THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC 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.

REPLY BRIEF OF THE APPELLANTS

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REPLY ARGUMENT NUMBER 1

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.*

The Association's Arguments Number 1 and 2 are founded on the premise that the following language in the 1973 Commercial Covenants is meaningless:

> 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.[1]

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

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

> 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.[2]

By their plain language, the 1973 Commercial Covenants govern property subjected to them in a deed, to the exclusion of ". . . those covenants and restrictions previously recorded. . . ."[3] 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.[4]

In the face of this language, and applicable law governing the construction of contracts, the Trial Judge ruled and the Association argues that the intent of the declarant was that the 1973 Commercial Covenants were supplemental to the 1970 Covenants, which ruling and argument are unsupported by the unambiguous language quoted above and by the law of South Carolina governing the interpretation of contracts.

In its Argument 1(B), the Association argues that no one disputes that the property of Catwalk, *et al.*, is within the area described in the plat referenced in the 1970 Covenants. Given, however, that the 1973 Commercial Covenants are the "sole applicable covenants,"

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[2] *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.

[3] The only evidence in the record is that the 1970 Covenants were "previously recorded" with respect to the 1973 Commercial Covenants.

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

to the exclusion of ". . . those covenants and restrictions previously recorded. . .," the point the Association attempts to make is of no consequence.

The argument of the Association is also founded on the premise that its failure to make any effort to enforce its claimed rights for a period of more than 40 years is also meaningless. To the contrary, the action of the Association is perfectly consistent with the notion that the Commercial Covenants were the "sole applicable covenants" encumbering the property of Catwalk, *et al.*

In its Argument 1(C), the Association asserts an issue preservation argument. The premise of the Association's argument is incorrect.[5] In addition, the Association misses the point that it made the affirmative argument that the 1970 and 1984 Deeds added the encumbrance of the 1970 Covenants to the property of Catwalk, *et al.*, and thus it bore the burden of proof on the issue.

As was shown in Argument 2(B) in the Brief of Appellants, the language of the 1970 Covenants detailed what had to be done to subject property to the encumbrance of the Covenants, and the Association failed to offer any evidence that those things were done. Thus, it failed to meet is burden of proof on this issue.[6]

REPLY ARGUMENT NUMBER 2

THE TRIAL JUDGE ERRED BY FAILING TO HOLD THAT THE ASSOCIATION'S

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[5] Clearly it was argued as the Trial Judge ruled on the issue. *See:* January 22, 2016, Order, p. 4, R. 8.

[6] In its footnote 4, the Association continues to advance the argument that an exception to title in a title insurance policy somehow subjects the insured to the exception. The express language of the title policies states only that the insurer will not defend or indemnify claims made with respect to the exceptions. The language of the title policies neither validates the exceptions or binds the insured to them.

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 Association's reliance on the "non-waiver" language in the 1970 Covenants set out in its Argument Number 3 is misplaced. Catwalk, *et al.*, argue that the statute of limitations set out in S. C. Code Ann. § 15-3-380 (Supp. 2016), bars the claims of the Association. The language from the 1970 Covenants that is relied on by the Association does not include a waiver of the right to assert the statute of limitations.

In its Argument Number 4, the Association ignores the plain language of S. C. Code Ann. § 15-3-380 (Supp. 2016), 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 Association's argument is that the 1970 Covenants do not create a possessory interest in the property of Catwalk, *et al.*, and as a result, S. C. Code Ann. § 15-3-380 (Supp. 2016), is inapplicable.

However, the plain language of S. C. Code Ann. § 15-3-380 (Supp. 2016), directs itself not only to possessory interests in real property ('. . . for the recovery of real property . . .), but also ". . . any interest therein . . . ."

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. 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.[7] The Trial Judge's ruling that S. C. Code Ann. § 15-3-380 (Supp. 2016), does not bar the Association's claim limits the application of the statute, and is contrary to the express, unambiguous language of the statute.

The 40 year lapse applies whether measured from the date of recording of the 1970 Covenants or the 1973 Commercial Covenants. The 1970 Covenants were recorded on August 18, 1970.[8] The 1973 Commercial Covenants were recorded on February 15, 1973.[9] The only evidence in the record is that the first time the Association's claim that the 1970 Covenants encumbered the real property of Catwalk, *et al.*, was by correspondence in July of 2013.[10]

Under the plain language of S. C. Code Ann. § 15-3-380 (Supp. 2016), the Association's failure to assert its claim for a period of more than 40 years operates as an absolute bar to the Association's claim. The Trial Judge should have granted the Motion of Catwalk, *et al.*, and denied the Motion of the Association because of it.

At a minimum, the failure of the Association to assert its claim under the 1970

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

[8] *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. 207-207.

[9] *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.

[10] *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.

Covenants for a period of more than 40 years creates a genuine issue of material fact sufficient to bar the granting of summary judgment to the Association under Rule 56, SCRCP.[11]

REPLY ARGUMENT 3

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 OPPOSITION TO THE ASSOCIATION'S MOTION.

In its Brief of Respondent, the Association fails to address the existence of evidence in the record sufficient to create a genuine issue of material fact sufficient to bar the summary judgment granted to it.

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.[12] 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

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[11] The Association's argument in its footnote 7 that 40 years has not elapsed is contrary to the evidence that is in the record, and is not supported by any evidence in the record. The Association's arguments based on deeds making reference to plats recorded in 1980 and 1987, which are not of record, doesn't prove or infer anything at all, other than those deeds referred to those plats. The Association appears to be arguing that an inference is created by the 1984 and 1987 deeds, however, under Rule 56, SCRCP, all inferences are in favor of the party resisting the motion.

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

for summary judgment.[13]

As was shown in Argument 4 of the Brief of Appellants, the undisputed facts in the record 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 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

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

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.[14]

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, and in the arguments set out in its Brief of Appellants, 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.*

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[14] In its footnote 3, the Association argues that the agreement related to the agreement for the dredging of Braddock Creek is irrelevant. It is not irrelevant because it shows that the Association, when its own financial contribution could be lessened, chose to treat Catwalk, *et al.*, not as a part of the Association, but rather as separate entities.

Respectfully Submitted:

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This 3rd Day of August, 2016.

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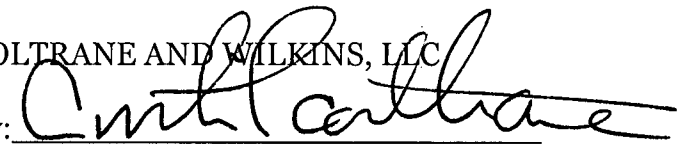
CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Reply 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: 

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