

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Master-in-equity

Appellate Case No. 2018-001326

RECEIVED

AUG 17 2018

S.C. SUPREME COURT

Knightsbridge Property Owners Association, Inc.,.....Respondent,

v.

Paul A. Nadeau,Petitioner.

Respondent's Return to Petition for a Writ of Certiorari

Stephanie C. Trotter
McCabe, Trotter & Beverly, PC
P.O. Box 212069
Columbia, SC 29221
(803) 724-5000
Attorney for Respondent

Other Counsel of Record:

J. Edwin McDonnell
South Carolina Legal Services
148 East Main Street
Spartanburg, SC 29306
864-699-0303
864-582-0302 (fax)
Attorneys for Petitioner

TABLE OF AUTHORITIES

Seabrook Island Prop. Owners Ass'n v. Pelzer, 292 S.C. 343, 356 S.E.2d 411
(Ct. App. 1987).....3

Janasik v Fairway Oaks Villas Horiz. Prop. Regime., 307 S.C. 339, 334, 415
S.E.2d 384, 387-388 (1992).....3

Satcher v. Woodmen of the World Life Ins. Soc., 199 S.C. 59, 18 S.E.2d 523 (1942).....4

STATEMENT OF THE CASE

Respondent brought suit against Appellant seeking foreclosure of an unpaid homeowners' association lien. A final foreclosure hearing was held before the Honorable S. Jackson Kimball, III on January 10, 2016. Judge Kimball granted judgment for foreclosure and established the balance due at \$1,516.94 plus attorney's fees and costs. Petitioner's Motion to Reconsider was heard on April 20, 2016 and subsequently denied on July 27, 2016.

Appellant's Notice of Appeal was filed on August 15, 2016. The Court of Appeals affirmed the Judge Kimball's decision in an unpublished Per Curiam opinion on May 9, 2018. Appellant's petition for rehearing was denied by order on June 22, 2018 and this Petition for Writ of Certiorari followed.

STATEMENT OF FACTS

Appellant, Paul A. Nadeau (hereinafter referred to as "Nadeau" or "Appellant") purchased and took possession of the real property located at 727 Cheval Drive in York County, South Carolina ("Property") in June 2001. (App. p. 2.) The property is encumbered by restrictive covenants contained in the Knightsbridge Master Declaration ("Declaration"), recorded on June 20, 1996 in the Office of the Register of Deeds for York County in Book 1559 at Page 117. Article V, Section 1, of the Declaration establishes the obligation of any lot owner in Knightsbridge to pay assessments to the Knightsbridge Property Owner's Association, Inc. ("Association"). The same section also establishes that there shall be a continuing lien on the property for the collection of assessments, along with attorney's fees and costs incurred in the collection of such debt. (App. p. 127.)

Pursuant to Article V, Section 3, of the Declaration, the Board of Directors has the obligation to unilaterally establish the operating budget for Knightsbridge so long as the annual

budget does not increase more than 10% from the prior year. Only when an increase of more than 10% is proposed is the general membership entitled to vote on the budget. Article V, Section 7 of the Declaration further provides that the Board “shall fix the amount of the annual assessment against each Lot at least thirty (30) days in advance of each calendar year.” (App. pp. 128-129.)

In December 2011, Knightsbridge established an annual assessment of \$440 per lot for 2012. (App. p. 15, l. 1-18.) The assessment was to be paid in four monthly installments commencing on February 1, 2012. (App. pp. 158-161.) Nadeau failed to pay that assessment and Knightsbridge referred his account to Respondent’s counsel in order to file a lien on the property. (App. p. 49, l. 6-25; App. p. 53, l. 1-11; App. p. 55, l. 5-12.) As a result, Knightsbridge incurred legal fees that were subsequently added to Nadeau’s account pursuant to the Declaration. (App. p. 53, l. 19-20.) Nadeau filed for bankruptcy in November 2012. (App. p. 46, l. 11-12.) As a result, Knightsbridge adjusted Nadeau’s account to reflect only those charges accruing after his bankruptcy petition. (App. p. 25, l. 20-25; App. p. 46, l. 1-3.)

The 2013 budget was approved on November 28, 2012 and again called for assessments of \$440.00 to be paid in four monthly installments commencing on February 1, 2013. (App. p. 21, l. 9-10; App. p. 160-161.) Nadeau failed to remit any payments in 2013. (App. p. 48, l. 13-16.)

On December 5, 2013 the Board approved the 2014 budget with a \$440.00 assessment payable in four monthly installments commencing on February 1, 2014. (App. p. 21, l. 11-14; App. p. 160-161.) Nadeau remitted payments totaling \$380.00 between March 2014 and December 2014. (App. p. 48, l. 7-12.)

In December 2014, the Board approved the budget for 2015 calling for an assessment of \$462.00 again payable in four monthly installments commencing on February 1, 2015. (App. p. 33, l. 1-15; App. p. 160-161.) Nadeau failed to remit any payment in 2015. (R. pp. 160-161.)

In October 2014, Knightsbridge instructed its attorney to begin foreclosure of Nadeau's property. Nadeau contested Knightsbridge's foreclosure arguing he did not owe any assessments because the Board failed to establish the budget by December 1 each year as required by the Declaration.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT BECAUSE THE RESPONDENT WAS AUTHORIZED TO LEVY THE SUBJECT ASSESSMENTS.

In Seabrook Island Prop. Owners Ass'n v. Pelzer, 292 S.C. 343, 346, 356 S.E.2d 411, 414 (Ct. App. 1987), the Court of Appeals held that assessments not authorized by a community association's restrictive covenants constitute an *ultra vires* act that cannot be saved under the business judgment rule. However, Seabrook is distinguishable from the case at hand because Nadeau does not contest Knightsbridge's power to levy annual assessments, nor does he contest the amount levied. Instead, Nadeau seeks relief from his obligation to pay based upon a timing issue in the Board minutes. Because Knightsbridge's timing issue is very different from Seabrook's association that lacked the authority to levy the assessment in the first place, the Court of Appeals correctly affirmed the trial court's decision.

II. THE COURT OF APPEALS CORRECTLY HELD THAT NADEAU WAIVED HIS RIGHT TO CHALLENGE THAT BUDGET APPROVAL PROCESS

"A waiver is a voluntary and intentional abandonment or relinquishment of a known right." Janasik v Fairway Oaks Villas Horiz. Prop. Regime., 307 S.C. 339, 334, 415 S.E.2d 384, 387-388 (1992). "Where one dealing with another has, by its course of dealing, through lenience

or otherwise, lulled that person into a sense of security, the one doing those things cannot, when a loss occurs, in order to escape its liability, fall back upon the strict terms of a contract, the terms of which the one liable on the contract has led the other party to believe would not be strictly enforced.” Satcher v. Woodmen of the World Life Ins. Soc., 199 S.C. 59, 18 S.E.2d 523, 527-28 (1942).

Nadeau claims that he did not pay certain assessments because Knightsbridge did not correctly follow the assessment procedure. (App. p. 75.) The budgets and various accompanying documents were all available to Nadeau via email and an online portal. (App. p. 16, l. 23; p. 30, l. 1-21.) Nadeau testified that he did not receive notice of the 2012 assessment within the deadline established by the Declaration and that he has never gotten notice of the assessments. (App. p. 56, l. 4-16.) The evidence shows that Nadeau was aware of his rights under the contract and aware of Knightsbridge’s assessment procedure, however, Nadeau presented no evidence that he raised the budget timing issue to the Knightsbridge prior to trial. On the contrary, Nadeau testified that he failed to make payments because he lost his job and his father was ill (App. p. 54, l. 18-25-p. 55, l. 1); contacted Knightsbridge’s agent to discuss a payment plan (App. p. 61, l. 11-21); and made payments when he could afford to do so. (App. p. 74, l. 15-24.) This conduct would not alert Knightsbridge that Nadeau objected to the assessment procedure, and therefore constitutes a waiver by Nadeau.

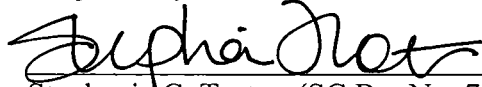
The Court of Appeals correctly affirmed that trial court’s decision in holding that Nadeau had waived his right to require strict compliance with Declaration by failing to raise the issue in the three years leading up to trial. Nadeau’s sporadic payment without any reference to the budget process could have reasonably led Knightsbridge to believe the budget process would not be strictly enforced by Nadeau. By virtue of failing to exercise any of his rights to challenge the

assessments and/or the process by which said assessments were fixed, Nadeau impliedly waived any argument he may have against the legitimacy of the assessments.

CONCLUSION

For the reasons stated herein, Knightsbridge respectfully requests that this Court deny Appellant's Petition.

Respectfully submitted,



Stephanie C. Trotter (SC Bar No. 77680)

McCabe Trotter & Beverly, PC

PO Box 212069

Columbia, SC 29221

803.724.5000

Attorney For Respondent.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

AUG 17 2018

S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Master-in-equity

Appellate Case No. 2018-001326

Knightsbridge Property Owners Association, Inc.,.....Respondent,

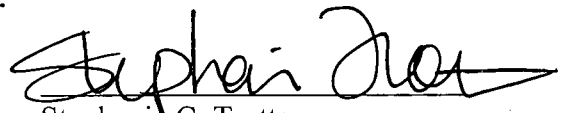
v.

Paul A. Nadeau,Petitioner.

PROOF OF SERVICE

I certify that I have served Respondent's Return to Petition for Certiorari on the following counsel by depositing a copy of it in the United States Mail, postage prepaid, on August 17, 2018:

J. Edwin McDonnell
South Carolina Legal Services
148 East Main Street
Spartanburg, SC 29306
864-699-0303
864-582-0302 (fax)
Attorney for Petitioner



Stephanie C. Trotter
McCabe, Trotter & Beverly, PC
P.O. Box 212069
Columbia, SC 29221
(803) 724-5000
Attorney for Respondent