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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
The Court of Common Pleas
Fourteenth Judicial Circuit

Edgar W. Dickson, Circuit Court Judge

RECEIVED
SEP 27 2018
SC Court of Appeals

Case No. 2018-000-707

Marc Haas, Susan Haas, Rob Star and Melissa Starr,

Plaintiffs-Appellants,

vs.

TI Oldfield Operations, LLC, SF Operations, LLC, Oldfield Club, Oldfield Community Association, Oldfield Club Board of Directors and John Does 1-10,

Defendants-Respondents,

APPELLANTS' NOTICE OF MOTION TO STRIKE RESPONDENTS DESIGNATION OF DOCUMENTS IN RECORD ON APPEAL

PLEASE TAKE NOTICE that pursuant to Rule 240, SCACR, Marc Haas, Susan Haas, Rob Star and Melissa Starr (collectively "**Appellants**") have filed the annexed motion to strike documents in the Respondents' Designation of Matter to be included in the Record on Appeal (the "**Motion**"); and

PLEASE TAKE FURTHER NOTICE that any objections to the Motion must be filed with the Court and served on Appellants' counsel pursuant to Rule 240(e), SCACR.

Dated: Beaufort, S.C.
September 25, 2018

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Plaintiffs-Appellants,

vs.

TI Oldfield Operations, LLC, SF Operations, LLC, Oldfield Club, Oldfield Community Association, Oldfield Club Board of Directors and John Does 1-10,

Defendants-Respondents,

APPELLANTS' MOTION TO STRIKE RESPONDENTS DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Plaintiffs-Appellants file this motion (the "**Motion**") seeking an order striking document numbers 2 and 2(a)-(e), 3, 4 5, 6, 7, 8, 9 and 10 set forth in the Respondents' Designation of Matter to be Included in the Record on Appeal, *undated*, but served Appellants on September 12, 2018 (and not received by Appellants until September 18, 2018) (the "**Designation,**" annexed hereto and made a part hereof as ***Exhibit 1***), for the reasons set forth below:

1. Rule 210(c), SCACR provides in relevant part that:

(c) Content. The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. The Record shall not, however, include matter which was not presented to the lower court or tribunal.

2. Rule 210(g), SCACR, provides in relevant part that:

(g) Certificate of Counsel. Appellant or his counsel shall certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

3. While Respondents' counsel *certify* that the Designation contains no matter which is irrelevant to this Appeal, this certification is false because the documents Appellants seek to strike via this Motion include matter that was not presented to the lower court or tribunal with respect to the summary judgment decision and order on appeal ("**Order**").

4. The lower court order on appeal was entered on April 13, 2018 (*See **Exhibit 2** hereto)*. Thereafter, on May 8, 2018, Defendants-Respondents' Oldfield Club and Oldfield Club Board of Directors filed a summary judgment motion (the "**SJ Motion**") before the lower court on counterclaims seeking attorneys' fees and costs from the Plaintiffs-Appellants (a copy of the Trial Court docket sheet is annexed hereto as ***Exhibit 3***) (Designated as *Document Number 2 in the Designation)*.

5. On May 15, 2018, the Plaintiffs-Respondents filed an objection (the "**Objection**") to the SJ Motion (annexed hereto and made part hereof as ***Exhibit 4***).

6. In the Objection, Plaintiffs-Respondents argued that a party in an action where a judgment after trial or a judgment was entered via a summary judgment motion, has ten (10) days after the entry of the court order to file post-judgment motions. *See Holmes v. E. Cooper Cmty. Hosp., Inc.*, 48 S.C. 138, 160-162, 758 S.E.2d 483, 495-496 (S.Ct. 2014) citing *In re Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct.App.

2004). While the filing of a notice of appeal does not deprive the trial court of jurisdiction with respect to timely filed post-judgment motions (*Holmes, supra*, 758 S.E.2d at 496), after the termination of the ten (10) day period after entry of a judgment, the trial court no longer has jurisdiction to hear post-judgment motions. *Id.* The Defendants failed to file the SJ Motion within ten (10) days of entry of the Order.

7. Thus, the Plaintiffs-Appellants argued that the Lower Court had and has no jurisdiction to hear the SJ Motion and it must be dismissed. *In re Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct.App. 2004).

8. On June 27, 2018, the Lower Court, via email, notified the parties that the SJ Motion was removed from the Court's roster because of the pending appeal to this Court. *See Email, dated June 27, 2018 from Marlene Kinard and Crystal H. Swinford to Plaintiffs-Appellants and Defendants-Respondents counsel*, annexed hereto and made a part hereof as ***Exhibit 5***.

9. Accordingly, documents numbered 2 and 2(a) through (e) in the Designation were never before the trial court and are wholly irrelevant and should be stricken. *Argabright v. Argabright*, 398 S.C. 176, 727 S.E.2d 748, fn.3 (2012)("Appellant's brief indicates she and Doe have since married. We are, of course, bound by the **record** established at trial. See Rule210(c), SCACR. "The **Record** shall not . . . include matter which was not presented to the lower court or tribunal.").

10. If this Court concludes that the SJ Motion (Document number 2 in the Designation), should be stricken, then the Counterclaims of Oldfield Club and Oldfield Board of Directors, filed January 2017, which underlie the SJ Motion must be stricken from the

record on appeal as irrelevant to this proceeding (Document numbered 3 in the Designation).

11. Likewise, it is respectfully submitted that the depositions of Marc Haas, Susan Haas and Melissa Star (documents numbered 5, 6 and 7 in the Designation), were never before the trial court as they were not cited by any of the Defendants-Respondents in their pleadings or at the hearing on the Summary Judgment motion, the Order on which is the subject of this appeal. Thus, these documents should be stricken under both 210(c) and 210(g).

12. Documents numbered 8, 9 and 10, must likewise be stricken. Not only do these designations of matter fail to explicitly identify each designated document, document number 8 seeks to include all documents filed by the parties "post-hearing." This is clearly a catch-all designation to capture the documents filed after entry of the Order on appeal before this Court, which encompasses the irrelevant documents numbered 2 and 2(a)- through 2(e) in the Designation. Manifestly, it is further respectfully submitted that it should not be incumbent on the Appellants or this Court to intuit what documents are encompassed in the "categories" of documents set forth in documents numbered 8, 9 and 10; nor is it incumbent upon the Appellants or this Court to ascertain what documents are referenced and/or defined in the Respondents' Initial Brief filed with this Court that have not otherwise been explicitly identified in order to determine their relevance.

13. Finally, document number 2 in the Designation is a letter sent by this Court to the parties' counsel relating to the extension of time to file briefs while the Appellants' counsel met her CLE requirements in South Carolina, which was immediately

accomplished by said counsel. Clearly, this letter has zero relevance to the Appeal before this Court.

14. Based upon the foregoing, it is respectfully submitted that all documents numbered 2 through 10 in the Designation must be stricken as irrelevant to the pending Appeal.

15. Thus, the "certification" by the Respondents' counsel that they did not designate any irrelevant documents in their Designation was false and made in bad faith. As such, if the Court strikes any one or more of the documents numbered 2 through 10 in the Designation, Plaintiffs-Appellants respectfully request an award of attorneys' fees, expenses and costs incurred in the filing of this Motion.

WHEREFORE, Plaintiffs-Appellants respectfully request that this Court enter an order:

(a) striking documents numbered 2 through 10 of the Designation;

(b) awarding the Plaintiffs-Appellants attorneys' fees, expenses and costs incurred in filing and prosecuting this Motion; and

(c) for such other necessary, reasonable and further relief as this Court may deem appropriate and proper.

Dated: September 25, 2018
Beaufort, South Carolina

By: _____
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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2018-000707
Circuit Court No. 2016-CP-07-00602

Marc Haas; Susan Haas; Melissa Star; Rob Star .....Appellants,

v.

Oldfield Club; Oldfield Club Board of Directors;
Oldfield Community Association;
SF Operations, LLC; TI Oldfield Operations, LLC.....Respondents.

RESPONDENTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Pursuant to Rule 209, SCACR, Respondents propose the following to be included in the Record on Appeal:

1. All materials included in Appellant's designation of matter to be included in the record on appeal.

2. Oldfield Club's and Oldfield Club Board of Directors' Memorandum in Support of Motion for Summary Judgment on Counterclaims and Opposition to Plaintiffs' Motion for Sanctions, dated June 19, 2018, including all exhibits, including but not limited to:

    a. Exhibit 1, Protective Order dated December 27, 2016

b. Exhibit 2, Termination and Release Agreement, dated Sept 17, 2009

c. Exhibit 3, Transcript of Rob Star deposition dated January 25, 2017 (excerpts)

d. Exhibit 4, Transcript of Court hearing on Defendants' Motion for Summary Judgment dated September 9, 2017

e. Exhibit 5, Affidavit of Steve Massas

3. Counterclaims of Oldfield Club and Oldfield Board of Directors filed January 13, 2017;

4. Letter from the South Carolina Court of Appeals to Denise Savage, Esq. dated April 19, 2018;

5. Transcript of Deposition of Marc Haas (cited pages);

6. Transcript of Deposition of Susan Haas (cited pages);

7. Transcript of Deposition of Melissa Star (cited pages);

8. To the extent not identified above, all exhibits to the Motions for Summary Judgment and related Memoranda, including those filed post-hearing.

9. To the extent not identified above, Materials cited in Respondents' Initial Brief.

10. To the extent not identified above, Governing Documents including as defined in Respondents' Initial Brief.

We certify that this designation contains no matter which is irrelevant to this Appeal.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2018-000707
Circuit Court No. 2016-CP-07-00602

Marc Haas; Susan Haas; Melissa Star; Rob Star .....Appellants,

v.

Oldfield Club; Oldfield Club Board of Directors;
Oldfield Community Association;
SF Operations, LLC; TI Oldfield Operations, LLC.....Respondents.

PROOF OF SERVICE

I HEREBY CERTIFY that on September 12, 2018, I have served the **RESPONDENTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid, addressed as follows:

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Attorneys for Third-Party Defendants Oldfield, LLC and Crescent Communities, LLC f/k/a Crescent Resources, LLC

Ian Ford

September 12, 2018

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT Marc Haas, Susan Hass, Rob Star and Melissa Star, Plaintiffs, vs. TI Oldfield Operations, LLC, SF Operations, LLC, Oldfield Club, Oldfield Community Association, Oldfield Club Board of Directors and John Does 1-10, Defendants. And TI Oldfield Operations, LLC and SF Operations, LLC Third Party Plaintiffs, vs. Oldfield, LLC and Crescent Communities, LLC f/k/a Crescent Resources, LLC Third Party Defendants.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2016-CP-07-00602 **ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS**

Defendants Oldfield Club ("OC) Oldfield Club Board of Directors ("OCB"), Oldfield Community Association ("OCA"), TI Oldfield Operations, LLC ("TI Oldfield"), and SF Operations, LLC ("SF," together with TI Oldfield "TI," and together with OC, OCB and OCA, collectively "Defendants") have filed motions for summary judgment and supporting memoranda and exhibits. Plaintiffs Marc Haas, Susan Haas, Rob Star, and Melissa Star (collectively "Plaintiffs") oppose those motions, and have filed opposition papers with supporting affidavits of

Rob Star (collectively, the "Rob Star Affidavits"), among other exhibits (collectively, "Plaintiffs' Objection.")

The Court held a hearing on September 9, 2017, at which all parties were represented by counsel. At the hearing, the Court instructed the parties to submit supplemental briefs and exhibits. Having received such, the motion is now ripe for ruling.

The Court has reviewed the Summary Judgment Motions, the Rob Star Affidavits, Plaintiffs' Objection, memorandum, and the supplemental briefs. As set forth below, and while viewing the facts in the light most favorable to the non-moving parties, this Court GRANTS Defendants' Motions for Summary Judgment, and further dismisses Plaintiffs' causes of action with prejudice. As will be discussed below: (1) there is no evidence that the Defendants have breached any requirement in the Agreement at issue; (2) Defendants' alleged actions are permitted under Oldfield's governing documents; (3) this lawsuit was filed outside of the statute of limitations; and (4) Plaintiffs have not produced evidence that they sustained requisite damages as a result of their claims.

BACKGROUND

Oldfield is a private community in Bluffton, South Carolina. The community has a homeowners' association (defendant OCA) and an amenities club (defendant OC), of which all property owners must be members. Plaintiff Rob Star is a property owner at Oldfield. Plaintiffs Marc and Susan Haas, and Melissa Star, are Mr. Star's in-laws and wife, respectively.

In 2009, Mr. Star had a dispute with a developer of Oldfield regarding the bankruptcy of that developer (third-party defendant Oldfield, LLC, and Crescent Communities, LLC f/k/a Crescent Resources, LLC ("Crescent")). On September 17, 2009, those parties apparently entered into an agreement ("Agreement"), the terms of which are confidential. Defendants provided an *in*

camera copy of the Agreement to the Court at the hearing on September 9, 2017. It is not known whether the Plaintiffs attorney, who was not licensed in South Carolina, determined if the Agreement was consistent with South Carolina law or the governing documents of Oldfield. Ex. 1 to Oldfield Club Memorandum ("OC Memo") at 23:6-24:12. Plaintiffs take the position in the current action that they became Community Members[1] of Oldfield Club, as opposed to Golf Members as a result of the Agreement.

It appears that Plaintiffs paid the same dues as other Community Members, and were treated like other such members. Each year the Oldfield Club budgets were published to the members, so the use of members' dues was open to the members. Ex. 1 to OC Memo at 134:9-17, 142:3-14. They have access to OC amenities, like the other members. Id. at 189:10-13, 230:1-14. Access includes use of parts of the clubhouse, a restaurant, social rooms, administrative offices, and a store. Id. at 231: 1-23, 232: 5-25, 233: 1-19. Additionally, Plaintiffs have access to certain rounds of golf each year. Ex. 3 to OC Memo.[2]

In their complaint, Plaintiffs have objected to the allocation of Community Members' fees among golf and non-golf expenses at Oldfield. See, e.g., Compl. ¶ 40. Since at least February 7, 2013 Plaintiffs' have claimed that Community Members' fees may not be used in any way to support golf facilities at Oldfield (the clubhouse, golf course, etc.). Ex. 2 to OC Memo. Instead, Plaintiffs' insist that funding for the golf course is to come from the dues paid by the Equity Golf Members and the Sponsor alone; not the general membership of the Club. Id.

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[1] At Oldfield, Community Members are sometimes referred to as Social Members, and *vise versa*. Ex. 1 to OC Memo at 32:2-20, 35:15-16, 36:14-15.

[2] Jan. 30, 2017 email from Rob Wilson, forwarding Feb. 14, 2013 email from Oldfied Club.

Om March 10, 2016, over three years after receiving notice of the dues increase, Plaintiffs filed this lawsuit on the issue of allocation of funds between golf and non-golf amenities. See, e.g., Compl. ¶¶ 37, 38, 39, 40. Plaintiffs allege three causes of action: (1) breach of settlement agreement; (2) negligence/gross negligence; and (3) constructive trust/accounting.

LEGAL STANDARD

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment is appropriate "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 judgment as a matter of law." Rule 56(c), SCRCP. In determining whether summary judgment is appropriate, the inferences must be viewed in the light most favorable to the nonmoving party. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

The party seeking summary judgment has the burden of clearly establishing the absence of any material fact. Jones v. State Farm Mut. Auto Insurance, Co., 364 S.C. 222, 612 S.E. 2d 719 (Ct. App. 2005). Once the party seeking summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case exists, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Id. However, the non-moving party is only required to submit a mere scintilla of evidence to support the existence of a dispute of material fact. Hancock v. Midsouth Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E2d 801, 803 (2009).

On those issues where the nonmoving party will have the burden of proof, it is that party's obligation to provide specific facts demonstrating all elements of the claim. Baughman, 306 S.C. at 116. If the nonmoving party fails to establish a genuine issue of fact as to one essential element

necessary to the cause of action, the existence of factual issues relating to other elements becomes immaterial and therefore summary judgment must be granted. Id.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. There is no evidence that Defendants breached the terms of the Agreement at issue.

The Agreement was submitted to this Court at the September 9, 2017 hearing, and was thoroughly reviewed. Generally, "the construction of contracts is a question of law for the court." Hope Petty Motors v. Hyatt, 310 S.C. 171, 175, 425 S.E.2d 786, 789 (Ct. App. 1992); Watson v. Underwood, 756 S.E.2d 155, 161 (S.C. App. 2014). "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." Schulmeyer v. State Farm Fire and Cas. Co., 579 S.E.2d 132, 134 (S.C. 2003). "A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. It is a question of law for the court whether the language of a contract is ambiguous." S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001); McGill v. Moore, 672 S.E.2d 571, 574 (S.C. 2009).

At the hearing, the Court specifically questioned Plaintiffs' counsel as to what language in the Agreement was breached by Defendants, or would be breached by the alleged use of Plaintiffs' (and others') dues for golf-related amenities at Oldfield Club. Plaintiffs' counsel was unable to point to language in the Agreement that prohibits such actions. In its own independent review of the Agreement and briefs of Counsel, the Court is unable to discern any such terms that have been breached as alleged by Plaintiffs. Accordingly, Plaintiffs have failed to satisfy a core element of negligence; that the Defendants breached any duty owed.[3]

[3] Plaintiffs' breach of contract and negligence claims both require a breach of a duty, or of a contractual term, as an essential element of the claims. See, Allegro, Inc. v. Scully, 791 S.E.2d 140, 145 (S.C. 2016), reh'g denied (Oct. 26, 2016) ("In an action for breach of contract, the burden

2. The unambiguous language of the governing documents allows Community Member dues to be used for amenities available to those members.

As stated above, a crux of Plaintiffs' complaint is their belief that their Community (a/k/a Social) Member dues may not be used for golf facilities under any circumstances. Ex. 1 to OC Memo at 32:4-6; 37:13-16; 70:3-8; 92:5-18. Plaintiffs admit that they have had access to golf facilities. Id. at 90:10-16; 106:1-13. Further, Mr. Star has use of the dining facilities and shops at the golf club. Id. at 233: 4-15. There is no material dispute that the golf course, golf clubhouse, and other amenities are available to Community Members, in varying degrees. Ex. 5 to OC Memo, *Amended Plan for Offering of Memberships* (Effective May 16, 2005). For example, Community Members have access to at least 4 rounds of golf each year. Id.

The governing documents specifically allow that Community Membership dues may be used for facilities that are available to such members. The covenants at Oldfield state:

> 3.1 Covenant to Pay. Each Owner, by accepting title to a Residential Unit, covenants and agrees to pay to the Club Operator assessments, annual dues, and minimum usage fees in such amount as Club Operator shall specify from time to time, except that Community Members shall not be subject to assessment for operating deficient or capital improvements related to golf facilities or golf operations.
>
> The dues for Community Membership shall be based upon a budget of the estimated costs of maintaining, repairing, replacing, insuring, operating and providing the facilities, activities, and events available for the use and enjoyment of Community Members, and a reasonable share of the overhead expenses associated with general operation and administration of the Club. Such costs may specifically include, but need not be limited to:
>
> (a) the costs of utility service (including water, sewer, electricity, natural gas, and cable or similar television) provided to such facilities;

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is on the plaintiff to prove the contract, its breach, and the damages caused by such breach."); Fettler v. Gentner, 722 S.E.2d 26, 29 (S.C. App. 2012) ("A plaintiff, to establish a cause of action for negligence, must prove the following four elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; (3) resulting in damages to the plaintiff; and (4) damages proximately resulted from the breach of duty.").

> (b) the costs of janitorial service, maintenance and repair; property and liability insurance; and similar ongoing expenditures related to such facilities; and
>
> (c) the costs of maintaining, repairing and replacing the buildings, fixtures, furnishings, equipment and systems located within or that serve such facilities, which may include a reasonable contribution to a reserve fund for repair and replacement of such items;
>
> (d) that portion of the costs that Club Operator incurs in sponsoring activities in which the Community members are invited to participate; and
>
> (e) administrative and overhead costs related to such facilities, services and programs or membership administration generally, including labor and payroll expenses.

When an amenity is used for both Golf and Community Members, the estimated costs are allocated among the memberships to whom the facility, services, and/or programs are available:

> Such budget shall not include costs associated solely with facilities, activities or events that do not benefit Community Members. The total estimated costs as reflected in such budget shall be allocated among the memberships of all classes and categories to whom the facilities, services and/or programs covered by such budget are made available. The dues charged for each Community Membership shall be based on the Community Member's status as a "Resident" or "Non-resident Member," as defined in the Club's Bylaws. The amount of estimated costs allocated pursuant to this Section as dues for Resident Community Memberships shall be equal to the amount of such costs allocated to each Resident Membership in other membership classifications. . . .

Ex. 4 to OC Memo. (First Amendment to the Declaration of Recreational Covenant for Oldfield Club, March 19, 2001; recorded in Beaufort County 3/23/2001, Book 01397, Page 1270). Emphasis added by the Court.

As discussed above, there is no dispute that the golf course, golf clubhouse, and other amenities are available to Community Members, in varying degrees. In reading the undisputed and unambiguous language of the governing documents, Community Members' dues may be used for the facilities that are made available to such members. Nothing in the Agreement alleged by Plaintiffs in this lawsuit changes those governing documents, or the authority of OC to budget its

expenses according to those provisions. Plaintiffs admit that they have had access to golf facilities and that their dues have been treated in the same manner as other such members. Therefore, based on the clear and unambiguous nature of the governing documents, this Court is without credible evidence of any breach of the Agreement or the governing documents as alleged by the Plaintiffs.

3. Plaintiffs' claims are barred by the statute of limitations.

The undisputed evidence shows that Plaintiffs filed these claims outside of the three-year statute of limitations. South Carolina law specifies a three-year limitations period for breach of contract and negligence actions. See, S.C. Code Ann. § 15-3-530. "The statute of limitations on a negligence claim accrues at the time of the negligence, or when facts and circumstances would put a person of common knowledge on notice that he might have a claim against another party (discovery rule). . . . The date on which discovery should have been made is an objective, not subjective, question." Kreutner v. David, 465 S.E.2d 88, 90 (S.C. 1995) (internal citations and footnotes omitted).

Plaintiffs filed their lawsuit on March 10, 2016. There is no genuine dispute that Plaintiffs were aware, or should have been aware, of their alleged claims for more than three years (before March 10, 2013). For example, in 2012 Mr. Star met with the developer about his concern regarding how administrative costs were being allocated among golf versus non-golf. Ex. 1 to OC Memo at 293:13-294:9. At deposition in this lawsuit, Mr. Star agreed that those issues were similar to the issues he is concerned about in this lawsuit. Id. at 280:1-281:16; 293:13-294:9; see also, Ex. 3 to OC Memo.

Most convincingly, a March 27, 2013 letter from Mr. Star references an e-mail that Club members received on February 7, 2013, regarding what he alleges was the increase in Community Members' dues to support golf facilities. Ex. 2 to OC Memo; Ex. 1 to OC Memo at 177:4-6; 182:6-

12. Mr. Star acknowledged that budget allocations are reflected in the budgets annually, and are publicly available at Oldfield. Ex. 1 to OC Memo at 142:3-14; 134:9-17. Plaintiffs produce no evidence that the numbers have been hidden:

> Q. When did that $96,000 golf course access assessment start?
>
> A. I don't know the exact date.
>
> Q. Okay. Has it been three years, five years? Any estimate?
>
> A. I'm going to say somewhere around the three-year mark.[4]
>
> Q. And as far as you know, has it been reflected in the budgets during that time?
>
> A. As far as I know.
>
> Q. So do you have any evidence it's been hidden in any way from members?
>
> A. I'm not accusing them of hiding it, no.
>
> Q. I understand. I'm just trying to understand what is in the mind—
>
> A. It's right there on the page.
>
> Q. For everyone to see, and it's publicly available, at least within Oldfield, correct?
>
> A. Yes.

Ex. 1 to OC Memo at 141:21-142:14 emphasis added. Mr. Star acknowledged that the golf/non-golf allocation issue has been going on "always." Id. at 150:15-17; see also Id. at 175:14-176:3.

In sum, upon a thorough review of the documents provided, there is no genuine dispute of material fact that Plaintiffs were aware of the facts and circumstances giving rise to their claim regarding use of Community Member fees to pay for golf facilities before March 10, 2013. The

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4 The undisputed evidence shows that the Club members were notified of this allocation at least as early as February 7, 2013. Ex. 2 to OC Memo.

Court is aware that Mr. Star's letter dated March 27, 2013 would suggest that the current claim is timely. However, our jurisprudence objectively limits the time in which a claimant may file to that time he was put on notice that he may have a claim. In his own words, Mr. Star acknowledges that Club Members received the email regarding dues increase with funding for the "COURSE" on February 7, 2013. As such, Plaintiffs' would at the latest have been required to file three years from that date. Accordingly, their claims are barred by the statute of limitations.

4. There is no evidence of damage to Plaintiffs.

Plaintiffs have produced no evidence they have suffered any damages. Proof of damages is a required element of Plaintiffs' breach of contract and negligence claims.[5] At their depositions, Plaintiffs were questioned repeatedly on how they had been damaged under the allegations in the Complaint, and repeatedly responded that they did not know. See, e.g., Ex. 1 to OC Memo at 60:23-25; 62: 9-18.

There also is no dispute that Plaintiffs have had access to Oldfield Club's amenities, and that they have paid the same dues as other Community Members. See, e.g., Ex. 1 to OC Memo at 105:6-7; 106:1-15. Therefore, Plaintiffs are not entitled to get their dues back. Even under Plaintiffs' theory of the case, a portion of Plaintiffs' dues should have been allocated toward other areas of Oldfield Club's expenses. Plaintiffs do not allege they should have paid less than other Community Members. Under such circumstances, Plaintiffs have not been damaged, are not entitled to monetary relief, and cannot meet their burden of proof on that issue.[6]

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[5] See, footnote 2, supra.

[6] Plaintiffs' third cause of action is for constructive trust/accounting. See, Compl. ¶¶ 52-59. That is an equitable claim that is based on the allegations in Plaintiffs' breach of contract and negligence causes of action. Because those causes of action fail, the constructive trust claim fails also.

CONCLUSION

Accordingly, THEREFORE, IT IS ORDERED that Defendants' Motion for Summary Judgment as to all Plaintiffs' is GRANTED. It is FURTHER ORDERED that the current claims are dismissed with prejudice.

AND IT IS SO ORDERED!

April_____, 2018.
Beaufort, South Carolina

_____
Edgar W. Dickson
Presiding Judge, Fourteenth Judicial Circuit

Beaufort Common Pleas

Case Caption: Marc Haas , plaintiff, et al VS TI Oldfield Operations Llc , defendant, et al

Case Number: 2016CP0700602

Type: Order/Summary Judgment

So Ordered

s/ Edgar W. Dickson #2153

2016CP0700602 : Marc Haas , plaintiff, et al VS TI Oldfield Operations Llc , defendant, et al

Common Pleas

Case Number 2016CP0700602
Case Subtype Constructions 100
Filed Date 03-10-2016
Status Appeal

Plaintiff Marc Haas et al
Defendant TI Oldfield Operations Llc et al
Assigned Judge
File Type Jury

⊞ Show/Hide Participants

Name	Description	Type	File Date	
Marc Haas	NEF(09-05-2018 02:34:54 PM) Notice/Other	Filing	09-05-2018	02:59:21 PM
Marc Haas	Notice of Change of Address	Filing	09-05-2018	02:34:54 PM
Marc Haas	NEF(07-02-2018 11:23:59 AM) Order/Form 4	Filing	07-02-2018	11:24:15 AM
Marc Haas	Order/Form 4/Judge Mullen Recused	Order	07-02-2018	11:23:59 AM
Marc Haas	NEF(06-25-2018 01:22:09 PM) Response	Filing	06-25-2018	01:42:44 PM
Marc Haas	Reply to Objection by Oldfield Club LLC/Oldfield Club BODs'	Filing	06-25-2018	01:22:09 PM
Oldfield Club	NEF(06-20-2018 11:34:06 AM) Memo/Memo in Support	Filing	06-20-2018	11:34:20 AM
Oldfield Club	Memo in Support of Motion for Summary Judgment on Counter	Filing	06-20-2018	11:34:06 AM
Suzanne Elizabeth Deters	6/28/2018_MOTION_Roster/Notice of Motions Roster Publication	Action	06-13-2018	12:21:56 PM
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Charles Robert Scarminach	6/28/2018_MOTION_Roster/Notice of Motions Roster Publication	Action	06-13-2018	11:59:11 AM
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Ian S. Ford	6/28/2018_MOTION_Roster/Notice of Motions Roster Publication	Action	06-13-2018	11:47:55 AM
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Denise Lynn Savage	6/28/2018_MOTION_Roster/Notice of Motions Roster Publication	Action	06-13-2018	11:47:55 AM
Hunter H James	6/28/2018_MOTION_Roster/Notice of Motions Roster Publication	Action	06-13-2018	11:47:55 AM
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Marc Haas	Transcript of Record	Filing	05-24-2018	05:14:52 PM
Marc Haas	NEF(05-23-2018 10:42:19 AM) Order/Protection from Court ...	Filing	05-23-2018	10:42:27 AM
Marc Haas	Order of Protection (Denise Savage)	Order	05-23-2018	10:42:19 AM
Marc Haas	NEF(05-15-2018 03:19:17 PM) Proposed Order/Protection fr...	Filing	05-15-2018	04:40:34 PM
Marc Haas	NEF(05-15-2018 04:03:28 PM) Motion/Attorney Fees	Filing	05-15-2018	04:21:46 PM
Marc Haas	Objection to Oldfields Motion/SJ on Counterclaims &Cross Mo	Motion	05-15-2018	04:03:28 PM
Marc Haas	Order Cover Sheet $25.00(Order/Protection Waived)	Filing	05-15-2018	03:19:17 PM
Oldfield Club Board Of Directors	NEF(05-08-2018 02:16:44 PM) Motion/Summary Judgment	Filing	05-08-2018	03:50:14 PM
Oldfield Club	Motion for Summary Judgment on Counterclaims	Motion	05-08-2018	02:16:44 PM
TI Oldfield Operations Llc	NEF(04-20-2018 10:40:07 AM) Order/Protection from Court ...	Filing	04-20-2018	10:40:16 AM
TI Oldfield Operations Llc	Order/Protection from Court Appearance	Order	04-20-2018	10:40:07 AM
Marc Haas	Notice of Appeal to Court of Appeals of Order Granting Summa	Action	04-17-2018	12:51:37 PM
TI Oldfield Operations Llc	NEF(04-16-2018 12:22:29 PM) Proposed Order/Protection fr...	Filing	04-16-2018	03:54:42 PM
Oldfield LLC	NEF(04-16-2018 03:44:08 PM) Order/Amend	Filing	04-16-2018	03:44:22 PM
Oldfield LLC	Order Denying Plaintiff Motion to Amend Complaint	Order	04-16-2018	03:44:08 PM
Marc Haas	NEF(04-16-2018 12:51:37 PM) Appeal/Notice of Appeal to C...	Filing	04-16-2018	02:10:44 PM
Marc Haas	Certificate Of Service of Notice of Appeal	Filing	04-16-2018	12:51:37 PM
TI Oldfield Operations Llc	Order Cover Sheet $25.00(Order/Protection Waived)	Filing	04-16-2018	12:22:29 PM
Oldfield Club Board Of Directors	NEF(04-13-2018 12:30:13 PM) Order/Summary Judgment	Filing	04-13-2018	12:30:27 PM
Oldfield Club Board Of Directors	Order for Motion of Summary Judgment filed by Defendants	Order	04-13-2018	12:30:13 PM
Oldfield Community Association	NEF(04-11-2018 08:17:47 AM) Order/Form 4	Filing	04-11-2018	08:18:00 AM
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Oldfield Community Association	Joint Notice of Motion for Status Conference & Court Trial	Motion	04-03-2018	02:03:21 PM
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Robert Michael Ethridge	4/23/2018_J1CP_Roster/Notice of Case Roster Publication Sent	Action	03-22-2018	04:31:06 PM
Ian S. Ford	4/23/2018_J1CP_Roster/Notice of Case Roster Publication Sent	Action	03-22-2018	04:31:06 PM
Merritt Gordon Abney	4/23/2018_J1CP_Roster/Notice of Case Roster Publication Sent	Action	03-22-2018	04:31:06 PM
Charles Robert Scarminach	4/23/2018_J1CP_Roster/Notice of Case Roster Publication Sent	Action	03-22-2018	04:31:06 PM
Christopher A. Ogiba	4/23/2018_J1CP_Roster/Notice of Case Roster Publication Sent	Action	03-22-2018	04:31:06 PM
Denise Lynn Savage	4/23/2018_J1CP_Roster/Notice of Case Roster Publication Sent	Action	03-22-2018	04:31:06 PM
Hunter H James	4/23/2018_J1CP_Roster/Notice of Case Roster Publication Sent	Action	03-22-2018	04:31:06 PM
Marc Haas	NEF(03-19-2018 11:05:04 AM) Order/Protection from Court ...	Filing	03-19-2018	11:05:19 AM
Marc Haas	Order of Protection	Order	03-19-2018	11:05:04 AM
Marc Haas	NEF(03-08-2018 11:30:13 AM) Proposed Order/Protection fr...	Filing	03-08-2018	03:42:26 PM
Rob Star	Order Cover Sheet $25.00(Order/Protection Waived)	Filing	03-08-2018	11:30:13 AM
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SF Operations Llc	Order Cover Sheet $25.00(Order Summary Judgment Waived)	Filing	01-16-2018	12:38:23 PM
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Marc Haas	Order Cover Sheet $25.00(Order Waived)	Filing	01-15-2018	02:39:16 PM
Marc Haas	Order Cover Sheet $25.00(Order/Amend Waived)	Filing	01-15-2018	02:35:08 PM
Oldfield Club Board Of Directors	NEF(01-12-2018 09:27:22 AM) Proposed Order/Summary Judgm...	Filing	01-12-2018	11:58:35 AM
Oldfield LLC	NEF(01-12-2018 10:07:16 AM) Proposed Order/Amend	Filing	01-12-2018	11:24:13 AM
Crescent Communitites LLC	Order Cover Sheet $25.00(Order/Amend Waived)	Filing	01-12-2018	10:07:16 AM
Oldfield Club	Order Cover Sheet $25.00 (OGSJD)	Filing	01-12-2018	09:27:22 AM
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Robert Michael Ethridge	2/5/2018_J1CP_Roster/Notice of Case Roster Publication Sent	Action	01-05-2018	04:53:39 PM

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Marc Haas, Susan Haas, Rob Star and Melissa Starr, **Plaintiffs,**	**Case No.** 2016-CP-07-602
vs.	
TI Oldfield Operations, LLC, SF Operations, LLC, Oldfield Club, Oldfield Community Association, Oldfield Club Board of Directors and John Does 1-10, **Defendants,**	
and	
TI Oldfield Operations, LLC and SF Operations, LLC, **Third Party Plaintiffs,**	
vs.	
Oldfield, LLC, Crescent Communities, LLC Resources, LLC f/k/a Crescent Resources, **Third Party Defendants.**	

PLAINTIFFS' OBJECTION TO OLDFIELD CLUB AND OLDFIELD CLUB BOARD OF DIRECTORS' MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIMS AND PLAINTIFFS' CROSS-MOTION FOR SANCTIONS UNDER SC CODE CHAPTER 36, SECTION 15-36-10

Plaintiffs, Marc Haas, Susan Haas, Rob Star and Melissa Starr (collectively, the "**Plaintiffs**"), file this objection (the "**Objection**") to Oldfield Club and Oldfield Club Board of Directors' (collectively, the "**Defendants**") Motion seeking post-judgment summary judgment (the "**Motion**") on Defendants' counterclaim for attorney's fees and expenses incurred in defense of the Motion and prosecution of the Cross-Motion, and respectfully represents as follows:

1. This Action was commenced by the Plaintiffs on March 10, 2016. Thereafter, certain, but not all discovery was undertaken.

2. On July 10, 2017, the Defendants filed a motion under Rule 56 of the SCRCP for summary judgment (the "**SJ Motion**") seeking an order from this Court finding judgment in favor of the Defendants.
3. On April 13, 2018, this Court entered an order granting summary judgment in favor of the Defendants (the "**Order**").
4. On April 16, 2018, the Plaintiffs timely filed a notice of appeal of the Order (the "**Appeal**").
5. On May 8, 2018 (24 days after entry of the Order and 22 days after the filing of the Appeal), Defendants filed the Motion.
6. The Motion seeks attorneys' fees, costs and damages purportedly incurred in connection with the Action allegedly pursuant to "the agreement at issue and other applicable documents" (Motion at 2), though the "other applicable documents" are not disclosed.
7. For the reasons set forth below, Plaintiffs object to the Motion and file the Cross-Motion, under SCRCP Section 15-36-10, seeking an order from this Court imposing sanctions against the Defendants and their counsel arising from the filing of the untimely and frivolous Motion.

The Motion is Untimely

A party in an action where a judgment after trial or a judgment was entered via a summary judgment motion, has ten (10) days after the entry of the court order to file post-judgment motions. *See Holmes v. E. Cooper Cmty. Hosp., Inc.*, 48 S.C. 138, 160-162, 758 S.E.2d 483, 495-496 (S.Ct. 2014) *citing In re Beard,* 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct.App. 2004).

While the filing of a notice of appeal does not deprive the trial court of jurisdiction with respect to timely filed post-judgment motions (*Holmes, supra,* 758 S.E.2d at 496), after the termination of the ten (10) day period after entry of a judgment, the trial court no longer has jurisdiction to hear post-judgment motions. *Id.*

In the matter at bar, the Defendants failed to file the Motion within ten (10) days of entry of the Order. Thus, this Court has no jurisdiction to hear the Motion and it must be dismissed.

The Motion Fails to Comply SCRCP Rule 7

Pursuant to Rule 7(b)(1), SCRCP requires that motions "shall state with particularity the grounds therefor, and shall set forth the relief or order sought." The particularity requirement "is to be read

flexibly in 'recognition of the peculiar circumstances of the case.'" *Cambridge Plating Co., Inc. v. Napco, Inc.*, 85 F.3d 752, 760 (1st Cir. 1996) (quoting *Registration Control Sys., Inc. v. Compusystems, Inc.*, 922 F.2d 805, 808 (Fed. Cir. 1990)). "By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that 'the court can comprehend the basis of the motion and [***5] deal with it fairly.'" *Calderon v. Kansas Dept. of Soc. and Rehab. Servs.*, 181 F.3d 1180, 1186 (10th Cir. 1999)(quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1192, at 42 (2d ed. 1990)). Therefore, when a motion is challenged for a lack of particularity, the court should ask "whether any party is prejudiced by a lack of particularity or 'whether the court can comprehend the basis for the motion and deal with it fairly.'" *Registration Control*, 922 F.2d at 807-08 (quoting 5 Wright & Miller, *Federal Practice and Procedure* § 1192, at 42). "The particularity requirement should not be applied in an overly technical fashion when the purpose behind the rule is not jeopardized." *Andreas v. Volkswagen of Am., Inc.*, 336 F.3d 789, 793 (8th Cir. 2003) (citations omitted).

Camp v. Camp, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010).

Here, the Motion is highly prejudicial. Defendants, in support of the Motion merely allege that they are entitled to attorneys' fees, costs, expenses and other damages arising under the "agreement at issue and other applicable documents." Motion at 2.

A failure to identify the applicable provision in the "agreement," of which Defendants are neither a signatory nor third party beneficiary (discussed more fully below), and a failure of Defendants to identify the "other applicable documents," much less the provisions in these unidentified documents, renders the Motion inadequate to satisfy the mandate of SCRCP Rule 7, requiring that such a motion state with particularity the grounds for the Motion. SCRCP Rule 7(b)(1).

The failure by Defendants to state with particularity the grounds for the Motion (as mandated under Rule 7(b)(1)), is highly prejudicial to the Plaintiffs and this Court as the Motion fails to identify with particularity the basis for an award of fees, costs, expenses and other damages so that the Plaintiffs and the Court are able to assess the arguments in the Motion.

Instead, Plaintiffs expect (as the Defendants have done in the past) that the Defendants will file a substantive pleading after the Plaintiffs file this Objection (which they will term a "reply"), which shall contain the necessary particularity the Motion should have contained. Plaintiffs ask this Court not to countenance such conduct as it is impermissible under SCRCP, Rule 7 (mirrored on FRCP 7).

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, [*820] which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought."

(Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

The defendant-appellant suggests that the motion on its face is sufficient in that it informed the plaintiffs that the State wanted the court to reconsider its prior ruling. While this may be true, it is irrelevant to the "particularity" requirement but instead satisfies the "relief or order sought" criteria of Rule 7(b)(1).

Looking at the motion, it is apparent that the defendant [**5] failed to state even one ground for granting the motion and thus failed to meet the minimal standard of "reasonable specification." *In the alternative, defendant suggests that the supporting brief filed one week later detailed the reasons for the motion and that this later filing satisfies the "particularity" requirement. In effect, defendant wants this Court to view the Memorandum as amending the November 22 motion. Were we to accept this view we would in effect be permitting an extension of time under Rule 6(b) of the Federal Rules of Civil Procedure. This we cannot do for two reasons. First, amendments are not allowed unless they consist of an elaboration of a ground already set out in the original motion. Secondly, if a party could file a skeleton motion and later fill it in, the purpose of the time limitation would be defeated. "Casting this substantial doubt on the finality of judgment would increase the burdens of an already overloaded federal judiciary."* 9 Moore's *Federal Practice*, para. 204.13[2], at 978.

Martinez v. Trainor, 556 F.2d 818, 819-20 (7th Cir. 1977)(emphasis added).

This is precisely the tack taken by the Defendants in past motions before this Court. A skeletal motion is filed. Then a memorandum and exhibits is filed the day before or day of the hearing, wherein the Defendants seek to "amend" the motion, thus attempting to undermine limitations on filing of papers, per the *Martinez* decision.

Should the Defendants engage in this tactic, we respectfully request that this Court strike any such additional brief, memorandum and exhibits.

Defendants may not seek attorneys' fees, costs, expenses or any other monetary claims against the Plaintiffs pursuant to the Express Terms of the Agreement

The Defendants are seeking fees, expenses, costs and other unspecified damages under the Agreement[1] and other unidentified documents.

A review of Section 3(C) of the Agreement reflects that attorney fees, expenses, costs and other damages are only to be awarded to a "Released Party" only in the event of a breach of the "covenants and agreements set forth in the Agreement." There is not a single covenant or agreement in the Agreement

[1] Defendants' counsel has attempted to continuously enforce against the Plaintiffs the non-disclosure provision set forth in the Agreement. However, at the hearing before this Court on September 7, 2017, regardless of the Plaintiffs' warning that discussing express terms of the Agreement in front of a full courtroom of people renders the non-disclosure provision in the Agreement a nullity, Defendants' counsel nonetheless continued discussing the Agreement in front of a full courtroom, contending that Defendants, nonetheless, assert there is no waiver of the non-disclosure provision. Defendants contend

which precludes the Plaintiffs from seeking to enforce the Agreement. Thus, there is not a single provision in the Agreement which awards attorneys' fees, costs, expenses or any other sums arising from the Plaintiffs legitimate enforcement of the Agreement. Accordingly, Defendants motion must be denied.

Defendants have Failed to Identify any Other Bases for Recovery of Attorneys' Fees, Costs, Expenses or any Other Monetary Claims

As Defendants have failed to identify any other documents or statutory basis for recovery of attorneys' fees, costs, expenses or any other monetary recovery, the Plaintiffs respectfully request that Motion be denied.

Cross-Motion for Sanctions

Inasmuch as the Motion was filed after the ten (10) day period after entry of the of the Order, the Defendants failed to state facts with particularity in the Motion under SCRCP, Rule 7, and/or the Defendants have failed to identify a single basis for recovery of attorneys' fees, costs, expenses or other monetary recovery, Plaintiffs seek an order from this Court awarding sanctions against the Defendants and their counsel, by the preponderance of the evidence, for filing a statutorily untimely motion without basis or merit (and, thus, frivolous), for violations of SC Code Section 15-36-10(A)(3)(b), (c), (d), and (4)(a). Plaintiffs seek sanctions under Section 15-36-10(G).

WHEREFORE, Plaintiffs respectfully request that the Motion be denied, *in toto*, and the Cross-Motion be granted and sanctions imposed against the Defendants and their counsel.

Date: May 15, 2018
BEAUFORT, S.C.

s/ Denise L. Savage
Denise L, Savage, Esq.
South Carolina Bar No. 102567
Savage Law, PLLC, Attorneys for the Plaintiffs
500 Carteret Street, Ste C2
Beaufort, South Carolina 29902
Phone: (843) 522-0058
Fax: (843) 522-2152
Email: dsavage@savagelitigation.com

The undersigned certifies that on May 15, 2018, this document was served by electronic service via the Court's online filing system on all attorneys of record.

Savage Law, PLLC

/s/ Denise L. Savage

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Marc Haas, Susan Haas, Rob Star and Melissa Star,

Plaintiffs,

Case No. 2016-CP-07-602

vs.

TI Oldfield Operations, LLC, SF Operations, LLC, Oldfield Club, Oldfield Community Association, Oldfield Club Board of Directors and John Does 1-10,

Defendants,

and

TI Oldfield Operations, LLC and SF Operations, LLC,

Third Party Plaintiffs,

vs.

Oldfield, LLC, Crescent Communities, LLC Resources, LLC f/k/a Crescent Resources,

Third Party Defendants.

PLAINTIFFS' REPLY TO OBJECTION FILED BY OLDFIELD CLUB LLC AND OLDFIELD CLUB BOARD OF DIRECTORS' OBJECTION TO CROSS-MOTION FOR SANCTIONS, AND PLAINTIFFS' RESPONSE IN FURTHER SUPPORT OF THEIR OBJECTION TO OLDFIELD CLUB LLC AND OLDFIELD CLUB BOARD OF DIRECTORS' MEMORANDUM OF LAW FILED IN FURTHER SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIMS

Plaintiffs, Marc Haas, Susan Haas, Rob Star and Melissa Star (collectively, the "**Plaintiffs**"), Reply to the objection (the "**Objection**") filed by Oldfield Club LLC (the "**OC**") and Oldfield Club Board of Directors (the "**BOD,**" together with OC, the "**OC Defendants**") to

Plaintiffs' Cross-Motion for sanctions against the OC Defendants and their counsel under South Carolina Code Chapter 36, Section 15-36-10 (the "**Cross-Motion**"); and Plaintiffs' Response in further support of their Objection to the OC Defendants' summary judgment motion on counterclaims (the "**SJ Motion**"), and respectfully sets forth and represents as follows:

Preliminary Statement

The OC Defendants filed a motion for summary judgment (i.e. the SJ Motion) on its one counterclaim alleging the Plaintiffs had violated a non-disclosure clause in a so-called Termination and Release Agreement (defined below) by citing a clause in the Termination and Release Agreement in an action to enforce the terms of the agreement (the "**Counterclaim**").

While the OC Defendants never took any action to have the Complaint in this action filed under seal, failed to even assert the Counterclaim in an amended answer until January 12, 2017 (ten (10) months after the filing of the Complaint in this action), made their own public filings and disclosures of the Termination and Release Agreement and its contents, and failed to make any attempts to mitigate any alleged damages, the OC Defendants now claim some unspecified injury from the disclosure of the Termination and Release Agreement by Plaintiffs.

For the reasons set forth below, Plaintiffs respectfully request that this Court deny the SJ Motion and award Plaintiffs fees, expenses and costs to Plaintiffs incurred in defending the SJ Motion and filing and prosecuting their pending Cross-Motion.

Applicable Facts and Argument

a. The Non-Disclosure Clause in the Termination Agreement is Void

1. On March 10, 2017, Plaintiffs' former counsel, Drew Toney, Esq. of Mullen Wylie, LLC, filed the complaint (the "**Complaint**" incorporated herein by reference) commencing the above captioned action (the "**Action**").

2. The Action was commenced by the Plaintiffs to enforce their rights under a certain Termination and Release Agreement, dated September 17, 2009 (the "**Termination Agreement**"), executed by and among Oldfield Club, LLC (the "**OC**"), Oldfield Community Association, Crescent Resources LLC ("**Crescent**"), and Oldfield LLC ("**Oldfield,**" together with Crescent, the "**Crescent Entities**"). The Crescent Entities were the predecessor developer/sponsor of the Oldfield community.
3. On June 10, 2009, the Crescent Entities filed a petition under Title 11, Chapter 11 of the United States Code (the "**Bankruptcy**").
4. The Termination Agreement had its origins in the Crescent Entities Bankruptcy, commencing with a motion filed by the Plaintiffs, under 11 U.S.C. §365 (the "**365 Motion**"), seeking an order compelling the Crescent Entities to assume or reject the Plaintiffs Equity Golf Membership Agreements (the "**Membership Agreements**") by a date certain.
5. To resolve the 365 Motion, the Crescent Entities negotiated and executed the Termination Agreement.
6. While all settlements by a Chapter 11 Debtor require Bankruptcy Court approval under Bankruptcy Rule 9019[1], in violation of the B.R. 9019, the Crescent Entities never sought or obtained Bankruptcy Court approval of the Termination Agreement, instead rendering

[1] B.R. 9019, entitled Compromise and Arbitration, provides in relevant part:

> (a) Compromise. On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.
> (b) Authority To Compromise or Settle Controversies Within Classes. After a hearing on such notice as the court may direct, the court may fix a class or classes of controversies and authorize the trustee to compromise or settle controversies within such class or classes without further hearing or notice.

the Termination Agreement a secret agreement with the Plaintiffs which sought to bind the Plaintiffs to a non-disclosure agreement in the Termination Agreement.

7. While the Crescent Entities could have filed a motion under B.R. 9019 seeking Court approval of the Termination Agreement and request it be filed under seal, the Crescent Entities knew such a motion to file the Termination Agreement under seal would fail as it is well settled that a Debtor may not seek to file a settlement agreement under seal when the "only reason given for sealing the settlement was that public disclosure would undercut the settling [debtor's] leverage in negotiating with other [bankruptcy] claimants. *In re Oldco M. Corp.*, 466 B.R. 234, 238 (Bankr. S.D.N.Y. 2012).

8. It is respectfully submitted that the Crescent Entities did not want the Termination Agreement to be disclosed so that other Equity Golf Members in the Oldfield Community and other planned communities built by Crescent would not seek similar relief. Ultimately, "[m]any courts have noted that the purpose behind Bankruptcy Rule 9019 is to prevent secret agreements between the debtor and other parties, and to provide interested creditors with a right to object to the proposed settlement." *See* L. Eljach, *No Seal No Deal: Amending Federal Rule of Bankruptcy Procedure 9019 to Require Judicial Approval of Settlement Agreements*, 32 Emory Bankr. Devlop. Journal 433, 444 at fn. 79 (2016).

9. B.R. 9019 dovetails with the Bankruptcy Code's mandate that the public has a right to inspect and copy judicial records, which are available for examination at reasonable times without charge. 11.U.S.C. §107(a). While sealing filed documents may occur in bankruptcy, sealing often does not extend to settlement agreements because a debtor

trades certain privacy rights for the benefit of recovery when filing for bankruptcy. *See Stellwagen v. Clum*, 245 U.S. 606, 617 (1918).

10. The OC Defendants were complicit in hiding the Termination Agreement and violating the Bankruptcy Code and Rules, and cannot be said to be innocent in this outrageous violation of federal law.

11. Accordingly, attempts to hide a settlement agreement by a Chapter 11 debtor violates the Bankruptcy Code and the public policy import behind B.R. 9019.

12. Thus, it is respectfully submitted that the non-disclosure clause in the Termination Agreement is *ipso facto* void.

b. Disclosing Terms of the Termination Agreement via Enforcement

13. It is well settled in the Fourth Circuit Court of Appeals that:

> The public has a general right to inspect and copy judicial records and documents. The tradition that litigation is open to the public is of very long standing. People who want secrecy should opt for arbitration. When they call on the Courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. Judicial proceedings are public rather than private property, and the third-party effects that justify the subsidy of the judicial system also justify making records and decisions as open as possible.

Co. Doe v. Public Citizen, 749 F.3d 246, 265 (4th Cir. 2014). *See also Jenkins v. Wash Metro. Area Transit Auth. (In re Fort Totten Metrorail Cases Arising out of the Events of June 22)*, 960 F.Supp 2d. 2, 14 (D.D.C.2013)("Although the court's rules allow litigants to agree to settle and dismiss lawsuits with limited court involvement, S.C.R. Civ. 41(a)(1) and 41.1(a), when parties seek to use the court system to enforce the provisions of private settlement agreements, those agreements become publicly available court records absent a properly filed and approved request to seal."); *Accord Am. Friends Serv.*

Comm. V. City & County of Denver, 2004 U.S.Dist. Lexis 18474 (D.Co. 2004); *Ex. Parte Brand*, 380 S.C. 1 (2008).

14. In the case at bar, pursuant to the Termination Agreement (Section 6.11), the Courts of South Carolina are deemed to have jurisdiction with respect to enforcement of the Termination Agreement. There is no arbitration provision in the Termination Agreement. Thus, all parties had to expect that a violation of the terms of the Termination Agreement would land parties in state court, not arbitration, to obtain an order enforcing the terms of the Termination Agreement, with the attendant public's right to access to all documents, including the Termination Agreement.

c. The OC Defendants made no effort to enforce the non-disclosure clause and actually disclosed its existence repeatedly to the public mandating a finding of waiver and laches by the OC Defendants

15. Manifestly, the OC Defendants failed to file a motion to have the Complaint filed under seal alleging a valid basis for the Termination Agreement to be filed under seal by this Court

16. Not only did the OC Defendants *not file a seal motion, but they repeatedly disclosed aspects of the Termination Agreement to the public* as follows:

    i. The OC Defendants failed to commence any type of enforcement action to enforce the non-disclosure clause;

    ii. The OC Defendants did not file their counterclaim alleging violation of the non-disclosure of the Termination Agreement until a full ten (10) months after the Complaint was filed and a full nine (9) months after the OC Defendants filed their first answer to the Complaint.

iii. The OC Defendants, as exhibits to their previous Motion for Summary Judgment on the claims in the Complaint, filed deposition transcripts of Mr. Star's deposition wherein he discussed the terms of the Termination Agreement at length. *See Oldfield Club's and Oldfield Club Board of Directors' Memorandum of Law in Support of Motion for Summary Judgment, filed September 14, 2017, Exhibit 1* (e-filed in Docket No. 2016CP07602).

iv. In front of a courtroom full of people unrelated to this Action, the OC Defendants' counsel spoke at length about the Termination Agreement and its contents at the September 19, 2017 hearing before this Court on the OC Defendants' first Summary Judgment Motion. The OC Defendants' counsel rejected Plaintiffs' counsel's demand that the Courtroom be emptied so that the purported confidentiality of the Termination Agreement not be further jeopardized. The OC Defendants' counsel rejected this demand and proceeded to air the agreement to all in the Courtroom. *See OC Defendants' Memorandum in Support of Motion for Summary Judgment on Counterclaims and Opposition to Plaintiffs' Motion for Sanctions,* Exhibit 4 (*Transcript of September 19, 2017 Hearing*, Case No 2016CP07602, at pp.12-14).

17. The OC Defendants' blatant disclosures of the Termination Agreement and its provisions clearly constitute a waiver of the OC Defendants' rights to enforce the non-disclosure clause against the Plaintiffs.

18. Section 6.8 of the Termination Agreement provides:

> Waiver. If any party expressly waives in writing an unsatisfied condition, representation, warranty, undertaking, covenant or agreement (or portion thereof) set forth herein, the waiving party shall thereafter be barred from recovering, and thereafter shall not seek to recover, any damages, claims, losses, liabilities or expenses including, without limitation, legal and other expenses, from the other parties in respect of the matter or matters so waived.

19. It is respectfully submitted that the OC Defendants conduct in repeatedly disclosing the terms of the Termination Agreement in publicly filed documents with this Court (i.e. not under seal), before a courtroom full of unrelated parties, and their inaction in seeking to seal the Complaint (to the extent they would succeed), constitutes a waiver of the OC Defendants' belated efforts to seek damages against the Plaintiffs. *See Shire LLC v. Mickle*, 2011 WL 863503 (W.D.Va.2011).

20. Even without the "waiver clause" in the Termination Agreement, laches and equity also precludes the OC Defendants from seeking damages or fees from the Plaintiffs.

> "'Laches' is defined as 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.'" *Gordon v. Drews*, 358 S.C. 598, 612, 595 S.E.2d 864, 871 (Ct. App. 2004) [***22] (*quoting Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct. App. 1999)). "Delay alone is not enough to constitute laches; it must be unreasonable, and the party asserting laches must show prejudice." *Gordon,* 358 S.C. at 612, 595 S.E.2d at 871 (*quoting Brown v. Butler*, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001)).

Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 359, 628 S.E.2d 902, 912 (Ct. App. 2006)

> Finally, Plaintiffs' decision to **sit on their hands** for three weeks affects their rights to cry foul now. While laches doesn't bar Plaintiffs' claims, equity does weigh against imposing emergency deadlines when an earlier complaint could have made redress less drastic.

Parson v. Alcorn, 157 F. Supp. 3d 479, 501 (E.D. Va. 2016)

21. Here, not only did the OC Defendants fail to take any action to limit any alleged injury, they continually and affirmatively, publicly disclosed the Termination Agreement and the terms thereof.

d. The OC Defendants have failed to identify any injury warranting an award of damages or legal fees and failed to mitigate any purported damages

22. The Termination Agreement contains no liquidated damages clause with respect to an alleged breach of the non-disclosure clause. Further, the OC Defendants have failed to identify damages sustained from any purported breach of the non-disclosure clause other than alleging they incurred $42,953.00 in legal fees and costs, which fees were incurred defending Plaintiffs' allegations that the Termination Agreement was breached by the OC Defendants.

23. Furthermore, it is not only clear that the OC Defendants affirmatively continued to publicly disclose provisions of the Termination Agreement, but also failed to take a single step to mitigate their alleged damages.[2]

24. It is well-settled that,

> "When there is an action for the breach of a contract, a plaintiff must not only prove the contract and its breach, but damages caused by the breach." *Jackson v. Midlands Human Resources Ctr.*, 296 S.C. 526, 528, 374 S.E.2d 505, 506 (Ct. App. 1988); *Baughman v. Southern Ry. Co.*, 127 S.C. 493, 495, 121 S.E. 356, 356 (1924).

Hughes v. Oconee Cty., No. 2007-UP-461, 2007 S.C. App. Unpub. LEXIS 438, at *15 (Ct. App. Oct. 11, 2007).

> The court finds that Mickle has not plausibly alleged that Shire's actions caused him to suffer any injury. In describing his damages, Mickle's breach of settlement agreement counterclaim states only that "Shire's statement [at the Conference] ...

[2] While the OC Defendants seek a hearing on purported damages suffered, this request is nonsensical where the OC Defendants have failed to append a single affidavit or supporting document alleging the exact nature of the alleged damages and any purported monetary damages arising therefrom. Thus, it is respectfully requested that the OC Defendants request for a damage hearing be denied.

> have damaged Dr. Mickle's reputation and/or business interests...." (Contercl.¶ 83.)
>
> There is no allegation that Mickle has been injured by Shire's public disclosure of the settlement agreement. Even if Mickle was injured by the public disclosure, Mickle has not sufficiently alleged facts to support its claim that Shire caused that injury. Under Rule 9(a) of the Western District of Virginia's Local Rules, "[a] document ... may be filed or placed under seal only if permitted by order of the Court . " (emphasis added). It is not readily apparent to the court why such an order would be justified here, and, in any event, the court is not inclined to speculate as to what it would have done had Shire filed such a motion. *Cf. Hinkle Oil & Gas, Inc. v. Bowles Rices McDavid Graff & Love, LLP*, 617 F.Supp.2d 447, 452 (W.D.Va.2008) (granting summary judgment against the plaintiff because the plaintiff's claims required the court to speculate on what the bankruptcy court would have decided if faced with different facts). Therefore, the court finds that Mickle has not alleged facts that would plausibly support his claim that Shire's failure to move to file the settlement agreement under seal caused Mickle any injuries. Accordingly, the court grants Shire's motion to dismiss Mickle's claim that it breached the confidentiality provisions of the settlement agreement .

Shire LLC v. Mickle, 2011 WL 863503 (W.D.Va.2011).

25. Here the OC Defendants have failed to disclose even the nature of the damage caused to them, much less any proposed damage sum arising from the undisclosed damage. Further, the OC Defendants, in failing to file a motion to file the Complaint under seal, and repeatedly making public disclosures of the Termination Agreement and its contents in filings with this Court and in the open Courtroom, not only failed to mitigate its damages but, if it suffered any such damages, affirmatively contributed to these damages by their inaction, on the one hand, and disclosures relating to the Termination Agreement, on the other hand.

26. It is well settled that,

> A defendant who claims a plaintiff's damages could have been mitigated has the burden of proving that mitigation is possible and reasonable. *Chastain v. Owens Carolina, Inc.*, 310 S.C. 417, 420, 426 S.E.2d 834, 835 (1993); *Moore v. Moore*, 360 S.C. 241, 262, 599 S.E.2d 467, 478 (Ct. App. 2004) (upholding the rule "defendants have the burden of proving a plaintiff's damages could have been

> avoided, reduced, or minimized."); *Genovese v. Bergeron*, 327 S.C. 567, 572, 490 S.E.2d 608, 611 (Ct. App. 1997) ("Moreover, the party who claims damages should have been minimized has the burden of proving they could reasonably have been avoided or reduced."); *Alala v. Peachtree Plantations, Inc.*, 292 S.C. 160, 167, 355 S.E.2d 286, 290 (Ct. App. 1987); *Tri-Continental Leasing Corp. v. Stevens, Stevens & Thomas, P.A.*, 287 S.C. 338, 342, 338 S.E.2d 343, 346 (Ct. App. 1985).

Id. at *16

27. It is beyond peradventure that the OC Defendants took no action to mitigate their alleged damages (i.e. file a seal motion), and affirmatively contributed to any alleged damages, thus precluding the OC Defendants from seeking damages against the Plaintiffs.[3]

Plaintiffs' Cross-Motion for Sanctions

28. The OC Defendants' SJ Motion has not a modicum of merit, thus rendering it frivolous.

29. *First,* the OC Defendants took no steps to mitigate any alleged damages. *Second*, the OC Defendants affirmatively made disclosures of the Termination Agreement and its contents throughout this litigation thus admitting that such disclosures, if any, by the Plaintiffs, could cause no damages to the OC Defendants, constituting a waiver of their claim under Section 6.8 of the Termination Agreement and undermining any alleged mitigation attempts. *Third*, it misrepresents that the legal fees and costs incurred are "damages" that can be reimbursed under Section 6.13 of the Termination Agreement, when all parties know that the fees and costs sought by the OC Defendants were incurred in defense of the Action, not in enforcing Section 6.13 (i.e. Plaintiffs' enforcement of the Termination Agreement cannot be viewed as a breach of the Termination Agreement, as contemplated under Section 3(C) of the Termination Agreement). *Fourth*, it fails to even identify the nature of the purported damages, much less a quantifiable sum, that they can

[3] Plaintiffs incorporate by reference all arguments contained in their Objection to [OC Defendants] Motion for Summary Judgment on Counterclaims.

legitimately seek under the Termination Agreement. Finally, the OC Defendants expressly disregarded the jurisdictional limits of this Court now that an appeal is pending on Summary Judgment entered against the Plaintiffs in this Action.

30. Accordingly, given the utterly frivolous nature of the SJ Motion, Plaintiffs respectfully request that the OC Defendants and their counsel be sanctioned via the imposition of attorneys' fees, expenses and costs incurred by Plaintiffs' counsel in responding to the OC Defendants SJ Motion and filing and prosecution of the Cross-Motion.

Date: June 25, 2018
BEAUFORT, S.C.

s/ Denise L. Savage
Denise L, Savage, Esq.
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Denise L. Savage hereby represents that the within Objection and were served on all parties in the Action via ECF notification.

/s/ Denise L. Savage

From: Kinard, Marlene akinard@bcgov.net
Subject: RE: Oldfield case on TR roster
Date: June 27, 2018 at 8:07 AM
To: Mullen, Carmen T. Law Clerk (Crystal Swinford) CMullenLC@sccourts.org
Cc: Carmen Mullen tevismullen@gmail.com, Mullen, Carmen T. Secretary (Jamie Thompson) CMullensc@sccourts.org, sdeters@ethridgelawgroup.com, Mike Ethridge (methridge@ethridgelawgroup.com) methridge@ethridgelawgroup.com, ian.ford@fordwallace.com, merritt.abney@nelsonmullins.com, charlesscarminach@mvalaw.com, chrisogiba@mvalaw.com, denise l savage (dsavage@savagelitigation.com) dsavage@savagelitigation.com, hunter.james@fordwallace.com

Good Morning Everyone,

The Motions for Summary Judgment have been removed from the roster for June 28, 2018.

Marlene

-----Original Message-----
From: Mullen, Carmen T. Law Clerk (Crystal Swinford) [mailto:CMullenLC@sccourts.org]
Sent: Tuesday, June 26, 2018 8:57 AM
To: Kinard, Marlene
Cc: Carmen Mullen; Mullen, Carmen T. Secretary (Jamie Thompson)
Subject: RE: Oldfield case on TR roster

Marlene,

Good morning. Please continue the motions in Haas v. Oldfield, 2016CP0700602 from Thursday's roster. This case is currently under appeal.

Thank you,

Crystal

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
The Court of Common Pleas
Fourteenth Judicial Circuit

Edgar W. Dickson, Circuit Court Judge

Case No. 2018-000-707

Marc Haas, Susan Haas, Rob Star and Melissa Starr,

Plaintiffs-Appellants,

vs.

TI Oldfield Operations, LLC, SF Operations, LLC, Oldfield Club, Oldfield Community Association, Oldfield Club Board of Directors and John Does 1-10,

Defendants-Respondents,

CERTIFICATE OF SERVICE

The undersigned certifies that on September 25, 2018, a true and correct copy of Plaintiffs-Appellants' Notice of Motion and Motion to Strike Documents in Respondents' Designation of Matter to be Included in the Record on Appeal, in the above-captioned matter, was served upon all the below counsel of record, via USPS, first class mail, postage prepaid, to the persons and at the addresses below:

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Date: September 25, 2018
BEAUFORT, S.C.

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