

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-26-03173

Condo-World Development, LLC and)
Heron Point Golf Club Limited Partnership,)

Plaintiffs,)

vs.)

Myrtle Beach Golf & Yacht Club)
Association, Inc.,)

Defendant.)

Myrtle Beach Golf & Yacht Club)
Association, Inc.,)

Defendant/Third Party)
Plaintiff,)

vs.)

South State Bank,)

Third Party Defendants.)

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SC Court of Appeals

**ORDER GRANTING IN PART AND
DENYING IN PART THE MOTION TO
DISMISS THIRD PARTY COMPLAINT OF
MYRTLE BEACH GOLF & YACHT CLUB
ASSOCIATION, INC. FILED ON BEHALF
OF THIRD PARTY DEFENDANT SOUTH
STATE BANK**

THIS MATTER COMES BEFORE THE COURT upon the Motion of South State Bank (“South State”) to Dismiss the Third Party Complaint filed by Myrtle Beach Golf & Yacht Club Association, Inc. (“the Association”) pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. A hearing was held before the Court on June 5, 2017, at the Horry County Judicial Center in Conway, South Carolina. Present at the hearing for South State was Attorney Audra M. Byrd. The Association was represented at the hearing by Attorney Christopher H.

Pearce. Also present were Howell V. Bellamy, Jr. and Howell V. Bellamy, III, counsel for Plaintiffs. After carefully considering the pleadings, the Motion and Memorandum submitted by South State and the arguments of counsel, the Court finds as follows:

PROCEDURAL HISTORY

Plaintiffs filed a Complaint against the Association on April 27, 2015. In their Complaint, Plaintiffs seek a judgment from the Court declaring that certain restrictions on the "golf course property" do not apply or have been waived or terminated, which would allow Plaintiffs to develop the property at issue in this case. On June 11, 2015, the Association filed an Answer, Defenses, and Counterclaims seeking declaratory judgment relief that certain restrictions do apply to the "golf course property," which would prevent residential development of the property. Subsequently, the Association filed an Amended Answer, Defenses and Counterclaims on November 5, 2015. On February 14, 2017, the Association filed a Second Amended Answer, which included a Third Party Complaint against South State, alleging causes of action for breach of contract, contractual indemnification, equitable indemnification and permanent injunction. The Association filed a revised and corrected Second Amended Answer and Third Party Complaint on March 13, 2017. In response, South State filed the present Motion to Dismiss.

FACTUAL BACKGROUND

According to the Third Party Complaint filed in this matter, in or around February 1984, Justice, Inc. ("Justice") and Peoples Federal Savings and Loan ("Peoples") entered into a real estate development project to develop a large tract of land located in Horry County, South Carolina otherwise known as the Myrtle Beach Golf & Yacht Club. [Third Party Compl. at ¶ 33]. Approximately four years later, in June of 1988, American Community Development

Corporation placed Myrtle Beach Golf & Yacht Club into involuntary bankruptcy. [Id. at ¶ 45]. During the bankruptcy proceedings, Myrtle Beach Golf & Yacht Club, Peoples, Property Consultants, Inc., and the Association entered into an agreement in order to release the property so that a foreclosure of the property could be pursued by Peoples. [Id. at ¶ 47 and Ex. 7]. This agreement was executed by the parties on July 25, 1988 (“the Bankruptcy Agreement”).

In the Bankruptcy Agreement, the parties made numerous assurances regarding the development of the property and the terms of the foreclosure. Three provisions of the Bankruptcy Agreement are of particular relevance with regard to the Third Party Complaint. First, in paragraph two on page two of the Bankruptcy Agreement, only the Association, Property Consultants, Inc. and Myrtle Beach Golf & Yacht Club, jointly and severally, agreed “to enforce the Restrictive Covenants, as they may be amended, from time to time, giving particular scrutiny to Covenant Compliance on those lots and parcels of land which are adjacent and contiguous to the golf course.” [Third Party Compl. at Ex. 7]. Peoples was specifically excepted from this provision and made no agreement to enforce the Restrictive Covenants related to the property. Second, in paragraph three on page four of the Bankruptcy Agreement, it was agreed that in the event Peoples was the successful bidder at the foreclosure sale of the property, it would cause the following deed restriction to be placed on the property: “The only permitted use of this property is a golf course, country club, or other ancillary use relating to golf course or county club use.” [Id. at Ex. 7]. Finally, paragraph two on page six of the Bankruptcy Agreement provides: “The parties between and among themselves will execute general releases so as to acquit, indemnify, and hold harmless each other from any claims or causes of action between and/or among them, prior to the execution of the date of this instrument.” [Id. at Ex. 7].

On September 12, 1988, Peoples filed for foreclosure and was the successful bidder for the property at the subsequent judicial sale. [Id. at ¶ 47]. Peoples continued to own the property for some time thereafter but eventually sold the property to Heron Point Golf Club Limited Partnership as evidenced by the Indenture Deed recorded on April 15, 1992 with the Horry County Register of Deeds in Deed Book 1540 at Page 483. As required under the terms of the Bankruptcy Agreement, the deed to Heron Point included the specified deed restriction language. [Id. at ¶¶ 50-51]. Peoples subsequently quitclaimed all of its remaining interest in the property to the Association. [Id. at ¶ 53-54]. On March 22, 2005, Heron Point Golf Club Limited Partnership obtained a Waiver of Restrictions from First Federal Savings and Loan Association of Charleston (successor in interest to Peoples) (“First Federal”) regarding a portion of the property in which it waived the following restriction: “The only permitted use of this property is a golf course, country club or other ancillary use relating to golf course or country club use.” [Id. at ¶ 55].

LEGAL STANDARD

A trial court may properly grant a motion to dismiss for failure to state facts sufficient to constitute a cause of action when the facts alleged in the complaint, along with all reasonable inferences deducible therefrom, do not entitle the plaintiff to recovery on any theory of the case. McCormick v. England, 328 S.C. 627, 632-33, 494 S.E.2d 431, 433 (Ct. App. 1997). When deciding a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, the Court may only consider the allegations set forth on the face of the complaint. Dye v. Gainey, 320 S.C. 65, 67, 463 S.E.2d 97, 98 (Ct. App. 1995). “The question is whether in the light most favorable to the plaintiff, and with every reasonable doubt resolved in her behalf, the complaint states any valid claim for relief.” McCormick, 328 S.C. at 633, 494 S.E.2d at 433-34.

CONCLUSIONS OF LAW

A. Breach of Contract.

In support of its cause of action for breach of contract, the Association alleges that South State breached the Bankruptcy Agreement, the 1992 Indenture Deed and failed to act in good faith “by not providing the Association with any notice or information regarding the 2005 Waiver of Restrictions issued for the benefit of South State Bank and Heron Point Golf Club Limited Partnership.” [Third Party Compl. at ¶ 76]. South State argues that the Association’s claim for breach of contract must be dismissed based upon the applicable statute of limitations.

Under South Carolina law, the statute of limitations for filing an action based upon “a contract, obligation, or liability” is three (3) years. S.C. Code Ann. §15-3-530 (1) (1976). In determining when the statute of limitations begins to run, South Carolina courts have consistently adopted the “discovery rule.” See Matthews v. City of Greenwood, 305 S.C. 267, 407 S.E.2d 668 (Ct. App. 1991); Santee Portland Cement Co. v. Daniel International Corp., 299 S.C. 269, 384 S.E.2d 693 (1989); Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996). Under the discovery rule, the statute of limitations commences when “the injured party knows or should have known by the exercise of due diligence that a cause of action arises from the wrongful conduct.” Walsh v. Woods, 358 S.C. 259, 264, 594 S.E.2d 548, 551 (Ct. App. 2004). A cause of action arises when it ought to have been discovered through reasonable diligence when “the facts and circumstances would have put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party might exist.” Id. at 265, S.E.2d at 551 (quoting Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998)). In addition, the fact that the injured party may not realize the entire extent of the damage is irrelevant in determining when the statute of limitations begins to run.

Dean, at 364, S.E.2d at 647; *see also*, Dillon County Sch. Dist. No. Two v. Lewis Metal Works, Inc., 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985). In Carolina Marine Handling, Inc. v. Lasch, the Court wrote:

Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote response by giving security and stability to human affairs.” The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation. Significantly, “statutes of limitations provide potential defendants with certainty that after a period of time, they will not be hailed [sic] into court to defend time-barred claims. Moreover, limitation periods discourage plaintiffs from sitting on their rights.” Statutes of limitations are, indeed, fundamental to our judicial system.

363 S.C. 169, 175-176, 609 S.E.2d 548, 552 (Ct. App. 2005) (internal citations omitted).

In reviewing the Third Party Complaint, the Association’s breach of contract claim rests solely upon the Waiver of Restrictions executed in 2005 and recorded with the Horry County Register of Deeds on May 5, 2005. In its Motion to Dismiss, South State asserts that based upon the allegations set forth in the Third Party Complaint, the Association’s claim for breach of contract should be dismissed because the Association failed to file its claim until February of 2017, nearly twelve years after the Waiver of Restrictions was made public through the recording of the document with the Register of Deeds. South State asserts that the Association knew or should have known of the alleged breach in May of 2005, and the applicable statute of limitations began to run, at the latest, when the Waiver of Restrictions was recorded with the Register of Deeds. The Court agrees and finds that at a minimum, the Association had constructive or inquiry notice of the alleged breach of contract in May of 2005.

“[C]onstructive notice or inquiry notice in the context of a real estate transaction often is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world.”

Spence v. Spence, 368 S.C. 106, 119, 628 S.E.2d 869, 876 (2006). A party is charged with constructive notice of the contents of documents filed in conformity with applicable statutory law, which an inquiry would have revealed. *See Fuller–Ahrens v. SC Dept. of Highways and Pub. Transp.*, 311 S.C. 177, 427 S.E.2d 920 (Ct. App. 1993). “The statute of limitations begins to run at the time the individual has inquiry or constructive notice.” Berry v. McLeod, 328 S.C. 435, 445, 492 S.E.2d 794, 799-800 (Ct. App. 1997) (holding that the statute of limitations began to run, at the latest, when the contested documents were publicly filed with the clerk of court).

The Court finds that the Association had notice of any alleged breach of contract on May 5, 2005, the date on which the Wavier of Restrictions was recorded with the Register of Deeds, and the time permitted by law to file suit expired, at the latest, in May of 2008. The present claim against South State was not commenced until February 14, 2017, almost nine years after the statute of limitations expired.

During the hearing before the Court, counsel for the Association argued that the three-year statute of limitations may not be applicable if the Court determines the Bankruptcy Agreement at issue is a sealed instrument, subject to the twenty-year statute of limitations found in S.C. Code Ann. § 15-3-520(b) (providing that sealed instruments are subject to a twenty-year statute of limitations). Initially, the Court notes that “whether or not an instrument is under seal, or whether or not a certain device constitutes a seal, is a question of law for the court.” 78A C.J.S. Seals § 8 (2017). Here, in the Bankruptcy Agreement attached to the Third Party Complaint as Exhibit 7, there is no physical seal or notation included with the signatures of the parties to the Bankruptcy Agreement. It is well established under South Carolina law that a contract that does not include a physical seal may only be deemed a sealed instrument where “the

contract clearly evidences an intent to create a sealed instrument.” Carolina Marine Handling, 363 S.C. at 175, 609 S.E.2d at 552.

In Carolina Marine Handling, the Court of Appeals held that the inclusion of standard attestation language, such as “IN WITNESS WHEREOF, the parties have hereunto set their hands and seals,” is insufficient to clearly evidence intent to create a sealed instrument. Carolina Marine Handling, 363 S.C. at 169, 609 S.E.2d at 551-52 (holding that generic and boiler plate language referring to seal in the standard attestation clause in a lease was not enough to demonstrate an intent to create a sealed instrument and, to hold otherwise, “would likely transform the twenty-year statute of limitations into the standard period of limitations for contract actions in this state”). Similarly, in Orlando Residence, LTD v. Hilton Head Hotel Investors, the United States District Court for the District of South Carolina found as follows:

The settlement agreement in this case includes the following standard attestation language immediately preceding the parties’ signatures: “IN WITNESS WHEREOF, the undersigned have hereunto set their hands and seals as of this 1st day of November, 1994. South Carolina judicial precedent dictates that the settlement agreement and confession of judgment cannot be considered sealed instruments, and therefore are not subject to the twenty-year statute of limitations for sealed instruments.

Orlando Residence, 2013 U.S. Dist. LEXIS at *30-31; *see also*, South Carolina Dep’t of Social Servs. v. Winyah Nursing Homes, Inc., 282 S.C. 556, 320 S.E.2d 464 (Ct. App. 1984) (holding that a contract which contained the language “the parties hereto have set their hands and seals” **and** the notation “L.S.,” an abbreviation meaning in the place of a seal, followed each of the parties’ signatures was a sealed instrument and subject to the twenty-year statute of limitations). In this case, there is no physical seal or notation following the parties’ signature, and the Bankruptcy Agreement contains only the standard attestation language which our courts have

consistently held is insufficient to create a sealed instrument. As such, the Court finds that the Bankruptcy Agreement, on its face, cannot be considered a sealed instrument.

Based on the foregoing, the Court finds that the three-year statute of limitations generally applicable to contracts applies to the Association's cause of action for breach of contract, and because this action was filed nearly nine years after the statute of limitations expired, the Association's claim for breach of contract must be dismissed.

B. Contractual Indemnification.

Contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties. Rock Hill Telephone Co., Inc. v. Globe Communications, Inc., 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005). General rules that govern construction and interpretation of contracts also apply to construction and interpretation of a contract of indemnity. Laurens Emergency Medical Specialists v. M.S. Bailey & Sons Bankers, 348 S.C. 191, 558 S.E.2d 531 (Ct. App. 2002), *rev'd*, 355 S.C. 104, 584 S.E.2d 375 (2003). As with other contracts, the principal question focuses on the intent of the parties. Id. Their intention is determined from the language used in the contract. Id.

The Association relies on the following provision contained in the Bankruptcy Agreement in support of its contractual indemnification claim: "The parties between and among themselves will execute general releases so as to acquit, indemnify, and hold harmless each other from any claims or causes of action between and/or among them, prior to the execution of the date of this instrument." [Third Party Compl. at Ex. 7]. There is no general release attached to the Third Party Complaint or alleged in the pleading. During oral argument, counsel for the Association conceded that no such document has been produced or discovered in this action.

As such, the Court must determine whether the cited provision constitutes an indemnity agreement between the parties. Accepting the allegations of the Third Party Complaint as true, as required under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, the Court considers the cited provision sufficient to create an agreement between the parties. “Of course, for a contract to be binding material terms cannot be left for future settlement. However, absolute certainty is not required, but only reasonable certainty. A contract will not be held unenforceable for indefiniteness because its performance is, as to particular details, left open to subsequent agreement of the parties. This is especially true where the contract provides the guidelines for the subsequent agreement.” Aperm of S.C. v. Roof, 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct. App.1986) (internal citations omitted).

South State argues that based upon a plain reading of the cited provision, the indemnity agreement as alleged in the Third Party Complaint encompasses only claims or causes of action between or among the parties to the Bankruptcy Agreement and occurring prior to July 25, 1988, the date of the execution of the Bankruptcy Agreement. The Court agrees. The indemnification provision reads as follows: “The parties between and among themselves will execute general releases so as to acquit, indemnify, and hold harmless each other from any claims or causes of action between and/or among them, prior to the execution of the date of this instrument.” [Third Party Compl. at Ex. 7 (emphasis added)]. The indemnification unambiguously limits the parties’ indemnification obligations to claims and causes of action “between and/or among” the parties to the Bankruptcy Agreement prior to the date of the execution of the Bankruptcy Agreement, July 25, 1988. There is no dispute that Condo-World Development, LLC and Heron Point Golf Club Limited Partnership, Plaintiffs herein, are not

parties to the Bankruptcy Agreement, and the present action was commenced in April of 2015, nearly twenty-seven years after the Bankruptcy Agreement was executed.

Thus, the Court finds that the indemnification agreement does not apply to Plaintiffs' claims against the Association, and therefore, the Association's claim for contractual indemnification must be dismissed.

C. Equitable Indemnification.

1. Adequate Remedy at Law.

South State argues that if the Court determines a valid indemnification contract exists between the parties, the Association's claim for equitable indemnification must be dismissed. Essentially, South State argues that if the Court finds a contract exists, the Association cannot maintain an equitable indemnification claim since the Association would have an adequate remedy at law based upon the contract. During oral argument, counsel for the Association conceded that its claim for equitable indemnification was an alternative cause of action in the event the Court determined that no contract of indemnification existed between the parties.

It is well established under South Carolina law that "equity is only available when a party is without an adequate remedy at law." *EllisDon Constr., Inc. v. Clemson Univ.*, 391 S.C. 552, 707 S.E.2d 399, 401 (2011). Our courts have consistently held that "[t]he basis for granting equitable relief is the impracticability of obtaining full and adequate compensation at law." *Nutt Corp. v. Howell Road, LLC*, 396 S.C. 323, 721 S.E.2d 447, 449 (Ct. App. 2011) (citing *Monteith v. Harby*, 190 S.C. 453, 3 S.E.2d 250, 251 (1939)). Because the Court has determined that a valid contract of indemnification existed between the parties, the Association's claim for equitable indemnification must be dismissed. *See Nutt Corp.*, 396 S.C. at 328, 721 S.E.2d at 450

(holding that a remedy at law was available because there was a contractual agreement between the parties).

2. Failure to Plead Sufficient Facts to State a Cause of Action.

As an additional basis for dismissal, South State argues that the Association's claim for equitable indemnification fails as a matter of law because the Association has failed to plead facts sufficient to state a claim for equitable indemnification. In summary, South State argues that the Association has failed to plead damages to a third party and failed to plead any act, omission or fault on the part of South State causing any such damages to a third party, which South State argues are necessary elements to state a cause of action for equitable indemnification. The Court agrees.

South Carolina law recognizes the principle of equitable indemnification. Generally, a party may maintain an equitable indemnification action if he was compelled to pay damages because of negligence imputed to him as a result of the tortious act of another. *See e.g., Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999). However, equitable indemnification is only allowed where a "special relationship" exists between the parties. *Id.* "According to equitable principles, a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join." *Id.* (citing *Stuck v. Pioneer Logging Machinery, Inc.*, 279 S.C. 22, 24, 301 S.E.2d 552 (1983)).

Once a sufficient relationship is established, an indemnity plaintiff must prove the following elements to recover damages on an equitable indemnity claim: (1) the indemnity defendant is at fault in causing the damages of the third party; (2) the plaintiff has no fault for

those damages; and (3) the plaintiff incurred expenses that were necessary to protect his interest in defending the third party's claim, which were the fault of the defendant. Inglese v. Beal, 403 S.C 290, 299, 742 S.E.2d 687, 692 (Ct. App. 2013).

South State argues that no special relationship exists between the Association and South State. However, in its Third Party Complaint, the Association alleges a special relationship exists based upon the Bankruptcy Agreement signed by Peoples in 1988. The Association alleges that because South State is a successor in interest to Peoples, the special relationship extends to South State. Accepting as true the existence of a special relationship between the parties, the Court finds the Association has failed to plead liability or damages caused to a third party for which the Association is responsible or fault on the part of South State in causing any such damages, both of which are fatal to the Association's claim for equitable indemnification.

In this case, the main action involves a request for a declaratory judgment as to the enforceability and/or applicability of certain alleged restrictive covenants regarding "golf course property." In Plaintiffs' Complaint in the main action, there is no request for monetary damages, and there is no allegation of liability on the part of the Association. To the contrary, Plaintiffs seek a declaratory judgment from the Court, not damages from the Association. Moreover, in its Third Party Complaint, the Association has failed to plead any act, omission or fault on the part of South State allegedly causing damage to Plaintiffs. These are necessary and required elements in order to state a cause of action for equitable indemnification. Therefore, the Court finds that the Association has failed to plead facts sufficient to state a cause of action for equitable indemnification.

For the reasons set forth above, the Court finds that the Association's claim for equitable indemnification must be dismissed.

D. Permanent Injunction

In its Third Party Complaint and request for a permanent injunction, the Association requests the Court order that “South State Bank be enjoined from any future waiver of deed restrictions relating to the Heron Point Golf Course property.” [Third Party Compl. at ¶ 91]. South State argues that because any deed restrictions contained in the 1992 Indenture Deed have already been waived, there is no justiciable controversy before this Court. South State contends that there exist no further deed restrictions relating to the Heron Point Golf Course property that South State could possibly waive at a future date. The Court disagrees. The Waiver of Restrictions recorded in 2005 references only a portion of the property conveyed to Heron Point Limited Partnership in the 1992 Indenture Deed. As such, the Court finds that a future waiver as to property not referenced in the 2005 Waiver of Restrictions is possible, and therefore, the Court denies South State’s Motion to Dismiss the Association’s cause of action for a permanent injunction.

CONCLUSION

After careful review of the pleadings and hearing arguments of counsel, this Court concludes it has properly considered the Third Party Complaint of Myrtle Beach Golf & Yacht Club Association, Inc., as well as the Motion to Dismiss filed by South State Bank.

NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that South State Bank’s Motion to Dismiss the cause of action for breach of contract contained in the Third Party Complaint is **GRANTED**;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that South State Bank's Motion to Dismiss the cause of action for contractual indemnification contained in the Third Party Complaint is **GRANTED**;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that South State Bank's Motion to Dismiss the cause of action for equitable indemnification contained in the Third Party Complaint is **GRANTED**;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that South State Bank's Motion to Dismiss the cause of action for permanent injunction contained in the Third Party Complaint is **DENIED**;

AND IT IS SO ORDERED.

THE HONORABLE LARRY B. HYMAN, JR.
Presiding Circuit Court Judge for the Fifteenth Judicial Circuit

Dated this ____ day of _____, 2017.

_____, South Carolina



Horry Common Pleas

Case Caption: Condo World Development LLC , plaintiff, et al VS Myrtle Beach
Golf & Yacht Club Association Inc
Case Number: 2015CP2603173
Type: Order/Dismissal

So Ordered

s/ Larry B. Hyman 2152

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EXHIBIT B