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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Hon. Marvin H. Dukes, III, Master in Equity

Case No. 2014-CP-07-1435
Appellate Case No. 2018-000643

Catwalk, LLC, Moondog, LLC, LET, LLC,
Lost Parrot, LLC, Vacation Inn, LLC, SBM, LLC,
and South Beach Swimming Pool, Inc., ..., Petitioners,

v.

Sea Pines South Beach Owners' Association, Inc. ..... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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South Carolina Appellate Court Rule 242(b) provides that "[a] writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons," such as those enumerated in subparts (1) through (5). Rule 242(b), SCACR. Here, there are no "special and important reasons" warranting the exercise of this Court's discretion. Rather, the Petition for Certiorari ("Petition") merely rehashes arguments previously presented to the Court of Appeals and properly rejected by that court.

Petitioners attempt to bring themselves within the ambit of Rule 242(b)(1) by asserting that their first issue "presents a novel issue of law in South Carolina." Pet'n at 9.[1] However, Petitioners never articulate any such issue. In fact, each of the three questions presented in the Petition is controlled by long-settled principles of South Carolina law that were properly applied by the Master in Equity, Pet. App. at 37-45, and by the Court of Appeal in its opinion, *id.* at 28-31. Accordingly, Respondent Sea Pines South Beach Owners' Association ("the Association) respectfully asks the Court to deny certiorari.

COUNTER-STATEMENT OF THE CASE

Petitioners own seven commercial properties located within South Beach, a planned unit development community in Sea Pines Plantation, Hilton Head

[1] Petitioners do not claim that their second and third issues present novel issues of law, nor do they identify any other basis under Rule 242(b) for a grant of certiorari as to these issues.

Island, Beaufort County, South Carolina. Pet. Appx. 112 (Resp. to Def's Request to Admit No. 1). South Beach was created in 1970. *Id.* at 99. There is no dispute that all property in South Beach is encumbered by the a set of restricted covenants (the "1970 Covenants") recorded in June 1970. *Id.*

An additional set of covenants, recorded in January 1973 (the "1973 Commercial Covenants"), restrict land designated for commercial use, including Petitioners' properties. Pet. Appx. 257. The 1973 Commercial Covenants provide that they "shall be the sole applicable covenants restricting and affecting commercial properties conveyed by" Lighthouse. Pet. App. Pet. App. 175. However, the 1973 Commercial Covenants also recognize the existence and continuing enforceability of the 1970 Covenants.

Two provisions of the 1973 Commercial Covenants make clear that the 1970 Covenants remain applicable to commercial-use properties located within the South Beach parcel. First, the Recitals of the 1973 Commercial Covenants reserve to Lighthouse "the right to add, in Deeds of Conveyance, additional covenants in respect to properties so conveyed by such deed." *Id.* Second, the 1973 Commercial Covenants provide:

> [I]t is the true intent and purpose of [Lighthouse], that ***to the extent that there is a conflict between those restrictions previously recorded,*** as set forth above, ***and those of the instant Declaration,*** the provisions of the instant Declaration shall govern ...

Id. (emphasis added).

Petitioners' properties are located in the South Beach Marina Village. Petitioners admit that their properties are located within the original 103-acre parcel described in, and burdened by, the 1970 Covenants. Further, Petitioners do not dispute that the titles to their properties trace back to deed stating that they properties are conveyed subject to ***both*** the 1970 Covenants and the 1973 Commercial Covenants.[2] *See* Pet. Appx. 381-82 (Br. of Respondents at 5-6).

The 1970 Covenants give the Association authority to maintain the community and administer the covenants for the benefit of all property owners, whether residential or commercial. Pet. Appx. 99-100. The 1970 Covenants also state that each owner of property in South Beach is an Association member and obligated to pay dues and assessments. Pet. App. 103-04.

In June 2014, Petitioners filed their Complaint pursuant to S.C. Code Ann. § 15-53-10, seeking a declaration that Petitioners (1) were not members of the Association and (2) have no liability for assessments made or imposed by the Association. Pet. Appx. 48. Following discovery and referral to the Master in Equity, Petitioners and Respondent filed cross motions for summary judgment. Pet. Appx. 44, 58. Based on the undisputed facts, the Master in Equity determined

[2] The various conveyances underlying Petitioners' present ownership of the properties are recounted in affidavits submitted in connection with the parties' cross-motions for summary judgment. Pet. Appx. 275-297.

that:

- "[T]he 1970 Covenants create a planned unit development community and give authority to the Association to maintain and administer the community";
- "The 1973 Commercial Covenants set forth design, environmental and other standards and requirements to assure that commercial property is in keeping with stated environmental and aesthetic goals"; and
- "To the extent a property in South Beach is commercial in nature, ***the 1973 Commercial Covenants complement rather than conflict with other community restrictions.***"

Pet. Appx. 44 (emphasis added). The Master in Equity concluded:

> The Court finds that as a matter of law Plaintiffs' properties are subject to and encumbered by the 1970 Covenants and the 1973 Commercial Covenants. Accordingly, Plaintiffs are members of the Association, with all rights and obligations of membership.

Id. Petitioners filed a Rule 59 Motion which was denied by the Master in Equity. Pet. Appx. 46.

The Court of Appeals affirmed the Master's decision in an unpublished Opinion filed February 7, 2018. Pet. Appx. 28 (*Catwalk, LLC et al. v. Sea Pines South Beach Owners' Association, Inc.*, Op. No. 2018-UP-069 (Ct. App. Feb. 7, 2018)). Petitioners filed a Petition for Rehearing which was denied by Order filed March 22, 2018. Pet. Appx. 1.

ARGUMENT

I. The Court of Appeals Correctly Held that S.C. Code Ann. § 15-3-380 Does not Apply.

Petitioners first contend that S.C. Code Ann. § 15-3-380, the forty-year lapse

statute, bars the Association from asserting that the 1970 Covenants encumber Petitioners' properties because "the Association did not claim that the 1970 Covenants encumbered [Petitioners' properties], or any of their predecessors in title, for more than 40 years after the recording of the 1970 Covenants." Pet'n at 9.

Petitioners' argument depends on their claim that the 1970 Covenants constitute an "interest in land" for purposes of § 15-3-380. As the Court of Appeals correctly noted, however, "[n]o South Carolina case suggests an 'interest' in property includes the type of claim at issue in this case." Pet. Appx. 30. To the contrary, it is settled law that covenants, restrictions, and easements are contractual, not possessory, interests. *See, e.g., Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863-64 (1998); *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 361, 628 S.E.2d 555, 913 (2001). Because restrictive covenants do not create any right of possession, § 15-3-380 is irrelevant to this litigation.[3]

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[3] Even if § 15-3-380 applied, it would not help Petitioners. The only restriction on the Properties that could even remotely be considered an "interest therein" is the obligation to pay assessments, and it has been less than forty years since the Properties became subject to assessments under the 1970 Covenants. *See Dreher v. SCDHEC*, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015) (holding that "an appellate court may affirm the lower court's decision for any reason appearing in the record"). The 1970 Covenants provide that the "Owner" of a "Lot" is subject to assessments and define "Lot" as any "any improved or unimproved plat of land shown on any recorded final subdivision map." Pet. Appx. 100 (1970 Covenants at Art. I, § 1(d).) The 1984 Deed refers to a plat recorded in 1980, and the 1987 Deed refers to a plat recorded in 1987. Pet. Appx. 117, 196-97. Thus, the earliest that anyone owning any of the Properties could be obliged to pay assessments was 1980, only 36 years ago.

Additionally, Petitioners' argument fails to account for the non-waiver provision of the 1970 Covenants, which provides that any "failure by the Association or any Owner or the Company to enforce any covenant or restriction herein contained for any period of time ***shall in no event be deemed a waiver or estoppel of the right to enforce the same.***" Pet. Appx. 107 (emphasis added). South Carolina courts have long held that such non-waiver provisions are recognized and enforceable. *See Cobb & Seal Shoe Store v. Aetna Ins. Co.*, 78 S.C. 388, 397 58 S.E. 1099, 1101 (1907) ("The non-waiver agreement should be given full effect as the contract of the parties."); *see also Crotts v. Fletcher Motor Co.*, 219 S.C. 210, 64 S.E.2d 540 (1951); *Tilley v. Pacesetter Corp.*, 333 S.C. 508, 508 S.E.2d 16 (1998). As a matter of law, therefore, the non-waiver provision is enforceable by its plain meaning and precludes any argument by Petitioners that the Association has waived its enforcement rights.

II. The Court of Appeals Correctly Held that Petitioners' Properties Are Encumbered by the 1970 Covenants and the 1973 Commercial Covenants.

In their second question, Petitioners contend that the Court of Appeals erred in rejecting Petitioners' argument "that the 'sole applicable' language used in the 1973 Commercial Covenants ... preclude[s] application of the 1970 Covenants to their property." Pet. Appx. 29. The Court of Appeals reasoned as follows:

> The 1973 Commercial Covenants expressly acknowledge the existence and possible applicability of other covenants by indicating if there is conflict between covenants, the 1973

> Commercial Covenants are controlling. In light of these seemingly inconsistent provisions within the document, the master did not err in not finding the use of "sole applicable" was controlling plain language sufficient to preclude application of the 1970 Covenants.

Id.

The Court of Appeals correctly applied South Carolina law that "the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E. 2d 862, 863-64 (1998). Petitioners *admit* that their properties lie within the South Beach parcel. Pet. Appx. 112. Moreover, the deeds conveying the Properties to Appellants or their predecessors specifically list the 1970 Covenants (as well as the 1973 Commercial Covenants) as encumbrances. Pet. Appx. 118, 196-97.

In light of the undisputed facts, the Court of Appeals correctly affirmed the Master in Equity's conclusion that the phrase "sole applicable covenants," when read in the context of the 1973 Commercial Covenants as a whole, does not preclude the continuing applicability of the 1970 Covenants. As the Master in Equity explained,

> The word "applicable" (which in this context means relevant) refers to any part of the 1970 covenants which would have dealt specifically with commercial properties. If the 1973 Covenants were intended to completely replace the 1970 covenants, the word "applicable" would be unnecessary, and the word "sole" could have stood alone. Likewise, the phrase "to the extent there is a conflict..." implies that the 1973 covenants were

> intended as a commercial covenant overlay to act in conjunction with the 1970 covenants."

Pet. Appx. 46.

Petitioners next argue that the Court of Appeals failed to apply the rule that ambiguities in covenants must be construed in favor of the "free and unrestricted use of land." Pet'n at 15 (internal quotation marks omitted). Petitioners grasp a phrase in the Court of Appeals' opinion ("In light of these seemingly inconsistent provisions ...") and argue it is a finding by the Court of a legal ambiguity. Petitioners are wrong, because the Court's language was simply a statement of the issue before it. Moreover, the law is that while doubts regarding covenants should be resolved in favor of the free use of property, this rule of construction "should not be applied so as to defeat the plain and obvious purpose of the instrument." *Taylor*, 323 S.C. at 4-5, 498 S.E.2d at 863-64. Additionally, "[e]very term contained in a contract must be considered and given effect if possible." *Valley Pub. Serv. Auth. v. Beech Island Rural Cmty. Water Dist.*, 319 S.C. 488, 494, 462 S.E.2d 296, 299 (Ct. App. 1995).

The Court of Appeals' construction of the contractual covenants is correct. Petitioners are asking the Court to ignore settled legal principles and construe the 1973 Commercial Covenants in a way that ignores the purpose of the covenants as gleaned from the whole instrument. "It is fundamental that in the construction of the language of a [contract], it is proper to read together the different provisions

therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning." *Brady v. Brady*, 222 S.C. 242, 72 S.E.2d 193 (1952). The 1973 Commercial Covenants encumber all retail commercial property on Hilton Head Island, wherever located, owned at the time of recording. Pet. Appx. 174.

The purpose of the 1973 Commercial Covenants was to address the "environmentally sensitive nature" of Hilton Head Island by ensuring that commercial properties are "developed pursuant to an orderly plan which contemplates among other things the environmental impact." *Id.* To that end, the 1973 Commercial Covenants set forth design, environmental and other standards and requirements to assure that commercial property would be in keeping with stated environmental and aesthetic goals. Pet. Appx. 177-80. Thus, the 1973 Commercial Covenants plainly complement, rather than conflict with, other community restrictions. To interpret the 1973 Commercial Covenants otherwise would contravene the intended purpose of the covenants which was to primarily address the environmentally sensitive nature of Hilton Head Island.

Further, Petitioners' argument flies in the face of the 1973 Commercial Covenants, which provide that "to the extent that there is a conflict between those restrictions and covenants previously recorded ... the provisions of the instant Declaration shall govern and restrict commercial properties." Pet. Appx. 175. If the

1973 Commercial Covenants are the only applicable covenants, as Petitioners claim, no conflict with other covenants and restrictions is possible and this language is superfluous. Thus, the text of the 1973 Commercial Covenants acknowledges that other covenants and restrictions exist and apply. Therefore, the 1973 Commercial Covenants do not negate or override the 1970 Covenants. *See Mishoe v. Gen. Motors Acceptance Corp.*, 234 S.C. 182, 188, 107 S.E.2d 43, 47 (1958) ("Contracts should be liberally construed so as to give them effect and carry out the intention of the parties.").

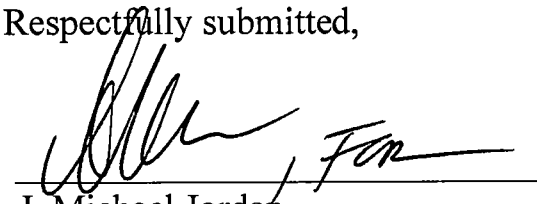
III. The Court of Appeals Correctly Affirmed Summary Judgment in Favor of the Association.

In their third question, Petitioners insist that the Court of Appeals' ruling is contrary to the "undisputed facts." The "facts" identified by Petitioners, however, are no more than a rephrasing of arguments already considered, and properly rejected, by the Court of Appeals.

CONCLUSION

For these reasons, Sea Pines South Beach Owners' Association, Inc. respectfully asks the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,



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May 9, 2018
Greenville, South Carolina

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PROOF OF SERVICE

I certify that I have served the Return to Petition for Certiorari upon Petitioners by depositing a copy via U.S. Mail on May 9, 2018, to counsel of record listed below.

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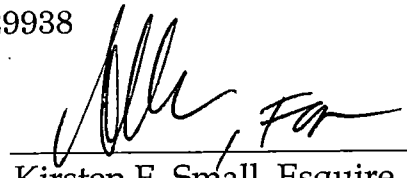

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