

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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APPEAL FROM BEAUFORT COUNTY,

S.C. SUPREME COURT

IN THE COURT OF COMMON PLEAS

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

Case Number 2014-CP-07-1435
Appellate Case No.: 2016-000637

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

v.

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

PETITIONERS' REPLY

COLTRANE & WILKINS, LLC
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LLC; and South Beach Swimming Pool, Inc.

REPLY ARGUMENT NUMBER 1

The language of S. C. Code Ann. § 15-3-380 (Supp. 2017), could not be more plain.

It 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 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 Association's argument is that : "... it is settled law that covenants, restrictions and easements are contractual, not possessory, interests (citations omitted). Because restrictive covenants do not create any right of possession, §15-3-380 is irrelevant to this litigation."¹

S. C. Code Ann. § 15-3-380 (Supp. 2017), bars an action for the recovery of any interest in real property after a lapse of 40 years. By its plain language, the bar of S. C. Code Ann. § 15-3-380 (Supp. 2017), is not limited to possessory interests, but rather applies to any interest. The Association's candid admission that it does claim an interest through its contract, the "Declaration of Covenants and Restrictions for Sea Pines South Beach, Hilton Head Island, South Carolina" (hereinafter, the "1970 Covenants") brings its claim squarely within the bar of S. C. Code Ann. § 15-3-380 (Supp. 2017).²

¹ Return to Petition for Certiorari, p. 6.

² The only evidence in the record for this case is that the 1970 Covenants were recorded on August 18, 1970, and that the Association did not make any claim that the 1970 Covenants encumbered the property of Catwalk, *et al.*, or any of its predecessors in title, until 2013.

The three cases cited by the Association in support of its argument that the “non-waiver” text in the 1970 Covenants, being *Cobb & Seal Shoe Store v. Aetna Insurance Company*, 78 SC 388, 58 SE 1099 (1907); *Crotts v. Fletcher Motor Company*, 219 SC 210, 64 SE2d 540 (1951); and, *Tilley v. Pacesetter Corporation*, 333 SC 33, 508 SE2d 16 (1998), do not address the situation presented by the facts of this case. None of them address a situation where a “non-waiver” agreement was asserted to relieve a party from the legal bar of the statute of limitations.

In its Footnote Number 3, the Association makes an argument that is legally wrong, and is not supported by any evidence in the record. The Association’s argument is that only the obligation to pay assessments creates an “interest” in real property, and that the obligation to pay assessments didn’t arise until 1980.

First, the 1970 Covenants were recorded on August 18, 1970, and include the following text:

“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 . . .”³ (emphases added)

Thus, from the moment the 1970 Covenants were recorded, an interest in real property was created.

Second, the reference to plats recorded in 1980 and 1987 in deeds recorded in 1984 and 1987, does not establish when “lots” as defined in the 1970 Covenants were first

³ Appendix, p. 106. The language of the 1970 Covenants removes any doubt that Lighthouse Beach Company intended that the 1970 Covenants would run with the land. See: *West v. Newberry Electric Co-op.*, 357 S.C. 537, 593 S.E.2d 500 (Ct.App. 2004).

created. There is simply nothing in the record to support this argument.

REPLY ARGUMENT NUMBER 2

It is undisputed that the real properties owned by Catwalk, *et al.*, are “commercial” properties, as described in the “Declaration of Rights, Restrictions, Affirmative Obligations, Conditions, Etc., which Constitute Covenants Running with certain Commercial Lands of Lighthouse Beach Company” (the “1973 Commercial Covenants”).

It is also undisputed that the 1973 Commercial Covenants include the following text:

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.

Both the Trial Judge and the Court of Appeals interpreted this language to say that “sole” does not mean “only” and the intent of this language was that the 1973 Covenants are in addition to the 1970 Covenants.

This conclusion is contrary to the plain language of the 1973 Commercial Covenants. It is also contrary to the law of South Carolina that requires courts to enforce unambiguous contracts according to the terms the parties have used, taken and understood in their plain, ordinary, and popular sense.⁴ Further, the reading by the Court of Appeals renders the

⁴ *Sifonios v. Town of Surfside Beach*, 414 S.C. 269, 777 S.E.2d 425 (Ct.App. 2015).

“sole applicable covenants restricting and affecting commercial properties” language meaningless, which is also contrary to the law of South Carolina.⁵

REPLY ARGUMENT NUMBER 3

In its Return, the Association makes no additional argument with regard to the “Question Presented Number 3” in the Petition for Writ of Certiorari, and Catwalk, *et al.*, stand on the arguments presented in the Petition.

CONCLUSION

For the reasons stated in the foregoing arguments and in their Petition for Writ of Certiorari, Catwalk, *et al.*, urge the Court to grant their Petition for Writ of Certiorari, to reverse Court of Appeals’ Opinion 2018-UP-069, and to enter judgment in favor of Catwalk, *et al.*,

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This 15th day of May, 2018.

⁵ The law in South Carolina is that one part of the contract should not be interpreted so as to annul another provision of the same contract. *Richland-Lexington Airport District v. American Airlines, Inc.*, 306 F. Supp. 2d 548 (D.S.C. 2002), *aff'd*, 61 F. Appx. 67 (4th Cir. 2003). The Court of Appeals’ holding does exactly that, and renders the “sole applicable covenants” language meaningless.

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Court of Common Pleas

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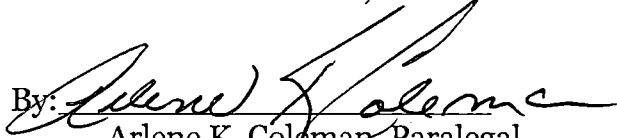
SEA PINES SOUTH BEACH PROPERTY OWNERS'
ASSOCIATION, INC., Respondent.

CERTIFICATE OF SERVICE

I, Arlene K. Coleman, paralegal at Coltrane & Wilkins, LLC, certify that on this date,
I served a copy of the Reply of the Petitioners, by depositing a copy of the same copy of the
same in the United States Mail, with first-class postage affixed, addressed as follows:

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This 15th Day of May, 2018.