THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2017-CP-10-3672

Christie MacConnell, Appellant,

v.

Frances C. Welch, Respondent.

INITIAL BRIEF OF RESPONDENT

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August 13, 2018

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Circuit Court correctly held that Frances Welch is the assignee of Parking Space 38, where the prior owners did not elect to designate the space as a Limited Common Element (non-assignable), and then the prior owners executed a written assignment of the space to Welch?

2. Whether the Circuit Court correctly held that Frances Welch is the assignee of Parking Space 38, where the Albemarle Horizontal Property Regime did not amend the Master Deed to reflect that the prior owners had elected to designate the space as a Limited Common Element (non-assignable), and then the prior owners executed a written assignment of the space to Welch?

3. Whether the Circuit Court erred in holding that issues of material fact remained which precluded summary judgment in favor of Frances Welch on the independent basis of laches, where MacConnell admitted that she knew Welch was parking in Space 38 immediately after MacConnell purchased her condominium in 2011, but where MacConnell never objected nor even parked in Space 38 prior to filing this lawsuit in 2017.

STATEMENT OF THE CASE

Christie MacConnell ("MacConnell") filed this lawsuit on July 19, 2017 seeking to quiet title to a parking space known as Space 38, which is part of the Albemarle Horizontal Property Regime in Charleston, SC. On September 18, 2017, Frances Welch ("Welch") answered and asserted a counterclaim also seeking to quiet title to Space 38. On October 3 and 5, 2017, the parties each filed motions for summary judgment.

The motions came before the Honorable R. Markley Dennis, Circuit Court Judge, on January 11, 2018 in Charleston. After considering the record and the arguments of counsel, on January 26, 2018 the Circuit Court issued an Order granting summary judgment in favor of Welch and denying summary judgment for MacConnell. On February 10, 2018, MacConnell filed a motion to alter or amend the judgment. Following a hearing on March 27, 2018, the Court filed an Amended Order removing one of the independent bases for its grant of summary judgment but still granting summary judgment in favor of Welch on the remaining grounds. This appeal followed on April 16, 2018.

STANDARD OF REVIEW

This Court reviews the lower court's grant of summary judgment by applying the same standard: summary judgment is mandated in cases where 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. Rule 56(c), SCRCP.

FACTS

Welch owns a condominium located in the Albemarle Horizontal Property Regime (the "Regime") known as Unit 404. MacConnell owns Unit 405 at the Regime. At issue in this lawsuit is which party owns the exclusive right to use a certain parking space in the Regime designated as Space 38.

On August 12, 2004, Riverview Condominium Associates, LLC (the "Developer") created the Regime by filing a Master Deed with the RMC Office for Charleston County. Section 6 of the Master Deed states that "[t]he limited common elements appurtenant to the Residences are...One parking space for each one (1) and two (2) bedroom Residence." MacConnell's condominium, Unit 405, is a 2-bedroom residence and thus has one appurtenant parking space.

Section 24 of the Master Deed governs parking spaces. It begins by repeating that "[e]ach one-bedroom and two-bedroom Residence shall have one (1) parking space designated as a Limited Common Element." The next provision is critical to this case:

> [i]f an Owner has been assigned an additional parking space in addition to the spaces provided above, he shall at the time of the closing of the purchase of his Residence elect to have that space designated as a Limited Common Element for his Residence, or have it remain as a GCE/Assignable Space as hereinafter defined. **If such Owner elects to have the additional space designated as a Limited Common Element for his Residence, the Master Deed shall be amended by the Association to reflect such election.**

(emphasis added). Later in the same section, it explains the difference between a General Common Element ("GCE")/Assignable Space and a Limited Common Element.

> A GCE/Assignable Space is a space that is a General Common Element that has been initially assigned or is to be assigned by Developer to a specific Owner for his/her exclusive use and is in addition to the parking space(s) designated as Limited Common Element(s) for specific Residences. Such space may be assigned by the Owner thereof to any other Owner of a Residence upon providing the Association with written notice of such assignment.

A plat attached to the Master Deed contains a table titled "The Albemarle Parking Space Assignments." Space 38 is listed as a General Common Element – Assignable. MacConnell's Unit 405 includes Space 14 as its Limited Common Element.

On January 24, 2005, the Developer transferred Unit 405 to William and Ann M. Maier. The deed also conveyed to the Maiers the exclusive right to use Space 38. The relevant portion of the deed states that Developer

> does grant, bargain, sell and release unto the said Grantee as joint tenants with the right of survivorship and not as tenants in common, their heirs and assigns forever, the following described real property, to wit: [Unit 405] TOGETHER WITH THE EXCLUSIVE RIGHTS of Grantee to the use of an additional parking space designated as space number 38 which shall run with title to the said Unit Number 405 in the Albemarle Horizontal Property Regime and shall inure to the benefit of Grantee, his heirs and assigns and shall be binding on Riverview Condominium Associates, LLC, its successors and assigns

There is no evidence of record that the Maiers ever elected to designate the additional parking space (Space 38) as a Limited Common Element attached to their Residence, nor was the Master Deed ever amended to show that this election had taken place in accordance with Section 24 of the Master Deed.

On November 30, 2011, the Maiers executed an Assignment of GCE/Assignable Space for Space 38 in favor of Welch. The Assignment cites to Section 24 of the Master Deed that "any parking space not designated as a limited common element shall become a GCE/Assignable Space, which may be assigned by the owner thereof." The Assignment was then recorded in the RMC Office on January 10, 2012.

Also on November 30, 2011, the Maiers executed a Title to Real Estate in favor of MacConnell for Unit 405. The deed does not mention Space 38. The deed was recorded in the RMC Office on May 16, 2012.

MacConnell admits that she first became aware that Welch was parking in Space 38 shortly after she purchased Unit 405 on November 30, 2011. However, there is no evidence of record that MacConnell made any objection to Welch parking in "her" space until this lawsuit was filed on July 19, 2017. MacConnell further admits that neither she nor any guest of hers has ever parked in Space 38.

On March 21, 2017, the Association executed an Amendment to the Master Deed. The Association noted that many parking spaces had been assigned to Co-Owners and designated as Limited Common Elements, but the Association had failed to amend the Master Deed accordingly. The Association researched the Charleston County public records and delivered the results of that research to the Co-Owners for comment. Then the Association filed the Amendment to the Master Deed in order to "confirm what parking spaces have been assigned to what Residences and whether the parking spaces are Limited Common Elements or General Common Element/Assignable parking spaces." The Association recorded that Space 38 is a Limited Common Element of Unit 404, Welch's unit.

ARGUMENTS

The Horizontal Property Act requires that "[e]ach co-owner shall comply strictly with the bylaws...and with the covenants, conditions and restrictions set forth in the master deed." S.C. Code § 27-31-170. In this case, the Master Deed requires that certain steps must be taken if a co-owner wishes to convert a General Common Element/Assignable space into a Limited Common Element space. First, the co-owner must elect to designate the space as a Limited Common Element. Second, the Master Deed must be amended to reflect the new designation. If either of these requirements is not met, then the parking space remains a General Common Element/Assignable space. It is undisputed that neither of these events occurred to make Space

38 a Limited Common Element of Unit 405. Therefore, the Maiers were at liberty to assign Space 38 to whomever they wanted, and they assigned it to Welch.

1. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT FOR WELCH BECAUSE THE PRIOR OWNER NEVER ELECTED TO DESIGNATE SPACE 38 AS A LIMITED COMMON ELEMENT (NON-ASSIGNABLE) AND THEN ASSIGNED THE SPACE TO WELCH

There is no evidence that the Maiers elected to designate Space 38 as a Limited Common Element attached to Unit 405. In the deed from the Developer to the Maiers, the term "Limited Common Element" is never used to describe the "additional parking space" which is being conveyed. As Section 24 of the Master Deed makes clear, a General Common Element/Assignable Space remains so unless and until the co-owner makes an election to convert it into a Limited Common Element of his/her condominium, and the Association amends the Master Deed to record this change.

MacConnell relies upon language in the Developer's deed such as "which shall run with the title" and "shall inure to the benefit of Grantee, his heirs and assigns" in support of her argument that the Developer intended to make Space 38 a Limited Common Element. However, the Master Deed places sole authority for this decision in the hands of the purchasing co-owner, not the developer. There is no evidence of record that the Maiers ever elected to designate Space 38 as a Limited Common Element. On the contrary, the Maiers' conduct confirms that they believed Space 38 was a GCE/Assignable space. The Maiers negotiated and sold the rights to Space 38 to Welch, identifying Space 38 as a GCE/Assignable space. The Maiers then sold Unit 405 to MacConnell. The Maiers' deed conveying ownership of Unit 405 to MacConnell omitted any mention of Space 38. One must therefore conclude that this was intentional because the Maiers executed the two transactions on the same day.

2. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT FOR WELCH BECAUSE THE ASSOCIATION NEVER AMENDED THE MASTER DEED TO SHOW THAT SPACE 38 WAS A LIMITED COMMON ELEMENT (NON-ASSIGNABLE) AND THEN THE PRIOR OWNER ASSIGNED THE SPACE TO WELCH

As a separate and independent ground for summary judgment in favor of Welch, the trial court relied upon the undisputed fact that the Association did not amend the Master Deed to convert Space 38 into a Limited Common Element (Non-Assignable). Thus, the Maiers did not follow the procedure outlined in the Master Deed to create a Limited Common Element (Non-Assignable) space attached to their unit, and they were free to transfer their rights to Space 38 independently of their condominium.

On November 30, 2011, when the Maiers conveyed Unit 405 to MacConnell and assigned their rights to Space 38 to Welch, the Master Deed stated that Space 38 was a General Common Elements – Assignable space. This is a matter of public record. MacConnell has no evidence to dispute this fact, but rather contends that the amendment of the Master Deed is merely a "ministerial function" and so the Maiers could create a Limited Common Element (Non-Assignable) space without following the procedures set forth in the Master Deed. This argument is erroneous because the parking spaces are created, defined and governed by the Master Deed. Thus, if not conveyed in accordance with the Master Deed, the conveyance fails.

Far from being a mere ministerial function, the Master Deed (along with its amendments) provides certainty to a prospective purchaser of a parking space in the Regime. Prior to purchasing the parking space, one need only look to the deed records in the county RMC office to determine whether the Association has amended the Master Deed to convert the General Common Element – Assignable space into a Limited Common Element (Non-Assignable) space. If this has not occurred, then the prospective purchaser may proceed with the sale with the full knowledge that the space is assignable. Likewise, a person in the position of MacConnell who expects to receive

an additional parking space with the purchase of her condo unit must either look for an explicit grant of that parking space in her deed, or check for an amendment to the Master Deed which makes the additional parking space a Limited Common Element attached to the condo. Neither of these were present, and so MacConnell would have been in error to assume that she received Space 38 along with the purchase of her condo.

MacConnell argues that an issue of material fact exists as to whether the Master Deed was ever amended to show that Space 38 was a Limited Common Element of Unit 405. In essence, MacConnell claims that the burden is on Welch to prove the negative, that no such amendment was filed. At the trial court hearing on this matter, Judge Dennis asked counsel for MacConnell and for Welch whether there were any issues of disputed facts. Both stated there were none. Furthermore, if an amendment to the Master Deed regarding Space 38 had been filed, one would expect MacConnell to produce it in support of her position. Instead, MacConnell argued that an amendment was an unnecessary ministerial function. In order for MacConnell to establish that Space 38 is a Limited Common Element (Non-Assignable) of Unit 405, she must prove both that Maier elected to designate the space LCE, and that the Association amended the Master Deed to designate the space LCE. This is an essential element of MacConnell's case in chief. Thus, to prevail on summary judgment, Welch need only point out to the Court that there is an absence of evidence in this regard, and then it becomes the burden of MacConnell to come forth with the required evidence – in this case, the filed amendment to the Master Deed. See, e.g., Baughman v. AT&T, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

3. THE TRIAL COURT ERRED IN FINDING THAT ISSUES OF MATERIAL FACT REMAINED WHICH PRECLUDED SUMMARY JUDGMENT IN FAVOR OF WELCH ON THE BASIS OF LACHES, WHERE MACCONNELL ADMITTED SHE KNEW WELCH WAS PARKING IN THE SPACE IN 2011, BUT MACCONNELL NEVER OBJECTED OR PARKED IN THE SPACE PRIOR TO FILING THIS LAWSUIT IN 2017

South Carolina courts have long held the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible. Jones v. Leagan, 384 S.C. 1, 19, 681 S.E.2d 6 (Ct.App. 2009). Under the equitable doctrine of laches, the Court may rule against a party who has demonstrated "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525 (1988). Where a party, knowing her rights, does not seasonably assert them, but by unreasonable delay causes her adversary to incur expenses or enter into obligations or otherwise detrimentally change her position, then a court in equity will refuse to enforce those rights. Chambers of S.C, Inc. v. Cty Council for Lee Cty, 315 S.C. 418, 421, 434 S.E.2d 279 (1993). The party seeking to prevail on a laches theory must show (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice. Robinson v. Estate of Harris, 388 S.C. 616, 627, 698 S.E.2d 214 (2010).

In responses to interrogatories, MacConnell stated that she first realized Welch was parking in Space 38 shortly after she purchased her condominium in November 2011. Notwithstanding this clear violation of MacConnell's alleged rights to Space 38, she has produced no correspondence or other documentation between her and Welch warning or alerting that she considered the space to be hers, until she filed this lawsuit over five (5) years later. Furthermore, MacConnell admits that she has not parked in Space 38 even one time. One is hard pressed to find any act that MacConnell has taken to assert her rights to Space 38 between November 30, 2011,

when she purchased her condominium, and July 19, 2017, when she filed this lawsuit. This delay of over 5 years is unreasonable under the circumstances.

Welch has been prejudiced by the delay because if MacConnell was correct and she had objected to the assignment of Space 38 in a timely manner, Welch could have rescinded the assignment and recovered her purchase price. Welch has reasonably relied on having access to Space 38, and it would be more difficult for her to secure a replacement parking space if indeed the space is found to belong to MacConnell. According to the most recent Amendment to the Master Deed, there are only 2 assignable parking spaces still available, and no indication whether they are for sale. Therefore, even if MacConnell would otherwise prevail on her claims, laches should bar her from proceeding after 5 years of intentional delay.

CONCLUSION

For the foregoing reasons, the trial court's decision to grant summary judgment in favor of Welch should be affirmed.

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Re: Christie MacConnell v. Frances C. Welch
Circuit Court Case No. 2017-CP-10-3672
Appellate Case No. 2018-000728

Dear Clerk:

Please find enclosed Respondent's Designation of Matter to Be Included in the Record on Appeal, Respondent's Initial Brief, and a Proof of Service. Kindly file these in your usual manner and return a stamped copy in the self-addressed stamped envelope. Should you need anything further, do not hesitate to call me. Thank you.

With kind regards, I remain

Sincerely,

Christopher M. Ramsey

CC: M. Richardson Hyman, Jr., Esq.
James E. Reeves, Esq.
Frances C. Welch

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PROOF OF SERVICE

I hereby certify that I have this date served all counsel with the Initial Brief and Designation of Matters to Be Included in the Record on Appeal by causing a copy of same to be placed in the United States Mail, proper postage attached, and addressed as follows:

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