STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

LongCreek Plantation Property Owners' Association, Inc. and Fairways Development General Partnership,

Plaintiffs,

vs.

Charles Marshall,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Case No. 2006-CP-40-3713

ORDER REGARDING DEFENDANT CHARLES MARSHALL'S MOTION TO RECONSIDER, ALTER, AMEND OR MODIFY

This matter comes before me upon Defendant Charles Marshall's Motion to Reconsider, Alter, Amend or Modify this Court's Order dated March 3, 2015, and filed with the Clerk of Court's Office on March 5, 2015.

I considered all of the issues Defendant Marshall raises in his Motion to Reconsider in reaching my decision as set forth in the original trial Order. Having reviewed the Motion and findings in the original Order, Defendant Marshall's Motion to Reconsider, Alter, Amend or Modify is denied.

IT IS SO ORDERED.

Joseph M. Strickland
Master-in-Equity, Richland County

June 23, 2016

STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND** LongCreek Plantation Property Owners' Association, Inc. and Fairways Development General Partnership, Plaintiffs, vs. Charles Marshall, Defendant.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT Civil Action No.: 2006-CP-40-03713 **ORDER FINDING FOR THE DEFENDANT CHARLES MARSHALL**

PROCEDURAL HISTORY AND INTRODUCTION

This action originally was commenced when Plaintiff LongCreek Plantation Property Owners Association, Inc. (sometimes "LongCreek", "LongCreek Association," or "Association") filed a Summons and Complaint on June 27, 2006, asking the Court to issue an order requiring Defendant Charles Marshall to seek and obtain approval by the Association of a landscaping plan for his property located at 864 Longtown Road West, Blythewood, South Carolina (the "Property" or "Marshall Property"). Plaintiff LongCreek also sought injunctive relief requiring Mr. Marshall to comply with certain restrictions and covenants in a Declaration of Covenants and Restrictions of LongCreek Plantation Property Owners' Association (hereafter "Covenants and Restrictions" or "Declaration"), and requested attorneys' fees and costs. Mr. Marshall answered the Complaint on the grounds that (1) the Property was not subject to the requirements of the LongCreek Covenants and Restrictions; (2) he was not a member of the Association; and, (3) therefore, he was not required to obtain approval for landscaping or other improvements to his Property. Mr. Marshall also filed Counterclaims for promissory estoppel, fraud, constructive

fraud, misrepresentation, slander of title, and defamation. Plaintiff denied those claims in its Reply.

On May 21, 2007, Plaintiff LongCreek filed a Motion for Temporary Restraining Order or Temporary Injunction, under Rule 65 of the South Carolina Rules of Civil Procedure seeking to immediately enjoin Mr. Marshall from continuing the construction of any structure or structures on the Property without prior review and approval by the LongCreek Association's Review Board. The Motion was heard on Wednesday, May 23, 2007, and the Court issued a Temporary Restraining Order until it could decide the issue of the Temporary Injunction. By Order dated June 8, 2007, and filed June 12, 2007, the Court lifted the Temporary Restraining Order and denied Plaintiff LongCreek's Motion for a Temporary Injunction pending the resolution of the lawsuit, holding that Plaintiff failed to prove a likelihood of success on the merits.

Plaintiff LongCreek obtained leave of the Court, and was permitted to amend its Complaint and Fairways Development General Partnership (sometimes "Fairways"), the developer of LongCreek Plantation, was permitted to intervene as a second Plaintiff. Plaintiffs' Amended Complaint dated December 29, 2008, was served on January 16, 2009. The Amended Complaint requested a judgment and/or injunctive relief, ordering Mr. Marshall "to immediately comply with the applicable covenants and restrictions, including the removal or correction of the landscaping, pool and outbuildings at the Property or to obtain proper approval from the Association for such landscaping, pool and outbuildings and to otherwise comply with the applicable covenants and restrictions.". (Amended Complaint, Paragraph 16).

The Amended Complaint also requested a judgment against Mr. Marshall for any costs and expenses incurred by the Association for enforcing the Covenants and Restrictions and a fine

of $500.00 for each tree in excess of six inches in diameter removed from Mr. Marshall's Property without prior approval. Mr. Marshall answered the Amended Complaint and counterclaimed. In addition to affirmative defenses,[1] Mr. Marshall counterclaimed for (1) Promissory Estoppel; (2) Fraud; (3) Constructive Fraud; (4) Negligent Misrepresentation; (5) Slander of Title; and (6) Defamation.

Plaintiff Fairways Development General Partnership on its own motion was dismissed without prejudice as a party on March 29, 2010. The Order dismissed Fairways' Complaint and Defendant's Counterclaim as to Fairways and provided as follows: "[i]t appears that the controversy between Fairways Development General Partnership and Defendant has been fully settled and resolved by way of agreement."

The matter came on for trial on May 23 and May 24, 2011, and was continued on August 22, 23, and August 26, 2011. The Court took testimony of witnesses and received evidence. The Court granted Plaintiff's motion for directed verdict as to the counterclaim for fraud and constructive fraud. Based on the testimony and all of the evidence the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

[1] The affirmative defenses included (1) Failure to state a claim; (2) Mr. Marshall acted properly in accordance with state and local laws and regulations; (3) A violation of Due Process related to requested excessive and irrational remedies; (4) A violation of Due Process related to give notice of remedies; (5) Substantial compliance; (6) Unclean hands; (7) Estoppel in interpreting and applying the Restrictions in an arbitrary, inequitable, non-uniform, subjective and unforeseeable manner; (8) Unclean hands and Estoppel because the Plaintiff's claims were precipitated by wrongful and deceptive activity directed by Plaintiff or plaintiff's agents against Mr. Marshall; (9) Estoppel because any damages were caused by Plaintiff or Plaintiff's agents provision of deceptive or false information to Mr. Marshall; 10) Estoppel, Waiver and Unclean Hands on the basis that Mr. Marshall's actions were reflective of the manner of property improvement among Marshall's neighbors (11) Plaintiff's failure to mitigate damages; (12) Estoppel based on the fact that Marshall sought in good faith to ascertain Plaintiff LongCreek's position concerning the applicability of the Restrictions to the Property, Plaintiff and Plaintiff's agents informed Mr. Marshall that the Property was not subject to the Property Owners' Associations' restrictions and they materially changed their position; (13) Estoppel on the basis that Plaintiff failed to apply the Restrictions to Mr. Marshall's predecessors of the Property and surrounding and contiguous pieces of property; (14) the Restrictions do not run with the land; (15) Fraud; (16) Laches; (17) Misrepresentation; (18) Mistake; and (19) Waiver.

LongCreek Plantation is a development comprised of 2400 acres, purchased by Fairways in the 1980s. Fairways was also the company managing the development. The manager of Fairways, Mr. John Bakhaus, testified that the development of the acreage was started in the 1970's by other owners and that when Fairways purchased the development in 1980 it became the third owner of the development. Mr. Bakhaus testified that there were no formal restrictions on property sold by the previous owners to Fairways. The development is bordered by Longtown Road West and Longtown Road East, which form an outside loop around the acreage. Mr. Bakhaus testified that some of the properties on the "outside loop" of the acreage were sold prior to Fairways' purchase of the acreage; and, that as a result some of the lots on Longtown Road are in the LongCreek Association and some are not. Mr. Bakhaus further testified that some of the lots on Longtown Road have different restrictions from each other, and that some lots have restrictions on them very different than those set out in the Declaration. As a result of this, Mr. Bakhaus stated that there was no uniformity as to many of the lots, fences, and structures on this outside loop of the development.

In 1986 or 1987, Fairways started working on a set of formalized restrictions to be placed on the 2400 acres at a later date. On July 14, 1988, Fairways filed the Declaration, which was entered into between the Association and Fairways in the Office of Registrar of Menes Conveyances at Deed Book and Page DO896 page 186. (Defendant's Exhibit #1). The collection of Association fees and the maintenance of the Association membership roll was handled by an accountant until February 2002, when Halcyon Real Estate Services, LLC ("Halcyon") began acting as the managing agent for the Association.

The Covenants and Restrictions define "Owner"[2] as those owners of property shown by the real estate records in the RMC office of the residential lots listed in Exhibit "A". (Declaration at p. 7). The Covenants and Restrictions require that every Owner "shall be a member of the Association." (Declaration at Part Three, Article 1, Section 1, p. 42).

At the time the Declaration was filed, parts of the LongCreek Plantation acreage had already been developed into a platted subdivision. Those properties were listed in Exhibit A to the Declaration and were thereby made subject to the terms set forth in the Declaration. The Marshall Property is not listed in Exhibit A to the Declaration.

The Declaration further reserved Fairways' right to make additional properties, identified in Exhibit B to the Declaration, subject to the Declaration. The Declaration specifically provided two ways by which those properties listed in Exhibit B could be added to the Association:

(1) The Association could cause to be filed in the Richland County Clerk's Office a Supplementary Declaration regarding a particular piece of property; or,
(2) Fairways could put a reference to the Book and Page of the filing of the Declaration in a deed out of Fairways Property filed in the realty records of the Office of the Clerk of Court for Richland County, South Carolina.

The Declaration also gave any property owners, who purchased property within the development acreage prior to the filing of the Declaration the option to join the Association. Mr. Bakhaus testified that the proper method to bring additional property into the Association and make the property subject to the Declaration is by the filing of a Supplemental Declaration.

Mr. Bakhaus testified he did not know whether the Marshall Property was included in the property identified in Exhibit B, and there was no evidence that the Marshall Property was among the properties identified in Exhibit B to the Declaration. Plaintiff admitted that there was no Supplemental Declaration filed as to the Marshall Property[3]. Plaintiff instead asserted that

[2]There is no other definition of "Owner" in the Declaration.
[3] Plaintiffs' Response to Defendant's Request to Admit, Exhibit # 35 at trial.

certain language in the deed from Fairways to Mr. and Ms. Burgess was sufficient to place the Marshall Property in the Association, option "2" above.

The Marshall Property came to be in Defendant's possession as follows:

On September 17, 1990, Fairways conveyed what was identified as Lot 1, Block P, containing 4.49 acres, to Ronnie W. and Nancy M. Burgess. (D.997, p.681). The property was further described as a "portion of the property conveyed to the GRANTOR by deed of J and J Corporation, dated July 11, 1980, recorded July 14, 1980, in Deed Book D. 545 page 850." Mr. and Ms. Burgess subsequently conveyed the same property to Secaida D. and Melissa B. Howell by deed dated April 11, 1997.[4] Thereafter, a home was constructed on the property. By deed dated May 31, 2005, and filed June 1, 2005, the Howells conveyed the property, by this time identified as 864 Longtown Road West, Blythewood, S.C., to Defendant Charles Marshall, Jr. and Pearlie D. Marshall[5]. (Book/Page R1059.8).

The deed from Fairways to Mr. and Ms. Burgess contained certain restrictions and a statement referring to LongCreek Plantation Property Owner's Association, Inc. The deeds to the Howells did not contain the specific restrictions or any reference to the Association or the Declaration, nor did the deed to the Mr. and Mrs. Marshall. Importantly, there is no deed in the title to the Property which refers to the Book and Page filing information of the Declaration.

The Residential Property Condition Disclosure Statement provided by the Howells to the Marshalls prior to closing required the seller to check a box for "yes" or "no" as to the applicability of various disclosure statements. Statement number 21 stated: "Owners' association fees or "common area" expenses or assessments." The answer provided by the

[4] Neither the Burgesses nor the Howells are parties to this action.
[5] Pearlie D. Marshall is not a party to this action.

properly recorded, that the property is not subject to the Declaration, and that the owner of that property is not an "Owner" as defined in the Declaration and thus not subject to Association fees, assessments, or fines. Mr. Peterson of Halcyon admitted that a homeowner could live within the LongCreek Plantation development area and not know whether their property was subject to the

Additions. The Company, its successors, and assigns, shall have the right, without further consent of the Association, to bring within the plan and operation of this Declaration: (i) all or any part of that Property described in Exhibit "B" attached hereto and made a part thereof; and (ii) additional properties in future stages of the development beyond those described in Exhibit "A" and Exhibit "B" so long as they are contiguous with then existing portions of LongCreek Plantation; and (iii) all of those lots less to and excepted to on Exhibit B which have been previously conveyed .... The additions authorized under this Section shall be made by filing a Supplementary Declaration of Covenants and Restrictions with respect to the additional property which shall extend the operation and effect of the covenants and restrictions of this Declaration to such additional property after which it shall fall within the definition of Property as herein set forth. [emphasis added].

On page 7 of the Declaration "Owner" is defined in pertinent part as follows:

(t) "Owner" shall mean and refer to the Owner as shown by the real estate records in the Office of the Register of Mesne Conveyances, ... Of fee title to any Residential Lot, Dwelling Unit, ... , situated upon the Property and the Owners of the Existing Residential Lots listed in Exhibit "A"....

"Property" is defined in the Declaration at page 8 in pertinent part as follows:

(u) "Property" and "LongCreek Plantation" shall mean and refer to the Property described in Part One, ARTICLE II, Section 1 hereof, and additions thereto, as are subjected to this Declaration or any supplemental declaration under the provisions of Part One, ARTICLE II, Section 2 hereof ....

Accordingly, there are two ways to make property owned by Fairways subject to the Declarations of Covenants: (1) filing a Supplementary Declaration; or (2) make reference in a deed from Fairways to the "LongCreek Plantation Covenants of 1988," by the Book and Page of the filing of the Declaration. (emphasis added).

In essence, Fairways planned to develop the 2400 acre property in phases. To accomplish this Fairways reserved the right to make additional property subject to the

LongCreek Plantation Declarations by filing a Supplementary Declaration at its option. It is undisputed that no Supplementary Declaration was filed with respect to the Marshall Property.

The Declaration, filed in 1988, at page 13, specifically provides that it applies to the property located on Exhibit A to the Declaration. The evidence is undisputed that the Marshall Property was not listed on Exhibit A to the Declaration. The Declaration provides that the property listed on Exhibit B could later be added and made subject to the Declaration. There was no evidence that the Marshall Property was listed on Exhibit B to the Declaration. In any event even if the Marshall Property was listed on Exhibit B to the Declaration, no Supplementary Declaration that included the Marshall Property was ever filed. Therefore, the Declaration does not apply to the Marshall Property.

Additionally, Plaintiff's reliance on the reference language in the Fairways to Burgess Deed is misguided. The language, contained in the original deed out of Fairways to the Burgesses, is as follows:

> The Grantee, by the acceptance of this deed, acknowledges that this conveyance **is subject to** the provisions of the Declarations and Covenants and Restrictions and to the By-Laws of LongCreek Plantation Property Owners' Association, Inc., including the provisions of all exhibits, and agrees to observe and perform all obligations there under and any rules or regulations adopted from time to time by LongCreek Plantation Property Owners' Association, Inc., including but not limited to the payment of assessments. The Grantee acknowledges and agrees that all of said provisions are reasonable, fair and equitable and Grantee acknowledges and agrees that this deed, the Declaration, Covenants and restrictions and By-Laws of LongCreek Plantation Property Owners Association, Inc., and exhibits thereto, contain all of the representations and inducements concerning the purchase by Grantee of the lot described above.

[emphasis added] (hereinafter referred to as the "Fairways' Deed Language").

The Declaration at page 2 provides that property may be made subject to the Declaration by reference in deeds from Fairways "to the Book and Page" of the recording of the Declaration in the realty records. The Burgess Deed did not refer to the Declaration by Book and Page of recording and there is no deed in the chain of title for the Marshall Property that refers to the Declaration by Book and Page.

The Fairways Deed Language states the conveyance is "subject to" the Declarations. The general rule of law is that the phrase "subject to" does not in-of-itself create any affirmative rights. It is purely to give notice. See, *S.L. Nusbaum and Company v. Atlantic Virginia Realty Corp.*, 206 Va. 673, 146 S.E.2d 205 (1966).

In *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corporation*, 368 S.C. 342, 350, 628 S.E. 2d 902, 907 (Ct.App.2006), the South Carolina Court of Appeals held that any attempt to amend restrictive covenants must strictly comply with the procedure set forth in the original declarations. It held as follows:

> the essence of our holding is that a developer may reserve to himself, in his sole discretion, the right to amend restrictive covenants running with the land or impose new restrictive covenants running with the land, provided five conditions are met: (1) the right to amend the covenants or impose new covenants must be unambiguously set forth in the original declaration of covenants; (2) the developer, at the time of the amended or new covenants, must possess a sufficient property interest in the development; (3) the developer must strictly comply with the amendment procedure as set forth in the declaration of covenants; (4) the developer must provide notice of amended or new covenants in strict accordance with the declaration of covenants and as otherwise may be provided by law; and (5) the amended or new covenants must not be unreasonable, indefinite, or contravene public policy.

[emphasis added].

Any amendment to the Declaration must be made in strict accordance with the Declaration's own requirements or the amendment is invalid. See also, *Duffy v. The Landing*

Any Supplementary Declaration subjecting property to restrictions and covenants must meet stricter requirements. Evidence at trial was that Plaintiff did, in fact, on July 6, 2005[7], file a document entitled "Supplementary Declaration", which purported to add to the Association some properties in Exhibit B of the Declaration. However, importantly, there is no evidence in the record that the Marshall Property was included in Exhibit B to the Declaration and Plaintiff makes no claim at all that the Property was ever added by Supplementary Declaration. Plaintiff limits the basis for its claim that the Property is subject to the Declaration to the Fairways Deed Language in the deed to Mr. and Ms. Burgess.

The ambiguous Fairways' Deed Language is not sufficient to overcome the strict requirements demanded to apply restrictive covenants to property. It is not sufficient to make the Marshall Property subject to the Declaration. The Fairways' Deed Language is at most a sign post. It tells a purchaser to look at a Declaration[8]. Upon being directed to the Declaration, it is evident that the Marshall Property is not listed in Exhibit A, Exhibit B, nor in any Supplementary Declaration then on file in the Richland County realty records. Therefore, the purchaser is then free to assume that that property, and the Marshall Property, is not subject to the Declaration.

2. **THE RESTRICTIONS AND COVENANTS IN THE DECLARATION DO NOT IMPLIEDLY APPLY TO THE MARSHALL PROPERTY.**

The Marshall Property was not expressly added as a property encumbered by the Declaration. The Marshall Property is not impliedly subject to the Declaration.

When a party contends that a restriction arises by implication, the contention is that the restrictions are said to create a reciprocal negative easement. To prove such an implied restriction four elements must be established: "(1) a common grantor, (2) a designation of land subject to restrictions, (3) a general plan or scheme of restrictions, and (4) covenants running

[7] This was one month *after* the Marshall Property was sold to Mr. and Mrs. Marshall.
[8] Yet, it does not give a Deed Book or Page as specifically required in the Declaration.

with the land in accordance with such plan or scheme." *Gambrell v. Schriver*, 312 S.C. 354, 358, 440 S.E.2d 393, 395 (Ct. App. 1994). Accord, *Bomar v. Echols*, 270 S.C. 676, 679-680, 244 S.E.2d 308, 310 (1978). *Traylor v. Holloway*, 206 Va. 257, 142 S.E.2d 521 (1965) (the party who seeks to enforce a covenant restricting free use of land has the burden of proving it prohibits the acts of which he complains).

The courts have held that in grants of lots, "there must have been included some restriction for the benefit of the land retained, evidencing a scheme or intent that the entire tract shall be similarly treated, so that once the plan has been effectively put into operation, the burden placed upon the land conveyed is by operation of law reciprocally placed upon the land retained." *Gambrell v. Schriver*, 312 S.C. 354, 358, 440 S.E.2d 393, 395 (Ct.App.1994). "In determining whether a reciprocal negative easement has been created, the court should consider not only the language of the deeds, but also the circumstances surrounding the origin of the covenants." *Id.* "Generally, the developer must establish the general scheme of development before any lots are sold." *Id.* "All doubts regarding the creation of an implied reciprocal negative easement must be resolved in favor of the freedom of land from restriction." *Id.*

There is no dispute that a general scheme or plan is lacking for the outer loop of the LongCreek Plantation development. The restrictions are very different and there is no uniformity. Some of the properties on Longtown Road near the Marshall Property are subject to the Declaration and some are not. Some owners of that property are in the Association and some are not. There is no consistency in size and style of the homes, the type of fencing used, out buildings, such as sheds, garage barns, etc. Mr. Peterson testified that there would be no way for a buyer in the area to infer that there were certain restrictions, limitations or requirements.

Accordingly, application of the restrictive covenants in the Declaration cannot be implied to the Marshall Property.

3. **PLAINTIFF IS BARRED BY WAIVER, ESTOPPEL, LACHES AND UNCLEAN HANDS TO IMPOSE THE DECLARATIONS OF COVENANTS ON THE SUBJECT PROPERTY.**

A. Waiver[9]

Plaintiff can be barred from imposing the restrictions in the Declaration on the Marshall Property, if its conduct demonstrates a waiver of the right to enforce those restrictions. "Restrictive covenants are contractual in nature." *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (S.C. 2006). Because they are contractual, they can be waived. The evidence is that several of the neighboring lots of the Marshall Property are not subject to the terms of the Declaration, or the rules, regulations, fees, penalties or directives by Association. Many of the houses on Longtown Road are not covered by the Declaration. Plaintiff through inaction against the previous owners of the Marshall Property for over 15 years waived any right to enforce the restrictive covenants on the Marshall Property or to now take the position the Marshall Property is subject to the Declaration or that Mr. Marshall is in the Association.

Waiver is defined as "a voluntary and intentional abandonment or relinquishment of a known right. Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387-88 (S.C. 1992). "The doctrine of waiver does not necessarily imply that the party asserting waiver has been misled to his prejudice or into an altered position." *Id.* at 344, 415 S.E.2d at 388. In this case neither the Association

[9] This principle of waiver was recognized by the Honorable Alison Rene Lee as a primary basis to deny Plaintiff's Motion for Temporary Injunction in her Order filed June 12, 2007.

nor Fairways attempted to assert that the Marshall Property was in the Association or subject to the Declaration for over a decade. It was Plaintiff's duty to know, and to act if it considered the Marshall Property to be in the Association and subject to the terms of the Declaration. The only evidence is that none of the previous owners were assessed Association fees or were put on the rolls of the Association members. There was not even evidence that the Howells, the previous owners of the Property, had to get architectural approval for the construction of the house on the Property. Plaintiff has waived any right they may have had to now make such contention.

An association cannot act arbitrarily. See, *Seabrook Island Property Owners Association v. Marshland Trust, Inc.*, 358 S.C. 655, 596 S.E. 2d 380 (Ct.App.2004). There was evidence that deeds from Fairways as to a number of other pieces of property physically located in the LongCreek Plantation subdivision also contain the Fairways' Deed Language, on which Plaintiff relies in this action; however, those properties are not in the Association and no other lawsuit was filed by Plaintiff as to the status of those properties. The Plaintiff has arbitrarily brought suit to impose the Declarations upon on the Marshall Property.

If a party fails to bring a claim for enforcement against a known violation until after a substantial amount has been spent on improvements, that party has waived its right to enforce a restrictive covenant. See, *Janasik v. Fairways Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344-45, 415 S.E.2d 384, 387-88 (S.C. 1992). *Cedar Cove Homeowners Ass'n., Inc. v. DiPietro*, 368 S.C. 254, 628 S.E.2d 284 (Ct.App.2006). In this case Plaintiff knew or should have known whether or not the Marshall Property was subject to the Declaration and its Owner was in the Association. The Association was aware that the house was built on the Property in about 2002, and that the owner was not on the Association roll, and was not paying assessments. Plaintiff apparently made no demand for architectural approval of the home built by Mr. and Ms.

Howell. It was not until after Mr. Marshall removed the trees, and put in the pool and the foundation for the pool house and garage that Plaintiff brought suit for injunction.[10] Plaintiff did not complain until more than a decade after the deed to Mr. and Ms. Burgess from Fairways. Plaintiff is held to have waived any right that the Marshall Property is subject to the Declaration.

B. Estoppel

Plaintiff is estopped to (1) enforce the restrictive covenants as against the Marshall Property and, (2) to take the position that the Marshall Property is subject to the Declaration or that Mr. Marshall is in the Association, if the elements of equitable estoppel have been met.

The elements of equitable estoppel as to the party estopped are: "(1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention or, at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts." *Southern Dev. Land & Golf Co., LTD v. S.C. Pub. Serv. Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748, 750 (S.C. 1993). The elements of estoppel as to the party claiming the estoppel are: "(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position." *Id.* "The doctrine of estoppel applies if a person, by his actions, conduct, words or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his prejudice or injury." *Rushing v. McKinney*, 370 S.C. 280, 293, 633 S.E.2d 917, 924 (Ct.App.2006), quoting *Hubbard v. Beverly*, 197 SC 476, 480, 15 S.E. 2d 740, 741 (S.C. 1941).

[10] This fact alone would bar any mandatory injunctive relief. The balance of the equities would demonstrate that the harm to Mr. Marshall outweighs any benefit to Plaintiff; thus, no relief should be given. *Hunnicutt v. Rickenbacker*, 268 S.C. 511, 234 S.E.2d 887 (S.C. 1977)

Plaintiff's agent, Halcyon, while acting within the course and scope of its agency for Plaintiff, informed Mr. Marshall's closing attorney that the Property was not subject to being assessed; that the Property was "grandfathered out" of the Association. Mr. Marshall was well established in his new home before anyone indicated to him that the Property was subject to the Declaration. Plaintiff had never assessed the prior owners, and the Property was not on the list of the homeowners in the Association. Mr. Marshall had every reason to believe what he was being told, was true. Plaintiff had the expectation that the conduct would be acted upon by Mr. Marshall. Mr. Marshall relied on the representations. Furthermore, Plaintiff did not try to take the position that the Property was in the Association until after Mr. Marshall had removed most of the trees in accordance with his landscape plan.

The court held as follows in *Janasik*:

> Where an implied waiver is involved, the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations, so that it is difficult to determine the exact point where one doctrine ends and the other begins." .... Whether a party is barred by estoppel or waiver can only be determined in light of the circumstances of each case.

307 S.C. at 344, 415 S.E.2d at 388, quoting Am.Jur. 2d, Estoppel and Waiver §§ 154, 158 (1966).

The Declarations do not apply to the Marshall Property, and Plaintiff is estopped to allege otherwise.

C. Laches

The Plaintiff is barred by the Doctrine of Laches to assert that the Marshall Property is subject to the Declaration or that Mr. Marshall is a member of the Association, if Plaintiff has neglected for an unreasonable and unexplained length of time, to do what in law it should have done when there were circumstances affording opportunity for diligence. *Gordon v. Drews*, 358

S.C. 598, 612, 595 S.E.2d 864, 871 (Ct.App.2004) (quoting *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct.App.1999). Although delay alone is not enough to constitute laches, if the delay is unreasonable, and the party asserting laches is prejudiced, laches is a defense. See, *Gordon*, 358 S.C. at 612, 595 S.E.2d at 871 (quoting *Brown v. Butler*, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct.App.2001)). Accord, *Queen's Grant II*, 368 S.C. at 359, 628 S.E. 2d. at 912.

In *Jervey v. Martint Environmental, Inc.*, 396 S.C. 442, 451, 721 S.E.2d 469, 474 (Ct.App.2012) the court held as follows: "Laches is an equitable doctrine that our courts have defined as 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do in law what should have been done.'" To establish laches as a defense Mr. Marshall is required to show that Plaintiff unreasonably delayed an assertion of a right that resulted in prejudice to Mr. Marshall. The evidence is that Plaintiff failed to decide the whether the Marshall Property was subject to the Declaration, failed to do anything to put the Property owners on notice of its contention that the Property was subject to the Declaration for over 15 years. This unreasonable delay resulted in substantial prejudice to Mr. Marshall. Accordingly, Plaintiff is barred to allege the Marshall Property is subject to the Declaration by the doctrine of laches.

4. <u>DEFENDANT'S COUNTERCLAIMS ARE DENIED</u>.

Defendant asserted counterclaims for Promissory Estoppel, Negligent Misrepresentation, Slander of Title, Defamation, Fraud and Constructive Fraud. At the conclusion of the trial the Court granted Plaintiff's motion for nonsuit as to Defendant's counterclaims for fraud and constructive fraud. The Court further finds:

A. Defendant's counterclaim for Promissory Estoppel is dismissed.

A contract and promissory estoppel are two separate and distinct legal theories. Satcher v. Satcher, 351 S.C. 477, 570 S.E.2d 535 (Ct. App. 2002). "They are two different creatures of the law; they are not legally synonymous; the birth of one does not spawn the other." Id. (internal quotations omitted). To succeed on a claim of promissory estoppel, a claimant must prove: (1) the presence of a promise unambiguous in its terms; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise. Id. at 483-84. "The applicability of the doctrine depends on whether the refusal to apply it would be virtually to sanction the perpetration of a fraud or would result in other injustice." Id. at 484. See Woods v. State, 314 S.C. 501, 431 S.E.2d 260 (Ct. App. 1993) (holding that property owner failed to allege or produce any evidence of the presence of a promise unambiguous in its terms or that he sustained injury in reliance on the promise).

I find the evidence presented does not support a cause of action for promissory estoppel. As noted above, there was clearly not an unambiguous promise made to Marshall by the Association. Marshall never talked to the Association or Halcyon. Rather, his closing attorney, Roddy Jordan instructed his staff to call Halcyon to find out if any dues were owed on the Property. Halcyon's statement to Jordan's staff that no dues were owed on the Property does not constitute an unambiguous promise that Marshall's property was not subject to the Association's Covenants and Restrictions.

Jordan testified that the call made to Halcyon was not for the purpose of getting Halcyon's opinion as to the covenants and restrictions of record in Marshall's chain of title. He testified that he would not ask Halcyon that question, because they are not lawyers and he believed from his examination of the chain of title that the Property was encumbered by the

Association's Covenants and Restrictions. Jordan testified that even if Halcyon had stated that the Property was not subject to the Covenants and Restrictions he would not have relied on that representation. At most, the evidence reflects a misunderstanding between Marshall and his attorney. However, this misunderstanding cannot be imputed to the Association. Because Defendant cannot meet the necessary elements, his counterclaim of promissory estoppel is denied.

Furthermore, Marshall was aware of the Association's claims that he was required to have landscaping and construction plans approved by the Association before he began building the garage and pool house. He therefore embarked on that project knowing the risk that he could be violating the Covenants and Restrictions. Any alleged damages that he incurred as a result of the temporary injunction filed by the Association in response to his activities are therefore not recoverable under this or any other cause of action alleged in the Counterclaim.

B. Defendant's counterclaim of negligent misrepresentation is dismissed.

To establish liability for negligent misrepresentation, the plaintiff must show by a preponderance of the evidence: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the representation; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation. Turner v. Milliman, 392 S.C. 116, 123, 708 S.E.2d 766, 769 (2011). Evidence of a mere broken promise is not sufficient to prove negligent misrepresentation. Id. at 769-70. Under the elements for both fraud and negligent misrepresentation, the representation at issue must be false. Id. at 770.

In order to prevail on this cause of action, Marshall must prove that the Association made a false statement to him, the Association had a pecuniary interest in making the false representation and that Marshall justifiably relied on the false statement. As previously discussed, Marshall could not justifiably rely on any statement made by the Association that the Property was not subject to the Covenants and Restrictions because of his actual and constructive knowledge.

Furthermore, the statement imputed to the Association is that there were no dues owed on the Property at the time of the purchase, that the property did not appear on the homeowners list and that the property was "grandfathered in." The first two statements were not false when they were made. Halcyon's records showed no outstanding dues and the Property was not shown on the owners list. The only potentially false statement was that the property was "grandfathered in" – that no dues would be owed in the future. However, the Association has absolutely no pecuniary interest in making such a statement. Marshall has not presented evidence that the Association had any pecuniary interest in informing Marshall that he would not have to pay homeowners' dues and was otherwise not a member of the Association. Rather, such statements would be against Plaintiff's pecuniary interest. The same rationale applies to Halcyon. The Association and Halcyon benefit from having properties included in the Association. There would be no incentive for Halcyon or LongCreek to tell Marshall the property would not subject to the Covenants and Restrictions. Defendant's assertion that Plaintiff or Halcyon had a pecuniary interest is not supported by the evidence before the Court. Therefore, Defendant's counterclaim for negligent misrepresentation is denied.

C. Defendant's counterclaims of Slander of Title and defamation are dismissed.

Marshall's slander of title claims is based upon Longcreek's filing of a lien for payment of the 2006 assessments. His defamation claim is based upon Longcreek's including his name as one who had not paid his assessments in a newsletter circulated only to Association members.

"The term 'slander of title' is defined as a false and malicious statement, oral or written, made in disparagement of a person's title to real or personal property, causing him injury." Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 18, 567 S.E.2d 881, 890 (Ct. App. 2002). To maintain an action for slander of title in South Carolina, a plaintiff must establish: "(1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff's title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties." Id., at 21-22, 567 S.E.2d at 892 (Ct. App. 2002). The "[w]rongfully recording an unfounded claim against the property of another generally is actionable as slander of title." Id., at 22, 567 S.E.2d at 892.

In order to prove defamation, the plaintiff must show (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Erickson v. Jones St. Publishers, L.L.C., 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006). In addition, a plaintiff must "plead and prove both common law malice and special damages." Id. "Where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded." Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 485, 514 S.E.2d 126, 134 (1999).

I find that there was no credible testimony that the lien filed against the property for the 2006 dues or the inclusion of Marshall's name in the newsletter was done with malice. Rather, the testimony confirmed that liens are filed by the Association as a matter of course for those who fail to pay assessments in a timely manner. In addition, the names of all members who are delinquent are included in the newsletter. Marshall was not singled out. The Association believed, based upon its review of the chain of title that the Property was subject to the Covenants and Restrictions. Marshall's closing attorney testified that it was reasonable for the Association to reach the conclusion that the Property was subject to the Covenants and Restrictions, because he himself, a licensed attorney in South Carolina, had reached the same conclusion.

I also find that the newsletter was entitled to a qualified privilege. In a defamation action, the defendant may assert the affirmative defense of conditional or qualified privilege. Swinton Creek, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999). In determining whether or not the communication was qualifiedly privileged, regard must be had to the occasion and to the relationship of the parties. Id. In South Carolina,

A communication made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable, and although the duty is not a legal one, but only a moral or social duty of imperfect obligation. Manley v. Manley, 291 S.C. 325, 331, 353 S.E.2d 312, 315 (Ct. App. 1987) (quoting Conwell v. Spur Oil Co. of W. S. Carolina, 240 S.C. 170, 178, 125 S.E.2d 270, 274-75 (1962)) ("The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not

restricted within any narrow limits."); Restatement (Second) of Torts, Section 596 ("An occasion is conditionally privileged when the circumstances are such as to lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that facts exist which another sharing such common interest is entitled to know.").

Although South Carolina has not specifically addressed whether qualified privilege protects a communication made by a homeowners' association to its members regarding issues affecting the members and the association, other jurisdictions have examined qualified privilege in similar circumstances and held that a qualified privilege does apply in this context to protect communications pertaining to a common interests shared by such organizations and their members. See, Century Mgmt., Inc. v. Spring, 905 S.W.2d 109 (Mo. Ct. App. 1995). In Spring, members of the homeowners' association circulated a document complaining about the way their property was being managed. The property management company filed suit for defamation. The court held:

[T]he respondents [homeowners] enjoyed a qualified privilege . . . this was a case in which the publishers of the allegedly defamatory statements (the respondents) and the recipients (fellow association members) had a common interest (upkeep of their subdivision) and the communication was of a kind reasonably calculated to further that interest. Id. at 112; see also Davidson v. Seneca Crossing Section II Homeowner's Ass'n, Inc., 979 A.2d 260 (Md. Ct. App. 2009) (holding statements made by homeowners' association members and minutes recording the same regarding candidate for the association's board fit squarely within the qualified privilege); Cohen v. Beachside Two-I Homeowners' Ass'n, CIV. 05-706 ADM/JSM, 2006 WL 1795140 (D. Minn. June 29, 2006) aff'd as modified sub nom. Cohen v. Beachside Two-I Homeowners' Assn., 272 F. App'x 534 (8th Cir. 2008) (upholding a qualified privilege for the

association to publish information about delinquencies in board meeting minutes because "the failure of some homeowners to pay their monthly assessments directly impacts the entire Beachside community. As a result, the Beachside homeowners have a general right to be kept informed by the Board of the financial status of their community.")

I find the LongCreek newsletter listing Marshall as having outstanding dues with the Association are protected by qualified privilege, because the collection of dues and the financial stability of the HOA is a matter of common interest to all homeowners. There is no evidence that the newsletter was distributed to anyone but members of the Association. The Association, the management company, and the homeowners share a common interest in their community. The failure of some homeowners to pay their monthly assessments or dues directly impacts the entire LongCreek community. As a result, the LongCreek homeowners have a general right to be kept informed by Plaintiff of the financial status of their community.

Accordingly, I find that Marshall's slander of title and defamation claims must fail, and therefore, his claim of attorney fees and costs.

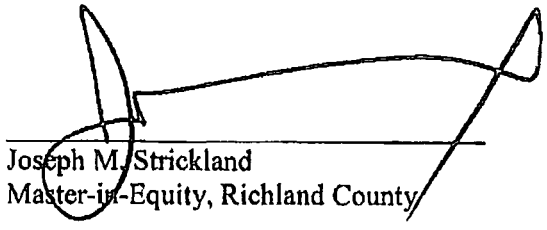
CONCLUSION

The ruling of the Court as summarized as follows:

1. The Court finds in favor of Defendant Charles Marshall on Plaintiff's Complaint and holds that Marshall Property at 864 Longtown Road West, Blythewood, South Carolina is not subject to the Declaration of Covenants and Restrictions of LongCreek Plantation Property Owners' Association and Defendant Charles Marshall, as owner of the property is not a member of the Association;
2. Accordingly, Plaintiff's Complaint for injunctive relief, enforcement of covenants and restrictions and any fine for tree removal is denied; and,

3. The Court finds in favor of Plaintiff on Defendant's Counterclaims.

IT IS SO ORDERED.



Joseph M. Strickland
Master-in-Equity, Richland County

March 3, 2015 ~~2014~~

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2006 CP-40-3713

Longcreek Plantation Property Owners' Association, Inc. And Fairways Development General Partnership

PLAINTIFF(S)

Charles Marshall

DEFENDANT(S)

Submitted by: Susan Batten Lipscomb	Attorney for : ☐ Plaintiff ☒ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Defendant, Charles Marshall on complaint	Plaintiff, LongCreek Plantation Property Owners' Association, Inc. on complaint	$0
Plaitiff LongCreek Plantation Property Owners' Association, Inc. on counter claims	Defendant, Charles Marshall on counter claims	$0
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

Property Address: 864 Longtown Road West

TMS: R20401-02-06

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: **Title abstractors and researchers should refer to the official court order for judgment details.**

~~Circuit Court Judge~~ Master — 2097 **Judge Code** — March 3, 2015 **Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.