

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 ) NINTH JUDICIAL CIRCUIT  
COUNTY OF BERKELEY ) CASE NO.: 2017-CP-08-2059

OLD RICE RETREAT AT CANE BAY )  
PLANTATION PROPERTY OWNERS )  
ASSOCIATION, INC., )

Plaintiff,

vs.

DAMAIRYS MIRABENT also known as )  
Damairys Rigoroso, )

Defendant.

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT  
AND AWARDING  
ATTORNEY FEES AND COSTS**

**RECEIVED**  
JAN 30 2019  
SC Court of Appeals

**THIS MATTER** came to be heard by me on October 10, 2018 pursuant to a Motion for Summary Judgment filed herein by the Plaintiff on June 5, 2018. Present at the hearing were John J. Dodds, III, Attorney for Plaintiff, and Karen M. DeJong, Attorney for Defendant.

After considering the arguments of counsel for the parties, respectively, the Complaint filed by the Plaintiff and Answer filed by the Defendant, Plaintiff's First Request to Admit which Defendant did not answer, and the Affidavits of Iris Pinnaro and Plaintiff's counsel, the Court finds and concludes that Plaintiff's Motion for Summary Judgment should be granted.

This Court is well aware that summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem Co. v. Allianz Underwriters Ins. Co., 594 S.E. 2d 455 (2004). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 534 S.E. 2d 688 (2000). Summary judgment should not be granted, even when there is no dispute as to the evidentiary facts, if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 534 S.E.2d 672 (2000). All

ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Schmidt v. Courtney, 592 S.E.2d 326, (Ct. App. 2003). However, summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Belton v. Cincinnati Ins. Co., 602 S.E. 2d 389 (2004). When plain, palpable and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Hedgepath v. American Tel. & Tel.Co., 559 S.E.2d 327 (Ct. App. 2001). “When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him”. SCRCP 56(e).

In the case at bar, Plaintiff’s counsel hand-delivered to Defendant’s counsel Plaintiff’s First Request to Admit on November 21, 2017. Defendant’s counsel has not responded and, as such, each of the matters set forth in Plaintiff’s First Request to Admit are deemed admitted. SCRCP 36(a). Specifically, it is admitted that 1) Defendant is the owner of the real property, together with improvements, known as 106 Brookhaven Road, Summerville, S.C. 29483 (“Subject Property”); 2) Defendant purchased the Subject Property subject to the Declaration of Covenants, Restrictions and Easements for Old Rice Retreat at Cane Bay Plantation recorded November 6, 2006, in Book 6104, at Page 115, as amended (collectively the “Covenants”); 3) Defendant constructed a fence and shed on the Subject Property without the knowledge, consent or approval of Plaintiff or Plaintiff’s Architectural Review Board (“ARB”) in violation of the Covenants; and 4) Plaintiff’s counsel made formal demand upon Defendant to remove the fence and shed, however, Defendant failed and refused to do so. In addition to the foregoing, Plaintiff submitted the Affidavit of Iris Pinnaro,

Plaintiff's ARB chairperson, who confirmed each of the matters set forth in Plaintiff's First Request to Admit, as well as Plaintiff's entitlement to an award of attorney fees and costs as the prevailing party in this action in accordance with the Covenants. Finally, Plaintiff's counsel submitted an Affidavit describing his legal background, the amount of time he expended in handling this matter on behalf of Plaintiff, as well as costs incurred, and his hourly rate for handling such matters.

Contrarily, Defendant presented no Affidavits whatsoever in opposition to Plaintiff's Motion for Summary Judgment, but rather argued the allegations set forth in Defendant's Answer and filed a Motion the day prior to the hearing requesting that Plaintiff's Motion be deferred until after the case had been mediated. As noted above, when a Motion for Summary Judgment is made and supported as provided in Rule 56, SCRCP, as is the case here, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. Defendant has clearly failed to set forth any facts showing there is a genuine issue for trial. Moreover, not only is Defendant's Motion seeking deferral of Plaintiff's Motion for Summary Judgment not timely, Rule 5(b) of the Alternative Dispute Resolution Rules clearly provides that the ADR Conference shall not be cause for delay of other proceedings in the case, including the completion of discovery, the filing and hearing of motions, or any other matter that would delay preparation of the case for trial, except by Order of the Court. In this case, no such Order exists.

To enforce a restrictive covenant, a party must show that the restriction applies to the property either by the covenant's express language or by a plain unmistakable implication. Hamilton v. CCM, Inc., 263 S.E. 2d 378 (1980). A restrictive covenant will be enforced if the covenant expresses the party's intent or purpose, and the rule of strict construction will not be used to defeat the clear language of the Covenants, Palmetto Dunes v. Brown, 336 S.E. 2d (1985). Restrictive Covenants are enforceable unless they are indefinite or contravene public policy. Vickery v. Powell,

225 S.E. 2d 856 (1976). In Sea Pines Plantation Co. v. Wells, 363 S.E. 2d 891 (1987), the South Carolina Supreme Court held that a Subdivision's architectural review board's rejection of property owner's modifications during construction of his house, and relandscaping of his property, based on aesthetic considerations, was not arbitrary; rather, it bore sufficient relation to subdivision's general plan of development and, therefore, covenants were not arbitrarily or discriminatorily enforced. As such, the property owner was required to remove various "structures" not approved by the Subdivision's architectural review including, among other things, a fence. *Supra* at page 895.

A court does not automatically issue a mandatory injunction once it finds a restrictive covenant has been violated. The Court must balance the equities between the parties; and if the harm to the defendants outweighs the plaintiff's benefit, no relief will be granted. Hunnicut v. Rickenbaker, 2345 S.E. 2d 887 (1977). In Buffington v. T.O. Enterprises, 680 S.E. 2d 289 (2009), the South Carolina Supreme Court upheld a restrictive covenant that land be used only for residential purposes and affirmed the South Carolina Court of Appeals' decision upholding the trial court's mandatory injunction. In doing so, the Supreme Court noted that "... it would be inequitable to consider Petitioners' financial loss in purchasing and improving the land since they were on notice of the covenants when they purchased the property. To find otherwise would indicate that any business could defeat a restrictive covenant by spending a significant amount of money developing the land". Buffington at page 393. Similarly, the South Carolina Court of Appeals held in Kinard v. Richardson, 754 S.E. 2d 888 (Ct. App. 2014), that neighbors violated restrictive covenant that prohibited any use of property other than single family residential use when they leased a tract of open land adjacent to their residence to operators of an equestrian center for the purpose of using the tract as a horse pasture, and that permanent injunction enjoining neighbors from leasing their property for such purpose was proper. Buffington at page 900. In doing so, the Court of Appeals noted that the neighbors, like the dealership operators in Buffington, were on notice of the

requirement that the use of the tract must be residential. The Court further noted that the covenants were recorded in the RMC Office and, therefore, the Owner seeking to enforce the covenants had a right to rely on these covenants in making his purchasing decision. Buffington at page 899.

The case at bar is no different from the cases noted above where The South Carolina Supreme Court and South Carolina Court of Appeals determined that a permanent injunction was the proper remedy when a knowing violation of restrictive covenants occurred. Here, as in those cases, the Covenants were duly recorded in the Register's Office for Berkeley County prior to the time Defendant purchased the Subject Property and clearly required Defendant to secure prior written approval from Plaintiff's ARB before constructing the fence and shed. Therefore, Defendant was on notice as to the requirement that any proposed fence and shed could not be constructed on the Subject Property unless and until Plaintiff's ARB approved such construction in writing. Moreover, Defendant's neighbors and other Owners in Defendant's subdivision had a right to rely on the Covenants in making their purchasing decisions. The equities in this case require a permanent injunction requiring Defendant to remove the fence and shed from the Subject Property.

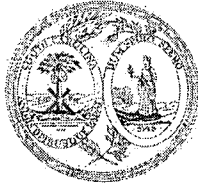
In addition to the permanent injunction, Plaintiff is entitled to an award of attorney fees and costs in accordance with the Covenants as a matter of law. Rule 56, SCRPC. Plaintiff's counsel's Affidavit and the Affidavit of Iris Pinnaro, Plaintiff's ARB Chairperson, both confirm that the Covenants provide for reasonable attorney fees and costs to the prevailing party in any action by Plaintiff to enforce the Covenants. Plaintiff's counsel has been a member of the South Carolina Bar for over thirty (30) years and has achieved beneficial results on behalf of his client. The hourly rate charged by Plaintiff's counsel (\$200.00) and number of hours expended in this action (11.75 hours, exclusive of Court time and preparation of this Order) are reasonable and consistent with the hourly rate charged by other attorneys in Berkeley County for similar services. It is just an proper that Defendant should be required to pay Plaintiff's attorney fees and costs in enforcing the Covenants.

**NOW, THEREFORE, it is ORDERED, ADJUDGED AND DECREED** as follows:

- ONE: Plaintiff shall be, and is hereby, granted Summary Judgment as to its requests for a permanent injunction and award of attorney fees and costs against Defendant;
- TWO: Defendant shall be, and is hereby, required to completely remove the fence and shed from the Subject Property within thirty (30) days from the date of this Order; and
- THREE: Plaintiff shall be, and is hereby granted an award of attorney fees and costs of and from Defendant in the total sum of \$2,985.00.

**AND IT IS SO ORDERED** this \_\_\_\_\_ day of \_\_\_\_\_, 2018, at \_\_\_\_\_, South Carolina.

\_\_\_\_\_  
Diane S. Goodstein  
Presiding Judge



Berkeley Common Pleas

**Case Caption:** Old Rice Retreat At Cane Bay Plantation Property Owners Asso VS  
Damairys Mirabent  
**Case Number:** 2017CP0802059  
**Type:** Order/Summary Judgment

Presiding Judge

s/Diane S. Goodstein (2112)