rabon* a commercial building was situated mainly on two lots which were free of restriction. However, the back end of the building slightly encroached upon a third lot — Lot 50 — restricted to residential use. After twenty-five years of commercial use of the building without objection, subdivision residents sought to enjoin commercial use of the portion of the building encroaching upon Lot 50. The court found that laches barred the action. In weighing the equities, the court noted five aspects of the facts. First, the new owner of the building had spent \$43,000 on improvements in reliance. An injunction would cause "grave hardship and financial detriment" to the new owner. Second, commercial use of the portion of the building encroaching upon Lot 50 had no impact upon the residential character of the subdivision since vacant Lot 51 served as a buffer between Lot 50 and the residences of the subdivision. Third, *most* of the building was situated on lots not restricted to residential use but fronting on a busy four-lane boulevard. Fourth, the character of the surrounding neighborhood was changing because of the recent influx of businesses. Fifth, an injunction would confer "no substantial benefit or value" upon the residential owners of the subdivision.

The case at bar has nothing in common with *Rabon v. Mali*. An injunction in *Rabon* would have sterilized the small portion of the building on restricted Lot 50, rendering it useless, while gaining the plaintiffs nothing. By contrast, the injunction here only returns

the commercial units to the uses allowed by the Master Deed.

2. "Windfall."

The respondents contend that a new purchaser of one of the sixty-three residential units would get a "windfall" if the restriction were to be enforced, thereby increasing the value of the residential units. This is a way of acknowledging the depressive financial effect on the sixty-three residential units caused by the violations at issue.

3. "Free use."

The respondents recite the rule that free use of land is favored, so that restrictions on use are strictly construed.⁴ There is nothing here to construe. Restaurants, bars, and other businesses dependent upon a walk-in trade are prohibited.⁵ The respondents have acknowledged from the start that they are in violation. Their defense is that unrelated others before them were not stopped from often less-serious violations of a clearly written restriction. This has nothing to do with the policy of free use.

4. *Arizona cases.*

The respondents say that this Court should pay no attention to Arizona cases because in Arizona covenants are construed according to the intent of the parties. The same is true here. *RV Resort and Yacht Club Owners Assoc. v. BillyBob's Marina, Inc.*, 386 S.C. 313, 320, 688 S.E.2d 555, 559 (2010), citing *Taylor v. Lindsey*, 332 S.C. 1, 4, 498

⁴ The policy favoring free use of land never rightly applied to condominium regimes, which depend for their very existence upon restriction of use. See, e.g., *Circle Square Co. v. Atlantis Devel. Co.*, 267 S.C. 618, 630, 230 S.E.2d 704, 709 (1976) ("[T]he success of [Hilton Head's] development is due in no small part to careful planning of development and enforcement of that planning through restrictive covenants. All the property owners have a vested interest in the continued enforcement of the covenants applicable to the subdivisions on the Island, for upon them largely depend the values of their property."). In Section 27-31-170, the General Assembly has adopted a policy of strict enforcement of condominium restrictions. The case at bar presents no occasion to explore the continued vitality of a policy favoring free use of land generally in modern society.

⁵ "[A]s pointed out in *Sprouse v. Winston*, 212 S.C. 176, 46 S.E.2d 874, the rule of strict construction has no application where, as here, there is no ambiguity and the meaning of the parties has been clearly expressed." *Archambault v. Sprouse*, 218 S.C. 500, 508, 63 S.E.2d 459, 462 (1951).

S.E.2d 862, 863 (1998) (“Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document.” quoting *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 336 S.E.2d 15 (1985)).⁶

5. “Unworkable.”

The respondents say that the restrictive covenant is “unworkable.” The first business to open in the commercial units — a hair salon in Units C and D [Tr. 88] — complied with the restriction. Salons typically operate by appointment and do not cater to “a volume of walk-in patrons”. [Master Deed, Art. X § 3, R. 284.] The salon is one of a multitude of business types consistent with the restriction. The marketplace dictates that *the rent* normally decides what is “workable” and what is not. There is no evidence that the restriction is “unworkable” today — only the implied premise that violation is more lucrative than compliance.⁷

⁶ Accord: *Hardy v. Aiken*, 369 S.C. 160, 631 S.E.2d 539 (2006); *South Carolina Dep’t of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001); *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987); *Hynes Family Trust v. Spitz*, 384 S.C. 625, 682 S.E.2d 831, 833 (Ct. App. 2009); *Houck v. Rivers*, 316 S.C. 414, 450 S.E.2d 106 (Ct. App. 1994); *Seabrook Island Property Owners Assoc. v. Pelzer*, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct. App. 1987).

⁷ If the owners were dissatisfied with the market for permitted uses, these units could easily be converted to residential use, like their twins across the hall, if the other owners agreed.

CONCLUSION

For these reasons and those given in its principal brief, the petitioner again asks the Court to reverse and to reinstate the judgment of the court of common pleas.

Respectfully submitted,

William M. Spillane
S.C. Bar No. 5284
P. O. Box 23037
Columbia, SC 29224
(803) 699-0901

James B. Richardson, Jr.
S.C. Bar No. 4718
1229 Lincoln Street
Columbia, South Carolina 29201
(803) 799-9412

by: James B. Richardson, Jr.
Attorneys for Petitioner.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the reply brief of petitioner, Place on the Greene Homeowners Assoc., Inc., by first class mail, postage prepaid, on March 23, 2015, addressed to respondents' attorneys at their addresses of record, namely:

Blake A. Hewitt, Esq.
John S. Nichols, Esq.
Bluestein Nichols Thompson Delgado
P. O. Box 7965
Columbia, SC 29202


James B. Richardson, Jr.
Attorney for Petitioner.

March 23, 2015.