

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge

Case No. 2014-CP-07-2438
Appellate Case No. 2015-0001795

Community Services Associates, Inc. Appellant,

v.

Stephen H. Wall and Maria P Snyder Wall, Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the Master in Equity Err in Holding the Homeowners' activity of renting the first floor of their home through "AirBnB" while simultaneously staying in the second floor of the home did not violate the restrictive covenants for Sea Pines Plantation?

- II. Did the Master Err in Declining to Consider the "Letter to the Editor" Mrs. Wall Wrote after the Hearing in the Matter?

STATEMENT OF THE CASE

On September 25, 2014, Community Services Associates, Inc. (CSA) filed an action against Stephen H. Wall and Maria P. Snyder Wall (collectively "Homeowners") for breach of land use covenants applicable to the Homeowners' home in Sea Pines Plantation on Hilton Head Island, South Carolina. CSA asserted Homeowners were renting a portion of their home and were operating a business on their premises through "AirBnB" in direct violation of the covenants. CSA sought injunctive relief to stop the activity. CSA also filed a motion for temporary injunction that same date.

On November 24, 2014, Homeowners filed an answer admitting their home is subject to the covenants and that they advertised with "AirBnB.com" in the "whole house" category. They denied that they engaged in a partial rental of their home and asserted their activity was not prohibited by the covenants. Mrs. Wall verified the answer.

Homeowners also filed a verified return to the motion for injunctive relief. They admitted again that they advertised on "AirBnB.com" in the "whole house" category but contended the activity did not violate the covenants. They also denied they rent part of their home, and asserted "they remain in their accessory building/guest suite when their whole house is rented."

On April 7, 2015, the Master in equity convened a hearing on CSA's request for temporary injunction. The parties agreed to postpone the matter and entered into several stipulations at that hearing. On April 21, 2015, the Master held a subsequent hearing on CSA's request for injunctive relief and entered the stipulations at that time.

On May 7, 2015, the Master entered an order finding the Homeowners' activities

did not violate the covenants. Accordingly, the Master denied CSA's request for an injunction.

On May 15, 2015, CSA filed a motion to reconsider or to alter or amend the judgment. The Master held a hearing on the motion on July 29, 2015 and took the matter under advisement. On August 4, 2015, CSA proffered as additional information a letter to the editor written by Mrs. Wall, but the Master refused to consider it.

On August 10, 2015, the Master entered an order denying CSA's motion. On August 20, 2015, CSA filed and served a notice of appeal.

FACTS

SCOPE OF REVIEW

An action to enforce restrictive covenants by injunction is in equity and the proper scope of review is *de novo*. *Hardy v. Aiken*, 369 S.C. 160, 631 S.E.2d 539 (2006); *Seabrook Island Prop. Owners Ass'n v. Marshland Trust, Inc.*, 358 S.C. 655, 661, 596 S.E.2d 380, 382–83 (Ct. App. 2004). *See also Lambries v. Saluda County Council*, 409 S.C. 1, 760 S.E.2d 785 (2014) (upon review of an action in equity the appellate court may make factual findings based on its own view of the preponderance of the evidence). With this scope of review in mind the evidence was as follows.

BACKGROUND

On April 1, 1970, Sea Pines Plantation filed certain restrictive covenants applicable to Class “A” limited residential areas. (Plaintiff’s Trial Brief, Exh. 2). These restrictions included the following:

5. All lots in said Residential Areas shall be used for residential purposes exclusively. No structure, except as hereinafter provided shall be erected, altered, placed or permitted to remain on any lot other than one (1) detached single family dwelling not to exceed two (2) stories in height and one small one-story accessory building which may include a detached private garage and/or servant’s quarters, provided the use of such dwelling or accessory building does not overcrowd the site and provided further, that such building is not used for any activity normally conducted as a business. Such accessory building may not be constructed prior to the construction of the main building.
6. A guest suite or like facility without a kitchen may be included as part of the main dwelling or accessory building, but such suite may not be rented or leased except as part of the entire premises including the main dwelling, and provided, however, that such guest suite would not result in over-crowding the site.

(Exh. 2, Part II, p. 13, ¶¶ 5, 6). These are the operative provisions in this dispute, although they are to be read against the backdrop of the entire document and they require that any lease be of the entire premises whether or not there is a "guest suite." (Tr. p. 41, l. 6 - p. 42, l. 22).

Sea Pines filed amendments to the covenants on September 24, 1974, October 7, 1974 and January 11, 1984, none of which impacted the restrictions in Part II, paragraphs 5 and 6. (Tr. p. 17, l. 14 - p. 19, l. 11; Pl. Trial Exh. 2).

The premises at issue are located at 48 Planters Wood Drive in Sea Pines Plantation. (Dep. S. Wall, p. 13, ll. 15-17). The home was initially built in 1974 by Arnold Ellison. (Letter of March 7, 1974 from Richard Anderson). The original home had a finished first floor but no finished second floor. It is a detached, single-family dwelling with no other structures. (Tr. p. 32, l. 24 - p. 33, l. 4).

In January 1981, Mr. Ellison applied to the Sea Pines Architectural Board to add a finished second floor area to the main structure. Mr. Ellison proposed an external stairway to the new area. The application was submitted by Kermit Huggins, the architect for the project.

The Board noted on the application that it was "concerned with outside stairway." On January 20, 1981, Edwin Johnson, the Board's administrator, wrote to Mr. Huggins the following letter:

In reply to your application dated January 16, 1981 and plans submitted therewith, the Architectural Review Board is very concerned with an outside stairway, since at some future date it could cause an owner to consider the use for a two family setup.

Please put stairway for the second floor addition on the inside of your residence.

(Johnson Letter of 1/20/81; Dep. S. Wall, p. 61, ll. 3-8).

Mr. Ellison wrote the following response to Mr. Johnson on February 11, 1981:

This is to request further consideration to the plans submitted by Kermit Huggins for the completion of a second-floor attic room to my house. Every effort was made to provide access to the attic from inside, but the only way possible is through a very small closet as shown in our plans. Such an access is not adequate for installing the building materials nor the necessary furniture; therefore, an exterior entrance must be provided.

This room will be used solely as a play room for our two sons, ages 9 and 11. The house has only two bathrooms; therefore, the third bathroom is desirable. I believe that the Architectural Review Board should have confidence in the Restrictive Covenants that absolutely prohibit a house to be used for more than one family; therefore, I respectfully request that you reconsider and approve the plans as submitted.

(Ellison Letter of 2/11/81; Dep. S. Wall, p. 61, ll. 15-24).

On February 18, 1981, Mr. Johnson wrote to Mr. Ellison that the Board had approved the final plans. (Johnson Letter of 2/18/81). The letter stated:

The Architectural Review Board has received and approved your final plans, application and stake-out for the subject project. This approval is limited to design criteria by the Architectural Review Board as provided by the Restrictive Covenants and should not be interpreted as approval of any variation from restrictions or conditions imposed on the property owner by contract or other provisions of the recorded restrictions unless so noted herein. The owner is responsible for being within the restrictive covenants.

(Plaintiff's Trial Brief, Exh. 3; Dep. S. Wall, p. 62, l. 17 - p. 63, l. 7). Mr. Ellison proceeded with the construction as approved.

The Homeowners acquired the property in April 1998. (Plaintiff's Trial Brief,

Exh. 1; Dep. S. Wall, p. 16, ll. 17-22; Tr. P. 17, ll. 5-12; Pl. Trial Exh. 1). There is only one stand-alone building on the lot. (Dep. S. Wall, p. 24, ll. 22-24). All of the heated space on the property is under one roof. (Dep. S. Wall, p. 24, l. 25 - p. 25, l. 24). The Homeowners were aware of the Class "A" Covenants and stated there were no amendments that would have affected their home. (Dep. S. Wall, p. 19, l. 5 - p. 20, l. 2).

In 2013, the Homeowners began renting a portion of the home through an on-line rental company, "AirBnB." (Dep. S. Wall, p. 35, ll. 16-19). The Board contacted the Homeowners and advised them that the activity violated Paragraph 5 because the residence was being used as a business, namely a "bed and breakfast," and Paragraph 6 because they were not renting the entire premises. (Borden Letter of 6/20/14; Dep. S. Wall, p. 55, l. 23 - p. 56, l. 11; Tr. p. 27, ll. 3-7).

The Homeowners responded through counsel that their use of their "guest suite" in the manner in which they used it did not violate the restrictive covenants. (Laughlin Letter of 7/18/14; Dep. S. Wall, p. 57, l. 7). CSA responded with a continued demand that the Homeowners cease their "bed and breakfast" activities in violation of the restrictive covenants. (Borden Letter of 8/8/14; Dep. S. Wall, p. 57, ll. 8-18). When the Homeowners refused CSA sought injunctive relief.

In his deposition, Homeowner Stephen Wall testified that the "upstairs addition" has an exterior stairwell, a full bath, a small refrigerator, and a "small induction...plate" the Homeowners use to occasionally "prepare food" for themselves or anyone else. (Dep. S. Wall, p. 27, l. 9 - p. 32, l. 22; Tr. p. 66, l. 25 - p. 67, l. 5). They keep some food in the area. (Dep. S. Wall, p. 33, ll. 1-3). If the Homeowners wanted to have cereal and milk on

a day when tenants were in the home they would not have to go down into the living quarters. (Dep. S. Wall, p. 33, ll. 8-19). They eat cereal, fruit and salad, and drink juice in the upstairs area. (Dep. S. Wall, p. 33, ll. 20-23; p. 39, ll. 11-17). They also make oatmeal with the induction plate. (Dep. S. Wall, p. 33, l. 24 - p. 34, p. 7). Homeowners occasionally cook in the downstairs area and they do their laundry downstairs. (Dep. S. Wall, p. 34, ll. 21-25). They wash their dishes upstairs. (Dep. S. Wall, p. 35, ll. 6-7).

The Homeowners have internet access in the upstairs area. (Dep. S. Wall, p. 41, ll. 12-22). They never sleep in the downstairs portion of the home if they have renters. (Dep. S. Wall, p. 42, ll. 20-23).

Mr. Wall stated that they rent to families through "AirBnB." (Dep. S. Wall, p. 53, l. 17 - p. 54, l. 5; p. 64, ll. 14-17). The family can stay as long as they want. (Dep. S. Wall, p. 54, l. 20 - p. 55, l. 3). Mr. Wall also stated that he considers his wife and himself to be a "family." (Dep. S. Wall, p. 64, ll. 5-13; Tr. p. 59, ll. 17-20).

Mr. Wall identified a number of photographs of the home that were entered into evidence without objection. (Tr. p. 60, l. 7 - p. 63, l. 24; Pl. Exhs. 4B). Mr. Wall also identified a letter Mrs. Wall wrote to someone named "Walt" in which she described the upstairs area as "a separate office/studio upstairs (no kitchen as per covenants) where we can retreat to." (Tr. p. 65, l. 1 - p. 66, l. 11; p. 78, ll. 13-17; Pl. Exh. 6). He also sketched and labeled a diagram of the upstairs area. (Tr. p. 67, l. 10 - p. 68, l. 1; p. 78, ll. 9-10; Pl. Exh. 7). Mr. Wall testified there was no possible way to reach the second story area apart from the outside stairway. (Tr. p. 73, ll. 16-22; p. 74, ll. 3-6).

In her deposition testimony, Mrs. Wall described the rental of the premises

through "AirBnB." (Tr. p. 74, l. 14 - p. 75, l. 7). The upstairs area is never mentioned or depicted in the ad. (Tr. p. 75, ll. 8-15).

At one time Homeowners listed the property as "Hilton Head Organic B&B, Sea Pines," but they changed the listing on advice of their attorney after CSA contacted them. (Tr. p. 75, l. 16 - p. 76, l. 3). She agreed that a bed and breakfast would violate the covenants. (Tr. p. 76, ll. 4-6).

Mrs. Wall also agreed that they could have a guest in the home stay as long as 28 days. (Tr. p. 76, l. 16 - p. 77, l. 3).

The parties entered into the following stipulations prior to trial:

- (1) The property is subject to the Class "A" covenants and restrictions as described in the Complaint.
- (2) The property is a 2-story detached residential dwelling unit. The second story space has a separate entrance and is not accessible from the first floor.
- (3) Homeowners rent "certain property" to third parties through an internet rental site.
- (4) The rented property consists of the entire first floor of the dwelling unit except for one locked closet.
- (5) The second floor of the dwelling unit is off limits to the renters and is occupied exclusively by the Homeowners.

(Stipulations; Tr. p. 7, ll. 13-20). The Master outlined these stipulations during the trial. (Tr. p. 69, l. 3 - p. 73, l. 8).

At trial, Brett Martin, CSA's president, testified CSA is responsible for numerous things, including enforcing covenants. (Tr. p. 20, l. 10 - p. 21, l. 18). Mr. Martin became familiar with Homeowners' activities while searching for compliance with payment of accommodation taxes. (Tr. p. 22, l. 19 - p. 23, l. 9). He discovered Homeowners were marketing their home through "AirBnB" to international customers. (Tr. p. 23, ll. 10-14; p. 24, ll. 10-12; p. 25, ll. 18-20).

Mr. Martin described CSA's position on how the Homeowners are using the second story area:

Specifically, it's renting a portion of the premise to an unrelated party while they remain or renting a portion of the premise to multiple parties. I believe that is where we started, I believe. Where we are today is where they remain in renting it to another unrelated party.

(Tr. p. 26, l. 18 - p. 27, l. 2). CSA was seeking a permanent injunction to prevent Homeowners from leasing a portion of the home while they remain or a portion of the home to multiple parties even if they were not to remain. (Tr. p. 27, ll. 16-21). CSA had no objection to Homeowners renting the entire premises to someone, and that is what the covenants permit. (Tr. p. 27, l. 22 - p. 28, l. 1; p. 37, ll. 6-12; p. 39, ll. 2-10). CSA considered the entire premises as being under one lease agreement. (Tr. p. 28, ll. 8-11). Any lease of less than the entire premises would violate the covenants. (Tr. p. 38, ll. 11-21). This is so even if the premises have a "guest suite." (Tr. p. 39, ll. 8-10).

Mr. Martin agreed that short-term rentals of property subject to the Class "A" Covenants are permitted. (Tr. p. 28, ll. 22-25). Further, a renter could bring servants with him or her and permit them to occupy the home at the same time. (Tr. p. 29, ll. 1-16). A

renter could also bring friends so long as they were invited guests. (Tr. p. 35, ll. 17-23). However, taking in a roommate who pays rent might violate the covenants if they entered into a contract for gain. (Tr. p. 31, ll. 3-22). Mr. Martin agreed that the covenants did not only permit members of the same family to occupy a home that is subject to the Class "A" Covenants. (Tr. p. 32, ll. 2-7).

Mr. Martin stated that the covenants may prohibit someone residing in a home that is subject to the Class "A" Covenants from engaging in income-producing activity. (Tr. p. 33, l. 10 - p. 34, l. 21).

On questions from the Master, Mr. Martin agreed that short-term rental is permitted. (Tr. p. 39, ll. 21-24). He stated that if the rental came with 24-hour service, then the servants still could not live on the premises because the premises are limited to single-family residential use. (Tr. p. 40, l. 13 - p. 41, l. 5).

ORDER

The Master noted the stipulations the parties entered. (Order of 5/7/15, p. 1). The Master stated that there "was un-contradicted testimony that the dwelling has only one kitchen, which is located on the first floor. The [Homeowners] have a portable toaster oven, an induction-type hot plate, and a dorm-style refrigerator in the second floor space." (Order of 5/7/15, p. 1). The Master also noted that short-term rentals are not prohibited under the covenants. (Order of 5/7/15, p. 1).

The Master found and concluded the following:

1. It is undisputed that short-term rentals are common in Sea Pines and do not

violate the provision of Paragraph 5 that all lots shall be used for residential purposes.

2. It is undisputed that the improvements in Homeowners' lot consist of one (1) two-story single family dwelling. There is no accessory building. There is no claim that the structure has not received all architectural and plans approvals required by the Covenants.
3. It is undisputed that the site is not overcrowded.
4. Homeowners' property has only one kitchen which is located on the first floor. Homeowners' use of several dormitory-style portable appliances to store and prepare foods on the second floor does not create a kitchen, as the term is commonly used. A guest suite without a kitchen is specifically permitted. The existence of a kitchen-less guest suite does not convert the single family dwelling into a duplex (or more specifically: "from" a single family residential dwelling to something else) under the Covenants.
5. The Covenants allow guest suites or similar facility without a kitchen, but such guest suites shall not be rented or leased except as part of the entire premises, including the main dwelling.
6. There is no language in the Covenants that would prohibit the rental or leasing of the main dwelling without including the kitchen-less guest suite or like facility.
7. Homeowners do not rent individual rooms. They rent the entire first floor to single rental parties.

(Order of 5/7/15, p. 3).

The Master stated that “[i]t would have been a simple matter for the developer to include a sentence that properties in Class ‘A’ residential areas with an accessory suite, or any such property, may only be rented in its entirety and as a whole. It did not.” (Order of 5/7/15, p. 3). The Master added:

The Plaintiff seeks to have me interpret the Covenants in such a way as to infer that the developer intended to prevent an owner from remaining in a guest suite while renting the main dwelling. I think that such an interpretation requires me to ignore the plain meaning of the covenants and to add a restriction which currently does not exist. See, e.g., [*Taylor v. Lindsey*, 332 S.C. 1, 498 S.E.2d 862 (1998)], where the South Carolina Supreme Court refused to enlarge a restriction by construction or implication beyond the clear meaning of its terms to include a restriction on mobile homes. Accordingly, I find that the Covenants do not prohibit [Homeowners] from occupying the kitchen-less guest suite on the second story of their home while they rent the first floor.

Plaintiff expresses the legitimate concern that an expansion of [Homeowners’] use to the rest of the Plantation will detrimentally affect the quality of life in Sea Pines. In this very fact-specific case, however, it appears to me that such a use (owner on-site) actually minimizes the possibility of loud or destructive tenants in what all agree is an area with numerous resort rentals.

(Order of 5/7/15, pp. 3-4).

ORDER ON RECONSIDERATION

CSA moved for reconsideration. (Rule 59, SCRPC, Motion). The Master held a hearing on the motion and took the matter under advisement. After the hearing but while the decision on the Rule 59 motion was pending CSA provided the Master additional information in the form of a “letter to the editor” authored by Mrs. Wall. However, the Master advised the parties that it would not consider the additional information. (Email from Master in Equity).

On August 10, 2015, the Master entered the following ruling:

It is obvious and undisputed that the original planners of Sea Pines sought to develop an upscale community. In doing so, it is not inconceivable that the original planners sought to prevent landowners from developing small, inexpensive rentals which would conflict with the high-end intentions of the developers.

Plaintiff seeks an injunction prohibiting [Homeowners] from renting their residence short-term while [Homeowners] simultaneously reside in a second floor room and bath that has separate access by an outside stairway. The Plaintiff admits that the circumstances and its objections mirror those which would occur if a Sea Pines property accommodated a live-in domestic staff. I do not believe that the intentions of the developers of an upscale resort community would include prohibiting live-in domestic staff.

I remain convinced that the plain meaning of the covenants supports [Homeowners'] position and I deny the Plaintiff's motion.

(Order of 8/10/15).

This appeal follows.

ARGUMENTS

“A restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.” *Buffington v. T.O.E. Enters.*, 383 S.C. 388, 392, 680 S.E.2d 289, 291 (2009); *The Spur at Williams Brice Owners Association, Inc. v. Lalla*, 415 S.C. 72, 781 S.E.2d 115 (Ct. App. 2015).

In order to enforce a restrictive covenant, “a party must show that the restriction applies to the property either by the covenant’s express language or by a plain and unmistakable implication.” *Buffington; Lallas*. See also *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 269, 363 S.E.2d 891, 894 (1987) (“A restrictive covenant will be enforced if the covenant expresses the party’s intent or purpose, and this rule will not be used to defeat the clear express language of the covenant.”). “Courts shall enforce such covenants unless they are indefinite or contravene public policy.” *Sea Pines Plantation Co.*, 294 S.C. at 270, 363 S.E.2d at 894.

I. The Master in Equity Erred in Holding the Homeowners' Activity of Renting the First Floor of Their Home Through "AirBnB" While Simultaneously Staying in the Second Floor of the Home Did Not Violate the Restrictive Covenants for Sea Pines Plantation

The activity in which Homeowners engage (renting the downstairs through "AirBnB" while simultaneously living in the second story) violates the Class "A" restrictive covenants. First, the "guest suite" does not serve as the type of accommodation contemplated by the restrictions because the owners are not "guests," and the area has what amounts to a "kitchen" separate from the main floor. Second, by engaging in this arrangement two families are living in the home at the same time. The Master's findings and conclusions to the contrary are against the evidence and this Court should reverse.

A. The Master Erroneously Held There "Was Un-Contradicted Testimony That the Dwelling Has Only One Kitchen, Which Is Located on the First Floor" and That the Property "Has Only One Kitchen Which Is Located on the First Floor" Because the Only Evidence Is That Homeowners Have a "Kitchen" in the Upstairs Area

The Master found that the dwelling had only one kitchen located on the first floor of the home. This finding is factually erroneous and this Court should reverse.

Restrictive covenants are contractual in nature. *RV Resort and Yacht Club Owners Ass'n, Inc. v. BillyBob's Marina, Inc.*, 386 S.C. 313, 688 S.E.2d 555 (2010); *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution. *RV Resort and Yacht Club Owners Ass'n, Inc.*; *Hardy v. Aiken*.

The paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document. *RV Resort and Yacht Club Owners Ass'n, Inc.; Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863–64 (1998); *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 336 S.E.2d 15 (1985).

In general, restrictive covenants are to be construed most strictly against the grantor and persons seeking to enforce them, and liberally in favor of the grantee, all doubts being resolved in favor of a free use of property and against restrictions. *Maxwell v. Smith*, 228 S.C. 182, 89 S.E.2d 280 (1955); *Sprouse v. Winston*, 212 S.C. 176, 184, 46 S.E.2d 874, 878 (1948). This rule, however, applies only where the parties have failed to express their meaning with sufficient clarity to enable the court to say that its construction is plain and admits of no doubt. *Sprouse*. The rule will not defeat the obvious purpose of the restriction, nor does it require an unnatural and strained construction of the words used; and before giving effect to the rule the court will have recourse to every aid, rule, or canon of construction to ascertain the intention of the parties, since it is the duty of courts to enforce, not to make, contracts. *Sprouse v. Winston*, 212 S.C. at 184, 46 S.E.2d at 878, quoting 26 C.J.S. *Deeds* § 163. Accord *Stanton v. Gulf Oil Corp.*, 232 S.C. 148, 101 S.E.2d 250 (1957) (rule that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of the free use of property should not be applied in such a way as to defeat the plain and obvious purposes of a contractual instrument of restriction).

In construing covenants the circumstances surrounding their origin are proper considerations for a court when the language used is susceptible of more than one

reasonable interpretation. *Hoffman v. Cohen*, 262 S.C. 71, 76-77, 202 S.E.2d 363, 366 (1974) (before giving effect to the rule of strict construction “the court will have recourse to every aid, rule, or canon of construction to ascertain the intention of the parties”). Restrictive covenants are voluntary contracts between the parties, and courts should enforce such contracts unless they are indefinite or violate public policy. *Cedar Cove Homeowners Ass’n, Inc. v. DiPietro*, 368 S.C. 254, 628 S.E.2d 284 (Ct. App. 2006).

In this case the Master acknowledged that Homeowners have “several dormitory-style portable appliances to store and prepare foods on the second floor,” yet the Master concluded there was no “kitchen” in the upstairs area. This Court should reverse.

As noted above, the Covenants provide:

6. A guest suite or like facility *without a kitchen* may be included as part of the main dwelling or accessory building, but such suite may not be rented or leased except as part of the entire premises including the main dwelling, and provided, however, that such guest suite would not result in over-crowding the site.

(Exh. 2, Part II, p. 13, ¶ 6). The Covenants, however, do not define “kitchen.”

When faced with an undefined term, the court must interpret the term in accord with its usual and customary meaning. *Canal Ins. Co. v. National House Movers, LLC*, 414 S.C. 255, 777 S.E.2d 418 (Ct. App. 2015), citing *Strother v. Lexington Cty. Recreation Comm’n*, 332 S.C. 54, 62, 504 S.E.2d 117, 122 (1998) and *Anderson v. Buonforte*, 365 S.C. 482, 490, 617 S.E.2d 750, 754 (Ct. App. 2005) (“When a term is not defined within a contract, evidence of its usual and customary meaning is competent to aid in determining its meaning.”).

The usual and customary meaning of “kitchen” is “a room or area where food is

prepared and cooked.” *Oxford Adv. Learner’s Dictionary*. See also Merriam-Webster Dictionary (“kitchen” is “a place where food is cooked or prepared.”) Webster’s II New Riverside University Dictionary, p. 667 (1984).

It is undisputed that Homeowners prepare or cook food in the upstairs area when they are living there. They have a small refrigerator and a “small induction...plate” that Homeowners use to occasionally “prepare food” for themselves or anyone else. (Dep. S. Wall, p. 27, l. 9 - p. 32, l. 22; Tr. p. 66, l. 25 - p.). Homeowners also keep some food in the area. (Dep. S. Wall, p. 33, ll. 1-3). They eat cereal, fruit and salad, and drink juice in the upstairs area. (Dep. S. Wall, p. 33, ll. 20-23; p. 39, ll. 11-17). They also make oatmeal with the induction plate. (Dep. S. Wall, p. 33, l. 24 - p. 34, p. 7). Homeowners wash their dishes upstairs. (Dep. S. Wall, p. 35, ll. 6-7). The “guest suite” therefore has a “kitchen” in violation of Paragraph 6 of the Class “A” restrictions.

New York addressed the meaning of “kitchen” in *People v. Kupas*, 171 Misc. 480, 481 (Court of Special Sessions, Borough of Queens, New York, Part II, 1939). In *Kupas*, an employee of “Swanky Franky, Inc.” would park a truck, remove the steering wheel, and light a built-in grill upon which he would prepare frankfurters. He then sold the food with beverages to customers. The New York Court stated:

The preparation of the frankfurters and the coffee on the grill make that a kitchen, for a kitchen has been defined as *a place where food is prepared*. This vehicle must be construed as a combination of both, and the defendant therefore requires a permit from the Board of Health, and not having one, is guilty as charged.

Id. at 482. (emphasis added). This definition accords with the usual and customary definition found in the dictionaries.

Accordingly, the Master's ruling is not supported by the usual and customary definition of "kitchen." This Court should reverse and remand for the Master to enter an injunction preventing Homeowners from continuing to use their "guest suite" as an apartment while leasing only a portion of the home through "AirBnB."

B. The Master Erroneously Held That the Class "A" Covenants Did Not Require That Residential Areas with an Accessory Suite, or Any Such Property, May Only Be Rented in its Entirety and as a Whole

The Master stated that "[i]t would have been a simple matter for the developer to include a sentence that properties in Class 'A' residential areas with an accessory suite, or any such property, may only be rented in its entirety and as a whole. It did not." (Order of 5/7/15, p. 3). This Court should reverse that ruling.

The Covenants provide:

5. All lots in said Residential Areas shall be used for residential purposes exclusively. No structure, except as hereinafter provided shall be erected, altered, placed or permitted to remain on any lot other than one (1) detached *single family dwelling* not to exceed two (2) stories in height and one small one-story accessory building which may include a detached private garage and/or servant's quarters, provided the use of such dwelling or accessory building does not overcrowd the site and provided further, that such building is not used for any activity normally conducted as a business. Such accessory building may not be constructed prior to the construction of the main building.
6. A guest suite or like facility without a kitchen may be included as part of the main dwelling or accessory building, *but such suite may not be rented or leased except as part of the entire premises including the main dwelling*, and provided, however, that such guest suite would not result in over-crowding the site.

(Exh. 2, Part II, p. 13, ¶¶ 5, 6). The purpose of these restrictions is obvious – only the “entire premises” may be rented or leased, not some portion, so as to maintain the “single family dwelling” character of the home.

Restrictive covenants are contractual in nature. *RV Resort and Yacht Club Owners Ass’n, Inc. v. BillyBob’s Marina, Inc.*, 386 S.C. 313, 688 S.E.2d 555 (2010); *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution. *RV Resort and Yacht Club Owners Ass’n, Inc.; Hardy v. Aiken*. The paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document. *RV Resort and Yacht Club Owners Ass’n, Inc.; Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863–64 (1998); *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 336 S.E.2d 15 (1985).

Sea Pines is a gated community of single-family detached dwellings. Although it is permissible to rent homes in Sea Pines, such must be done as a whole. Renting part of the premises, or the carrying on of a bed and breakfast, would violate the covenants. Even Homeowners acknowledge as much.

The Court should reverse the Master’s finding that the Covenants do not prohibit Homeowners from living in the upstairs “accessory suite” area at the same time they are renting the downstairs portion of their home. The Court should then remand the matter with instructions to proceed in accordance with this Court’s mandate.

C. The Master Erred in Finding That the Covenants Do Not Prohibit Homeowners from Occupying the “Guest Suite” on the Second Story of Their Home While They Rent the First Floor

The Master found the Class “A” covenants did not preclude Homeowners from occupying the second floor area while they rent the first floor area to others. This Court should reverse.

Once again, the Class “A” covenants provide:

5. All lots in said Residential Areas shall be used for residential purposes exclusively. No structure, except as hereinafter provided shall be erected, altered, placed or permitted to remain on any lot other than one (1) detached *single family dwelling* not to exceed two (2) stories in height and one small one-story accessory building which may include a detached private garage and/or servant’s quarters, provided the use of such dwelling or accessory building does not overcrowd the site and provided further, that such building is not used for any activity normally conducted as a business. Such accessory building may not be constructed prior to the construction of the main building.

(Exh. 2, Part II, p. 13, ¶ 5) (emphasis added).

In this case it is undisputed that when Homeowners rent the downstairs portion of their home through “AirBnB,” they simultaneously dwell in the upstairs area. That is, multiple families are residing in the “detached single family dwelling” at one time under one roof; it therefore does not remain a single family dwelling, but is being used for multi-family purposes which is not permitted under the Covenants.

Also, as stated above, restrictive covenants are contractual in nature. *RV Resort and Yacht Club Owners Ass’n, Inc. v. BillyBob’s Marina, Inc.*, 386 S.C. 313, 688 S.E.2d 555 (2010); *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). The language of a restrictive covenant is to be construed according to the plain and ordinary

meaning attributed to it at the time of execution. *RV Resort and Yacht Club Owners Ass'n, Inc.; Hardy v. Aiken*. The paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document. *RV Resort and Yacht Club Owners Ass'n, Inc.; Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863–64 (1998); *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 336 S.E.2d 15 (1985). In construing covenants the circumstances surrounding their origin are proper considerations for a court when the language used is susceptible of more than one reasonable interpretation. *Hoffman v. Cohen*, 262 S.C. 71, 76-77, 202 S.E.2d 363, 366 (1974) (before giving effect to the rule of strict construction “the court will have recourse to every aid, rule, or canon of construction to ascertain the intention of the parties”). Restrictive covenants are voluntary contracts between the parties, and courts should enforce such contracts unless they are indefinite or violate public policy. *Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 628 S.E.2d 284 (Ct. App. 2006).

The intent of the parties to the Covenants here is clear. Each lot is to have a “single family” detached dwelling that may be rented, but as the entire dwelling. When Homeowners rent through “AirBnB” and then live upstairs, they convert their home into a multi-family dwelling, even if only for a short time.

Webster’s Dictionary defines “guest” as “one to whom entertainment or hospitality has been extended.” Webster’s II New Riverside University Dictionary, page 553 (1984). The definition of “suite” is “[a] series of connected rooms functioning as a living unit.” Webster’s II New Riverside University Dictionary, page 1159 (1984). In this case, while the area is, in fact, functioning as “a living unit,” it is not being occupied by a

“guest” but by Homeowners themselves. It is, therefore, not a “guest suite” during the times Homeowners rent the downstairs through “AirBnB.” In fact, the “guest suite” is off-limits to guests during the times Homeowners have renters in the home. (Stipulations; Tr. p. 7, ll. 13-20).

The Master erred in finding that the Covenants do not prohibit Homeowners from occupying the upstairs area during the time they are renting the downstairs area through “AirBnB.” This Court should reverse that finding and remand with instructions for the Master to enter injunctive relief preventing Homeowners from renting their home in this manner.

II. The Master Erred in Declining to Consider the “Letter to the Editor” Mrs. Wall Wrote after the Hearing in the Matter

On August 2, 2015, *The Island Packet* newspaper ran a letter to the editor authored by Ms. Wall. The letter stated:

As a three-year Airbnb host and Airbnb traveler, 25-year Hilton Head Island resident, former hospitality marketing executive and former Accommodations Tax Advisory Committee member, I believe that redeploying existing community assets – i.e. homes and driveways – and spreading the wealth among hospitable community members is a far better solution than a new hotel that keeps the bulk of the money in a few hands and does not extend the experience that many of today’s travelers want.

Additionally, the environment is preserved, no extra parking is needed, jobs are created and locally owned businesses make money from a new segment of visitors.

Airbnb, like other game-changing ideas, tends to generate negativity at first. Folks dislike what they don’t understand or have not experienced and jump on the “fearful bandwagon.”

As a community, we should explore the benefits that this sustainable business model brings. We should have a town meeting and engage in healthy dialogue.

It looks like the perfect solution to clean growth without the disruptive and ecological downside, and a no-brainer for some extra revenue for the town.

Tuzy Wall
Hilton Head Island

(Letter of 8/2/15).

On August 4, 2015, which was after the hearing on reconsideration but before the Master ruled on the motion, CSA provided a copy of the letter to the Master. CSA argued the letter demonstrated Ms. Wall's actual view of the "sustainable business model" as she described it – calling it "a far better solution than a new hotel." CSA contended that her call for a town meeting to "engage in healthy dialogue" was an apparent admission that this business model does not comport with the current covenants and restrictions. CSA asked the Master to "consider Ms. Wall's own words that she expressed in the letter to the editor as you reconsider your ruling in this matter." CSA copied all counsel with the communication.

On August 5, 2015, the Master sent an email to the parties as follows:

Thank you for the message,
however, I'm not going to consider matters outside the original record.
Also, the Plaintiff's interpretation of "healthy dialogue" seems a stretch.
Best to all,

(Email from Master of 8/5/15). Other than saying these matters were "outside the original record" the Master gave no reason for refusing to consider the letter. This Court should reverse that ruling or, alternatively, consider the letter in reviewing this matter in equity.

Rule 52, SCRPC, governs “Findings by the Court,” and provides:

(b) Amendment. Upon motion of a party made not later than 10 days after receipt of written notice of entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly, and the motion may be made with a timely motion for a new trial. * * *

Rule 52(b), SCRPC. “Amendment of Judgments” is governed by Rule 59, which provides:

A new trial may be granted to all or any of the parties and on all or part of the issues ... (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State. On a motion for a new trial in an action tried without a jury, *the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.*

Rule 59(a), SCRPC (emphasis added).

Rule 52 and 59 provide the trial court with discretion to open the judgment and take additional testimony. However, the court must explain that it is, in fact, exercising discretion because a failure to exercise discretion amounts to an abuse of that discretion. *See Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) (“When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.”).

Here, the letter to the editor is relevant to whether Homeowners actually believed their activities constituted an unlawful business activity and violated the Covenants such that the community should consider removing any business restrictions and to permit the arrangement in which they engaged under “AirBnB.”

To refuse to consider the letter because it is “outside the original record” ignores

the nature of the letter. Mrs. Wall wrote it *after* the hearing so it was not in existence at the time and could not have been made part of “the original record.” Her call for the community to “explore the benefits that this sustainable business model brings” and to “have a town meeting and engage in healthy dialogue” make sense only if she believes such a community dialogue is required to remove business activity restrictions, including the Covenants, to permit what Homeowners were doing.

The Court should reverse the Master’s refusal to exercise his discretion to consider the letter under Rule 52(b) and 59(a), and should either remand for that consideration or take the letter into consideration on appeal under the Court’s authority in equity. *Compare Pendarvis v. Cook*, 391 S.C. 528, 706 S.E.2d 520 (Ct. App. 2011) (this Court considered all evidence in the record, including evidence offered through a Rule 52(b) motion but excluded below, in reviewing a decision by a master in equity).

CONCLUSION

For the reasons stated this Court should reverse the Master's order and remand the matter for proceedings consistent with this Court's ruling.

Respectfully submitted,



February 22, 2016

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Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

RECEIVED

Marvin H. Dukes, III, Circuit Court Judge

FEB 22 2016

SC Court of Appeals

Case No. 2014-CP-07-2438

Community Services Associates, Appellant,

v.

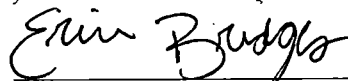
Stephen H. Wall and Maria P Snyder Wall, Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondents with a copy of the *Initial Brief of Appellant* and *Designation of Matter to be Included in the Record on Appeal* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

Drew A. Laughlin
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Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC

February 22, 2016
Columbia, South Carolina



BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

February 22, 2016

RECEIVED
FEB 22 2016
SC Court of Appeals

VIA HAND DELIVERY

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Community Services Associates, Inc. v. Stephen H. Wall
Case Tracking No.: 2015-001795

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal in reference to this case. I have also enclosed a proof of service of these documents on counsel for the Respondents. Please return the additional filed copies to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges
Paralegal to John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON &
DELGADO, LLC

/emb

Enclosures

cc: F. Ward Borden, Esquire
Drew A. Laughlin, Esquire
Stephen A. Spitz, Esquire