

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT  
CASE NO.: 2010-CP-10-10490

I'ON ASSEMBLY, INC.; BRAD J. )  
WALBECK, AND LEA ANN ADKINS, )  
INDIVIDUALLY AND DERIVATIVELY )  
ON BEHALF OF THE I'ON ASSEMBLY, )  
INC., )

Plaintiffs, )

vs. )

THE I'ON COMPANY, LLC; THE I'ON )  
CLUB, LLC; THE I'ON GROUP, LLC )  
F/K/A CIVITAS, LLC; and I'ON )  
REALTY, LLC, )

Defendants: )

**ORDER DECLARING THE INVALIDITY  
OF THE 2000 RECREATIONAL  
EASEMENT**

FILED  
2015 JUL 16 AM 10:07  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY           

**ORDER**

THIS MATTER CAME BEFORE THE COURT on September 3, 2014, upon cross-motions filed by the parties at the conclusion of trial requesting that the Court issue a judgment as to Defendants' equitable claim for declaratory judgment regarding the validity of the 2000 Recreational Easement. Specifically, the declaratory action concerns the validity of a "Recreational Easement and Agreement to Share Costs" dated February 9, 2000 (hereinafter referred to as the "2000 Recreational Easement").

At the September 3, 2014 hearing, Plaintiffs, the I'On Assembly, Inc., Brad Walbeck and Lea Ann Adkins, individually, and derivatively on behalf of the I'On Assembly, Inc. (hereinafter collectively referred to as "Plaintiffs"), were represented by attorneys, Justin Lucey, Joshua

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Evans and Dabny Lynn; Defendants, the I'On Company, LLC, the I'On Club, LLC, the I'On Group, LLC f/k/a Civitas, LLC and I'On Realty, LLC (hereinafter collectively referred to as "Defendants") were represented by attorneys, Brian Duffy, Rutledge Young, and Seth Whitaker; and re-aligned Plaintiff the I'On Assembly, Inc., was represented by attorney Tim Bouch.

Having reviewed the submissions of the parties and having heard the oral arguments presented by counsel, this Court declares the 2000 Recreational Easement invalid and void *ab initio*.

### **SUMMARY OF PERTINENT FACTS**

#### **A.) Overview of Present Case**

The background of this dispute was aired at length during the trial of this matter and will not be repeated herein except as necessary for purposes of this Order. The factual background of this matter is set forth at length in the Court's Order Denying the I'On Defendants' Motion for JNOV.

#### **B.) The 2000 Recreational Easement**

On February 9, 2000, the I'On Club, LLC, the I'On Company, LLC, and the I'On Assembly (then controlled by the Defendants) executed a document entitled "Recreational Easement and Agreement to Share Costs" which purported to grant the parties a perpetual right to use and access certain amenities located on civic lots within the I'On neighborhood.

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Specifically, in the 2000 Recreational Easement, the I'On Club, LLC purported to grant the Assembly and its members perpetual use and access of the "Community Dock" and associated boat ramp as well as perpetual use and access of a corresponding parking lot, including the perpetual right to temporarily park vehicles and boat trailers in the parking lot for up to 12 hours. In the same document, the Assembly purported to grant the I'On Club and its members the perpetual right to use and access "East Lake" and the "Athletic Field" through consenting to a grant of easement by the Developer (The I'On Company, LLC).

When the 2000 Recreational Easement was executed, however, the I'On Club did not own the Community Dock, boat ramp, and parking lot. Further, regarding the East Lake and Athletic Field easement, it is undisputed that the Developer controlled the Assembly at the time the Assembly allegedly consented to the Developers' grant of the East Lake easement to the Club.

Significantly, only one individual, Joe Barnes, a general agent for the I'On Defendants, executed the 2000 Recreational Easement on behalf of all three interested parties. Mr. Barnes signed the 2000 Recreational Easement in his capacities as (1) Manager of the I'On Company; (2) Manager of the I'On Club; and (3) President of the I'On Assembly.

Additionally, although the 2000 Recreational Easement purported to provide the foregoing "perpetual" rights, Section 4.2 of the Easement limits its terms to thirty (30) years, superseding any "perpetual" language referenced in the Easement's other provisions.<sup>1</sup>

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<sup>1</sup> Where general and specific terms of a contract are inconsistent, the inconsistency is resolved in favor of the more specific terms in the contract. In other words, the specific terms control and the meaning of the general terms are restrained or superseded by the specific. *Southern Ry. Co. v. Columbia Compress Co.*, 280 F. 344, 348 (4<sup>th</sup> Cir. 1922); *State v. Williams*, 33 S.C.L. 474, 476-77 (Ct. App. 1848); 17A C.J.S. Contracts § 416 (June 2014).

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## LEGAL DISCUSSION

Based on the evidence presented and a plain reading of the 2000 Recreational Easement, this Court finds the 2000 Recreational Easement invalid for several reasons.

### **A.) The 2000 Recreational Easement is Invalid Because the Granting Party Did Not Own the Subject Property at the Time of Execution**

The 2000 Recreational Easement is invalid as a matter of law. The F'On Club did not own the relevant property when the Easement was executed. Under South Carolina law, the granting party must, at the time of the granting, own the property over which the easement is granted. *See, e.g., Moore v. Reynolds*, 285 S.C. 574, 578, 330 S.E.2d 542, 545 (Ct. App. 1985); *Guy v. Guy*, 2008 M.E.141, 955 A.2d 212, 215 (2008); *Sakonnet Point Marina Ass'n, Inc. v. Bluff Head Corp.*, 798 A.2d 439, 442 (R.I. 2002); *Trahms v. Starrett*, 34 Cal.App.3d 766, 110 Cal. Rptr. 239, 242 (1973); *Stilbell Realty Corp. v. Cullen*, 352 N.Y.S.2d 656, 658 (1974).

In *Moore*, William Reynolds brought an action to prevent Robert Moore from obstructing his right-of-way over an easement granted by their predecessors in title. *Moore*, 285 S.C. at 575. On appeal, Moore conceded an easement existed but contested the location of the easement as determined by the master. *Id.* at 577. In determining the location of the easement the court factored into its consideration which portion of the land was owned by the grantor at the time the easement was created. *Id.* at 578. In considering this, the court stated, "[T]he easement necessarily had to have been granted upon property owned by [the predecessor] in 1926." *Id.* The court concluded it could not accept Moore's assertion of the

location because that would require the court to conclude that the predecessor granted an easement over land she did not own. *Id.*

Thus, as *Moore* indicates, an easement cannot be granted over land the grantor does not own, and because the I'On Club did not own the property subject to the 2000 Recreational Easement, the Easement is invalid. Indeed, the 2000 Recreational Easement was signed and recorded in February 2000, over six (6) months before the I'On Club acquired title to the Community Dock property from the I'On Company. Accordingly, the 2000 Recreational Easement is invalid as a matter of South Carolina law, and thus, void *ab initio*.

**B.) The Assembly's Purchase of the Amenity Property Created a Merger and Subsequent Termination of the Easement.**

When the Assembly acquired the Boating Facilities as part of the 2014 settlement with 148 Civitas, the easement regarding the Boating Facilities merged into the Assembly's title to the property.

According to South Carolina jurisprudence, if an entity owns the property over which an easement exists and serves, the easement is terminated. *Haselden v. Schein*, 167 S.C. 534, 166 S.E. 634 (1932). As such, the terms of the 2000 Recreational Easement purporting to grant the Assembly a right to use and access the amenity property upon which the Community Dock, boat ramp, and parking lot are located, were effectively terminated when the Assembly acquired title to this property in accordance with the Settlement Agreement. See *Windham v. Riddle*, 370 S.C. 415, 419, 635 S.E.2d 558, 560 (Ct. App. 2006) *aff'd*, 381 S.C. 192, 672 S.E.2d 578 (2009) (holding that an easement cannot exist where both the purported servient and dominant estates are owned by the exact same person).

Given the effective termination of these Easement provisions, this Court finds these terms are no longer valid.

### EQUITABLE CONCERNS

The testimony and evidence presented at the trial of this case repeatedly referenced the Easement's ambiguous terms, its non-perpetual interpretation, and its conflicted execution by the same individual, Joe Barnes, for three I'On entities. The jury considered this evidence and implicitly recognized the invalidity of the Easement in light of the Developers' fiduciary relationship with the Assembly. *See Wilson v. Wilson*, 117 S.C. 454, 117 S.E. 330 (1921) (“[W]herever a fiduciary relation exists between two persons and a business transaction occurs between them, as a result of which the superior party obtains a possible benefit, equity raises a presumption against its validity, throwing the burden upon him to prove his good faith.”).

While this lack of an arms-length Easement transaction and the Easement's ambiguous terms alone are sufficient to give this court pause, other concerns come into play when Defendants seek the benefit of equitable relief. For example, several times in March of 2009, Defendants reiterated to the Assembly their intention to transfer the amenity property to the Assembly, all while negotiating the sale of CV6 and CV5 (the parking area serving CV6) with third-party for-profit entity Civitas. As the sale actually occurred in August of 2009, it certainly appears that the I'On Defendants made the March 2009 representations in an effort to keep the Assembly and concerned homeowners at bay.

Simply put, the Defendants cannot rely on equitable principles when the evidence, and the jury's verdict, demonstrate that Defendants acted inequitably. The record reflects that

Defendants were aware that the I'On Club did not hold title to the amenity property when the 2000 Recreational Easement was executed, and thus, Defendants are barred from using an equitable doctrine to "ratify" a defective, ineffective instrument. Specifically, Defendants are estopped from utilizing the After-Acquired Title Doctrine because Defendants' employee signed the 2000 Recreational Easement on behalf of all parties while on notice that the I'On Club was not the legal title holder. *See, e.g., Noronha v. Stewart*, 199 Cal.App.3d 485, 491 (1988) ("[b]ecause [the common law after-acquired title doctrine] is based upon estoppel, it does not apply in favor of a grantee who has notice or knowledge that the grantor does not have the full title which he purportedly conveyed.").

Additionally, the Doctrine of Unclean Hands precludes Defendants from relying upon equitable principles such as the After-Acquired Title Doctrine because, in order to recover in equity, one must act equitably. *Wilson v. Landstrom*, 281 S.C. 260, 266 315 S.E.2d 130, 134 (Ct. App. 1984). In the trial of the underlying matter, the jury found that Defendants acted unfairly, and thus, inequitably, in carrying out the fiduciary duties they owed the Assembly. The jury's verdicts further reflect that the I'On Defendants violated certain disclosure and anti-fraud provisions of the Interstate Land Sales Act and misrepresented the availability, accessibility, and future ownership of community amenities to Plaintiffs on multiple occasions by varied means of communication for one primary purpose – profit. Thus, the Court declines to apply the equitable doctrine of after-acquired title for their benefit.

During the course of this action, both 148 Civitas and the Assembly's counsel have represented to the Court that it was their intent and understanding that the Assembly had a perpetual easement to use all of the Boating Facilities located on the Club Property pursuant to the 2000 Recreational Easement. The I'On Defendants have also taken this position.

Nonetheless, the individual Plaintiffs, initially acting derivatively on behalf of the Assembly, sought to have the 2000 Recreational Easement declared invalid, as their theory - - from the outset of this litigation - - was that the promised amenities were to be **conveyed** to the Assembly. Limited access to the deep water and dock closures on the week-ends during Civitas events were not part of the bargain.

This tension between the Assembly leadership and the individual Plaintiffs who brought suit derivatively is emblematic of the problems the individual homeowner members of the Assembly faced in their attempts to have the Assembly take action regarding Defendants' obligations to convey the promised amenities. Prior to the first trial of the case, Assembly counsel sat with the I'On and Civitas Defendants' during the striking of the jury. It was only late in the day on the third day of trial, during the testimony of the Assembly President, Ms. Bedell, that the Court and Defendants learned that the Assembly Board had met the weekend prior to trial and voted to "realign" itself with the Plaintiffs in support of their claims against the I'On Defendants regarding the breach of their obligations to convey the promised amenities to the Assembly. The individual/derivative Plaintiffs' view of the validity and intended duration of the easement was not contrary to the interests of the Assembly - - their claim was always that the I'On Defendants represented that the "Creekside Park," "Community Dock," and the Community Dock's associated parking and boat ramp were to be conveyed to the Assembly. It was not until the "realignment" that the Assembly agreed.

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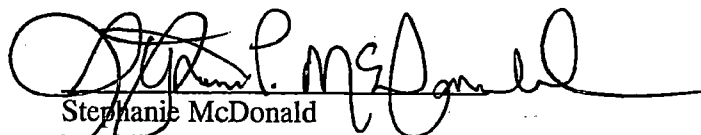
**CONCLUSION**

In sum, because (a) the P'On Club did not hold title to the amenity property over which the 2000 Recreational Easement was granted at the time the Easement was executed; (b) the "perpetual" terms of the 2000 Recreational Easement are ambiguous; (c) the 2000 Recreational Easement was not an arms-length transaction; (d) the 2000 Recreation Easement was not in the best interest of the Assembly; and/or (e) the provisions of the 2000 Recreational Easement are effectively terminated, this Court declares the 2000 Recreational Easement invalid and void *ab initio* under South Carolina law.

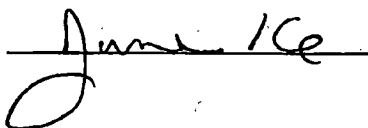
Accordingly, it is hereby:

ORDERED, ADJUDGED, and DECREED that the 2000 Recreational Easement in invalid and void *ab initio*.

AND IT IS SO ORDERED!

  
Stephanie McDonald  
Presiding Judge, Ninth Judicial Circuit

Charleston, South Carolina

, 2015