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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

MAY 15 2017

APPEAL FROM DORCHESTER COUNTY OF COMMON PLEAS
S.C. SUPREME COURT

The Hon. Diane S. Goodstein, Circuit Court Judge

Unpublished Opinion No. 2016-UP-519 (S.C. Ct. App. Filed Dec. 21, 2016)

Live Oak Village Homeowners Association, Inc., Jennifer McFarland,
Carlton Holcombe and Ute Holcombe, Plaintiffs,

Of whom Live Oak Village Homeowners Association, Inc., Jennifer McFarland and
Carlton Holcombe are the Appellants,

v.

Thomas Morris, David Hannemann, Sofia Mazell and Michael Mazell, Respondents.

Sofia Mazell and Michael Mazell, Third Party Plaintiffs,

v.

William McFarland, Third Party Defendant.

**RETURN OF RESPONDENTS SOFIA MAZELL AND MICHAEL MAZELL
TO WRIT OF CERTIORARI**

WILLIAM B. JUNG, ESQ.
1156 Bowman Road, Ste. 200
Mount Pleasant, S.C. 29464
(843) 576-4200
(#0068788)

Attorney for Respondents
Sofia and Michael Mazell

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Preliminary Statement

Respondents Sofia and Michael Mazell ("Mazell") submit this Return to the Petition for the Writ of Certiorari of the December 21, 2016 Order of the Court of Appeal affirming the trial court dismissal the claims brought in the name of the appellant Live Oak Village Homeowners Association, Inc. (the "HOA") against Mazell. For the following reasons, Mazell respectfully submits that the Orders of the Court of Appeals and trial court should be affirmed.

Argument

I. THE ORDER DISMISSING THE CLAIMS FILED IN THE NAME OF THE HOA SHOULD BE AFFIRMED

The Amended Complaint states two claims against Mazell in the name of the HOA: (1) a claim of civil conspiracy (Set forth in Count II); and (2) a claim for breach of the covenants and restrictions (Set forth in Count IV). (R. p. 034). In sum, the civil conspiracy claim alleges that Mazell and the other respondents, HOA Board of Director Members David Hannemann and Thomas Morris, formed a conspiracy to injury the HOA and association property owners, appellants Jennifer McFarland and Carlton Holcombe. *Id.* Count IV alleges that Mazell had renters in the Mazell home in violation of the HOA By-laws, covenants and restrictions. (R. pp. 034-035). Mazell denies the facts supporting these alleged claims; however, a finding regarding these factual issues is not necessary to determine in order to determine whether the claims in the name of the HOA have been property filed against Mazell. As set forth herein and confirmed by the trial court and the Court of Appeals, the cause of action in the name of the HOA filed against Mazell violate the express provisions of the HOA By-laws and were property dismissed by the lower courts.

The Applicable HOA By-laws

In pertinent part, the HOA By-laws do authorize the HOA to bring legal actions against HOA members for violations of the By-laws, covenants and restrictions:

6. POWERS AND DUTIES OF THE BOARD OF DIRECTORS

(A) ... The Board of Directors shall exercise such duties and responsibilities as shall be incumbent upon it by law ... and shall include ... the following:

(6) To enforce by legal means the provisions of the Certificate of Incorporation and By-laws of the Association ...

(R. p. 402, par. 6(A) and 6(A)(6)).

However, before any action can be taken by the HOA against an individual homeowner, the By-laws mandate two alternative conditions precedent. One requires a decision by a majority of BOD Members at a BOD Meeting: "An act or decision done or made a majority of the number of directors present at a duly held meeting at which a quorum is present shall be regarded as an act of the Board." (R. p. 401, par. 5(C)). The second is by "Actions Taken Without a Meeting." Herein, any action taken without a meeting requires **advance written consent** of all the BOD Directors to such action: "The directors shall have the right to take any action in the absence of a meeting of the directors which they could take at a meeting **by obtaining the written approval of all the directors**. Any action so approved shall have the same effect as though taken at a meeting of the directors." (R. p. 40-1, par. 4(E)). (Emphasis added).

At his deposition, respondent HOA Board of Director David Hannemann ("Hannemann") confirmed that the Board of Directors for Live Oak Village HOA never

met or voted to institute the claims filed in the name of the HOA against Mazell. (R. p. 171-72, lines 25-23)). Furthermore, in discovery, the appellant HOA failed to produce any minutes for any meeting of the HOA Board of Directors where said actions were discussed or voted upon. (Cf, R. pp. 449-59). Accordingly, there is no dispute that no meeting or vote was taken to authorize the claims that have been filed against Mazell in the name of the HOA. (R. p. 63, lines 10-15(Conceded by Appellant's Counsel); see also, R. pp. 171-172).

Rule 56(e) dictates the evidence that a party opposing summary judgment must meet. In pertinent part, Rule 56(e) provides:

“Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in affidavits shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment has been made and supported as provided in this rule, an adverse party may not rest on the mere allegations or denials in his pleading, but his response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.”

South Carolina Rules of Civil Procedure, Rule 56(e).

At the hearing on respondents' motion for summary judgment, appellants conceded that there was no prior unanimous written consent of all members of the Board of Directors for the HOA to have instituted claims against Mazell. (R. p. 63; see also, R. pp. 171-172). Appellant's counsel further conceded that a majority of members of the HOA Board of Directors did not vote at a board meeting to institute claims in the name of the HOA against Mazell. *Id.* Given that there is no dispute over the fact that appellants' filing of claims in the name of the HOA against Mazell violated the

procedures set forth in the governing Bylaws, the HOA was not empowered or authorized to have filed any claims in this action against anyone. (E.g., R. pp. 064-65) (Trial Court's colloquy with counsel on issue). In effect, the individual appellants commandeered the HOA as a co-plaintiff in this action without having requisite prior authorization from the Board of Directors. (E.g., R. 063, lines 5-16).

Appellants argue that respondents Hannemann and Morris, as co-members of the HOA's Board of Directors, cannot be expected to vote in a favor of a lawsuit to be brought against themselves. Therefore, appellants maintain they are excused from following the condition precedent procedures set forth in the By-Laws before the HOA can file litigation. Without commenting on the merits of this argument, this argument does not apply to respondents Mazell, who have never been members of the Board of Directors for the HOA. In fact, the evidence introduced at the summary judgment motion confirmed that the HOA did not authorize the filing of any lawsuit against Mazell. (R. p. 171-72, lines 12-23). Respondent David Hannemann confirmed this in a November 4, 2014 deposition:

Q: OK, I want to take you back to the time, I think it was in late of 2012, when this lawsuit got started. Was there a board of directors meeting prior to the filing of this lawsuit in which the HOA voted on whether or not to pursue a claim against yourself, Mr. Morris and the Mazell's?

A: No.

Q: Okay.

A: My understanding is that the suit filed was not filed on behalf of the HOA. It was separate and distinct by Mr. McFarland or Mrs. McFarland, Mr. Holcombe and Mrs. Holcombe.

Q: My next question is: Do you know who is acting on behalf of the HOA? Because the HOA most certainly is a Plaintiff to this lawsuit?

A: I understand that. And, no I do not.

Q: But you didn't make any vote for that to happen?

A: That's correct.

Q: Did you conduct any meeting for that to happen?

A: No, sir.

Q: Did you send out any notice to any HOA members for that to happen?

A: No.

Id.

Simply put, there was a failure of a condition precedent to the HOA's authority to file a civil action against Mazell, and it is respectfully submitted that the HOA's claims should be dismissed therefor. Even crediting the argument that filing suit against respondents was proper because respondents Hannemann and Morris, as members of the Board of Directors, had a conflict of interest, it is still true that the remedy available to the individual appellants is the filing of suit in their individual capacities against respondents. (R. p. 393, Section 8.1). Simply stated, the individual appellants have no right to commandeer the HOA, naming it as a co-plaintiff to this lawsuit, in addition to their individual claims against respondents. The trial court recognized this very point at oral argument in discussion of the merits of appellants' position. Transcript of Hearing before Judge Goodstein. (R. pp. 063-65).

In reality, the reason that the individual appellants have hijacked the HOA and named it as a co-plaintiff to this lawsuit is to use the authorization provided under the By-Laws for the HOA to recover attorney's fees on successful suits against community homeowners. (R. p. 415, par. 15(D)). After filing this lawsuit, the individual

appellants made "loans" to the HOA for payment of attorney's fees in prosecuting their claims. (R. pp. 232-23). The individual appellants now seek to use the HOA's authority to recover attorney's fees from community homeowners as a means of gaining repayment of the individual appellants' "loans" for payment of appellants' individually paid attorney's fees. *Id.* It is shocking that the individual appellants have taken such action on purported behalf of the HOA without the consent, knowledge or authorization of the other members of the community HOA. The trial court saw through this attempt to create inequity, and respondents respectfully submit that the judgment of the trial court should be affirmed.

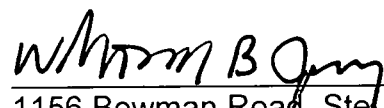
Conclusion

Based upon the foregoing argument and evidence in the record before this Court, Mazell respectfully submits that the Court of Appeal's and trial court's dismissal of the HOA as a party to this action should be confirmed.

Dated: May 11, 2017

Respectfully submitted,

WILLIAM B. JUNG, ESQ.



1156 Bowman Road, Ste 200
Mount Pleasant, S.C. 29464
(843) 576-4200
(#0068788)

Attorney for the Respondents
Sofia and Michael Mazell

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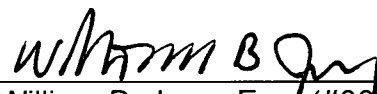
I, William B. Jung, Esq., counsel for respondents Mazell, certify under penalty of perjury that on May 11, 2017 I served a copy of the Respondents Mazell's Return to the Petition to Writ of Certiorari by mailing a true copies thereof to the below listed counsel in an envelope, first class postage paid, addressed to:

William W. Watkins, Esq.
Wall, Templeton & Haldrup
145 King Street, Ste. 300
P.O. Box 1200
Charleston, S.C. 29402

Lydia P. Davidson, Esq.
Krawchek & Davidson
9 State Street
Charleston, S.C. 29401

Steven L. Brown, Esq.
Russell G. Hines, Esq.
Young Clement Rivers
25 Calhoun Street, Ste. 400
P.O. Box 993
Charleston, S.C. 29401

Dated: May 11, 2017

Handwritten signature of William B. Jung in black ink, written over a horizontal line.

William B. Jung, Esq. (#0068788)
1156 Bowman Road, Ste. 200
Mount Pleasant, S.C. 29464
(843) 576-4200

Attorney for Respondents Mazell