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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY

IN THE COURT OF COMMON PLEAS

HON. MARVIN H. DUKES, III
MASTER IN EQUITY AND SPECIAL CIRCUIT JUDGE

Case Number 2014-CP-07-1435

CATWALK, LLC; MOONDOG, LLC; LET, LLC; LOST PARROT LLC; VACATION INN, LLC; SBM, LLC; and SOUTH BEACH SWIMMING POOL, INC., ... Appellants,

v.

SEA PINES SOUTH BEACH OWNERS ASSOCIATION, INC., ... Respondent.

PETITION FOR REHEARING

COLTRANE & WILKINS, LLC
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Catwalk, LLC; Moondog, LLC; Let, LLC; Lost Parrot LLC; Vacation Inn, LLC; SBM, LLC; and South Beach Swimming Pool, Inc. (hereinafter, collectively, "Catwalk, *et al.*"), Petition the South Carolina Court of Appeals for Rehearing of this case. Opinion 2018-UP-069 of the South Carolina Court of Appeals was filed on February 7, 2018.

1. The Court has misapprehended the meaning of the following text from the 1973 Covenants:

> IT BEING THE TRUE INTENT AND PURPOSE of this Declaration that the commercial land use covenants contained herein shall be the sole applicable covenants restricting and affecting commercial properties conveyed by LIGHTHOUSE BEACH COMPANY subsequent to the recording of this Declaration, and such other property as may be deeded subject to the covenants herein by specific reference in individual deeds, or by subsequent declarations; and further, it is the true intent and purpose of LIGHTHOUSE BEACH COMPANY that to the extent that there is a conflict between those restrictions and covenants previously recorded, as set forth above, and those of the instant Declaration, the provisions of the instant declaration shall govern and restrict commercial properties hereafter conveyed in deeds making reference to this Declaration.

In its opinion, the Court reads the above language to contemplate the "possible applicability of other covenants." This reading ignores the plain and unmistakable language of the 1973 covenants which is that the 1973 Covenants are the: ". . . sole applicable covenants restricting and affecting commercial properties conveyed by LIGHTHOUSE BEACH COMPANY subsequent to the recording of this Declaration."[1]

The subsequent text regarding conflicts with covenants previously recorded simply

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[1] It is undisputed that the real property owned by Catwalk, *et al.*, are commercial properties as the same are described in the 1973 Covenants. *See:* Complaint, paragraph 24, p. 7, R. 22; Answer and Counterclaim paragraph 8, p. 2, R. 30; Affidavit of Charles A. Scarminach, Paragraph 10, p. 3, R. 208; Affidavit of Robert A. Gossett, Jr., Paragraph 2, p. 1, R. 255. The Trial Judge found that the Catwalk, *et al.*, properties are commercial properties. *See:* January 22, 2016, Order, paragraph 6, p. 4, R. 8.

reinforces the text that the 1973 Covenants govern commercial property, irrespective of the existence of any other previously recorded declaration of covenants.

That is because any previously recorded declaration purporting to encumber commercial property is in direct conflict with the plain text of the 1973 Covenants stating that the 1973 Covenants are the "sole applicable covenants restricting and affecting commercial properties." Any other reading renders the "sole applicable covenants restricting and affecting commercial properties" language meaningless.

Further, the Court's ruling finds an ambiguity (". . .in light of these seemingly inconsistent provisions within the document. . .") and then misapplies the governing law related to such. The governing law where an ambiguity is found is this: ". . .courts interpret restrictive covenants strictly and resolve any doubt or ambiguity in the covenants in favor of the free and unrestricted use of land."[2]

Thus, in this case, to the extent that the Court finds that the text of the 1973 Covenants creates any inconsistency or ambiguity, it is bound to resolve inconsistency or ambiguity in favor of the free use of property.[3] The imposition of the encumbrance of the 1970 Covenants based on any perceived inconsistency is precisely the opposite of what the law requires.

The plain and unambiguous text of the 1973 Covenants is that the 1973 Covenants are the "sole applicable covenants" governing commercial property. The Court's reading

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[2] *Hyer v. McRee*, 306 S.C. 210, 212, 410 S.E.2d 604, 605 (Ct.App.1990).

[3] Catwalk, *et al.*, do not argue the existence of an ambiguity in the 1973 Covenants. The text stating that the 1973 Covenants are the "sole applicable covenants" could not be more plain.

of the 1973 Covenants renders the plain language of them meaningless, and the Court's reading utilizes a perceived ambiguity to impose an additional declaration of covenants on the property of Catwalk, *et al.* This result is contrary to the law of South Carolina which obliges the Court to enforce unambiguous contracts according to the plain language used in them, and, where any ambiguity is found, to resolve them in favor of the free use of real property.[4]

2. The Court mis-applied the plain language of S. C. Code Ann. § 15-3-380 (Supp. 2017).

In this case, the undisputed fact is that the Sea Pines South Beach Owner's Association, Inc. (hereinafter, the "Association"), did not claim that the 1970 Covenants encumbered the commercial property of Catwalk, *et al.*, or any of its predecessors in title, for more than forty years.

S. C. Code Ann. § 15-3-380 (Supp. 2017), reads:

> No action shall be commenced in any case for the recovery of real property *or for any interest therein* against a person in possession under claim of title by virtue of a written instrument unless the person claiming, his ancestor or

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[4] When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense. *Sifonios v. Town of Surfside Beach*, 414 S.C. 269, 777 S.E.2d 425 (Ct.App. 2015). The contract and the language used must be considered as a whole. *Madden v. Bent Palm Investments, LLC*, 386 S.C. 459, 688 S.E.2d 597 (Ct. App. 2010). Words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed. *State Accident Fund v. South Carolina Second Injury Fund*, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010). Every term contained in a contract must be considered and given effect if possible. *Valley Public Service Authority v. Beech Island Rural Community Water District*, 319 S.C. 488, 494, 462 S.E.2d 296, 299 (Ct. App. 1995). Courts interpret restrictive covenants strictly and resolve any doubt or ambiguity in the covenants in favor of the free and unrestricted use of land." *Hyer v. McRee*, 306 S.C. 210, 212, 410 S.E.2d 604, 605 (Ct.App.1990).

> grantor, was actually in the possession of the same or a part thereof within forty years from the commencement of such action. And the possession of a defendant, sole or connected, pursuant to the provisions of this section shall be deemed valid against the world after the lapse of such a period. (Our emphasis.)

In its opinion, the Court finds that the rights claimed by the Association, are not an "interest" in property.[5] This finding is contrary to the language of the 1970 Covenants. The text of the 1970 Covenants read, in Article VIII, "General Provisions" as follows, in relevant part:

> "Section 1. Duration and Amendments. The covenants and restrictions of this Declaration shall run with and bind the land, and shall inure to the benefit of and be enforceable by the Association, the Developer of any land subject to this Declaration, their respective legal representatives, heirs, successors and assigns . . ."[6]

Further, the 1970 Covenants impose an obligation to pay assessments to the Association for the maintenance of common elements.[7] Covenants including such language have been held to run with land and to touch and concern the land.[8]

The 1970 Covenants state that the obligation to pay assessments *creates a continuing lien* upon any property subject to the 1970 Covenants. The 1970 Covenants

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[5] By making this argument, Catwalk, *et al.*, do not concede that the 1970 Covenants encumber their property. The argument is made to demonstrate that the rights claimed by the Association are an "interest" in real property, and that S. C. Code Ann. § 15-3-380 (Supp. 2017), bars its claim.

[6] R. p. 74. The language of the 1970 Covenants removes any doubt that the parties intended that the 1970 Covenants run with the land. *See: West v. Newberry Electric Co-op.*, 357 S.C. 537, 593 S.E.2d 500 (Ct. App. 2004).

[7] *See:* 1970 Covenants, Article V, Section 1 and Section 2. R. p. 71.

[8] *Harbison Community Association, Inc. v. Mueller*, 319 S.C. 99, 459 S.E.2d 860 (Ct. App. 1995); *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corporation*, 368 S.C. 342, 628 S.E.2d 902 (Ct. App.2006).

read, in relevant part:

> The Annual and Special Assessments together with such interest thereon and the costs of collection therefore as herein provided, shall be a charge and continuing lien upon the land and all the improvements thereon against which each such assessment is made.[9]

Thus, the Association, by claiming that the 1970 Covenants encumber the real property of Catwalk, *et al.*, , asserts rights that run with the land, which touch and concern the land, and which impose a continuing lien upon the real property of Catwalk, *et al.* S. C. Code Ann. § 15-3-380 (Supp. 2017), bars a suit to assert "any interest" in real property after a period of 40 years. A right that runs with the land and touches and concerns the land is an "interest." A continuing lien on real property is an "interest."[10]

The Court also mis-applies the law of South Carolina by finding that the "non-waiver" language in the 1970 Covenants precludes application of the statute of limitations. The bar of the statute of limitations set out in S. C. Code Ann. § 15-3-380 (Supp. 2017), is not dependent on any knowing and voluntary relinquishment of rights. Rather, it is a legal

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[9] R. p. 71.

[10] *See: Blacks Law Dictionary, Sixth Edition*, in which "interest" is defined as follows:

> The most general term that can be employed to denote a right, claim title or legal share in something.... More particularly, it means a right to have the advantage accruing to anything; any right in the nature of property but less than title.

The rights claimed by the Association are an "interest" in real property. By the text of the 1970 Covenants, the covenants run with the land, touch and concern the land, and create a continuing lien encumbering the land. Further, if the 1970 Covenants do not create an interest in real property, then the 1970 Covenants are a mere personal covenant, not binding on the successors in interest to the real property. *Epting v. Lexington Water Power Co.*, 177 S.C. 308, 181 S.E. 66 (1935); *In re Daufuskie Island Properties, LLC*, 431 B.R. 612, 624 (Bankr. D.S.C. 2009).

bar to the bringing of a suit for the recovery of any interest in real property after forty years of inaction.

Because the only evidence in this case is that the Association did not make any claim based on the 1970 Covenants for a period of more than 40 years, its claim is barred by the plain and unambiguous text of S. C. Code Ann. § 15-3-380 (Supp. 2017).

When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. In interpreting a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Further, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.[11] The Court's ruling limits the effect of S. C. Code Ann. § 15-3-380 (Supp. 2017), in a way that is contrary to the plain language of the statute.

3. This case comes to the Court on an Order granting a Motion for Summary Judgment.[12] Summary judgment is appropriate only where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. The evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.

The Court's finding that because of a listing of the 1970 Covenants in a subsequent deeds, along the recording data for the 1973 Covenants, the only reasonable inference is

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

[12] January 22, 2016, Order of Hon. Marvin H. Dukes, III. R. pp. 5-13.

that the property of Catwalk, *et al.*, is encumbered by the 1970 Covenants is wrong as a matter of law, and is an impermissible weighing of conflicting evidence.

This Court's finding is founded on a deed from the Sea Pines Company and a deed from a Trustee in Bankruptcy which include a list of covenants and restrictions in the legal description that includes the recording data for 1970 Covenants and the 1973 Commercial Covenants.[13]

While the text in the deeds referred to by the Court reads as it does, the mere listing of the documents in the deeds does not undo the language contained in them. One must still read the documents to determine the effect of them, if any.

The text of the 1973 Commercial Covenants read, in relevant part:

> IT BEING THE TRUE INTENT AND PURPOSE of this Declaration that the commercial land use covenants contained herein shall be the sole applicable covenants restricting and affecting commercial properties conveyed by LIGHTHOUSE BEACH COMPANY subsequent to the recording of this Declaration, and such other property as may be deeded subject to the covenants herein by specific reference in individual deeds, or by subsequent declarations; and further, it is the true intent and purpose of LIGHTHOUSE BEACH COMPANY that to the extent that there is a conflict between those restrictions and covenants previously recorded, as set forth above, and those of the instant Declaration, the provisions of the instant declaration shall govern and restrict commercial properties hereafter conveyed in deeds making reference to this Declaration.[14]

And also:

> It is the true intent and purpose of LIGHTHOUSE BEACH COMPANY that the covenants and restrictions contained herein shall be the sole applicable covenants restricting Commercial Property conveyed by LIGHTHOUSE

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[13] *See:* January 22, 2016, Order, p. 4, R. 8.

[14] R. p. 148. The only evidence is that the properties of Catwalk, *et al.*, are commercial properties that were conveyed subsequent to the recording of the 1973 Covenants.

> BEACH COMPANY to grantees of the Company subsequent to the date of the Declaration adopting these covenants and restrictions being made applicable to such conveyances by specific references in individual deeds, or by subsequent declaration to the extent that there is variation from and addition to covenants herein recorded; however, those properties conveyed by LIGHTHOUSE BEACH COMPANY prior to the effective date of this instrument are not governed by or otherwise restricted by the consolidated uniform provisions of this Declaration, but are so governed and restricted by any covenants and restrictions previously recorded as set forth above and to which specific reference was made in the particular and appropriate deed of conveyance.[15]

The Court's finding ignores the plain language of the 1973 Covenants, and renders it meaningless. The law of South Carolina obliges the Court to construe the 1973 Covenants according to its plain and unambiguous text.[16] By its plain language, the 1973 Commercial Covenants govern property subjected to them in a deed, to the exclusion of ". . . those covenants and restrictions previously recorded. . . ." The only evidence in the record is that the 1970 Covenants was recorded previous to the 1973 Covenants. When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense.[17]

In addition, including the recording data for the 1970 Covenants in deeds of a later time does nothing to alter the following undisputed facts in the record:

(a) The Association failed to enforce its claimed rights under the 1970 Covenants against the commercial property of Catwalk, *et al.*, and their predecessors in title for a period of more than forty years following the recording of the 1970 Covenants.

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[15] R. p. 158.

[16] *Sifonios v. Town of Surfside Beach, supra.*

[17] *Sifonios v. Town of Surfside Beach, supra.*

(b) The Association never sought to collect any regular or special assessment imposed by it from Catwalk, *et al.*, or their predecessors in title for a period of more than forty years following the recording of the 1970 Covenants.

(c) Neither Catwalk, *et al.*, nor any of their predecessors in title, have ever attended any regular or special meeting of the Association, paid any regular or special assessment to the Association, claimed to be members of the Association, claimed any rights under the 1970 Covenants, made use of any of the common property of the Association or participated in the affairs of the Association with respect to any of the commercial properties within the South Beach Marina Village.

(d) The declarant of both the 1970 Covenants and the 1973 Commercial Covenants considered the properties of Catwalk, *et al.*, to be commercial, and assessed the Catwalk, *et al.*, properties in that fashion.

(e) The plain language of the 1973 Commercial Covenants is that the 1973 Commercial Covenants are the "sole applicable" covenants governing commercial property conveyed subsequent to the recording of the 1973 Covenants, which includes all of the properties of Catwalk, *et al.*, to the exclusion of any previously recorded covenants, namely the 1970 Covenants.[18]

(f) The Association took advantage of the 2013 Agreement concerning the dredging of Braddock Creek, whereby Catwalk, *et al.*, contributed forty (40%) of the total cost, and the Association contributed only 31% per cent of the total cost. If the property of Catwalk, *et*

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[18] There is no law supporting the Court's finding that the listing of both of these documents in a subsequent deed alters the language used in them or the import of it. Nor is there any evidence that the drafter of the deeds intended such.

al., was, indeed, encumbered by the 1970 Covenants, then the entire Association would have been responsible for the costs of the dredging that was assumed solely by Catwalk, *et al.*, and the Association, combined. This would have been a significant benefit to Catwalk, *et al.*, and a significant detriment to the Association.[19]

Even in light of the listing of the recording data for the 1970 Covenants in later deeds, the above undisputed facts, alone or in combination, qualify as a "mere scintilla" of evidence sufficient to overcome the Motion for Summary Judgment of the Association. In light of these undisputed facts, it was error for the Court to affirm the grant summary judgment in favor of the Association.

CONCLUSION

For the reasons stated in the foregoing arguments, Catwalk, *et al.*, urge the Court to rehear and reverse its Opinion 2018-UP-069 of February 7, 2018, and to reverse the January 22, 2016, and March 18, 2016, Orders of the Trial Judge, and to grant Summary Judgment in favor of Catwalk, *et al.*, finding that the 1970 Covenants do not encumber the

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[19] In its Opinion, the Court does not address Catwalk, *et al.*'s appeal of the Trial Judge's finding that Catwalk, *et al.*'s, claims based on estoppel failed on three grounds: (a) the non-waiver language in the 1970 Covenants; (b) there was no showing of prejudice or reliance; and, (c) no evidence that the Association intended to relinquish a known right. With respect to the first point, the non-waiver language in the 1970 Covenants simply does not address the estoppel claim. With respect to the second point, the only evidence is that the Association took advantage of the dredging agreement that treated the Association and Catwalk, *et al.*, as wholly separate entities and thus avoided participating at all in the cost of the dredging that was carried wholly by Catwalk, *et al.* As to the third point, it relates to waiver, and does not address the estoppel claim. The elements of an estoppel claim are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position. *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992). The undisputed facts in the record show all three, or at a minimum, show a scintilla of evidence sufficient to defeat the Associations's motion for summary judgment.

commercial property of Catwalk, *et al.*

Respectfully Submitted:

COLTRANE AND WILKINS, LLC

By: _____

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Hilton Head Island, South Carolina

This 19th Day of February, 2018.

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

HON. MARVIN H. DUKES, III
MASTER IN EQUITY AND SPECIAL CIRCUIT JUDGE

Case No. 2014-CP-07-1435

CATWALK, LLC; MOONDOG, LLC; LET, LLC; LOST PARROT LLC;
VACATION INN, LLC; SBM, LLC; and
SOUTH BEACH SWIMMING POOL, INC., ... Appellants,

v.

SEA PINES SOUTH BEACH PROPERTY OWNERS'
ASSOCIATION, INC., ... Respondent.

CERTIFICATE OF SERVICE

I, Arlene K. Coleman, paralegal at Coltrane & Wilkins, LLC, certify that on this date, I caused to be served a copy of the Petition for Rehearing, by depositing a copy of the same with Federal Express for overnight delivery (Tracking Number 7715 1344 1202), addressed as follows:

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This 19th Day of February, 2018.

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February 19, 2018

Hon. Jenny A. Kitchings
SOUTH CAROLINA COURT OF APPEALS
1220 Senate Street
Columbia, South Carolina 29201

RE: Catwalk, et al. v. Sea Pines South Beach POA, Inc.
Appellate Case Number 2016-000637

Dear Ms. Kitchings:

Enclosed, you will find and original and six copies of the Petition for Rehearing of Catwalk, LLC; Moondog, LLC; Let, LLC; Lost Parrot LLC; Vacation Inn, LLC; SBM, LLC; and South Beach Swimming Pool, Inc., along with filing fee of Twenty Five and no/100 ($25.00) Dollars, and a Certificate of Service showing service of the Petition on Counsel for the Respondent. I thank you for your assistance with this, and look forward to hearing from you soon. I am,

Sincerely,

COLTRANE & WILKINS, LLC

Curtis L. Coltrane

CLC/bms
cc: J. Michael Jordan, Esq.
Kirsten E. Small, Esq.
Robert A. Gossett, Jr.
Enc.: As Stated

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