

the Covenants were invalid as a violating the Rule Against Perpetuities and alleging a civil conspiracy between the two defendants. He also alleged violation of the South Carolina Consumer Protection Act, but subsequently dropped that claim.

The Plaintiff then moved for partial summary judgment on his claim of breach of the Rule Against Perpetuities. The Defendant Brays Island Plantation Colony, Inc. moved for summary judgment on both of the Plaintiff's remaining claims and also moved for summary judgment on its Counterclaim for payment of amounts owed. The Plaintiff's motion is hereby denied. Brays Island's motion is hereby granted.

The Covenants do not violate the Rule Against Perpetuities. South Carolina's rule against perpetuities originated at common law. In 1987 it was codified as a uniform law at S.C. Code 27-6-10 et seq. The Covenants at issue were adopted a year later. The rule does not apply to the Covenants.

Defendants incorrectly contend the deed restrictions are a restraint on the alienation of property or transferability of realty with no time limit and, therefore, are void as a violation of the rule against perpetuities. To the contrary, the rule against perpetuities does not pertain to covenants restricting the land to certain uses. Gibson v. Huffman, 246 Ga. App. 218, 540 S.E.2d 222 (2000) citing McKinnon v. Neugent, 225 Ga. 215, 167 S.E. 593 (1969) and Reeves v. Comfort, 172 Ga. 331, 157 S.E.2d 629 (1931).

Under the common law the rule did not apply to Covenants. That exclusion is preserved in Section 27-6-50 (7) of the South Carolina statute, which provides that it does not apply to "a property interest ... that was not subject to the common law rule against perpetuities."

Moreover, the rule applies only to interests that are not vested. S. C. Code 27-6-20(A). The interest of Brays Island under the Covenants - in getting paid by property owners - vested at the time of its creation. Therefore, it falls outside the rule.

Further, the plaintiff does not have an interest under the Covenants. Instead, he has an obligation. The rule applies only to interests, otherwise known as estates. “[T]he rule against perpetuities deals with estates in land and the vesting of estates, and does not relate to covenants restricting the land to certain uses.” McKinnon, supra.

Even if the Plaintiff could clear these hurdles, the statute would not apply because Section 27-6-50(1) specifically excludes non-vested property interests arising out of a “non-donative transfer.” The Plaintiff himself alleges that he purchased his property interest. It was not a donation. The fees at issue under the Covenants are not donations, either. The Plaintiff alleges a “non-donative” matter that is outside the rule.

If the rule did apply, the Brays Island Covenants are in compliance. Under the South Carolina statute there are two ways that this can occur. The first is under the “life in being” subsection. S.C. Code 27-6-20(A)(1) The second is under the “90 year” subsection. S.C. Code 27-6-20(2) Either is sufficient.

The “life in being” sub-section does not require that a specific person be named. It refers only to “an individual then alive.”

The measuring life need not be specified or even mentioned in the distribution. The donor need not intend any particular person to be the measuring life. The measuring life need not be a relative of any taker, or the holder of a previous estate or of any interest in the distribution. *Understanding the Measuring Life in the Rule Against Perpetuities*, 1974 Wash. U. L. Q. 265 (1974) (citations omitted)

It is a common practice to select a prominent family in order to comply with the rule’s “life in being” requirement. That was done for the Covenants, which referenced President Kennedy’s family.

Also, vesting has occurred within 90 years after creation of the interest. That is also compliance. The Covenants were created in 1989; the Plaintiff bought his property and became subject to them in 2014.

Covenants such as those at issue are well recognized and accepted by the courts. "Restrictive covenants differ from contracts in that they 'run with the land,' meaning that they are enforceable by and against later grantees." Queen's Grant II v. Greenwood Development, 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006), citing 17 S.C. Jur. Covenants §18 (2005). The Plaintiff is bound by them.

The Plaintiff's claim for civil conspiracy should also be dismissed. This is required for several reasons.

First, "the damages alleged must go beyond the damages alleged in other causes of action." Pye v. Fox, 369 S.C. 555,568, 633 S.E.2d 505 (2006) The damages alleged by the Plaintiff in his conspiracy cause of action arise solely from enforcement of the Covenants, which he attacks in his only other cause of action. Because the damages are the same, the conspiracy claim fails. It was upon this ground that the circuit court judge dismissed the conspiracy claim in Pye, supra, (aff'd on other grounds).

Second, the "essential consideration" in civil conspiracy" is "whether the primary purpose or object of the combination is to injure the plaintiff." Pye, supra, 369 S.C. 567. The Complaint itself is clear that the lawsuit is based on general covenants applicable to all property owners at Brays Island Plantation. It is upon the "primary purpose" ground that the South Carolina Supreme Court affirmed the circuit judge's grant of summary judgment in Pye. "There

was absolutely no evidence submitted at the summary judgment stage supporting an agreement between Hill and Richard Fox to injure the Pyes.” Pye, supra, 369 S.C. 568.

Third, the Plaintiff has offered no proof of the required elements of this cause of action. “The elements of civil conspiracy in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. ... It is essential that the plaintiff prove all of these elements in order to recover.” Pye, supra, 369 S.C. 567. The Plaintiff has offered no proof.

The Plaintiff wanted property at Brays Island, so he bought it from another owner. He did not buy it from Brays Island Plantation. The Plaintiff is a sophisticated business man. He knew about the Covenants before his purchase. He is not in a position to complain about them now.

Finally, the Defendants have submitted uncontroverted affidavits from F. Douglas P. Evans, Kevin Rhatigan and Paul Burton, and verification of the Counterclaim by William Fabian, establishing that there is no genuine issue of fact and that Brays Island is entitled to judgment as a matter of law. The Court finds the affidavits and verification credible, relevant, and helpful in every respect. They are dispositive. Mr. Evans is an experienced and knowledgeable real estate lawyer who is of the expert opinion that the Covenants are legal, valid and binding as written and in full compliance with South Carolina law, including, but not limited to, the Rule Against Perpetuities. He is correct. Mr. Rhatigan and Mr. Fabian have set forth the details of the amounts owed by the Plaintiff to Brays Island. Also, Mr. Rhatigan and Mr. Burton attest that there is no factual basis for the Plaintiff’s civil conspiracy claim. The Plaintiff cannot rest on his pleadings or memoranda in the face of these affidavits and the verification. Rule 56(e) SCRCP. For this final,

and independent, reason, the Court denies the Plaintiff's motion for partial summary judgment and grants summary judgment in favor of Brays Island on the Complaint and the Counterclaim.

Brays Island is entitled to judgment against the Plaintiff in the amount of Thirty-two Thousand One Hundred Thirty-five and 50/100 Dollars (\$32,135.50) through April 25, 2017, for additional assessments, interest at the rate of eighteen per cent (18%) per annum, all costs and expenses of collection (including court costs, expenses, and a reasonable attorney's fee) and any other amounts provided or permitted under the Covenants and agreement described in the Counterclaim. Leave is hereby granted to Brays Island to submit such amounts from time to time to the Court for addition to the judgment now ordered in the amount of Thirty-two Thousand One hundred Thirty-five and 50/100 Dollars. (\$32,135.50).

AND IT IS SO ORDERED.

Honorable Roger M. Young, Sr.
Circuit Judge

September __, 2017



Beaufort Common Pleas

Case Caption: Alexander Burns VS Brays Island Plantation Colony Inc , defendant,
et al

Case Number: 2017CP0700265

Type: Order/Summary Judgment

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134