

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, III, Master-In-Equity

RECEIVED

Appellate Case No. 2016-001696

JAN 17 2017

SC Court of Appeals

Paul A. Nadeau Appellant,

v.

Knightsbridge Property Owners' Association, Inc. Respondent,

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court correctly hold that Knightsbridge Property Owners' Association acted properly in levying assessments and foreclosing liens for nonpayment of assessments by Nadeau?
- II. Did the trial court correctly hold that Nadeau is estopped from raising claims challenging the assessment rate because Nadeau did not raise this issue prior to the final judgment in the foreclosure proceeding and because Nadeau paid monies toward the assessment without protest?

STATEMENT OF THE CASE

Knightsbridge filed suit against Nadeau on November 20, 2014 seeking foreclosure of an unpaid homeowner's association assessment lien on Nadeau's property. On January 10, 2016, the Honorable S. Jackson Kimball, III conducted the trial in this matter. On March 1, 2016 the trial court entered judgment in favor of Knightsbridge in the amount of \$1,516.94 plus attorney's fees and costs. Subsequently, on March 10, 2016 Nadeau filed a Motion to Reconsider, which the trial court denied on July 27, 2016.

On August 15, 2016, Nadeau filed a Notice of Appeal. Execution of the underlying order has been stayed pending appeal after Nadeau posted a bond of \$9,500.00 on September 6, 2016..

STATEMENT OF FACTS

In June 2001 Nadeau, Paul A. Nadeau purchased and took possession of the real property located at 727 Cheval Drive in York County, South Carolina ("Property.") (Compl. ¶ 3.) The Property is encumbered by restrictive covenants contained in the Knightsbridge Master Declaration ("Declaration.") (Compl. ¶ 4.) The Declaration was recorded June 20, 1996 in the Office of the Register of Deeds for York County in Book 1559 at Page 117. Article V, Section 1, of the Declaration establishes the obligation of

any owner of a lot in Knightsbridge to pay assessments to the Knightsbridge Property Owner's Association, Inc. It further establishes a lien in favor of Knightsbridge for the collection of such assessments or charges, along with attorney's fees and costs incurred in the collection process. (Declaration Art. V, §§ 1, 9.)

Pursuant to Article V, Section 3 of the Declaration, the Knightsbridge Board of Directors unilaterally establishes the operating budget for Knightsbridge as long as the annual budget does not increase more than 10% above the prior year. Only where the Board proposes an increase of more than 10% is the general membership entitled to vote on the budget. Article V, Section 5 of the Declaration provides that the assessments are uniformly set for all lots. The Declaration further provides that the Board "shall fix the amount of the annual assessment against each Lot at least thirty (30) days in advance of each calendar year." (Declaration, Art. V, § 7.)

In December 2011 Knightsbridge established an annual assessment of \$440 per lot for 2012. (Trans. p. 15, l. 1-8.). The assessment was due in four monthly installments starting February 1, 2012. (Plf. Ex. 3.) Nadeau did not pay that assessment and Knightsbridge referred his account to an attorney to file a lien against the property. (Trans. p. 52, l. 16- p. 53, l. 11; trans. p. 55, l. 5-12.) At that time Knightsbridge incurred legal fees that were added to Nadeau's account pursuant to the Declaration. (Trans. p. 57, l. 19-20.) Subsequently, in November 2012, Nadeau filed for bankruptcy relief. (Trans. p. 45, 11-12.) When Knightsbridge learned of the bankruptcy it adjusted Nadeau's account to show only those charges accruing after his bankruptcy petition. (Trans. p. 25, l. 20-25 – p. 46, l. 1-3.)

On November 28, 2012 the Knightsbridge Board approved the 2013 budget with an assessment rate of \$440.00. (Trans. p. 15, l. 9-10.) The assessment was again due in four monthly installments starting February 1, 2013. (Plf. Ex. 3.) Nadeau did not remit any payments in 2013. (Trans. p. 48, l. 13-16.)

On December 5, 2013 the Knightsbridge Board approved the 2014 budget with an assessment rate of \$440.00. (Trans. p. 15, l. 11-14.) The assessment was again due in four monthly installments starting February 1, 2014. (Plf. Ex. 3.) Nadeau remitted payments totaling \$380.00 between March 2014 and December 2014. (Trans. p. 48, 7-12.)

In early December 2014, the Knightsbridge Board approved the 2015 budget with an assessment rate of \$462.00. (Trans. p. 27, l. 47-15.) The assessment was again due in four monthly installments starting February 1, 2015. (Plf. Ex. 3.) Nadeau did not remit any payments in 2015. (Plf. Ex. 3.)

At trial Knightsbridge submitted board meeting minutes ratifying or approving the annual budget for 2011 through 2015. The 2013 budget was approved on November 28, 2012. Knightsbridge's representatives testified that the budgets for the remaining years were approved sometime in December of the preceding year.

In October 2014 Knightsbridge instructed its attorney to begin foreclosure of Nadeau's property. Nadeau contested Knightsbridge's foreclosure arguing he did not owe any assessments because Knightsbridge's board of directors failed to establish the annual budget before December 1st of each year as required by the Declaration.

ARGUMENT

I. The trial court correctly exercised its equitable powers to uphold the budgets approved by Knightsbridge's Board of Directors and Nadeau's corresponding liability to pay assessments.

A. The trial court correctly held that Knightsbridge's failure to adopt a budget before December 1 of each year did not invalidate the budget and assessments levied by Knightsbridge between 2011 and 2015.

“Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible.” Regions Bank v. Wingard Prop., Inc., 394 S.C. 241, 252, 715 S.E.2d 348, 354 (Ct. App. 2011). Courts often use equitable maxims as guidance in balancing equitable considerations. “The principle ‘equity regards as done that which ought to be done’ applies in cases where the party seeking equitable relief establishes ‘a clear obligation based upon a valuable consideration that another do some act which he has failed to perform.’” Regions Bank v. Wingard Prop., Inc., 394 S.C. at 253, 715 S.E.2d at 354 (quoting Wilkie v. Phila. Life Ins. Co., 187 S.C. 382, 393–94, 197 S.E. 375, 380 (1938)). “The notion ‘equity looks to substance rather than form’ evolved out of judicial regard for that which ought to be done.” Id. “This maxim applies by ‘dispensing with pure formalities which would otherwise defeat the equity.’” Id. “After a party establishes an equitable right, the court may dispense with pure formalities which would otherwise defeat the equity.” Id.

In Regions Bank the court looked at the substance of the agreement between the parties to give an equitable lien holder priority over the bank's first-in-time recorded lien. Specifically, the court held that even though the lien holder's deposit was mistakenly not paid until after the bank's lien was recorded, the bank knew of the lien holder's pending payment. Rather than strictly enforcing the timing of the recording and payment, the

court found that equities favored granting the lien holder priority over the bank's mortgage.

The case at hand is analogous. Nadeau was well aware that he was responsible for paying his pro rata portion of the operating expenses of the Association and did not contest such at trial. Nadeau similarly did not contest the substance of the operating budget or corresponding annual assessments. In fact, Nadeau paid in 2011, 2012, and 2014 without complaint regarding the adoption of the budget. Nadeau did not dispute that he received the benefit of the services provided by Knightsbridge during these years. Nadeau's sole argument is that the budgets for the relevant timeframe were approved by the Board less than 30 days before the December 31st of each year. Nadeau presented no evidence or argument of how this delay prejudiced him or otherwise changed his course of action.

This case is exactly the type to which "substance over form" applies. Knightsbridge clearly established Nadeau's obligation to pay his pro rata share of the operating expenses of the Association. In every relevant year the Knightsbridge Board possessed sole authority to set the budget and assessment rate. Nadeau made no argument disputing the calculation of the assessment or the substance of the operating budget. Because the Board possessed the sole authority to set the budgets for the relevant years, the Board's failure to meet and approve the budget before December 1st of each year in no way deprived Nadeau of some right to vote or contest the assessments levied against his lot. Instead of contesting the substance of the Knightsbridge's claim, Nadeau asks this court to strictly apply the budget approval date to defeat the validly adopted budget and

assessment. This is the very definition of allowing a formality to defeat equity and the trial court was correct in denying Nadeau's requested relief.

B. The trial court correctly held that Seabrook v. Pelzer is inapplicable in this case because setting the budget and levying the assessment against Knightsbridge were both powers granted to Knightsbridge by the Declaration.

Nadeau argues that the Knightsbridge Board its authority by levying assessments that are based on a budget adopted after December 1st and are therefore unenforceable pursuant to Seabrook Island Property Owners Association v. Pelzer, 292 S.C. 343, 356 S.E.2d 411 (Ct.App.1987). Nadeau's reliance on Seabrook v. Pelzer is misplaced. In Seabrook, the issue decided by the court was whether the property owners' association exceeded its authority by calculating a special assessment in a manner not authorized by the restrictive covenants. Specifically, the property owner's association established a fixed rate of assessment for each lot despite the restrictive covenants' clear mandate that each lot's assessment be established based on that lot's taxable value. The property owners' association argued that, in its business judgment, the uniform rate of assessment was a reasonable alternative. The Court of Appeals held the board of directors lacked the power to levy the assessments in question because the restrictive covenants did not empower the board to establish a fixed rate assessment.

In this case Nadeau does not contest Knightsbridge's power to levy annual assessments and does not contest the amounts levied by the Association. Instead, Nadeau asks this Court to relieve him of his obligation based on a mere technical error in the timing of the minutes approving the budgets. To do so would frustrate the principles of equity and would require a level of strict scrutiny in no way advocated by Seabrook.

II. The trial court correctly held that Nadeau waived his right to challenge the budget approval process because Nadeau did not raise this issue prior to trial and because Nadeau paid monies toward the assessment without protest.

“A waiver is a voluntary and intentional abandonment or relinquishment of a known right.” Janasik v. Fairway Oaks Villas Horiz. Prop. Regime, 307 S.C. 339, 334, 415 S.E.2d 384, 387-388 (1992). “Where one dealing with another has, by its course of dealing, through leniency or otherwise, lulled that person into a sense of security, then the one doing those things cannot, when a loss occurs, in order to escape its liability, fall back upon the strict terms of a contract, the terms of which the one liable on the contract has led the other party to believe would not be strictly enforced.” Satcher v. Woodmen of the World Life Ins. Soc., 199 S.C. 59, 18 S.E.2d 523, 527-28 (1942).

Nadeau was on notice of the budget adoption timeline because the Declaration appears in his chain of title. Nadeau claims that he did not pay certain assessments because Knightsbridge was not following the correct assessment procedure. (Trans. p. 105, l. 5-24.) The various budgets, notices, and minutes were all available to Nadeau through email and an online portal. (Trans. p. 16, l. 23 – p. 24, l. 1-21.) Further, Nadeau testified that he did not receive notice of the 2012 assessment within the deadline established by the Declaration and that he has never gotten notice of the assessments. (Trans. p. 86, l. 4-16.) The evidence demonstrates that Nadeau was aware of his rights under the contract and aware of Knightsbridge’s assessment procedure. However, Nadeau presented no evidence that he raised the budget timing issue to the Knightsbridge at any time before trial. Instead, Nadeau testified that he originally failed to make payments because he lost his job and because his father was ill (trans. p. 84, l. 18-25 - p. 85, l. 1.); that he contacted Knightsbridge’s agent to discuss a payment plan for the balance due (trans. p. 91, l. 11-21.); and that he made

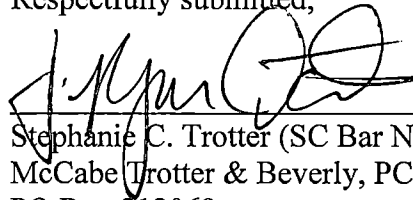
payments when he could afford to do so (trans p. 104, l. 15-24.). None of those communications would alert Knightsbridge that Nadeau objected to the assessment procedure and thus constitutes a waiver by Nadeau.

The trial court correctly held that Nadeau had waived his right to require strict compliance with the Declaration by failing to raise the issue in the three years preceding trial. Further, Nadeau's course of dealing with Knightsbridge, including sporadic payments without any reference to the budget process, could have reasonably led Knightsbridge to believe the assessment procedure would not be strictly enforced by Nadeau. By failing to exercise any of his rights to challenge the assessments and/or the process in which the assessment rate is fixed, Nadeau effectively and impliedly waived any argument he may have against the legitimacy of the assessments.

CONCLUSION

For the reasons stated herein Knightsbridge respectfully requests that this Court affirm the Master-in-Equity's ruling.

Respectfully submitted,



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January 17, 2017

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CERTIFICATE OF SERVICE

I, Tammy Hicks, of McCabe Trotter & Beverly, attorney for Plaintiff, do hereby certify that a copy of the foregoing documents have been served upon the below named individual and/or counsel on the 17th day of January, 2017, via Regular U.S. Mail, addressed as follows:

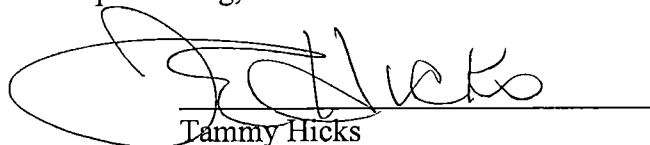
DOCUMENTS SERVED

INITIAL BRIEF OF RESPONDENT

**RESPONDENT'S DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD OF APPEAL**

PARTIES SERVED

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January 17, 2017

RECEIVED
JAN 17 2017
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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Re: Knightsbridge Property Owners Association, Inc. v. Paul A. Nadeau
Appellant Case No. 2016-001696
MTB File No. 019396/00002

Dear Ms. Kitchings:

Enclosed please find the original and three copies of Respondent's Designation of Matter to be Included in the Record on Appeal and the Initial Brief of Respondent. Please file the original and return a clocked in copy to us in the enclosed envelope.

By copy of this letter, I am serving a copy of the same on all parties.

Sincerely yours,

Stephanie C. Trotter

SCT/th
Enclosures

cc: J. Edwin McDonnell, Esquire (w/enclosure)