THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY

IN THE COURT OF COMMON PLEAS

HON. MARVIN H. DUKES, III
MASTER IN EQUITY AND SPECIAL CIRCUIT JUDGE

Case Number 2014-CP-07-1435

CATWALK, LLC; MOONDOG, LLC; LET, LLC; LOST PARROT LLC; VACATION INN, LLC; SBM, LLC; and SOUTH BEACH SWIMMING POOL, INC., ... Appellants,

v.

SEA PINES SOUTH BEACH OWNERS ASSOCIATION, INC., ... Respondent.

BRIEF OF THE APPELLANTS

COLTRANE & WILKINS, LLC
Curtis L. Coltrane
South Carolina Bar Number 1344
Post Office Box 6808
Hilton Head Island, SC 29938
(843) 785-5551
(843) 785-5552 (Fax)
curtis@coltraneandwilkins.com
Attorneys for Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot, LLC; Vacation Inn, LLC; SBM, LLC; and South Beach Swimming Pool, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 5

STANDARD OF REVIEW 12

ARGUMENT NUMBER 1 13

ARGUMENT NUMBER 2 21

ARGUMENT NUMBER 3 23

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Café Associates Limited v. Gengross, 305 S.C. 6, 406 S.E.2d 162 (1991) 12

Centex International, Inc. v. S. Carolina Department of Revenue, 406 S.C. 132, 750 S.E.2d 65 (2013) 23

Evening Post Publishing Co. v. Berkeley County School District, 392 S.C. 76, 708 S.E.2d 745 (2011) 12

Hancock v. Mid-South Mgt. Company, 381 S.C. 326, 673 S.E.2d 801 (2009) 24

Hansson v. Scalise Builders of S.C., 374 S.C. 352, 650 S.E.2d 68 (2007) 12

Hoard ex rel. Hoard v. Roper Hospital, Inc., 387 S.C. 539, 694 S.E.2d 1 (2010) 12

Hyer v. McRee, 306 S.C. 210, 410 S.E.2d 604 (Ct.App. 1991) 13

Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992) 25

Koester v. Carolina Rental Ctr., 313 S.C. 490, 443 S.E.2d 392 (1994) 24

Madden v. Bent Palm Investments, LLC, 386 S.C. 459, 688 S.E.2d 597 (Ct. App. 2010) 16

P.P.G. Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc., 297 S.C. 176, 375 S.E.2d 331 (Ct.App. 1988) 12

Redwend Limited P'ship v. Edwards, 354 S.C. 58, 581 S.E.2d 496 (Ct.App. 2003) ... 12

Sifonios v. Town of Surfside Beach, 414 S.C. 269, 777 S.E.2d 425 (Ct.App. 2015) 16, 20

South Carolina Property & Casualty Guaranty Association v. Yensen, 345 S.C. 512, 548 S.E.2d 880 (Ct.App. 2001) 12

State Accident Fund v. South Carolina Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) 16

Sutton v. Clark, 59 S.C. 440, 38 S.E. 150 (1901) 21

Valley Public Service Authority v. Beech Island Rural Community Water District, 319 S.C. 488, 494, 462 S.E.2d 296, 299 (Ct. App. 1995) 16

STATUTES

S. C. Code Ann. § 15-3-380 (Supp. 2015) 1, 22, 23

COURT RULES

Rule 56(c), SCRCP 12, 24

OTHER AUTHORITIES

17 S.C. Juris. *Covenants* § 69 (1993) 13

American Heritage Dictionary of the English Language, 3rd Ed., 1992. 16

STATEMENT OF ISSUES ON APPEAL

1. Was it error for the Trial Judge to rule that a "Declaration of Rights, Restrictions, Affirmative Obligations, Conditions, Etc., which Constitute Covenants Running with certain Commercial Lands of Lighthouse Beach Company" (hereinafter, the "1973 Commercial Covenants"), is not the only applicable declaration of covenants encumbering the Appellants' real property, when the plain language of the 1973 Commercial Covenants states that it is the "sole applicable" declaration of covenants?

2. Was it error for the Trial Judge to rule that the "Declaration of Covenants and Restrictions for Sea Pines South Beach, Hilton Head Island, South Carolina" (hereinafter, the "1970 Covenants")" encumbered the Appellants' real property?

3. Was it error for the Trial Judge to rule that the Respondent is not barred by S. C. Code Ann. § 15-3-380 (Supp. 2015), from enforcing its claimed rights under the 1970 Covenants, when the only evidence in the record is that the Respondent failed to enforce, claim or assert any claimed rights and interests in the Appellants' real property founded on the 1970 Covenants for a period of more than 40 years?

4. Was it error for the Trial Judge to grant summary judgment to the Respondent by disregarding the evidence or weighing conflicting evidence and inferences in favor of the Respondent when the Appellants submitted more than a scintilla of evidence in opposition to the Respondent's motion?

STATEMENT OF THE CASE

Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot LLC; Vacation Inn, LLC; SBM, LLC; and South Beach Swimming Pool, Inc. (hereinafter, collectively referred to as "Catwalk, *et al.*"), began this action against the Sea Pines South Beach Owners Association, Inc. (hereinafter, the "Association"), by the filing and service of a Summons and Complaint on or about June 17, 2014, seeking a declaratory judgment that the 1970 Covenants are not enforceable against their real property.[1]

The Association filed its Answer and Counterclaim on or about August 25, 2014. In its Answer and Counterclaim, the Association denied the material allegations of the Catwalk, *et al.*, Complaint, and counterclaimed that the 1970 Covenants do encumber the real property owned by Catwalk, *et al.*, and demanded a Jury Trial.[2]

Catwalk, *et al.*, filed their Reply to the Counterclaims of the Association on August 27, 2014. In their Reply to Counterclaims, Catwalk, *et al.*, denied the material allegations of the Association's Answer and Counterclaims.[3]

By an Order dated February 18, 2015, the case was referred to the Hon. Marvin H. Dukes, III, Master In Equity and Special Circuit Judge for Beaufort County, South Carolina.[4]

---

1 *See:* Complaint, pp. 1-13, R. 16-28.

2 *See:* Answer and Counterclaim, pp. 1-6, R. 29-35.

3 *See:* Reply to Counterclaims, pp. 1-8, R. 36-43.

4 *See:* February 18, 2015, Order of Hon. Perry M. Buckner, pp. 1-2, R 3-4.

On June 15, 2015, Catwalk, *et al.*, filed their Motion for Summary Judgment.[5] The June 15, 2015, Motion for Summary Judgment was supported by the Affidavits of Charles A. Scarminach[6], Richard T. Sonberg[7], Ned E. Gilleland, Sr.[8], and Robert A. Gossett, Jr.[9]

The Association filed its Combined Response to Catwalk, *et al.'s*, Motion for Summary Judgment and Cross Motion for Summary Judgment on or about August 7, 2015.[10] The Association's Motion for Summary Judgment was supported by copies of various documents as attachments to it and also by the Affidavit of George W. Williams, Jr.[11]

Catwalk, *et al.*, filed their Return to the Association's Combined Response to Plaintiffs' Motion for Summary Judgment and Cross Motion for Summary Judgment.[12] The Return was supported by the Supplemental Affidavit Robert A. Gossett, Jr.[13], and the affidavit of Donald E. Sigmon.[14]

On August 18, 2015, the Association filed the Supplemental Affidavit of George W.

---

5 *See:* Motion for Summary Judgment, pp. 1-14, R. 44-57.

6 *See:* Affidavit of Charles A. Scarminach, pp. 1-5, Exhibits A and B, R. 206-242.

7 *See:* Affidavit of Richard T. Sonberg, pp. 1-3, R. 243-245.

8 *See:* Affidavit of Ned E. Gilleland, Sr., pp. 1-9, R. 246-254.

9 *See:* Affidavit of Robert A. Gossett, Jr., pp. 1-11, Exhibit "A", R. 255-287.

10 *See:* Combined Response to Plaintiffs' Motion for Summary Judgment and Cross Motion for Summary Judgment, pp. 1-9, Exhibits 1-8, R. 58-172.

11 *See:* Affidavit of George W. Williams, Jr., pp. 1-3, Exhibits 1-2, R. 166-172.

12 *See:* Return to Defendant's Combined Response to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, pp. 1-10, R. 173-182.

13 *See:* August 18, 2015, Supplemental Affidavit of Robert A. Gossett, Jr., pp. 1-2, R. 296-297.

14 *See:* Affidavit of Donald E. Sigmon, pp. 1-4, Exhibits "A" and "B," R. 288-295.

Williams, Jr.[15] On August 19, 2015, Catwalk, et al., filed their objection to the Supplemental Affidavit of George W. Williams, Jr.[16]

The motions were heard by the Hon. Marvin H. Dukes, III, on August 19, 2015. The motions were taken under advisement, and Catwalk, *et al.*, were granted leave to file an additional affidavit, which was done on September 21, 2015.[17]

On January 22, 2016, the Hon. Marvin H. Dukes, III, filed his Order denying the motion of Catwalk, *et al.*, and granting the Association's motion.[18] Catwalk, *et al.*, filed their Motion to Alter or Amend under Rule 59, SCRCP, on February 1, 2016.[19] The Association filed its Response to the motion of Catwalk, *et al.*, on March 11, 2016.[20]

The Rule 59, SCRCP, motion was heard by the Hon. Marvin H. Dukes, III, on March 16, 2016. The Hon. Marvin H. Dukes, III, filed his Order denying the Rule 59, SCRCP, Motion of Catwalk, *et al.*, on March 18, 2016.[21]

Catwalk, *et al.*, timely filed and served their Notice of Appeal on March 23, 2016.

---

[15] *See:* Supplemental Affidavit of George W. Williams, Jr., pp. 1-4, Exhibits "A." "B," "C," "D," "E," "F" and "G," R. 298-320.

[16] *See:* Objection to Affidavit of George W. Williams, Jr., mis-styled as Return to Defendant's Combined Response to Plaintiffs' Motion for Summary Judgment and Cross Motion for Summary Judgment, pp. 1-4, R. 321-324.

[17] *See:* September 21, 2015, Supplemental Affidavit of Robert A. Gossett, Jr., pp. 1-3, R. 325-327.

[18] *See:* January 22, 2016, Order of Hon. Marvin H. Dukes, III, pp. 1-9, R. 5-13.

[19] *See:* Motion to Alter or Amend under Rule 59, SCRCP, pp. 1-14, R. 183-196.

[20] *See:* Defendant's Response to Plaintiffs' Rule 59(e) Motion to Alter or Amend, pp. 1-9, R. 197-205.

[21] *See:* March 18, 2016, Order of Hon. Marvin H. Dukes, III, pp.1-2, R. 14-15.

STATEMENT OF FACTS

The following facts in the record are undisputed:

1. Catwalk, *et al.*, are the owners of multiple parcels of real property situate in a commercial tract in Sea Pines on Hilton Head Island that is known as the "South Beach Marina Village."[22]

2. The Association is a residential home owners' association that was established by Lighthouse Beach Company, A South Carolina Limited Partnership, in the 1970 Covenants.[23]

3. The 1970 Covenants were recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, on August 18, 1970, in Official Record Book 176 at Page 203.[24]

4. The 1970 Covenants refer to a recorded plat which includes the land that was developed into the commercial tract known as South Beach Marina Village.

5. On February 15, 1973, Lighthouse Beach Company, A South Carolina Limited Partnership, recorded the 1973 Commercial Covenants.[25]

6. The 1973 Commercial Covenants were recorded in the Office of The Register of

---

[22] *See:* Complaint, Paragraphs 10-16, pp. 2-6, R. 17-21; Affidavit of Robert A. Gossett, paragraphs 3-9, pp. 1-8, R. 255-262; Affidavit of Charles A. Scarminach, paragraphs 9-10, p. 5, R. 208.

[23] *See:* Complaint, paragraph 17, p. 6, R. 21; Answer and Counterclaim, paragraph 5, p. 1, R. 29.

[24] *See:* Complaint, Paragraph 18, p. 6, R. 21; Answer and Counterclaim, Paragraph 5, p. 1, R. 29; Affidavit of Charles A. Scarminach, Paragraph 5, pp. 1-2, R. 206-207.

[25] *See:* Complaint, Paragraph 19, p. 6, R. 21; Answer and Counterclaim, Paragraph 5, p. 1, R. 29; Affidavit of Charles A. Scarminach, Paragraph 6, p. 2, R. 207.

Deeds for Beaufort County, South Carolina, in Official Record Book 206 at Page 1143.[26]

7. The 1973 Commercial Covenants apply to commercial property, which is described in Article 2 of the 1973 Commercial Covenants as follows:

> Whenever used herein, the term "Commercial Property" shall apply to property used or to be used for all retail commercial uses except "package stores" for the sale and take-out of alcoholic beverages and real estate sales offices which accept listings, and offer for sale, real property outside the Forest Beach area. Permissible retail commercial uses shall include, but not be limited to, retail shops, hotel, motel, motor hotel, or motor lodge sites or operation, and all other Class "B" multi-family residence areas such as condominiums or apartments.[27]

8. The 1973 Commercial Covenants read as follows, in relevant part:

> IT BEING THE TRUE INTENT AND PURPOSE of this Declaration that the commercial land use covenants contained herein shall be the sole applicable covenants restricting and affecting commercial properties conveyed by LIGHTHOUSE BEACH COMPANY subsequent to the recording of this Declaration, and such other property as may be deeded subject to the covenants herein by specific reference in individual deeds, or by subsequent declarations; and further, it is the true intent and purpose of LIGHTHOUSE BEACH COMPANY that to the extent that there is a conflict between those restrictions and covenants previously recorded, as set forth above, and those of the instant Declaration, the provisions of the instant declaration shall govern and restrict commercial properties hereafter conveyed in deeds making reference to this Declaration.[28]

And also:

> It is the true intent and purpose of LIGHTHOUSE BEACH COMPANY that

---

[26] *See*: Complaint, Paragraph 20, p. 7, R. 22; Answer and Counterclaim, Paragraph 5, p. 1, R. 29; Affidavit of Charles A. Scarminach, Paragraph 6, p. 2, R. 207.

[27] *See*: Complaint, Paragraph 22, p. 7, R. 22; Answer and Counterclaim, Paragraph 7, p. 2, R. 30; Affidavit of Charles A. Scarminach, Paragraph 7, p. 2, R. 207. The record reflects a subsequent "Declaration of Covenants and Restrictions by Sea Pines Plantation Company, Inc.," that is recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Official Record Book 224 at Page 1036, that includes terms related to commercial properties in Sea Pines. The Trial Judge found that neither this subsequent declaration nor any other affects the issues present in this case, however. *See:* January 22, 2016, Order, paragraph 2, p. 3, R. 7.

[28] *See*: Affidavit of Charles A. Scarminach, Exhibit B, p. 2, R. 226.

the covenants and restrictions contained herein shall be the sole applicable covenants restricting Commercial Property conveyed by LIGHTHOUSE BEACH COMPANY to grantees of the Company subsequent to the date of the Declaration adopting these covenants and restrictions being made applicable to such conveyances by specific references in individual deeds, or by subsequent declaration to the extent that there is variation from and addition to covenants herein recorded; however, those properties conveyed by LIGHTHOUSE BEACH COMPANY prior to the effective date of this instrument are not governed by or otherwise restricted by the consolidated uniform provisions of this Declaration, but are so governed and restricted by any covenants and restrictions previously recorded as set forth above and to which specific reference was made in the particular and appropriate deed of conveyance.[29]

9. The real properties owned by Catwalk, *et al.*, that lie within South Beach Marina Village are "commercial properties" as the same are described in the 1973 Commercial Covenants.[30] The title to the Catwalk, *et al.*, properties reflects the following:

(a) At various times prior to January 3, 1984, Lighthouse Beach Company, and its successor, the Sea Pines Plantation Company, owned all or substantially all of the real property lying within the confines of the South Beach Marina Village.[31]

(b) On or about January 3, 1984, the Sea Pines Plantation Company conveyed all of the real property that it owned within the confines of South Beach Marina Village to South Beach Marina Village, A Partnership.[32]

---

[29] *See*: Complaint, paragraph 23, p. 7, R. 22; Answer and Counterclaim, paragraph 7, p. 2, R. 30; Affidavit of Charles A. Scarminach, Exhibit B, p. 17, R. 241.

[30] *See:* Complaint, paragraph 24, p. 7, R. 22; Answer and Counterclaim paragraph 8, p. 2, R. 30; Affidavit of Charles A. Scarminach, Paragraph 10, p. 3, R. 208; Affidavit of Robert A. Gossett, Jr., Paragraph 2, p. 1, R. 255. The Trial Judge found that the Catwalk, *et al.*, properties are commercial properties. *See:* January 22, 2016, Order, paragraph 6, p. 4, R. 8.

[31] *See:* Affidavit of Charles A. Scarminach, Paragraph 9, p. 3, R. 208.

[32] *See:* Affidavit of Charles A. Scarminach, Paragraph 9, p. 3, R. 208; Affidavit of Ned E. Gilleland, Sr., Paragraph 3, pp. 1-7, R. 246-250.

(c) Between 1988 and 1998, South Beach Marina Village, A Partnership, subsequently conveyed all of the property it owned within the confines of South Beach Marina Village to various entities and individuals, including Ned E. Gilleland, Sr.; the Gilleland Family Partnership; South Beach Marina Limited Partnership; and Robert A. Gossett, Jr.[33]

10. All of the properties described in the foregoing paragraph are now owned by Catwalk, *et al.*, and lie within the confines of South Beach Marina Village.[34]

11. In July of 2013, the Association claimed for the first time since the recording date of the 1970 Covenants, that the real property owned by Catwalk, *et al.*, was encumbered by the 1970 Covenants.[35]

12. Between August 18, 1970, and July of 2013, the Association never:

(a) claimed that any of the properties owned by Catwalk, *et al.*, or any of their predecessors in title to the property in South Beach Marina Village were encumbered by the 1970 Covenants;[36]

(b) claimed that Catwalk, *et al.*, or any of their predecessors in title to the commercial property in South Beach Marina Village were obliged to pay

---

[33] *See:* Affidavit of Ned E. Gilleland, Jr., paragraphs 3, 4 and 5, pp. 1-7, R. 246-252; Affidavit of Richard T. Sonberg, paragraph 3, p. 1, R. 243; Affidavit of Robert A. Gossett, Jr., paragraphs 3-9, pp. 1-8, 9, R. 255-262.

[34] *See:* Affidavit of Robert A. Gossett, Jr., paragraphs 3-9, pp. 1-8, R. 255-262.

[35] *See:* Complaint, paragraph 33, p. 9, R. 24; Answer and Counterclaim, paragraph 12, p. 2, R. 30. The Association does not allege that it claimed that the 1970 Covenants encumbered the Catwalk, *et al.*, property prior to July of 2013. *See also:* Affidavit of Robert A. Gossett, paragraphs 10-12, pp. 8-9, R. 262-263.

[36] *See:* Affidavit of Charles A. Scarminach, Jr., paragraph 11, pp. 3-4, R. 208-209; Affidavit of Ned E. Gilleland, Sr., paragraph 6, p. 7, R. 252; Affidavit of Richard T. Sonberg, paragraph 4, p. 2, R. 244; Affidavit of Robert A. Gossett, Jr., paragraph 10, p. 8, R. 262.

assessments to the Association arising under the 1970 Covenants;[37]

(c) claimed that Catwalk, *et al.*, or their predecessors in title to the commercial property in South Beach Marina Village were members of the Association or had any rights or obligations arising under the 1970 Covenants.[38]

13. Between August 18, 1970, and July of 2013, or thereafter:

(a) neither Catwalk, *et al.*, nor any of their predecessors in title to the commercial property in South Beach Marina Village ever paid a regular or special assessment to the Association related to any of the commercial properties owned by them in South Beach Marina Village.[39]

(b) neither Catwalk, *et al.*, nor any of their predecessors in title to the commercial property in South Beach Marina Village ever attended any regular or special meeting of the Association in relation to any of the commercial properties owned by them in South Beach Marina Village.[40]

---

[37] *See:* Affidavit of Charles A. Scarminach, Jr., paragraph 11, pp. 3-4, R. 208-209; Affidavit of Ned E. Gilleland, Sr., paragraphs 8-9, pp. 7-8, R.252-253; Affidavit of Richard T. Sonberg, paragraph 8-9, p. 2, R. 244; Affidavit of Robert A. Gossett, Jr., paragraphs 12-13, pp. 8-9, R. 262-263.

[38] *See:* Affidavit of Charles A. Scarminach, Jr., paragraph 11(b), pp. 3-4, R. 208-209; Affidavit of Ned E. Gilleland, Sr., paragraph 7, p. 7, R. 252; Affidavit of Richard T. Sonberg, paragraph 7, p. 2, R. 244; Affidavit of Robert A. Gossett, Jr., paragraph 11, p. 8, R. 262.

[39] *See:* Affidavit of Charles A. Scarminach, paragraph 12, p. 4, R. 209; Affidavit of Ned E. Gilleland, Sr., paragraph 9, p. 8, R. 253; Affidavit of Richard T. Sonberg, paragraph 9, p. 2, R. 244; Affidavit of Robert A. Gossett, Jr., Paragraph 13, p. 9, R. 263.

[40] *See:* Affidavit of Ned E. Gilleland, Sr., Paragraph 10, p. 8, R. 253; Affidavit of Richard T. Sonberg, Paragraph 10, pp. 2-3, R. 244-255; Affidavit of Robert A. Gossett, Jr., Paragraph 14, p. 9, R. 263. The Appellant Vacation Inn, LLC, also owns a property known as Apartment 1732, South Beach Village Bluff Apartments Horizontal Property Regime 56, which is a residential condominium property that is encumbered by the 1970

(c) neither Catwalk, *et al.*, nor any of their predecessors in title to the commercial property in South Beach Marina Village ever asserted that they had any rights of any nature arising under the 1970 Covenants, related to any of the commercial properties owned by them in South Beach Marina Village.[41]

(d) neither Catwalk, *et al.*, nor any of their predecessors in title to the commercial property in South Beach Marina Village ever made any use of Common Property owned by the Association in any way that is related to their ownership of commercial property in South Beach Marina Village.[42]

14. On or about October 22, 2013, the South Island Dredging Association, Inc., The Harbour Town Yacht Club Boat Slip Owners Association, Inc., the Gull Point Property Owners Association, Inc., South Beach Marina, Inc., and the Association, entered into an Agreement for the purpose, among other things, of providing funding to pay for the dredging of waterways described as the Harbour Town Marina and Braddock Cove Creek.[43]

15. South Beach Marina, Inc., is a corporation organized and existing under the laws of of South Carolina, with its principal place of business in Beaufort County, South Carolina.

Covenants. The South Beach Bluff Apartments condominium is not one of the commercial properties owned by Catwalk, *et al.*, at issue in this case. Vacation Inn, LLC, has sent a representative to meetings of the Association and paid its annual fees to the Association related to its ownership of the South Beach Bluff Apartments condominium. This does not create any genuine issue of material fact in this case. *See:* Supplemental Affidavit of Robert A. Gossett, Jr., dated September 15, 2015, R. 325-327.

[41] *See:* Affidavit of Charles A. Scarminach, paragraph 13, pp. 4-5, R. 209-210; Affidavit of Ned E. Gilleland, Sr., paragraph 11, p. 8, R. 253; Affidavit of Richard T. Sonberg, paragraph 11, p. 3, R. 245; Affidavit of Robert A. Gossett, Jr., Paragraph 15, p. 9, R. 263.

[42] *See:* Affidavit of Ned E. Gilleland, Sr., paragraph 12, p. 8, R. 253; Affidavit of Richard T. Sonberg, paragraph 12, p. 3, R. 245; Affidavit of Robert A. Gossett, Jr., paragraph 16, pp. 9-10, R. 263-264.

[43] Braddock Cove Creek is the same body of water described in the Answer and Counterclaim of the Association as Braddock Cove.

Robert A. Gossett, Jr., is a principal in South Beach Marina, Inc. South Beach Marina, Inc., is the entity through which Catwalk, *et al.*, contributed to the funding of the dredging of Braddock Cove Creek.[44]

16. The terms and conditions of the October 22, 2013, Agreement, include the following:

> 3. **Liability for Allocated Costs.** Each Participating Party is solely and only responsible for payment of the Project allocated to each under the Agreement. Each Participating Party will promptly pay to Project Administrator its required contributions to pay any allocation to its account, and as necessary thereafter to balance the accounts of the parties following completion of the Project with the Agreement.[45]

17. Catwalk, *et al.*, through South Beach Marina, Inc., contributed the sum of Seven Hundred Eighty Seven Thousand and no/100 ($787,000.00) Dollars, or approximately 40% of the total cost of the dredging of Braddock Cove Creek.[46]

18. The Association contributed the sum of Six Hundred Twenty Five Thousand One Hundred and no/100 ($625,100.00) Dollars, or approximately 31% of the total cost of the dredging of Braddock Cove Creek.[47]

---

[44] *See:* Affidavit of Robert A. Gossett, Jr., paragraph 18, p. 10, R. 264.

[45] *See:* Affidavit of Robert A. Gossett, Jr., paragraph 19, p. 10, R. 264.

[46] *See:* Affidavit of Robert A. Gossett, Jr., paragraph 20, pp. 10-11, R. 264-265.

[47] *See*: Exhibit "A" to Affidavit of Robert A. Gossett, Jr., p. 3, R. 269.

STANDARD OF REVIEW

Under Rule 56, SCRCP, Summary Judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[48] In determining whether any material issues of fact exist, the evidence and all inferences that can be drawn from the evidence must be viewed in the light most favorable to the party resisting the motion.[49] An issue is 'material' if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action.[50] If the moving party demonstrates that no genuine issue of material fact exists, a party defeats summary judgment by affirmatively demonstrating the presence of a genuine issue of material fact.[51] At the summary judgment stage, the court does not weigh conflicting evidence with respect to a disputed material fact.[52] Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.[53] On review, the appellate court applies the same standard applied by the trial court.[54]

---

[48] *Café Associates Limited v. Gengross*, 305 S.C. 6, 406 S.E.2d 162 (1991).

[49] *Redwend Limited Partnership v. Edwards*, 354 S.C. 58, 581 S.E.2d 496 (Ct.App. 2003).

[50] *P.P.G. Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc.*, 297 S.C. 176, 375 S.E.2d 331 (Ct.App. 1988).

[51] *Hoard ex rel. Hoard v. Roper Hospital, Inc.*, 387 S.C. 539, 694 S.E.2d 1 (2010).

[52] *South Carolina Property & Casualty Guaranty Association v. Yensen*, 345 S.C. 512, 548 S.E.2d 880 (Ct.App. 2001).

[53] *Evening Post Publishing Co. v. Berkeley County School District*, 392 S.C. 76, 708 S.E.2d 745 (2011).

[54] *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 650 S.E.2d 68 (2007).

ARGUMENT NUMBER 1
(Issues 1 and 2)

THE TRIAL JUDGE ERRED BY DENYING THE SUMMARY JUDGMENT MOTION OF CATWALK, *ET AL.*, AND BY GRANTING THE SUMMARY JUDGMENT MOTION OF THE ASSOCIATION FOR THE FOLLOWING REASONS:

(A) IT WAS ERROR FOR THE TRIAL JUDGE TO RULE THAT THE 1973 COMMERCIAL COVENANTS ARE NOT THE ONLY APPLICABLE COVENANTS ENCUMBERING THE COMMERCIAL PROPERTY OF CATWALK, *ET AL.*, BECAUSE THE PLAIN LANGUAGE OF THE 1973 COMMERCIAL COVENANTS STATES THEY ARE THE "SOLE APPLICABLE" COVENANTS ENCUMBERING COMMERCIAL PROPERTY.

(B) IT WAS ERROR FOR THE TRIAL JUDGE TO RULE THAT THE 1970 COVENANTS WERE ADDED AS AN ENCUMBRANCE TO THE COMMERCIAL PROPERTY OF CATWALK, *ET AL.*

(A) THE PLAIN LANGUAGE OF THE 1973 COMMERCIAL COVENANTS IS THAT THE 1973 COMMERCIAL COVENANTS ARE THE "SOLE APPLICABLE" COVENANTS ENCUMBERING COMMERCIAL PROPERTY.

In the January 22, 2016, and the March 18, 2016, Orders, the Trial Judge found that the 1970 Covenants encumbered the commercial property of Catwalk, *et al.*[55]

In the January 22, 2016, Order, the Trial Judge found that the intention of the Lighthouse Beach Company was that the commercial property of Catwalk, *et al.*, was encumbered by both the 1970 Covenants and the 1973 Commercial Covenants.[56]

---

[55] *See:* January 22, 2016, Order, p. 3, R. 7.

[56] There is no finding by the Trial Judge that the 1973 Commercial Covenants are ambiguous, and Catwalk, *et al.*, do not argue such. But, the Trial Judge's comments regarding the intention of Lighthouse Beach Company implies an ambiguity, and to the extent that such exists, any ambiguity must be resolved against the Association. The rules applicable to the construction of contracts are applicable to the construction of covenants in deeds. 17 S.C. Juris. *Covenants* § 69 (1993). Covenants that restrict the free use of property must be strictly construed against limitations upon the property's free use. Where there is doubt, the doubt must be resolved in favor of the property's free use. *Hyer v. McRee,* 306 S.C. 210, 410 S.E.2d 604 (Ct.App. 1991). Thus, to the extent the Trial Judge's order implies any ambiguity related to the meaning of the 1973 Commercial Covenants, as a matter of law, the ambiguity is resolved against the Association.

The Trial Judge reached this conclusion in the face of following language from the 1973 Commercial Covenants:

> IT BEING THE TRUE INTENT AND PURPOSE of this Declaration that the commercial land use covenants contained herein shall be the sole applicable covenants restricting and affecting commercial properties conveyed by LIGHTHOUSE BEACH COMPANY subsequent to the recording of this Declaration, and such other property as may be deeded subject to the covenants herein by specific reference in individual deeds, or by subsequent declarations; and further, it is the true intent and purpose of LIGHTHOUSE BEACH COMPANY that to the extent that there is a conflict between those restrictions and covenants previously recorded, as set forth above, and those of the instant Declaration, the provisions of the instant declaration shall govern and restrict commercial properties hereafter conveyed in deeds making reference to this Declaration.[57]

And also:

> It is the true intent and purpose of LIGHTHOUSE BEACH COMPANY that the covenants and restrictions contained herein shall be the sole applicable covenants restricting Commercial Property conveyed by LIGHTHOUSE BEACH COMPANY to grantees of the Company subsequent to the date of the Declaration adopting these covenants and restrictions being made applicable to such conveyances by specific references in individual deeds, or by subsequent declaration to the extent that there is variation from and addition to covenants herein recorded; however, those properties conveyed by LIGHTHOUSE BEACH COMPANY prior to the effective date of this instrument are not governed by or otherwise restricted by the consolidated uniform provisions of this Declaration, but are so governed and restricted by any covenants and restrictions previously recorded as set forth above and to which specific reference was made in the particular and appropriate deed of conveyance.[58]

The text of the 1973 Commercial Covenants is plain and unequivocal that as of the date of the recording, the 1973 Commercial Covenants were the "sole applicable covenants restricting and affecting Commercial Property" subsequently conveyed by Lighthouse

---

[57] *See*: Affidavit of Charles A. Scarminach, Exhibit B, p. 2, R. 226.

[58] *See*: Complaint, paragraph 23, p. 7, R. 22; Answer and Counterclaim, paragraph 7, p. 2, R. 30; Affidavit of Charles A. Scarminach, Exhibit B, p. 17, R. 241.

Beach Company.[59] Further, the text of the 1973 Commercial Covenants is plain and unequivocal that the 1973 Commercial Covenants govern commercial property irrespective of the existence of any previously recorded declaration of covenants.

In the face of the quoted language from the 1973 Commercial Covenants, the Trial Judge made findings in both the January 22, 2016, and the March 18, 2016, Orders, that the 1970 Covenants also encumber the commercial property of Catwalk, *et al.*

(a) In the January 22, 2016, Order, the Trial Judge found that the 1973 Commercial Covenants overlay or compliment the 1970 Covenants.[60] There is no text in the 1973 Commercial Covenants suggesting such a result. The language in the 1973 Commercial Covenants is that they are the sole applicable covenants encumbering commercial property subsequently conveyed by Lighthouse Beach Company.

(b) In the March 18, 2016, Order, the Trial Judge found: "The word 'applicable' (which in this context means relevant) refers to any part of the 1970 Covenants which would have dealt specifically with commercial properties. If the 1973 Covenants were intended to completely replace the 1970 Covenants, the word 'applicable' would be unnecessary, and the word 'sole' could have stood alone."[61]

(c) In the March 18, 2016, Order, the Trial Judge found: "Likewise, the

---

[59] There is no dispute that the commercial properties of Catwalk, *et al.*, are "commercial property" as described in the 1973 Commercial Covenants, and were conveyed subsequent to the date of recording of the 1973 Commercial Covenants. The Association did not dispute these facts, and the Trial Judge found such to be facts in the January 22, 2016, Order. *See:* January 22, 2016, Order, paragraphs 5-6, pp. 3-4, R. 7-8.

[60] *See:* January 22, 2016, Order, pp. 6, 8, R. 10, 12.

[61] *See:* March 18, 2016, Order, p. 1, R. 14.

phrase 'to the extent there is a conflict . . .' implies that the 1973 covenants were intended as a commercial covenant overlay to act in conjunction with the 1970 Covenants."[62]

These findings are contrary to the plain language of the 1973 Commercial Covenants, and the law of South Carolina regarding the construction of a contract. In South Carolina, the rules relating to the construction of contracts include: When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense.[63] The contract and the language used must be considered as a whole.[64] Words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed.[65] Every term contained in a contract must be considered and given effect if possible.[66]

The text is that the 1973 Commercial Covenants are the "sole applicable" covenants governing commercial property conveyed by Lighthouse Beach Company subsequent to the recording of the 1973 Commercial Covenants.

The word "sole" means "the only one."[67] The finding that the "sole applicable"

---

62 *See:* March 18, 2016, Order, p. 1, R. 14.

63 *Sifonios v. Town of Surfside Beach*, 414 S.C. 269, 777 S.E.2d 425 (Ct.App. 2015).

64 *Madden v. Bent Palm Investments, LLC*, 386 S.C. 459, 688 S.E.2d 597 (Ct. App. 2010).

65 *State Accident Fund v. South Carolina Second Injury Fund*, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010).

66 *Valley Public Service Authority v. Beech Island Rural Community Water District*, 319 S.C. 488, 494, 462 S.E.2d 296, 299 (Ct. App. 1995).

67 *See: American Heritage Dictionary of the English Language*, 3rd Ed., 1992.

covenants are anything other than the "only applicable" covenants is contrary to the plain language of the document and reads words into the document that is wholly unexpressed in the language of it.

The Trial Judge's ruling in the March 18, 2016, Order concerning the word "applicable" is, to this author, hard to follow. The word "applicable," suggests only "that which applies," without regard to how many such things there might be. More importantly, in the 1973 Commercial Covenants, the word "applicable" does not stand alone, it is modified by the word "sole." The phrase "sole applicable" means "only applicable." There is no other way to read it.

The Trial Court's lifting of a phrase relating to conflict with other covenants from one of the paragraphs describing the 1973 Commercial Covenants as the "sole applicable covenants," is taken out of context. The text of both paragraphs appears above on pp. 6-7 and 14. The plain language shows that the intent was that commercial properties subsequently conveyed by Lighthouse Beach Company would be governed only by the 1973 Commercial Covenants, irrespective of the existence of any previously recorded covenants. Again, there is no other way to read it.

If evidence other than the plain language of the 1973 Covenants is relevant as to the intent of Lighthouse Beach Company with respect the declaration that the 1973 Commercial Covenants are the "sole applicable covenants" affecting commercial property, the only evidence in the record on that point is the Affidavit of Charles A. Scarminach, Jr. His testimony is that Lighthouse Beach Company and its successor the Sea Pines Plantation Company considered the property of Catwalk, et al., to be commercial property.[68] Further,

---

[68] *See:* Affidavit of Charles A. Scarminach, paragraphs 10-12, pp. 3-4, R. 208-209.

the only evidence in the record is that the Association, for a period exceeding 40 years, did not claim or act on any claim that the 1970 Covenants encumbered the commercial property of Catwalk, *et al.*[69]

The Court's findings and interpretation of the 1973 Commercial Covenants are contrary to the plain language of the 1973 Commercial Covenants and the established law of South Carolina.[70]

(B) THE 1970 COVENANTS WERE NOT ADDED AS AN ENCUMBRANCE TO THE COMMERCIAL PROPERTY OF CATWALK, *ET AL.*

The Trial Judge found that the commercial property of Catwalk, et al., were conveyed subject to the 1970 Covenants.[71] This finding is founded on a deed from the Sea Pines Company and a deed from a Trustee in Bankruptcy which include a list of covenants and restrictions in the legal description that includes the recording data for 1970 Covenants and the 1973 Commercial Covenants.[72] While the text of the deeds reads as it does, the mere listing of the documents does not undo the language contained in them. One must still read the documents to determine the effect of them, if any.

As was shown in Argument 1(A) above, the text of the 1973 Commercial Covenants

---

69 *See:* Statement of Facts, *supra.*,paragraphs 11-13.

70 The text of the January 22, 2016, and March 18, 2016, Orders also suggests that because the Commercial Covenants include language authorizing Lighthouse Beach Company to add additional covenants, that the 1970 Covenants encumber the commercial property of Catwalk, *et al.* This construction of the language is untenable. The language gives the ability to add covenants in the future, but states that covenants recorded prior to the 1973 Commercial Covenants do not apply. If such had been the intent, there would been no reason to include the language stating that the 1973 Commercial Covenants are the "sole applicable covenants" encumbering commercial property. Further, the construction adopted by the Trial Judge renders the "sole applicable covenants" language meaningless.

71 *See*: January 22, 2016, Order, p. 8, R. 12.

72 *See:* January 22, 2016, Order, p. 4, R. 8.

reads, in relevant part:

> IT BEING THE TRUE INTENT AND PURPOSE of this Declaration that the commercial land use covenants contained herein shall be the sole applicable covenants restricting and affecting commercial properties conveyed by LIGHTHOUSE BEACH COMPANY subsequent to the recording of this Declaration, and such other property as may be deeded subject to the covenants herein by specific reference in individual deeds, or by subsequent declarations; and further, it is the true intent and purpose of LIGHTHOUSE BEACH COMPANY that to the extent that there is a conflict between those restrictions and covenants previously recorded, as set forth above, and those of the instant Declaration, the provisions of the instant declaration shall govern and restrict commercial properties hereafter conveyed in deeds making reference to this Declaration.[73]

And also:

> It is the true intent and purpose of LIGHTHOUSE BEACH COMPANY that the covenants and restrictions contained herein shall be the sole applicable covenants restricting Commercial Property conveyed by LIGHTHOUSE BEACH COMPANY to grantees of the Company subsequent to the date of the Declaration adopting these covenants and restrictions being made applicable to such conveyances by specific references in individual deeds, or by subsequent declaration to the extent that there is variation from and addition to covenants herein recorded; however, those properties conveyed by LIGHTHOUSE BEACH COMPANY prior to the effective date of this instrument are not governed by or otherwise restricted by the consolidated uniform provisions of this Declaration, but are so governed and restricted by any covenants and restrictions previously recorded as set forth above and to which specific reference was made in the particular and appropriate deed of conveyance.[74]

By its plain language, the 1973 Commercial Covenants govern property subjected to them in a deed, to the exclusion of ". . . those covenants and restrictions previously recorded. . . ." When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain,

---

[73] *See*: Affidavit of Charles A. Scarminach, Exhibit B, p. 2, R. 226.

[74] *See*: Complaint, paragraph 23, p. 7, R. ; Answer and Counterclaim, paragraph 7, p. 2, R. 30; Affidavit of Charles A. Scarminach, Exhibit B, p. 17, R. 241.

ordinary, and popular sense.[75]

The Trial Judge's finding in the January 22, 2016, Order, that the 1973 Commercial Covenants "... provide that Lighthouse Beach Company may add additional covenants to Deeds of Conveyance ..." is quoted out of context and is incomplete. The complete text from the 1973 Commercial Covenants reads:

> The Company reserves in each instance the right to add, in Deeds of Conveyance, additional covenants in respect to said properties so conveyed by such Deed, or to limit therein the application to the uniform covenants contained herein. Notice of such additional covenants will, in all cases, be set forth in the contract of sale relating to such property.[76]

There is no evidence in the record to show that the contracts of sale between the Sea Pines Company or the Bankruptcy Trustee and the purchasers from them and South Beach Marina Village, a Partnership, included any notice that the 1970 Covenants would be added as an encumbrance to the property.

There is an additional reason that the text of the 1984 Deed or any other deed in the chains of title of Catwalk, *et al.*, fails to add the 1970 Covenants as an encumbrance to the commercial property of Catwalk, *et al.* The relevant text of the 1970 Covenants reads:

> The Company, it successors, and assigns shall have the right, without further consent of the Association, to bring within the plan and operation of this Declaration, additional properties in future stages of the development. The additions authorized under this and the succeeding sub-section shall be made by filing of record 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 to such additional property.[77]

There is no evidence that any Supplementary Declaration of Covenants subjecting

---

[75] *Sifonios v. Town of Surfside Beach, supra.*

[76] *See:* Affidavit of Charles A. Scarminach, Exhibit B, p. 17. R. 241.

[77] See: Exhibit 1 to Combined Response to Plaintiffs' Motion for Summary Judgment and Cross Motion for Summary Judgement, p. 3, R. 69.

the commercial properties of Catwalk, *et al.*, to the encumbrance of the 1970 Covenants was ever filed of record by Lighthouse Beach Company, or any of its successors. Since the plain language of the 1970 Covenants requires such in order to subject property to the 1970 Covenants, the mere listing of the recording data for the 1970 Covenants in the legal description of a subsequent deed does not meet the requirements of the plain language of the 1970 Covenants.

Finally, the only evidence in the record as to the intentions of various parties, including the Association, is that none of them, for a period exceeding 40 years, claimed or acted on any claim that the 1970 Covenants encumbered the commercial property of Catwalk, *et al.*

ARGUMENT NUMBER 2
(Issue 3)

THE TRIAL JUDGE ERRED BY FAILING TO HOLD THAT THE ASSOCIATION'S FAILURE TO ASSERT ITS CLAIM BASED ON THE 1970 COVENANTS FOR A PERIOD OF MORE THAN FORTY (40) YEARS WAS BARRED BY S. C. CODE ANN. § 15-3-380 (SUPP. 2015).

The only evidence in the record is that the Association did not claim that the 1970 Covenants encumbered the commercial property of Catwalk, *et al.*, or any of its predecessors in title for more than 40 years.[78] The only evidence in the record is that the first time that the Association raised this claim in any fashion was when it corresponded with the principal of Catwalk, *et al.*, in July of 2013.[79] In its Counterclaim in this case, the Association claims interests in the commercial property of Catwalk, *et al.*, arising under the

---

[78] The possession of Catwalk, *et al.*, and their predecessors in title can be tacked to achieve the 40 year period. *See: Sutton v. Clark,* 59 S.C. 440, 38 S.E. 150 (1901).

[79] *See:* Affidavit of Robert A. Gossett, Jr., paragraphs 10-12, pp. 8-9, R. 262-263. The Association did not assert the claim in any legal action until it filed its Answer and Counterclaim on August 25, 2014. Both events occurred more than 40 years following the recording of 1970 Covenants.

1970 Covenants.[80]

In their Motion for Summary Judgment, Catwalk, *et al.*, sought summary judgment based on these undisputed facts, and the application of S. C. Code Ann, § 15-3-380 (Supp. 2015), to these facts.

In his January 22, 2016, Order, the Trial Judge ruled that S. C. Code Ann, § 15-3-380 (Supp. 2015), did not bar the Association's claim because it ". . . is the limitations period for an action for possession of property." The Trial Judge ruled that the claim and defense of Catwalk, *et al.*, under S. C. Code Ann. § 15-3-380 (Supp. 2015), failed because the Association did not assert a claim for possession of the property of Catwalk, *et al.*[81]

The Trial Judge's ruling conflicts with the plain language of S. C. Code Ann. § 15-3-380 (Supp. 2015), which reads:

> No action shall be commenced in any case for the recovery of real property *or for any interest therein* against a person in possession under claim of title by virtue of a written instrument unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within forty years from the commencement of such action. And the possession of a defendant, sole or connected, pursuant to the provisions of this section shall be deemed valid against the world after the lapse of such a period. (Our emphasis.)

The Trial Judge's ruling that S. C. Code Ann. § 15-3-380 (Supp. 2015), is limited to actions for possession of real property is contrary to the plain language of the statute. The plain language of the statute bars any action for the recovery of real property, and also any action for the recovery of "any interest therein."

The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. When a statute's terms are clear and unambiguous on their

---

[80] *See:* Answer and Counterclaim, paragraphs 38-45, pp. 5-6, R. 33-34.

[81] *See:* January 22, 2016, Order, page 8. R. 12; March 18, 2016, Order, p. 1, R. 14.

face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. In interpreting a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Further, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.[82] The Trial Judge's ruling limits the effect of S. C. Code Ann. § 15-3-380 (Supp. 2015), in a way that is contrary to the plain language of the statute.

In this case, the Association asserts a claim that the 1970 Covenants encumber the commercial property of Catwalk, *et al.* The Association's claim fails because under the plain language of S. C. Code Ann. § 15-3-380 (Supp. 2015), the Association's failure to assert its claim of any interest in the commercial property of Catwalk, *et al.*, for a period of more than 40 years, means Catwalk, *et al.'s*, title is "deemed valid against the world." Under the plain language of S. C. Code Ann. § 15-3-380 (Supp. 2015), the Association's failure to claim any interest in Catwalk's real property for a period of more than 40 years operates as an absolute bar to the Association's claim, and the Trial Judge should have granted the Motion for Summary Judgment of Catwalk, et al., and denied the Motion for Summary Judgment of the Association because of it.

ARGUMENT NUMBER 3
(Issue 4)

THE TRIAL JUDGE ERRED IN GRANTING SUMMARY JUDGMENT TO THE ASSOCIATION BY DISREGARDING EVIDENCE OR WEIGHING CONFLICTING EVIDENCE AND INFERENCES IN FAVOR OF THE ASSOCIATION AND WHEN CATWALK, *ET AL.*, SUBMITTED MORE THAN A SCINTILLA OF EVIDENCE IN

---

[82] *See: Centex International, Inc. v. S. Carolina Department of Revenue*, 406 S.C. 132, 750 S.E.2d 65 (2013)(internal citations omitted).

OPPOSITION TO THE ASSOCIATION'S MOTION.

Summary judgment is appropriate only where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. The evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.[83] In a case such as this where the "preponderance of the evidence" burden of proof is applicable, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.[84]

The undisputed facts in the record, as shown above, are as follows:

(a) The Association failed to enforce its claimed rights under the 1970 Covenants against the commercial property of Catwalk, *et al.*, and their predecessors in title for a period of more than forty years following the recording of the 1970 Covenants.

(b) The Association never sought to collect any regular or special assessment imposed by it from Catwalk, *et al.*, or their predecessors in title for a period of more than forty years following the recording of the 1970 Covenants.

(c) Neither Catwalk, *et al.*, nor any of their predecessors in title, have ever attended any regular or special meeting of the Association, paid any regular or special assessment to the Association, claimed to be members of the Association, claimed any rights under the 1970 Covenants, made use of any of the common property of the Association or participated in the affairs of the Association with respect to any of the commercial properties within the

---

[83] *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 443 S.E.2d 392 (1994).

[84] *Hancock v. Mid-South Management. Company*, 381 S.C. 326, 673 S.E.2d 801 (2009).

South Beach Marina Village.

(d) The declarant of both the 1970 Covenants and the 1973 Commercial Covenants considered the properties of Catwalk, *et al.*, to be commercial, and assessed the Catwalk, *et al.*, properties in that fashion.

(e) The plain language of the 1973 Commercial Covenants is that the 1973 Commercial Covenants are the "sole applicable" covenants governing commercial property, to the exclusion of any previously recorded covenants, namely the 1970 Covenants.

(f) The Association took advantage of the 2013 Agreement concerning the dredging of Braddock Creek, whereby Catwalk, *et al.*, contributed forty (40%) of the total cost, and the Association contributed only 31% per cent of the total cost. If the property of Catwalk, *et al.*, was, indeed, encumbered by the 1970 Covenants, then the entire Association would have been responsible for the costs of the dredging that was assumed solely by Catwalk, *et al.*, and the Association, combined. This would have been a significant benefit to Catwalk, *et al.*, and a significant detriment to the Association.[85]

---

[85] In the January 22, 2016, Order, the Trial Judge found that Catwalk, *et al.*'s, claims based on estoppel failed on three grounds: (a) the non-waiver language in the 1970 Covenants; (b) there was no showing of prejudice or reliance; and, (c) no evidence that the Association intended to relinquish a known right. With respect to the first point, the non-waiver language in the 1970 Covenants simply does not address the estoppel claim. With respect to the second point, the only evidence is that the Association took advantage of the dredging agreement that treated the Association and Catwalk, *et al.*, as wholly separate entities and thus avoided participating at all in the cost of the dredging that was carried wholly by Catwalk, *et al.* As to the third point, it relates to waiver, and does not address the estoppel claim. The elements of an estoppel claim 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. *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992). The undisputed facts in the record show all three, or at a minimum, show a scintilla of evidence sufficient to defeat the Associations's motion for summary judgment.

These facts, alone or in combination, qualify as a "mere scintilla" of evidence sufficient to overcome the Association's Motion for Summary Judgment. In light of these undisputed facts, it was error for the Trial Judge to grant summary judgment in favor of the Association.

CONCLUSION

For the reasons stated in the foregoing arguments, Catwalk, *et al.*, urge the Court to reverse the January 22, 2016, and March 18, 2016, Orders of the Trial Judge, and to grant Summary Judgment in favor of Catwalk, *et al.*, finding that the 1970 Covenants do not encumber the commercial property of Catwalk, *et al.*

Respectfully Submitted:

COLTRANE AND WILKINS, LLC

By: _____

Curtis L. Coltrane
South Carolina Bar Number 1344
Post Office Box 6808
Hilton Head Island, SC 29938
(843) 785-5551
(843) 785-5552 (Fax)
curtis@coltraneandwilkins.com

Hilton Head Island, South Carolina

This 3 29 Day of August, 2016.

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

RECEIVED
AUG 12 2016
SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

HON. MARVIN H. DUKES, III
MASTER IN EQUITY AND SPECIAL CIRCUIT JUDGE

Case No. 2014-CP-07-1435

CATWALK, LLC; MOONDOG, LLC; LET, LLC; LOST PARROT LLC;
VACATION INN, LLC; SBM, LLC; and
SOUTH BEACH SWIMMING POOL, INC., ... Appellants,

v.

SEA PINES SOUTH BEACH OWNERS
ASSOCIATION, INC., ... Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court relating to personal data identifiers.

COLTRANE AND WILKINS, LLC

By: _____

Curtis L. Coltrane
South Carolina Bar Number 1344
Post Office Box 6808
Hilton Head Island, SC 29938
(843) 785-5551
(843) 785-5552 (Fax)
curtis@coltraneandwilkins.com

Hilton Head Island, South Carolina
This 3rd Day of August, 2016