

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
APPEAL FROM BEAUFORT COUNTY
Carmen Tevis Mullen, Circuit Court Judge

Appellate Case No. 2016-001113

Trial Court Case No. 2014-CP-07-02670

RECEIVED

NOV 13 2017

Benjamin C. Gecy, River City Developers, LLC, and
River City Real Estate, LLC

SC Court of Appeals

v.

Somerset Point at Lady's Island Homeowners' Association, Inc., f/k/a
Coosaw River Estates Homeowners' Association, LLC, Hilton C. Smith, Jr.,
Coosaw Investments, LLC, Hilton C. Smith, Jr., Inc., of South Carolina and
Manorhouse Builders of South Carolina, LLC Defendants,

Of which Hilton C. Smith, Jr., Coosaw Investments, LLC, and Hilton C.
Smith, Jr., of South Carolina are Respondents.

RECORD ON APPEAL

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Association, Inc.

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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

SOMERSET POINT AT LADY'S ISLAND

Plaintiff(s)

vs.

RIVER CITY DEVELOPERS, LLC, et al

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2011-CP - 07- 4028

(Please Print)

Submitted By: ALYSOUN M. EVERSOLE

Address: 1509 KING STREET
BEAUFORT, SC 29902

SC Bar #: 68011

Telephone #: 843-379-3333

Fax #: 843-379-5558

Other:

E-mail: aeversole@eversolelaw.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts**
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

- Torts - Professional Malpractice**
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

- Torts - Personal Injury**
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

- Real Property**
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☒ Other (499)
- Injunctive Relief

- Inmate Petitions**
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

- Judgments/Settlements**
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Other (799)

- Administrative Law/Relief**
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- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
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- ☐ Forfeiture-Consent Order (850)
- ☐ Other (899)

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- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Administrative Law Judge (980)
- ☐ Public Service Commission (990)
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- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Sexual Predator (510)

Submitting Party Signature: [Signature]

Date: 9-26-2011

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

002

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

) CIVIL ACTION NO.: 11-CP-07- 4028

SOMERSET POINT AT LADY'S ISLAND
HOMEOWNERS ASSOCIATION, INC.,

)

NON-JURY

Plaintiff,

)

)

vs.

)

)

RIVER CITY DEVELOPERS, LLC, and
BENJAMIN GECY,

)

)

)

Defendants.

)

)

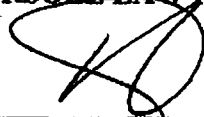
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2011 SEP 27 PM 3:14
CLERK OF COURT

**CERTIFICATE OF EXEMPTION
FROM ARBITRATION**

I, Alysoun M. Eversole, Attorney for the Plaintiff, hereby certify that the claims in the above styled cause of action are exempt from Arbitration and Mediation under Alternative Dispute Resolution/Circuit Court Arbitration Rule 1(a)(3)(A) as this is a special proceeding seeking injunctive relief.

EVERSOLE LAW FIRM, P.C.



Alysoun M. Eversole
1509 King Street
Beaufort, SC 29902
Phone: (843)379-3333
Fax: (843)379-5558

Beaufort, South Carolina

26 day of September, 2011.

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

) CIVIL ACTION NO.: 11-CP-07-4628SOMERSET POINT AT LADY'S ISLAND
HOMEOWNERS ASSOCIATION, INC.,

)

NON-JURY

Plaintiff,

)

)

)

vs.

)

SUMMONS

RIVER CITY DEVELOPERS, LLC, and
BENJAMIN GECY,

)

)

)

)

Defendants.

)

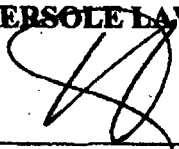
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TO: THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED TO ANSWER the Complaint in the above entitled action, a copy of which has been filed in the Office of the Clerk of Court for Beaufort County, South Carolina, and to serve a copy of your Answer to said Complaint on the subscriber at her office at 1509 King Street, Beaufort, South Carolina, 29902, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiffs in this action will apply to the Court for the relief demanded in said Complaint.

EVERSOLE LAW FIRM, P.C.


 Alysoun M. Eversole
 1509 King Street
 Beaufort, SC 29902
 Phone: (843)379-3333
 Fax: (843)379-5558

Beaufort, South Carolina

26 day of September, 2011.
 2011 SEP 27 PM 3:14
 BEAUFORT COUNTY CLERK
 COURT CLERK'S OFFICE

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

) CIVIL ACTION NO.: 11-CP-07- 4028

SOMERSET POINT AT LADY'S ISLAND
HOMEOWNERS ASSOCIATION, INC.,

)
)
)

NON-JURY

Plaintiff,

)
)
)

vs.

)
)
)

COMPLAINT

RIVER CITY DEVELOPERS, LLC, and
BENJAMIN GECY,

)
)
)

Defendants.

)
)
)

2011 SEP 27

3:16

The Plaintiff, complaining of the Defendants, would respectfully show unto this Honorable Court:

1. This is an action for injunctive relief involving real property located in Beaufort County, South Carolina; Plaintiff demands a trial without a jury before the Master-in-Equity for Beaufort County, South Carolina and this Court, therefore, has jurisdiction to hear all matters hereinafter alleged.

2. The real property mentioned and referred to in this Complaint and which forms the basis of this cause of action herein (hereinafter the "Property") is more specifically described as follows:

ALL that certain piece, parcel or lot of land, situate, lying and being on Lady's Island, Beaufort County, South Carolina, being shown and designated as Lot 16 of Somerset Point at Lady's Island Subdivision, Phase I (f/k/a Coosaw River Estates) on a plat prepared by Gary Blair Burgess, RLS, dated June 16, 2006, last revised October 10, 2010 and recorded at the Office of the Register of Deeds for Beaufort County, South Carolina in Plat Book 131 at Page 134.

3. The Property is subject to the Second Amended, Restated and Consolidated Declaration of Covenants for Coosaw River Estates, recorded 10/9/08 in Record Book 2773 at Page 1143 and any applicable amendments thereto recorded at the Office of the Register of Deeds for Beaufort County, South Carolina.

4. The Defendant River City Developers, LLC acquired title to the Property on August

006

2, 2011 by deed of James Williamson and Arlene Williamson recorded in Book 3075 at Page 2487.

5. On October 6, 2008 the Developer, Coosaw Investments, LLC adopted the Second Amended, Restated and Consolidated Declaration of Covenant for Coosaw River Estates Subdivision which was recorded on October 9, 2008 in Book 2773 at Page 1143. These restated covenants, among other things, created an architectural review committee and the By-Laws for the home owners association.

6. By Corporate Resolution dated July 7, 2010 of the Board of Directors of Coosaw River Estates, the name of the subdivision and the homeowners association was changed to Somerset Point at Lady's Island, said resolution being recorded at the Office of the Register of Deeds for Beaufort County in Book 2989 at Page 421.

7. The Somerset Point at Lady's Island Architectural Review Committee (ARC) Standards effective March 25, 2011 provide the process and procedure by which lot owners obtain approval for constructing homes on the lots they own. The procedure requires compliance with review fees and plan review before construction may begin.

8. Benjamin Gecy is named as a defendant in this action because he is the agent acting on behalf of River City Developers, LLC for the construction of a home on Lot 16.

9. The Defendants have failed to comply with the requirements of the ARC Standards in the following manner:

- a. failing to pay review fees and fines;
- b. mutilating, damaging and/or removing trees without permission;
- c. submitting incomplete plans;
- d. proceeding with construction without ARC approval.

10. The ARC Standards provide that each applicant strictly comply with the terms and conditions of the Covenants and the Standards, and that failure to comply is grounds for enforcement by The Somerset Point at Lady's Island Homeowners Association by, among other things, assessing fines, seeking equitable relief and recovering damages.

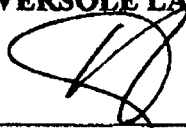
11. The Plaintiff has attempted to resolve this matter with the Defendants without success and has no other remedy in law or equity but by bringing this present action.

12. The Plaintiff has elected to seek equitable relief and asks this court to enter an Order requiring the Defendants to cease and desist construction until Defendant complies with the ARC

Standards, plus award costs and attorneys fees of this action to the Plaintiff.

WHEREFORE, the Plaintiff prays that this Honorable Court will inquire into the matters set forth herein and enter an Order requiring the Defendants to Cease and Desist construction until such time that Defendants comply with the ARC Standards, awarding costs and attorneys fees to the Plaintiff and for such other relief that this court deems just and proper.

EVERSOLE LAW FIRM, P.C.



Alysoun M. Eversole
1509 King Street
Beaufort, SC 29902
Phone: (843)379-3333
Fax: (843)379-5558

Beaufort, South Carolina

26th day of September, 2011.

008

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

SOMERSET POINT AT LADY'S ISLAND
HOMEOWNERS ASSOCIATION, INC.,

Plaintiff,

vs.

RIVER CITY DEVELOPERS, LLC, and
BENJAMIN GECY,

Defendants.

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO.: 11-CP-07- 4028

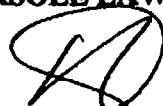
NON-JURY

MOTION FOR TEMPORARY
RESTRAINING ORDER

2011 SEP 27 PM 3:15

COMES NOW the Plaintiff, by and through its undersigned counsel and states the Plaintiff may suffer immediate and irreparable injury as shown upon the facts averred to in the attached Affidavit, and move this Court for a Temporary Restraining Order requiring the Defendants to cease and desist construction on Lot 16 Somerset Point at Lady's Island Subdivision, until such time as notice can be served and a hearing held upon the Complaint of the Plaintiffs.

EVERSOLE LAW FIRM, P.C.



Alysoun M. Eversole
1509 King Street
Beaufort, SC 29902
Phone: (843)379-3333
Fax: (843)379-5558

Beaufort, South Carolina

26th day of September, 2011.

009

Somerset Point at Lady's Island Homeowners Association, Inc

P.O. Box 1298
Charleston, SC 29402

Phone:(843)377-1312 Fax:(843)722-0332

September 21, 2011

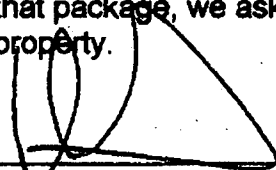
Alysoun M. Eversole
EVERSOLE LAW FIRM, P.C.
1509 King Street
Beaufort, SC 29902

Dear Alysoun:

The undersigned affiant, Hilton C. Smith, Jr., personally appeared before me, Debra L. Hollis, who, after being duly sworn, does depose and say as follows:

I am writing you to let you know that as of 9/21/11, River City and Ben Gecy have ignored your letter on our behalf and have instead continued to push forward in their construction of a home on Lot 16 at Somerset Point. I have enclosed a picture of the construction progress. Clearly, Gecy is proceeding to build this home without complying with the terms of the HOA documents.

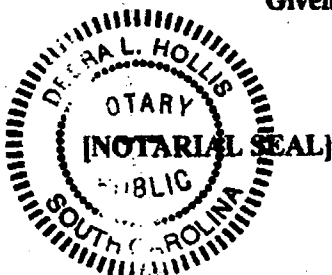
Due to the fact that he has disregarded our request to stop and submit a complete review package to us, pay the review fee, and allow us the ability to review and approve that package, we ask that you seek a cease and desist order for construction on his property.


Hilton C. Smith, Jr.
President, Somerset Point HOA

STATE OF South Carolina)
Charleston COUNTY)

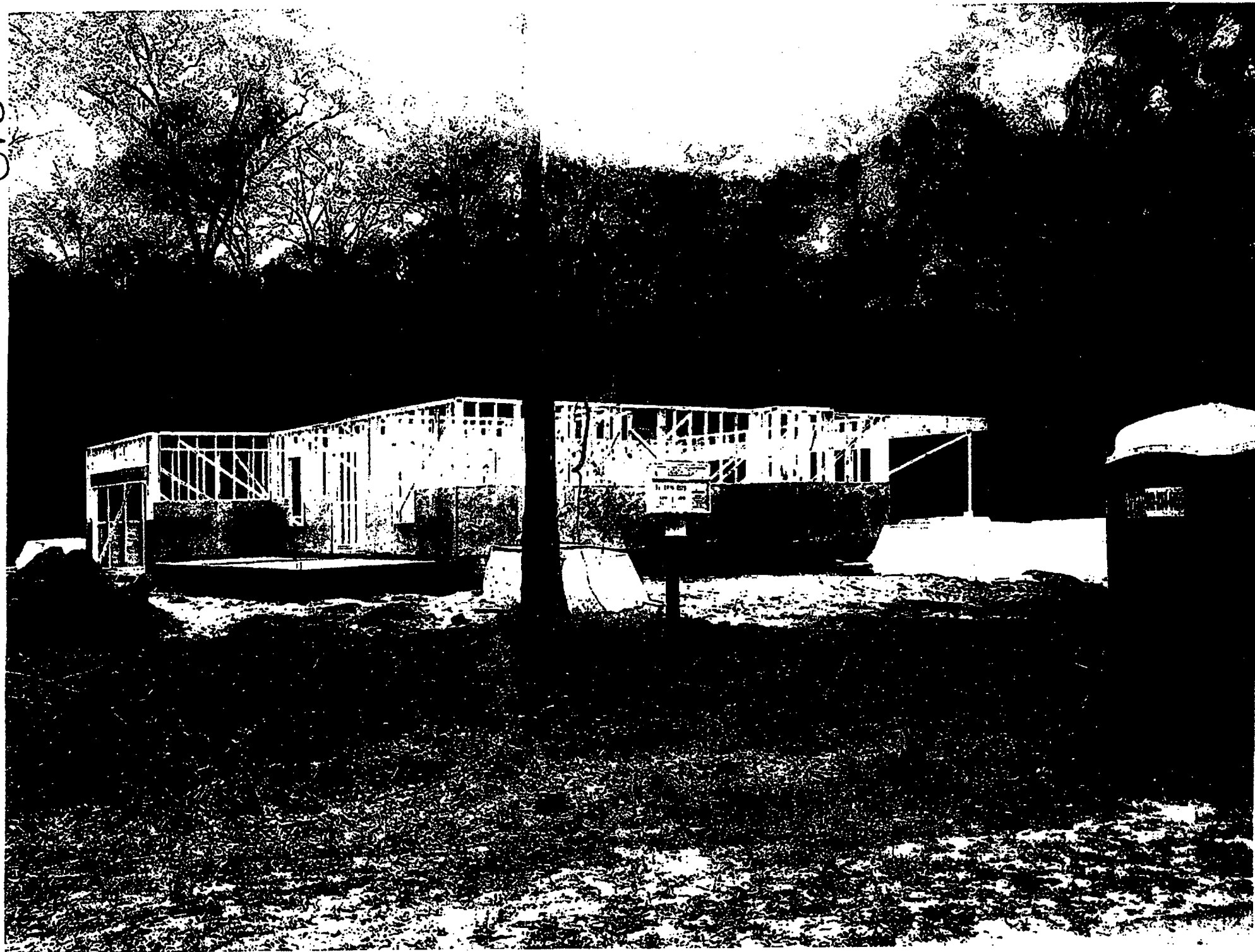
I, the undersigned, a notary public in and for said county in said state, hereby certify that Hilton C. Smith, Jr., whose name is signed to the foregoing instrument, and who is known to me, swore to the above statement before me on this day that, being informed of the contents of said instrument, he executed the same voluntarily on the day the same bears date.

Given under my hand and official seal this 21 day of Sept., 2011.



Debra L. Hollis
Notary Public

My commission expires: October 19, 2015



011

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

) CIVIL ACTION NO.: 11-CP-07-4028

SOMERSET POINT AT LADY'S ISLAND
HOMEOWNERS ASSOCIATION, INC.,

)

NON-JURY

Plaintiff,

)

vs.

)

RULE TO SHOW CAUSE

RIVER CITY DEVELOPERS, LLC, and
BENJAMIN GECY,

)

Defendants.

)

2011 SEP 27 PM 3:00

TO: THE DEFENDANTS RIVER CITY DEVELOPERS, LLC and BENJAMIN GECY

This Court has reviewed the Plaintiff's Motion for a Temporary Restraining Order pursuant to Rule 65, SCRPC, the Complaint and the supporting Affidavit attached thereto. In the motion the Plaintiff have averred they will suffer irreparable injury should you continue to construct a residence on Lot 16 without ARC approval. Although the Rules provide for the relief the Plaintiff requests, I find that it would be more appropriate to enter this Rule to Show Cause why the Plaintiff's request should not be granted.

Now therefore,

IT IS HEREBY ORDERED that the Defendants, RIVER CITY DEVELOPERS, LLC and BENJAMIN GECY, are ORDERED to appear at a hearing on a Rule to Show Cause why the Plaintiffs' request for a ~~permanent injunction~~ ^{restraining order} should not be granted shall be held before me on the 29th day of September, 2011 at 1:30 o'clock p.m.

Marvin H. Dukes, III, Master-in-Equity and Special Circuit Court
Judge for Beaufort County

Beaufort, South Carolina

27 day of Sept, 2011.

012

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP0704028

Somerset Point At Ladys
Island Homeowners
Association Inc

River City Developers Benjamin Gecy
Llc

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ 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.
- ☒ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☒ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ 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:

Voluntary Dismissal

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX
 Complete this section below when the judgment, order, or other court document is entered. If the judgment information is not available at the time of the filing, complete the form below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

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 or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on November 14, 2011, and a copy mailed first class or placed in the appropriate attorney's box on December 1, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Alysoun M. Eversole Eversole Law Firm, P.C. 1509 King St.
 Beaufort, SC 29902

H. Fred Kuhn Jr. Moss, Kuhn & Fleming, P.A. P.O. Drawer
 507 Beaufort, SC 29901

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Melissa Kilby

Jerri Ann Roseneau - Clerk of Court

Court Reporter

IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

CASE NO. 2011-CP-07-04028

SOMERSET POINT AT LADY'S ISLAND
HOMEOWNERS ASSOCIATION, INC.

Plaintiff,

MOTION TO CONTINUE

vs.

RIVER CITY DEVELOPERS, LLC and
BENJAMIN GECY,

Defendants.

2011 SEP 29 AM 8:52
CLERK OF COURT
BEAUFORT COUNTY, S.C.

TO: Alysoun M. Eversole, Esquire, Attorney for the Plaintiff:

PLEASE TAKE NOTICE that the Defendants, through their undersigned attorney, hereby moves for a continuance of the hearing scheduled in this matter for today, September 29, 2011 at 1:30 o'clock p.m. This motion is made upon the ground that the Defendants' attorney has a scheduling conflict. He has a deposition of a doctor in Summerville in a personal injury case. This deposition was scheduled by the other side over a month ago for a case that is high on the roster.

Additionally, the Defendants need more time to prepare for the hearing. The Defendants' attorney has not had the chance to even speak with the Defendants since they were served with the papers in this matter. Upon information and belief the Defendants were served yesterday while the undersigned attorney was trying a case in Court and when he returned from trial he had successive appointments that extended into the evening. The Defendants have had absolutely no time to prepare for the hearing. Rule 6(d) provides that, unless there is an emergency, ten (10) days notice should be given before a motion

can be held.

Additionally, it appears that this hearing is scheduled as a result of a Rule to Show Cause. A Rule to Show Cause is issued to a party when there is reason to believe that the subject of the Rule to Show Cause has violated an existing Court Order. Additionally, a Rule to Show Cause must be supported, at a minimum, by affidavit. In this case, there does not appear to be any affidavit, nor is there any pre-existing Court Order. Accordingly, it appears that the Rule to Show Cause was improvidently issued.

Finally, a quick review of the Complaint in this action indicates that this is simply an action which is alleged that Restrictive Covenants in a subdivision have been violated. There is no emergency. There is no irreparable harm. There has been no showing of a likelihood of success on the merits. In short, this does not appear to be a case which would justify the issuance of a temporary restraining order.

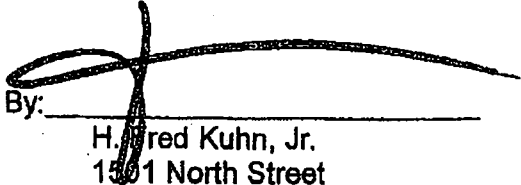
Finally, there is another, recently filed, lawsuit pending between some of the same parties. A true and accurate copy of the pleadings in that action is attached. In sum, this pre-existing lawsuit alleges that the Architectural Review Committee upon which the Plaintiffs in this action rely is a sham and is an instrumentality utilized by the Developer who controls the Plaintiff Homeowners Association in this action in order to gain a competitive advantage over other builders, such as the Defendant in this action.

It is, accordingly, respectfully requested that the hearing in this matter be continued so as to provide to the Defendants at least ten (10) days to respond.

Respectfully submitted,

MOSS, KUHN & FLEMING, P.A.

016

By: 

H. Fred Kuhn, Jr.
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843)524-3373
(84)3524-1302- FX

Beaufort, South Carolina
September 29, 2011

Attorneys for Defendants

017

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

)

) CIVIL ACTION NO.: 11-CP-07-04028

SOMERSET POINT AT LADY'S ISLAND
HOMEOWNERS ASSOCIATION, INC.,

)

NON-JURY

)

Plaintiff,

)

)

vs.

)

RETURN TO MOTION TO
CONTINUE

)

RIVER CITY DEVELOPERS, LLC, and
BENJAMIN GECY,

)

)

Defendants.

)

)

)

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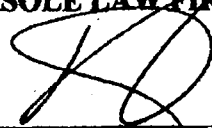
)

TO: H. FRED KUHN, JR., ATTORNEY FOR THE DEFENDANTS

The Plaintiff, by and through its undersigned counsel, responds to the Defendants' Motion to Continue the hearing on the Rule to Show Cause scheduled for today at 1:30 p.m. On September 27, 2011 the Plaintiff filed a Motion for a Temporary Restraining Order requiring the Defendants to cease construction on Lot 16 Somerset Point at Lady's Island Subdivision until hearing can be held on Plaintiff's motion. The motion was accompanied by all required documents. In deference to the effect a restraining order may have on the Defendants' employees and subcontractors, the Court preferred to set a hearing on a Rule to Show Cause. In light of the content of the Defendants' motion, the Plaintiff respectfully requests that the Temporary Restraining Order be entered restraining the Defendant from further construction until such time as a hearing can be held on this matter.

Respectfully Submitted,

EVERSOLE LAW FIRM, P.C.



Alysoun M. Eversole
1509 King Street
Beaufort, SC 29902
Phone: (843)379-3333
Fax: (843)379-5558

Beaufort, South Carolina

29th day of September, 2011.

2011 SEP 29 AM 10:07

018

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

SOMERSET POINT AT LADY'S ISLAND
HOMEOWNERS ASSOCIATION, INC.,

Plaintiff,

vs.

RIVER CITY DEVELOPERS, LLC, and
BENJAMIN GECY,

Defendants.

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO.: 11-CP-07-04028

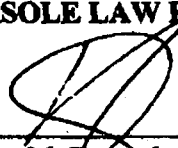
NON-JURY

VOLUNTARY DISMISSAL

2011 NOV 14 PM 3:24

COMES NOW the Plaintiff, Somerset Point at Lady's Island Homeowners Association, Inc. by and through its undersigned counsel and prior to the Defendant filing an Answer or Motion for Summary Judgment, and enters this Voluntary Dismissal of the above captioned cause of action pursuant to Rule 41(a), SCRCF. This dismissal is without prejudice.

EVERSOLE LAW FIRM, P.C.


Alyson M. Eversole
1509 King Street
Beaufort, SC 29902
Phone: (843)379-3333
Fax: (843)379-5558

Beaufort, South Carolina
14th day of November, 2011.

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

RIVER CITY DEVELOPERS, LLC

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

Plaintiff(s) 2011 SEP 20 PM 4:05

vs.

JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

2011-CP - 07-3945

COOSAW INVESTMENTS, INC.

Defendant(s)

(Please Print)

Submitted By: H. Fred Kuhn, Jr.

Address: PO Drawer 507

Beaufort, SC 29901

SC Bar #: 3576

Telephone #: 843-524-3373

Fax #: 843-524-1302

Other:

E-mail: fred@mossandkuhn.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|--|---|---|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☒ Breach of Contract (140)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 -CP- -
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☐ Other (299) | Torts - Personal Injury
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☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Other (799) | Administrative Law/Relief
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☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)

☐ Public Service Commission (990)
☐ Employment Security Comm (991)

☐ Other (999) |
| Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Sexual Predator (510) | | |

Submitting Party Signature: _____

Date: 09/20/11

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

IN THE STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
RIVER CITY DEVELOPERS, LLC,

Plaintiff,

vs.

COOSAW INVESTMENTS, LLC,
HILTON C. SMITH, JR., and
SOMERSET POINT AT LADIES ISLAND
HOMEOWNERS ASSOCIATION, INC.,
f/n/a COOSAW RIVER ESTATES
HOMEOWNERS ASSOCIATION, LLC,

Defendant.

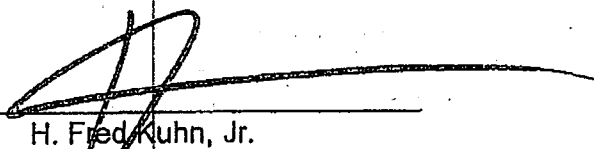
IN THE COURT OF COMMON PLEAS
2011 SEP 20 PM 4:05
CASE NO. 2011-CP-07-3945
JERIL ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

SUMMONS
(JURY TRIAL DEMANDED)

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to Answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer upon the subscribed at his office, Post Office Drawer 507/1501 North Street, Beaufort, South Carolina 29901, within thirty (30) days from the service hereof, exclusive of the day of such service; and if you fail to Answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded.

MOSS, KUHN & FLEMING, P.A.

By: 
H. Fred Kuhn, Jr.
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843)524-3373
(843)524-1302-Facsimile

Beaufort, South Carolina
September 20, 2011

Attorneys for Plaintiff

022

IN THE STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
RIVER CITY DEVELOPERS, LLC,

Plaintiff,

vs.

COOSAW INVESTMENTS, LLC,
HILTON C. SMITH, JR., and
SOMERSET POINT AT LADIES ISLAND
HOMEOWNERS ASSOCIATION, INC.,
f/n/a COOSAW RIVER ESTATES
HOMEOWNERS ASSOCIATION, LLC,

Defendant.

IN THE COURT OF COMMON PLEAS
2011 SEP 20 PM 4:05
CASE NO. 2011 CP 07- 3945
JERILIA R. ROSENBAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

COMPLAINT
(JURY TRIAL DEMANDED)

The Plaintiff, River City Developers, LLC, complaining of the Defendants above-named, would respectfully show unto this Honorable Court as follows:

1. The Plaintiff, River City Developers, LLC ("River City"), is a limited liability company organized under and existing by virtue of the laws of the State of South Carolina with its primary place of business in Beaufort County, South Carolina.

2. The Defendant, Coosaw Investments, LLC ("Coosaw Investments"), upon information and belief, is a limited liability company organized under and existing by virtue of the laws of the State of South Carolina with its primary place of business in, and owning property in, Beaufort County, South Carolina.

3. The Defendant Hilton C. Smith, Jr. ("Smith"), upon information and belief, is a citizen and resident of the County of Charleston in the State of South Carolina, and does business in Beaufort County, South Carolina.

4. The Defendant Somerset Point at Ladies Island Homeowners Association,

Inc. ("HOA"), is a corporation organized under and existing by virtue of the laws of the State of South Carolina with its primary place of business in Beaufort County, South Carolina.

5. The HOA was formerly known as Coosaw River Estates Homeowners Association, LLC, a South Carolina limited liability company.

6. There exists in Beaufort County, South Carolina, a parcel of real estate which has been subdivided and developed into a residential subdivision known as Coosaw River Estates Subdivision ("Coosaw River"), which is known and described as follows:

All those certain pieces, parcels, lots and real property, situate, lying and being on Lady's Island, Beaufort County, South Carolina, located within Coosaw River Estates Subdivision, including, but not limited to, those parcels located in Blocks A, B, G, F, H, I, N, O, P, Q, R, Z, AA, BB and CC, and all open spaces, roadways and reserved areas, as shown on a plat prepared by David S. Youmans, RLS, dated August 11, 2003 and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Plat Book 95 at Page 121.

This being a portion of the property conveyed to Ultima Breeze Bay, Ltd. by Deed of B.B.Z., a Partnership recorded in the Office of the Register of Deeds for Beaufort County, South Carolina in Record Book 1848 at Page 2491 and also a portion of the property conveyed to Coosaw Investments, LLC by Deed of Ultima Breeze Bay, Ltd., dated April 3, 2006 and recorded April 6, 2006 in the Office of the Register of Deeds for Beaufort County, South Carolina in Record Book 2351 at Page 1523; re-recorded July 27, 2006 in the Office of the Register of Deeds for Beaufort County, South Carolina in Record Book 2414 at Page 484..

7. The Defendant Smith, upon information and belief, is a member in, and controls; the Defendant Coosaw Investments.

8. Coosaw Investments acquired ownership of, and title to, Coosaw River pursuant to Deed from Ultima Breeze Bay, Ltd., dated April 3, 2006 and recorded April 6, 2006 in Record Book 2351 at Page 1523, and by corrective Deed re-recorded on July 27, 2006 in Record Book 2414 at Page 484, both in the Office of the Register of Deeds for Beaufort County, South Carolina.

9. The Defendants Coosaw Investments and Smith authored and created, and

on October 9, 2008 recorded in Book 2773 at Page 1143 a document entitled "Second Amended, Restated and Consolidated Declaration of Covenants for Coosaw River Estates Subdivision", in the Office of the Register of Deeds for Beaufort County, South Carolina.

10. The Defendants Coosaw Investments and Smith created and recorded the aforesaid covenants in order to place upon Coosaw River "beneficial restrictions under a general plan of improvement for the benefit of all owners within" the subdivision.

11. The Defendants Coosaw Investments and Smith created the Defendant HOA.

12. The Defendant HOA exists "for the primary purpose of performing certain functions for the common good and general welfare of the people" owning property in the subdivision.

13. The Defendant Coosaw Investments is the developer of the subdivision.

14. Upon information and belief, Coosaw Investments has transferred or assigned co-equal rights as developer to the Defendant Smith.

15. On or about October 6, 2008 the Defendants authored and adopted by-laws governing the HOA.

16. On or about February 21, 2011 the Defendants Coosaw Investment and Smith, exercising their powers as developer, created an Architectural Review Committee ("ARC") and required that any person or entity desiring to install, construct, or alter any structure on any lot located within the subdivision submit plans and specifications to the ARC and vested with the ARC the power to approve or disapprove said plans and specifications, and prohibited any installation, construction or alteration not approved by the ARC.

17. The Defendants Smith and Coosaw Investments control the Defendant HOA.

18. The Defendants Coosaw Investments and Smith control the ARC.
19. The Plaintiff River City is a residential construction company owned by Benjamin C. Gecy, who has a legal and equitable interest in lots located within Coosaw River.
20. River City has built, and is in the process of building, homes and improvements on lots in Coosaw River.

FOR A FIRST CAUSE OF ACTION
(BREACH OF FIDUCIARY DUTY)

21. The Defendants, jointly and severely, control the development of the subdivision, the restrictive covenants applicable to the subdivision, the board of directors of the HOA, the by-laws of the HOA, the members of the ARC, and the guidelines applied by the ARC.
22. The Defendants owe to the Plaintiff, as well as to all members of the HOA and all owners of lots within the subdivision, a fiduciary duty.
23. The fiduciary duty owed by the Defendants to the Plaintiff arises out of the Defendants' control over the subdivision, over the restrictive covenants applicable to the subdivision, over the board of directors of the HOA, over the members of the ARC, and arises out of the dictatorial powers granted to the Defendants by themselves as developer.
24. The fiduciary duty owed by the Defendants to the Plaintiff, as well as to other members of the HOA and other owners of lots within the subdivision, includes:
- a. An obligation not to utilize their position of control to benefit their own personal interest;
 - b. A duty not to secure any profit to themselves or advantage to themselves at the expense of the Plaintiff or other members of the HOA or other owners in the subdivision;

c. A duty to make full disclosure of all relevant facts and all transactions with the Plaintiff, or other members or owners;

d. A duty to act with intrinsic or inherent fairness; and

e. A duty not to misuse their power by giving themselves a competitive advantage.

25. The Defendants have breached their fiduciary duty in one or more of the following particulars:

a. In imposing financial assessments upon the Plaintiff, members and owners which they do not impose upon themselves;

b. In imposing "fees" upon the Plaintiff, members and owners, such as plan review fees, which they do not impose upon themselves;

c. In giving themselves a competitive advantage over other builders, members, and owners;

d. In arbitrarily altering the restrictive covenants to suit their own purposes;

e. In arbitrarily altering the architectural review standards to suit their own purposes and to the detriment of others, such as, by way of example, eliminating the prohibition on vinyl siding and eliminating the prohibition on slab on grade construction.

26. As a direct and proximate result the Plaintiff has suffered injuries and damages as are hereinafter more particularly set forth in the final paragraph herein.

FOR A SECOND CAUSE OF ACTION
(BREACH OF CONTRACT)

27. The restrictive covenants imposed by the Defendants upon the subdivision constitute a covenant between the Defendants and the Plaintiff, members, and owners.

28. Included in the aforesaid covenant is an implied covenant of good faith and fair dealing by the Defendants.

29. The Defendants have breached the aforesaid covenant of good faith and fair dealing, either jointly or severally, in one or more of the particulars set forth in Paragraph 25, supra.

30. As a direct and proximate result of the Defendants' breach of the implied covenant of good faith and fair dealing the Plaintiff has suffered injuries and damages as are hereinafter more particularly set forth in the final paragraph herein.

FOR A THIRD CAUSE OF ACTION
(UNFAIR TRADE PRACTICE)

31. The conduct of the Defendants as set forth above constitutes an unfair trade practice within the meaning of the *South Carolina Unfair Trade Practices Act, S.C. Code Ann. §38-57-10, et seq. (2011)*.

32. As a direct and proximate result of the Defendants' violation of the *South Carolina Unfair Trade Practices Act* the Plaintiff has suffered injuries and damages as are hereinafter more particularly set forth in the final paragraph herein.

DAMAGES

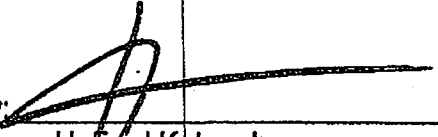
33. As a direct and proximate result of the acts and conduct of the Defendants, either separately, or combining and concurring one with the other, the Plaintiff has suffered injuries and damages in that its property and assets have been devalued, it has lost income, it has lost business opportunities, it has incurred fees and expenses, and as to the Fourth Cause of Action it is has incurred attorney's fees and costs, all to its great detriment and damage.

WHEREFORE, the Plaintiff prays for judgment against the Defendants in a fair and reasonable amount of actual damages, and as to the First Cause of Action in a fair and reasonable amount of punitive damages, and as to the Third Cause of Action treble actual damages, all as determined by a jury.

028

Respectfully submitted,

MOSS, KUHN & FLEMING, P.A.

By: 

H. Fred Kuhn, Jr.
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843)524-3373
(84)3524-1302- FX

Beaufort, South Carolina
Date: _____

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

SOMERSET POINT AT LADY'S ISLAND

Plaintiff(s)

vs.

RIVER CITY DEVELOPERS, LLC, et al

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2011-CP - 07- 04028

(Please Print)

Submitted By: ALYSOUN M. EVERSOLE

Address: 1509 KING STREET

BEAUFORT, SC 29902

SC Bar #: 68011

Telephone #: 843-379-3333

Fax #: 843-379-5558

Other:

E-mail: aeversole@eversolelaw.com

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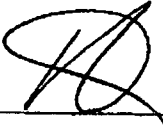
DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

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☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| ☐ Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Sexual Predator (510) | | |

Submitting Party Signature: 

Date: 9-26-2011

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
RIVER CITY DEVELOPERS, LLC

Plaintiff,

vs.

COOSAW INVESTMENTS, LLC, HILTON C.
SMITH, JR. and SOMERSET POINT AT
LADIES ISLAND HOMEOWNERS
ASSOCIATION, INC. f/k/a COOSAW RIVER
ESTATES HOMEOWNERS ASSOCIATION,
LLC

Defendants.

And

SOMERSET POINT AT LADY'S ISLAND
HOMEOWNERS ASSOCIATION, INC.

Plaintiff,

vs.

RIVER CITY DEVELOPERS, LLC, RIVER
CITY REAL ESTATE, LLC and BENJAMIN
GECY,

Defendants.

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO.: 11-CP-07-3945

2011-CP-01-2129

LIS PENDENS

2011 OCT 24 PM 3:54
JENNIFER H. ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

NOTICE IS HEREBY GIVEN that an action has been commenced and is now pending in this Court upon a Complaint of the above named Plaintiff against the above named Defendants for the purpose of removing the clouds upon the title of the Plaintiff above named in and to the property hereinafter described, and to forever bar all claims, rights, titles, interests or liens of the Defendants above named in or to the property hereinafter described.

That the property affected by this action is situated in the County of Beaufort, State of South

Carolina and is described as follows:

ALL that certain piece, parcel or lot of land, situate, lying and being on Lady's Island, Beaufort County, South Carolina, being shown and designated as Lot 16 of Somerset Point at Lady's Island Subdivision, Phase I (f/k/a Coosaw River Estates) on a plat prepared by Gary Blair Burgess, RLS, dated June 16, 2006, last revised October 10, 2010 and recorded at the Office of the Register of Deeds for Beaufort County, South Carolina in Plat Book 131 at Page 134. R200 005 00A 0020 0000

By: 

Alysoun M. Eversole

EVERSOLE LAW FIRM, P.C.

1509 King Street

Beaufort, SC 29902

Phone: (843)379-3333

Fax: (843)379-5558

**ATTORNEY FOR THE PLAINTIFF in
the COUNTERCLAIM AND CROSSCLAIM**

Beaufort, South Carolina

24th day of October 2011

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
RIVER CITY DEVELOPERS, LLC

Plaintiff,

vs.

COOSAW INVESTMENTS, LLC, HILTON C.
SMITH, JR. and SOMERSET POINT AT
LADIES ISLAND HOMEOWNERS
ASSOCIATION, INC. f/k/a COOSAW RIVER
ESTATES HOMOWNERS ASSOCIATION,
LLC

Defendants.

And

SOMERSET POINT AT LADY'S ISLAND
HOMEOWNERS ASSOCIATION, INC.

Plaintiff,

vs.

RIVER CITY DEVELOPERS, LLC, RIVER
CITY REAL ESTATE, LLC and BENJAMIN
GECY,

Defendants.

) IN THE COURT OF COMMON PLEAS
)
) CIVIL ACTION NO.: 11-CP-07-3945

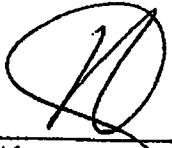
SUMMONS

2011 OCT 24 PM 3:54
JENNIFER A. BUSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

TO THE DEFENDANTS IN THE COUNTERCLAIM AND CROSSCLAIM NAMED ABOVE:

YOU ARE HEREBY SUMMONED AND REQUIRED TO ANSWER the Complaint
in the above entitled action, a copy of which has been filed in the Office of the Clerk of Court for
Beaufort County, South Carolina, and to serve a copy of your Answer to said Complaint on the
subscriber at Eversole Law Firm, P.C. at 1509 King Street, Beaufort, South Carolina, 29902,
within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to

answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in said Complaint.

By: 
Alysoun M. Eversole
EVERSOLE LAW FIRM, P.C.
1509 King Street
Beaufort, SC 29902
Phone: (843)379-3333
Fax: (843)379-5558

**ATTORNEY FOR THE PLAINTIFF in
the COUNTERCLAIM AND CROSSCLAIM**

Beaufort, South Carolina
24th day of October 2011

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

RIVER CITY DEVELOPERS, LLC

Plaintiff,

VS.

COOSAW INVESTMENTS, LLC, HILTON C. SMITH, JR. and SOMERSET POINT AT LADIES ISLAND HOMEBOWNERS ASSOCIATION, INC. f/k/a COOSAW RIVER ESTATES HOMEBOWNERS ASSOCIATION, LLC

Defendants.

And

**SOMERSET POINT AT LADY'S ISLAND
HOMEOWNERS ASSOCIATION, INC.**

Plaintiff,

VS.

RIVER CITY DEVELOPERS, LLC, RIVER CITY REAL ESTATE, LLC and BENJAMIN GECY,

Defendants.

) IN THE COURT OF COMMON PLEAS
)
) CIVIL ACTION NO.: 11-CP-07-3945

**ANSWER
COUNTERCLAIM
CROSSCLAIM**

2011 OCT 24 PM 3:54
JEREMY A. ROSENBERG
DEPUTY CLERK OF COURT
CLERK OF COURT

COME NOW THE DEFENDANTS, by and through their undersigned counsel, Answering the Complaint of the Plaintiff and Counterclaiming as follows:

1. All allegations not specifically admitted herein are denied and strict proof demanded thereof.
2. Paragraphs 2, 3, 4 and 5 of the Plaintiff's Complaint are admitted.
3. As to Paragraph 6 of the Plaintiff's Complaint, by way of clarification the property described in Paragraph 6 was originally known as Coosaw River Estates Subdivision; the portion acquired by Coosaw Investments, LLC is now known as Somerset Point at Lady's Island Subdivision.

4. Paragraph 7 of the Plaintiff's Complaint is denied.

5. Paragraph 8 of the Plaintiff's Complaint is clarified in that Coosaw Investments, LLC acquired title to a portion of Coosaw River Estates as delineated in the Deed from Ultima Breeze Bay, Ltd, dated April 3, 2006 and as corrected and re-recorded on July 27, 2006 in Record Book 2414 at Page 484. Any inference contained in Paragraph 8 that Coosaw Investments, LLC acquired title to lots in Coosaw River Estate acquired by others in that subdivision prior to its acquisition is denied.

6. Paragraph 9 of the Plaintiff's Complaint is clarified in that Coosaw Investments, LLC, as Developer, revised already existing covenants and restrictions by way of authoring the Second Amended, Restated and Consolidated Declaration of Covenants for Coosaw River Estates Subdivision (hereinafter the "Covenants") in which the homeowners association, architectural review committee and the by-laws were established. Remaining allegations to the contrary in Paragraph 9 are denied.

7. Paragraph 10 of the Plaintiff's Complaint is clarified in that Coosaw Investments, LLC as Developer, revised, amended and restated the existing covenants upon the Property (as defined therein) for the "beneficial restrictions under a general plan of improvement for the benefit of all owners within the Property." All remaining allegations contained in Paragraph 10 are denied.

8. Paragraph 11 is admitted to the extent that Coosaw Investments, LLC, as Developer, created the Coosaw River Estates Homeowners Association, Inc. ("HOA") in the Covenants. All remaining allegations contained in Paragraph 11 are denied.

9. Paragraph 12 of the Plaintiff's Complaint is clarified in that the HOA was formed "for the primary purpose of performing certain functions for the common good and general welfare of the people of the Development", "Development" being defined in Section 1.12 of the Second Amended, Restated and Consolidated Declaration of Covenants for Coosaw River Estates Subdivision. All remaining allegations and inferences to the contrary in Paragraph 12 are denied.

10. As to Paragraphs 13 and 14 of the Plaintiff's Complaint, Coosaw Investments, LLC, Developer, by and through the authority stated in the Covenants, has assigned developer rights in certain lots to Hilton C. Smith, Jr., Inc. of South Carolina, who in turn has assigned its developer rights in certain lots to Manorhouse Builders of South Carolina, LLC.

11. Paragraph 15 of the Plaintiff's Complaint is admitted as it pertains to Defendant Coosaw Investments, LLC. All remaining allegations contained in Paragraph 15 are denied.

12. Paragraph 16 of the Plaintiff's Complaint is denied. For clarification, Defendant Coosaw River Investments, LLC, as Developer, created the Architectural Review Committee (hereinafter "ARC") on October 6, 2008 in Article VI of the Covenants for the purposes set forth therein.

13. Paragraph 17 of the Plaintiff's Complaint is admitted to the extent that Coosaw Investments, LLC, as Developer, has control of the HOA and power to appoint all members of the board consistent with Article 4.07 of the Covenants. All remaining allegations contained in Paragraph 17 are denied.

14. Paragraph 18 of the Plaintiff's Complaint is admitted to the extent that Coosaw Investments, LLC, Hilton C. Smith, Jr., Inc. of South Carolina and Manorhouse Builders of South Carolina, LLC, as Developers, have control of the ARC until such time as the Developer's membership expires as provided in Article 6.01 of the Covenants. All remaining allegations contained in Paragraph 18 are denied.

15. The Defendants are without sufficient information to form a belief about the allegations contained in Paragraph 19 of the Plaintiff's Complaint and as such, deny the allegations and demand strict proof thereof.

16. Paragraph 20 of the Plaintiff's Complaint is denied. By all information and belief the Plaintiff, River City Developers, LLC, owns one lot in Somerset Point at Lady's Island Subdivision, that being Lot 16, by way of a deed from James Williamson and Arlene Williamson dated August 2, 2011 and recorded at the Office of the Register of Deeds for Beaufort County in Book 3075 at Page 2487. All remaining allegations contained in Paragraph 20 are denied.

17. Paragraph 21 of the Plaintiff's Complaint is admitted to the extent that the Developers, including Coosaw Investments, LLC, by authority of the covenants and restrictions, control the development of the subdivision, possess the authority to supplement the covenants and restrictions, appoint the members of the Board of Directors for the HOA and the ARC, all of which is provided in the covenants and restrictions. All remaining allegations contained in Paragraph 21 are denied.

18. Paragraphs 22, 23, 24, 25 and 26 of the Plaintiff's Complaint are admitted only to the extent that the Developer has a fiduciary duty to assure the conformity and harmony of external design and general quality of the development, and use the fees and assessments collected by the HOA for the purposes described in the covenants and restrictions until such time as its control of the

HOA expires as provided in the Covenants. All remaining allegations contained in Paragraphs 22, 23, 24, 25 and 26 to the contrary are denied and strict proof demanded thereof.

19. Paragraphs 27, 28, 29, 30, 31, 32 and 33 of the Plaintiff's Complaint are denied.

AS A FIRST DEFENSE
12(b)(6) SCRPC

20. Plaintiff has failed to state facts sufficient to constitute the causes of action alleged against them in the Complaint.

21. Defendants are informed and believe they are entitled to an Order dismissing the Plaintiff's Complaint as a matter of law.

AS AN AFFIRMATIVE DEFENSE
Estoppel

22. The Plaintiff, River City Developers, LLC, ("RCD") purchased Lot 16 in Somerset Point of Lady's Island Subdivision by deed of James Williamson and Arlene Williamson dated August 2, 2011 and recorded at the Office of the Register of Deeds for Beaufort County in Book 3075 at Page 2487.

23. The aforementioned deed provides that Lot 16 was conveyed to the Plaintiff RCD subject to the Second Amended Restated and Consolidated Declarations of Covenants for Coosaw River Estates recorded October 9, 2008 and any applicable amendments thereto, (the Covenants).

24. Coosaw River Estates Subdivision is now known as Somerset Point at Lady's Island Subdivision.

25. The aforementioned Covenants for Somerset Point at Lady's Island Subdivision are those covenants f/k/a as the covenants for Coosaw River Estates Subdivision.

26. All Covenants, Amendments and ARC Design Standards relevant hereto were delivered to Plaintiff prior to its purchase of its property.

27. By virtue of all the covenants and restrictions and related documents recorded prior to Plaintiff's purchase of Lot 16, Plaintiff was on notice of, and is bound by, the contents of the Covenants for Somerset Point at Lady's Island Subdivision and Plaintiff, therefore, is estopped from complaining about the rights of the Developer, the HOA, the ARC or any other provision provided for therein.

28. The Plaintiff's Complaint should be dismissed as a matter of law.

29. The Defendants are informed and believe they are entitled to recover their costs and attorneys fees of this action as provided in the applicable Declaration of Covenants for Somerset Point at Lady's Island Subdivision.

BY WAY OF COUNTERCLAIM & CROSSCLAIM
Request for Temporary Injunction

1. This is an action in equity to enforce restrictive covenants applicable to the real property hereinafter described and this Court, therefore, has jurisdiction to hear all matters set forth herein.

2. The Plaintiff in this Counterclaim and Crossclaim is Somerset Point at Lady's Island Homeowners Association, Inc. (hereinafter "SPHOA")

3. The Defendant in the Counterclaim, River City Developers, LLC, (hereinafter "RCD") is the owner of Lot 16 of Somerset Point at Lady's Island Subdivision, Phase I having acquired title by deed of James Williamson and Arlene Williamson dated August 2, 2011 and recorded at the Office of the Register of Deeds for Beaufort County in Book 3075 at Page 2487.

4. The Defendant in the Crossclaim, River City Real Estate, LLC, (hereinafter "RCRE") is the owner of Lot 165 of Somerset Point at Lady's Island Subdivision, Phase I, having acquired title by deed of Regions Bank dated July 22, 2011 and recorded at the Office of the Register or Deeds for Beaufort County in Book 3073 at Page 834.

5. The Defendant Benjamin Gecy is named as a defendant in this action because he is the agent of Defendants RCD and RCRE having submitted proposed building plans to the SPHOA on behalf of Defendants RCD and RCRE on or about September 2, 2011 and he is, by all information and belief the builder for RCD and RCRE.

6. The aforementioned lots owned by RCD and RCRE are subject to the Second Amended, Restated and Consolidated Declaration of Covenants for Coosaw River Estates, recorded October 6, 2008 and recorded in Record Book 2773 at Page 1143 and any applicable amendments thereto recorded at the Office of the Register of Deeds for Beaufort County, South Carolina (the "Covenants").

7. The Covenants established the homeowners association, the architectural review committee and the By-Laws for the home owners association.

8. By Corporate Resolution dated July 7, 2010 of the Board of Directors of Coosaw River Estates, changed the name of the subdivision and the homeowners association to Somerset

Point at Lady's Island, said resolution being recorded at the Office of the Register of Deeds for Beaufort County in Book 2989 at Page 421.

9. The Covenants authorize the Architectural Review Committee (the "ARC") to promulgate design standards ("Design Standards") and amend them from time to time. The Design Standards effective February 1, 2011 as modified March 25, 2011, specify the process and procedures by which lot owners, (exclusive of Developer) obtain approval for constructing homes on the lots they own. The procedure requires, among other things, compliance with review fees and plan review and approval by the ARC before construction may begin.

10. The Defendants in this Counterclaim and Crossclaim were on notice of, and subject to, the Covenants when they purchased their respective properties.

11. The Defendants RCD and Benjamin Gecy have breached the Covenants and Design Standards by failing to comply with the requirements contained in the said Covenants and the Design Standards promulgated by the Architectural Review Committee (ARC) by, including but not limited to:

- a. failing to pay review fees and fines;
- b. mutilating, damaging and/or removing trees without permission;
- c. submitting incomplete plans;
- d. proceeding with construction without ARC approval.

12. The Defendants RCRE and Benjamin Gecy have submitted proposed plans for building on Lot 165 and Plaintiff will, by all information and belief, proceed with building on Lot 165 without complying with the Covenants and Design Standards for the subdivision.

13. The Covenants and the Design Standards provide that each applicant strictly comply with the terms and conditions of the Covenants and the Design Standards, and that failure to comply is grounds for enforcement by the SPHOA for, among other things, assessing fines, seeking equitable relief and recovering damages, costs and attorney fees.

14. Enforcement of the Covenants and Design Standards is necessary to protect the legal rights of the Plaintiff SPHOA, preserve the status quo in the subdivision and prevent irreparable harm to the common scheme and plan envisioned by the Developer.

15. The Defendants RCD, RCRE and Benjamin Gecy, have intentionally, deliberately and spitefully ignored the prerequisites for building in Somerset Point at Lady's Island Subdivision and the Plaintiff SPHOA knows of no adequate remedy at law to enforce the Covenants but by bringing

the present action.

16. The Plaintiff SPHOA is informed and believes that it is entitled to an Order of this Court enjoining the Defendants RCD, RCRE and Benjamin Gecy from any and all construction activity until such time as they pay the fees, fines, damages and attorney's fees assessed against them (in an amount to be determined at or before the trial) and fully comply with the Covenants and ARC Design Standards for Somerset Point at Lady's Island Subdivision.

WHEREFORE, the Plaintiff in the Counterclaim and Crossclaim prays that this Honorable Court will inquire into the matters set forth herein and dismiss the Plaintiff RCD's Complaint, enter an Order enjoining the Defendants RCD, RCRE and Benjamin Gecy from any further construction activities until they comply with the Covenants and ARC Design Standards for Somerset Point at Lady's Island Subdivision and pay all fines, penalties, damages due and owing to the SPHOA plus the costs and attorney's fees of this action; and for such further relief that this court deems just and proper.

EVERSOLE LAW FIRM, P.C.


Alysoun M. Eversole
1509 King Street
Beaufort, SC 29902
Phone: (843)379-3333
Fax: (843)379-5558

Beaufort, South Carolina
24th day of October, 2011.

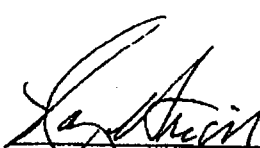
CLERK OF COURT
BEAUFORT COUNTY, S.C.

2011 OCT 24 PM 3:55

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 24th day of October, 2011 the Answer and Counterclaim has been served upon counsel for the Plaintiff by mail or delivery at the following address:

H. Fred Kuhn, Jr.
Moss, Kuhn and Fleming, P.A.
P.O. Drawer 507
Beaufort, SC, 29901


Nancy Wright, assistant to Alysoun M. Eversole, Esq.
EVERSOLE LAW FIRM, P.C.
1509 King Street
Beaufort, SC 29902

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT 2012 JAN -5 PM 4: 18) 2011-CP-07-3945

RIVER CITY DEVELOPERS, LLC)
BEAUFORT COUNTY, S.C.)
CLERK OF COURT)

Plaintiff,)

COOSAW INVESTMENTS, LLC,)
HILTON C. SMITH, JR. and SOMERSET)
POINT AT LADIES ISLAND)
HOMEOWNERS ASSOCIATION, INC.)
aka COOSAW RIVER ESTATES)
HOMEOWNERS ASSOCIATION, LLC.,)

MOTION TO STRIKE LIS PENDENS

Defendants,)

AND)

SOMERSET POINT LADY'S ISLAND)
HOMEOWNERS ASSOCIATION, INC.,)

Plaintiff,)

vs.)

RIVER CITY DEVELOPERS, LLC,)
RIVER CITY REAL ESTATE, LLC and)
BENJAMIN GECY,)

Defendants.)

TO: Alysoun Eversole, Esquire, Attorney for the Plaintiff in the
Counterclaim and Cross Claim:

The Defendants, River City Developers, LLC, River City Real Estate, LLC and Benjamin Gecy,
hereby move to strike or quash the Lis Pendens filed in this action on October 24, 2011 (2011-LP-07-
2129) on the ground that said Lis Pendens is not authorized by statute and not supported by the

underlying action inasmuch as the underlying action is not one "affecting the title to real property."

A Lis Pendens may only be filed "in an action affecting the title to real property." *S.C. Code Ann. §15-11-10 (2010)*. Furthermore, the Lis Pendens must contain a description of "the object of the action." *Id.* There are two (2) fatal defects in the Lis Pendens filed in connection with this action.

First, the Lis Pendens is fatally defective on its face. The Lis Pendens recites that the underlying action which purportedly supports the Lis Pendens was filed by the Plaintiff against the Defendants "for the purpose of removing the clouds upon the title of the Plaintiff above named in and to the property hereinafter described, and to forever bar all claims, rights, titles, interest or liens of the Defendants above named in or to the property hereinafter described." The underlying action, however, was not filed by the Plaintiff against the Defendants in order to clear clouds upon the title of the Plaintiff or to remove any claims which the Defendants have to the subject property. The underlying claim, as set forth in the Counterclaim, is for an injunction. In their request for injunctive relief the Plaintiff, contrary to the recitation in the Lis Pendens, does not assert that it owns the subject property, that the action is brought to remove a cloud upon its title to the subject property, or that it seeks to bar the Defendants from owning the subject property. The Lis Pendens, in fact, appears to be one that would be appropriate for a quiet title action, as opposed to the Counterclaim in this action.

Furthermore, it has already been ruled upon at a prior hearing that the Plaintiff is not entitled to an injunction in this action, inasmuch as the Plaintiff has an adequate remedy at law.

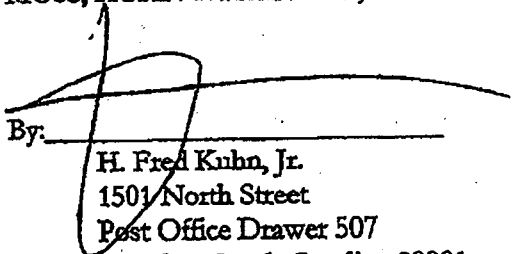
Second, a Lis Pendens may only be filed "in action affecting the title to real property." Regardless of the recitation set forth within the Lis Pendens itself, the Counterclaim brought by the Homeowners Association is not "an action affecting the title to real property." As already noted, it is an action for an injunction. In fact, the subject plans have been approved by the Homeowners Association and the only dispute existing between the parties is the claim of the Homeowners

Association to levy and collect a fine in the amount of \$33,345.00. Even if the Counterclaim were amended so as to include this demand, an action seeking monetary damages does not support a *Lis Pendens*. *Armstrong v. Carwile*, 56 S.C. 463, 35 S.E. 196, 202-03 (1900).

In short, the recitations set forth in the *Lis Pendens*, are not supported by the allegations of the Counterclaim, and the Counterclaim does not affect the title to the subject real property, but boiled down to its essence is simply a claim for monetary damages. The *Lis Pendens* is wrongfully slandering the Defendants' undisputed title to and ownership of the subject property, and it is respectfully requested that it be removed immediately.

This motion will be heard at a date, time and place to be set by the Court.

MOSS, KUHN & FLEMING, P.A.

By: 

H. Fred Kuhn, Jr.
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843)524-3373
(843)24-1302- FX

Beaufort, South Carolina
January 4, 2012

Attorneys for Defendants

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

) CIVIL ACTION NO.: 11-CP-07-3945

RIVER CITY DEVELOPERS, LLC

Plaintiff,

vs.

COOSAW INVESTMENTS, LLC, HILTON C.
SMITH, JR. and SOMERSET POINT AT
LADIES ISLAND HOMEOWNERS
ASSOCIATION, INC. f/k/a COOSAW RIVER
ESTATES HOMEOWNERS ASSOCIATION,
LLC

Defendants.

And

SOMERSET POINT AT LADY'S ISLAND
HOMEOWNERS ASSOCIATION, INC.

Plaintiff,

vs.

RIVER CITY DEVELOPERS, LLC, RIVER
CITY REAL ESTATE, LLC and BENJAMIN
GECY,

Defendants.

RETURN TO PLAINTIFF'S
MOTION TO STRIKE LIS PENDENS

2012 FEB -6 AM 1:27

COMES NOW the Defendant/Plaintiff in the Counterclaim, Somerset Point at Lady's Island Homeowners Association, Inc., (hereinafter "Somerset") by and through its undersigned counsel, and files this Return to Defendants', River City Developers, LLC, River City Real Estate, LLC and Benjamin Gecy (hereinafter collectively "River City") Motion to Strike Somerset's Lis Pendens.

Defendant River City bases its motion on the premise that Somerset's Counterclaim does not affect title to the subject real property and boils down to a claim for monetary damages and, further, it alleges the Lis Pendens is wrongfully slandering title to the Defendant's property. River City is mistaken.

Somerset Counterclaimed against River City to enforce restrictive covenants applicable to property owned by River City by seeking an order of this court to enjoin River City from further

construction activities until such time as River City complies with the requirements of covenants, and to recover fees, fines, damages and attorney fees assessed against River City for its breach of the restrictive covenants. Somerset's Counterclaim does, in fact, involve matters that affect the title to River City's real estate. "Restrictive covenants, by their very nature, clearly affect a property owner's ownership of their subject land." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E. 2d 881 (S.C. App. 2002), [Lis Pendens filed in an underlying action for a declaratory judgment regarding amendments to the restrictive covenants where all of the litigants involved had some ownership interest within the subdivision did not constitute slander of title.]

In its Complaint, River City acknowledges that the restrictive covenants imposed by Somerset on the subdivision constitute a covenant between the Somerset and the owners in the subdivision inclusive of River City. However, the crux of this case, for both parties, requires the court to interpret the restrictive covenants and decide whether either party has breached a duty or a requirement of them. River City started this suit. It was imperative that Somerset protect its interests by filing a lis pendens in conjunction with the pleadings. Somerset is authorized by the covenants to place a lien against River City for fees, fines, damages and costs and attorney fees because River City was deliberately not complying with the requirements for building in Somerset Point. A lien affects title to property. The true extent of River City's non-compliance was unknown at the time Somerset was required to file its responsive pleading to River City's Complaint. Somerset's filing of the lis pendens was appropriate. "...[a] lis pendens filed in conjunction with an action involving the same real estate is merely another form of pleading. It is premised upon and must be filed in time in conjunction with an underlying complaint involving an issue of property." *Pond Place Partners*, at 896.

River City argues that Somerset's Lis Pendens is fatally defective because the language contained in the document "appears to be one that is appropriate for a quiet title action." In the course of determining whether the filing of a lis pendens could constitute slander, the court in *Pond Place Partners* analyzed the privileged nature of pleadings and held that "...the filing of a lis pendens is ABSOLUTELY privileged in South Carolina." *Id.* at 897. The Court said "[t]o hold otherwise would clearly endanger an untold number of transactions in this state that require the filing of a lis pendens for its intended purpose of providing notice to the world of a potential conflict involving the subject property." *Id.* The Court appears to have been persuaded, in part, by several cases from other jurisdictions that stand for the proposition that a lis pendens is a privileged pleading and even if the statements in the pleading or lis pendens are malicious or false, the statements should be liberally construed as relevant and material to the claim to the interest in the land. *Id.* at pp 894-897. Therefore, although the language in Somerset's Lis Pendens could have been more specific as to the nature of the Counterclaim, the Counterclaim does involve an interest that Somerset has in River City's

real estate by virtue of the restrictive covenants to which the land is subject. A violation of the covenants that results in a lien against the property does create a cloud on the title to the land. Somerset's Lis Pendens should be liberally construed as relevant to Somerset's Counterclaim and the relief sought.

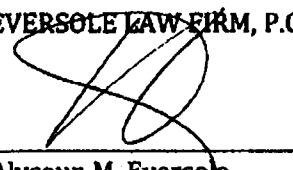
River City further alleges that Somerset is not entitled to an injunction in this action because this court ruled in another action that Somerset has an adequate remedy at law. River City's statement is misleading. Somerset filed a separate action at the same time River City filed its Complaint. Somerset was asking the court to order River City to cease and desist its construction on the subject property until such time as River City complied with the covenants, i.e. obtained approval of its building plans and paid the fees and fines associated with the violations. Although an order was never entered, (the action was voluntarily dismissed and the same allegations form the basis of Somerset's Counterclaim) this court declined to enter a cease and desist order because the circumstances were not such that irreparable harm would occur absent a cease and desist order. For example, if River City was about ready to cut down a protected live oak tree there would be irreparable harm if the court did not intervene to stop the activity. The court said that Somerset has an adequate remedy at law in the form of fines and damages, which goes to the heart of this action for injunctive relief. Rule 65(f)(2), SCRCF, provides for the recovery of damages, costs and attorney fees in an action for injunctive relief, where proper. Somerset's adequate remedy at law includes its ability to collect the fees, fines, damages, costs and attorney fees to which it is entitled upon River City's sale or conveyance of its property. The Lis Pendens secures this adequate remedy at law and places the world on notice of this dispute involving River City's property.

For these reasons River City's Motion to Strike the Lis Pendens should be denied.

Other grounds may be presented ore tenus.

Respectfully Submitted,

EVERSOLE LAW FIRM, P.C.



Alyson M. Eversole
1509 King Street
Beaufort, SC 29901
Phone: (843)379-3333

ATTORNEY FOR SOMERSET

Beaufort, South Carolina
February 6, 2012

048

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 6th day of February, 2012 the Plaintiff Somerset's Return to Defendant's Motion to Strike Lis Pendens has been served upon counsel for the Defendant River City by mail or delivery at the following addresses:

H. Fred Kuhn, Jr.
1501 North Street
P.O. Drawer 507
Beaufort, SC 29901



Nancy Wright, assistant to Alysoun M. Eversole, Esq.
EVERSOLE LAW FIRM, P.C.
1509 King Street
Beaufort, SC 29902
Phone: (843)379-3333
Fax: (843)379-5558

2012 FEB -6 AM 1:27
CLERK OF COURT
JUDICIAL DISTRICT
OF BEAUFORT COUNTY
S.C.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

2011-CP-07-3945

RIVER CITY DEVELOPERS, LLC,

Plaintiff,

COOSAW INVESTMENTS, LLC,
HILTON C. SMITH, JR. and SOMERSET
POINT AT LADIES ISLAND
HOMEOWNERS ASSOCIATION, INC.
fka COOSAW RIVER ESTATES
HOMEOWNERS ASSOCIATION, LLC,

ORDER GRANTING MOTION TO
STRIKE LIS PENDENS

Defendants,

AND

SOMERSET POINT LADY'S ISLAND
HOMEOWNERS ASSOCIATION, INC.,

Plaintiff,

vs.

RIVER CITY DEVELOPERS, LLC,
RIVER CITY REAL ESTATE, LLC and
BENJAMIN GECY,

Defendants.

2012 FEB 15 AM 10:29
CLERK OF COURT
BEAUFORT COUNTY, S.C.

This matter came to be heard before me in the Beaufort County Court of Common Pleas on February 8, 2012 for the purpose of hearing the motion filed on behalf of the Defendants, River City Developers, LLC, River City Real Estate, LLC and Benjamin Gecy to strike or quash the Lis Pendens filed in this action on October 24, 2011 (2011 LP-07-2129) on the ground that said Lis Pendens is not authorized by statute and not supported by the underlying action inasmuch as the underlying action is

13/3

not one "affecting the title to real property." Present at the hearing on behalf of the aforesaid Defendants was their attorney, H. Fred Kuhn, Jr., Esquire. Appearing on behalf of Somerset Point Lady's Island Homeowners Association, Inc. was its attorney, Alysoun M. Eversole, Esquire. Also present at the hearing were the Defendant Benjamin Gecy and two (2) observers, Phillip L. Fairbanks, Esquire and Kenneth L. Tootle, Esquire.

This lawsuit was commenced by the filing of a Summons and Complaint in the Beaufort County Court of Common Pleas on September 20, 2011. The Defendants filed an Answer, Counterclaim and Crossclaim on October 24, 2011 in which all of the Defendants counterclaimed against the Plaintiff, and in which the Defendant Somerset Point at Lady's Island Homeowners Association, Inc., filed a cross-claim against River City Developers, LLC, River City Real Estate, LLC, and Benjamin Gecy.

On October 24, 2011 the Defendant-Cross Plaintiff, Somerset Point at Lady's Island Homeowners Association, Inc. filed the subject Lis Pendens, 2011-L.P-07-2129, upon the following described property:

All that certain piece, parcel or lot of land, situate, lying and being on Lady's Island, Beaufort County, South Carolina, being shown and designated as Lot 16 Somerset Point at Lady's Island Subdivision, Phase I (f/k/a Coosaw River Estates) on a plat prepared by Gary Blair Burgess, RLS, dated June 16, 2006, last revised October 10, 2010 and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina in Plat Book 131 at Page 134, R200 005 00A 0020 0000.

Section 15-11-10 of the South Carolina Code of Laws authorizes the filing of a Lis Pendens in an action "affecting the title to real property." See also Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 17, 567 S.E.2d 881, 889 (Ct. App. 2002) ("Therefore, an action "affecting the title to real property" clearly allows the filing of a lis pendens by an interested party in order to protect their ownership interest in the property subject to the litigation."); and Armstrong v. Carwile, 56 S.C. 463, 35 S.E. 196 (1900) ("the filing of a lis pendens against the property of a Defendant in an ordinary action on a money

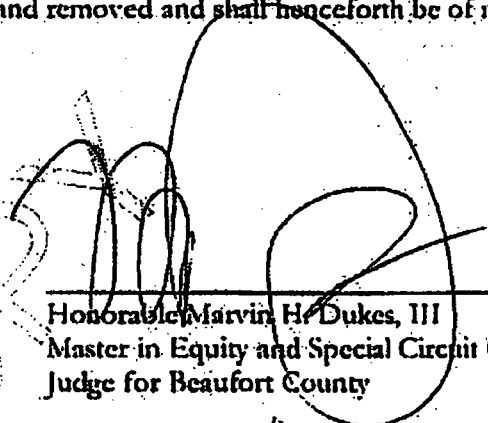
demand, which in no way affects the title to real estate, is ineffective for any purpose, since (the statute) authorizes the filing of lis pendens only when the action affects real estate").

After considering the arguments of counsel, and reviewing the authorities cited by the respective parties in the motion and the return to the motion, I find and conclude that the Counterclaim and Crossclaim do not seek to "affect" the title to the subject real property in this litigation. Accordingly, the Lis Pendens is not authorized by S.C. Code Ann. §15-11-10 (2011) and must be removed.

IT IS, THEREFORE, ORDERED that the Lis Pendens filed in this action on October 24, 2011 (2011-LP-07-2129) shall be and is hereby stricken and removed and shall henceforth be of no further force or effect.

AND IT IS SO ORDERED.

Beaufort, South Carolina
February 15, 2012



Honorable Marvin H. Dukes, III
Master in Equity and Special Circuit Court
Judge for Beaufort County

052

STATE OF SOUTH CAROLINA)

COUNTY OF Beaufort)

River City Developers, LLC)

Plaintiff,)

vs.)

Coosaw Investments, LLC, et al.)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-07-3945

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

H. Fred Kuhn, Jr., Bar No. _____

Address: _____

Phone: _____ Fax: _____

E-mail: _____ Other: _____

Defendant's Attorney:

Alysoun M. Eversole, Bar No. 68011

Address: _____

1509 King St., Beaufort, SC 29902

Phone: 843-379-3333 Fax 843-379-5558

E-mail: aeversole@eversolelaw.com Other: _____

☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion: Motion to Reconsider

Estimated Time Needed: _____ Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

2/17/12

Date submitted

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$ 25.00**

☐ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

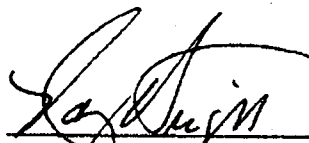
☐ **MOTION FEE COLLECTED: \$ _____**

☐ **CONTESTED - AMOUNT DUE: \$ _____**

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 17th day of February, 2012 the Plaintiff Somerset's Return to Defendant's Motion to Strike Lis Pendens has been served upon counsel for the Defendant River City by mail or delivery at the following addresses:

H. Fred Kuhn, Jr.
1501 North Street
P.O. Drawer 507
Beaufort, SC 29901



Nancy Wright, assistant to Alysoun M. Eversole, Esq.
EVERSOLE LAW FIRM, P.C.
1509 King Street
Beaufort, SC 29902
Phone: (843)379-3333
Fax: (843)379-5558

FEB 17 AM 11:53

054

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

) CIVIL ACTION NO.: 11-CP-07-3945

RIVER CITY DEVELOPERS, LLC

Plaintiff,

vs.

COOSAW INVESTMENTS, LLC, HILTON C.
SMITH, JR. and SOMERSET POINT AT
LADIES ISLAND HOMEOWNERS
ASSOCIATION, INC. f/k/a COOSAW RIVER
ESTATES HOMEOWNERS ASSOCIATION,
LLC

Defendants.

And

SOMERSET POINT AT LADY'S ISLAND
HOMEOWNERS ASSOCIATION, INC.

Plaintiff,

vs.

RIVER CITY DEVELOPERS, LLC, RIVER
CITY REAL ESTATE, LLC and BENJAMIN
GECY,

Defendants.

NOTICE OF MOTION AND
MOTION TO RECONSIDER

2012 FEB 17 AM 11:53

COMES NOW the Defendant/Plaintiff in the Counterclaim, Somerset Point at Lady's Island Homeowners Association, Inc., (hereinafter "Somerset") by and through its undersigned counsel, and moves this Honorable Court, within ten (10) days or as soon thereafter as may be heard to reconsider the Court's Order Granting Plaintiff's Motion to Strike Lis Pendens filed on February 15, 2012; the grounds wherefore are as follows:

1. At the hearing on River City's motion, the parties made known to the court the basis of the underlying dispute, namely that River City sued Somerset, *et al* for Breach of Fiduciary Duty, Breach of Contract and Unfair Trade Practices, essentially alleging that Somerset did not have the authority to amend the covenants, or did so in an unfair way.

Somerset denied the allegations and counterclaimed and crossclaimed seeking enforcement of the covenants which River City had violated. Present was H. Fred Kuhn, Esq. and his client, Benjamin Gecy, the owner of River City, and Alysoun M. Eversole, Esq., attorney for Somerset. Also present at the hearing in support of River City was Phillip Fairbanks, Esq. and Kenneth Tootle, Esq.

2. The Court concluded that Somerset's Counterclaim does not seek to affect the title to the property in this litigation and therefore the filing of the Lis Pendens was not appropriate. Somerset submits that the Court has misinterpreted the Court of Appeal's Opinion in *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E. 2d 881 (S.C. App. 2002) in three important respects. First, the purpose of underlying declaratory judgment action brought by Poole was to "affirm and validate restrictive covenants and enforcement thereof", not to interpret them. Second, the Court of Appeals did not find that the lis pendens filed in conjunction with the underlying declaratory judgment must involve or affect "title" to property, but rather it wrote that a lis pendens may be filed "...in conjunction with an underlying complaint involving an issue of property." Third, the Court of Appeals in *Pond Place Partners* was not ambiguous when it found the lis pendens appropriate in the case. The court wrote "Restrictive covenants, by their very nature, clearly affect a property owner's ownership of their subject land."

3. Applying these important points to this case, the Court's Order Granting River City's Motion to Strike does not follow the legal precedent established in *Pond Place Partners* or serve substantial justice. The facts in *Pond Place Partners* and this case are substantially the same. In *Pond Place Partners*, Poole filed the lis pendens to prevent the owners in the subdivision from selling their lots during the litigation to determine if certain amendments to the covenants were enforceable. Title to the property encumbered by the lis pendens was not an issue in the case. Here, Somerset filed a lis pendens enforce the covenants against an owner who had failed to comply with the covenants and to protect itself by providing subsequent purchasers or encumbrancers with notice of the pending litigation and the dispute over the scope of the covenants. These covenants are limitations on the rights of an owner in a subdivision to construct a residence on that property, and these limitations are incident to the owner's title. This litigation involves a determination of River City's duties and rights incident to ownership of property in the subdivision and therefore affects title to real

property.

4. It is unjust to all owners in the subdivision to set a precedent that the covenants to which all owners are subject are unenforceable against an owner during litigation involving the owner and his property. The court's actions in *Pond Place Partners*, supports this argument. In *Pond Place Partners*, the Partners filed a motion for summary judgment, which was granted. Pool appealed. The Partners moved to have the lis pendens lifted because they could not sell their property during the automatic stay of the appeal. Their motion was denied and even the Supreme Court refused to dissolve the lis pendens until full adjudication of Poole's case was completed. *Id.* at 897.

5. The Court's reliance on *Armstrong v. Carwile* is misplaced. *Armstrong* was an action to foreclose a mortgage against Carwile. During the litigation it was discovered that there was a sheriff's sale of the property by way of a judgment that had been executed upon. There had been a lis pendens filed in that previous action against Carwile to recover damages for breach of a demand note. The lis pendens was recorded prior to the mortgage being recorded. Although there was discussion about when the filing of a lis pendens is appropriate, the court did not render an opinion about it in the case on appeal because the issue was not property preserved. The case was really about whether the buyer at the sheriff's sale was a bonafide purchaser for value without notice.

WHEREFORE, for the forgoing reasons Somerset respectfully requests this Court reconsider River City's Motion to Strike and enter an order denying the requested relief.

Respectfully Submitted,

EVERSOLE LAW FIRM, P.C.



Alysoun M. Eversole
1509 King Street
Beaufort, SC 29901
Phone: (843)379-3333

Beaufort, South Carolina
February 17, 2012

ATTORNEY FOR SOMERSET

057

3 DE
10 DE
Eve/sale
(assn)

BEAUFORT COUNTY SC - ROD
BK 00076 PGS 0457-0459
FILE RUN 2012007947
02/10/2012 01:58:11 PM
REC'D BY D EVANS RCPT# 668111
RECORDING FEES 10.00

STATE OF SOUTH CAROLINA)

OFFICE OF THE REGISTER OF DEEDS

COUNTY OF BEAUFORT)

SOMERSET POINT AT LADY'S ISLAND)
HOMEOWNERS ASSOCIATION, INC.)

Lienor,)

v.)

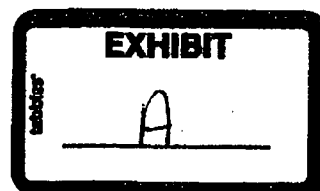
NOTICE AND CERTIFICATE OF LIEN

RIVER CITY DEVELOPERS, LLC)

Debtor.)
_____)

NOTICE IS HEREBY GIVEN, that Somerset Point at Lady's Island Homeowners Association, Inc. (hereinafter the "Association") is due the sum of \$33,345.00 according to the Verified Statement of Account, with all just credits given, attached and made a part hereof by reference.

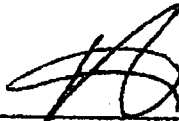
The said debt, and further accruals thereto, is due to the Association for fees, assessments and fines of the Association imposed for the common interests of the owners and for maintaining the common elements for Somerset Point Subdivision, plus costs of collection, attorney's fees and other proper purposes as authorized by the Second Amended, Restated and Consolidated Declaration of Covenants and Restrictions of Somerset Point at Lady's Island Subdivision (f/k/a Coosaw River Estates), and any amendments thereto, as set forth in the Verified Statement of Account attached hereto.



That by virtue thereof, and by the service and filing of this Notice and Certificate of Lien, for Unpaid Assessments the Association has and claims a lien to secure the payment of the debt so due and the cost of enforcing such lien upon the following described real estate:

ALL that certain piece, parcel or lot of land, situate, lying and being on Lady's Island, Beaufort County, South Carolina, being shown and designated as Lot 16 of Somerset Point at Lady's Island Subdivision, Phase I (f/k/a Coosaw River Estates) on a plat prepared by Gary Blair Burgess, RLS, dated June 16, 2006, last revised October 10, 2010 and recorded at the Office of the Register of Deeds for Beaufort County, South Carolina in Plat Book 131 at Page 134.
R200 005 00A 0020 0000

EVERSOLE LAW FIRM, P.C.



Alysoun M. Eversole
1509 King Street
Beaufort, SC 29902
(843)379-3333

ATTORNEY FOR SOMERSET POINT AT
LADY'S ISLAND HOMEOWNERS ASSOC, INC.

Beaufort County, SC
10th day of February, 2012

VERIFICATION AND STATEMENT OF ACCOUNT

LIENOR: Somerset Point at Lady's Island Homeowners Association, Inc.
DEBTOR: River City Developers, LLC
REAL PROPERTY: Lot 16, Somerset Point at Lady's Island Subdivision, Phase I, Beaufort County, South Carolina
AMOUNT DUE: Fines: \$30,100.00
Attorney fees/costs of collection to date: \$ 3,245.00
TOTAL: \$33,345.00

PERSONALLY appeared before me, the undersigned Hilton C. Smith, III, who first being duly sworn, deposes and swears and affirms the following to be true and correct:

"I have read the foregoing Notice and Certificate of Lien, which references this Verified Statement of Account, I have personal knowledge that the aforesaid total amount due is a true and correct amount owed to the Association for unpaid assessments, authorized fines and costs and attorney fees, (with all just credits applied) and that despite demand for payment of the same, this amount remains unpaid."

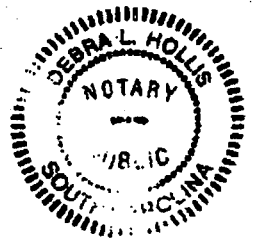
SOMERSET POINT AT LADY'S ISLAND
HOMEOWNERS ASSOCIATION, INC.

By: HCS
Hilton C. Smith, III
Secretary/Treasurer

SWORN TO before me, this 9
day of February, 2012.

Debra L. Hollis (SEAL)
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: October 19, 2015



STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT)

2011-CP-07-3945

RIVER CITY DEVELOPERS, LLC,)

Plaintiff,)

COOSAW INVESTMENTS, LLC,)

HILTON C. SMITH, JR. and SOMERSET)

POINT AT LADIES ISLAND)

HOMEOWNERS ASSOCIATION, INC.)

fka COOSAW RIVER ESTATES)

HOMEOWNERS ASSOCIATION, LLC.,)

Defendants,)

MOTION TO STRIKE CERTIFICATE
OF LIEN

AND)

SOMERSET POINT LADY'S ISLAND)

HOMEOWNERS ASSOCIATION, INC.,)

Plaintiff,)

vs.)

RIVER CITY DEVELOPERS, LLC,)

RIVER CITY REAL ESTATE, LLC and)

BENJAMIN GECY,)

Defendants.)

In Re:)

STATE OF SOUTH CAROLINA)

OFFICE OF THE REGISTER OF DEEDS

COUNTY OF BEAUFORT)

SOMERSET POINT AT LADY'S ISLAND)

HOMEOWNERS ASSOCIATION, INC.,)

Lienor,)

vs.)

RIVER CITY DEVELOPERS, LLC,)

Debtor.)

061

TO: ALYSOUN EVERSOLE, ESQUIRE, ATTORNEY FOR SOMERSET POINT AT
LADY'S ISLAND HOMEOWNERS ASSOCIATION, INC.:

PLEASE TAKE NOTICE that the Debtor, River City Developers, LLC, hereby moves before the presiding judge of the Beaufort County Court of Common Pleas for an Order striking and removing that document entitled "Notice and Certificate of Lien" filed by the Lienor, Somerset Point at Lady's Island Homeowners Association, Inc., against the alleged Debtor, River City Developers, LLC, in Book 00076 at Pages 0457-0459 on February 10, 2012 on the ground that said "Certificate of Lien" is unsupported by either the law or the facts.

In its Certificate of Lien the Somerset Point at Lady's Island Homeowners Association, Inc., (hereinafter the "Association") claims that it is due the sum of \$33,345.00 by River City Developers, LLC (hereinafter "River City"). The Statement of Account attached to the Certificate recites that this sum represents "unpaid assessments, authorized fines and costs and attorney's fees." Neither the Certificate nor the attached Statement of Account set forth any legal authority authorizing the Association to file a lien against River City's property. The Certificate and Statement of Account appear to be modeled after the Certificate and Statement of Account that would be filed in support of a mechanic's lien. A mechanic's lien, of course, is expressly authorized by statute. See, S.C. Code Ann. §29-5-10 (2012). A mechanic's lien is authorized only for labor performed or furnished or for materials furnished and actually used in the construction of a structure upon real estate. The alleged lien claimed by the Association, does not fall within the purview of the mechanic's lien statute. Statutory liens are authorized for security guards (§29-5-25), landscapers (§29-5-26), as well as others. For example, horizontal property regimes, such as condominiums and apartment complexes, have the right to assert a lien for unpaid assessments. S.C. Code Ann. §27-31-210 (2012). A homeowners association simply does not have the right to unilaterally impose a lien for an unproven and disputed indebtedness.

There is likewise nothing to support an equitable lien. Contrary to what is asserted in the Verified Accounting, the alleged debt is not for assessments by the Homeowners Association, but rather, is for fines or penalties attempted to be levied by the Homeowners Association's

Architectural Review Committee ("ARC"). The restrictive covenants applicable to the subject property authorizes a lien only for unpaid assessments and charges incidental to unpaid assessments. Nothing in the covenants authorizes a lien for fines levied by the ARC. Furthermore, the covenants do not authorize the ARC to levy fines.

This is not the first time that the Association has attempted to unilaterally encumber River City's property. The Association previously filed a lis pendens against this same property, for this exact same claimed indebtedness. This alleged lis pendens was stricken by the Court because it was apparent that, contrary to the Association's assertion, this claimed indebtedness did not affect the title to real property as required by the lis pendens statute and is not owed.

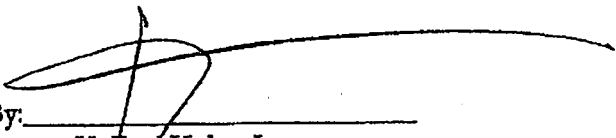
Once again, by this claimed mechanism of a "Certificate of Lien" the Association is attempting to unilaterally encumber River City's property without having to advance a shred of proof in support of the claimed debt. The debt claimed by the Association is improper, not supported by the Association's own covenants, disputed, and is simply not owed. The Association knows it cannot prove the debt, and rather than file suit to collect the debt, it is repeatedly attempting to unilaterally encumber River City's property knowing that this property is in the middle of construction, and that the wrongfully filed lis pendens, and now the wrongfully filed Certificate of Lien, has placed River City in an untenable financial condition by having the affect of freezing River City's construction funding. The Association is simply attempting to extort funds from River City on a bogus debt it knows it cannot substantiate.

If the Association truly believes that the debt is owed, it is has the same remedy available to it that is available to every creditor, to-wit, file suit and put up proof. It is fundamental that, except for certain statutory exceptions as previously noted, a creditor who believes it is owed funds must file suit and prove the existence of the alleged indebtedness before it is entitled to a lien. In this instance, the Association is attempting to reverse the process, and obtain the lien first, before it has advanced a shred of proof in support of its claim. This is a blatant and malicious abuse of process which should not be tolerated.

It is accordingly respectfully requested that the Court strike the Certificate of Lien filed by the Association against the property of River City.

This motion will be heard at a date, time and place to be set by the Clerk.

MOSS, KUHN & FLEMING, P.A.

By: 

H. Fred Kuhn, Jr.
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843)524-3373
(843)24-1302- FX

Beaufort, South Carolina
February 17, 2012

Attorneys for Plaintiff

064

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

) CIVIL ACTION NO.: 11-CP-07-3945

RIVER CITY DEVELOPERS, LLC

Plaintiff,

vs.

COOSAW INVESTMENTS, LLC, HILTON C. SMITH, JR. and SOMERSET POINT AT LADIES ISLAND HOMEOWNERS ASSOCIATION, INC. f/k/a COOSAW RIVER ESTATES HOMEOWNERS ASSOCIATION, LLC

Defendants.

And

SOMERSET POINT AT LADY'S ISLAND HOMEOWNERS ASSOCIATION, INC.

Plaintiff,

vs.

RIVER CITY DEVELOPERS, LLC, RIVER CITY REAL ESTATE, LLC and BENJAMIN GECY,

Defendants.

RETURN TO PLAINTIFF'S
MOTION TO STRIKE LIEN

2012 MAR -5 PM 4:51
JERRI ANN ROSE
CLERK OF COURT
BEAUFORT COUNTY, S.C.

COMES NOW the Defendant/Plaintiff in the Counterclaim, Somerset Point at Lady's Island Homeowners Association, Inc., (hereinafter "Somerset") by and through its undersigned counsel, and files this Return to Defendants', River City Developers, LLC, River City Real Estate, LLC and Benjamin Gecy (hereinafter collectively "River City") Motion to Strike Somerset's Certificate of Lien.

Defendant River City bases its motion on the ground that Somerset's Certificate of Lien filed on February 10, 2012 is unsupported by either law or fact and rests its argument on statutory provisions related to mechanics liens and horizontal property regimes. River City's reliance on statutory law is misplaced and its assertion that the lien is unsupported by fact is

for the jury or trier of fact to decide.

Covenants and Restrictions are not governed by statute. They are contracts. "A restrictive Covenant is a voluntary contract between the parties." *Walker v. Sandy Pointe Homeowners Association, Inc.* 2010-UP-354 (SCCA) citing *Cedar Grove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 261, 628 S.E.2d 284, 287 (Ct.App. 2006). "Property, whether subject to the Horizontal Property Act, may, of course, be governed by restrictive covenants. Real covenants have been defined as agreement[s]...to do, or refrain from doing, certain things with respect to real property. 20 Am. Jur. 2d Covenants, Conditions, and Restrictions § 1 (2005). 'Therefore, covenants, in a sense are contractual in nature and bind the parties thereto in the same manner as would any other contract.' *Id.* (citing *Seabrook Island Prop. Owners Assoc. v. Pelzer*, 292 S.C. 343, 356 S.E.2d 411 (Ct.App. 1987))" *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 628 S.E.2d 902, 913 (S.C.App.2006). "Restrictive covenants differ from contracts in that they run with the land, 'meaning that they are enforceable by and against later grantees.' 17 S.C. Jur. Covenants § 18 (205)." *Id.*

Somerset Point at Lady's Island Homeowners Association was formerly known as Coosaw River Estates Homeowner's Association. The name was changed on August 31, 2010. See attachment "Exhibit A". Lots within Somerset Point are conveyed subject to the Second Amended, Restated and Consolidated Declaration of Covenants for Coosaw River Estates Subdivision recorded October 8, 2008 in Records Book 2773 Page 1143, as amended from time to time (hereinafter "the Covenants"). River City Developers, LLC, as a later grantee, purchased Lot 16 in Somerset Point on August 5, 2011, clearly subject to the aforementioned covenants and restrictions. See deed to River City Developers, LLC attached hereto as "Exhibit B".

Article IV of the Covenants, The Homeowners Association, Section 4.09, Enforcement, states, among other things, "...The Board shall have the power to file a lien for unpaid assessments, fees or fines or seek relief in any court for violation..." A copy of Article IV is attached hereto as "Exhibit C".

Article VI of the Covenants, Architectural Review, Section 6.05, Design Standards, states "(a) The ARC may from time to time (but shall not be required to) adopt, promulgate,

0666

amend, revoke and enforce guidelines (the Design Standards)..." A copy of Article VI is attached here to as "Exhibit D".

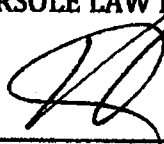
The Standards were promulgated in September 2008. River City knows about the Standards and was familiar with the Standards in effect when it purchased Lot 16. See attached Affidavit of Hilton C. Smith, Jr., "Exhibit E". The Standards contain an Enforcement clause that provides, among other things, "Any fines will become a lien against the property." See page 2, "ENFORCEMENT" of Exhibit E.

"Restrictive covenants will be enforced unless they are indefinite or contravene public policy." *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987). "A clear and explicit contract must be construed according to the terms the parties have used, with the terms to be taken and understood in their plain, ordinary, and popular sense." *Gilbert V. Miller*, 356 S.C. 25, 30, 586 S.E.2d 861, 864 (Ct.App. 2003). "When 'the language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning.'" *Matsell v. Crowfield Plantation Community Services Ass'n, Inc.*, 393 S.C. 65, 710, S.E.2d 90 (S.C.App. 2011) citing *Shipyard Proper Owners' Ass'n v. Mangiaracina*, 307 299, 308, 414 S.E.2d 795, 801 (Ct.App. 1992).

The meaning of the enforcement provisions in both the Covenants and the Standards are clear and unambiguous. Somerset is authorized by the Covenants to file a lien for unpaid fines. River City's Motion to Strike the Certificate of Lien should be denied.

Other grounds may be presented ore tenus.

Respectfully Submitted,
EVERSOLE LAW FIRM, P.C.



Alysoun M. Eversole
1509 King Street
Beaufort, SC 29901
Phone: (843)379-3333

Beaufort, South Carolina
March 5, 2012

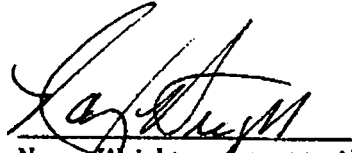
ATTORNEY FOR SOMERSET

067

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 5th day of March, 2012 the Plaintiff Somerset's Return to Defendant's Motion to Strike Lis Pendens has been served upon counsel for the Defendant River City by mail or delivery at the following addresses:

H. Fred Kuhn, Jr.
1501 North Street
P.O. Drawer 507
Beaufort, SC 29901



Nancy Wright, assistant to Alysoun M. Eversole, Esq.
EVERSOLE LAW FIRM, P.C.
1509 King Street
Beaufort, SC 29902
Phone: (843)379-3333
Fax: (843)379-5558

2012 MAR -5 PM 4:52
CLERK OF COURT
JOHN R. NOBENEAU
CURTIS COUNTY, S.C.

068

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

) CIVIL ACTION NO.: 11-CP-07-3945

RIVER CITY DEVELOPERS, LLC

Plaintiff,

vs.

COOSAW INVESTMENTS, LLC, HILTON C.
SMITH, JR. and SOMERSET POINT AT
LADIES ISLAND HOMEOWNERS
ASSOCIATION, INC. f/k/a COOSAW RIVER
ESTATES HOMEOWNERS ASSOCIATION,
LLC

Defendants.

And

SOMERSET POINT AT LADY'S ISLAND
HOMEOWNERS ASSOCIATION, INC.

Plaintiff,

vs.

RIVER CITY DEVELOPERS, LLC, RIVER
CITY REAL ESTATE, LLC and BENJAMIN
GECY,

Defendants.

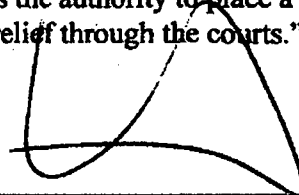
Affidavit of Hilton C. Smith, Jr.

2012 MAR -5 PM 4:52
JERRY ANN ROSENBERG
CLERK OF COURT
BEAUFORT COUNTY, S.C.

PERSONALLY APPEARED BEFORE ME Hilton C. Smith, Jr., who after being duly sworn, deposes and states the following:

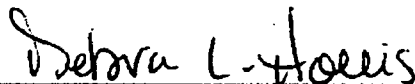
"My name is Hilton C. Smith, Jr.. I am a member of the Board of Directors of Somerset Point at Lady's Island Subdivision Homeowners Association, Inc. On February 21, 2011 a meeting was held at Grayco with Ben Gecy, Richard Gray, my son Hilton Smith, III and me to discuss building issues within Somerset Point that Mr. Gecy had questioned during the homeowners association meeting a couple week prior. At that meeting we discussed, in detail, the ARC requirements and I handed Mr. Gecy a copy of the ARC Standards in effect at that time dated September 2008. A copy is attached hereto. The ARC Standards were amended on March 25,

2011; primarily with respect to slab on grade building which we had discussed, but there have been no changes to the enforcement provisions. A copy was delivered to Mr. Gecy via e-mail on April 11, 2011, prior to his purchase of Lot 16, upon which we have placed the lien for unpaid fines. Section 4.09 of the Covenants and the Enforcement provision in the ARC Standards clearly and unambiguously state the HOA has the authority to place a lien against an owner's property for unpaid fees and fines and to seek relief through the courts."



Hilton C. Smith, Jr.

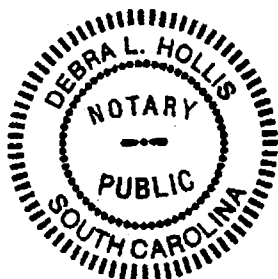
SWORN TO and subscribed before me
this 2 day of MARCH, 2012.



Notary Public for South Carolina

My Commission Expires: _____

My Commission Expires
October 19, 2015



STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT)

CAASE NO: 2011-CP-07-3945

RIVER CITY DEVELOPERS, LLC,)

Plaintiff,)

COOSAW INVESTMENTS, LLC,)

HILTON C. SMITH, JR. and SOMERSET)

POINT AT LADIES ISLAND)

HOMEOWNERS ASSOCIATION, INC.)

Ika COOSAW RIVER ESTATES)

HOMEOWNERS ASSOCIATION, LLC.,)

Defendants,)

AND)

SOMERSET POINT LADY'S ISLAND)

HOMEOWNERS ASSOCIATION, INC.,)

Counterclaim Plaintiff,)

vs.)

RIVER CITY DEVELOPERS, LLC,)

RIVER CITY REAL ESTATE, LLC and)

BENJAMIN GECY,)

Counterclaim Defendants.)

ORDER

2012 APR -6 PM 3:03

This matter came to be heard before me in the Beaufort County Court of Common Pleas on March 5, 2012 for the purpose of hearing the motion filed on behalf of the Counterclaim Defendant River City Developers, LLC ("River City") to strike that document entitled "Notice and

Certificate of Lien" recorded by Counterclaim Plaintiff Somerset Point at Lady's Island Homeowners Association, Inc. ("Somerset") on February 10, 2012, Record Book 273 at Page 1143-1186. At that same time, I heard the motion filed on behalf of Somerset seeking a reconsideration of my Order of February 15, 2012 granting River City's Motion to Strike Lis Pendens. Present at the hearing on behalf of River City was H. Fred Kuhn, Jr., Esquire. Appearing on behalf of Somerset was its attorney, Alysoun M. Eversole, Esquire.

Upon consideration of the pleadings in this matter, the arguments of counsel, the law and the facts as presented to me by counsel, I find and conclude that Somerset's Motion to Reconsider should be denied and that equitable relief should be provided to Somerset to secure its interests in this litigation, which is more fully set forth hereinafter. I further find that River City's Motion to Strike the Lien should be denied for the reasons set forth hereinafter.

In this case, the parties agree that River City's real property is subject to the Covenants and Restrictions for Somerset at Lady's Island Subdivision, and they further agree that the Covenants are a contract and that, in an appropriate case, these covenants authorize an equitable lien. The parties disagree, however, on whether the debt which is the subject of the Somerset's Counterclaim against River City is a debt for which the Covenants authorize a lien or a Lis Pendens.

This case is complicated by the fact that River City's property is encumbered by a construction mortgage that was recorded only minutes after Somerset's Lis Pendens was filed in this case. Upon the lender learning of the Lis Pendens, it froze River City's draws on the loan and ceased providing River City with the construction draws needed to complete a house it is building on its property located at 16 China Back in Somerset Point. The freeze on the draws has caused the construction to stop resulting in River City's inability to complete the project and

2 of 5

close on a contract for a sale of its property to a third party. Somerset filed its lien against River City after my Order Granting River City's Motion to Strike the Lis Pendens was announced after the hearing.

Because of the timing of the filing of Somerset's Lis Pendens, it had priority over River City's mortgage on its property. Somerset's Notice and Certificate of Lien, however, is subordinate to the mortgage and does not affect or impair Normandy Corporation's security interest.

In my opinion, leaving the Lis Pendens in place benefits neither party. River City is unable to complete its project which could result in the property being foreclosed. Somerset is certainly not benefitted by having an unfinished house in its community.

An equitable lien, by definition, is a creature of equity. "Equity should always act on a case-by-case basis." *Nut Corporation v. Howell Road, LLC*, 396 S.C. 323, 721 S.E.2d 447, 450 (S.C. App. 2011) (discussing equitable liens). "An equitable lien is a specific restitutionary remedy that may supplement the law." *Id.*

In *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 715 S.E.2d 348 (S.C. App. 2011) the South Carolina Court of Appeals emphasized the Court's flexibility and broad powers in fashioning a remedy when dealing with an equitable lien, so as to not put form over substance. *Id.*, 394 S.C. at 249, 715 S.E.2d at 352, citing with approval *Brown v. Plata*, 131 S.Ct. 1910, 1944 (2011) (discussing the Court's "substantial flexibility" when deciding cases in equity, and noting that the scope of a Court's equitable powers "is broad, for breadth and flexibility are inherent in equity remedies."). The South Carolina Court of Appeals noted that in fashioning a remedy for an equitable lien that "equity looks to substance rather form." *Id.*, 394 S.C. at 253, 715 S.E.2d at 352. The Court further noted that once a party establishes an equitable right, the

Court may dispense with pure formalities which would otherwise defeat the equity, and that the Court should look to the substance and intent of the parties, and give a construction consistent with such intent. *Id.*, 394 S.C. at 253-54, 715 S.E2d at 352.

Applying the foregoing principals to the facts presented to me at this time by counsel, I find that the harm to River City in granting Somerset's Motion to Reconsider outweighs the benefit to Somerset if the Lis Pendens is remains in place. Striking the Lis Pendens will allow River City's lender to resume providing construction draws and River City's project can then be completed. Somerset's lien, however, is subordinate to the River City's loan which should not prohibit the lender from dispensing construction draws to River City.

I find that balancing the equities in this case is appropriate. Now therefore

IT IS HEREBY ORDERED:

- a. That Somerset's Motion to Reconsider my Order striking its Lis Pendens is denied;
- b. River City's motion filed on February 17, 2012 seeking to strike and remove the Notice and Certificate of Lien filed by the Somerset on February 10, 2012 IS denied;
- c. River City shall proceed with all due diligence to complete the construction of the residence upon the subject real property and to close upon the sale of said residence; and
- d. At closing, after payment of all reasonable and customary closing costs, expressly including payment in of the first mortgage and security interest held by Normandy Corporation as it relates to the property located at 16 China Back, the subject property in this litigation, the net proceeds which would ordinarily be payable to the seller, in the amount of the claimed lien (or up to the amount of the claimed lien if the proceeds are less than the lien, i.e., \$33,345.00) shall be held in escrow by the closing attorney and shall not be distributed to River City, or any

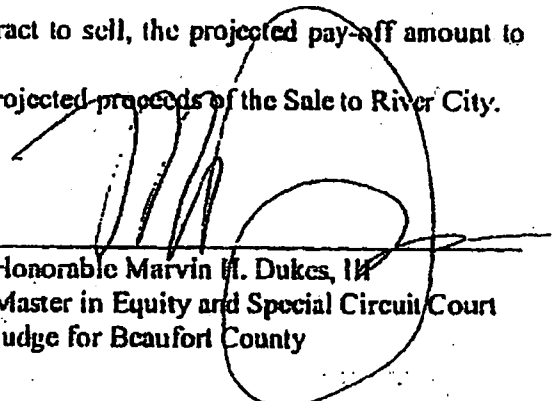
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of River City's related entities or principals, specifically including Benjamin Geey, until further order of the Court.

e. River City Developers, LLC, River City Real Estate, LLC and Benjamin Geey, their agents, servants and employees are restrained and prohibited from taking or receiving any draws on the aforesaid construction loan, and any such draws shall be utilized exclusively to pay subcontractors, materialmen, suppliers or laborers necessary for the completion of the residence.

f. River City Developers shall, by April 16, 2012, provide Somerset with a good faith estimate of the projected costs to River City to build the home, the projected sales price, or the contract sales price if it is currently under contract to sell, the projected pay-off amount to Normandy at the closing of the transaction and the projected proceeds of the Sale to River City.

AND IT IS SO ORDERED.



Honorable Marvin H. Dukes, III
Master in Equity and Special Circuit Court
Judge for Beaufort County

Beaufort, South Carolina
April 6, 2012

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075

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) 2011-CP-07-3945
RIVER CITY DEVELOPERS, LLC,)
Plaintiff,)
COOSAW INVESTMENTS, LLC,)
HILTON C. SMITH, JR. and SOMERSET)
POINT AT LADIES ISLAND)
HOMEOWNERS ASSOCIATION, INC.)
fka COOSAW RIVER ESTATES)
HOMEOWNERS ASSOCIATION, LLC.,)
Defendants,)
AND)
SOMERSET POINT LADY'S ISLAND)
HOMEOWNERS ASSOCIATION, INC.,)
Plaintiff,)
vs.)
RIVER CITY DEVELOPERS, LLC,)
RIVER CITY REAL ESTATE, LLC and)
BENJAMIN GECY,)
Defendants.)

MOTION TO RECONSIDER OR
CLARIFY ORDER

2012 APR 13 PM 3:57
CLERK OF COURT
BEAUFORT COUNTY, S.C.

TO: ALYSOUN M. EVERSOLE, ESQUIRE, ATTORNEY FOR THE COUNTER-CLAIM
PLAINTIFF:

1
✓

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PLEASE TAKE NOTICE that the counterclaim Defendants, River City Developers, LLC, River City Real Estate, LLC and Benjamin Gecy, hereby move before the Honorable Marvin H. Dukes, III, Master in Equity and Special Circuit Court Judge for Beaufort County pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure for an Order reconsidering and/or clarifying that portion of his Order dated April 6, 2012 which provides as follows:

"IT IS HEREBY ORDERED:

...
e. River City Developers, LLC, River City Real Estate, LLC and Benjamin Gecy, their agents, servants and employees are restrained and prohibited from taking or receiving any draws on the aforesaid construction loan, and any such draws shall be utilized exclusively to pay subcontractors, materialmen, suppliers or laborers necessary for the completion of the residence."

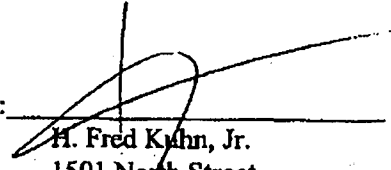
The movants respectfully request that the Court reconsider and/or clarify the aforesaid provision of its Order so as to allow the movants to be reimbursed from draws for advances made by the movants out of their separate funds for payments to subcontractors, materialmen, suppliers or laborers necessary for the completion of the residence. This motion is made upon the ground that said advances were made by the movants solely because the draws were temporarily frozen while the motion to reconsider the lifting of the lis pendens was pending.

This motion will be heard at such date, time and place as the Court may direct.

077

Respectfully submitted,

MOSS, KUHN & FLEMING, P.A.

By: 

H. Fred Kuhn, Jr.
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843)524-3373
(843)524-1302- FX

Beaufort, South Carolina
April 12, 2012

Attorneys for Plaintiff

078

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

SOMERSET POINT AT LADY'S ISLAND
HOMEOWNERS ASSOCIATION, INC.,

Plaintiff,

vs.

RIVER CITY DEVELOPERS, LLC, and
BENJAMIN GECY,

Defendants.

) IN THE COURT OF COMMON PLEAS
)
) CIVIL ACTION NO.: 11-CP-07-3945

NON-JURY

NOTICE OF MOTION AND
MOTION FOR RULE TO SHOW
CAUSE AND MOTION
TO STAY TIME TO APPEAL

2012 APR 27 PM 02
CLERK OF COURT
BEAUFORT COUNTY, S.C.

TO: H. FRED KUHN, ATTORNEY FOR THE DEFENDANTS RIVER CITY
DEVELOPERS, LLC and BENJAMIN GECY

PLEASE TAKE NOTICE that the Counterclaim Plaintiff, Somerset Point at Lady's Island HOA (hereinafter "Somerset") will, within ten (10) days, or as soon thereafter as may be heard, move this Court for a Rule to Show Cause for the Counterclaim Defendants, River City Developer and Benjamin Gecy (hereinafter referred to collectively as "River City") to show why they should not be held in contempt of court for failing to comply with a court order.

As grounds wherefore, Somerset states:

On April 6, 2012 this Court entered an Order wherein it required the Defendants to produce a Good Faith Estimate of projected proceeds of the sale of River City's property by Monday, April 16, 2012. See paragraph "F" of Order, attached as Exhibit A. River City failed to produce a Good Faith Estimate on or by Monday, April 16, 2012. Upon request of undersigned counsel via e-mail, counsel for River City replied on April 19, 2012 with an e-mail containing a speculative "ideal" calculation that was significantly inconsistent with prior representations by him regarding the expected proceeds of the sale. See e-correspondence attached as Exhibit B. Further requests by undersigned counsel for a Good Faith Estimate prepared by and signed by River City have been unanswered.

Somerset, has an interest in protecting its priority status of the Lis Pendens it filed in this matter. Without adequate assurances that the proceeds from River City's sale of the property are sufficient to cover the Lien Somerset filed subsequent to this Court's decision to lift the Lis Pendens,

Somerset must act to protect its interests by filing its Notice of Appeal for the denial of its Motion to Reconsider entered on by the Court on April 6, 2012.

Further argument to be presented ore-tenus.

WHEREFORE, Somerset respectfully requests that this Court enter a Rule to Show Cause directed to River City requiring it to show cause why River City should not be held in contempt of court for failing to comply with a court order. Somerset further respectfully requests that this Court enter an order staying the time for Somerset to file its Notice of Appeal until such time at this Motion is ruled upon.

RESPECTFULLY SUBMITTED,

EVERSOLE LAW FIRM, P.C.



Alysoun M. Eversole
1509 King Street
Beaufort, SC 29902
Phone: (843)379-3333
Fax: (843)379-5558

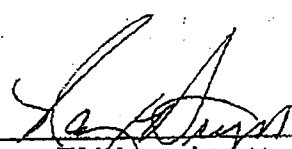
Beaufort, South Carolina
27th day of April, 2012.

2012 APR 27 PM 2:02
CLERK OF COURT
ROSEMEAU
BEAUFORT COUNTY, S.C.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 27th day of April, 2012 the foregoing Counterclaim Plaintiff's Notice of Motion and Motion for Rule to Show Cause has been served upon counsel for the Defendant River City by mail or delivery at the following addresses:

H. Fred Kuhn, Jr.
1501 North Street
P.O. Drawer 507
Beaufort, SC 29901



Nancy Wright, assistant to Alysoun M. Eversole, Esq.
EVERSOLE LAW FIRM, P.C.
1509 King Street
Beaufort, SC 29902
Phone: (843)379-3333
Fax: (843)379-5558

080

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-07-03945

RIVER CITY DEVELOPERS

SOMERSET POINT AT LADIES ISLAND HOMEOWNERS
ASSOCIATION, INC., ET AL

2012 MAY 31 PM 2:44
CLERK OF COURT

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: BEAUFORT COUNTY MASTER IN EQUITY

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.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ 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:

SOMERSET POINT AT LADIES ISLAND HOMEOWNERS ASSOCIATION'S MOTION FOR RULE TO SHOW CAUSE AND FOR EXTENSION OF TIME, FILED 4/27/2012, IS DENIED. RIVER CITY DEVELOPERS SHALL PROVIDE WITHIN 7 DAYS TO SOMERSET POINT AT LADIES ISLAND HOMEOWNERS ASSOCIATION THE ADDITIONAL DETAILS ON THE COST TO COMPLETE PROJECT.

ORDER INFORMATION

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

INFORMATION FOR THE PUBLIC 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)
		\$
		\$
		\$

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

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if additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

3069

Judge Code.

5/17/2012

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

H. FRED KUHN

ALYSOUN M. EVERSOLE

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: N/A

082

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
RIVER CITY DEVELOPERS, LLC
Plaintiff,

vs.

COOSAW INVESTMENTS, LLC,
HILTON C. SMITH, JR. and
SOMERSET POINT AT LADY'S
ISLAND HOMEOWNERS
ASSOCIATION, INC. fka COOSAW
RIVER ESTATES HOMEOWNERS
ASSOCIATION, LLC.,

Defendants.

AND

SOMERSET POINT LADY'S ISLAND
HOMEOWNERS ASSOCIATION, INC.,

Counterclaim Plaintiff,

vs.

RIVER CITY DEVELOPERS, LLC,
RIVER CITY REAL ESTATE, LLC and
BENJAMIN GECY,

Counterclaim Defendants.

IN THE COURT OF COMMON PLEAS
(Case No. 2012-CP-07-03945)
2013 JUL -3 AM 4:13

JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

NOTICE OF MOTION
AND MOTION

TO: E. MITCHELL GRIFFITH, Esquire, and MATTHEW D. CAVENDER,
Esquire, Attorneys for SOMERSET POINT AT LADY'S ISLAND
HOMEOWNERS ASSOCIATION, INC.

PLEASE TAKE NOTICE that River City Developers, LLC, by and through its
undersigned attorney, upon evidence heretofore presented and arguments duly made,
and upon such further hearing, if any, as the Court may require, will move before the

083

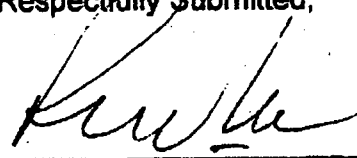
Honorable Marvin H. Dukes, III, Master in Equity and Special Circuit Court Judge for Beaufort County, South Carolina, at the Beaufort County Courthouse, 102 Ribaut Road, Beaufort, South Carolina, for the following relief:

1. An order construing the Order dated April 6, 2012, which was signed by Judge Dukes, with respect to the amount of net proceeds of the sale of property in Beaufort County known as 16 China Back that must be escrowed with the closing attorney in order to release and discharge the assessment lien that was heretofore recorded at the Register of Deeds for Beaufort County, South Carolina, on February 10, 2012, in Book 00076 at Pages 0457-0459.

THIS MOTION is based upon the language of the Order dated April 6, 2012, as well as upon the undersigned's correspondence to counsel for Somerset Point and to the Court dated June 14, 2012 and June 25, 2012, respectively.

BY SIGNING herein bellow, the movant's counsel affirms that, prior to filing this motion, he communicated with opposing counsel, both on the telephone and in writing, in a good faith effort to resolve the subject matter of the motion.

Respectfully Submitted,

By: 
Robert V. Mathison, Jr.
Attorney for
River City Developers, LLC

MATHISON & MATHISON
Post Office Box 5271
Hilton Head Island, SC 29201
Telephone: (843) 785-6503
Facsimile: (832) 785-6170
Email: rmathlaw@aol.com

July 1, 2013

Hilton Head Island, South Carolina.

084

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
(Case No. 2012-CP-07-03945)

RIVER CITY DEVELOPERS, LLC)
Plaintiff,)

vs.)

ORDER

COOSAW INVESTMENTS, LLC,)
HILTON C. SMITH, JR. and)
SOMERSET POINT AT LADY'S)
ISLAND HOMEOWNERS)
ASSOCIATION, INC. fka COOSAW)
RIVER ESTATES HOMEOWNERS)
ASSOCIATION, LLC.,)
Defendants.)

AND)

SOMERSET POINT LADY'S ISLAND)
HOMEOWNERS ASSOCIATION, INC.,)
Counterclaim Plaintiff,)

vs.)

RIVER CITY DEVELOPERS, LLC,)
RIVER CITY REAL ESTATE, LLC and)
BENJAMIN GECY,)
Counterclaim Defendants.)

2013 JUL -3 AM 11:13
JENNIFER ROSENBAUM
BEAUFORT COUNTY, S.C.
CLERK OF COURT

THIS matter came before me on the motion of River City Developers, LLC
(herein "River City"), which is the Plaintiff in the action captioned first above. River City,
as the owner of real property in Beaufort County known as 16 China Back, is also the
defendant in a foreclosure action brought by the lender, Normandy Corporation (Case
No. 2012-CP-07-03986). River City has identified and qualified a buyer for the house

✓

subject to the mortgage held by Normandy Corporation, and completion of the sale should resolve the foreclosure action.

The motion brought by River City asks me to construe certain language in my Order in this case dated April 6, 2012. In that order I fashioned an equitable remedy, substituting funds to be held in escrow from a closing of River City's property for an assessment lien so that the assessment lien could be released and discharged from the property. My purpose was to facilitate a sale, which appeared to be not only equitable but in the best interests of all parties.

However, a dispute arose about the amount of funds to be held in escrow, with the Defendant in this case, Somerset Point at Lady's Island Homeowners Association, Inc. (herein "Somerset Point"), contending that the amount escrowed should be \$55,633.54, that is, more than \$20,000.00 more than the amount set forth in the Order dated April 6, 2012. The primary reason for the increase, according to Somerset Point, is that it has incurred additional attorney's fees since the entry of the Order dated April 6, 2012.

The relevant provision in the order in question is found in paragraph (d) on page 4 of the Order and reads as follows:

At closing, after payment of all reasonable and customary closing costs, expressly including payment of the first mortgage and security interest held by Normandy Corporation as it relates to the property located at 16 China Back, the subject property in this litigation, the net proceeds which would ordinarily be paid to the seller, *in the amount of the claimed lien (or up to the amount of the claimed lien if the proceeds are less than the lien, i.e. \$33,345.00)* shall be held in escrow by the closing attorney and shall not be distributed to River City . . . until further order of the Court. Order dated April 6, 2012, at 4 (italics added).

086

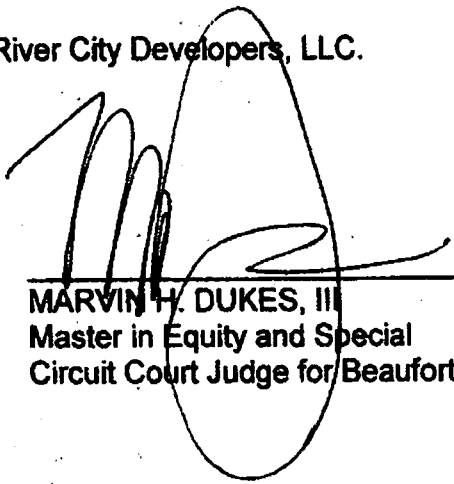
The plain meaning of that provision, in my view, is that the amount of net proceeds to be escrowed with the closing attorney is equal to the "the amount of the claimed lien," which, in turn, is equated to or defined as \$33,345.00.

I can recall that the order in question was drafted, critiqued and redrafted by both of the parties which now disagree about its meaning. Had the parties chosen to include such amounts as would subsequently become due and payable to Somerset Point, language to that effect certainly could have been included.

However, no such escalator was included, and nothing else in the order militates against the plain meaning of the paragraph quoted above.

Accordingly, I find and conclude that the amount of the escrow established by the Order dated April 6, 2012, is \$33,345.00, which shall be held in escrow by the closing attorney pending further order of this Court. The balance of the net proceeds of the sale shall be paid to the seller of 16 China Back, River City Developers, LLC.

AND IT IS SO ORDERED.



MARVIN H. DUKES, III
Master in Equity and Special
Circuit Court Judge for Beaufort County

July 2, 2013

Beaufort, South Carolina.

087

NOTICE OF APPEAL IN A CIVIL CASE
THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Marvin H. Dukes, III, Master in Equity and Special Circuit Court Judge

Case No. 2011-CP-07-3945

RIVER CITY DEVELOPERS, LLC,
Respondent,

v.

COOSAW INVESTMENTS, LLC, HILTON C.
SMITH, JR. and SOMERSET POINT AT
LADIES ISLAND HOMEOWNERS
ASSOCIATION, INC. f/k/a COOSAW RIVER
ESTATES HOMEOWNERS ASSOCIATION, LLC,

Appellant.

NOTICE OF APPEAL

Coosaw Investments, LLC, Hilton C. Smith, Jr., Somerset Point at Ladies Island Homeowners Association, Inc. f/k/a Coosaw River Estates Homeowners Association, LLC, appeals the May 31, 2012, Order of the Honorable Marvin H. Dukes, III, including all orders underlying the said Order. A true copy of the May 31, 2012, Order is attached hereto. Appellant received written notice of entry of the Order denying reconsideration on June 1, 2012.

June 28, 2011

Marshall H. Waldron, Jr.
MARSHALL H. WALDRON, JR.
MATTHEW D. CAVENDER
Griffith, Sadler & Sharp, P.A.
Post Office Drawer 570
Beaufort, South Carolina 29901
843-521-4242
Attorneys for the Appellant

Other Counsel of Record:
H. FRED KUHN, JR.
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
843-524-3373
Attorney for the Respondent

12 JUL -2 PM 3:21
J.S.C.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

68617
088

APPEAL FROM BEAUFORT COUNTY
Marvin H. Dukes III, Master-in-Equity and Special Circuit Court Judge

Civil Action No. 2011-CP-07-03945
Appellate Case No. 2012-212441

River City Developers, LLC Respondent

v.

Coosaw Investments, LLC; Hilton C.
Smith Jr.; and Somerset Point at Ladies
Island Homeowners Association, Inc.
f/k/a Coosaw River Estates
Homeowners Association, LLC Appellants

MOTION TO STAY

E. Mitchell Griffith
Matthew D. Cavender
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mgriffith@griffithsadlerssharp.com
mcavender@griffithsadlerssharp.com

Attorneys for the Appellants

RECEIVED
JUN 04 2013

SC Court of Appeals

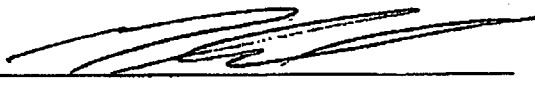
The Appellant hereby moves, pursuant to Rule 240, SCACR, for an order staying this appeal. This appeal involves a lis pendens that was placed on property owned by the Respondent as a result of monies owed to Appellant Somerset Point at Ladies Island Homeowners Association, Inc. ("Somerset Point"). The property that is the subject of this action is currently the subject of a separate foreclosure action, civil action number 2012-CP-07-03986, initiated by Normandy Corporation to recover money owed on a note given to Normandy by the Respondent. The proceedings resulting from the foreclosure sale will likely be sufficient to pay off both Normandy and Somerset Point, which will make this appeal moot. Staying this appeal until the foreclosure is completed will save the parties costs that would be incurred in pursuing the appeal and will also conserve scarce judicial resources. Accordingly, the Appellants respectfully request that this Court stay this appeal pending the completion of the foreclosure proceedings.

[SIGNATURE PAGE FOLLOWS]

090

GRIFFITH, SADLER & SHARP, P.A.

By:


E. Mitchell Griffith
Matthew D. Cavender
600 Monson Street
PO Drawer 570
Beaufort, SC 29901-0570
(843) 521-4242
(843) 521-4247 (fax)
mgriffith@griffithsadlersharp.com
mcavender@griffithsadlersharp.com

Attorneys for the Appellant

May 31, 2013
Beaufort, South Carolina

The South Carolina Court of Appeals

River City Developers, LLC, Respondent,

v.

Coosaw Investments, LLC, Hilton C. Smith Jr. and
Somerset Point at Ladies Island Homeowners
Association, Inc. f/k/a Coosaw River Estates
Homeowners Association, LLC, Appellant.

And

Somerset Point Lady's Island Homeowners Association,
Inc., Counterclaim Plaintiff,

v.

River City Developers, LLC, River City Real Estate,
LLC, and Benjamin Gecy, Counterclaim Defendants.

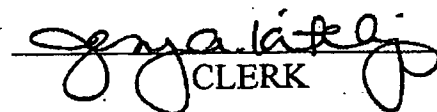
Appellate Case No. 2012-212441

ORDER

After careful consideration, the motion to stay this appeal is denied. However, the Court will grant an extension of time to order the transcript to allow some time for the related foreclosure to proceed. Without more detail regarding when the foreclosure may occur, we will not delay the resolution of this appeal. Accordingly, the appellant must make satisfactory arrangements in writing with the court reporter by August 2, 2013, or request another extension of time.

FOR THE COURT

BY


CLERK

FILED

7-3-13 AS

092

Columbia, South Carolina

cc:

H. Fred Kuhn, Jr.

Marshall H. Waldron, Jr.

Matthew David Cavender

Ernest Mitchell Griffith

093

69362

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Marvin H. Dukes III, Master-in-Equity and Special Circuit Court Judge

Civil Action No. 2011-CP-07-03945
Appellate Case No. 2012-212441

River City Developers, LLC Respondent

v.

Coosaw Investments, LLC; Hilton C.
Smith Jr.; and Somerset Point at Ladies
Island Homeowners Association, Inc.
f/k/a Coosaw River Estates
Homeowners Association, LLC Appellants

MOTION TO WITHDRAW APPEAL

E. Mitchell Griffith
Matthew D. Cavender
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mcavender@griffithsadlersharp.com

Attorneys for the Appellants

RECEIVED

AUG 08 2013

SC Court of Appeals

The Appellants hereby move to withdraw this appeal pursuant to Rule 260(c), SCACR. This appeal involves the correctness of the lower court's order striking a lis pendens that was placed on the Respondents' property as a result of monies owed to Appellant Somerset Point at Ladies Island Homeowners Association, Inc. The property has since sold to a third party, and the issue presented by the appeal is now moot. Accordingly, the Appellants hereby withdraw this appeal.

GRIFFITH, SADLER & SHARP, P.A.

By: 

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Matthew D. Cavender
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mcavender@griffithsadlersharp.com

Attorneys for the Appellant

August 5, 2013
Beaufort, South Carolina

075

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Marvin H. Dukes III, Master-in-Equity and Special Circuit Court Judge

Civil Action No. 2011-CP-07-03945
Appellate Case No. 2012-212441

River City Developers, LLC Respondent

v.

Coosaw Investments, LLC; Hilton C.
Smith Jr.; and Somerset Point at Ladies
Island Homeowners Association, Inc.
f/k/a Coosaw River Estates
Homeowners Association, LLC Appellants

CERTIFICATE OF SERVICE

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Matthew D. Cavender
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RECEIVED

AUG 08 2013

SC Court of Appeals

Attorneys for the Appellants

096

I am a legal assistant at Griffith, Sadler & Sharp, P.A., and on August 5, 2013, I placed a copy of the Appellants' *Motion to Withdraw Appeal* in the US Mail, with first-class postage prepaid, and addressed as follows:

H. Fred Kuhn Jr.
Moss, Kuhn & Fleming, PA
PO Drawer 507
Beaufort, SC 29901

Robert V. Mathison Jr.
PO Box 5271
Hilton Head Island, SC 29938


Chautae Elmore

0917



GRIFFITH SADLER SHARP
ATTORNEYS AT LAW

Matthew D. Cavender
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W griffithsadlerssharp.com
E mcavender@griffithsadlerssharp.com

E. MITCHELL GRIFFITH+
NANCY D. SADLER+
MARY E. SHARP++
O. EDWORTH LIFFERT, III
MICHAEL D. FREEMAN+
KELLY DENNIS DEAN
MATTHEW D. CAVENDER
MARSHALL H. WALDRON, JR.
(OF COUNSEL)
+ certified mediator
+ also admitted in NC

August 5, 2013

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

**RE: Normandy Corporation v. River City Developers, LLC; and Somerset
Point at Lady's Island Homeowners Association, Inc.
Civil Action No. 2011-CP-07-03945
Appellate Case No. 2012-212441
GS&S File No.: 9221**

Dear Ms. Kitchings:

Please find the original and seven copies of the enclosed Motion to Withdraw Appeal in reference to the above captioned matter. I would appreciate you filing the original and returning a clocked copy to me in the enclosed self-addressed stamped envelope.

With kindest regards, I remain

Very truly yours,

Matthew D. Cavender

MDC/cde

Enclosures

cc: H. Fred Kuhn Jr.
Robert V. Mathison Jr.

RECEIVED

AUG 08 2013

SC Court of Appeals

The South Carolina Court of Appeals

River City Developers, LLC, Respondent,

v.

Coosaw Investments, LLC, Hilton C. Smith Jr. and
Somerset Point at Ladies Island Homeowners
Association, Inc. f/k/a Coosaw River Estates
Homeowners Association, LLC, Appellant.

And

Somerset Point Lady's Island Homeowners Association,
Inc., Counterclaim Plaintiff,

v.

River City Developers, LLC, River City Real Estate,
LLC, and Benjamin Gecy, Counterclaim Defendants.

Appellate Case No. 2012-212441

ORDER

The appellants wish to withdraw their appeal. Accordingly, this matter is dismissed. The remittitur will be sent as provided by Rule 221(b), SCACR.

FOR THE COURT

BY

Joy A. Kitchin
CLERK

FILED

8-12-13 AS

Columbia, South Carolina

cc:

H. Fred Kuhn, Jr.

Marshall H. Waldron, Jr.

Matthew David Cavender

Ernest Mitchell Griffith



100

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

August 29, 2013

The Honorable Jerri Ann Roseneau
PO Box 1128
Beaufort SC 29901-1128

REMITTITUR

Re: River City Developers, LLC, v. Coosaw Investments
Lower Court Case No. 2011CP0703945
Appellate Case No. 2012-212441

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: H. Fred Kuhn, Jr.
Marshall H. Waldron, Jr.
Matthew David Cavender
Ernest Mitchell Griffith

The South Carolina Court of Appeals

River City Developers, LLC, Respondent,

v.

Coosaw Investments, LLC, Hilton C. Smith Jr. and
Somerset Point at Ladies Island Homeowners
Association, Inc. f/k/a Coosaw River Estates
Homeowners Association, LLC, Appellant.

And

Somerset Point Lady's Island Homeowners Association,
Inc., Counterclaim Plaintiff,

v.

River City Developers, LLC, River City Real Estate,
LLC, and Benjamin Gecy, Counterclaim Defendants.

Appellate Case No. 2012-212441

ORDER

The appellants wish to withdraw their appeal. Accordingly, this matter is dismissed. The remittitur will be sent as provided by Rule 221(b), SCACR.

FOR THE COURT

BY

Joy A. Kitchin
CLERK

FILED

8-12-13 AS

Columbia, South Carolina

cc:

H. Fred Kuhn, Jr.

Marshall H. Waldron, Jr.

Matthew David Cavender

Ernest Mitchell Griffith

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In the Court of Common Pleas for the
State of South Carolina, County of Beaufort

Case No.: 2014-CP0702670

Benjamin C. Gecy, et al,

Plaintiff(s),

vs.

Transcript of Record

Somerset Point at Lady's
Island Homeowners' Association, Inc.,
et al,

Defendant(s).

August 4, 2015

Beaufort, South Carolina

BEFORE:

The Honorable CARMEN T. MULLEN

1

APPEARANCES

2

3

REPRESENTING PLAINTIFF(S):

4

Robert V. Mathison, Jr., Esquire

5

Post Office Box 5271

6

Hilton Head Island, SC 29938

7

rmathlaw@aol.com

8

9

10

REPRESENTING DEFENDANT(S):

11

12

Peden Brown McLeod, Jr., Esquire

13

145 King Street

14

Suite 300

15

Charleston, SC 29401

16

brown.mcleod@walltempleton.com

17

18

19

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21

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1

PROCEEDINGS

2

THE COURT: Do we have everyone here? Are we waiting on anyone in this Gecy versus Somerset?

3

4

MR. MCLEOD: Mr. Mathison just walked out.

5

THE COURT: Who is on the other side of that; do you know?

6

7

MR. MCLEOD: On our --

8

THE COURT: Your motion.

9

MR. MCLEOD: It is Robert Mathison. He just walked out.

10

11

THE COURT: Okay. I need a file on this one too, y'all.

12

13

THE CLERK: I'm fixing to send an instant message. You want the Cry Babies?

14

15

THE COURT: The one that the Harvey put on the record and on the first motion, 2013 -- 6670, Gecy versus Somerset. And after that I'll take up the Gambrell versus International Spa. Okay. Do you see Mr. Mathison? Does someone want to pop out and grab him?

16

17

18

19

MR. MATHISON: Sorry, Your Honor, I have been driving for a long time.

20

21

THE COURT: Where did you come in from, Mr. Mathison?

22

23

MR. MATHISON: (Inaudible) North Carolina.

24

25

1 THE COURT: Okay.

2 MR. MATHISON: May it please the Court, I have
3 a memorandum that goes with the underlying case and
4 sometimes the devil is in the details.

5 THE COURT: Correct me if I am wrong, There
6 were additional motions in this case. There was a
7 conflict with an attorney, Mr. John Rogers, and we
8 continued those two motions but were going forward
9 with the other two; is that right?

10 MR. MCLEOD: That's right.

11 THE COURT: Okay. I'm just reading an email on
12 that now, so I appreciate y'all. Okay.

13 So, the two motions that we are going forward on
14 are what?

15 MR. MCLEOD: Well, Brown McLeod on behalf of
16 Hilton Smith, Junior, Hilton Smith, Junior Inc., and
17 Coosaw Investments LLC. We have a motion for
18 partial summary judgment as to the claims for
19 malicious prosecution. We have an alternative to
20 that motion to stay this case. And then an
21 alternative to that motion to amend our pleading.

22 THE COURT: Okay.

23 MR. MCLEOD: The basis of our motion for
24 partial summary judgment is that the case that the
25 claims for malicious prosecution are arising from,

1 that case is still pending.

2 THE COURT: That hasn't been resolved?

3 MR. MCLEOD: It is --

4 THE COURT: If we can't say yes at this point
5 that it is in their favor, correct? I agree.

6 MR. MCLEOD: Right. That is the basis of it.
7 The problem is the devil is in the details, as
8 Mr. Mathison stated. The underlying case involves a
9 lot at Somerset Point at Lady's Island.

10 THE COURT: Okay.

11 MR. MCLEOD: The River City Developers owned
12 that lot and were seeking to put a house on it,
13 build a house on it. I guess as a spec home of some
14 sort I guess. And during those attempts in
15 constructing a house on this lot the Plaintiffs are
16 under the belief that they were being inhibited or
17 prohibited or somehow hindered from doing so. And
18 so based on that belief they filed an underlying
19 claim or case against my clients as well as Somerset
20 Homeowner's Association.

21 THE COURT: Okay.

22 MR. MCLEOD: And that underlying case involved
23 a claim for breach of fiduciary duty, breach of
24 contract. And a violation of the Unfair Trade
25 Practices Act.

1 THE COURT: Okay.

2 MR. MCLEOD: And so when that complaint was
3 filed all of the Defendants answered, including my
4 clients. But Somerset Point Homeowner's
5 Association, which is not my client, filed
6 counterclaims.

7 THE COURT: Okay.

8 MR. MCLEOD: Against -- against the Plaintiff,
9 River City Developers.

10 THE COURT: Okay.

11 MR. MCLEOD: And in addition to filing
12 counterclaims they also named Mr. Gecy and then
13 River City Real Estate, a separate -- so, they
14 brought in two new parties. They filed
15 counterclaims. They brought in two more parties.
16 And then Somerset Homeowner's Association filed a
17 lis pendens on that lot saying -- you know, letting
18 everybody -- all third parties know that there's
19 litigation involving that lot.

20 So the Plaintiffs filed a motion to strike the lis
21 pendens. That motion is heard by Judge Dukes. Judge
22 Dukes grants the motion to strike the lis pendens.
23 About the time when that order was given or handed down
24 or filed Somerset Homeowner's Association files an
25 assessment lien against that property.

1 THE COURT: Okay.

2 MR. MCLEOD: And soon after that they file a
3 motion to strike the assessment lien and Somerset
4 Homeowner's Association files a motion to reconsider
5 the order striking the previous lis pendens.

6 THE COURT: Okay.

7 MR. MCLEOD: So, Judge Dukes hears them again.

8 THE COURT: Then, what does he do after that?

9 MR. MCLEOD: He denies both of them.

10 THE COURT: Okay.

11 MR. MCLEOD: And then he takes that
12 opportunity --

13 THE COURT: So, he agrees that he originally
14 removed the lis pendens, so that is gone. And how
15 did he rule on the Homeowner's Association lien?

16 MR. MCLEOD: He denied both motions. The
17 motion to reconsider, denied. The motion to strike
18 the assessment lien, denied.

19 THE COURT: Denied, okay. So, there's a lien
20 now to the Homeowner's Association. Okay.

21 MR. MCLEOD: Now, this is the important part,
22 Your Honor. In the second order by Judge Dukes he
23 clarifies the reasoning for striking the lis
24 pendens, and he basically says that after balancing
25 the equities he says that it was an equitable

1 decision in striking that lien. And the reason he
2 does it is because the lis pendens was filed either
3 hours or a day before a mortgage was filed on it.
4 And the mortgage was for financing the construction
5 of the project.

6 THE COURT: Got it.

7 MR. MCLEOD: And in the second order he says it
8 doesn't do anybody any good to have that lis pendens
9 in front of -- and I'm paraphrasing. It doesn't do
10 anybody any good to have that lis pendens in front
11 of the mortgage, because doing so the bank won't
12 give them any money, so it just sits there. So he
13 strikes the lis pendens after balancing the
14 equities.

15 THE COURT: Okay.

16 MR. MCLEOD: Somerset files an appeal with
17 regard to the lis pendens, and it goes up. While
18 it's pending, this is -- it goes up to the Court of
19 Appeals. It is there pending. And in the meantime
20 that property is sold. And so, then Somerset sends
21 a letter to the Court of Appeals saying the lis
22 pendens issue is moot.

23 THE COURT: Gecy sold the property?

24 MR. MCLEOD: Right, they sold the property.

25 The issue of the lis pendens is moot now. And they,

1 Somerset, notifies the Court of Appeals. The Court
2 of Appeals withdraws -- or they withdraw the appeal.
3 And the rest of the case is still pending right now.

4 THE COURT: Okay.

5 MR. MCLEOD: The Court knows the elements to
6 malicious prosecution. You have to have, I
7 mentioned it earlier, terminated. So that case is
8 not terminated, so that is the basis of our motion.
9 They assert in this action that those two claims,
10 the abuse of process and malicious prosecution are
11 related to those counterclaims in the lis pendens.
12 Those counterclaims are still pending. The lis
13 pendens, we believe, has not been terminated in
14 their favor because Judge Dukes ruled on equitable
15 grounds.

16 And the general rule is, in order for a matter to
17 be terminated in someone's favor, it must be on
18 substantive grounds. Now, that is the general rule and
19 there's no case law in South Carolina that I can find,
20 but there's a general rule. And I cite some other
21 jurisdictions in my memo about the general rule having
22 to be substantive. And again, his ruling was
23 equitable.

24 THE COURT: Okay.

25 MR. MCLEOD: And then thirdly, my clients are

1 not Somerset Point Homeowner's Association, my
2 clients are one of -- Coosaw was the developer of
3 it. But Somerset filed these counterclaims,
4 Somerset filed these lis pendens and filed the
5 assessment. My clients didn't. And so that is sort
6 of the third argument there. There's been no
7 allegations as to piercing the corporate veil that I
8 have seen.

9 THE COURT: And tell me again, you represent
10 who?

11 MR. MCLEOD: Hilton C. Smith, Junior,
12 individually.

13 THE COURT: Who is what?

14 MR. MCLEOD: He is the -- he is the shareholder
15 of Coosaw Investments, and Coosaw Investments was
16 the developer of Somerset. So, thank you, Your
17 Honor.

18 THE COURT: Okay. All right. Mr. Mathison.

19 MR. MATHISON: Let's take care of the third
20 item first. If you look at the caption you will see
21 every Defendant on there is owned or controlled by
22 Hilton C. Smith Junior. That is why all of these
23 people are named. He has become an agent in every
24 one of these entities. When the Homeowner's
25 Association filed the counterclaim he used their

1 money to pay an attorney. Hilton C. Smith did.

2 So, the reason that all of these people are named
3 is that Mr. Smith is the operative agent of evil and
4 everything he did is imputable to all of the people for
5 whom he works and who he controls. That is vicarious
6 liability. I don't think that we need to go into that
7 any further.

8 Next, Mr. Templeton, who filed this motion, read
9 my pleading. My pleading doesn't say that the action
10 has been dismissed. It doesn't say that there's been a
11 favorable determination in the underlying action. What
12 my pleading says is that the lis pendens is gone, and
13 it is for three reasons. First, the order striking it,
14 there was a motion filed to reconsider. That motion
15 was heard and denied on April 6th. On April 27th the
16 attorney for Somerset, who is the counterclaim
17 defendant in the underlying case, filed a motion to
18 stay time for appeal. And in that motion she said that
19 unless the time was stayed for her to appeal from the
20 motion for summary judgment -- excuse me, from the
21 motion to strike having been granted and the motion to
22 reconsider having been denied, she would be constrained
23 to appeal for a motion she had just filed which had to
24 do with the equitable remedy that the Judge fashioned
25 later on could not be heard. I'm not certain what the

1 Judge thought upon seeing that motion, but he didn't do
2 anything with it.

3 And on May 6th, 2012 the appeal should have been
4 filed and it was not. Consequently, regardless of
5 whether it was appealed later, it was appealed on May
6 31st, the lis pendens issue has been resolved. It is
7 the law of the case.

8 Now, when they went in and filed their dismissal
9 it made it clear because that portion of the case is
10 over. And I understand where the Defendants are coming
11 from. If you look at conventional law in South
12 Carolina, what it says is that there must be a
13 favorable termination. But there is no case directly
14 in point in South Carolina on this, with the exception
15 of the fingers that are pointed in a case that is an
16 affirmant to me, it is the Pond Place Partners versus
17 Poole case, which I think is wrongly decided. But
18 whether it is or whether it isn't, here is what they
19 said in Section 5 of that case. They said lastly --
20 and this is a section called "alternative relief."

21 "Lastly, we are not unmindful of the fact that our
22 holding above may limit the prosecution of actions for
23 slander of title." However, it does not extinguish
24 every form of relief when a party files a lis pendens
25 that is motivated by some malicious intent. The

1 jurisdictions are in agreement that the proper action
2 against a maliciously-filed lis pendens is under abuse
3 of process or malicious prosecution. And then it cites
4 nine different cases, six of which hold that malicious
5 prosecution is a proper remedy for a wrongly-filed lis
6 pendens. And seven, allowing for the fact that some
7 hold both, endorses abuse of process.

8 There isn't abuse of process action in this case,
9 they haven't moved against that. Why is this
10 important? This is the Court that just reigned in
11 slander of title, just pulled it up by the reigns,
12 saying, Go over here to this venue, malicious
13 prosecution and abuse of process. And the reason they
14 did that is they were aware that the restatement,
15 second, of torts, which fortunately has been adopted at
16 virtually every particular by the State of South
17 Carolina, specifies two different actions for malicious
18 prosecution. The first one is the case in which there
19 is a prosecution in the criminal context, traditional
20 malicious prosecution. Restatement calls that wrongful
21 use of criminal proceedings.

22 The restatement classifies what this action is
23 about is, quote, wrongful use of civil proceedings.
24 Chapter 30 starting with Section 674 is the Bible in
25 terms of malicious prosecution in a civil context.

1 Now, I would ask the Court to turn to Page 455 under
2 Section 674 and you will see "ancillary proceedings".

3 THE COURT: I just read it.

4 MR. MATHISON: And this is what this case is
5 all about. It is not about the underlying cause of
6 action. My client doesn't have to win that. This
7 is about a meretricious lis pendens that was filed,
8 dismissed, and then five days before it was actually
9 stricken the same Plaintiff went back and filed an
10 assessment lien. It is egregious. And this is the
11 kind of case that a defense lawyer ought to be in
12 here saying, We need to get rid of this sort of
13 stuff, it pollutes the system. Because it does.
14 This is heavy-handed litigation by coercion.

15 This provision, Section F, endorses what Plaintiff
16 is doing in this case. And I submit to the Court that
17 this is the law of the State of South Carolina.
18 Notwithstanding the fact that we haven't gotten to this
19 decision yet. This case may be when we get to it. But
20 that is the law. There's no question for what -- a lis
21 pendens is an ancillary proceeding. If you look at the
22 rules of court, extraordinary relief, an injunction is
23 an ancillary proceeding, so is a claim of delivery act,
24 so is an attachment.

25 The interesting thing about all of those is that

1 they require judicial intervention before someone
2 encumbers somebody else's property. They require a
3 Judge. It used to be that a Clerk of Court could do
4 it, but thanks to Fuentes versus Shevin we need to have
5 a Judge look at it, the bonafide Judge. And if he
6 doesn't like it he can decline it in his discretion.
7 Or if she finds it a bit sketchy, she can require a
8 bond, a bond conterminous with what the victim might
9 lose by this kind of process. Not so the lis pendens.
10 No one looks at that before it gets slapped on the
11 register of deeds. And unless the Defendant files a
12 motion and makes it an issue it sits there with no bond
13 ever. It is a stretch and an overreach any time that
14 it's used except in a context called for by the
15 statute.

16 South Carolina Code Section 15-11-10. And that
17 statute requires that the action must affect the title
18 to real property. The reason Judge Dukes got rid of
19 this lis pendens, and did so summarily, the only cause
20 of action stated by way of counterclaim, by the
21 counterclaiming association, was a request for an
22 injunction. What they wanted to do was enjoin my
23 client from building his house. That manifestly does
24 not affect title to real property.

25 Subsequently, forgive me, when the case started,

1 this is one of these cases where everybody decided they
2 were sick of the other side, so both sides went to the
3 courthouse. My client filed a claim. He got here a
4 little bit earlier. He sued them for breach of
5 fiduciary duty, for breach of contract, and for unfair
6 trade practices. All right. They at the same time
7 were suing my client to get an injunction to prevent
8 him from building his house. When it became clear that
9 they were not going to get a restraining order or a
10 temporary injunction, for two reasons --

11 THE COURT: What was the problem? I mean, what
12 is the underlying problem?

13 MR. MATHISON: It has to do with the use of the
14 covenants and the design standards to favor
15 contractors inside this planned unit development who
16 are owned by the developer. Mr. Smith is the common
17 denominator in all of these entities. And what he
18 would --

19 THE COURT: So, you are saying that the ARB
20 didn't approve; is that what happened?

21 MR. MATHISON: Actually, the -- my client built
22 houses before there was an ARB.

23 THE COURT: Okay.

24 MR. MATHISON: And then they came in, they are
25 trying to get traction in the community, established

1 an ARB and basically told him that he was violating
2 all of the rules.

3 THE COURT: Because they wanted their own
4 builders?

5 MR. MATHISON: Right.

6 THE COURT: Okay. Did they ever approve -- at
7 that point, if the ARB wasn't in place, did the
8 homeowners' association -- who had to approve the
9 plans?

10 MR. MATHISON: There was a realtor in the area,
11 his name is Greg Bennett, who approved the plans.
12 He did the first three.

13 THE COURT: Okay.

14 MR. MATHISON: One of the issues in this case
15 is that --

16 THE COURT: That is the whole issue, is that
17 they don't like -- that they didn't want this
18 particular builder, so they said that they didn't
19 like this house?

20 MR. MATHISON: We think it is. They, of
21 course, don't think so. My client, in all honesty,
22 went and told Mr. Smith where he thought he was not
23 obeying the design standards, and Mr. Smith pointed
24 out that he was the developer and he could exempt
25 himself and had. And when Mr. Gecy pointed out that

1 all of these construction companies weren't the
2 developer, he proceeded to go back and conferred
3 upon them, all three of them, developer rights so
4 that they could violate the covenants too.

5 And then he took my client to court in an
6 injunction case. That is the underlying case. And for
7 what it's worth, I think that I can win that case. But
8 I don't have to win it to state a claim for malicious
9 prosecution because Section 674 of the restatement,
10 second, of torts says that this is a proper plea, and
11 that it should not be dismissed, summary judgment
12 shouldn't be granted on it. We should go forward in
13 this case. And if anything the only time that the
14 Court should consider whether or not the issue of
15 summary judgment would be when we get to the end we see
16 what the evidence shows. Thank you, Your Honor.

17 THE COURT: Thank you. Yes, sir.

18 MR. MCLEOD: Your Honor, again, I mentioned the
19 general rule. It was no -- under the general rule
20 there is no termination in favor of them. It was
21 purely equitable reasons why he, why Judge Dukes
22 struck the lis pendens. I mean, what we just heard
23 was all of the underlying stuff. That stuff needs
24 to be hashed out. And that supports the motion to
25 stay. But that case hadn't been hashed out, so

1 these claims aren't ripe.

2 He mentioned malicious intent. I mean, Judge
3 Dukes didn't have anything in the order about malicious
4 intent of the lis pendens. I think that is something
5 that has to be dealt --

6 THE COURT: That would be commenting on the
7 fact and I can't ask him to do that.

8 MR. MCLEOD: Right. Right. So we believe that
9 it's premature and they haven't been terminated in
10 his favor and so we are entitled to summary
11 judgment. If not we ask that this case be stayed to
12 let all of that stuff get hashed out. I'm not
13 involved in the underlying case. So, I can't -- you
14 know, I have listened -- I have heard some of that
15 stuff, but I'm not as familiar with it as he is.

16 THE COURT: Let me just ask you, just in
17 thinking about it, I would typically agree with you
18 and say, until there's a final disposition he can't
19 bring a malicious prosecution case. And I would say
20 that the statute of limitations doesn't begin
21 running until that underlying case has a final
22 conclusion. However, we also have in this case, I'm
23 assuming, other causes of action. And my question
24 to you is: Would he be precluded from bringing a
25 malicious prosecution case if he's already litigated

1 in this second case having to do with the same
2 issues? Not necessarily the same, all of the causes
3 of action, but the same issues? Do you see what I'm
4 saying?

5 MR. MCLEOD: I totally -- that is a very good

6 --

7 THE COURT: I would normally, like I said, I
8 would agree with you, but again would he be --
9 because it was the same issues, would he be
10 precluded?

11 MR. MCLEOD: And that is fine. Get rid of the
12 malicious prosecution claims and go forward on the
13 abuse of process.

14 THE COURT: You really think you can get sued
15 twice? I mean, that lis pendens would still be open
16 depending on whatever happens in the, you know, in
17 the underlying case. I mean, that means potentially
18 he gets two bites of the apple.

19 MR. MCLEOD: True.

20 THE COURT: What are the other causes of action
21 in your case? I mean, is it the breach of fiduciary
22 duty, breach of contract, and the unfair trade
23 practices?

24 MR. MCLEOD: That is his case, yes.

25 THE COURT: That is your underlying case?

1 MR. MATHISON: That is the underlying case,
2 yes.

3 THE COURT: What else do you have in this case,
4 other than abuse of process and malicious
5 prosecution, what other causes of action?

6 MR. MATHISON: I have abuse of process and
7 malicious prosecution because that is what
8 contemplates --

9 THE COURT: No, no, I am asking what other
10 causes of action in this second case do you have?

11 MR. MATHISON: Abuse of process.

12 THE COURT: Adn that is it?

13 MR. MATHISON: That is it.

14 THE COURT: Just those two?

15 MR. MATHISON: Correct. And they are not in
16 the alternative. They are both at stake.

17 THE COURT: Got it, okay. And you haven't
18 moved on the abuse of process, correct?

19 MR. MCLEOD: No, Your Honor, because I don't
20 think that the determination, it is the same
21 elements. Otherwise, we would.

22 THE COURT: Okay.

23 MR. MCLEOD: But, you know, alternative, we
24 seek to stay this or --

25 THE COURT: I'll tell you, I do think that it

1 is premature. I think the Supreme Court very
2 clearly set out when you could bring a malicious
3 prosecution case. I am going to grant summary
4 judgment to that, but obviously he is going to have
5 leave to file it. And I don't think that his
6 statute of limitations begins running until that
7 underlying case is resolved. I think that he has
8 the time.

9 MR. MATHISON: May it please the Court.

10 THE COURT: Yes, sir.

11 MR. MATHISON: I haven't pleaded the case that
12 you want me to plea. I haven't pleaded termination
13 of the underlying case, I have pleaded a favorable
14 outcome with respect to the lis pendens. All right.

15 In addition, I would ask that you read the
16 procedural background. Because what's been stated here
17 that Judge Dukes went back and modified his previous
18 order isn't accurate. What my learned colleague says
19 when you ask him --

20 THE COURT: Do you have a copy of his previous
21 order for me?

22 MR. MATHISON: Yes, it is actually attached to
23 their motion.

24 MR. MCLEOD: Yes, Your Honor.

25 THE COURT: What exhibit is it? Here is one.

1 Here is the April 6th order, right?

2 MR. MATHISON: That is the order that he's
3 referring to.

4 THE COURT: That is the one that he amended.

5 MR. MATHISON: Correct. And if you will look,
6 the only thing in his directives having to do with
7 the lis pendens is, number one says, The motion to
8 reconsider my order striking the lis pendens is
9 denied. That is what it says. There is no
10 reopening of that. There is no qualification of
11 what he said before.

12 THE COURT: Was it just done on a Form 4?

13 MR. MATHISON: No, there is a full-blown order
14 dated April 6th. It is five pages long. And what
15 he did is he fashioned an equitable remedy.

16 THE COURT: I understand that. I have heard
17 that.

18 MR. MATHISON: But it was -- he fashioned the
19 equitable remedy in response to my client's motion
20 to strike the certificate of lien, which is the
21 second encumbrance that they filed.

22 THE COURT: Okay.

23 MR. MCLEOD: I mean, both orders are in there,
24 Your Honor. You can read them.

25 THE COURT: Okay, I'll read them both.

1 MR. MCLEOD: The first one -- yeah, he clearly
2 talks about equitable remedies with regard to why.
3 Anyway, Your Honor can read it.

4 THE COURT: Okay. Let me just go through and
5 read the whole thing then and I will just take it
6 under advisement. And then my understanding what
7 you are asking for, Mr. McLeod, in the alternative
8 if I don't grant the motion to dismiss -- I am
9 sorry, the Motion for Malicious Prosecution, to stay
10 the case. Is that correct?

11 MR. MCLEOD: To stay the case. If the Court
12 decides not to stay the case we simply want -- I
13 think it was Mitch Griffith filed an answer on
14 behalf of everybody in this case that just was a
15 general denial, just like a one or two-sentence
16 denial answer. And so we would like, if the Court
17 doesn't grant our motion, or the motion to stay,
18 then we want to be able to file an answer asserting
19 pleadings with regard to all, the complaint, and
20 asserting affirmative defenses.

21 THE COURT: Okay. How long has this case been
22 going on?

23 MR. MATHISON: Pardon?

24 THE COURT: How long has this case been going
25 on, this one?

1 MR. MATHISON: It was filed in October.

2 THE COURT: I see that it has a 2014 number, so
3 I was just interested.

4 MR. MATHISON: The underlying case --

5 MR. MCLEOD: We filed this in March, you know,
6 we -- I'm not sure when our office got it.

7 THE COURT: So, what is the status of the
8 underlying case right now? Have your people been
9 able to begin building, and are they?

10 MR. MATHISON: What happened is the equitable
11 remedy that Judge Dukes came up with, if they got an
12 offer he would remove the certificate of lien.
13 Actually, he removed the certificate of lien so they
14 could get an offer. Because the lender wouldn't
15 fund.

16 THE COURT: They have since sold the property I
17 thought?

18 MR. MATHISON: That is what I'm saying. What
19 happened is, they got somebody -- he built it.

20 THE COURT: Right.

21 MR. MATHISON: The lender didn't fund it. He
22 built it out of his own pocket.

23 THE COURT: Okay.

24 MR. MATHISON: They found somebody to buy it.

25 THE COURT: Okay.

1 MR. MATHISON: And there was \$33,000 escrow,
2 which is what they claimed that they were owed.

3 THE COURT: For the lien?

4 MR. MATHISON: On a lien that -- they never
5 sued my client for money damages. They sued for an
6 injunction if he didn't pay what they said was owed
7 to them. That is all that they sued for. But then
8 they converted their claim in equity into collecting
9 \$33,000 that is being held in escrow pending the
10 outcome of this case.

11 THE COURT: Okay. All right. And, Mr. McLeod,
12 you are not in that portion at all?

13 MR. MCLEOD: No, Your Honor. That sounds --
14 I'm vaguely familiar with the facts.

15 THE COURT: Okay. Let me do this, gentlemen,
16 let me just go through, I want to read Marvin's
17 orders and I want to see and I want to read the
18 procedural history that Mr. Mathison has provided
19 me. Let me go through the whole thing and just
20 figure out the best way to proceed in this case.

21 MR. MATHISON: May it please the Court, I am
22 not -- they can amend. I know what Rule 15A says,
23 I'm not opposed to that motion.

24 THE COURT: Right.

25 MR. MATHISON: I would point out, one of the

1 things that they want to put in there is advice of
2 counsel, which is a swinging door. And if they use
3 that lawyer as advice of counsel, I am going to find
4 out what she didn't advise them about.

5 MR. MCLEOD: Well, that is why -- that is why
6 we are taking these steps, and as the last
7 alternative, but we wanted to amend.

8 THE COURT: All right. Okay, let me just look
9 at it procedurally and see what the best way is to
10 go about it. Thank you, I appreciate it.

11 MR. MATHISON: Thank you, Judge.

12 THE COURT: Thank you.

13 MR. MATHISON: May it please the Court do you
14 have --

15 THE COURT: Can I keep it?

16 MR. MATHISON: Yes, definitely, that is for
17 you. I have one for your clerk if you would like
18 one.

19 THE COURT: Yes, as long as you are inclined,
20 let me keep it. Thank you.

21 (Hearing concluded.)
22
23
24
25

1

2 CERTIFICATE

3

4 STATE OF SOUTH CAROLINA:

5 COUNTY OF BEAUFORT:

6 I, MONA L. MANLEY, Court Reporter, certify that I
7 was authorized to and did stenographically report the
8 foregoing proceedings and that the transcript is a true
and complete record of my stenographic notes.

8

DATED this 5th day of September, 2016.

9

10

11

Mona L. Manley /s/

12

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STATE OF SOUTH CAROLINA
14TH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT
COURT OF COMMON PLEAS
CASE NUMBER 2014-CP-07-02670

BENJAMIN C. GECY, ET AL

PLAINTIFFS

VERSUS

MARCH 31, 3016

TRANSCRIPT OF HEARING

BEAUFORT, SOUTH CAROLINA

SOMERSET POINT AT LADY'S
ISLAND HOMEOWNERS' ASSOCIATION,
INC, ET AL

DEFENDANTS

B E F O R E:

CARMEN T. MULLEN, JUDGE

WANDA H. ROWE, CVR-CM
OFFICIAL COURT REPORTER

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EXHIBITS

No exhibits were admitted.

1 BEGINNING 10:48 A.M.

2 BY THE COURT:

3 THE COURT: This is defense motion for summary
4 judgment. Is that correct?

5 MR. MATHISON: There are a number of motions, your
6 Honor.

7 THE COURT: Okay.

8 MR. MATHISON: First, I have a motion for
9 reconsideration.

10 THE COURT: Right.

11 MR. MATHISON: And that's of the summary judgment,
12 partial summary judgment, that's already been granted.

13 THE COURT: That I granted. Know it well.

14 MR. MATHISON: And my colleague from Young, Clement
15 & Rivers wishes to argue summary judgment based,
16 essentially, on the same grounds that were initially
17 argued. Mr. Templeton, on the behalf of his client,
18 though those are related, one is --

19 THE COURT: Okay. And have we consolidated this
20 case?

21 MR. MATHISON: Yes.

22 THE COURT: Okay. For everything or just for
23 discovery?

24 MR. MATHISON: The underlying case is put together
25 with the successive case.

1 THE COURT: Got it. Okay.

2 MADAM CLERK: Judge for discovery it was
3 consolidated?

4 THE COURT: I'm asking was the whole thing -- just
5 for discovery it was consolidated?

6 MR. MATHISON: It's consolidated for discovery, but
7 not yet for trial.

8 THE COURT: Okay.

9 MR. MATHISON: And I ask permission to hand up a
10 copy of my motion for reconsideration.

11 THE COURT: Certainly.

12 MR. MATHISON: And a copy of an affidavit in
13 response to Young, Clement & Rivers recent -- more
14 recent motion for summary judgment.

15 MR. MCLEOD: I mean, if we don't need a motion to
16 --

17 THE COURT: Yes.

18 MR. MCLEOD: And I've got a couple of memos, as
19 well.

20 THE COURT: Sure.

21 MR. MCLEOD: We received some affidavits yesterday.
22 So, one is really concerning the affidavits, and one we
23 filed in January, which I think I sent you all
24 yesterday.

25 THE COURT: Okay.

1 MR. MATHISON: May it please the Court? This is
2 Peden McLeod's son.

3 THE COURT: All right.

4 MR. MATHISON: We'll go in any order you prefer.

5 THE COURT: We'll start with your original, your
6 motion. Are you all okay with that?

7 MR. MCLEOD: Sure, whatever --

8 THE COURT: Because if, for some reason, I changed
9 my mind, obviously, that would affect what you're going
10 to do, so. If you have the same basis as the previous
11 defendant, so.

12 MR. MCLEOD: Okay.

13 THE COURT: Well versed, Mr. Mathison. I re-read
14 it again this morning and last night just here by
15 myself.

16 MR. MATHISON: May it please --

17 THE COURT: Yes, sir.

18 MR. MATHISON: May it please the Court? Please
19 forgive my chewing gum, but I cracked a tooth this
20 morning, and I'm trying not to bleed to death in public,
21 so.

22 THE COURT: Please don't.

23 MR. MATHISON: All right. If you'll recall, this
24 is a case in which the plaintiff alleged two causes of
25 action as a result of what the plaintiff believes is the

1 unlawful filing of a lis pendens. First cause of action
2 was for abuse of process. The second cause of action
3 was for malicious prosecution.

4 After pleading in this case, -- and let me back up.
5 A number of the named defendants have different
6 insurance carriers. A number of the people, the
7 individuals who work for the named defendants, have
8 multiple allegiances in that they work not only for
9 Manor House Builders, for Coosaw Investments, but they
10 also are officers and directors of the Homeowners'
11 Association. That's because, at the time these causes
12 of action accrued, the developer, --

13 THE COURT: Right.

14 MR. MATHISON: -- to the extend that person could
15 be defined, was still in charge of running the
16 Homeowners' Association.

17 THE COURT: Hadn't been turned over yet. All
18 right.

19 MR. MATHISON: All right. Without any affidavits
20 and before pending discovery had been undertaken,
21 counsel for some of these defendants, including Hilton
22 C. Smith, Jr., in one capacity or another, made a motion
23 for summary judgment on the law, and its characterized
24 as such. The argument that was made in that motion was
25 that malicious prosecution --

1 THE COURT: Is this the one that was argued in
2 front of Judge Dukes?

3 MR. MATHISON: No, ma'am.

4 THE COURT: No.

5 MR. MATHISON: This was argued to you on August 4

6 --

7 THE COURT: This is the second one. Okay.

8 MR. MATHISON: -- August 4, 2015.

9 THE COURT: Okay.

10 MR. MATHISON: The argument that was made at that
11 time was that malicious prosecution wouldn't lie because
12 there had not been a favorable determination with
13 respect to the underlying action. And as a consequence,
14 they asked for you to do one of two things: either stay
15 the second claim based on abuse of process and malicious
16 prosecution, or to grant summary judgment with respect
17 to the malicious prosecution.

18 This motion was made despite the fact that,
19 plainly, on the face of the complaint, plaintiff was not
20 complaining that there was malicious prosecution in
21 bringing the underlying case. The plaintiff was only
22 complaining about the issuance of a lis pendens in
23 support of the underlying case. In other words, the
24 plaintiff was complaining about the provisional remedy.

25 THE COURT: Right. And I understand that that lis

1 pendens was removed by Judge Dukes.

2 MR. MATHISON: It was.

3 THE COURT: In his capacity in an equitable manner,
4 is what he said. And I remember that he actually had an
5 order. There was a question about whether or not it was
6 legal or ethical. And so, he cleared it up by order.
7 Am I correct on that?

8 MR. MATHISON: No, actually, you're not, your
9 Honor. And that's why we have this problem.

10 THE COURT: Well, that's why you're here, Mr.
11 Mathison. Just tell me why I'm not correct, but go
12 ahead.

13 MR. MATHISON: Because the motion was made by the
14 plaintiffs' lawyer in the underlying case to dissolve
15 the lis pendens. That motion was heard, and an order
16 was issued on February 15th that did, in fact, remove
17 the lis pendens. There is an order --

18 THE COURT: Who issued that order?

19 MR. MATHISON: Pardon?

20 THE COURT: Who issued that order?

21 MR. MATHISON: Judge Dukes did.

22 THE COURT: Okay.

23 MR. MATHISON: Prior to Judge Dukes issuing that
24 order, five days prior, without the knowledge of Judge
25 Dukes or the plaintiffs' lawyer, the lawyer for Mr.

1 Smith and the Association had filed an assessment lien.
2 Once the plaintiffs' lawyer became aware of the
3 assessment lien, he filed a motion to dismiss that, as
4 well.

5 The counterclaim plaintiffs, that is Mr. Smith and
6 the Association, filed a motion to reconsider Judge
7 Dukes' order of February 15th. Both motions were heard
8 on March 5th. There was continuing debate afterwards as
9 to what the outcome of the hearing is and what the
10 language of the order would be. At the time that we
11 argued in August, I handed up what I believed was an
12 accurate recapitulation of the procedural matters in
13 this case, and that recapitulation is attached to my
14 client's affidavit before you as Exhibit 2.

15 Here's what happened. At the hearing, Judge Dukes
16 ruled that the motion for reconsideration would be
17 denied.

18 THE COURT: I've got his order.

19 MR. MATHISON: Yes. And that ultimately made it
20 into his order dated April 6, in the following
21 terminology. Excuse me. I'm having a difficult time
22 finding it. I'm at Page 6 of the recapitulation. His
23 initial order had ruled -- this is the February 15th
24 order:

25 *I find and conclude that the counterclaim*

1 and crossclaim do not seek to 'affect' the
2 title to the subject real property in this
3 litigation. Accordingly, the lis pendens is
4 not authorized by the 'South Carolina Code'
5 in '15-11-10,' and must be removed.

6 In response to plaintiffs' motion for
7 reconsideration, he ruled unequivocally that the motion
8 for reconsideration was denied. There's a separate
9 paragraph in the order dated April 6 that says that.
10 The order dated April 6 was prepared by the crossclaim
11 plaintiffs' lawyer. All right?

12 Subsequently, -- excuse me. In the same order, in
13 response to the plaintiffs' motion to eliminate the
14 assessment lien, Judge Dukes fashioned an equitable
15 remedy in which he decided that, because of the timing
16 of the events that led up to that, it would be expedient
17 to accept the deposit in lieu of the assessment lien if
18 the property could be made available for sale. That,
19 specifically, is in response to the plaintiffs', that is
20 Gecy and River City's, motion to eliminate the
21 assessment lien. The two are not related.

22 My colleagues from Mr. Templeton's law firm alleged
23 that somehow that was a re-characterization of what
24 Judge Dukes had done in the previous order. But there
25 is nothing in the order of April 6 that says that.

1 There's nothing that says he modified his previous
2 order. He did nothing in the April 6 order with respect
3 to the order removing the lis pendens, except say their
4 motions for reconsideration is denied.

5 Now, how do we know that? Well, on April 27th, the
6 counterclaim plaintiff filed a motion to enforce by
7 contempt the April 6 order. That's in the record. In
8 addition, that's discussed at Page 6 and Page 7 of the
9 memorandum that was submitted to you. You can't move to
10 enforce an order that hasn't been served and you're
11 unaware of.

12 Understand, the inference here, this order was
13 prepared by them. I'll admit that there's no affidavit
14 of service, but that's because, in the course of these
15 events, plaintiffs' lawyer, counterclaim plaintiffs'
16 lawyer, and Judge Dukes were doing things via email.
17 However, once you make a motion to enforce an order, it
18 has to have been served. All right?

19 The second prong of that motion filed on April 27th
20 asks that there be, quote, a stay.

21 *That Judge Dukes's order a stay in the*
22 *time the counterclaim plaintiff had to*
23 *appeal from the April 6 motion for*
24 *reconsideration denial.*

25 Judge Dukes didn't have authority, didn't have

1 jurisdiction, to grant stay from the time to appeal.
2 That motion shows the order dated April 6 had been
3 served at least by April 27. And they were aware that
4 they had to appeal from it timely, because they were
5 asking for a stay. But they didn't. They didn't
6 appeal. May 6 came and went, no appeal.

7 Judge Dukes, ultimately, on May 31st, ruled in
8 response to the motion to reconsider the equitable
9 remedy, which itself is amazing. This is the
10 counterclaim plaintiff preparing an order to her liking,
11 and then, filing a motion to reconsider it. He denied
12 that motion for reconsideration, but that had nothing to
13 do with the lis pendens. And he also said I don't have
14 the authority to grant additional time to appeal.

15 Thirty days after he did that, they filed an
16 appeal. And they purported to appeal from not only the
17 last order dated May 31st, but all previous, quote,
18 *underlying orders*. I was not in the case. I did not
19 receive a copy of the notice. The copy of the notice
20 that was furnished to me only had the last order
21 attached. And if you know, the Court of Appeals
22 requires that you send them all orders.

23 Their argument now is that, basically, they
24 appealed from all the orders, and then, they decided to
25 dismiss their appeal, once the property got sold and

1 it's moot.

2 The fact of the matter is -- and we pleaded this --
3 there was no appeal from the decision to strike the lis
4 pendens. That had already become the law of the case
5 when no appeal was timely taken timely taken.
6 Consequently, as to the provisional remedy of the lis
7 pendens, we believe that there was a favorable
8 determination.

9 Now, what I just told you is, at least in some
10 regard, a question of fact. They did not move on
11 affidavits. They did not point to any facts, other than
12 the documents, which they say proved their point. If
13 this is a factual determination, with no evidence in the
14 record, other than what exists in the previous file,
15 it's a matter of fact, the counterclaim plaintiffs'
16 motion dated April 27th, in which she seeks to enforce
17 the order dated April 6, creates an inference that it
18 was served on her and was valid and enforceable, which
19 means that she had a duty to appeal not later than
20 thirty days after April 6, or thirty days after April
21 27th when she filed the motion. She didn't do either
22 one.

23 It's plain to me that there's an inference, if you
24 go to a judge and ask him to stay the time limits for
25 the appeal with respect to the lis pendens, that you

1 know what the time limits are. And yet, there was no
2 timely appeal taken. What was appealed from,
3 ultimately, was the order fashioning the equitable
4 remedy, and that had nothing to do with the lis pendens.

5 So, from a factual standpoint, assuming that
6 somehow they can make an argument that they're entitled
7 to summary judgment on the fact without having, you
8 know, put anybody under oath, there are inferences in
9 the record that clearly warrant your denial of the
10 motion.

11 Second, the original basis for their motion was
12 that yours truly apparently didn't know what the law was
13 and was trying to somehow propagate the notion that I
14 could file a malicious prosecution action with respect
15 to the underlying cause of action without it having been
16 adjudicated. If you read the complaint, it's clear that
17 that's not the case. If you read the complaint, it's
18 abundantly clear that what we were objecting to is the
19 provisional remedy, it being unlawful. And that was
20 done under authority from the re-statement second, and
21 specifically, I'm citing you to Section 674, in which
22 the following is stated:

23 *Ancillary Proceedings: A particular*
24 *civil proceeding may be ancillary to other*
25 *proceedings.*

1 I don't think that anybody here would argue that a
2 lis pendens is not an ancillary proceeding. Just like
3 an attachment, just like a request for an injunction,
4 it's an ancillary proceeding. Thus, an attachment may
5 be issued to secure the payment of a possible future
6 judgment. If the principal proceedings were improperly
7 brought for the rule stated in this section,
8 compensation for the harm done by the ancillary
9 proceedings is recoverable as part of the damages for
10 improper initiation of the principal proceedings.

11 We didn't allege any defect in the principal
12 proceedings, except the ancillary proceeding. And this
13 is what the re-statement says:

14 *Even though the principal proceedings*
15 *are properly brought, the ancillary proceeding*
16 *may be wrongfully initiated.*

17 *In this case, the wrongful procurement*
18 *and execution of the ancillary process subject*
19 *the person's procuring it to liability under*
20 *the rule stated in this section.*

21 I submit, your Honor, that that is persuasive
22 authority to allow as a matter of law what the plaintiff
23 has done here. And I also submit that the order that
24 was submitted to you does not have a single case in
25 South Carolina that addresses whether you can state a

1 malicious prosecution claim based on a ancillary
2 proceeding that has, in fact, gone haywire.

3 As to the ancillary proceeding, if you accept the
4 fact that it is over and done with, that it can't be
5 brought again, and I believe that's clear, based on the
6 material that I presented, then, this is the only
7 authority that exists in South Carolina that I'm aware
8 of. Therefore, I submit you have only two options. One
9 would be, if you're cautious, you could say that we'll
10 stay the underlying proceeding until there's a
11 resolution of the underlying claim.

12 But you should, under any set of circumstances,
13 deny the motion for summary judgment. Because, quite
14 frankly, the way the law is framed is, if there has been
15 no factual development in the case, you can't really
16 decide how best to apply the law to the facts until
17 there has been such. There's ample authority. Here, we
18 have no factual development. In my opinion, since they
19 offered you the option to stay it, that is the only
20 decision that could have been made, because, quite
21 frankly, the summary judgment on the law is against the
22 only authority I'm aware of in South Carolina as to
23 whether an ancillary proceeding might be useful to state
24 a malicious prosecution claim. And as to the facts,
25 it's directly opposed to the inference that they knew

1 when an appeal was properly due; they didn't take the
2 appeal; and therefore, the dismissal of the lis pendens
3 became the law of the case.

4 Thank you.

5 THE COURT: Thank you. Yes, sir.

6 MR. MCLEOD: Your Honor, Brown McLeod on behalf of
7 Hilton C. Smith, Jr.; Hilton C. Smith, Jr. South
8 Carolina, Inc.; and Coosaw Investments, LLC.

9 We, first of all, like to just point out that what
10 they're seeking to do is you to reconsider stuff outside
11 the record. He filed this motion for reconsideration on
12 December 28th, attached a post-hearing letter, two post-
13 hearing letters, to the two-page motion, which it just
14 says:

15 *The Court appears to overlook and the*
16 *order fails to address the arguments made*
17 *at the initial hearing and the communications*
18 *with the Court after it.*

19 He doesn't say what arguments were during the
20 hearing. He had produced a copy of the transcript.
21 What he did is, he filed -- he submitted a couple
22 affidavits on the 29th of March, just the other day.
23 And I think he handed them that day.

24 THE COURT: I have them, yes.

25 MR. MCLEOD: Well, under Rule 59, you are supposed

1 to attach affidavits to the motion when you file it.

2 MR. MATHISON: May it please the Court? I'm not
3 submitting that affidavit in response to the motion for
4 reconsideration.

5 THE COURT: You're doing it --

6 MR. MATHISON: That's in response to the other
7 gentleman's motion.

8 MR. MCLEOD: Okay. Fair enough, then.

9 THE COURT: Reconsider it.

10 MR. MCLEOD: So, the only -- so, he's simply
11 relying on these two letters that he attached to his
12 motion to reconsider, both of which were post-hearing
13 correspondence. And as the Court knows, when you hear a
14 motion for summary judgment, you take a look at the
15 documents, the pleadings, the affidavits, and discovery
16 that's in the record. Those two letters are not in the
17 record. You should not consider those at all.

18 He did not make a lot of these arguments that he's
19 touched on here today during that initial hearing. So,
20 he doesn't get to bring up new issues in a motion for
21 reconsideration. He can simply ask the Court to
22 reconsider what he put forth during that initial
23 hearing. So, he's gone beyond the motion to reconsider
24 by providing four additional arguments today.

25 As the order indicates, the Court found that Judge

1 Dukes determined that the lis pendens be removed for
2 equitable purposes.

3 It's stated right in the order. He doesn't even
4 address that in his motion. He mentions it a little bit
5 today, but that's what the Court found. It's clear,
6 when you file a motion for reconsideration, it provides
7 the Court an opportunity to reconsider it, which
8 includes amending judgments. And that's exactly what
9 happened here. Judge Dukes turned around and amended --
10 or supplemented for possibly the prior order, by saying
11 I removed the lis pendens for equitable purposes. And
12 we provide that we -- we state in our motion, and he
13 doesn't address it at all, is when something is
14 determined on equitable purposes and not on substantive
15 purposes, and therefore, it is not a determination in
16 anybody's favor. So, that was the basis for the motion
17 for summary judgment. He didn't even address that this
18 morning, nor in any of the items.

19 So, your Honor, we believe --

20 THE COURT: The whole point of removing the lis
21 pendens so the property could be sold, correct? I mean,
22 wasn't that --

23 MR. MCLEOD: We're involved in the second part of
24 this case.

25 THE COURT: That's right.

1 MR. MCLEOD: Mitch and his office was involved in
2 the underlying case. And that's my understanding. This
3 may have some --

4 THE COURT: That's how I read Judge Dukes's order.
5 But you know, we can -- we'll sit on it just on what it
6 said, his supplemental order basically said that.

7 MR. MCLEOD: Yes, your Honor.

8 THE COURT: Okay. All right. Anyone else need to,
9 other than that?

10 MR. MCLEOD: Well, there are just --

11 THE COURT: Mitch, do you -- hold on a sec. Sit
12 down. Anything else?

13 MR. GRIFFITH: Nothing in response to this. Again,
14 the only thing is I'm not sure about my firm's
15 involvement because it was started by another law firm,
16 and our firm become involved, so.

17 THE COURT: Okay.

18 MR. GRIFFITH: But I don't think it applies to this
19 motion. So, I won't even go into --

20 THE COURT: All right. You're fine. All right,
21 Mr. Mathison, do you want to briefly reply to Mr.
22 McLeod's comments? And I mean briefly.

23 MR. MATHISON: Yes, ma'am. First of all, he was
24 served with a copy of the restatement, Section 674, and
25 you were handed up a copy, and it exists in the file.

1 It was delivered to you on August 4th.

2 THE COURT: Who is he? Mr. McLeod? Or who are we
3 talking about?

4 MR. MATHISON: The gentleman who was here on behalf
5 of Morgan Templeton at the time.

6 THE COURT: Okay.

7 MR. MATHISON: It was, in fact, argued, and the
8 proof is in the record with that. In addition, I handed
9 up the entire history of these proceedings so that you
10 would have an eight-page synopsis of the documents they
11 were asking you to review. And I maintain that there is
12 not a single word in the order he says re-characterizes
13 the order striking the lis pendens that could be
14 construed as that. If there is such --

15 THE COURT: Mr. Mathison, it is what it is. I
16 mean, we can all read Judge Dukes' two orders. It is
17 what it is. You can argue what it says. He can argue
18 what it says. I can tell you that I can read it, and I
19 know what it says. So, my point is, again, you both can
20 construe it any way you want, it is his order.

21 MR. MATHISON: I understand it's his order, but it
22 says specifically the motion for reconsideration, the
23 striking of the lis pendens is denied. That's the only
24 sentence that deals with that. It has not modified the
25 previous order at all. There is no word in there,

1 modify, amend, supplement, any of the words he used,
2 they're not there. And if they are, I deserve to lose,
3 but they aren't.

4 Thank you.

5 THE COURT: Okay. All right, you want to bring --

6 MR. MCLEOD: Yes. Just one more thing. When we
7 had that motion for summary judgment, you said, well let
8 me read the order, I'm going to take a look at it. And
9 that's what the Court did. And so, it --

10 THE COURT: And I re-read it last night again.

11 MR. MCLEOD: Yes, your Honor. I just want to point
12 that out. You --

13 THE COURT: So I could familiarize myself with this
14 case. So, let's move on. As far as your motion is
15 concerned -- I know we have a number of motions. We
16 have now your motion. No? We have no others. You have
17 a motion for summary judgment.

18 MR. MATHISON: No, the -- different firm.

19 THE COURT: You do. You're from Young, Clement,
20 correct?

21 MR. SWEENEY: I am. I'm Bill Sweeney.

22 THE COURT: Thank you. And you represent?

23 MR. SWEENEY: I represent the defendant in the
24 second action, Somerset Point.

25 THE COURT: Okay.

1 MR. SWEENEY: And essentially, our motion is a res
2 judicata motion, essentially saying the same thing.

3 THE COURT: Okay.

4 MR. SWEENEY: That, if the decision stands and,
5 obviously, if the full opportunity to be heard had been
6 made.

7 THE COURT: Except you are not the same party.

8 MR. SWEENEY: Well, that's correct, your Honor.

9 THE COURT: Except -- okay. So, except you're not
10 the same party. You just say sit and stand situated.

11 MR. SWEENEY: That's exactly right.

12 THE COURT: So, other than your res judicata
13 argument, I believe you had two other argument in there.
14 Is that correct?

15 MR. SWEENEY: Well, I have a motion to compel, and
16 I would just point out that, in terms of the -- well, I
17 mean, in terms of the lis pendens being, you know, the
18 two orders, it belies logic to say, well, the liens are
19 decided on equitable grounds, and then, somehow the lis
20 pendens doesn't relate to those liens. I mean, clearly,
21 they're linked together intrinsically. But again, our
22 partial motion for summary judge is to the malicious
23 prosecution claim, based upon res judicata, as you just
24 said, similarly situated, and certainly, the plaintiff
25 is the same party, the same opportunity.

1 And then, your Honor, our other motion is a simple
2 motion to compel. And I spoke with Rob outside. We
3 served discovery requests a long time ago, back in
4 October of last year, actually. We were both provided,
5 I guess, partial responses for discovery in the first
6 case in January. Rob's informed me that he realized
7 that we didn't receive all of the records that were
8 provided in that case. In any event, we have not been
9 provided initial responses to our discovery requests.
10 You know, no explanation as to why. No objections have
11 been made. I believe they're five months old. I've
12 been informed that maybe two weeks would be sufficient.
13 I mean, we're certainly willing to allow a reasonable
14 amount of time to get full and complete responses.

15 THE COURT: Mr. Mathison, how long do you need?

16 MR. MATHISON: Two weeks is fine, your Honor. It
17 would have been done before now, because they were kind
18 enough to give me the information and material, and I,
19 through oversight believed that I had already furnished
20 all the documents. We initially, in the underlying
21 case, served about 450 documents on Mitch's law firm.

22 THE COURT: Okay.

23 MR. MATHISON: And then, we created a thumbdrive in
24 the second case, which was used to respond to Manor
25 House. And I believed that all 950 documents were on

1 that thumbdrive, but actually, the only thing that was
2 on the thumbdrive was the second production. And
3 everybody got that last September 8th.

4 We've already answered interrogatories from Mr.
5 Griffith's firm, and we propose to simply re-frame those
6 with the interrogatories that have been posed by Young,
7 Clement & Rivers. But I have been ill for the past
8 week, and didn't get around to doing it. And it's going
9 to require at least two weeks henceforth, because I've
10 got other commitments, and I believe that that's okay
11 with them.

12 In addition, Mr. Sweeney asked me, with respect to
13 the production requests if we would identify documents
14 in response to those requests that supported specific
15 allegations, and I told him that we would.

16 MR. SWEENEY: That is fair. And I don't -- I
17 certainly don't want to belabor that issue, but just by
18 virtue of -- or for safe reference, rather, in the
19 initial responses that we've been provided, there's an
20 Exhibit A listing some potential witnesses. We'd like a
21 little bit more contact information there. And there's
22 an Exhibit B that's three pages of alleged damages.
23 These are consequential damages. I mean, it's not just
24 a broken leg from a car accident where we can just get
25 medical records and sort through them ourselves. We

1 certainly believe that we're entitled to not just, you
2 know, a thousand pages of documents, but also, which
3 documents relate to which claim.

4 I mean, there's probably thirty different claims of
5 damages, as well as, you know, if certain claims are
6 undocumented, we need to know that. And I think it's
7 unfair for us to go through a thousand pages and say,
8 well, did we miss something. You know. I mean, how can
9 we take a deposition and things like that, especially
10 when you're dealing with consequential damages, without
11 some idea of what those damages relate to, what supports
12 them.

13 I certainly believe it would be for the sake of
14 fairness and efficiently if we had some idea who these
15 parties are, whether we can send subpoenas to them, what
16 records exist, prior to taking a deposition, rather than
17 we get a deposition, we get a list of names, and then,
18 all of a sudden, we're scrambling, and now we're sending
19 out subpoenas for deposition all over the State. So,
20 that's simply that concern.

21 MR. MATHISON: May it please the Court? What he
22 has is a list of witnesses. He does not have the full
23 adumbration, as does Mitch, of what they're going to
24 say. In addition, there's a list of damages, which were
25 initially conceived in response to Mr. Griffith's

1 request. We will answer his interrogatories and his
2 request to produce with the degree of detail that they
3 require.

4 THE COURT: Okay. Thank you.

5 MR. MATHISON: All right?

6 MR. SWEENEY: Thank you.

7 THE COURT: Appreciate it. Okay.

8 So, I've heard the plaintiffs' motion for
9 reconsideration; Somerset's motion to compel. I'm a
10 little confused just the way it's listed on my roster.

11 MR. MCLEOD: I was confused, as well, your Honor.

12 THE COURT: So, Megan, this is -- I think one of
13 these is wrong as to the filing party. I'm assuming, on
14 this motion, you represent Joe Somerset, correct?

15 MR. MATHISON: Your Honor, they all represent the
16 same people with different hats on.

17 MR. SWEENEY: Right. So, Somerset Point
18 Homeowners' Association is correct, formerly Coosaw
19 Creek.

20 THE COURT: Okay. So, formerly. Is it Coosaw
21 Investments, or is that a separate entity?

22 MR. MATHISON: Coosaw Investments is a separate
23 entity.

24 THE COURT: And who represents them? Mr. McLeod,
25 is that your client, or Mr. Griffith's? I'm just trying

1 to figure out, --

2 MADAM CLERK: I think the --

3 THE COURT: -- when I sign an order in these cases,
4 what plaintiff or what party actually moved.

5 MR. MCLEOD: The motion for summary judgment and
6 this motion for reconsideration is the second motion in
7 2014, the second case, 2014 case.

8 THE COURT: Okay. You need to come up here and
9 tell Megan. I don't think they're listed correctly on
10 the roster. That's what I'm not understanding.

11 MR. MCLEOD: The second one's confusing.

12 MR. GRIFFITH: Judge, if we may.

13 THE COURT: Sure.

14 MR. GRIFFITH: If you're looking at the roster, --

15 THE COURT: Yes.

16 MR. GRIFFITH: -- the number one motion --

17 THE COURT: Right.

18 MR. GRIFFITH: -- has a 2011-CP number on it.

19 THE COURT: Right.

20 MR. GRIFFITH: Which would indicate to me that that
21 was my motion for summary judgment.

22 THE COURT: On behalf of whom?

23 MR. GRIFFITH: On behalf of all defendants.

24 THE COURT: Okay.

25 MR. GRIFFITH: I represent all defendants in the

1 first lawsuit, I guess.

2 MR. MCLEOD: The 2011.

3 MR. GRIFFITH: The 2011 lawsuit.

4 THE COURT: Okay.

5 MR. GRIFFITH: Then, the number two motion appears
6 to be defendants' motion for summary judgment originally
7 filed 11-39 -- 3945, which is the same number. And
8 since they've been consolidated, I think it's just been
9 put on there to show that it comes up.

10 MADAM CLERK: Correct. So, the only reason number
11 two is on there, --

12 MR. GRIFFITH: Is to give us notice.

13 MADAM CLERK: -- it was just thrown into that so
14 everybody would have notice.

15 THE COURT: Got it.

16 MADAM CLERK: This was consolidated for discovery
17 only.

18 MR. GRIFFITH: Absolutely.

19 MADAM CLERK: So, it is not consolidated for trial
20 in our computer. They're still two separate cases.

21 MR. MATHISON: That's the way it was supposed to
22 be.

23 MADAM CLERK: Correct. And that's why the two
24 motions are -- the one motion is put in two different
25 cases.

1 MR. MCLEOD: So, that's one motion, but listed
2 twice.

3 MADAM CLERK: Correct.

4 MR. GRIFFITH: It makes a lot of sense, because
5 early on, some people were getting notice, some weren't,
6 so she has now got it so we're all getting notice about
7 everything. So, she has done a great job about that.
8 It may be a little confusing there. And with regards to
9 that motion, Mr. Mathison and I agreed that we would
10 entertain depositions of the parties before going
11 forward with it. So, if it helps the Court
12 statistically, I will withdraw that motion with leave to
13 re-file.

14 THE COURT: Your number one motion on this?

15 MR. GRIFFITH: Ma'am.

16 THE COURT: What motion?

17 MR. GRIFFITH: One and two. It's actually one and
18 two. It's the same summary judgment.

19 THE COURT: Okay.

20 MR. GRIFFITH: If that helps. Once we get the
21 depositions, we can re-file.

22 MR. SWEENEY: And your Honor, that probably makes
23 sense. And I'm sure I added to the confusion, as well.
24 I'll take --

25 THE COURT: What I'm not understanding is, is where

1 is your, then, motion for summary judgment that you just
2 argued? I don't see it on here.

3 MR. MATHISON: He has served it. All right. There
4 is a motion out there. I received it.

5 THE COURT: Okay. And we all agree that he just
6 argued it. Or do we not agree to that?

7 MR. GRIFFITH: I agree with it.

8 MR. MCLEOD: Right.

9 THE COURT: Okay. And that's on behalf of Somerset
10 Point. Okay.

11 MADAM CLERK: Then, I'm going to mark -- I'm going
12 to pull the case up and mark that one as heard.

13 THE COURT: Right.

14 MADAM CLERK: So that it doesn't pop up again.

15 THE COURT: Okay. You need to pull -- you actually
16 need to pull that motion so I know I can have a filing
17 date for it so I can do an order. Okay?

18 MR. MCLEOD: Can I mention something else?

19 THE COURT: Sure.

20 MR. MCLEOD: We have a motion to compel that is
21 coming up next month, and you know, I don't know if we
22 want to proffer --

23 THE COURT: Has it been answered at all or?

24 MR. MCLEOD: No, he hadn't responded. And so, if
25 he wants -- if you want to do a, you know, if you do an

1 order in their motion to compel saying he'll respond
2 within two weeks to ours, I --

3 THE COURT: How long do you need, Mr. Mathison, to
4 respond to Mr. McLeod's motion?

5 MR. MATHISON: What I'm going to do is this, once I
6 get his done, --

7 THE COURT: Gotcha.

8 MR. MATHISON: -- you understand, I've already done
9 Mitch, I've already done Manor House. Once I get his
10 done, what I'm going to do is incorporate to the extent
11 possible the things I can from the ones in response to
12 Young, Clement, Rivers and give them to Mr. McLeod.
13 They've been kind enough to actually give me their
14 materials in interactive form, so it'll be much easier
15 to do.

16 THE COURT: Okay. So, I don't want to see you all
17 again until you have them. No disrespect, as much as I
18 enjoy you all. So, how do we -- can I take that motion
19 off? We'll just say you'll answer his within a month,
20 thirty days?

21 MR. MCLEOD: That's fine.

22 MR. MATHISON: Sure.

23 THE COURT: Because you need to do his first, and
24 then, his. Is that okay with me -- with everyone?

25 MR. MATHISON: That's fine.

1 MR. MCLEOD: Yes, your Honor.

2 MR. SWEENEY: Yes, your Honor.

3 THE COURT: So, we're going to take that motion
4 off, too.

5 MADAM CLERK: When did you file your motion?

6 MR. MATHISON: It's already on a roster for next
7 month.

8 MR. SWEENEY: I'm not sure that when it's been
9 filed. It actually is my understanding I was just -- I
10 was kind of -- I thought I was covering just simply a
11 motion.

12 THE COURT: You were sent here. I understand.

13 MR. SWEENEY: I do know enough about this case to
14 be dangerous. It's my understanding that the partner in
15 this case has -- I don't know if he's filed or reserved
16 the right to file, but the basis for the motion is
17 essentially what was argued, which is a res judicata.

18 THE COURT: You say it's been filed, right, Mr.
19 Mathison? You've seen it.

20 MR. MATHISON: It is in the file and it has been
21 served on me.

22 THE COURT: He's seen it.

23 MR. MATHISON: It was literally identical to what
24 Morgan Templeton filed, once they heard what your
25 predisposition was.

1 THE COURT: Got it.

2 MR. MATHISON: Okay?

3 THE COURT: I'm pretty sure that was my ruling, so.
4 Okay. Just so I'm sure. Okay. So, there should be,
5 according to Mr. Mathison, a filed motion that has been
6 served on him by Somerset. Fingers crossed. There
7 should be. Are you seeing it in there? Do you have a
8 copy of it?

9 MR. MCLEOD: No.

10 THE COURT: You probably don't have it with you.

11 MR. MATHISON: I do not, ma'am.

12 MADAM CLERK: No NIM in August.

13 THE COURT: No, this is not a motion to compel.
14 Motion for summary judgment.

15 MR. MCLEOD: I know. I know. Right.

16 THE COURT: Don't ask about that. Don't even go
17 there.

18 MR. MATHISON: Your Honor, may it please the Court?

19 THE COURT: Yes.

20 MR. MATHISON: Just so that we don't get out of our
21 depth, by submitting an affidavit in response to the
22 Young, Clement, Rivers motion, I've made it a question
23 of fact, and I don't believe that you can grant that
24 motion based on legal grounds, which is, in theory, the
25 basis for granting theirs. Because there are now fact

1 issues in the case, which is what the affidavit is all
2 about. So, if what they want to do is reserve it, and
3 come back and argue it later, that's fine with me.

4 THE COURT: But you didn't file that on your motion
5 for reconsideration, obviously, because it wasn't argued
6 as that as a basis for the first one. Okay.

7 MR. MATHISON: No, it's --

8 THE COURT: Have you seen a copy of this affidavit?

9 MR. SWEENEY: I have not, your Honor.

10 MR. MATHISON: It's been sent to them, so somebody
11 has. These gentlemen have.

12 MR. MCLEOD SHOOK HEAD, INDICATING YES.

13 THE COURT: Okay. Did you find it, Megan?

14 MADAM CLERK: I mean, I have -- I have a motion to
15 compel, which we discussed. That's on Judge Nettles
16 next week. I'm going to take it off, mark it as
17 resolved. I have the first motion -- or I'm sorry.
18 It's number two. So, number two is not your motion for
19 summary judgment, right?

20 MR. SWEENEY: I believe that likely is the case.
21 And we're certainly amenable to filing it at a
22 subsequent time.

23 THE COURT: Just find a copy of the motion.

24 MR. SWEENEY: Okay.

25 THE COURT: Just a copy of the motion.

1 MADAM CLERK: Yeah.

2 THE COURT: Just need to know what I'm ruling on.

3 MR. MATHISON: And I've got -- excuse me, your
4 Honor.

5 THE COURT: All I need is a copy of it.

6 MR. MATHISON: I have a -- I've got a copy at my
7 office.

8 THE COURT: Okay. Well, can you forward to me.
9 And if you filed it, your office should have one.

10 MR. SWEENEY: I would hope so. Absolutely.

11 THE COURT: Okay.

12 MR. SWEENEY: We'll be -- we'll send it.

13 THE COURT: Okay. So, you're going to call your
14 office on your drive back, and you're going to tell them
15 to scan it to Leigh Ellen, my law clerk. Okay?

16 MR. SWEENEY: Will do. Thank you, your Honor.

17 THE COURT: And that way, I'll have it. Okay. All
18 right. Do we have anything else in this case? No.
19 Megan's like no. I won't tell you her additional
20 commentary. Yes, okay. Thank you all. I'm going to
21 take it under advisement. I'll let you know. Okay.

22 MR. MATHISON: May it please the Court?

23 THE COURT: Yes.

24 MR. MATHISON: If, when you read the order dated
25 April 6th again, --

1 THE COURT: Yes.

2 MR. MATHISON: -- would you please read it in
3 connection with the motion filed by Ms. Eversole on
4 April 27.

5 THE COURT: Okay.

6 MR. MATHISON: And if this equitable malarkey that
7 I've been listening to is, in fact, what was intended by
8 that order, I would like you to ask yourself when you're
9 reading it why Ms. Eversole thought that she had to
10 appeal from it in dire time, and therefore, ask for
11 additional time. That's all I ask.

12 THE COURT: Okay. Okay.

13 MR. MCLEOD: Thank you, your Honor.

14 THE COURT: Thank you, you all.

END PROCEEDING 11:33 A.M.

CERTIFICATE OF REPORTER

MARCH 31, 2016 TRANSCRIPT OF HEARING

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

I, Wanda H. Rowe, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing March 31, 2016 Transcript of Hearing is a true, accurate, and complete record of the proceedings had on said date, in the case of Benjamin C. Gecy, et al, versus Somerset Point at Lady's Island Homeowners' Association, Inc., et al, Beaufort County, Court of Common Pleas, Case Number 2014-CP-07-02670; that no exhibits were admitted; that I am of neither kin, counsel, nor interest to any party hereto.

THIS CERTIFICATE OF REPORTER CONTAINS MY DIGITAL SIGNATURE AND IS ATTACHED TO THE EMAILED COPY OF THIS TRANSCRIPT REQUESTED BY HON. ROBERT V. MATHISON, JR. PURSUANT TO SCACR 607, REQUESTS FOR COPIES OF THIS TRANSCRIPT MUST BE MADE TO THE COURT REPORTER. UNAUTHORIZED COPYING/EMAILING IS PROHIBITED.

Witness my signature June 4, 2016.

Wanda H. Rowe
Wanda H. Rowe, CVR-CM
Official Court Reporter

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
(Case No. 2014-CP-07-02670)

BENJAMIN C. GECY, RIVER CITY
DEVELOPERS, LLC, and RIVER CITY
REAL ESTATE, LLC,
Plaintiffs,

v.

SOMERSET POINT AT LADY'S
ISLAND HOMEOWNERS ASSOCIA-
TION, INC., f/k/a COOSAW RIVER
ESTATES HOMEOWNERS ASSOCIA-
TION, LLC, HILTON C. SMITH, JR.,
COOSAW INVESTMENTS, LLC,
HILTON C. SMITH, JR., INC. OF
SOUTH CAROLINA, and
MANORHOUSE BUILDERS OF
SOUTH CAROLINA, LLC,
Defendants.

COMPLAINT
(Jury Trial Demanded)

2014 OCT 23 PM 2:14
BEAUFORT COUNTY

The Plaintiffs, Benjamin C. Gecy, River City Developers, LLC, and River City Real Estate, LLC, complaining of the Defendants, respectfully allege the following:

PROLOGUE

1. The Plaintiff, Benjamin C. Gecy (herein "Plaintiff Gecy" or "Gecy"), is a citizen and resident of Beaufort County, South Carolina.
2. The Plaintiff, River City Developers, LLC (herein "Plaintiff RCD" or "RCD"), is a limited liability company organized and existing under the laws of the State of South Carolina, which maintains its principal place of business, as well as a general agent, in Beaufort County, South Carolina.

3. The Plaintiff, River City Real Estate, LLC (herein "Plaintiff RCRE" or "RCRE"), is a limited liability company organized and existing under the laws of the State of South Carolina, which maintains its principal place of business, as well as a general agent, in Beaufort County, South Carolina.

4. The Defendant, Somerset Point at Lady's Island Homeowners Association, Inc. (herein "Defendant SPLIHOA" or "SPLIHOA"), is a corporation organized and existing under the laws of the State of South Carolina, which maintains its principal place of business, as well as a general agent, in Beaufort County, South Carolina, and which, upon information and belief, is the successor to and/or was formerly known as Coosaw River Estates Homeowners Association, LLC.

5. The Defendant, Hilton C. Smith, Jr. (herein "Defendant Smith" or "Smith"), upon information and belief, is a citizen and resident of Charleston County, South Carolina, who owns and/or controls Coosaw Investments, LLC, Hilton C. Smith, Jr., Inc. of South Carolina and Manorhouse Builders of South Carolina, LLC.

6. The Defendant, Coosaw Investments, LLC (herein "Defendant Coosaw, LLC" or "Coosaw, LLC"), is a limited liability company organized and existing under the laws of the State of South Carolina, which does or did business in Beaufort County South Carolina.

7. The Defendant, Hilton C. Smith, Jr., Inc. of South Carolina (herein "Defendant HCS, Inc." or "HCS, Inc."), is a corporation organized and existing under the laws of the State of South Carolina, which does or did business in Beaufort County South Carolina.

8. The Defendant, Manorhouse Builders of South Carolina, LLC (herein "Defendant Manorhouse, LLC" or "Manorhouse, LLC"), is a limited liability company organized and existing under the laws of the State of South Carolina, which does or did business in Beaufort County South Carolina.

9. The events, actions and/or omissions which caused injury to the Plaintiffs, or to any one or more of them, all took place in Beaufort County South Carolina.

10. Plaintiff RCD, in 2011, was the owner of that certain lot of land located on Lady's Island in the Somerset Point Subdivision in Beaufort County, South Carolina, on which it was building a house to sell to a third party, the said lot being referred to herein below as "the Real Property" and being more fully described as follows:

All that certain piece, parcel and lot of land, situate, lying and Being on Lady's Island, Beaufort County, South Carolina, being shown and designated as Lot 16, Somerset Point at Lady's Island Subdivision, Phase I (f/k/a Coosaw River Estates), on a plat prepared by Gary Blair Burgess, R.L.S., dated June 16, 2006, and last revised on October 10, 2010, and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Plat Book 131 at Page 134.

TMS No. R200-005-00A-0020-0000.

11. Heretofore, Plaintiff RCD, as the owner of the Real Property described in paragraph 10 above, commenced an action in the Court of Common Pleas for Beaufort County, South Carolina (Case No. 2011-CP-07- 03945), against certain of the Defendants named herein, including, without limitation, Defendants SPLIHOA, Smith and Coosaw, LLC (herein "the Initial Case").

12. Before and after the commencement of the Initial Case, and at all relevant times since, SPLIHOA has been controlled by the "Developer," as defined by the covenants applicable to Somerset Point at Lady's Island Subdivision.

13. The Developer was, at all relevant times, either Defendant Smith or Coosaw, LLC, except when it was expedient for Smith to contend that another entity owned and/or controlled by him was serving in that capacity, such as Defendants HCS, Inc. and/or Manorhouse, LLC.

14. Smith and all other officers and/or agents of SPLIHOA, Coosaw, LLC, HCS, Inc. and/or Manorhouse, LLC, were acting within the scope of their authority from their respective principals.

15. Smith and all other employees of SPLIHOA, Coosaw, LLC, HCS, Inc. and/or Manorhouse, LLC, were acting within the course of their employment by their respective employers. The Defendants SPLIHOA, Smith, Coosaw, LLC, HCS, Inc. and Manorhouse, LLC, are referred to herein below collectively as "the Defendants."

16. On October 24, 2011, in a purported response to the Summons and Complaint filed by Plaintiff RCD in the Initial Case, SPLIHOA filed and subsequently served a putative Answer, Counterclaim and Cross-Claim bearing that date in which it jumbled or conflated in a single cause of action a claim for injunctive relief and a claim to recover fines for the alleged deviation from construction standards in building the house on the Real Property.

17. For no reason other than malice or to prevent or impede the construction of other dwellings in Somerset Point Subdivision, SPLIHOA named as additional parties on its supposed Counterclaim and Cross-Claim Plaintiff Gecy and Plaintiff RCRE.

18. In addition to overreaching in the manner described in paragraph 17, SPLIHOA filed or caused to be filed at the Office of the Clerk of Court for Beaufort County, South Carolina, that certain Notice of Pendency of Action (Lis Pendens Case

No. 2011-CP-07-02124), which was also dated October 24, 2011 (herein "the Lis Pendens").

19. The Lis Pendens encumbered the Real Property, and, as intended by the Defendants, it prevented further building on the Real Property because (a) the construction loan was subordinate to the Lis Pendens, and the lender refused to fund the work, (b) certain subcontractors refused to perform the work and (c) certain suppliers refused to supply materials.

20. Pursuant to the Order of the Honorable Marvin H. Dukes, III, dated February 15, 2012, the Lis Pendens was determined to be unlawful, and it was ordered to be canceled and released of record because no cause of action in SPLIHOA's Counterclaim and Cross-Claim "affect[ed] the title to real property," as is required by S.C. Code Ann. § 15-11-10.

21. Instead of complying with the order as announced by Judge Dukes, SPLIHOA filed a purported assessment lien, thereby attempting unlawfully to recover construction fines as though they were assessments, and, when, by Order dated April 6, 2012, the invalidation of the Lis Pendens was upheld and the assessment lien was ordered to be canceled and released of record, SPLIHOA filed more motions, including, without limitation, one purporting to "stay the time within which to file an appeal," after which, on or about May 31, 2012, SPLIHOA filed and served a Notice of Appeal.

22. The appeal by SPLIHOA was dismissed by the South Carolina Court of Appeals in 2013.

FOR A FIRST CAUSE OF ACTION
(Abuse of Process)

23. The allegations of paragraphs 1 through 22 above are hereby adopted and by express reference made a part of this First Cause of Action.

24. The purposes and objectives of the Defendants in filing the Lis Pendens and the assessment lien, as well as in filing successive motions and in appealing from orders adverse to their positions, were (a) to prevent or impede construction on the Real Property, (b) to prevent or impede construction on other lots in the Somerset Point Subdivision, except by builders that were owned and/or controlled by Smith, and/or (c) to extort or to coerce the payment of money by the Plaintiffs.

25. The Defendants acted with an ulterior purpose and engaged in one or more willful acts not proper in the regular course of the proceeding, all as appears more fully in paragraphs 16, 17, 18, 19, 20, 21, 22 and 24 above.

26. As the direct and proximate result of the abuse of process by the Defendants, the Plaintiffs have sustained and are entitled to recover actual damages in an amount to be determined by the jury, including, without limitation, loss of income and expenses, as well as damage to their reputations, pain, suffering and mental anguish.

27. The conduct of the Defendants was reckless, willful, wanton and malicious, as well as in conscious disregard for the Plaintiffs' rights, and, as a consequence, the Plaintiffs are entitled to recover exemplary or punitive damages.

FOR A SECOND CAUSE OF ACTION
(Malicious Prosecution)

28. The allegations of paragraphs 1 through 22 above are hereby adopted

and by express reference made a part of this Second Cause of Action.

29. By the filing and service of the Counterclaim and Cross-Claim, the Lis Pendens and/or the assessment lien, SPLIHOA instituted against the Plaintiffs proceedings in the Court of Common Pleas for Beaufort County, South Carolina.

30. With respect to the unlawful Lis Pendens and assessment lien, the proceedings have been terminated in the Plaintiffs' favor.

31. The proceedings were instituted and prosecuted by SPLIHOA without probable cause.

32. The proceedings were instituted and prosecuted with malice.

33. As the direct and proximate result of the malicious prosecution by the Defendants, the Plaintiffs have sustained and are entitled to recover actual damages in an amount to be determined by the jury, including, without limitation, loss of income and expenses, as well as damage to their reputations, pain, suffering and mental anguish.

34. The conduct of the Defendants was reckless, willful, wanton and malicious, as well as in conscious disregard for the Plaintiffs' rights, and the Plaintiffs are entitled to recover exemplary or punitive damages.

WHEREFORE, the Plaintiffs, Benjamin C. Gecy, River City Developers, LLC, and River City Real Estate, LLC, pray that the Court inquire into the facts and matters alleged herein; and

(a) Enter judgment in favor of the Plaintiffs and against the Defendants with respect to the First Cause of Action and/or the Second Cause of Action in such amounts of actual damages (including special damages) and punitive damages as the jury shall award; and

(b) Tax all costs of this action against the Defendants.

Respectfully Submitted,

By: 

Robert V. Mathison, Jr.
Attorney for the Plaintiffs
Benjamin C. Gecy
River City Developers, LLC, and
River City Real Estate, LLC

MATHISON & MATHISON
Post Office Box 5271
Hilton Head Island, SC 29938
Telephone: (843) 785-6503
Email: mathlaw@aol.com

October 22, 2014

Hilton Head Island, South Carolina.

PLAINTIFFS DEMAND TRIAL BY JURY.

179

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Benjamin C. Gecy, River City Developers,
LLC, and River City Real Estate, LLC,

PLAINTIFFS,

v.

Somerset Point at Lady's Island
Homeowners Association, Inc. f/k/a
Coosaw River Estates Homeowners
Association, LLC, Hilton C. Smith, Jr.,
Coosaw Investments, LLC, Hilton C. Smith,
Jr., Inc. of South Carolina, and Manorhouse
Builders of South Carolina, LLC,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2014-CP-07-02670

Answer
(Jury Trial Demanded)

2014 DEC 16 PM 3:07

TO: ROBERT V. MATHISON, JR., ATTORNEY FOR PLAINTIFF:

The Defendants, Somerset Point at Lady's Island Homeowners Association, Inc., f/k/a Coosaw River Estates Homeowners Association, LLC, Hilton C. Smith, Jr., Coosaw Investments, LLC, Hilton C. Smith, Jr., Inc. of South Carolina, and Manorhouse Builders of South Carolina, LLC, (hereinafter "the Defendants"), answering the Complaint, would allege and show as follows:

1. The Defendants deny each and every allegation not specifically admitted hereinafter and demand strict proof thereof.

GENERAL DENIAL

2. The Defendants deny the allegations in Paragraphs 1 through 34.

WHEREFORE, the Defendants, having fully answered the Plaintiffs' Complaint,
prays that this action be dismissed with costs to the Plaintiff.

GRIFFITH, SADLER & SHARP, P.A.

By: 

E. Mitchell Griffith
Kelly D. Dean
600 Monson Street
PO Drawer 570
Beaufort, SC 29901
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mgriffith@griffithsadlerssharp.com
kdean@griffithsadlerssharp.com

ATTORNEYS FOR DEFENDANTS

December 15, 2014
Beaufort, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
C.A. NO.: 2014-CP-07-2670

BENJAMIN C. GECY, RIVER CITY)
DEVELOPERS, LLC and RIVER CITY)
REAL ESTATE, LLC,)
Plaintiffs,)

-versus-

AMENDED ANSWER

SOMERSET POINT AT LADY'S)
ISLAND HOMEOWNERS)
ASSOCIATION, INC., f/k/a COOSAW)
RIVER ESTATES HOMEOWNERS)
ASSOCIATION, LLC; HILTON C.)
SMITH, JR., COOSAW INVESTMENTS,)
LLC; HILTON C. SMITH, JR., INC. OF)
SOUTH CAROLINA and)
MANORHOUSE BUILDERS OF SOUTH)
CAROLINA, LLC,)
Defendants.)

2015 OCT 25 PM 4:03
CLERK OF COURT

Defendants, Hilton C. Smith, Jr., Coosaw Investments, and Hilton C. Smith, Jr., Inc.

(collectively referred to as "Defendants") answering the Complaint of Plaintiffs, allege and say:

FOR A FIRST DEFENSE

Defendants deny each and every allegation of the Amended Complaint not hereinafter specifically admitted.

AS TO THE PROLOGUE

1. As to the allegations contained in Paragraphs 1, 2 and 3 of Plaintiffs' Complaint, Defendants lack sufficient knowledge to admit or deny, and therefore, denies, and demands strict proof thereof.
2. As to the allegations contained in Paragraphs 4, 5, 6, 7, and 8 of Plaintiffs' Complaint, Defendants admit the same.

3. As to the allegations contained in Paragraph 9 of Plaintiffs' Complaint, the Defendants deny any responsibility for events, actions and/or omissions that are alleged to have caused injury to Plaintiffs.

4. As to the allegations contained in Paragraph 10 of Plaintiffs' Complaint, Defendants admit that River City Developers owned property in Somerset Point Subdivision located in Beaufort County, South Carolina, and was constructing a house on the property. As to the remaining allegations contained in Paragraph 10 of Plaintiffs' Complaint, Defendants lack sufficient knowledge to admit or deny, and therefore, denies, and demands strict proof thereof.

5. As to the allegations contained in Paragraph 11 of Plaintiffs' Complaint, Defendants admit the River City Development filed an action in Beaufort County, South Carolina ("Underlying Action") against Defendants.

6. As to the allegations contained in Paragraph 12 of Plaintiffs' Complaint, the same constitute legal conclusions to which no responsive pleading is required. To the extent that the allegations contained within the aforementioned Paragraphs do require a response from Defendants, the same are denied in full and Defendants demand strict proof thereof.

7. As to the allegations contained in Paragraph 13 of Plaintiffs' Complaint, Defendants admit that Coosaw Investments, LLC was the developer of Somerset Point at Lady's Island Subdivision. As to the remaining allegations contained in Paragraph 13 of Plaintiffs' Complaint, Defendants deny and demand strict proof.

8. As to the allegations contained in Paragraphs 14 and 15 of Plaintiffs' Complaint, the same constitute legal conclusions to which no responsive pleading is required. To the extent that the

allegations contained within the aforementioned Paragraphs do require a response from Defendants, the same are denied in full and Defendants demand strict proof thereof.

9. As to the allegations contained in Paragraph 16 of Plaintiffs' Complaint, Defendants aver that the allegations contained therein do not constitute allegations against Defendants, and, therefore, do not require a response from Defendants. To the extent that a response is required, Defendants deny the allegations contained in said Paragraphs and demands strict proof thereof.

10. As to the allegations contained in Paragraph 17 of Plaintiffs' Complaint, Defendants aver that the allegations contained therein do not constitute allegations against Defendants, and, therefore, do not require a response from Defendants. To the extent that a response is required, Defendants deny the allegations contained in said Paragraphs and demands strict proof thereof.

11. As to the allegations contained in Paragraph 18 of Plaintiffs' Complaint, Defendants aver that the allegations contained therein do not constitute allegations against Defendants, and, therefore, do not require a response from Defendants. To the extent that a response is required, Defendants deny the allegations contained in said Paragraphs and demands strict proof thereof.

12. As to the allegations contained in Paragraph 19 of Plaintiffs' Complaint, Defendants deny the same, and demand strict proof thereof.

13. As to the allegations contained in Paragraph 20 of Plaintiffs' Complaint, Defendants admit that the Order of the Honorable Marvin H. Dukes, III, ordered that the *lis pendens* be stricken and removed in the Underlying Action. As to the remaining allegations contained in Paragraph 20 of Plaintiffs' Complaint, Defendants deny and demand strict proof.

14. As to the allegations contained in Paragraph 21 of Plaintiffs' Complaint, Defendants aver

that the allegations contained therein do not constitute allegations against Defendants, and, therefore, do not require a response from Defendants. To the extent that a response is required, Defendants deny the allegations contained in said Paragraphs and demands strict proof thereof.

15. As to the allegations contained in Paragraph 22 of Plaintiffs' Complaint, Defendants admit upon the motion of Appellants, the South Carolina Court of Appeals dismissed Defendant Somerset Point at Lady's Island Homeowners Association's appeal as being moot.

AS TO THE FIRST CAUSE OF ACTION
(Abuse of Process)

15. As to the allegations contained in Paragraph 23 of Plaintiffs' Complaint, Defendants reallege and reaver the above paragraphs as if set forth herein.

16. As to the allegations contained in Paragraphs 24, 25, 26 and 27 of Plaintiffs' Complaint, Defendants deny the same, and demand strict proof thereof.

AS TO THE SECOND CAUSE OF ACTION
(Malicious Prosecution)

17. As to the allegations contained in Paragraph 28 of Plaintiffs' Complaint, Defendants reallege and reaver the above paragraphs as if set forth herein.

18. As to the allegations contained in Paragraph 29 of Plaintiffs' Complaint, Defendants aver that the allegations contained therein do not constitute allegations against Defendants, and, therefore, do not require a response from Defendants. To the extent that a response is required, Defendants deny the allegations contained in said Paragraph and demands strict proof thereof.

19. As to the allegations contained in Paragraph 30 of Plaintiffs' Complaint, Defendants deny the same, and demand strict proof thereof.

20. As to the allegations contained in Paragraph 31 of Plaintiffs' Complaint, Defendants aver that

the allegations contained therein do not constitute allegations against Defendants, and, therefore, do not require a response from Defendants. To the extent that a response is required, Defendants deny the allegations contained in said Paragraph and demands strict proof thereof.

21. As to the allegations contained in Paragraphs 32, 33 and 34 of Plaintiffs' Complaint, Defendants deny the same, and demand strict proof thereof.

22. The final unnumbered paragraph, including the subparts, constitutes a prayer for relief which requires no response from Defendants. To the extent a response is required, Defendants deny each allegation contained therein and demands strict proof thereof.

**FOR A SECOND DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Waiver, Estoppel, Laches, and Release)**

23. Defendants realleges and reavers the above paragraphs as if set forth herein.

24. Plaintiff's claims may be barred by the doctrines of waiver, estoppel, laches, and/or release.

**FOR A THIRD DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Good Faith)**

25. Defendants realleges and reavers the above paragraphs as if set forth herein.

26. Defendants acted in good faith when they sought advice of counsel and filed their pleadings, *lis pendens*, and assessment lien.

**FOR A FOURTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Proper Use of Legal Process)**

27. Defendants realleges and reavers the above paragraphs as if set forth herein.

28. At all times in the underlying case, Defendants exercised proper use of legal process.

**FOR A FIFTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Lack of Ulterior Motive)**

29. Defendants realleges and reavers the above paragraphs as if set forth herein.
30. Defendants' lack of ulterior motive is a complete defense to one or more of Plaintiffs' claims.

**FOR A SIXTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Proceeding Not Terminated in Plaintiffs' Favor)**

31. Defendants realleges and reavers the above paragraphs as if set forth herein.
32. There was no final determination regarding the *lis pendens* or other issues in the Underlying Action because the appeal of the *lis pendens* was dismissed as being moot, and because the Underlying Action is still pending.

**FOR A SEVENTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Lack of Malice)**

33. Defendants realleges and reavers the above paragraphs as if set forth herein.
34. Defendants' lack of malice is a complete defense to one or more of Plaintiffs' claims.

**FOR AN EIGHTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Lack of Proximate Cause)**

35. Defendants realleges and reavers the above paragraphs as if set forth herein.
36. Defendants allege that any alleged conduct or omission by these Defendants was not the cause in fact or proximate cause of any injury alleged by Plaintiffs.

**FOR A NINTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Lack of Want of Probable Cause)**

37. Defendants realleges and reavers the above paragraphs as if set forth herein.
38. Defendants' lack of want of probable cause is a complete defense to one or more of Plaintiffs' claims.

**FOR A TENTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(*Lis Pendens* and Assessment Lien were Valid)**

39. Defendants realleges and reavers the above paragraphs as if set forth herein.
40. The *lis pendens* and assessment lien were facially valid, and there has been no final determination that either were invalid because the Court of Appeals dismissed the appeal as being moot.

**FOR AN ELEVENTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(12(b)(6))**

41. Defendants realleges and reavers the above paragraphs as if set forth herein.
42. Plaintiffs fail to state facts sufficient to constitute a cause of action and all causes of action should be dismissed pursuant to Rule 12(b)(6), SCRCP.

RESERVATION AND NON-WAIVER

43. Defendants realleges and reavers the above paragraphs as if set forth herein.
44. Defendants reserve and do not waive any additional defenses as may become available in the course of discovery or otherwise.

WHEREFORE, Defendants, Hilton C. Smith, Jr., Coosaw Investments, and Hilton C. Smith, Jr., Inc., pray that the Court inquire into the above referenced matter and, to the extent the

principles of law and equity allow, dismiss the Plaintiffs' Complaint and award Defendants the cost incurred in defending this action, including reasonable attorney's fees, and for an award of such other and further relief as this Court may deem just and proper.

Dated this 20 day of October 2015

WALL TEMPLETON & HALDRUP, P.A.



Neil S. Haldrup
Peden Brown McLeod, Jr.
Post Office Box 1200
Charleston, South Carolina 29402
(843) 329-9500
Attorneys for Hilton C. Smith, Jr., Coosaw
Investments, and Hilton C. Smith, Jr., Inc.

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
C.A. NO.: 2014-CP-07-2670

BENJAMIN C. GECY, RIVER CITY)
DEVELOPERS, LLC and RIVER CITY)
REAL ESTATE, LLC,)
Plaintiffs,)

-versus-

SOMERSET POINT AT LADY'S)
ISLAND HOMEOWNERS)
ASSOCIATION, INC., f/k/a COOSAW)
RIVER ESTATES HOMEOWNERS)
ASSOCIATION, LLC; HILTON C.)
SMITH, JR., COOSAW INVESTMENTS,)
LLC; HILTON C. SMITH, JR., INC. OF)
SOUTH CAROLINA and)
MANORHOUSE BUILDERS OF SOUTH)
CAROLINA, LLC,)
Defendants.)

**MOTION FOR PARTIAL SUMMARY
JUDGMENT AS TO MALICIOUS
PROSECUTION AND IN THE
ALTERNATIVE, A MOTION TO STAY
AND AMEND**

2015 MAR 30 PM 3:20
CLERK OF COURT
JOSEPH E. BEAU
COUNTY, S.C.

COMES NOW, Defendants, Hilton C. Smith, Jr., Coosaw Investments, LLC, and Hilton C. Smith, Jr., Inc. (collectively "Defendants") hereby move for summary judgment in the above captioned action pursuant to Rule 56 of the South Carolina Rules of Civil Procedure as to Plaintiffs' cause of action for malicious prosecution. The grounds for said motion are that there has been no termination of the previous action in Plaintiffs' favor. Based on the following law and arguments, Defendants are entitled to an order granting Defendants' summary judgment as to Plaintiffs' claims for malicious prosecution.

In the alternative, Defendants hereby move for an order staying this action. The basis of the motion to stay is that the matter from which Plaintiffs claim the causes of action arise is still pending

and any action for malicious prosecution is premature.

As an additional alternative, Defendants hereby move for an order pursuant to Rule 15 of the South Carolina Rules of Civil Procedure granting Defendants permission to file the attached proposed Amended Answer to Plaintiffs' Amended Complaint, Cross-claims, and Third-Party Complaint.

Defendants reserve the right to supplement these motions with other memorandum and/or documents pursuant to the South Carolina Rules of Civil Procedure.

Factual and Procedural Background

Plaintiffs filed this action against defendants on October 23, 2014, asserting causes of action for abuse of process and malicious prosecution against all the defendants. Plaintiffs allege that these claims arise out of an underlying action captioned *River City Developers, LLC v. Coosaw Investments, LLC, et al.*, Case Number 2011-CP-07-3945 ("Underlying Action") related to property River City Developers owned in Somerset Point at Lady's Island subdivision. Plt. Compl. ¶¶ 11, 16, 17, and 18. River City Developers, LLC asserted three causes of action in the Underlying Action. Plaintiffs allege that in response to the complaint filed in the Underlying Action, Defendant Somerset Point at Lady's Island Homeowners Association ("SPLIHOA") filed an answer, counterclaim, and cross-claim asserting a claim for injunctive relief. *Id.* Furthermore, the Complaint alleges that SPLIHOA named as additional parties, Plaintiffs, Benjamin C. Gecy and River City Real Estate, LLC to the Underlying Action and filed a *lis pendens* against a lot owned by River City Developers, LLC. *Id.*

Plaintiffs moved to have the *lis pendens* removed in the Underlying Action, and the Honorable Marvin H. Dukes, III issued an order dated February 15, 2012, which ordered "that the

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lis pendens filed in [the Underlying Action] shall be and is hereby stricken and removed and shall henceforth be of no further force or effect.” See Exhibit “A”. After Judge Dukes’ order filed on February 15, 2012, SPLIHOA filed an “assessment lien.” Plt. Compl. ¶ 21.

SPLIHOA filed a motion to reconsider on February 17, 2012, in response to Judge Dukes’ order striking the *lis pendens*. See Exhibit “B”. SPLIHOA argued in its motion to reconsider that Judge Dukes “misinterpreted the Court of Appeals’ Opinion in Pond Place Partners, Inc. v. Poole, 351 S.C. 567, S.E.2d 881 (S.C. App. 2002) in three important ways.” Id. SPLIHOA’s motion to reconsider noted that: (1) SPLIHOA’s “underlying declaratory judgment action was to ‘affirm and validate restrictive covenants and enforce thereof,’ not interpret them;” (2) the Court of Appeals in Pond Place did not hold that a *lis pendens* “must involve or affect ‘title’ to property, but rather it wrote that a *lis pendens* may be filed ‘... in conjunction with an underlying complaint involving an issue of property;’”; and (3) the Court of Appeals “was not ambiguous when it found the *lis pendens* appropriate in the case” and wrote “[r]estrictive covenants, by their very nature, clearly affect a property owner’s ownership of their subject land.” Id. (quoting Pond Place Partners, Inc., supra.).

On the same date that SPLIHOA filed its motion to reconsider, River City Developers, LLC filed a motion to strike certificate of lien seeking to have the assessment lien removed. See Exhibit “C”.

After a hearing on March 5, 2012, on the motion to reconsider and the motion to strike the assessment lien, an order was filed by Judge Dukes on April 6, 2012, that denied both SPLIHOA’s the motion to reconsider and Plaintiffs’ motion to strike the assessment lien. See Exhibit “D”. In response to Judge Dukes’ order filed on April 6, 2012, SPLIHOA filed a motion to stay time to appeal. See Exhibit “E”. On May 31, 2012, Judge Dukes filed a Form Four order denying the

motion for an extension of time to file an appeal. See Exhibit "F".

On July 2, 2012, Coosaw Investments, LLC, Hilton C. Smith, Jr., and SPLIHOA ("Appellants") filed a Notice of Appeal of the May 31, 2012 (including all prior orders). See Exhibit "G". On August 8, 2013, Appellants filed a motion to withdraw appeal because "[t]he property has since sold to a third party, and the issue presented by the appeal is now moot." See Exhibit "H". On August 12, 2013, an order was filed dismissing the appeals pursuant to Appellants' motion. See Exhibit "I".

Summary Judgment Standard

"Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." Etheredge v. Richland School Dist. One, 534 S.E.2d 275, 277 (S.C. 2000). "In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the nonmoving party." Id. "When reasonable minds cannot differ on plain, palpable, and indisputable facts, summary judgment should be granted." Singleton v. Sherer, 659 S.E.2d 196, 202 (S.C. Ct. App. 2008).

"The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." Richardson v. The State Record Co., Inc., 499 S.E.2d 824-25 (S.C. Ct. App. 1998). "With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility 'may be discharged by "showing" –that is, pointing out to the [trial] court – that there is an absence of evidence to support the nonmoving party's case.'" Id. at 825. "The moving party need not 'support its motion with affidavits or other similar materials negating the opponent's claim.'" Id.; see Milligan v. Liberty Life Ins. Co., 443 S.E.2d 381, 382 (S.C.

1994) (nothing that where record is devoid of evidence, moving party is entitled to summary judgment as a matter of law). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." Singleton, 659 S.E.2d at 203. "It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine." Thompkins v. Festival Centre Group, I, 410 S.E.2d 593, 594 (S.C. Ct. App. 1991).

Malicious Prosecution

"[T]o maintain an action for malicious prosecution, a plaintiff must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in [the] plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." Pallares v. Seinar, 407 S.C. 359, 366, 756 S.E.2d 128, 131 (2014)(quoting Law v. S.C. Dep't of Corr., 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006)) "An action for malicious prosecution fails if the plaintiff cannot prove **each of the required elements** by a preponderance of the evidence, including malice and lack of probable cause." Id. (emphasis added).

In this matter, Plaintiffs are unable to prove the element of termination of such proceeding in plaintiffs' favor. All the causes of actions in the Underlying Action are still pending. So, there cannot have been any termination of any of the causes of action asserted in the Underlying Action in anyone's favor. Accordingly, Plaintiffs are unable to establish that any of the causes of action were terminated in their favor, and Plaintiffs' claim for malicious prosecution must fail.

The lis pendens issue that was addressed by Judge Dukes is not considered a final determination because Judge Dukes ruling on striking the lis pendens is not based on substantive

grounds. Judge Dukes ordered the *lis pendens* stricken in his February 15, 2012, order, and readressed this issues related to the *lis pendens* in his April 26, 2012 order. In his February 15, 2012, order, Judge Dukes held that the SPLIHOA's declaratory judgment claim asserted in the Underlying Action did not affect title to real property, and ordered that the *lis pendens* be stricken. See Exhibit "A". In response to the order, SPLIHOA filed a motion to reconsider based Judge Dukes' misinterpretation of Pond Place Partners, Inc. v. Poole, supra. SPLIHOA argued in the motion to reconsider that (1) SPLIHOA's underlying declaratory judgment action was seeking a declaration affirming and validating the restrictive covenants and enforce thereof; (2) that the court in Pond Place did not hold that a *lis pendens* "must involve or affect 'title' to property, but rather it only need to involve an "issue" of property; and (3) that the court in Pond Place held that restrictive covenants affect a property owner's ownership of their subject land. See Exhibit "B".

In response to the motion to reconsider, Judge Dukes filed an order on April 26, 2012, which clarified his basis for striking the *lis pendens*. See Exhibit "C". In that order, Judge Dukes noted that the *lis pendens* was filed minutes prior to the filing of the construction mortgage on the property, and stated that "[b]ecause of the timing of the filing of Somerset's *lis pendens*, it had priority over River City's mortgage on its property." Id. Judge Dukes also noted that the assessment lien filed by SPLIHOA was recorded after the mortgage, and "is subordinated to the mortgage and does not affect or impair [the mortgage company's] security interest." Id. Judge Dukes went on and stated that "[i]n my opinion, leaving the *lis pendens* in place benefits neither party," and that "[e]quity should always act on a case-by-case basis." Judge Dukes stated that "once a party establishes an equitable right, the Court may dispense with pure formalities which would otherwise defeat the equity . . ." Id. He concluded by stating that "I find that the harm to River City in granting

Somerset's Motion to Reconsider outweighs the benefit to Somerset if the *lis pendens* [sic] remains in place." Id.

Although South Carolina courts have not addressed whether a finding on substantive grounds is necessary for a ruling to be considered a termination in favor of a plaintiff asserting malicious prosecution, the general rule is that "termination of underlying civil proceedings, in order to constitute a favorable termination for the purposes of a malicious prosecution action, must be consistent with a finding for the defendant on substantive grounds and must not be based solely upon technical or procedural considerations." 30 A.L.R.4th 572 (citing Ferraris v Levy, 223 Cal App 2d 408, 36 Cal Rptr 30 (1963, 1st Dist); Lumpkin v Friedman, 131 Cal App 3d 450, 182 Cal Rptr 378 (1982, 2d Dist); Levy's Store, Inc. v Endicott Johnson Corp. 272 NY 155, 5 NE2d 74 (1936); Rounds v Humes, 7 RI 535 (1863).

Judge Dukes' order denying the motion to reconsider explained his ruling on the issue of the *lis pendens*. In the order denying the motion to reconsider, Judge Dukes made it clear that his ruling to strike the *lis pendens* was based on a balancing of the equities, rather than substantive grounds. Therefore, Judge Dukes' April 6th order on this issue of the *lis pendens* was not a final termination under the general rule requiring that the ruling must be on substantive grounds. Accordingly, Defendants are entitled to summary judgment because there has been no final determination in favor of Plaintiffs in the underlying action.

Additionally, Judge Dukes' decision to strike the *lis pendens* was ultimately appealed. See Exhibit "G". The appeal was never addressed by the Court of Appeals because the appeal was dismissed at the requests of Appellants as being moot because the property that the *lis pendens* was attached to was sold by Plaintiffs and the *lis pendens* issue became moot. See Exhibit "H".

In the Alternative, Defendants' Motion to Stay

If the Court denies Defendants' Motion for Summary Judgment as to Plaintiffs' claim for malicious prosecution, Defendants, by and through its undersigned attorneys, hereby move for an Order staying this matter pending a final decision in Underlying Action. The final determinations in the Underlying Action will have a direct impact on Plaintiffs' claims in this matter for malicious prosecution and the need to protect communications between the Defendants in the Underlying Action and their counsel.

Plaintiffs have filed this action against Defendants asserting claims for abuse of process and malicious prosecution. These claims are allegedly derived from the Underlying Action based on SPLIHOA's filing of claims against Plaintiffs, as well as filing a lis pendens and an assessment lien.

As noted above, the Plaintiffs must prove all the elements of malicious prosecution to recover under that claim. One of the required elements is that the prior proceeding be terminated in Plaintiffs' favor. Because the Underlying Action is still pending, Plaintiffs will be unable to prove all the elements of malicious prosecution. Accordingly, Defendants are seeking to have this matter stayed until the Underlying Action has come to a conclusion.

A motion to stay an action is within the discretion of the circuit court. Talley v. John-Mansville Sales Corp., 328 S.E.2d 621, 623 (S.C. 1985). Here, a stay of this case is appropriate because: 1) there is litigation pending in another forum which will materially affect the outcome of the pending state court action; and 2) the interests of justice are served and no prejudice to any party exists.

In the Alternative, Defendants' Motion to Amend

If the Court denies Defendants' Motion to Stay, Defendants move to amend its Answer to

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Plaintiffs' Amended Complaint, Cross-Claims, and Third-Party Complaint, as outlined in the attached proposed Second Amended Answer to Plaintiffs' Amended Complaint, Cross-Claims, and Third-Party Complaint which includes an additional affirmative defense of advice of counsel. See Exhibit "J". This motion is made pursuant to Rule 15 of the South Carolina Rules of Civil Procedure.

"A motion to amend is addressed to the sound discretion of the trial judge." Parker v. Spartanburg Sanitary Sewer Dist., 607 S.E.2d 711, 716 (S.C. Ct. App. 2005) (citing Stanley v. Kirkpatrick, 592 S.E.2d 296 (S.C. 2004); City of North Myrtle Beach v. Lewis-Davis, 599 S.E.2d 462 (S.C. Ct. App. 2004)). "Leave to amend pleadings pursuant to Rule 15, SCRCP, shall be liberally and freely given when justice so requires and does not prejudice any other party." Id. (citing Crestwood Golf Club, Inc. v. Potter, 493 S.E.2d 826 (S.C. 1997); Pruitt v. Bowers, 499 S.E.2d 250 (S.C. Ct. App. 1998)). "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." Id. (citing Tanner v. Florence County Treasurer, 521 S.E.2d 153 (S.C. 1999); Lewis-Davis, 599 S.E.2d at 465)).

"The party opposing the amendment has the burden of establishing prejudice. Id. at 717 (citing Foggie v. CSX Transp., Inc., 431 S.E.2d 587 (1993); Pruitt, 499 S.E.2d at 253). "This rule strongly favors amendments and the court is encouraged to freely grant leave to amend." Id. (citing Jarrell v. Seaboard Sys. R.R., 363 S.E.2d 398 (S.C. Ct. App. 1987)). The South Carolina Supreme Court has held in instances where the facts giving rise to the claim are no different than those already asserted, there is no prejudice associated with the amendment. See Stanley v. Kirkpatrick, 592 S.E.2d 296, 298-99 (S.C. 2004). Additionally, the rules permit a party to move to amend to conform the pleadings to the evidence at any time, even after judgment. SCRCP 15(b).

Defendants are seeking to assert the additional defense of advice of counsel which was not asserted initially because of the risk of waiving the attorney-client privilege as to those claims related to malicious prosecution. If the court has denied Defendants' motion for summary judgment as to malicious prosecution, denied Defendants' motion to stay, other Defendants have the only option of asserting this defense in an effort to defeat Plaintiffs' claims for malicious prosecution and run the risk of waiving the attorney-client privilege as to issues related to Plaintiffs' claims for malicious prosecution.

In this case, upon information and belief, no party may demonstrate actual prejudice because there is no lack of notice of any new issue that is going to be tried and, in fact, the parties have been on notice of the claim for some time.

Conclusion

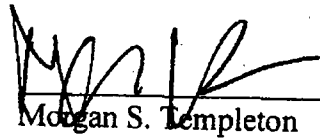
WHEREFORE, Defendants, Hilton C. Smith, Jr.; Hilton C. Smith, Jr., Inc.; and Coosaw Investments, LLC respectfully request that the Court, pursuant to SCRCP 56, issue an order granting Defendants' summary judgment as to Plaintiffs' cause of action for malicious prosecution. If the Court denies Defendants' motion for summary judgment, Defendants respectfully request that the Court issue an order staying this matter until the conclusion of the Underlying Action. If the Court denies Defendants' motion to stay, Defendants respectfully request that the Court issue an order granting Defendants leave to allow Defendants to assert the amended pleadings attached to the motion, as justice so requires and there is no prejudice to any other party.

[SIGNATURE INTENTIONALLY ON FOLLOWING PAGE]

Dated this 29th day of March 2015.

Respectfully submitted,

WALL TEMPLETON & HALDRUP, P.A.



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Investments, LLC**

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
(Case No. 2014-CP-07-02670)

BENJAMIN C. GECY, RIVER CITY)
DEVELOPERS, LLC, and RIVER CITY)
REAL ESTATE, LLC,,)

Plaintiffs,)

vs.)

PLAINTIFFS' MEMORANDUM
(PROCEDURAL BACKGROUND
IN THE UNDERLYING CASE)

SOMERSSET POINT AT LADY'S)
ISLAND HOMEOWNERS ASS'N, INC.,)
f/k/a COOSAW RIVER ESTATES)
HOMEOWNERS ASS'N, LLC, HILTON)
C. SMITH, JR., COOSAW)
INVESTMENTS, LLC, HILTON C.)
SMITH, JR., INC., OF SOUTH)
CAROLINA and MANORHOUSE)
BUILDERS OF SOUTH CAROLINA,)
LLC,)

Defendants.)

The River City Plaintiffs (herein, collectively, "River City") were among the earliest builders in Coosaw River Estates and the rechristened Somerset Point. They had built three houses before the Architectural Review Committee was formed. After it was formed, Ben Gecy, the President of River City made the mistake of pointing out exactly how the construction companies owned and/or controlled by Hilton C. Smith, Jr., were deviating from the very standards that had been announced for the community.

After having promised to make River City his primary builder, in return for information about River City's marketing ideas, and thereafter promising to make an allied company, GMC Mortgage, his principal take-out lender, Mr. Smith repudiated both promises and began to build in earnest in Somerset Point through the construction companies owned and/or controlled by him which are the other Defendants in this

action. Acting by and for all of the Defendants, Mr. Smith embarked on a course of anti-competitive conduct in an effort to frustrate River City's ability to build on lots owned by it and by others in the community.

At one point, each of the actors knew that the other's teeth had become set. River City, therefore, filed an action on September 20, 2011, in which it named as defendants Hilton Smith, Jr., individually and as the managing member and/or agent of and for the developer of the project, Coosaw River Estates, LLC, as well as of and for both of the homeowners' associations, that is, the original one for Coosaw River Estates and its successor, Somerset Point at Lady's Island Homeowners Association, Inc. River City's action was assigned Case No. 2011-CP-07-03945, and, in it, the Plaintiff sought damages from Smith and Coosaw River Estates for breach of fiduciary duty, as well as for unfair trade practices. It also sought damages from the homeowners associations for breach of contract.

One week later, on September 27, 2011, Somerset Point at Lady's Island Homeowners Association, Inc., filed its own suit. It was assigned Case No. 2011-CP-07-04028. The Association sought only injunctive relief against River City and its managing member, Benjamin Gecy, based on the alleged failure of River City to obey the covenants and design standards and the perceived need to enjoin its agent.

To implement its plan to stop work on River City's house at Lot 16, China Back (herein Lot 16), the Association, by a motion and supporting affidavit from Mr. Smith, sought an *ex parte* restraining order, and, when the Master declined to grant that relief, a rule to show cause requiring River City to appear in court two days later—on

September 29, 2011--to explain why the construction of its house should not be enjoined.

It is interesting to note that, although the Association's action was supposedly based on an alleged violation of the covenants, no lis pendens was filed in the action at the outset. Instead, the plaintiff tried to stop construction by relying directly on injunctive relief, which, of course is a special or extraordinary proceeding in and of itself.

Indeed, the Association recognized that its action was in the nature of a special proceeding, because, among other things, it filed a Certificate of Exemption in which counsel certified that the claim was exempt from ADR "under . . . Rule 1(a)(3)(A) as this is a special proceeding seeking injunctive relief."

Upon learning of the hearing scheduled before the Master on September 29, 2011, at which the Association proposed to restrain River City's construction on Lot 16, counsel for River City filed a motion to continue the hearing based upon the counsel's need to attend to other preexisting commitments, as well as upon the primacy of River City's case, in which virtually the same issues were involved.

The hearing on the restraining order was continued, and the Association agreed to plead over as a Defendant in River City's case. Therefore, Case No. 2011-CP-07-04028 was ultimately dismissed (on November 14, 2011), and the parties soldiered on in River City's case alone, that is, Case No. 2011-CP-07-03945.

However, In the course of the status conferences leading to that outcome, the Association's lawyer learned that her client's quest for injunctive relief was unlikely to succeed because (a) the Association had an adequate remedy at law, and (b) because

of the constraints of Rule 65(e), SCRCP, made the suspension of a going business difficult and potentially costly in view of the bond customarily required.

When the Association pleaded over, on October 24, 2011, by way of its counterclaim and cross-claim, it continued to make a nominal effort to obtain injunctive relief, that is, to restrain and/or to enjoin River City from building its house on Lot 16, which was a patent attempt to enjoin a going business. However, the Association made absolutely no effort to schedule a hearing to obtain that relief.

The reason was simple: The Association had recorded a lis pendens against Lot 16 at the same time that it had filed its Answer, Counterclaim and Cross-Claim. As a bonus, the lis pendens had beaten the construction mortgage to the Register of Deeds' Office, which caused the lender to refuse to fund further construction on Lot 16.

In short, the Association had used one ancillary, special proceeding, namely, the filing of the lis pendens, to implement the objective of its initial special proceeding, which was its action to obtain injunctive relief.

This was unusual beyond a doubt, especially since the underlying action for an injunction was not, in any manner, an action "affecting the title to real property," as is required by S.C. Code Ann. §§ 15-11-10 *et seq.*

Even more unusual was the language employed by counsel in the Association's lis pendens itself. A lis pendens must contain a description of the object of the action. *Id.* §15-11-10. The object, in this case, was to enjoin the construction by River City on its house at Lot 16 unless and until it paid fees, fines and penalties that the Association claimed were due. In other words, the object had nothing to do at all with the title to real property.

Yet the lis pendens recited that the underlying action "was for the purpose of removing clouds upon the title of the Plaintiff above named in the property herein described and to forever bar all claims, rights, titles, interests or liens of the Defendants above named in or to the property hereinafter described." Lis Pendens at 1.

Please recall that River City was the Plaintiff in Case No. 2011-CP-07-03945. The Association was the Defendant. The conflation of them—especially in conjunction with the misstatement of the objective of the action—was, at best, a glaring error and, at worst, a strong indication that little or no thought was given by the Association and its counsel to encumbering River City's property for the duration of the litigation.

Therefore, River City moved to strike the lis pendens. After a contested hearing, the Master held:

I find and conclude that the Counterclaim and Crossclaim do not seek to "affect" the title to the subject real property in this litigation. Accordingly, the the Lis Pendens is not authorized by S.C. Code Ann. §15-11-10 (2011) and must be removed. Order dated February 15, 2012, at 3.

The Master thereupon directed that the lis pendens shall be "stricken and removed, and shall henceforth be of no further force or effect." *Id.*

There the issue should have ended but for the fact that the Association moved to reconsider the Order striking the lis pendens.

In addition, five days before that order was issued, the Association had already recorded *sub silentio* at the Register of Deeds (on February 10, 2012) a putative Certificate of Lien that purported to allow the Association a lien for the fees, fines and penalties allegedly unpaid by River City by claiming that they were the equivalent of, or functionally similar to, assessments.

Because the fees, fines and penalties allegedly due all had their origin, if any, in design standards for the Architectural Review Committee (herein "the ARC"), which clearly had never been recorded, the Association's argument was attenuated at best from the outset.

But argue it did, and strenuously. In response to River City's Motion to Strike the certificate of lien, which was filed on February 17, 2012, the Association filed a Return dated March 5, 2012, in which, for the first time, the Association attempted a full blown defense of its conduct, contending that it's lis pendens beforehand, and now its certificate of lien, was each lawful because each had been issued in support of an action to enforce a covenant. The Return was filed served immediately before the argument of the motions, which occurred on March 5, 2012.

The Master reached a decision and directed that an order be prepared. Debate then ensued about the content of the order, and argument continued.

The Association also made a motion to amend its Answer, Counterclaim and Cross-Claim on March 30, 2012, presumably in an effort to bring that pleading more closely into line with the argument that was then being advanced.

All the while, River City's Lot 16 remained encumbered, and the construction lender continued to refuse to fund the work.

A status conference was finally held to resolve all outstanding matters. The Association's lawyer ultimately prepared the order that was adopted by the Master. In that Order dated April 6, 2012, the Master unconditionally denied the Association's Motion to Reconsider the Order dated February 15, 2012, stating, without further

adornment, "Somerset's Motion to Reconsider my Order striking the Lis Pendens is denied." Order dated April 6, 2012, at 4.

The Master then fashioned an equitable remedy, in lieu of granting River City's motion to strike the certificate of lien, in essence deciding that the escrow of a certain amount of money from a potential sale would be a sufficient basis on which to order the lien to be release and satisfied. *Id.* at 4-5.

Thereafter, the Association filed a motion to seeking a contempt citation against River city for failing to comply with the Order of April 6, 2012.

The Association also filed what was described therein as a "Motion to Stay Time to Appeal." Both were dated April 27, 2012. The reason that the Association sought the stay described was:

Somerset must act to protect its interests by filing its Notice of Appeal for the denial of its Motion to Reconsider entered on [sic] by the Court on April 6 2012. Motion by Somerset Point at Lady's Island Homeowners Association, Inc., dated April 27, 2012.

The time to appeal from the denial of the Association's motion to reconsider the Order dated February 15, 2012, expired some time on or about May 6, 2012.

Manifestly, the Master did not have the authority to grant a stay or an extension of the time to appeal, which is jurisdictional.

No further argument ensued, and, finally, the Master-in-Equity entered a form order denying both the motion seeking contempt and the remarkable application for a stay of the time to file an appeal. That order was filed on May 31, 2012.

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On June 28, 2012, the Association filed a Notice of Appeal purporting to appeal from "the May 31, 2012, Order of the Honorable Marvin H. Dukes, III, including all orders underlying the said Order." Attached to the notice was only the Order dated May 31, 2012.

However, in submissions to the Court by the moving Defendants in the new action, all three orders are attached to the notice, namely, that dated February 15, 2012, that dated April 6, 2012, and that dated May 31, 2012, which gives the false impression that all three orders were properly appealed.

Accordingly, the Order dated February 15, 2012, was never lawfully appealed. That argument never had to be made because, with the dismissal of the appeal by the Association, the striking of the lis pendens became "the law of the case," regardless.

Respectfully Submitted,

By: 
Robert V. Mathison, Jr.
Attorney for the Plaintiffs
River City Developers, LLC
River City Real Estate, LLC, and
Benjamin C. Gecy

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August 3, 2015

Hilton Head Island, South Carolina.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	:	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	C.A. NO.: 2014-CP-07-2670
BENJAMIN C. GECY, RIVER CITY	)	
DEVELOPERS, LLC and RIVER CITY	)	
REAL ESTATE, LLC,	)	
	)	
Plaintiffs,	)	
	)	
-versus-	)	AMENDED ANSWER
	)	
SOMERSET POINT AT LADY'S	)	
ISLAND HOMEOWNERS	)	
ASSOCIATION, INC., f/k/a COOSAW	)	
RIVER ESTATES HOMEOWNERS	)	
ASSOCIATION, LLC; HILTON C.	)	
SMITH, JR., COOSAW INVESTMENTS,	)	
LLC; HILTON C. SMITH, JR., INC. OF	)	
SOUTH CAROLINA and	)	
MANORHOUSE BUILDERS OF SOUTH	)	
CAROLINA, LLC,	)	
	)	
Defendants.	)	

Defendants, Hilton C. Smith, Jr., Coosaw Investments, and Hilton C. Smith, Jr., Inc.
(collectively referred to as "Defendants") answering the Complaint of Plaintiffs, allege and say:

FOR A FIRST DEFENSE

Defendants deny each and every allegation of the Amended Complaint not hereinafter specifically admitted.

AS TO THE PROLOGUE

1. As to the allegations contained in Paragraphs 1, 2 and 3 of Plaintiffs' Complaint, Defendants lack sufficient knowledge to admit or deny, and therefore, denies, and demands strict proof thereof.
2. As to the allegations contained in Paragraphs 4, 5, 6, 7, and 8 of Plaintiffs' Complaint, Defendants admit the same.

3. As to the allegations contained in Paragraph 9 of Plaintiffs' Complaint, the Defendants deny any responsibility for events, actions and/or omissions that are alleged to have caused injury to Plaintiffs.
4. As to the allegations contained in Paragraph 10 of Plaintiffs' Complaint, Defendants admit that River City Developers owned property in Somerset Point Subdivision located in Beaufort County, South Carolina, and was constructing a house on the property. As to the remaining allegations contained in Paragraph 10 of Plaintiffs' Complaint, Defendants lack sufficient knowledge to admit or deny, and therefore, denies, and demands strict proof thereof.
5. As to the allegations contained in Paragraph 11 of Plaintiffs' Complaint, Defendants admit the River City Development filed an action in Beaufort County, South Carolina ("Underlying Action") against Defendants.
6. As to the allegations contained in Paragraph 12 of Plaintiffs' Complaint, the same constitute legal conclusions to which no responsive pleading is required. To the extent that the allegations contained within the aforementioned Paragraphs do require a response from Defendants, the same are denied in full and Defendants demand strict proof thereof.
7. As to the allegations contained in Paragraph 13 of Plaintiffs' Complaint, Defendants admit that Coosaw Investments, LLC was the developer of Somerset Point at Lady's Island Subdivision. As to the remaining allegations contained in Paragraph 13 of Plaintiffs' Complaint, Defendants deny and demand strict proof.
8. As to the allegations contained in Paragraphs 14 and 15 of Plaintiffs' Complaint, the same constitute legal conclusions to which no responsive pleading is required. To the extent that the

allegations contained within the aforementioned Paragraphs do require a response from Defendants, the same are denied in full and Defendants demand strict proof thereof.

9. As to the allegations contained in Paragraph 16 of Plaintiffs' Complaint, Defendants aver that the allegations contained therein do not constitute allegations against Defendants, and, therefore, do not require a response from Defendants. To the extent that a response is required, Defendants deny the allegations contained in said Paragraphs and demands strict proof thereof.

10. As to the allegations contained in Paragraph 17 of Plaintiffs' Complaint, Defendants aver that the allegations contained therein do not constitute allegations against Defendants, and, therefore, do not require a response from Defendants. To the extent that a response is required, Defendants deny the allegations contained in said Paragraphs and demands strict proof thereof.

11. As to the allegations contained in Paragraph 18 of Plaintiffs' Complaint, Defendants aver that the allegations contained therein do not constitute allegations against Defendants, and, therefore, do not require a response from Defendants. To the extent that a response is required, Defendants deny the allegations contained in said Paragraphs and demands strict proof thereof.

12. As to the allegations contained in Paragraph 19 of Plaintiffs' Complaint, Defendants deny the same, and demand strict proof thereof.

13. As to the allegations contained in Paragraph 20 of Plaintiffs' Complaint, Defendants admit that the Order of the Honorable Marvin H. Dukes, III, ordered that the *lis pendens* be stricken and removed in the Underlying Action. As to the remaining allegations contained in Paragraph 20 of Plaintiffs' Complaint, Defendants deny and demand strict proof.

14. As to the allegations contained in Paragraph 21 of Plaintiffs' Complaint, Defendants aver

that the allegations contained therein do not constitute allegations against Defendants, and, therefore, do not require a response from Defendants. To the extent that a response is required, Defendants deny the allegations contained in said Paragraphs and demands strict proof thereof.

15. As to the allegations contained in Paragraph 22 of Plaintiffs' Complaint, Defendants admit upon the motion of Appellants, the South Carolina Court of Appeals dismissed Defendant Somerset Point at Lady's Island Homeowners Association's appeal as being moot.

AS TO THE FIRST CAUSE OF ACTION
(Abuse of Process)

15. As to the allegations contained in Paragraph 23 of Plaintiffs' Complaint, Defendants reallege and reaver the above paragraphs as if set forth herein.

16. As to the allegations contained in Paragraphs 24, 25, 26 and 27 of Plaintiffs' Complaint, Defendants deny the same, and demand strict proof thereof.

AS TO THE SECOND CAUSE OF ACTION
(Malicious Prosecution)

17. As to the allegations contained in Paragraph 28 of Plaintiffs' Complaint, Defendants reallege and reaver the above paragraphs as if set forth herein.

18. As to the allegations contained in Paragraph 29 of Plaintiffs' Complaint, Defendants aver that the allegations contained therein do not constitute allegations against Defendants, and, therefore, do not require a response from Defendants. To the extent that a response is required, Defendants deny the allegations contained in said Paragraph and demands strict proof thereof.

19. As to the allegations contained in Paragraph 30 of Plaintiffs' Complaint, Defendants deny the same, and demand strict proof thereof.

20. As to the allegations contained in Paragraph 31 of Plaintiffs' Complaint, Defendants aver that

the allegations contained therein do not constitute allegations against Defendants, and, therefore, do not require a response from Defendants. To the extent that a response is required, Defendants deny the allegations contained in said Paragraph and demands strict proof thereof.

21. As to the allegations contained in Paragraphs 32, 33 and 34 of Plaintiffs' Complaint, Defendants deny the same, and demand strict proof thereof.

22. The final unnumbered paragraph, including the subparts, constitutes a prayer for relief which requires no response from Defendants. To the extent a response is required, Defendants deny each allegation contained therein and demands strict proof thereof.

**FOR A SECOND DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Waiver, Estoppel, Laches, and Release)**

23. Defendants realleges and reavers the above paragraphs as if set forth herein.

24. Plaintiff's claims may be barred by the doctrines of waiver, estoppel, laches, and/or release.

**FOR A THIRD DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Good Faith)**

25. Defendants realleges and reavers the above paragraphs as if set forth herein.

26. Defendants acted in good faith when they sought advice of counsel and filed their pleadings, *lis pendens*, and assessment lien.

**FOR A FOURTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Proper Use of Legal Process)**

27. Defendants realleges and reavers the above paragraphs as if set forth herein.

28. At all times in the underlying case, Defendants exercised proper use of legal process.

**FOR A FIFTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Lack of Ulterior Motive)**

29. Defendants realleges and reavers the above paragraphs as if set forth herein.
30. Defendants' lack of ulterior motive is a complete defense to one or more of Plaintiffs' claims.

**FOR A SIXTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Proceeding Not Terminated in Plaintiffs' Favor)**

31. Defendants realleges and reavers the above paragraphs as if set forth herein.
32. There was no final determination regarding the *lis pendens* or other issues in the Underlying Action because the appeal of the *lis pendens* was dismissed as being moot, and because the Underlying Action is still pending.

**FOR A SEVENTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Lack of Malice)**

33. Defendants realleges and reavers the above paragraphs as if set forth herein.
34. Defendants' lack of malice is a complete defense to one or more of Plaintiffs' claims.

**FOR AN EIGHTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Lack of Proximate Cause)**

35. Defendants realleges and reavers the above paragraphs as if set forth herein.
36. Defendants allege that any alleged conduct or omission by these Defendants was not the cause in fact or proximate cause of any injury alleged by Plaintiffs.

**FOR A NINTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(Lack of Want of Probable Cause)**

37. Defendants realleges and reavers the above paragraphs as if set forth herein.
38. Defendants' lack of want of probable cause is a complete defense to one or more of Plaintiffs' claims.

**FOR A TENTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(*Lis Pendens* and Assessment Lien were Valid)**

39. Defendants realleges and reavers the above paragraphs as if set forth herein.
40. The *lis pendens* and assessment lien were facially valid, and there has been no final determination that either were invalid because the Court of Appeals dismissed the appeal as being moot.

**FOR AN ELEVENTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE
(12(b)(6))**

41. Defendants realleges and reavers the above paragraphs as if set forth herein.
42. Plaintiffs fail to state facts sufficient to constitute a cause of action and all causes of action should be dismissed pursuant to Rule 12(b)(6), SCRCP.

RESERVATION AND NON-WAIVER

43. Defendants realleges and reavers the above paragraphs as if set forth herein.
44. Defendants reserve and do not waive any additional defenses as may become available in the course of discovery or otherwise.

WHEREFORE, Defendants, Hilton C. Smith, Jr., Coosaw Investments, and Hilton C. Smith, Jr., Inc., pray that the Court inquire into the above referenced matter and, to the extent the

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principles of law and equity allow, dismiss the Plaintiffs' Complaint and award Defendants the cost incurred in defending this action, including reasonable attorney's fees, and for an award of such other and further relief as this Court may deem just and proper.

Dated this 20 day of October 2015

WALL TEMPLETON & HALDRUP, P.A.



Neil S. Haldrup
Peden Brown McLeod, Jr.
Post Office Box 1200
Charleston, South Carolina 29402
(843) 329-9500
Attorneys for Hilton C. Smith, Jr., Coosaw
Investments, and Hilton C. Smith, Jr., Inc.

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FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP0702670

Benjamin C Gecy River City Developers Llc

Somerset Point At Ladys
Island Homowers
Association Inc
Hilton C Smith Jr
Hilton C Smith Jr Inc
Of South Carolina

Coosaw River Estates
Homeowners Association
Llc
Coosaw Investments Llc
Manorhouse Builders Of
South Carolina Llc

River City Real Estate Llc

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ 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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ 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:

ORDER INFORMATION

Motion to Compel dtd 06/22/15 is continued for 2 weeks. Motion for Summary Judgment dtd 06/22/15 Granted without Prejudice. Motion for Summary Judgment dtd 08/06/15 Denied. Action Stayed as to anything other than Lis Pendens. This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

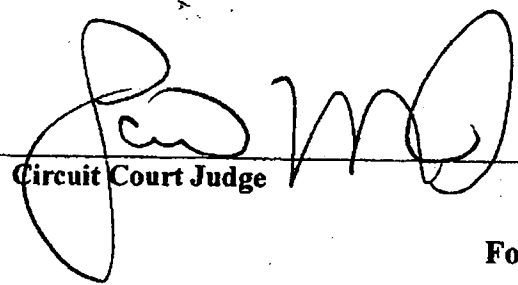
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

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 or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

217



2155
Judge Code

9/9/2015
Date

For Clerk of Court Office Use Only

This judgment was entered on 9th Day of Septemeber 2015, and a copy mailed first class or placed in the appropriate attorney's box on 10th Day of Septemeber 2015, to attorneys of record or to parties (when appearing pro se) as follows:

Robert V. Mathison Jr. PO Box 5271 Hilton Head Island, SC 29938

Ernest Mitchell Griffith PO Drawer 570 Beaufort, SC 29901
John Elliott Rogers II PO Box 5663 Spartanburg, SC 29304
Morgan S. Templeton PO Box 1200 Charleston, SC 29402
Jeffrey J. Wiseman PO Box 993 Charleston, SC 29402

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Meghan M. Neilan - Scheduling Clerk

Court Reporter

Jerri Ann Roseneau - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMONS PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Benjamin C. Gecy, River City
Developers, LLC and River City
Real Estate, LLC,)

ORDER

Plaintiffs)

v.)

Somerset Point at Lady's Island
Homeowners Associates, Inc.,
f/k/a Coosaw River Estates
Homeowners Association, LLC
Hilton C. Smith, Jr., Coosaw
Investments, LLC, Hilton C.
Smith, Jr., Inc. of South Carolina
and Manorhouse Builders of
South Carolina, LLC,)

CA No.: 2014-CP-07-2670

Defendants.)

2015 OCT -5 PM 2:11
BEAUFORT COUNTY, S.C.
CLERK OF COURT

This matter came before the Court on September 9, 2015 on the Motion of Defendant Manorhouse Builders of South Carolina, LLC (hereinafter "Manorhouse"), for Summary Judgment against Plaintiffs' Benjamin C. Gecy, River City Developers, LLC and River City Real Estate, LLC (hereinafter "Plaintiffs") claims for abuse of process and malicious prosecution. Manorhouse was not a party to the underlying lawsuit wherein Plaintiffs claim that other Defendants improperly filed a *Lis Pendens* and maliciously prosecuted Plaintiffs with the *Lis Pendens* and associated claims, Counterclaims and/or Cross-Claims. Accordingly, the Court grants Manorhouse's Motion for Summary Judgment.

FACTS

Plaintiffs filed this action against defendants on October 23, 2014, asserting causes of action for abuse of process and malicious prosecution against all the defendants. Plaintiffs allege

that these claims arise out of an underlying action captioned *River City Developers, LLC v. Coosaw Investments, LLC, et al.*, Case Number 2011-CP-07-3945 ("Underlying Action") related to property River City Developers owned in Somerset Point at Lady's Island subdivision. River City Developers, LLC asserted three causes of action in the Underlying Action. Plaintiffs allege that in response to the complaint filed in the Underlying Action, Defendant Somerset Point at Lady's Island Homeowners Association ("SPLIHOA") filed an answer, counterclaim, and cross-claim asserting a claim for injunctive relief. Furthermore, the Complaint alleges that SPLIHOA named as additional parties, Plaintiffs, Benjamin C. Gecy and River City Real Estate, LLC to the Underlying Action and filed a *lis pendens* against a lot owned by River City Developers, LLC.

Plaintiffs moved to have the *lis pendens* removed in the Underlying Action, and the Honorable Marvin H. Dukes, III issued an order dated February 15, 2012, which ordered "that the *lis pendens* filed in [the Underlying Action] shall be and is hereby stricken and removed and shall henceforth be of no further force or effect." After Judge Dukes' order filed on February 15, 2012, SPLIHOA filed an "assessment lien."

SPLIHOA filed a motion to reconsider on February 17, 2012, in response to Judge Dukes order striking the *lis pendens*. SPLIHOA argued in its motion to reconsider that Judge Dukes "misinterpreted the Court of Appeals' Opinion in Pond Place Partners, Inc. v. Poole, 351 S.C. 567, S.E.2d 881 (S.C. App. 2002) in three important ways." SPLIHOA's motion to reconsider noted that: (1) SPLIHOA's "underlying declaratory judgment action was to 'affirm and validate restrictive covenants and enforce thereof,' not interpret them;" (2) the Court of Appeals in Pond Place did not hold that a *lis pendens* "must involve or affect 'title' to property, but rather it wrote that a *lis pendens* may be filed '... in conjunction with an underlying complaint involving an issue of property,'" and (3) the Court of Appeals "was not ambiguous when it found the *lis*

pendens appropriate in the case” and wrote “[r]estrictive covenants, by their very nature, clearly affect a property owner’s ownership of their subject land.”

On the same date that SPLIHOA filed its motion to reconsider, River City Developers, LLC filed a motion to strike certificate of lien seeking to have the assessment lien removed.

After a hearing on March 5, 2012, on the motion to reconsider and the motion to strike the assessment lien, an order was filed by Judge Dukes on April 6, 2012, that denied both SPLIHOA’s motion to reconsider and Plaintiffs’ motion to strike the assessment lien.

On July 2, 2012, Coosaw Investments, LLC, Hilton C. Smith, Jr., and SPLIHOA (“Appellants”) filed a Notice of Appeal of the May 31, 2012 (including all prior orders). On August 8, 2013, Appellants filed a motion to withdraw appeal because the property has since sold to a third party, and the issue presented by the appeal is now moot. On August 12, 2013, an order was filed dismissing the appeals pursuant to Appellants’ motion.

STANDARD OF REVIEW

Summary Judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Young v. South Carolina Dep’t of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(c), SCRPC.

In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. *Strother v. Lexington County Recreation Comm’n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct.App.197). However, once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the

opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. Rule 56(e), SCRPC, *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1190); *Peterson v. West American Ins. Co.*, 336 S.C. 89, 518 S.E.2d 608, (Ct.App. 1999). Where the record is devoid of any allegation or evidence tending to show there is a material fact in issue, the moving party is entitled to summary judgment as a matter of law. *Milligan v. Liberty Life Ins. Co.*, 313 S.C. 478, 443 S.E.2d 381 (1994)

A conclusory statement as to the ultimate issue in case is not sufficient to create genuine issue of fact for purposes of resisting summary judgment. *Germann v. New York Life Ins. Co.*, 331 S.E.2d 385 (S.C. App. 1985). When a plaintiff is faced with a defendant's motion for summary judgment that is supported by evidence, the plaintiff cannot defeat the motion by relying upon the mere allegations of his complaint, but must disclose the facts he intends to rely on by affidavit or other proof. *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994).

LAW

(1) Abuse of Process

The essential elements of an abuse of process claim are (1) an ulterior purpose; and (2) a willful act in the use of process not proper in the regular conduct of the proceeding. *First Union Mortg. Corp. v. Thomas*, 451 S.E.2d 907, 914 (S.C. App. 1994). An ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process. *Davis v. Epting*, 454 S.E.2d 325, 328 (S.C. App. 1994). Abuse of process is the misusing or misapplying of legal process justified in itself for an end other than that which it was designed to accomplish. *Whitfield Constr. Co. v. Bank of Tokyo Trust Co.*, 338 S.C. 207, 525 S.E.2d 888 (Ct. App. 1999).

(2) Malicious Prosecution

"[T]o maintain an action for malicious prosecution, a plaintiff must establish: (1) the institution or continuation of original judicial proceedings;⁴ (2) by or at the instance of the defendant; (3) termination of such proceedings in [the] plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." *Pallares v. Seinar*, 756 S.E.2d 128, 131 (S.C. 2014). Malice is defined as 'the deliberate[,] intentional doing of an act without just cause or excuse.' *Id.* at 131 (S.C. 2014). In an action for malicious prosecution, malice may be inferred from a lack of probable cause to institute the prosecution. *Id.*

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. The issue is not what the actual facts were, but what the prosecuting party honestly believed them to be. *Id.* A party must show the opponent lacked probable cause as to each cause of action asserted to prevail on a claim of malicious prosecution; thus, the existence of probable cause as to any one is sufficient to defeat a malicious prosecution claim. *Id.* at 132 (S.C. 2014). Whether probable cause exists is ordinarily a jury question, but it may be decided as a matter of law when the evidence yields only one conclusion. *Id.*

ANALYSIS

Plaintiffs' Complaint does not contain any allegations of amalgamation of interests. There are no allegations that Manorhouse's activities blurred the legal distinction between any of the other corporations named as defendants. Plaintiffs' allegations are made directly against Manorhouse. Accordingly, Plaintiffs' theory of liability against Manorhouse, as stated in Plaintiffs' Complaint, is one of direct liability. The Court finds there is no evidence to support

Plaintiff's abuse of process and malicious prosecution claims against Manorhouse.

There is no factual basis to support any allegations of Plaintiffs pertaining to Manorhouse filing or causing to be filed any *Lis Pendens*, Counterclaim or Cross-Claim in the underlying lawsuit which forms the basis of Plaintiffs' Complaint. No evidence has been provided by Plaintiffs to support claims of abuse of process and/or malicious prosecution against Manorhouse. Manorhouse submitted the Affidavits of Hilton C. Smith, Jr. and Hilton C. Smith, III in support of its assertion that it did not file or cause to be filed any *Lis Pendens*, Counterclaim or Cross-Claim in the underlying lawsuit. No evidence has been provided by Plaintiffs to refute the contents in the Affidavits.

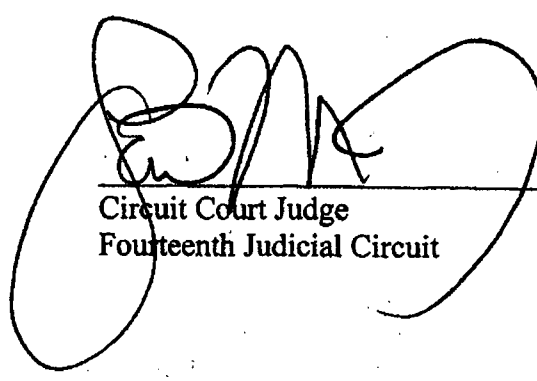
Hilton C. Smith, Jr. was the President of Manorhouse during the time period of the allegations of the underlying lawsuit. Hilton C. Smith, III was the Vice President of Finance Treasurer during this same time. Both had knowledge of the day to day operations of Manorhouse at that time. The Affidavits clearly state that Manorhouse was not involved in any decision making process during which a decision was made to file any of the claims in the underlying lawsuit. Manorhouse had no part in the decision to file the *Lis Pendens* or to appeal Judge Dukes' order regarding the *Lis Pendens*. Manorhouse did not manage or operate homeowners associations. Therefore, no genuine issue of material facts exists and Manorhouse is entitled to summary judgment as a matter of law on all causes of action.

CONCLUSION

The Court finds there are no genuine issues of material fact and Manorhouse is entitled to summary judgment as a matter of law regarding the abuse of process and malicious prosecution claims based upon a lack of evidence that Manorhouse was involved in the underlying lawsuit. Therefore, Manorhouse's Motion for summary judgment is granted and Plaintiffs' claims are

dismissed without prejudice. Plaintiffs shall have thirty (30) days from the date of this order to amend the Complaint.

10-2-15
~~September~~, 2015



Circuit Court Judge
Fourteenth Judicial Circuit

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
BENJAMIN C. GECY, RIVER CITY)
DEVELOPERS, LLC and RIVER CITY)
REAL ESTATE, LLC,)
)
Plaintiffs,)
)
-versus-)
)
SOMERSET POINT AT LADY'S)
ISLAND HOMEOWNERS)
ASSOCIATION, INC., f/k/a COOSAW)
RIVER ESTATES HOMEOWNERS)
ASSOCIATION, LLC; HILTON C.)
SMITH, JR., COOSAW INVESTMENTS,)
LLC; HILTON C. SMITH, JR., INC. OF)
SOUTH CAROLINA and)
MANORHOUSE BUILDERS OF SOUTH)
CAROLINA, LLC,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
C.A. NO.: 2014-CP-07-2670

**ORDER GRANTING DEFENDANTS
HILTON C. SMITH, JR., COOSAW
INVESTMENTS, LLC AND HILTON C.
SMITH, JR., INC. SUMMARY
JUDGMENT AS TO MALICIOUS**

PROSECUTION
(Not Case Ending)

2015 NOV 12 PM 4:21
JERRI ANN ROSEHEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

On August 4, 2015, Defendants Hilton C. Smith, Jr., Coosaw Investments, LLC, and Hilton C. Smith, Jr., Inc. (hereinafter collectively referred to as "Smith Defendants"), came before the Court on their Motion for Summary Judgment as to Plaintiffs' claim for malicious prosecution. After considering oral arguments and written briefs, the Court grants Smith Defendants' Amended Motion for Summary Judgment as to Plaintiffs' claim for malicious prosecution because the underlying action that gives rise to the claim for malicious prosecution is still pending, and because there was no termination of the *lis pendens* in favor of Plaintiffs.

BACKGROUND AND RELEVANT FACTS

Plaintiffs filed this action against Defendants on October 23, 2014, asserting causes of action for abuse of process and malicious prosecution against all the defendants. Plaintiffs allege that these claims arise out of an underlying action captioned *River City Developers, LLC v. Coosaw Investments, LLC, et al.*, Case Number 2011-CP-07-3945 ("Underlying Action") related to property River City Developers owned in Somerset Point at Lady's Island subdivision. River City Developers, LLC asserted three causes of action in the Underlying Action. Plaintiffs allege that in response to the complaint filed in the Underlying Action, Defendant Somerset Point at Lady's Island Homeowners Association ("SPLIHOA") filed an answer, counterclaim, and cross-claim asserting a claim for injunctive relief. Furthermore, the Complaint alleges that SPLIHOA named as additional parties, Plaintiffs, Benjamin C. Gecy and River City Real Estate, LLC to the Underlying Action and filed a *lis pendens* against a lot owned by River City Developers, LLC.

Plaintiffs moved to have the *lis pendens* removed in the Underlying Action, and the Honorable Marvin H. Dukes, III issued an order dated February 15, 2012, which ordered "that the *lis pendens* filed in [the Underlying Action] shall be and is hereby stricken and removed and shall henceforth be of no further force or effect." After Judge Dukes' order filed on February 15, 2012, SPLIHOA filed an "assessment lien."

SPLIHOA filed a motion to reconsider on February 17, 2012, in response to Judge Dukes order striking the *lis pendens*. SPLIHOA argued in its motion to reconsider that Judge Dukes "misinterpreted the Court of Appeals' Opinion in Pond Place Partners, Inc. v. Poole, 351 S.C. 567, S.E.2d 881 (S.C. App. 2002) in three important ways." SPLIHOA's motion to reconsider noted

that: (1) SPLIHOA's "underlying declaratory judgment action was to 'affirm and validate restrictive covenants and enforce thereof,' not interpret them;" (2) the Court of Appeals in Pond Place did not hold that a *lis pendens* "must involve or affect 'title' to property, but rather it wrote that a *lis pendens* may be filed '... in conjunction with an underlying complaint involving an issue of property;'" and (3) the Court of Appeals "was not ambiguous when it found the *lis pendens* appropriate in the case" and wrote "[r]estrictive covenants, by their very nature, clearly affect a property owner's ownership of their subject land."

On the same date that SPLIHOA filed its motion to reconsider, River City Developers, LLC filed a motion to strike certificate of lien seeking to have the assessment lien removed.

After a hearing on March 5, 2012, on the motion to reconsider and the motion to strike the assessment lien, an order was filed by Judge Dukes on April 6, 2012, that denied both SPLIHOA's motion to reconsider and Plaintiffs' motion to strike the assessment lien.

On July 2, 2012, Coosaw Investments, LLC, Hilton C. Smith, Jr., and SPLIHOA ("Appellants") filed a Notice of Appeal of the May 31, 2012 Order of the Honorable Marvin H. Dukes, III (including all prior orders). On August 8, 2013, Appellants filed a motion to withdraw appeal because the property has since sold to a third party, and the issue presented by the appeal is now moot. On August 12, 2013, an order was filed dismissing the appeals pursuant to Appellants' motion.

SUMMARY JUDGMENT STANDARD

"Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." Etheredge v. Richland Sch. Dist. One, 534 S.E.2d 275, 277 (S.C. 2000). "In ruling on a motion

for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the nonmoving party.” Id. “When reasonable minds cannot differ on plain, palpable, and indisputable facts, summary judgment should be granted.” Singleton v. Sherer, 659 S.E.2d 196, 202 (S.C. Ct. App. 2008).

“The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” Richardson v. The State Record Co., Inc., 499 S.E.2d 824-25 (S.C. Ct. App. 1998). “With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility ‘may be discharged by “showing” –that is, pointing out to the [trial] court – that there is an absence of evidence to support the nonmoving party’s case.’” Id. at 825. “The moving party need not ‘support its motion with affidavits or other similar materials negating the opponent’s claim.’” Id.; see Milligan v. Liberty Life Ins. Co., 443 S.E.2d 381, 382 (S.C. 1994) (nothing that where record is devoid of evidence, moving party is entitled to summary judgment as a matter of law). “Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings.” Singleton, 659 S.E.2d at 203. “It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine.” Thompkins v. Festival Centre Group, I, 410 S.E.2d 593, 594 (S.C. Ct. App. 1991).

LAW AND ANALYSIS

“[T]o maintain an action for malicious prosecution, a plaintiff must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in [the] plaintiff’s favor; (4) malice in instituting

such proceedings; (5) lack of probable cause; and (6) resulting injury or damage.” Pallares v. Seinar, 407 S.C. 359, 366, 756 S.E.2d 128, 131 (2014)(quoting Law v. S.C. Dep’t of Corr., 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006)). “An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence, including malice and lack of probable cause.” Id.

In this matter, Plaintiffs are unable to prove the element of termination of such proceeding in plaintiffs’ favor. All the causes of actions in the Underlying Action are still pending. So, there cannot have been any termination of any of the causes of action asserted in the Underlying Action in anyone’s favor. Therefore, Plaintiffs are unable to establish that any of the causes of action were terminated in their favor, and Plaintiffs’ claim for malicious prosecution must fail.

Plaintiffs argued at the motion hearing that the proceeding from which the malicious prosecution arises dealt with the ancillary issue of the *lis pendens*. However, the *lis pendens* issue that was addressed by Judge Dukes is not considered a final determination because Judge Dukes ruling on striking the *lis pendens* was not based on substantive grounds. Judge Dukes ordered the *lis pendens* stricken in his February 15, 2012, order, and readdressed this issue related to the *lis pendens* in his April 26, 2012 order. In his order filed February 15, 2012, Judge Dukes held that the SPLIHOA’s declaratory judgment claim asserted in the Underlying Action did not affect title to real property, and ordered that the *lis pendens* be stricken. In response to that order, SPLIHOA filed a motion to reconsider based on Judge Dukes’ misinterpretation of Pond Place Partners, Inc. v. Poole, supra. In response to the motion to reconsider, Judge Dukes filed a second order on April 26, 2012, which clarified his basis for striking the *lis pendens*. In that order, Judge Dukes noted that the *lis pendens* was filed minutes prior to the filing of the construction mortgage on the

property, and stated that “[b]ecause of the timing of the filing of Somerset’s *lis pendens*, it had priority over a construction mortgage on its property.” Judge Dukes also noted that the assessment lien filed by SPLIHOA was recorded after the mortgage, and “is subordinated to the mortgage and does not affect or impair [the mortgage company’s] security interest.” Judge Dukes went on and stated that “[i]n my opinion, leaving the *lis pendens* in place benefits neither party,” and that “[e]quity should always act on a case-by-case basis.” Judge Dukes stated that “once a party establishes an equitable right, the Court may dispense with pure formalities which would otherwise defeat the equity . . .” He concluded by stating that “I find that the harm to River City in granting Somerset’s Motion to Reconsider outweighs the benefit to Somerset if the *lis pendens* [sic] remains in place.”

The general rule is that “termination of underlying civil proceedings, in order to constitute a favorable termination for the purposes of a malicious prosecution action, must be consistent with a finding for the defendant on substantive grounds and must not be based solely upon technical or procedural considerations.” 30 A.L.R. 4th 572 (citing *Ferraris v. Levy*, 223 Cal. App. 2d 408, 36 Cal. Rptr. 30 (1963, 1st Dist.); *Lumpkin v. Friedman*, 131 Cal. App. 3d 450, 182 Cal. Rptr. 378 (1982, 2d Dist.); *Levy’s Store, Inc. v Endicott Johnson Corp.*, 272 NY 155, 5 N.E. 2d 74 (1936); *Rounds v. Humes*, 7 R.I. 535 (1863).

Judge Dukes’ order denying the motion to reconsider and the motion to strike the lien assessment explained his ruling on the issue of the *lis pendens*. In the order denying the motion to reconsider and the motion to strike the lien, Judge Dukes made it clear that his ruling to strike the *lis pendens* was based on a balancing of the equities, rather than substantive grounds. Therefore, Judge Dukes’ April 6th order on the issue of the *lis pendens* was not a final termination under the

general rule requiring that the ruling must be on substantive grounds. Accordingly, Defendants are entitled to summary judgment because there has been no final determination in favor of Plaintiffs in the underlying action.

THEREFORE, the Court finds that the Underlying Action has not been terminated in favor of Plaintiffs, so, any claim for malicious prosecution must fail, and as conceded by Plaintiffs' counsel at the hearing, the malicious prosecution claim arose out of the ancillary issue of the *lis pendens*, and the Court finds that Judge Dukes resolution of the *lis pendens* issue was based on equitable grounds, not substantive grounds, and thus, cannot be a termination in favor of any party.

IT IS THEREFORE ORDERED that pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Defendants Hilton C. Smith, Jr., Coosaw Investments, LLC, and Hilton C. Smith, Jr., Inc.'s, Motion for Summary Judgment as to Plaintiffs' claim for malicious prosecution is GRANTED!



Judge Carmen T. Mullen
Fourteenth Judicial Circuit

Beaufort, South Carolina

This 10 day of November, 2015

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
(Case No. 2014-CP-07-02670)

Benjamin C. Gecy, River City)
Real Estate Developers, LLC,)
and River City Real Estate, LLC,)

Plaintiffs,)

v.)

NOTICE OF MOTION AND MOTION
(Reconsideration)

Somerset Point at Lady's Island)
Homeowners Association, Inc.,)
f/k/a Coosaw River Estates)
Homeowners Association, LLC,)
Hilton C. Smith, Jr., Coosaw)
Investments, LLC, Hilton C.)
Smith, Jr., Inc. of South Carolina,)
And Manorhouse Builders of)
South Carolina, LLC,)

Defendants.)

2015 DEC 28 PM 12:54
JERRI ANN ROBERTS, ALB.
BEAUFORT COUNTY, S.C.
CLERK OF COURT

TO: The Defendants, by and through their Attorneys.

PLEASE TAKE NOTICE that the Plaintiffs herein, by and through their undersigned attorneys, ten (10) days after the service hereof, upon such date and at such time as shall be scheduled by the Court, will move before the Honorable Carmen T. Mullen, Circuit Court Judge, at the Beaufort County Courthouse, 102 Ribaut Road, Beaufort, South Carolina, for the following relief:

1. An order, pursuant to Rules 52(b) and 59(a) and (e), SCRCP, awarding a new trial or, in the alternative, altering or amending the judgment set forth in the Order dated November 10, 2015 (and filed on November 12, 2015)(herein "the Order"), in the following particulars and upon the following grounds:

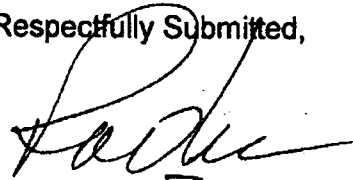
(a) The Court appears to have overlooked, and the Order fails to address, the arguments made by the Plaintiff at the initial hearing, as well as in communications with the Court and opposing counsel made after the initial hearing, including, without limitation, the applicable facts, and the law appertaining thereto, which is set forth in that certain letter of Robert V. Mathison, Jr., dated August 31, 2015, as well as in that certain email by the same person dated November 10, 2015, copies of which are attached hereto as Exhibits A and B, respectively, and are incorporated herein by express reference.

(b) The order is in conflict with that of Judge R. Lawton McIntosh which addresses the same subject matter, and, though argued subsequently, was entered prior to the Order of Judge Mullen.

THIS MOTION is premised upon all matters of record in this case, as well as in the underlying, previous case.

Respectfully Submitted,

By:


Robert V. Mathison, Jr.
Attorney for the Plaintiffs

MATHISON & MATHISON
Post Office Box 5271
Hilton Head Island, SC 29938
Telephone: (843) 785-6503
Email: rmathlaw@aol.com

December 24, 2015

Hilton Head Island, South Carolina.

MATHHISON & MATHISON

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Email: rmathlaw@aol.com

August 31, 2015
VIA EMAIL AND U.S. MAIL

The Honorable Carmen T. Mullen
Circuit Court Judge
100 Ribaut Road, Suite 205
Beaufort, South Carolina 29902

Re: Benjamin C. Gecy v. Somerset Point at Lady's Island Homeowners
Association, Inc., et al.
Case No. 2014-CP-07-02670

Dear Judge Mullen:

I appreciate this opportunity to respond to the proposed order submitted by my opponents.

1. Prologue.

The proposed order handed up (herein after cited as "Order") states that the Defendants' motion for summary judgment should be granted "because the underlying action that gives rise to the claim for malicious prosecution is still pending and because there was no termination of the *lis pendens* in favor of the Plaintiffs." Order at 1. As a reading of the full order makes clear, the foregoing statement is inaccurate because the proposed order conflates the two issues, expands on the contentions previously made and obscures the question of "termination" with a factual argument that is premature, but that, in any event, can be readily refuted.

Furthermore, the order ignores the Plaintiffs' two principal arguments that were made to you on August 4, 2015, namely, that the Plaintiffs' approach in this case is squarely supported by the literal invitation of the Court of Appeals in *Pond Place Partners v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002)(herein after referred to as "*Pond Place*"), as well as by the express endorsement of Section 674 of the **Restatement (Second) of Torts** (A.L.I. 1977)(herein after referred to as "the Restatement").

2. Theories of Recovery after *Pond Place*.

Please recall that in *Pond Place* the Court of Appeals deemed the *lis pendens* in question in that case to be a "pleading," [a conclusion at odds with the definition of the

same term in the South Carolina Rules of Civil Procedure], and thus the *lis pendens* was deemed subject to the absolute privilege that attaches to judicial proceedings in defamation actions, including the slander of title claim made in that case.

Nevertheless, the court in *Pond Place* took pains to instruct the bar that other causes of action were available to redress the damage caused by an unlawful *lis pendens*, and, indeed, the court devoted an entire section of its decision to that subject:

V. Alternative Relief

Lastly, we are not unmindful of the fact that our holding above may limit the prosecution of actions for slander of title in South Carolina. However, it does not extinguish every form of relief when a party files a *lis pendens* which is motivated by some malicious intent. The jurisdictions are in agreement that ***the proper action against a maliciously filed lis pendens is under abuse of process or malicious prosecution***. See *Sanders v. Rollinson*, 33 S.C. Law (2 Strob.) 447 (1848) (stating an action for slander based on a defamatory affidavit was a non-suit; ***the proper attack was under malicious prosecution***). *Pond Place*, 351 S.C. 1, 31, 567 S.E.2d 881, ____ (emphasis added).

The Court of Appeals then went on to cite as examples seven cases from other jurisdictions. Two authorized a recovery for an unlawful *lis pendens* under the theory of abuse of process. Five cases concluded that the proper action for an unlawful *lis pendens* was malicious prosecution.

In short, the Plaintiff in the case at bar has followed the express instructions of the Court of Appeals. The case before you comprises two causes of action: One is for abuse of process, and the other is for malicious prosecution, all as would appear to be expressly authorized by *Pond Place*, as well as by *Sanders v. Rollinson*.

3. The Restatement Supports the Plaintiffs.

Nevertheless, the Plaintiffs went even further. Before they filed the instant action, they made certain that there was credible authority for the proposition that the favorable termination of an ancillary proceeding, such as the striking of a *lis pendens*, would support an action for malicious prosecution. Restatement § 674 provides that authority:

f. Ancillary proceedings. A particular civil proceeding may be ancillary to other proceedings. Thus an attachment may be issued to secure the payment of a possible future judgment. If the principal proceedings were improperly brought under the rule stated in this section, compensation for the harm done by the ancillary proceedings is recoverable as part of the

damages for the improper initiation of the principal proceedings. ***Even though the principal proceedings are properly brought, the ancillary proceeding may be wrongfully initiated. In this case the wrongful procurement and execution of the ancillary process subjects the persons procuring it to liability under the rule stated in this Section.*** *Id.* § 674, Comment f, at 455 (emphasis added).

The Section to which reference is made in the foregoing quotation is Section 674, which is entitled "Wrongful Use of Civil Proceedings," and which I handed up to you (as well as to moving counsel) at the hearing on August 4. That Section provides that a person initiating, continuing or procuring civil proceedings against another is liable if he acts without probable cause and "(b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought." *Id.* § 674(b).

The "termination" required by the Restatement, as argued by the Defendants and as presented as the law in the order that they have prepared for your signature, manifestly ***does not*** refer to the dismissal or other conclusion of the underlying action. If this were so, a person aggrieved by a wrongful attachment or *lis pendens*, at a minimum, would have to win the underlying action, and then make an effort to establish lack of probable cause by his opponent in bringing the underlying action, just to have a chance to institute a malicious prosecution action based upon the ancillary proceeding—no matter how egregious or harmful the initiation of the ancillary proceeding proved to be.

That is not the law of this state. And it is prohibitively unlikely ever to become the law because of the likelihood that gross injustice in the procurement of ancillary proceedings would go unpunished unless the defendant in the underlying proceeding could get it dismissed, or otherwise adjudicated, in such a way as to establish that his oppressor lacked probable cause to sue him.

Stated simply, one can have probable cause to institute a law suit, and yet not have probable cause to record a *lis pendens* in aid of that law suit. That may well be what happened in this case. And the determination of probable cause as to the underlying cause of action has no bearing whatsoever on the determination of probable cause with respect to the ancillary proceeding.

4. The Restatement Is the Best Authority.

And, because that formula is so sensible, it is the rule adopted by Restatement § 674, as set forth in the language quoted at the end of Section 3 above.

That is important because, whenever the cases in South Carolina have not addressed a tort issue, the South Carolina Supreme Court historically has embraced the Restatement to provide the answer. See, e.g., *ML-Lee Acquisition v. Deloitte & Touche*, 327 S.C.238, 489 S.E.2d 470 (1997) (In footnotes 3 and 4, the Supreme Court adopted

Restatement § 552 verbatim in its entirety as the law of South Carolina with respect to the elements of negligent representation).

Moreover, despite the contention in the proposed order that the termination must be "on the merits" to make the wrongful use of a *lis pendens* actionable for purposes of malicious prosecution, which, according to the proposed order is supported by absolutely no South Carolina authority, Order at 6, the Restatement leavens that rule with respect to ancillary proceedings. Thus, the Restatement provides:

Furthermore, the filing of a bond or the payment of money to release property from attachment, although so terminating the attachment proceedings as to prevent any further steps from being taken in the proceedings and accomplishing the purpose for which the attachment was procured, ***is not a termination in favor of the person who obtained the attachment. In this case if the person whose property is attached proves that the attachment was wrongfully procured, he may recover for the harm caused by the attachment of his property. The same is true as to other forms of ancillary proceedings.*** Restatement § 674, Comment f, at 455 (emphasis added).

Therefore, according to the Restatement, the requirements for an "actionable termination," as set forth in the proposed order, are simply wrong on the law.

5. Judge Dukes' Order Striking the *Lis Pendens* Was Not Modified.

Next, the proposed order, as submitted to you, attempts to make the argument that the striking of the *lis pendens*, which was clearly and unequivocally directed by Judge Dukes in his Order dated February 15, 2012 (herein "the February Order"), was somehow qualified or undermined by his subsequent order dated April 6, 2012 (herein "the April Order"). This arguably raises questions of fact with no affidavits having been submitted either by the moving parties or by my clients.

Assuming without conceding that the factual discussion about the meaning and import of Judge Dukes' orders can be lawfully included in the proposed order without any authentication, and without any opportunity to examine witnesses, the following is clear: In the February Order, the unequivocal holding was:

I find and conclude that the [Defendants'] Counterclaim and Cross-Claim do not seek "to affect" the title to the subject real property in this litigation. Accordingly, the *Lis Pendens* is not authorized by S.C. Code Ann. § 15-11-10 (2011) and must be removed. February Order at 3.

Without a doubt, the Defendants filed a motion to reconsider the February Order. However, the Defendants' motion was summarily and unconditionally denied by Judge

Dukes in the following words: "Somerset's Motion to Reconsider my Order striking the *Lis Pendens* is denied." April Order at 4.

The contorted effort, commencing at page 6 in the proposed order, to have you rule that somehow Judge Dukes modified the February Order so that it became one based upon the "balancing of the equities," as set forth in the April Order, is unparalleled in my experience. Judge Dukes did not say in his April Order that he did anything other than deny the Defendants' motion for reconsideration. He did not use the word "amend," or the word "modify," or any similar term, in connection with the February Order.

At the time of the hearing on March 5, 2012, that ultimately led to the April Order, in dealing with a newly-disclosed certificate of lien as an encumbrance on the real property, Judge Dukes fashioned an equitable remedy. In doing so, he may have adverted to his previous ruling on the propriety of the *lis pendens*. That, however, did not change the character, meaning or import of the February Order.

The Judge was simply explaining his thought process, and, specifically, how the different timing of the *lis pendens* and the assessment lien impacted his thinking. However, the equitable remedy that he designed was in response to the Gecy Plaintiffs' motion to strike the assessment lien. The *lis pendens* had, of course, already been removed.

Any uncertainty in this regard, assuming that all orders in the underlying case are self-authenticating, can best be resolved by Judge Dukes' own words, as set forth in his Order dated and filed on June 13, 2013:

The motion brought by River City asks me to construe certain language in my Order in this case dated April 6, 2012. In that order I fashioned an equitable remedy, substituting funds to be held in escrow from a closing of River City's property for an assessment lien so that the assessment lien could be released and discharged from the property. My purpose was to facilitate a sale, which appeared to be not only equitable but in the best interest of all parties. Order dated June 13, 2013.

Judge Dukes at that time made no mention of the February Order or of the *lis pendens* because the former had irrevocably removed the latter.

Thus, the Defendants' effort to recast Judge Dukes' February Order should be rejected out of hand. The appeal from that order, and from the order denying reconsideration, was not timely taken. And the effort to withdraw the appeal as moot accomplished nothing because the appeal was simply dismissed, with no reason being specified by the Court of Appeals.

Thus, the ruling on the *lis pendens* became final and "the law of the case." See, e.g., *Transportation Ins. Co. v. Second Injury Fund*, 389 S.C. 422, 432, 699 S.E.2d 687, 691 (2010); *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000).

6. Novel Issues of Law.

In addition, (a) whether a malicious prosecution action can be based on the favorable termination of an ancillary proceeding, such as the striking of the *lis pendens* in this case, and (b) what manner of termination would be required, are both novel questions in South Carolina.

In this context, the rule on the subject is clear, though it was omitted from the discussion of "the Summary Judgment Standard," which commences on page 3 of the proposed order. It can be stated simply, in cases involving novel issues, "[s]ummary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law." *Schmidt v. Courtney*, 357 S.C. 310, 319, 592 S.E.2d 326, ____ (Ct. App. 2003)(collecting cases)(herein after referred to as "*Schmidt*"). When a novel issue exists, summary judgment should not be granted unless and until there has been adequate factual development. *Shadwell v. Craigie*, 361 S.C. 492, 502, 605 S.E.2d 567, ____ (Ct. App. 2004)(herein after referred to as "*Shadwell*").

In this case, there has been little or no factual development, which is a prescription for reversal, as may surely be attested by the *Schmidt* and *Shadwell* cases. The Plaintiffs, however, have no interest at all in taking a pre-trial appeal. That may not be the case for the Defendants.

The state of the law is equally opaque. The Defendants have not cited *any* authority in the proposed order submitted to you on the first of the two novel questions described at the outset of Section 6 above, and the general authority pertaining to the second question (ranging from 1863 to 1963) appears to reflect only decisions based on conventional causes of action, not on ancillary proceedings in aid of those causes of action.

The Plaintiffs, on the other hand, have argued consistently since August 4, 2015, that the outcome of this motion should be governed by Section V of the *Pond Place* decision, as well as by the requirements of Restatement § 674. However, the Plaintiffs must concede that their authority is persuasive and not controlling, except, perhaps, for the "seasoned" case of *Sanders v. Rollinson*, 33 S.C. Law (2 Strob.) 447 (1848).

7. Conclusion.

Under these circumstances, summary judgment is clearly inappropriate, especially since, in view of the action for abuse of process, the case will continue in the trial court regardless of the decision on this motion. It would better serve the interests of judicial economy to allow discovery to unfold and to allow the motion to be renewed and

heard right before trial on a full record. Indeed, in the interim, the underlying case may be decided, which might either vindicate or eliminate one of the grounds for the Defendants' motion.

Indeed, if the Defendants' initial argument were correct (before it morphed into what appears in the proposed order), to wit, that no action for malicious prosecution could be brought until the underlying action had been decided, awarding summary judgment before that decision was reached would seem unusually Draconian, especially when a stay was requested by the Defendants as alternative relief.

Regardless, summary judgment at this stage of the case is clearly unwarranted.

Thanking you and with kind regards, I am

Sincerely,

Robert V. Mathison, Jr.

RVM:bh

cc: The Honorable Jerri Ann Roseneau
Counsel of Record (via email only)
Mr. Benjamin C. Gecy (via email only)

241

From: rmathlaw <rmathlaw@aol.com>
To: CMullenLC <CMullenLC@sccourts.org>
Cc: brown.mcleod <brown.mcleod@walltempleton.com>; morgan.templeton <morgan.templeton@walltempleton.com>; mgriffith <mgriffith@griffithsharp.com>; jrogers <jrogers@wardfirm.com>; Neil.Haldrup <Neil.Haldrup@elmorewall.com>; dhighfield <dhighfield@ycrlaw.com>
Bcc: ben <ben@beaufortlending.com>
Subject: Re: Gecy v. Somerset Point at Ladys Island HOA Motion 2014CP072680
Date: Tue, Nov 10, 2015 12:56 pm

Ms. Gray,

The major problem with the highlighted language is that it is NOT TRUE. Judge Dukes' order dated February 15, 2012, directed that the *lis pendens* be struck from the record. Somerset Point, in addition to filing an assessment lien, then filed a motion to reconsider the Order dated February 15.

In his Order dated April 6, 2015, Judge Dukes expressly denied Somerset Point's motion to reconsider his previous order, and the April 6 Order so recites. While he did fashion an equitable remedy on the Plaintiff's motion to strike the assessment lien, that had no bearing at all on his previous order striking the *lis pendens*.

Accordingly, the time for Somerset Point to appeal from the denial of the motion to reconsider the striking of the *lis pendens* expired 30 days after April 6, 2012. An appeal taken on May 31, 2012, therefore, could not have affected the previous rulings on the *lis pendens* issue. Ms. Eversole knew that was a possibility, which is why she filed a motion purporting "to enlarge the time within which to appeal" from the February 15 and April 6 Orders. It was in response to that motion that Judge Dukes ruled on May 31, 2012.

One need only read the motions and orders to confirm what I have just said.

And, for the forgoing reasons, the issue of whether the filing of the *lis pendens* was lawful or not was fully and finally adjudicated in the negative in 2012.

Thank you.

Rb Mathison.

Law Offices of Mathison & Mathison
Post Office Box 5271
Hilton Head Island, SC 29938
843-785-6503 rmathlaw@aol.com

-----Original Message-----

From: Mullen, Carmen T. Law Clerk (Leigh Ellen Gray) (Leigh Ellen Gray) <CMullenLC@sccourts.org>
To: Brown McLeod <Brown.McLeod@WallTempleton.com>; Morgan S. Templeton <Morgan.Templeton@WallTempleton.com>
Cc: rmathlaw <rmathlaw@aol.com>; mgriffith <mgriffith@griffithsharp.com>; jrogers <jrogers@wardfirm.com>; Neil S. Haldrup <Neil.Haldrup@WallTempleton.com>; dhighfield <dhighfield@ycrlaw.com>
Sent: Tue, Nov 10, 2015 11:45 am
Subject: RE: Gecy v. Somerset Point at Ladys Island HOA Motion 2014CP072680

Thank you.

Leigh Ellen Gray
Law Clerk to the Honorable Carmen T. Mullen

EXHIBIT B

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2014 CP-07-02870

242

Benjamin C. Gecy et al.

Somerset Point at Ladys Island HOA Inc., et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Leigh Ellen Gray

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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ 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: On March 31, this matter came before the Court for oral argument on Plaintiff's Motion for Reconsideration of the Court's prior order granting Defendant's motion for summary judgment. After taking the matter under advisement, the Court hereby denies Plaintiff's Motion for Reconsideration.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

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)
		\$
		\$
		\$

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 or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2142

Judge Code

Date

4-18-16

For Clerk of Court Office Use Only

243

This judgment was entered on the 22 day of April 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 22 day of April 2016 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT SAFE

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

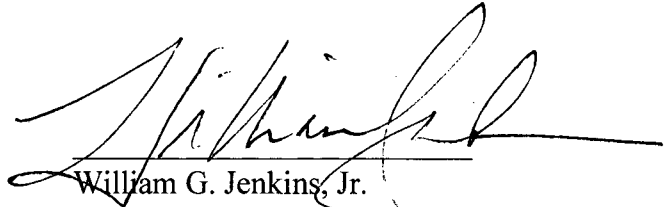
RECEIVED

NOV 13 2017

SC Court of Appeals

CERTIFICATE OF COUNSEL
(Rule 210(g), SCACR)

I, the undersigned attorney for the Appellants, hereby certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



William G. Jenkins, Jr.

S.C. Bar No. 2982

Attorney for the Appellants

Benjamin C. Gecy, River City Developers
LLC, and River City Real Estate, LLC

November 10, 2017

Hilton Head Island, South Carolina.