THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Commons Pleas

R. Markley Dennis Jr., Circuit Court Judge

Opinion No. 2015-UP-391 (S.C. Ct. App. Filed August 5, 2015)

Cambridge Lakes HOA,..... Respondent,

v.

Johnson Koola,.....Appellant.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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III. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT BECAUSE THERE IS NO EVIDENCE THAT RESPONDENT BREACHED ITS FIDUCIARY DUTY

IV. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT AS IT DID NOT DECIDE ANY ISSUES OF FACT

STATEMENT OF THE CASE

This case centers on whether a condominium owner may avoid the payment of dues and assessments to the condominium homeowner's association by claiming the association breached its fiduciary duties to him and engaged in a civil conspiracy against him when it instituted legal action to recover the delinquent dues and assessments.

Respondent Cambridge Lakes Homeowners Association[1] (the "HOA" or "Respondent") filed suit in Charleston County Small Claims Court for unpaid monthly regime fees and late charges on July 29, 2010 owed by Petitioner Johnson Koola ("Koola" or "Petitioner") in the amount of two thousand nine hundred twelve dollars and three cents ($2,912.03). Koola filed a form answer with the box checked indicating he contested the claim, but did not state in the Answer that he did not owe the money. On the same day, Koola filed a document entitled "Summons," which was not a summons

[1] The HOA is incorporated under South Carolina law as a non-profit corporation and its official name is Cambridge Lakes Condominiums Homeowners Association, Inc.

but more of a letter to the Court wherein he asked the Court to remove the case to Circuit Court where a foreclosure action filed by his mortgage company was already pending on the same property. A *lis pendens* was placed on the property by the mortgage company when that suit was filed. *See Bank of America, N.A. v. Koola, et al.*, 2010-CP-10-6060.[2]

By October 13, 2010, Koola had obtained an attorney, who filed a motion to transfer the case to Charleston County Circuit Court, where the foreclosure action against Appellant was pending.[3] Koola filed a Counterclaim against the HOA on November 3, 2010, alleging Civil Conspiracy and Breach of Fiduciary Duty, seeking damages in excess of one hundred thousand ($100,000.00) dollars. The case was sent to the Court of Common Pleas by the Small Claims Court Judge. On January 11, 2011, the HOA filed a Motion to Dismiss the Counterclaims since they were already asserted in the Circuit Court case. Koola filed a *pro se* response to the Motion on the grounds that the counterclaims in the foreclosure suit were totally separate matters than those in this case. The HOA filed a Motion for Summary Judgment as to Appellant's counterclaims on August 1, 2012. Koola filed a Motion to Compel discovery from the HOA and a Motion for Summary Judgment on August 15, 2012.[4] The parties appeared before the Honorable R. Markley Dennis on November 6, 2012. Judge Dennis issued an order on November 14, 2012, informing the parties he was taking the motion under advisement. On March 4, 2013, the court issued a Form 4 Order granting the HOA's Motion for Summary Judgment and rendering Koola's Motion to Compel moot. A written Order was entered

[2] Bank of America was granted summary judgment in this case on April 25, 2014. Koola is appealing that decision as well. *See* Appellate Case No. 2014-001323.

[3] Attorney Melinda Lucka also filed a Notice of Appearance on October 13, 2010. Attorney Shawn French then filed a Notice of Appearance on behalf of Appellant, on September 30, 2011, substituting Ms. Lucka as Appellant's counsel. On July 3, 2013, Mr. French was relieved as counsel. Appellant has since proceeded in this litigation *pro se.*

[4] Appellant subsequently withdrew his Motion for Summary Judgment. (R. p. 129).

on March 15, 2013. The court held there was no evidence to support Koola's claim that the HOA conspired against him in seeking to collect his unpaid fees or that the HOA Board of Directors did not act in the best interest of the HOA by pursuing a construction defect case to correct problems with the building. Koola filed a Motion to Reconsider on April 5, 2013, which was denied on June 18, 2013.

Koola appealed to the South Carolina Court of Appeals on July 17, 2013. On appeal, Koola argued that the Circuit Court erred in granting summary judgment and dismissing Koola's counterclaims against the HOA. On August 5, 2015, in an unpublished opinion pursuant to Rule 220(b), SCACR, the Court of Appeals affirmed the Circuit Court's grant of summary judgment to Respondent, finding (1) no error in granting summary judgment when discovery was not completed because Koola did not demonstrate that additional discovery was warranted; (2) no error in granting summary judgment because no genuine issue of material fact existed and that as a matter of law, Koola could not demonstrate the HOA was involved in a civil conspiracy against him or that it breached its fiduciary duty. *Cambridge Lakes Homeowners Ass'n v. Koola*, Op. No. 2015-UP-391 (S.C. Ct. App. filed August 5, 2015) (per curiam). The Court of Appeals denied the petition for rehearing on October 23, 2015.

STATEMENT OF FACTS

This case derives from Koola's failure to pay his condo fees and assessments to the HOA. Koola's last payment occurred on October 23, 2009. Koola purchased his condominium located at 1587 Cambridge Lakes Drive, Unit 208 in Charleston, South Carolina (the "Condo"), on February 24, 2004, which is evidenced by a deed recorded in the Charleston County RMC Office (R. pp. 194-199). The Condo is a part of the

Cambridge Lakes Horizontal Property Regime ("HOA"). Koola is a member of the HOA. Section Seventeen of the Master Deed established the operation and administration of Cambridge Lakes Condominiums by the HOA, which is structured as a nonprofit corporation (R. pp. 215-216 § (17)). The HOA was incorporated by filing the appropriate documents with the South Carolina Secretary of State's Office on April 25, 2003 (R. p. 150, ¶4). All unit owners, including Koola, are members of the HOA ("Owners") and subject to the regulations set forth in the Master Deed and the HOA's By-laws ("By-laws") (R. pp. 201-253). A Board of Directors ("Board") consisting of unit owners elected from the Owners has existed since 2004. At all times relevant to this lawsuit, these Board members were acting in their official capacities and in the best interests of the Association by instituting this collection action against Koola (R. p. 151, ¶6; R. p. 183, ¶4; R. p. 186, ¶4; R. p. 190, ¶4).

The Master Deed specifies the HOA's ability to collect monthly assessments from all condominium owners, as is standard practice with horizontal property regimes (R. pp. 145-146; R. pp. 210-211 § (16) ¶ (1)). The By-laws charge the Board to administer the affairs of the HOA and Cambridge Lakes (R. p. 146 § (16) ¶ (1) (b), R. pp. 210-211 § (16) ¶ (1) (b)). The HOA budget is reviewed and adjusted annually and does not change during the calendar year (R. p. 187 ¶ 10). The budget is presented to the Owners at the annual meeting and the new annual budget takes effect on January 1st each year (R. p. 187 ¶ 10). Owners may review the proposed annual budget from the date of the annual meeting until January 1st to review the proposed budget (R. p. 187 ¶ 10). Koola met with at least one Board Member on several occasions to discuss the HOA's finances (R. p. 187 ¶ 11).

The By-laws also require the HOA to maintain, repair, replace and operate the common elements; enforce by legal means the provisions of the South Carolina Horizontal Property Act, the Master Deed, Charter, By-Laws, and Rules and Regulations of the HOA; and allow the Board to retain legal counsel." (R. pp. 238-239, Art. II, § 12 ¶¶ e, i, and l). In April 2008, the Board learned of potential construction defects at Cambridge Lakes (R. p. 152 ¶ 15). The defects were not disclosed by the Developer when the HOA was turned over to the Owners (R. p. 152 ¶ 16.). Exercising their power to retain legal counsel, the HOA hired an attorney to file a construction lawsuit on its behalf (R. p. 152 ¶¶ 18-19). The attorney was retained on a contingency fee basis and would only be compensated out of monies received on behalf of the HOA (R. p. 153 ¶ 22). All expenses related to the construction lawsuit were paid out of the HOA's Reserve Accounts (R. pp. 152-153 ¶ 20; R. p. 184 ¶ 13; R. pp. 187-188 ¶ 13; R. p. 191 ¶ 14). The HOA did not levy a special assessment to fund the construction lawsuit. Since January 2007, there have only been three increases to the monthly regime fee from $210.00 to $285.00 per month (R. p. 192 ¶¶ 20-22). These were due to increases in insurance premiums on the common areas of Cambridge Lakes (R. p. 192 ¶¶ 20-22.).

The attorney sent a letter to all Owners on June 25, 2008, through Cambridge Lakes' property management company, Ravenel Associates, informing them about the construction defect lawsuit. The letter asked the Owners to assign their claims to the HOA and additionally to join the lawsuit as plaintiffs. Owners were under no obligation to join the lawsuit, and some, including Koola, declined to do so. (R. p. 153 ¶ 24; R. p. 185 ¶ 17; R. p. 188 ¶ 17; R. p. 192 ¶ 17). Ultimately, all unit owners received new windows from the settlement of the construction case, improving the units. There is no

evidence that Koola attempted to refinance his unit with a company that does offer refinancing even when litigation to improve the property is pending.

The HOA, like all horizontal property regimes, relies on the collection of fees and assessments from all of its owners to operate. No individual owner can stop making payments for a length of time of their choosing or they will be placed in default (R. pp. 213-214 § (16) ¶ (8)). Since the HOA was established, it has filed multiple liens and lawsuits and obtained judgments against different Owners.[5]

Koola stopped paying his monthly assessment to the HOA on October 23, 2009 (R. p. 110 ¶¶ 2(b) and (c)). The Board members discussed several delinquent homeowners at board meetings, including Koola, before making any decisions to pursue legal action (R. p. 151 ¶ 10; R. p. 184 ¶ 8; R. p. 187 ¶ 8; R. p. 191 ¶ 8). Acting under the provisions set forth in the Master Deed and By-laws, the HOA filed a Notice of Lien against Appellant's Condo on May 24, 2010, for the unpaid assessments and late fees in the amount of one thousand nine hundred sixty-three dollars and fifty-two cents ($1,963.52). This action was filed to recover payment of delinquent assessments from Koola (R. p. 151 ¶ 9; R. p. 184 ¶ 7; R. p. 187 ¶ 7; R. p. 191 ¶ 7).

On July 27, 2010, BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP ("BAC"), filed a *Lis Pendens* and Summons and Complaint against Koola seeking to foreclose its first mortgage on his Condo. On July 29, 2010, the HOA instituted this action against Koola (R. pp. 109-113). Rather than pay the balance due, Koola counterclaimed against the HOA alleging Civil Conspiracy and Breach of Fiduciary Duty (R. pp. 034-038; R. pp. 118-123). To date, Koola continues to live in the unit without paying past or current fees required by his Deed.

[5] *See generally* R. p. 254; R. p. 255; R. p. 256; R. pp. 257-258; and R. p. 259.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT TO RESPONDENT AND DISMISSAL OF APPELLANT'S CIVIL CONSPIRACY CLAIM

Petitioner asserted his claim of civil conspiracy against only the Respondent based upon the Respondent's decision to institute this litigation to recover Petitioner's delinquent HOA fees and assessments. The Court of Appeals correctly determined that there was no civil conspiracy as a matter of law, and affirmed the trial court's grant of summary judgment on Petitioner's counterclaim. "[I]t is well settled that a corporation cannot conspire with itself." *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 887 (2006) (citing to 16 Am.Jur.2d *Conspiracy* § 56 (2005) (stating a corporation cannot be a party to a conspiracy consisting of the corporation and the persons engaged in the management, direction, and control of corporate affairs, where the individuals are acting only for the corporation and not for any personal purposes of their own)). *McMillan* also held "a civil conspiracy cannot exist when the alleged acts arise in the context of a principal-agent relationship because by virtue of the relationship such acts do not involve separate entities." *Id.*

Petitioner asserts that it was error for the Court of Appeals to dismiss the civil conspiracy claim under the jurisprudence of *McMillan* because "Respondent's Management Company and its attorneys are not its agents by law" and that the determination of whether "Respondent's Management Company and its attorneys are its agents is a question of fact." Petitioner's first argument is not supported by the evidence in the record, which shows that Respondent's Board members authorized its attorneys to

institute this litigation.[6] His second argument is moot, because it is undisputed that the Respondent's management company and its attorneys were agents or employees of Respondent and that their only role in this litigation was to execute the Respondent's decision to institute this litigation to recover the dues and assessments Petitioner owed Respondent. The fact that the agency relationship is undisputed renders it a question of law. *See Rhode v. Ray Waits Motors, Inc.*, 223 S.C. 160, 168, 74 S.E. 2d 823, 826 (1953) (holding trial court correctly decided the agency issue as a matter of law where the undisputed testimony "was susceptible of no other reasonable inference"). "When an appeal involves stipulated or undisputed facts, an appellate court is free to determine if the trial court properly applied the law to the facts." *S. Carolina Farm Bureau Mut. Ins. Co. v. Dawsey*, 371 S.C. 353, 356, 638 S.E.2d 103, 104 (Ct. App. 2006). Accordingly, the Court of Appeals did not err in affirming the trial court's grant of summary judgment to Respondent under the jurisprudence set forth in *McMillan, supra.*

The remainder of Petitioner's arguments are also without merit. His argument that the Court of Appeals made improper findings of fact fails because as noted above, the question of agency in this case is a matter of law that the Court of Appeals was free to decide. Because the Court of Appeals was reviewing the grant of summary judgment, it applied the same standard the trial court used. *Turner v. Milliman,* 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). Petitioner's final argument on this point relates to his assertion regarding his injury and special damages. However, this issue is moot as the

[6] Koola does not explain what role the HOA's management company played in instituting this collection action against him. However, no matter what role Koola could allege, it is undisputed that the management company was retained by the HOA to assist the HOA in its duties.

Court of Appeals held Petitioner could not demonstrate the existence of a civil conspiracy.

II. THERE WAS NO ERROR BY THE COURT OF APPEALS IN RULING THAT PETITIONER FIRST RAISED HIS ARGUMENT REGARDING THE ENFORCEABLILITY OF THE MASTER DEED; ALTERNATIVELY, ANY ERROR WAS HARMLESS

Petitioner asserts that the Court of Appeals erred when it found that the issue of whether the Master Deed was unenforceable was raised for the first time in his Motion for Reconsideration. In full candor, Petitioner is correct that he raised the issue in his Response in Opposition to the HOA's Motion for Summary Judgment (R. pp. 47-50). However, this argument fails under the established rules and case law of this Court, because the Court of Appeals was not required to review every issue raised by Koola. "The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR; see also *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (noting an appellate court can affirm for any reason appearing in the record).

As further grounds that this argument is without merit, any failure by the Court of Appeals to review Petitioner's arguments related to the enforceability of the Master Deed was harmless. In his brief to the Court of Appeals, Petitioner failed to cite to any evidence that the Master Deed is unenforceable, and cited only his arguments raised in his Response in Opposition to the HOA's Motion for Summary Judgment. *See* Appellant's Fin. Br. at pp. 9-10. In fact, Petitioner has advanced the same arguments regarding the enforceability of the Master Deed to every court he has appeared before. In every instance, he has never cited to any evidence supporting his arguments, and there is none in the record before this Court.

Because there was no evidence supporting Petitioner's arguments that the Master Deed was unenforceable, any error by the Court of Appeals in failing to review Petitioner's arguments was harmless. Had the Court of Appeals reviewed the issue, it would have noted that Petitioner offered no evidence to support his arguments that the Master Deed was unenforceable. Because it was reviewing an order granting summary judgment, the Court of Appeals would have applied the same standard as the Trial Court. *Turner*, *supra*, 392 S.C. at 121-22, 708 S.E.2d at 769. A genuine issue of fact, however, can be created only by evidence that would be admissible at trial. *Hansen v. DHL Laboratories, Inc.*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (1994) (emphasis added). "The plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 357–58, 650 S.E.2d 68, 71 (2007) (internal citations omitted). Because there was no evidence in the record to support Petitioner's arguments regarding the enforceability of the Master Deed, the Court of Appeals would have likely found no genuine issue of material fact and still affirmed the Trial Court's grant of summary judgment to the HOA. Accordingly, any error by the Court of Appeals was harmless.

Finally, as further support that Petitioner's arguments related to the enforceability of the Master Deed are without merit, Respondent notes Petitioner also instituted unsuccessful litigation against twelve (12) parties involved in developing and marketing the subject condominiums. *See Koola v. Cambridge Two, LLC, et al.*, 2010-CP-10-9158. In that litigation, Petitioner alleged the following causes of action: (1) violation of the

Horizontal Property Act, S.C. Code Ann. § 27-31-10, *et seq.* (2006); (2) violation of the Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (2006); (3) breach of contract/warranty; (4) negligence; and (5) fraud and misrepresentation. All of the defendants in that action were dismissed on summary judgment.[7] Were there truly questions relating to the enforceability of the Master Deed, presumably those questions would have been issues in that litigation. The unsuccessful status of that litigation is additional confirmation that Petitioner's arguments related to the Master Deed are baseless.

III. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT BECAUSE THERE IS NO EVIDENCE THAT RESPONDENT BREACHED ITS FIDUCIARY DUTY

The Court of Appeals correctly affirmed the Trial Court's grant of summary judgment as to Petitioner's counterclaim for breach of fiduciary duty. The Court of Appeals affirmed the Trial Court's finding that there was no evidence Respondent's board members acted in bad faith, were dishonest or incompetent, and thus, their decisions were protected by the business judgment rule. *See Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 409 S.C. 164, 180, 760 S.E.2d 121, 129-30 (Ct. App. 2014) ("In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action.").

In asserting that the Court of Appeals erred in affirming the dismissal of his claim for breach of fiduciary duty, Petitioner merely recites the same arguments advanced to

[7] This case is also currently on appeal, with Koola appealing the dismissal of the two real estate brokerage firms. *See* Appellate Case No. 2015-000111.

the Court of Appeals regarding the allegedly incompetent actions of Respondent's board members. *See* Appellant's Fin. Br. at pp. 19-24. In response, Respondent incorporates fully by reference all of its arguments and evidence contained in its Final Brief to the Court of Appeals. *See* Resp't's Fin. Br. at pp. 19-25. Further, Respondent notes Petitioner has failed to cite to any evidence in the record which supports that Respondent's board members acted in bad faith, were dishonest or incompetent, something he also failed to do in his briefs to the Court of Appeals. Simply put, the Court of Appeals properly affirmed the Trial Court's dismissal of Petitioner's breach of fiduciary duty counterclaim because Respondent's members' decisions were protected by the business judgment rule.

IV. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT AS IT DID NOT DECIDE ANY ISSUES OF FACT

Petitioner asserts that the Court of Appeals erred because it decided questions of fact that were or should be jury issues.[8] However, Petitioner's argument misses the point of both the Court of Appeals and Trial Court's rulings: neither court found that Petitioner offered evidence the Respondent's directors acted in bad faith, were dishonest or incompetent, and therefore the Respondent's decisions cannot be set aside by judicial action. *See Fisher, supra,* 409 S.C. at 180, 760 S.E.2d at 129-30. Petitioner's assertions regarding the Respondent's decisions are merely recitations of the same arguments advanced to both the Trial Court and the Court of Appeals, arguments those courts found to be without merit.

[8] Koola asserts that the following were questions of fact decided by the Court of Appeals: whether Koola's offer to pay his outstanding dues and assessments to the HOA through a short sale of his unit was a legitimate tender and whether the HOA had the authority to sue Koola based upon a reading of the HOA's annual budgets.

CONCLUSION

This litigation began in 2010 in the Magistrate's Court as Respondent's attempt to collect less than two thousand dollars in delinquent fees and assessments from Petitioner. After five years, Petitioner continues to live in his condominium without the payment of either the delinquent fees which are the subject of this collection action or any subsequent fees. During that time, Petitioner has litigated this case, and two others, over issues related to his condominium. At every stage in those litigations, Petitioner has been unsuccessful.

The instant petition is yet another attempt by Petitioner to advance many of the same tired arguments that he has tried before. The Trial Court heard these arguments, and granted summary judgment to Respondent. The Court of Appeals considered the same arguments, and affirmed the grant of summary judgment to Respondent. Petitioner now asks this Court to consider the same meritless arguments.[9] This Court has the opportunity to put an end to this litigation once and for all, and should do just that. The well-established case law of this State supports that Respondent could not engage in a civil conspiracy and did not breach its fiduciary duty, thus, the grant of summary judgment to Respondent was proper, as was the Court of Appeals affirmation of same.

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[9] Respondent notes that none of Petitioner's arguments relate to the Court of Appeals decision affirming the Trial Court's grant of summary judgment despite Petitioner's insistence that additional discovery was warranted. Accordingly, Respondent considers Petitioner to have abandoned that argument.

For all these reasons, and any others the Court should deem appropriate, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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December 23, 2015

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PROOF OF SERVICE

I certify that I have served the foregoing **RESPONDENT'S RETURN TO PETITION FOR CERTIORARI** on all parties of record by depositing a copy of it in the United States Mail, postage prepaid, on December 23, 2015, addressed to their attorneys of record as follows:

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