THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Roger Young, Circuit Court Judge

Case No. 2017-002395

Alexander Burns, Appellant,

v.

Brays Island Plantation Colony, Inc. &
Brays Island Realty, LLC, Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On February 15th, 2017, Alexander Burns ("Appellant") brought this action against Brays Island Plantation Colony, Inc. ("Respondent") and Brays Island Plantation Realty, LLC (collectively "Respondents") seeking a declaratory judgment against Respondent declaring the Declaration of Covenants, Conditions & Restrictions dated November 11th, 1988 (the "Covenants") allegedly governing a parcel of land located at 50 Gun Club Drive, in Sheldon, SC, as a part of the Brays Island plantation, which was purchased by Appellant in October, of 2014, as invalid and unenforceable as a matter of law, as well as complaining of civil conspiracy between Respondents to the injury of the Appellant.

On March 15th, 2017, Respondent moved to dismiss all counts of the action.

On March 17th, 2017, Brays Island Realty, LLC answered the complaint denying Appellant's allegations of civil conspiracy.

On April 11th, 2017, the trial court heard Respondent's motion to dismiss.

On April 17th, 2017, the trial court denied Respondent's motion to dismiss.

On April 25th, 2017, Respondent answered and counterclaimed seeking damages for Appellant' alleged breach of the covenants for failure to pay certain assessments due.

Appellant and Respondent each moved for summary judgment. Appellant moved for summary judgment on the first cause of action, the declaratory judgment regarding the Covenants, and Respondent moved for summary judgment on both causes of action as well as its counterclaim.

On August 22nd, 2017, the trial court heard oral argument from the parties on the competing motions.

On September 21st, 2017, the trial court issued an order granting Respondent's motion for summary judgment, including its counterclaim, and denying Appellant's motion for summary judgment on the first cause of action. The trial court issued judgment in the amount of Thirty-two Thousand One hundred Thirty-five and 50/100 ($32,135.50) in favor of Respondent, with leave to submit such amounts from time to time for the court to add to the judgment.

On September 27th, 2017, the Appellant filed a motion for reconsideration or in the alternative a motion to stay judgment.

On October 24th, 2017, the trial court denied Appellant's motion for reconsideration or in the alternative to stay judgment.

On November 7th, 2017, the Appellant, served the Respondents as well as the trial court with a Notice of Appeal.

ARGUMENTS

1. **DID THE TRIAL COURT ERR IN FAILING TO CONSIDER THE EVIDENCE SET FORTH BY THE APPELLANT, PRO SE, IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT?**

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Savannah Bank, N.A. v. Stalliard,* 400 S.C. 246, 250, 734 S.E.2d 161, 163 (2012) (quoting *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Id.* (quoting *Fleming*, 350 S.C. at 493, 567 S.E.2d at 860). "To withstand a motion for summary judgment 'in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence.'" *Id.* (quoting *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)).

In considering a motion for summary judgment "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to judgment as a mater of law." Rule 56(c) SCRCP.

"Except as otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit." Rule 11(a), SCRCP.

It is well established in South Carolina law that the basis of determination for summary judgment is the review facts that would otherwise constitute evidence were the matter to proceed to trial. While it may be commonplace to establish these facts through an affidavit insofar as the majority of cases are tried by attorneys advocating on behalf of their clients, when a matter is brought before the court *pro se,* the facts tendered by the pleader are inherently upon the personal knowledge of the interested party, eliminating the need for a supplemental affidavit

attesting that the thing that was said by very the same person maintains its veracity. As such, any fact (as opposed to a mere allegation or conclusion of law) asserted by a *pro se* party in a pleading inherently has the same evidentiary weight as if it were attested to by the *pro se* party in an affidavit annexed to the pleading.

The surety to the Court that the evidence attested to in *pro se* pleadings meets the same standard of that would be found in a *pro se* party's affidavit is the obligation imposed by Rule 11, SCRCP, that requires the signature constitute a certificate by him (the *pro se* party) that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief that there is good ground to support it; and that it is not interposed for delay."

Conversely, the affidavits accepted by the trial court as evidence, on behalf of the Respondent, are affirmed only as "...being duly sworn, deposes and says as follows" (*See* R. p. 239-240; p.333-334; p. 341-343).

The court must accept that evidence presented in a pleading, which is signed by the relevant individual (*pro se)*, certifying that to the best of his knowledge, information, and belief there are good grounds to support the factual assertions (which can clearly be separated from mere allegations) is at least as persuasive, if not more so, than affidavits of adverse parties attested to as *being duly sworn, deposes and sa[id].*

In the alternative, the Appellant could have simply taken all of the factual assertions set forth in the pleadings, pasted them into an affidavit and appended it to any pleading. To do so is not specifically required anywhere in the South Carolina Rules of Civil Procedure, would have provided no additional information to the trial court, and certainly would not have served judicial economy as it would have senselessly increased the volume of filings served on the trial court and opposing parties. This issue was raised at oral argument by the Appellant who stated "First

and foremost, on the issues of things that I may or may not have filed in opposition, I filed an answer which I signed and verified myself. As a *pro se* filer, the answer was signed and filed by me in which I denied the allegations. That is sufficient as a *pro se* filer. That is sufficient filing in my defense. There's no need for a supplemental affidavit as it was drafted by me, signed by me, and attested to under Rule 11. Second, just in case we're unclear as to my opposition, I filed and signed a memorandum in opposition, separate and apart from my memorandum in support. I filed a separate memorandum in opposition to defendant Brays' motion, so to subject that I've been silent on the issue is just not found in the record." (R. p. 223 lines 20-25 & p. 224 lines 1-9)

The trial court order denying Appellant's motion for summary judgment and granting Respondent's motion for summary judgment makes clear that the affidavits set forth by the Respondent are "uncontroverted". (R. p. 8) In this, the trial court relies upon a narrow (and flawed) interpretation of Rule 56(e), SCRCP, which states that "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

While the trial court correctly notes that the Appellant did not submit an affidavit, the trial court omits to afford any deference to the Appellant's use of the other evidentiary means afforded by Rule 56(c), SCRCP, which states "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Taken together, the Appellant may properly make an affidavit or, if the pleadings contain more than mere allegations or denials (which are on

the personal knowledge of the *pro se* party), rely upon the evidentiary information in the pleadings insofar as they themselves do not require a supplementary affidavit to accepted as evidence pursuant to the aforementioned lack of affidavit requirement imposed by Rule 11(a), SCRCP. Specifically, the plain language of Rule 56(c) envisages that there may not be any affidavits insofar as it says "affidavits, if any". The clear intent of the law is to provide numerous means of determining a genuine issue of material fact, specifically including facts from pleadings without affidavits.

Accepting that the facts pled by the Appellant, in both the Appellant's memorandum in support of its motion for partial summary judgment as well as in its memorandum in opposition of the Respondent's motion for summary judgment, hold the same evidentiary weight as an affidavit submitted by the Appellant himself, in considering whether the moving party is entitled to judgment as a matter of law, the Court must review these facts individually in search of a *scintilla* of evidence, any of which would be sufficient to defeat the Respondent's motion for summary judgment:

i. **The Individual Assessments Are Personal vs. Real Covenants.** The Appellant has set forth facts that the individual assessments are personal covenants and not real covenants and therefore do not run with the land as required by South Carolina common law. The Appellant has referenced uncontested facts that Section 4.02 of the Covenants sets forth a formula for computing the cost of the individual assessments based upon the number of individual Members designated by an owner of the property rather than having anything to do with the property itself. The determination as to whether this calculation, which is set forth in the Covenants and based upon individuals, having nothing to do with the land (e.g. they are not required to live on

the property nor have any connection other than being designees of the property owner), does not provide any evidence of a real covenant that "touches and concerns the land and therefore runs with the land" as is required by law can only be properly analyzed by a jury. (R. p. 52-55)

ii. **The Covenants Have No Beneficial Effect On The Value Of The Property.** The Appellant sets forth evidence a detailed series of factual calculations as evidence that the Covenants do not have a beneficial effect on the land. The Appellant lays out a mathematical calculation by which the lien imposed by the Covenants decreases the property's value at rate of approximately 16% per annum. At this rate, the value of the property would be reduced from the purchase price to zero in just over six years from the purchase. Moreover, the Appellant sets forth an analysis of the estimated market value for the property based upon written exchanges between the Appellant and Brays Island Realty, LLC in which Brays Island Realty, LLC indicates that some owners are willing to sell similarly situated lots at a price approximately 12% below the price where the Appellant purchased the property, three years ago. The Appellant sets these calculations, in opposition to the fact that land values all over Beaufort County have been steadily increasing for the past three years. (R. p. 56) The determination of whether these liabilities, imposed by the Covenants, constitute a lack of a beneficial effect on the land, thereby rendering them unenforceable, is a factual determination to be made by a trier of fact.

iii. **The Covenants Are Indefinite.** Section 9.08 of the Covenants states that "No owner may waive or otherwise escape liability for the assessments provided herein, including by way of illustration but not limitation, non-use of the Common Areas,

failure to designate Members, voluntary or involuntary termination of Membership, or abandonment of his Lot, and any Owner shall remain personally liable for assessments, interest, late charges and other amounts which accrue prior to a sale, transfer or other conveyance of his Lot." (R. p. 133) The determination as to whether this covenant violates the South Carolina common law that "Restrictive covenants will only be enforced unless they are indefinite or contravene public policy." *Sea Pines Plantation Co. v. Wells* 294 S.C. 266, 270 (1997) is a factual determination properly made by a jury as a genuine issue of material fact.

iv. **The Personal Covenants Cannot Be Terminated.** Section 14.05 of the Covenants provides for an initial term of thirty years with automatic ten year renewal periods unless ninety percent (90%) of the owners vote for termination, during specific windows:

> The provisions of this Declaration shall run with, and bind title to the Plantation, shall be binding upon and inure to the benefit of all Owners and mortgages and their respective heirs, executors, legal representatives, successors and assigns, and shall remain in effect for a period of thirty (30) years from and after the date of is Declaration, provided that the rights and easements which are stated herein to have a longer duration shall have a longer duration. Upon the expiration of said thirty (30) year period, this Declaration shall automatically be renewed for successive ten (10) year periods. The number of ten (10) year periods shall be unlimited with this Declaration, being automatically renewed and extended upon the expiration of each ten (10) year renewal period for an additional ten (10) year period; provided, however that there shall be no renewal or extension of this Declaration, if, during the last year of the initial thirty (3) year period or the last year of any ten (10) year renewal period, ninety percent (90%) of the total votes of the Colony are cast in favor of terminating this Declaration at the end of the current term. (R. p. 149-150)

Whether the inability for the Covenants to be terminated by either the Appellant or Respondent, or even at the joint wish of the Appellant and Respondent raises the factual issue of

whether the arrangement is that of a perpetual agreement as both can continue to be forced to unceasingly be bound to the Covenants based upon the whims of third-parties, with potentially divergent interests, which must be considered by a jury as opposed to as a matter of law.

To the extent that any of the aforementioned facts, as established by the Appellant were to be have been considered by the trial court it would certainly have given rise to multiple genuine issues of material fact ranging from how the Covenants run with the land (versus being merely personal covenants, which the trial court appears to be willing to accept would not be enforceable) to how the Covenants have a beneficial effect on value of the property, and the lack of ability by the parties themselves to terminate the Covenants, and thus the Respondent's motion for summary judgment would have been properly denied.

2. **DID THE TRIAL COURT ERR IN FAILING TO RULE ON BOTH THE STATUTORY AND THE COMMON LAW UNENFORCABILITY OF THE COVENANTS WHEN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON ITS COUNTERCLAIM?**

As noted by the trial court in oral argument with regard to the comprehension of the law regarding perpetual agreements, the trial court asked of the Appellant "...how many people [*pro se]* know about the law of perpetuities, much less understand it." The Appellant replied, "Well, Your Honor, we'll see if we [I] understand it" to which the trial court responded "I'm still not sure that I do, but go ahead." (R. p. 204 lines 17-25) The laws regarding perpetual agreements are a quagmire. Complicating the matter is that there are actually two independent determinations that must be made by a court in adjudicating whether these particular Covenants are valid on the basis of perpetuities: (i) to the extent that the Covenants involves an interest in land, does they violate the South Carolina Rule Against Perpetuities, as codified by statute; (ii) separately, and independently, as a contractual matter (as covenants are quasi-contractual) is the issue of the contract enforceability based upon South Carolina common law insofar as perpetual

agreements are disfavored as a matter of public policy. "Historically, perpetual contracts have not been favored in South Carolina and are generally upheld only when the perpetual nature of the agreement is an express term of the contract." *See Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 102 (S.C. 1994); *See Also Childs v. City of Columbia,* 87 S.C. 566 (1911).

South Carolina Rule Against Perpetuities

The trial court order states that the South Carolina Rule Against Perpetuities, as codified under SC Code Ann. 27-6-10 *et. seq.* only applies to interests that are not vested. The order goes on to state that the interest in Brays Island under the Covenants – in getting paid by property owners --- vested at the time of its creation [October 11th, 1988]. Therefore it falls outside of the rule. (R. p. 5) The trial court's ruling on the basis that the interest was fixed at granting seems to directly contradict the end of the same order where the trial court afforded the Respondent the right to submit such amounts from time to time to the court for the addition to the judgment now ordered....[for additional assessments]". As the Appellant argued in its memorandum in opposition of the Respondent's motion to dismiss, a vested interest by definition must be "not contingent, unconditional and absolute." (R. p. 85) Section 9.02 of the Covenants makes clear that the Appellants interest in the lot subject to Respondent's "equitable charge and continuing lien therefore, but without prejudice to the rights of such grantee to recover from his granter any assessments paid by such grantee therefore; provided however, the lien for unpaid assessments shall be subordinated and junior in lien to any first priority institutional mortgage." (R. p. 129)

The basis for the Respondent's lien is a contingent interest in the non-payment of assessments by future owners (such as Appellant) in any assessments by Respondent and is obviously conditioned upon its subordination to an institutional mortgage. Given that the institutional mortgage on the property was originated upon Appellant's purchase of the property

in 2014, and the delinquencies in assessment, as alleged by Respondent occurred in 2016, the lien interest cannot have been vested in 1988, as a purely factual matter. The determination of the vesting of the interest is a subjective issue for a jury and not one that can be concluded as a matter of law.

The trial court's order relies upon the "life in being" clause contained in Section 14.06 of the Covenants as providing evidence of compliance of the Covenants with the South Carolina Rule Against Perpetuities. (R. p. 150) Strictly construed against the Respondent, the imposition of an individual then alive would require that the individual be suitably identifiable as an individual as opposed to a class of individuals – making the investigation of compliance difficult to the point of shambolic. As pled by the Appellant, to determine whether the Covenants were enforceable at any time, pursuant to Section 14.06 would require that both the Appellant and Respondent have sufficient information to determine every descendant alive at the inception of the agreement (raising the ambiguity as to whether this would be the date the Covenants incepted, November 11th, 1988 – or the date the Appellant acquired an interest in the property, October 1st, 2014). Further complicating matters, is that despite the prominence of the Kennedy family, the Covenants are ambiguous as to the nature of the descendants.

For purposes of calculation, would the parties include only the direct descendants of Mrs. Kennedy (her children) or any children of her children (her grandchildren – being derivatively descended), further given that Mrs. Kennedy was born in 1890, and assuming an interpretation that we are considering any descendants alive as of October 1st, 2014, it raises the factual issue of a seemingly iterative number of generations (grandchildren, great-grandchildren and perhaps even great-great grandchildren of Mrs. Kennedy) who might be alive as of October 1st, 2014. Despite the undisputed prominence of the Kennedy family, the imposition that the parties must

determine the identity and mortality status of every derivative progeny of Mrs. Kennedy ought to offend the Court's notions of the boundaries of what can be lawfully contracted considering that the Kennedy family has no ostensible connection to the Brays Island plantation.

Moreover, this section of the Covenants only applies "If any of the covenants, conditions, and restrictions or other provisions of this Declaration shall be unlawful, void, or avoidable for the violation of the rule against perpetuities, then such provision shall continue only until twenty-one (21) years after the death of the last survivor of the now living descendants of Mrs. Rose Fitzgerald Kennedy – mother of U.S. Senator Edward Kennedy." The Respondent clearly argues that the rule against perpetuities, referenced in the Covenants is the statutory rule against perpetuities, as codified under S.C. Code Ann 27-6-10 et seq. Strictly construed against the Respondent, this reformation can only be used to cure defects in the statutory law and not for common law defects in the covenants (as a contractual matter) to determine the enforceability of the Covenants against the Appellant.

Common Law Contractual Issues

The legal enforceability of the Covenants, particularly the Individual Assessment, as set forth in Section 9.03 of the Covenants, was not addressed by the trial court in its order (except in summary form as to declare the Covenants entirely valid and enforceable). The enforceability of Section 9.03 of the Covenants has essential factual considerations that must be determined by a trier of fact as opposed to as a matter of law. (R. p. 130)

The Court need not concern itself with the sufficiency of pleading by the Appellant with regard to the common law illegality of the Covenants. The Appellant originally sought a declaratory judgment rendering the Covenants as legally unenforceable as a first cause of action. While the specific nature of the complaint dealt only with the statutory violation of the South

Carolina Rule Against Perpetuities, the failure to specifically include allegations of the Covenants violations of South Carolina common law as a contractual issue are mollified by South Carolina law. "It is generally true that illegality of a contract, if of a serious nature, need not be pleaded, as a court will generally of its own motion take notice of anything contrary to public policy if it appears from the pleadings or in evidence, and the plaintiff will be denied relief, for to hold otherwise would be to enforce inappropriately an illegal agreement.'" *Ward v. West Oil Company, Inc.* 379 S.C. 225, 665 S.E.2d 618 (Ct. App. 2008) (quoting 6 Richard A. Lord, Williston on Contracts § 12:5 at 56-64 (4th ed. 1995))); *see also* 17A Am. Jur. 2d Contracts § 323 (2004) ("[I]f a question of illegality develops during the course of the trial, a court must consider that question, whether pleaded or not."); *see also White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371 (2004) ("The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions."); *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64 (Ct. App. 2002) (holding that illegal contracts are void and unenforceable, such that actions for its breach may not be maintained).

The Court's consideration of the legality of the contract is essential prior to the determination, on summary judgment or otherwise, that the Covenants are enforceable enough against the Appellant to render a monetary judgment (for breach thereof) against Appellant.

Insofar as the Appellant never entered into any other contractual relationship with the Respondent, the only source of Appellant's obligation to Respondent must be the assumption of the Covenants upon purchasing the property. This complexity heightens the standard of review for certain covenants, as they are not exactly freely entered into, mutually drafted, arm's length

agreements, but rather are obligations assumed by a party by virtue of their purchase of a parcel of land, and therefore are held enforceable in much more limited circumstances than freely negotiated, arm's length agreements between parties. "Covenants must be strictly construed against the party seeking to enforce them." *Sea Pines Plantation Co. v. Wells* 294 S.C. 266, 270 (1987); *Seabrook Island Prop. Owners Assoc. v. Marshland Trust, Inc.* 358 S.C. 655, 662 (Ct. App.2004).

Under this standard, the Respondent must establish that there is not only not a *scintilla* of evidence available to the Appellant, that would otherwise have defeated the Respondent's motion for summary judgment, BUT the Respondent must also do so with the additional burden of having all of the ambiguities in the interpretation of the Covenants construed strictly against the Respondent, resolved in its favor. Practically speaking, this means that any ambiguity in the interpretation of the Covenants, as raised by Appellant, that the Court deems could be a proper question for a jury, MUST be resolved by a trier of fact (as opposed to as a matter of law) as the law requires the strict construction of any ambiguity against the Respondent (compounded by the heightened requirements for covenants).

The Appellant has properly raised the issue of the computation of the individual assessments and the nature of the formula being based upon individually designated members, having nothing to do with the land itself. This raises a factual question as to whether the individual assessments are enforceable affirmative real covenants, as a matter of law, insofar as the legal standard for an enforceable restrictive covenant is "A restrictive covenant runs with the land, and is thus enforceable by a successor-in-interest, if the covenanting parties intended that the covenant run with the land, and the covenant touches and concerns the land." *Marathon Fin.*

Co. v. HHC Liquidation Corp., 325 S.C. 589, 604, 483 S.E.2d 757, 765 (Ct. App. 1997); *quoting* 20 Am.Jur.2d Covenants, Conditions, Etc. §29 (1965).

This is obviously a factual issue, as opposed to a legal conclusion as just as obviously as no man can be an island, no individual (or number of individuals) can run with a parcel of land without some factual determination as to the closeness of their connection to the land, when the parties in question potentially have no contractual privity, other than being designated by an owner pursuant to Section 2.11 of the Covenants. Moreover, "a party seeking to enforce a covenant must show the covenant applies to the property either by its express language or by a plain and unmistakable implication." *Charping v. J.P. Scurry & Co., Inc.*, 296 S.C. 312, 314, 372 S.E.2d 120, 121 (Ct. App. 1988). It appears a clear question for a jury, as opposed to a matter of law, as to whether the affiliated membership of in the social activities of a plantation is inextricably bounded up in the touching and concerning of land by unmistakable implication.

There is a second independent determination of where the Covenants have a beneficial effect on the land. "Covenants that require property owners to pay to a developer or homeowners' association assessments that have a beneficial effect on the value of the owners' properties touch and concern land and therefore 'run with the land.'" *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.* 368 S.C. at 357 (*citing Harbison Cmty. Assoc., Inc. v. Mueller*, 319 S.C. 99, 102 (Ct.App.1995). The Appellant has provided a detailed factual analysis of the negative effect of the Covenants on the value of the Appellant's property. At the current rate of assessment, the assessments presently decrease the value of the property at a *negative carry* rate of approximately 16% of the value of the property per year. (R. p. 56)

The determination of whether the application of the financial obligations of the Covenants in Article IX are excessive to the point where they no longer have a beneficial effect

on the value of the owners' properties (in order to be recognized as a valid covenant), is a factual determination that is most appropriately resolved by a jury, to the extent that any ambiguity in what constitutes a beneficial effect on the value of the property must be strictly construed against the Respondent.

Taken literally, the factual evidence provided by the Appellant that the offer prices for similarly situated properties appear to be 12% lower than the Appellant's purchase price three years ago, despite broad increases in real estate prices all over Beaufort County during the same time period, coupled with an obligation of negative carry of a further 16% (per the Appellant's calculation of assessments in the Covenants), which is secured by a lien on the property pursuant to Sections 9.02 & 9.07 of the Covenants, renders overwhelming, and unrefuted evidence, that the assessment portion of the Covenants do not have a beneficial effect on the land. Further, as testified by the Appellant, subsequent to listing the property with Brays Island Realty, LLC, on October 21st, 2016 date, the Appellant has received no offers or material indications of interest in the property at ANY price as of the date of this appeal. (R. p. 227 lines 24-25 & p. 228 lines 1-2)

For the trial court to rule in favor of the Respondent's counterclaim requires a third, independent, determination of whether the contract is indefinite or violates public policy in order to determine whether the Covenants constitute a contract which is enforceable against the Appellant, as previously cited by Appellant. As pled, and factually established by the Covenants themselves, once the obligations under the Covenants are assumed by a party – the Appellant -- (via the purchase of a lot), the obligations to abide by the terms of the Covenants, including the payment of the Individual Assessments, continue until the Appellant can find someone else to assume their obligations (through the sale of the lot to another party agreeing to so be bound). As provided Section 9.08 of the Covenants "No owner may waive or otherwise escape liability for

the assessments provided for herein, including by way of illustration but not limitation, non-use of the Common Areas, failure to designate Members, voluntary or involuntary termination of the Membership, or abandonment of his Lot, and an Owner shall remain personally liable for assessments, interest, late charges and other amounts which accrue prior to a sale, transfer or other conveyance of his Lot." (R. p. 133) Strictly construed against the Respondent, this covenant plainly states that unless the Applicant can find someone else willing to purchase the Lot, the Applicant will be personally liable for the assessments for the rest of time without any mitigation.

The trial court ruled in favor of the Respondent's counterclaim without ever once addressing if Section 9.08 of the Covenants constitutes an indefinite, and thus unenforceable, obligation between the Appellant and Respondent.

Taken together with the obligation that the Covenants have a beneficial effect on the value of the property; if the Appellant cannot abate its obligations by offering the property for sale (for over a year), at a price recommended by the only real estate broker with access to the plantation, then the Appellant is stuck in the unenviable position of perpetually being obligated to continue to suffer assessments under the Covenants without any means mitigation. Strictly construed and resolving every doubt in favor of the Appellant, the Court cannot possibly find as a matter of law that the Covenants, are neither indefinite nor contravene public policy.

3. **DID THE TRIAL COURT ERR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT WITHOUT AFFORDING THE APPELLANT DISCOVERY ON THE CIVIL CONSPIRACY CLAIM?**

The trial court makes clear that a motion for summary judgment cannot be entertained until all discovery has been completed. Specifically, the trial court states, "...but it's a pretty basic law that I can't entertain a summary judgment motion until all discovery has been done." (R. p. 219 lines 1-4) The Appellant responds in oral argument, "The second cause of action with regard to civil conspiracy I absolutely plan to seek discovery on." (R. p. 219 lines 9-10) Further, the Appellant clarifies, "In the second cause of action where I allege civil conspiracy, that is ripe for discovery, and as a matter of judicial economy, I put the motion for summary judgment for the first cause before the discovery plan for the second, and seeing no objection from either of the counsels in the past six months have found it to be appropriate." (R. p. 219 lines 16-22)

This exchange should serve to highlight to the Court the error in the trial court's granting of summary judgment in favor of the Respondent on the second cause of action, civil conspiracy. The trial court's order regarding the second cause of action refers to it as a dismissal. This is both procedurally improper, insofar as the Respondent previously sought dismissal, on the same grounds, in its March 15th, 2017 motion to dismiss. (R. p. 80) This motion was heard and denied by Hon. Carmen T. Mullen on April 17th, 2017, and judicially improper based upon the lack of merit.

"Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). "This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Id.*

Without the opportunity for discovery, as prayed for by the Appellant, the trial court's reliance upon the affidavits of the Respondent parties as referenced in the order "The Court finds the affidavits and verification credible, relevant and helpful in every respect. They are dispositive." is foundationally improper. (R. p. 8)

With regard to the second cause of action, the civil conspiracy claim, the parties are in no different position then when the sufficiency of the pleading was tested by the Respondent and the trial court ruled that the pleading was sufficient to proceed. The trial court makes no indication that the Appellant unduly delayed or burdened the party by prioritizing the first cause of action ahead of discovery on the second cause of action and therefore there is no basis for the trial court to extinguish the Appellant's inviolable right to have conducted discovery on the second cause of action prior to the trial court's ruling. Specifically, the trial court found that the affidavits which were "credible, relevant and helpful in every respect" were those of the principals of the two parties being accused of civil conspiracy who stated that there was no civil conspiracy because they would have known about it. If any two parties could prevail on a motion for summary judgment simply by denying that they had engaged in civil conspiracy, prior to the plaintiff having the opportunity to conduct significant discovery on the matter, civil conspiracy would entirely fall away as a cause of action in South Carolina.

Even without the benefit of any material discovery, the Appellant has still set forth a cogent theory by which the Respondents engaged in civil conspiracy pursuant to the elements as set forth in *Pye v. Fox* 369 S.C. 555,568, 633 S.E.2d 505 (2006) as cited by the Appellant, Respondents and the trial court. (I) The Respondents, (1) Brays Island Plantation Colony, Inc. AND (2) Brays Island Realty, LLC; (II) For purposes of injuring the Appellant, insofar as they conspired to keep the Appellant from being able to easily sell his property; (III) caused special

damages in the form of the Appellant being deprived from the sales proceeds of his property, his obligation to continue to pay his mortgage on his property, after seeking to sell the property, and being forced to continue to pay real estate taxes on the property, after seeking to sell the property.

The identification of the parties ought to be self-evident as both were named in the original complaint. The purpose of injuring the parties is the area in which the Appellant seeks discovery of the Respondents in order to establish the exact nature of their conspiracy to injure the Appellant. The Appellant has alleged that Brays Island Realty, LLC has deviated from the industry custom in failing to ever list the property in any multiple listing service, or make any information publicly available as to the asking prices of other lots, or even the number of other lots available for sale at any given time. Presumably, this is to create an appearance of an artificially low inventory versus demand, of available lots, in order to deceive buyers and sellers into believing that there is a more liquid market for these properties. This deception is assisted by the efforts of the Respondent who have permitted Brays Island Realty, LLC unfettered access to the plantation (despite there being no reference to Brays Island Realty, LLC anywhere in the original Covenants) and have provided them with a marketing budget to market properties at the plantation although there is no information available to Appellant as to whether this marketing budget is used for both undeveloped lots or completed houses. Other real estate brokers are not allowed access to the plantation (as stated in Section 3.04 & 4.02(f) of the Covenants, which restricts access to third parties to when the Member is physically on the premises) and owners may not post "for sale" or "for rent" signs as imposed by Section 11.03 of the Covenants. (R. p. 112, p. 119, & p. 139) Despite being never referenced once in the Covenants, the Respondent has subtly created a franchise by which its gate-keeper can control how properties at the plantation

are sold and can inhibit the natural price and inventory discovery that would otherwise be afforded to the sale of real estate by the purchasers and sellers of real estate. This conspiracy, has the effect of turning what appears to be a homeowner's association of independent plots of real estate into a hybrid time-share investment and country-club membership type transaction. The Appellant has set forth sufficient facts allegations as to the conspiracy as have been tested and cannot sufficiently rebut materials outside of the pleadings without the opportunity for material discovery.

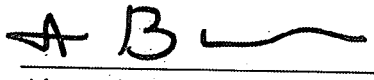
The special damages are similarly evident, if the two Respondents have conspired to "lock in" the Appellant (and presumably other owners) without having any real opportunity to efficiently sell the property at the plantation, the damages would include all of the ancillary costs in maintaining their ownership (irrespective of the assessments as set forth in the Covenants) as well as the loss of enjoyment of their principal investment capital.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

May 20th, 2018

Respectfully submitted,



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