THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Master in Equity

S. Jackson Kimball, Master in Equity
2014-CP-46-03819

Appeal Case No. 2016-001696

Knightsbridge Property
Owners Association, Inc.,

Respondent,

v.

Paul A. Nadeau, Appellant.

BRIEF OF APPELLANT

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DID THE TRIAL JUDGE ERR BY FINDING THAT NADEAU IS ESTOPPED FROM CHALLENGING THE FIXING OF THE ASSESSMENTS BECAUSE NADEAU DID NOT COMPLAIN BEFORE THE FORECLOSURE AND PAID SOME AMOUNT TOWARD THE ASSESSMENTS?

STATEMENT OF THE CASE

This is an action to foreclosure a homeowner's association assessment filed by Knightsbridge Property Owners Association, Inc. (Knightsbridge) on November 20, 2014. Paul Nadeau (Nadeau) properly filed an answer. The trial in this matter was held before the Master in Equity on January 11, 2016. The Court foreclosed on the assessment ordering the sale of Nadeau's home. The order was signed on February 29, 2016 and filed on March 1, 2016. Nadeau timely filed a motion to reconsider which was heard on April 20, 2016. The order denying the motion was signed on July 27, 2016 and filed on July 28, 2016. The Notice of Intent to Appeal was filed on August 15, 2016. Nadeau sought a stay of the foreclosure sale which was granted by order dated September 6, 2016. The order required Nadeau to post a bond of $9,500. Nadeau complied with that order. The foreclosure sale has been stayed.

FACTS

Knightsbridge Property Owner's Association, Inc. was created by a Master Declaration (Declaration) dated June 19, 1996 and filed on June 20, 1996 (R. pp. 120-143) Each owner of property within Knightsbridge neighborhood is obligated to pay properly fixed assessments. (R. p. 127 Article V, Section 1) A Board of Directors governs Knightsbridge. (R. p. 125 Article III, Section 6) "The Board of Directors shall fix the amount of the annual assessments against each lot at least thirty (30) days in advance of each calendar year." (R. p. 129, Article V, Section 7) This foreclosure action involves the assessments for 2012 through 2015. (R. p. 7, fn. 1). The board minutes show that the assessments were fixed by the approval of a budget that included a line item for the assessments on the following dates:

Meeting December 14, 2011 for 2012 (R. p. 147)

Meeting November 28, 2012 for 2013 by email vote (R. p. 149)

Meeting December 5, 2013 for 2014 (R. p. 151)

Meeting with No date in 2014 for 2015 (R. p. 155)

Neither the Master Declaration (R. p. 128 lines 10-13) nor the Bylaws (R. p. 44 ine 9-p. 39 line 17) provide for a board of Directors vote by email.

Knightsbridge included late fees in the foreclosure amount. The Trial Court deducted late fees because late fees were not established in the Master Declaration or the Bylaws. (R. p. 8)

Nadeau did not pay all of the assessments for the years 2012 through 2015. He did pay some amount toward those assessments. (R. pp. 59 line 23-p. 60 line 16; R. p. 74 line 12-p. 75 line 4)

ARGUMENTS

I. THE ASSESSMENTS ARE A NULLITY BECAUSE KNIGHTSBRIDGE DID NOT FIX THE ANNUAL ASSESSMENTS WITHIN THIRTY DAYS OF ADVANCE OF THE FOLLOWING CALENDAR YEAR,

Knightsbridge seeks to force the sale of Nadeau's home for the alleged failure to pay assessments. Knightsbridge must show that the assessments are properly due before collection of such assessments can be enforced. The assessments sought to be collected were improperly fixed by Knightsbridge. The assessments are therefore unenforceable and uncollectible.

Assessments are authorized by the Knightsbridge Master Declaration. Article V, Section 7 sets forth the procedure to fix assessments for lots in the subdivision including Paul Nadeau's lot. (R. pp. 128-12) That section states: "The Board of Directors shall fix the amount of the annual assessment against each Lot at least thirty (30) days in advance of each calendar year."

The evidence presented by Plaintiff included minutes from the Board of Directors meetings that allegedly fixed the amount of the assessments. Those documents show the following:

Minutes with no date but with a budget dated 12/10/2014 allegedly fixed the assessment for 2015. (R. p. 155)

The minutes dated 12/09/2013 allegedly fixed the assessment for 2014. (R. p. 151)

An email dated November 28, 2012 allegedly fixed the assessment for 2013. (R. p. 149)

The minutes dated 12/14/2011 allegedly fixed the assessment for 2012. (R. p. 147)

The minutes dated 12/13/2010 allegedly fixed the assessment for 2011. (R. p. 145)

Knightsbridge attempted to testify that the budget dated December 12, 2014 indicated that the budget was approved in November. This testimony was based on computer

records that were not in evidence and an objection to the testimony was sustained by the trial court. (R. p. 33 line 16- p. 37 line 21) Knightsbridge did not present any admitted testimony to show the date of the December 2014 meeting. Two other budgets between 2011 and 2014 had dates. Each of those budgets had dates that were within two days of the corresponding meeting (2011 and 2012) (R. pp. 145-158)

The Board of Directors did not comply with the Master Declaration in fixing any of the assessments for 2011 and beyond. The assessments for 2011, 2012, 2014, and 2015 were, at best, all fixed at meetings in December of the previous year. The assessments were not fixed in advance of thirty days of the end of each calendar year. For 2013, there is an email dated November 28, 2012 that states the budget was approved by email. (R. p. 149) The Master Declaration (R. pp. 120-143) does not have a provision for votes by email. The Bylaws of Knightsbridge (R. p. 169-185) does not authorize votes by email. The Bylaws do authorize the Board to take action without a meeting. The written approval of all Directors is necessary for such action (R. p. 178 Section 12). No such approval was presented by Knightsbridge. (R. p 44 line 7-p. 39 line 17)

It is clear that Knightsbridge did not properly fix the assessments for the years 2011 through 2015. If the assessments were not properly fixed, they cannot be collected by Knightsbridge. If they cannot be collected by Knightsbridge, the non-payment cannot be the basis of the foreclosure requested by Knightsbridge.

In *Seabrook Island Property Owners Association v. Pelzer,* 292 S.C. 343, 356 S.E.2d 411 (Ct.App.1987), the Association was attempting to collect assessments that had not been fixed in accordance with the restrictive covenants. The Court of Appeals held that:

> The restrictive covenants and the bylaws require annual maintenance charges to be based on property values. A system of charges that violates this requirement cannot be defended on the ground that it is a reasonable alternative. The Association is bound to follow the covenants and its own bylaws.
>
> Since the flat fee annual maintenance charge violates the restrictive covenants and the bylaws, we reverse the judgment against Pelzer for the 1984 charges on his two lots. P. 348

The Court of Appeals in *Seabrook* did not allow Pelzer a refund for previously paid assessments because of estoppel. Paul Nadeau does not seek any such refund. The Court of Appeals did stop the collection of unpaid assessments. The Court of Appeals also addressed the "business judgment" rule and found that it did not aid the Association.

> The Association argues that its flat fee system of charges is reasonable and was adopted in good faith in the exercise of business judgment. This argument misses the point. Restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract. Palmetto Dunes Resort v. Brown, 287 S.C. 1, 336 S.E.2d 15 (Ct.App.1985). Moreover, a corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant thereto; acts beyond the scope of the powers so granted are ultra vires. Lovering v. Seabrook Island Property Owners Association, 289 S.C. 77, 344 S.E.2d 862 (Ct.App.1986), aff'd as modified, 291 S.C. 201, 352 [292 S.C. 348] S.E.2d 707 (1987). The "business judgment" rule applies to intra vires action of the corporation, not to ultra vires acts. See Dockside Association, Inc. v. Detyens, 291 S.C. 214, 352 S.E.2d 714 (Ct.App.1987). p. 347

The Trial Court found that equity requires the foreclosure. (R. p. 9). The Trial Court did find that all assessments (except 2013) were fixed in December and were not fixed at least thirty days in advance of the calendar year. (R. p. 7) For 2013, the court found that

the assessment was fixed on November 28, 2012. (R. p. 7) The court failed to note that the November 28, 2012 vote was by email. (R. p. 149) There is no provision for an email vote in the Declaration or Bylaws of Knightsbridge. (R. pp. 120-143 and pp. 169-185 and R. p. 28 lines 10-13 and R. p. 44 line 9-p. 39 line 1).

The court found that Nadeau knew about the assessments and made some payment toward the assessments. (R. p. 8) The court decided that equity required that Nadeau had an obligation to pay the assessments and the failure to pay those assessments result in foreclosure. (R. p. 9). The court sited *Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 715 S.E.2d 348 (Ct App 2011)* (*Regions*) for the proposition that a court can do anything to ensure that just results are reached. While the *Regions* court used equity to protect a purchaser's interest in real estate, the *Regions* court did note: "The rule that equity considers as done that which should be done cannot be invoked to create a right contrary to the agreement of the parties." *Regions* at page 254. The trial court found that "The noncompliance of the Board in regard to the date specified for formulating the budget and assessments is inconsequential, and no party, including Defendant, has suffered prejudice as a result." (R. p. 8)).

The Declaration specifies how Knightsbridge's is to fix the assessments. The fixing of the assessments is an *ultra vires* act. Equity should not allow Knightsbridge to deviate from the procedure set in the Declaration simply because what Knightsbridge did was inconsequential. In *Fisher v. Shipyard Village Council of Co-Owners, Inc., 409 S.C. 164, 760 S.E.2d 121 (Ct App 2014),* the court stated "A homeowner's association is bound to

follow its covenants and bylaws and cannot defend something that violates those documents on the basis that is a reasonable alternative." 760 S.E.2d 121, 130.

NADEAU IS NOT ESTOPPED FROM CHALLENGING THE FIXING OF THE ASSESSMENTS.

The Trial Judge, *sua sponte*, found that Nadeau is estopped from challenging the fixing of the assessments because Nadeau did not challenge the Board's actions before the foreclosure was filed. (R. p. 11) Nadeau did nothing to the Board's detriment.

Estoppel by silence ". . . arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts . . . The circumstance must have been such as to render it his duty to speak." *Mayes v. Paxton*, 313 S.C. 109, 437 S.E.2d 66 (1993), page 113. Nadeau did not have a duty to speak. Nadeau did not say anything that lead Knightsbridge to ignore the Declaration.

Promissory estoppel is a quasi-contractual remedy. "The elements of promissory estoppel are (1) an unambiguous promise by the promisor; (2) reasonable reliance on the promise by the promisee; (3) reliance by the promisee was expected by and foreseeable to the promisor; and (4) injury caused to the promisee by his reasonable reliance." *North American Rescue Products, Inc. v P. J. Richardson, 411 S.C. 371, 769 S.E.2d 237 (2015), 769 S.E.2d at page 241.* Nadeau did not make any promises to Knightsbridge that led Knightsbridge to ignore the Declaration.

Collateral estoppel and judicial estoppel requires prior litigation between the same parties. *Carrigg v Cannon, 347 S.C. 75, 552 S.E.2d 767, (Ct. of App. 2001)*

> The essential elements of estoppel as related 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; (3) knowledge, actual or constructive, of the real facts. . . . As related to the party claiming the estoppel, the essential elements 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. (cites omitted)
>
> *Southern Development Land and Golf Company, Ltd. v. South Carolina Public Service Authority, 311 S.C. 29, 426 S.E.2d 748 (1993) page 33*

Nadeau did not make any false representations to Knightsbridge about the process to fix the assessments. Knightsbridge did not rely on any information from Nadeau in ignoring the Declaration. Nadeau is not estopped from requiring Knightsbridge to comply with the Declaration..

CONCLUSION

Knightsbridge did not comply with its own rules. Knightsbridge did not fix the assessments as required by the Master Declaration. The assessments sought by Knightsbridge are unenforceable. Foreclosure should be denied. Knightsbridge should not be excused from failing to comply with the Master Declaration because the Board was just sloppy. Knightsbridge acted outside its power. Knightsbridge's failure cannot be justified because it needs funds to properly operate. Estoppel should not be a consideration because it was brought up by the trial court at the hearing for reconsideration. If estoppel is considered, there are no facts to support a finding of estoppel by Nadeau.

The trial court should be reversed. The foreclosure should be stopped.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certified that Appellant's Final Brief complies with Rule 211(b), SCACR.

March 9, 2017

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