

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2016 CP-10-2108

The Bohicket Yacht Club Marina Counsel of Co-Owners, Inc., R. Patrick Welch, and Bohicket Investors, LLC,

COC Corporation, Coast Real Estate, LLC, Marketexplore.com, LLC, NYSD, Inc., Michael J. Allen, Dale J. Haefner, Laurine Haefner, David M. Graham, Jr., David W. Olikier, Susan Lynn Klaus, Timothy C. Bickham, Jennifer M. Tesero, Bryan Stock, Michael T. Casa, Ruby L. Casa, Frances A. Casa, Frank A. Casa, Jean Jones, and John C. Butera,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Jean H. Toal

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRCP; Rule 41(a), SCRCP (Vol. Nonsuit); Rule 43(k), SCRCP (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRCP; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

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

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

Motion to Dismiss as to Defendants COC Corporation, Coastal Real Estate LLC, NYSD, Inc., Bryan Stock, Michael T. Casa, Ruby L. Casa, and David M. Graham, Jr., is GRANTED.

ORDER INFORMATION

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

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MAY 15 2017

SC Court of Appeals

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE #: 2016-CP-10-2108

THE BOHICKET YACHT CLUB MARINA)
COUNSEL OF CO-OWNERS, INC., R. PATRICK)
WELCH, AND BOHICKET INVESTORS, LLC,)

Plaintiffs,

v.)

COC CORPORATION, COAST REAL ESTATE,)
LLC, MARKETEXPLORER.COM, LLC, NYSD,)
INC., MICHAEL J. ALLAN, DALE J. HAEFNER,)
LAURINE HAEFNER, DAVID M. GRAHAM, JR.,)
DAVID W. OLIKER, SUSAN LYNN KLAUS,)
TIMOTHY C. BICKHAM, JENNIFER M. TESORO,)
BRYAN STOCK, MICHAEL T. CASA, RUBY L.)
CASA, FRANCES A. CASA, FRANK A. CASA,)
JEAN JONES, AND JOHN C. BUTERA,)

Defendants.)

*ORDER GRANTING MOTION TO DISMISS
OF DEFENDANTS COC CORPORATION,
COAST REAL ESTATE LLC, NYSD, INC.,
BRYAN STOCK, MICHAEL T. CASA,
RUBY L. CASA AND DAVID M. GRAHAM, JR*

FILED
2017 MAY -1 AM 11:53
JULIE J. ARMSTRONG
CLERK OF COURT

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BACKGROUND

The Complaint in this case alleges a single cause of action for malicious prosecution. The Defendants, including the moving Defendants, were Plaintiffs in a prior case (case number 2012-CP-10-8214) hereinafter “the prior litigation”, brought against the Plaintiffs herein and others, alleging improper management of the Bohicket Yacht Club Marina Counsel of Co-Owners, Inc., an association subject to the a South Carolina Horizontal Property Act. Plaintiffs in the prior litigation (Defendants herein) were all unit owners in the regime.

The First Cause of Action in the prior litigation alleged the failure to require Bohicket Investors, LLC to pay assessments for 99 units owned, in violation of the Master Deed and Horizontal Property Act. The prior litigation was tried, non-jury, before the Honorable Maite Murphy, on November 17th & 18th, 2014. On

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JST

January 21, 2015, Judge Murphy issued her order. She granted a directed verdict in favor of Defendant Teresa Penniger, who is not a Plaintiff herein, and after deliberation, found for the other Defendants which included all of the current Plaintiffs.

After service of the Summons and Complaint in this action, Defendant David M. Graham, Jr. filed a Motion to Dismiss pursuant to Rule 12(b)(6), S.C.R.C.P. Defendants COC Corporation, Coast Real Estate, LLC, NYSD, Inc., Bryan Stock, Michael T. Casa, Ruby L. Casa jointly filed a separate Motion to Dismiss.

The motions came before me to be heard on October 13, 2016.

DISCUSSION

This being a motion to dismiss under Rule 12(b)(6), S.C.R.C.P. I must consider only matters appearing within the four corners of the Complaint. I do, however, take judicial notice of the filings in the prior litigation, specifically the Complaint and Judge Murphy's Order.

The moving Defendants contend the allegations of Complaint, particularly Paragraph 52, demonstrate as a matter of law, that the Plaintiffs cannot possibly prove a necessary element of the tort of malicious prosecution, lack of probable cause.

The elements of malicious prosecution are:

1. The institution or continuation of original judicial proceedings;
2. By or at the instance of the Defendant;
3. Termination of such proceedings in Plaintiff's favor;
4. Malice in instituting such proceedings;
5. Lack of probable cause; and
6. Resulting injury or damage.

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Pallares v. Seinar, 407 S.C. 359, 366, 756 S.E. 2nd 128, 131 (S.C. 2014).

The existence of probable cause as to any one of multiple causes of action in the prior litigation is sufficient to defeat a malicious prosecution claim. Id. at 407 S.C. 359, 367,756 S.E. 2nd 132.

The moving Defendants contend, and I find, that Paragraph 52 of the Complaint acknowledges that the Defendants had probable cause to initiate and maintain the First Cause of Action in the prior litigation. Paragraph 52 of the Complaint, recites an email written by Defendant's counsel to Plaintiff's counsel in the prior litigation and containing the following language:

"The Plaintiffs complain that we didn't pay quarterly assessments as they did, but the Master Deed expressly provides that the assessments do not commence until such time as a Unit is transferred to an third party. You would say that this conflicts with the Act, and you may be right..." (Emphasis added).

Section 27-31-190 of the Act requires that co-owners of all units in a Horizontal Property Regime contribute, pro-rata, toward expenses of administration, maintenance and repair of the common elements. The email acknowledged that the prior Defendants did not pay assessments but gave a justification for that position.

By citing the email, Paragraph 52 of the Complaint acknowledges that there was a probable cause basis for the First Cause of Action in the prior litigation.

In Pallares, the Supreme Court defined probable cause as follows:

"Where a plaintiff bases the claim on an opponent's institution of civil causes of action, probable cause exists if the facts and circumstances would lead a person of ordinary intelligence to believe that the plaintiff committed one or more of the acts alleged in the opponent's complaint." (Citations Omitted.) The issue is not what the actual facts were, but what the prosecuting party honestly believed them to be." Citation omitted. Pallares Supra at 407 S.C. 367 756 S.E. 2nd 132.

The Plaintiff has the burden of proving lack of probable cause, Elletson v. Dixie Home Stores, 231 S.C. 565, 571, 99 S.E. 2nd 384, 387 (1957).

By including this email in the Complaint, Plaintiffs now admit that the Defendants not only believed there had been a violation of the Horizontal Property Act but also had a valid reason to have formed that belief - the failure to pay assessments.

The fact that the Plaintiffs herein were successful in the prior litigation does not mean that it was instituted or continued without probable cause. Judge Murphy's Order supports this view. In her order, Judge Murphy granted a directed verdict to one Defendant in the prior litigation who is not a Plaintiff herein. The remainder of her Order indicates that the judgment in favor of the current Plaintiffs was reached after a completed trial and a non-jury judge's usual deliberative process. The case was under advisement from the completion of the trial on November 18, 2014, until Judge Murphy's Order of January 21, 2015. Had the allegations in the prior litigation been without probable cause, undoubtedly she would have granted a directed verdict as to all Defendants including the Plaintiffs herein.

I therefore find that the acknowledgement, found within the four corners of the Complaint, that the Defendants herein, "...may have been right..." in their contention in the prior litigation that the Defendants' (Plaintiffs herein) actions did not comply with the Horizontal Property Act is an admission that there was probable cause for Defendants allegations of the First Cause of Action.

Therefore, as a matter of law, the Plaintiffs herein cannot possibly prove the necessary element of lack of probable cause. This applies as to all moving Defendants.

Among the moving Defendants, COC Corporation, Coast Real Estate, LLC, NYSD, Inc., Bryan Stock and Ruby L. Casa advance the additional argument that, while the Complaint directly alleges an animus against Plaintiffs by Defendants Graham and Michael T. Casa, due to prior business dealings, no such allegations are made against the other Defendants. These Defendants contend, and I find, that the Complaint only alleges that they were Unit owners who participated in the prior litigation at the behest of Graham and Michael T. Casa. The Complaint alleges no facts from which malice could be inferred on the part of these

Defendants. The Complaint appears to suggest a theory that these Defendants were somehow influenced by either Casa or Graham to take part in the action in order to serve Casa and Graham's purposes. I therefore find that the Complaint fails as to these Defendants on this additional ground.

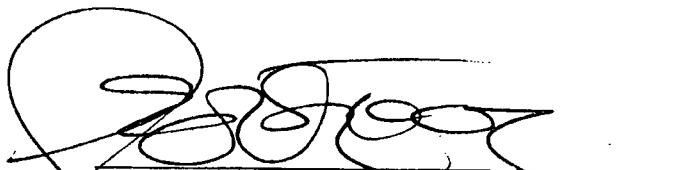
I find therefore, that the pleadings fail to state facts sufficient to constitute a cause of action against any of the moving Defendants and that, based upon the facts alleged in the Complaint, and the inferences reasonably deducible from those facts, the Plaintiffs would not be entitled to relief under any theory of their case. See Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 395, 596 S.E. 2nd 42, 45 (2004) and Brown v. Leverette, 291 S.C. 364, 366, 353 S.E. 2nd 697, 698 (1987).

It is therefore,

ORDERED that the motions to dismiss of COC Corporation, Coast Real Estate, LLC, NYSD, Inc., David M. Graham, Jr., Bryan Stock, Michael T. Casa and Ruby L. Casa are granted.

AND IT IS SO ORDERED!

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Honorable Jean H. Toal
Presiding Judge

This 27th day of April, 2017.

JULIE J. ARMSTRONG

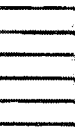
CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258

RETURN SERVICE REQUESTED



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RONALD L. RICHTER JR.
18 BROAD ST STE MEZZ
CHARLESTON SC 29401-3010

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NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

Order/Mot to dismiss COC Corp etc

CASE NO: 2016CP1002108

Bohicket Yacht Club Marina Council of Co Owners Inc The , plaintiff, et al VS COC Corporation ,

This judgment was entered on the 01th day of May, 2017, and notice mailed first class on Tuesday, May 02, 2017, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at <http://clerkofcourt.charlestoncounty.org> or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.