

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

RECEIVED
MAR 12 2018
SC Court of Appeals

Case Number 2014-CP-07-1435

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

v.

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

REPLY OF APPELLANTS

COLTRANE & WILKINS, LLC
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Attorneys for Catwalk, LLC; Moondog, LLC; LET,
LLC; Lost Parrot, LLC; Vacation Inn, LLC; SBM,
LLC; and South Beach Swimming Pool, Inc.

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.*”), file their Reply to the “Return to Petition for Rehearing” of the Sea Pines South Beach Property Owners’ Association, Inc. (hereinafter, the “Association”), received by the undersigned on March 5, 2018, as follows:

1. The plain language of the 1973 Covenants is that the 1973 Covenants are “the sole applicable covenants” encumbering commercial property in Sea Pines.

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.¹

The 1973 Covenants state that the 1973 Covenants are “the sole applicable covenants” encumbering commercial real property in Sea Pines “conveyed subsequent to the recording” of the 1973 Covenants.²

The 1973 Covenants state: “. . . to the extent that there is a conflict between those covenants and restrictions previously recorded, . . . and those of the instant declaration, the provisions of the instant declaration shall govern and restrict commercial properties. . .”

The intent of the declarant is plain. Upon recording of the 1973 Covenants, the 1973 Covenants govern commercial property to the exclusion of any previously recorded

¹ *Sifonios v. Town of Surfside Beach*, 414 S.C. 269, 777 S.E.2d 425 (Ct.App. 2015).

² R, pp. 143, 158.

covenants.³

In its opinion, the Court not enforced the unambiguous language of the 1973 Covenants, but rather has impermissibly engaged in a construction of them so as to defeat the plain meaning of them.

Neither the language of the 1973 Covenants, nor the law of South Carolina authorize the result reached by the Court in its Opinion 2018-UP-069.

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

By the plain text in them, the 1970 Covenants purport to create an interest in real property. The 1970 Covenants state that they “run with and bind the land;”⁴ are binding on “the successors and assigns” of the Declarant;⁵ and create an obligation to pay assessments that is a “continuing lien” on the real estate encumbered by the 1970 Covenants.⁶

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 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

³ The listing of the 1970 Covenants along with the 1973 Covenants in subsequent deeds does not change the result. The 1970 Covenants are still the “sole applicable covenants” governing commercial property to the exclusion of any “previously recorded” covenants, which category includes the 1970 Covenants.

⁴ R. p. 74.

⁵ R. p. 74.

⁶ R. p. 71.

defendant, sole or connected, pursuant to the provisions of this section shall be deemed valid against the world after the lapse of such a period. (Our emphasis.)

The only evidence in the record is that the Association made no effort to enforce the 1970 Covenants against owned by Catwalk, *et al.*, or any if their predecessors title for a period of more than 40 years, from August 18, 1970, to July of 2013.⁷

Irrespective of the fact that this case might present an issue of novel impression, the 1970 Covenants do create an interest in property because the 1970 Covenants touch and concern the land, because they run with the land, are binding on successors, create an obligation to pay assessments and create a continuing lien. The plain language of S. C. Code Ann. § 15-3-380 (Supp. 2017), bars a claim to assert “any interest” in property after a lapse of 40 years.⁸

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.

⁷ See: Affidavit of George W. Williams, Jr., paragraph 7, R. pp. 166-167; Affidavit of Charles A. Scarminach, Jr., paragraph 11, R. pp. 208-209; Affidavit of Ned E. Gilleland, Jr., R. pp. 246-254; Affidavit of Richard T. Sonberg, R. pp. 243-245; Affidavit of Donald E. Sigmon, R. pp. 288-291; Affidavit of Robert A. Gossett, Jr., R. pp. 255-265.

⁸ The “non-waiver” language relied on by the Court is unavailing. The express language of the “non-waiver” term limits it to a “waiver or estoppel of the right to enforce” the 1970 Covenants. R. p. 75. While a party can waive a statute of limitations defense, the waiver it must arise from either an express agreement to do so, or some other action inconsistent with the intention to rely on the statute. *City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 599 S.E.2d 462 (Ct. App. 2004). . The “non-waiver” language relied on by the Court does not include an express waiver of the statute of limitations, and thus does not relieve the Association of the bar of S. C. Code Ann. § 15-3-380 (Supp. 2017).

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.⁹

The Court's ruling that S. C. Code Ann. § 15-3-380 (Supp. 2017), does not bar the Association's claim is contrary to the language of the statute.¹⁰ As a matter of law, the Association's claim is barred.

3. Summary Judgment in favor of the Association was improper under Rule 56, SCRPC.

In its Opinion 2018-UP-069, the Court found that Summary Judgment in favor of the Association was proper because both the 1970 Covenants and the 1973 Covenants were listed in the legal descriptions of subsequent deeds. By doing so, the Court impermissibly weighed evidence rather than simply determining whether or not a scintilla of evidence in opposition to the motion existed. Any conflicts in the evidence are in the light most favorable to the party opposing the motion.¹¹

CONCLUSION

For the reasons stated in the foregoing arguments and in the Petition for Rehearing filed herein, *Catwalk, et al.*, urge the Court to rehear and reverse its Opinion 2018-UP-069

⁹ See: *Centex International, Inc. v. S. Carolina Department of Revenue*, 406 S.C. 132, 750 S.E.2d 65 (2013)(internal citations omitted).

¹⁰ In its Return, the Association makes the specious argument that 40 years did not elapse between the recording of the 1970 Covenants on August 18, 1970, and the first time that the Association sought to enforce them against the property of *Catwalk, et al.*, which occurred no earlier July of 2013.

¹¹ Rule 56, SCRPC. *L & W Wholesale, Inc. v. Gore*, 305 S.C. 250, 407 S.E.2d 658 (Ct.App.1991). Applying this standard dictates reversal of the grant of Summary Judgment to the Association.

of February 7, 2018, and to reverse the January 22, 2016, and March 18, 2016, Orders of the Trial Judge, and to find that the 1970 Covenants do not encumber the commercial property of Catwalk, *et al.*, by the express language of the 1973 Covenants, and find that the Association's claim is barred by S. C. Code Ann. § 15-3-380 (Supp. 2017).

Respectfully Submitted:

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Hilton Head Island, South Carolina

This 8th Day of March, 2018.

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

HON. MARVIN H. DUKES, III
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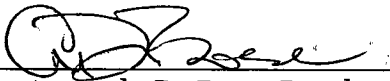
CERTIFICATE OF SERVICE

I, Amanda DuBose, paralegal at Coltrane & Wilkins, LLC, certify that on this date, I caused to be served a copy of the Reply of Appellants, by depositing a copy of the same copy of the same in the United States Mail, with proper first-class postage affixed thereon, addressed as follows:

J. Michael Jordan, Esq.
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Hilton Head Island, South Carolina
This 8th Day of March, 2018.

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CURTIS L. COLTRANE*
JOHN W. WILKINS
*Also member Virginia Bar & Certified
Circuit Court Mediator & Arbitrator

March 8, 2018

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SC Court of Appeals

The Hon. Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29911


IN RE: Catwalk, LLC, et al. v. Sea Pines South Beach Owners' Association, Inc.
Civil Action Number 2014-CP-07-1435
Appellate Case No. 2016-000637

Dear Ms. Kitchings:

Enclosed please find an original plus six (6) copies of the Reply of Appellants and Certificate of Mailing in the above referenced action.

Thank you very much. Should you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,
COLTRANE & WILKINS, LLC


Amanda C. DuBose
Paralegal

Enclosures

Cc: J. Michael Jordan, Esq.
Kristen E. Small, Esq.

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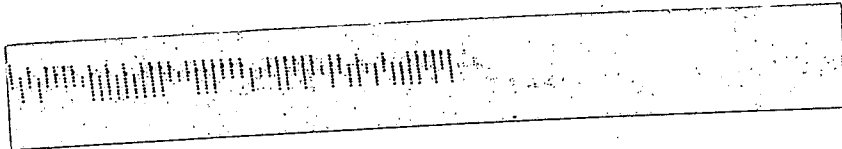
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TO:

The Hon. Jenny Abbott Kitchings

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