THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Master-In-Equity

The Honorable Joseph M. Strickland, Master-In-Equity

Case No. 2017-CP-40-06634

The Homestead Property Owners Association, Inc. .....Respondent,

v.

Wanda J. Miller & Orlando F. Miller ..... Appellants.

FINAL BRIEF OF RESPONDENT THE HOMESTEAD PROPERTY OWNERS ASSOCIATION, INC.

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February 13, 2019
Columbia, South Carolina

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STATEMENT OF CASE

This case arises out of the foreclosure of a homeowners' association lien for unpaid assessments. Appellants Wanda J. Miller and Orlando F. Miller (collectively "Appellants") are the owners of real property located at 261 Kenmore Park Drive ("Property") in Richland County. The property is located in The Homestead subdivision and, therefore, encumbered by Covenants, Conditions and Restrictions for Homestead (the "Declaration"). Respondent The Homestead Property Owners Association, Inc. ("Respondent") is the homeowners' association for The Homestead.

On May 4, 2016 Respondent recorded a Notice of Lien against the Property for unpaid homeowners' association assessments. (R. p. 18, ¶ 8). On October 30, 2017, Respondent initiated this suit seeking foreclosure of its lien. Appellants were served on November 8, 2017. (R. pp. 23-24; pp. 220, ll. 13-25). On January 23, 2018 Respondent filed an Affidavit of Default and this matter was referred to the Master-in-Equity for foreclosure proceedings. (R. p. 32). The initial foreclosure hearing was scheduled for May 14, 2018 however, that hearing was continued and rescheduled for July 30, 2018.

On June 1, 2018, Appellants filed an Answer and Counterclaim alleging claims of Abuse of Process and Breach of Contract against Respondent. (See R. pp. 47-51). Appellants' Counterclaims allege Respondent refused and returned Appellants' payments in order to "illegally" generate a lawsuit and attorneys' fees. (R. p. 50, ¶¶ 32-36; p. 50-51, ¶¶ 39-41). Appellants were deposed on July 16, 2018. (See generally R. pp. 152-288; pp. 289-355). On July 20, 2018, Respondent timely filed its Reply to Appellants' Counterclaims and a Motion for Summary Judgment. (See generally R. pp. 52-56; pp. 57-58).

On July 27, 2018, Appellants filed two Motions for Relief from Judgment pursuant to Rule 60(a) and Rule 60(b), SCRCP. (See generally R. pp. 59-60; pp. 61-63).

On July 30, 2018, both parties appeared for a hearing on the outstanding motions. Following the hearing, the Richland County Master-in-Equity granted Respondent's Motion for Summary Judgment as to Appellants' Counterclaims. (ROA 1-6). Further, this Order also denied Respondent's claim for foreclosure and specifically provided it did not end the case. (See R. p. 5).

STATEMENT OF FACTS

As noted above, Respondent is the homeowners' association for The Homestead subdivision that includes the Property owned by Appellants. As part of The Homestead subdivision, the Property is subject to the Declaration that provides for Appellants to make certain payments to Respondent and for Respondent to take collection of those payments for certain assessments levied by Respondent.

To be sure, the Declaration was recorded on April 5, 2006 in the Register of Deeds for Richland County in Book 1169 at Page 3279. (R. pp. 72-87). The Declaration explicitly encumbers the real property designated as Tracts A, B and C on a plat recorded at the Richland County Register of Deeds in Book 859 at Page 540 (the "Plat"). (R. p. 88). In 2007 Brickyard 44, LLC conveyed two parcels from the real property depicted on the Plat to Shumaker Homes, Inc. by deed recorded in the Richland County Register of Deeds in Book 1292 at Page 3389 (the "Shumaker Deed"). (R. pp. 89-90). The Shumaker Deed states that these parcels are a portion of the same land already encumbered by the Declaration.[1] (Id.). Shumaker Homes, Inc. subsequently conveyed one of these parcels, denoted as Lot 62, to the Appellants by deed recorded December 12, 2007 in the Register of Deeds for Richland County in Book 1383 at Page 2579. (R. pp. 91-92). These plats and deeds show that Appellants' Property is a portion of the

[1] The Shumaker Deed's derivation cites three deeds recorded in October 2003 in Book 864 at Pages 653-662. These deeds describe the real property in question by reference to the plan

real property initially encumbered by the Declaration when it was filed April 5, 2006. Therefore, as record owners of the Property, Appellants are required to make certain payments to Respondent for assessments related to the Property's inclusion in The Homestead subdivision.

The Declaration entitles Respondent to collect assessments and costs from Appellants. The Declaration provides:

> "[E]ach Owner of any Lot, by acceptance of a deed therefor, whether or not it shall be so expressed in such deed, is deemed to covenant and agree to pay to the Association: (1) Annual assessments or charges; and (ii) Special assessments for capital improvements, such assessments to be established and collected as hereinafter provided. The annual and special assessments, together with interest, costs,...shall be a charge on the land and shall be a continuing lien upon the Lot and improvements against which each such assessment is made."

(R. p. 75, §1). Further, the due date for each assessment is established by the Board of Directors. (See R. pp. 76-77, §7(a)).

The Declaration also provides for timelines when an unpaid assessment becomes delinquent, the interest rate and the ultimate penalties for a failure to pay an owed assessment. More specifically, the Declaration states:

> "Any annual assessment not paid within thirty (30) days after the due date shall bear interest from the due date at that rate which is equal to the rate of interest chargeable by law in the State of South Carolina on money judgments. The Association may . . . foreclose the lien against the property in like manner as a mortgage of real property, and . . . interest, costs and a reasonable attorney's fee shall be added to the amount of such assessment."
>
> (R. p. 77, §8).

The contract between the parties provides that Respondent is entitled to foreclose its lien in the same manner as a mortgage if Appellants fail to pay any annual assessment within thirty (30) days. Importantly, Appellants admit they owe Respondent $180.00 per year for each year they have not paid. (See R. p. 224 ll. 11-12). Further, Appellants admit they did not pay any

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recorded at Book 859 at Page 540. This is the same plat used to describe the property encumbered by the Declaration.

assessments in 2014, 2015, 2016, 2017 or 2018. (R. p. 202, ll.3-11; p. 226, ll. 7-9; p. 315, ll. 16-21; p. 318, ll. 16-22). Therefore, Appellants have not presented any evidence to contest Respondent's claim for unpaid assessments in the amount of $900.00. Most significantly, Appellants admit they have not paid any money to Respondent or its agents since 2013. (See R. p. 315, ll. 16-21; p. 202, ll. 3-10).

After failed attempts to collect unpaid assessments from Appellants itself, Respondent directed its attorney to file a claim of lien against Appellants' property. Thus, on October 30, 2017, Respondent initiated suit seeking foreclosure of its lien for unpaid assessment. (See generally R. pp. 15-19). Appellants were served with Respondent's suit on November 8, 2017. (R. pp. 23-24). On January 23, 2018, Respondent filed an Affidavit of Default and this matter was referred to the Richland County Master-in-Equity for foreclosure proceedings. (R. pp. 26-27; p. 32).

The initial foreclosure hearing was scheduled for May 14, 2018. At this hearing, Appellants appeared for the first time, with Brian C. Gambrell as counsel; therefore, the hearing was continued until July 30, 2018.[2] However, during the May 14, 2018 hearing, the trial court *sua sponte* stated that Appellants, by and through their counsel, were free to file an Answer. Unfortunately, no transcript for the May 14, 2018 hearing exists. Even still, Appellants assert the Master's *sua sponte* statement lifted the default previously imposed. However, the entry of default was never formally set aside pursuant to Rule 55(c), SCRCP.

Thereafter, Appellants filed an Answer and Counterclaim alleging claims for abuse of process and breach of contract against Respondent. (See R. pp. 47-51). Appellants'

[2] Following the May 14, 2018 hearing, the lower court signed an Order Granting Judgment of Foreclosure and Sale that was electronically filed on June 4, 2018. This order was signed as a result of a clerical error. The parties consented to a vacation of this order at the July 30, 2018 hearing.

counterclaims allege Respondent refused to accept and returned Appellants' payments in order to "illegally" generate a lawsuit and attorneys' fees. (R. p. 50, ¶¶ 32-36; pp. 50-51, ¶¶ 39-41). In addition, Appellants' Answer and Counterclaim demanded a jury trial. (R. p. 51, ¶ B).

In the interim, Appellants were deposed. During their depositions, Appellants admitted they have not paid any money to Respondent since 2013. (R. p. 315, ll. 16-21; p. 202, ll. 3-10). Instead, Appellants testified Respondent refused to resolve the foreclosure case under terms acceptable to Appellants. (R. p. 202, ll. 10-25; p. 203, ll. 2-6: p. 331, ll. 7-14).

In response to Appellants' counterclaims, the undersigned were retained to defend Respondent. (R. p. 357). On July 20, 2018, Respondent filed a Reply to Appellants' Counterclaims and a Motion for Summary Judgment as to Respondent's claim for foreclosure and to dismiss Appellants' counterclaims based largely on Appellants' deposition testimony. (See generally R. pp. 52-56; pp. 57-58). On July 30, 2018, Respondent filed a Memorandum in Support. (See generally R. pp. 64-94). Significantly, Appellants did not file any Memoranda in Opposition to Respondent's Motion. Instead, on July 27, 2018, Appellants filed two Motions for Relief from Judgment pursuant to Rule 60(a) and (b), SCRCP. (See generally R. pp. 59-60; pp. 61-63).

Appellants' Motion asserted the Master's *sua sponte* statement during the May 14, 2018 foreclosure hearing that Appellants could file responsive pleadings relieved Appellants of default judgment pursuant to Rule 60(b). (Id.). Further, the Motion also requested that the trial court transfer the counterclaims to the general docket. (Id.). According to Appellants, a transfer to the general docket was appropriate due to Appellants' timely jury trial demand contained in their Answer and Counterclaim and the causes of action asserted therein were legal and compulsory. (Id.).

On July 30, 2018, the parties again appeared before the Master-in-Equity for a hearing on all outstanding motions. Following this hearing, the Master granted Respondent's Motion for Summary Judgment as to Appellants' counterclaims, thereby dismissing those claims with prejudice as a matter of law, but denied Respondent's Motion for Summary Judgment on its claim for foreclosure. (See generally R. pp. 1-6). As Appellants' counterclaims were dismissed as a matter of law, the Master also found Appellant's Motion was moot—therefore, it was denied. (R. p. 5).

As a result of the trial court granting Respondent's Motion as to the counterclaims, the trial court also determined Appellants' Motions to transfer and relief from judgment were moot—therefore, denied.

Appellants filed a Notice of Appeal with this Court on August 28, 2018. (R. p. 95). Appellants now ask this Court to review the trial court's August 13, 2018 Order granting Respondent's Motion for Summary Judgment as to Appellants' Counterclaims and Denying Respondent's Claim for Foreclosure.

STANDARD OF REVIEW

When reviewing an order granting summary judgment, an appellate court applies the same standard as the court below. David v. McLeod Reg. Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP (2016); Garvin v. Bi-Lo, Inc., 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001). A court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. City of Columbia v. Town of Irmo, 316 S.C. 193, 195, 447 S.E.2d 855, 856 (1994). However, the opposing party may not rest upon mere allegations or denials, but must respond with specific facts showing a genuine issue of material fact. Id. More specifically, a

responding 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." Rule 56(e), SCRCP (2016). A grant of summary judgment is "completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David, 367 S.C. at 250, 626 S.E.2d at 5.

ARGUMENTS

I. Appellants incorrectly assume default was set aside despite a lack of evidence in the record to support such a conclusion.

The trial court's Order on August 13, 2018 specifically provided its ruling did not end the case and only dismissed Appellants' counterclaims against Respondent. Therefore, Respondent would assert that this case, in its entirety, is not properly before this Court.

As set forth in their Initial Brief, Appellants' first and second statements of the issues on appeal erroneously assume default was lifted. Appellants' sole basis for this belief is the Master's *sua sponte* statement that they could file an Answer made during a hearing that occurred without a court reporter; therefore, there is no record of those proceedings for this Court to review. While Respondent does not dispute this *sua sponte* statement was made, no evidence exists in the record supporting that this statement, in and of itself, was intended by the Master and/or effectively set aside the default originally entered against Appellants. Further, no evidence in the record (or lack thereof) supports such a finding. At worst, the record is unclear as to whether or not the default was lifted.

The standard for granting relief from an entry of default is "good cause" as prescribed by the South Carolina Rules of Civil Procedure. Rule 55(c), SCRCP ("For good cause shown the court may set aside an entry of default . . . ."); see Wham v. Shearson Lehman Bros., Inc., 298

S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989) (explaining the standard for granting relief under Rule 55(c) is "good cause"). "This standard requires a party seeking relief from an entry of default . . . to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). "Once a party has put forth a satisfactory explanation . . . the trial court must also consider [the Wham factors]: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." Id. at 607-08, 681 S.E.2d at 888 (citing Wham, 298 S.C. at 465, 381 S.E.2d at 501-02). However, a trial court is not required to make specific findings of fact for each factor if there is sufficient evidence in the record to support the trial court's decision. Sundown, 383 S.C. at 608, 681 S.E.2d at 888. The decision whether to set aside an entry of default is within the sound discretion of the trial court. Williams v. Vanvolkenburg, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994).

While case law does provide that a trial court is not required to make specific findings of fact for each *Wham* factor if there is sufficient evidence in the record to support the trial court's decision, here, the trial court never even believed it had lifted the default and there is insufficient evidence in the record to support such a belief. (R. p. 105, ll. 5-14).

Appellants rely on S.C. Cmty. Bank v. Salon Proz, LLC, 420 S.C. 89, 800 S.E2d 488 (Ct. App. 2017), to support the assertion that the Order of Reference to the Master-in-Equity was improper; however, the facts presented to this Court in Salon Proz are easily distinguishable to those at issue in the present case.

In Salon Proz, a bank filed a foreclosure action against a salon for defaulting on a note and a mortgage. In response, the salon filed an Answer which raised several counterclaims in addition to a timely jury trial demand. The bank filed a Motion to refer the case to the local

Master-in-Equity under Rule 53, SCRCP, and the Clerk of Court incorrectly signed and filed an Order which referred the case to the Master despite the salon's timely filed answer, legal counterclaims and jury trial demand. See id. at S.C. 92. However, this Court held that the case should not have been referred due to the salon's jury trial demand in its Answer that was timely filed to begin with.

Here, the Order of Reference and Affidavit of Default for each Defendant were filed on January 23, 2018. (R. p. 32; p. 25). However, Appellants did not attempt to set aside the default until May 14, 2018 which was also their first appearance in the case, and an answer was not filed until June 1, 2018. (R. pp. 47-51). Appellants then filed two Motions for Relief from Judgment on July 27, 2018, three days before the July 30, 2018 Motion for Summary Judgment hearing. (R. pp. 59-60; pp. 61-63). For the jury trial demand to be proper and Appellants' case to be restored to the general docket, the default would still have to be lifted. However, no evidence in the record suggests this occurred. Instead, the Master's decision to not immediately return the case to the general docket further supports the position that the setting aside of Appellants' default was never intended.

Unlike the salon in Salon Proz, Appellants did not have a timely jury trial demand or an answer that was timely filed when the Order of Reference was signed by the Clerk; therefore, the referral was proper. As the referral was proper, the South Carolina Rules of Civil Procedure conferred jurisdiction the lower court to hear Respondent's motion. ("[T]he master...shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter." Rule 53, SCRCP).

Under the jurisdiction bestowed upon the lower court pursuant to Rule 53, SCRCP and based on the arguments of counsel and evidence presented at the July 30, 2018 hearing, the lower court properly granted Respondent's motion for summary judgment.

II. The trial court properly dismissed Appellants' abuse of process and breach of contract claims on the merits.

A. Abuse of Process

"The essential elements of abuse of process are an ulterior purpose and a willful act in the use of the process not proper in the conduct of the proceeding." Hainer v. American Medical Intern., Inc., 328 S.C. 128, 137, 492 S.E.2d 103, 107 (1997). "There is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." Id.

Appellants allege Respondent filed this suit for "the ulterior purpose of collecting a non-existent debt." (R. p. 50, ¶ 32). Appellants further claim Respondent "returned Defendants' assessment payments inside (sic) of accepting them for the purposes of generating this lawsuit." (Id. at ¶ 34). However, given Appellants' own deposition testimony that they have neither submitted payments to Respondent nor have Respondents returned any payments, Appellants' abuse of process claim fails as a matter of law. (See R. p. 203, ll. 12-25; p. 205, ll. 16-23; p. 317, ll. 10-15).

Appellants' deposition testimony established they have not submitted any payments to Plaintiff since 2014; therefore, Respondent, having received no payments, could not have possibly returned any payments. (Id.).

During Appellants' depositions, the only evidence offered to support the allegation that Respondent refused their payments was in the context of Respondent's refusal to accept payment plans proposed by Appellants. (R. p. 202, ll. 10-25; p. 203, ll. 2-6; p. 331, ll. 7-14; p. 335, ll. 4-7). Appellants' testimony directly contradicts the allegations in their abuse of process counterclaim and does not create any genuine issue of fact that Respondent has prosecuted this foreclosure action for any ulterior or improper purpose. (R. p. 203, ll. 12-25; p. 205, ll. 16-23; p. 317, ll. 10-15).

Taken in the light most favorable to Appellants, the evidence in the record establishes only that Respondent has refused to settle this case under the terms Appellants requested. Respondent's refusal to accept less than the balance due cannot form the basis for an abuse of process claim. Further, Declaration specifically empowers Respondent to seek foreclosure of its lien for assessments not paid within thirty days. (R. p. 77, § 8).

Based on the foregoing, the lower court was correct to determine Respondent was and is entitled to judgment as a matter of law on this cause of action.

B. Breach of Contract

Appellants testified that Respondent was in breach of contract by failing to maintain the common areas within the neighborhood. (R. p. 249, ll. 2-5; p. 326, ll. 5-13). However, Appellants did not make this allegation in their counterclaim. Even if they had, Respondent would still be entitled to summary judgment.

Respondent owns approximately sixteen acres of unimproved property at the rear of the subdivision. (See generally R. pp. 72-87). This area is shown as "Common Area" on the Plat. (See R. pp. 93-94). The Common Area is comprised of almost fifteen acres of wetlands. (Id.). Therefore, Respondent is prevented from developing this area.

Even still, as alleged in their counterclaim for abuse of process, Appellants also claim in their breach of contract counterclaim that Respondent breached its contract with Appellants by failing to accept Appellants' payments and "filed a lien in order to justify higher fees, costs, and attorney's fees." (R. p. 51, ¶ 41). However, as discussed above, both Appellants testified they did not submit any payments to Respondent. (See R. p. 203, ll. 12-25; p. 205, ll.16-23; p. 317, ll. 10-15). Again, Respondent could not possibly refuse to accept payments Appellants admit they never made. Even still, both Appellants admitted they owe Respondent assessments that are more than thirty days past due. (R. p. 202, ll. 3-7; p. 318, ll. 16-25; p. 350, ll. 10-13). The

Declaration specifically empowers Respondent to file a lien to secure charges more than thirty days past due. (R. p. 77, § 8).

Accordingly, Respondent was and is entitled to judgment as a matter of law on Appellants' counterclaim for breach of contract. Therefore, the lower court's order granting summary judgment to Respondent on Appellants' breach of contract claim should be affirmed.

C. In the light most favorable to Appellants, no amount of time for discovery could refute Appellants' deposition testimony.

Appellants assert they were not afforded an adequate amount of time to conduct discovery; however, no additional amount of time for discovery would have led to any materials, affidavits or other documents that could refute the direct testimony of Appellants as discussed above. Appellants unequivocally testified they owed a debt to Respondents and made no payments to Respondent to satisfy or reduce the amount of the debt owed. (See R. p. 203, ll. 12-25; p. 205, ll. 16-23; p. 317, ll. 10-15).

"The judgment sought shall be rendered forthwith if the...depositions...show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c) SCRCP. No additional time for discovery could have created a genuine issue of material fact when Appellants' deposition testimony was the basis for the lower court's granting Respondent's Motion for Summary Judgment as to Appellants' counterclaims.

Therefore, the lower court's Order should be affirmed as to Appellants counterclaims against Respondent.

III. Respondent's lien and right to foreclose arises by agreement between the parties; therefore, a statutory lien is not necessary.

Appellants argue that Respondent cannot file a pre-suit lien or foreclose because no state statute exists giving an HOA that right. However, Appellants' argument overlooks the fact that

South Carolina, as well as the rest of the country, recognizes and enforces contractual and equitable liens in addition to statutory liens.

"A lien can be created only by a contract with the owner of the property . . . or by a statute or by operation of the common law." 51 Am. Jur. 2d Liens § 11. "[A] restrictive covenant is a voluntary contract between the parties. Courts shall enforce such covenants unless they are indefinite or contravene public policy." Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 894, (1987). "It is unquestioned that an owner of land may contract with respect to their property as they see fit . . .". Inwood North Homeowners' Ass'n, Inc. v. Harris, 736 S.W.2d 632, 634 (Tex. 1987) (citing Goodstein v. Huffman, 222 S.W.2d 259, 260 (Tex. Civ. App. – Dallas 1949)). It is well accepted that "[p]romises in deeds for the grantee to perform some act may be expressly or impliedly made a lien upon the land which is subject to foreclosure on breach and which binds the land through constructive notice in the hands of innocent purchasers." 7 G. Thompson, *Commentaries on the Modern Law of Real Property* § 3157 at 93 (J. Grimes ed. 1962).

South Carolina appellate courts have not faced this issue directly; however, our courts have a long history of enforcing HOA liens and foreclosures. In Lovering v. Seabrook Island Prop. Owners Ass'n, several homeowners challenged the validity of a special assessment levied by Seabrook Island POA. Lovering v. Seabrook Island Prop. Owners Ass'n, 289 S.C. 77, 344 S.E.2d 862, (Ct. App. 1986), aff'd as modified on other grounds, 291 S.C. 201, 203, 352 S.E.2d 707, 708 (1987), superseded on other grounds by S.C. Code Ann. § 33-31-302.

While this court ultimately held the special assessment in that case was invalid, the Court specifically held that "a nonprofit corporation has the power to enforce the collection of dues and charges in accordance with the provisions of its by-laws." Id. at S.C. 83.

Most recently, in Wachesaw Plantation East Comm. Svcs. Ass'n, Inc. v. Alexander, this court stated that, "[l]ike an action to foreclose a mortgage, an action to foreclose a lien for the unpaid assessments of a homeowners' association is an action in equity." Wachesaw Plantation East Comm. Svcs. Ass'n, Inc. v. Alexander, 420 S.C. 251, 256, 802 S.E.2d 635, 638, n.1 (Ct. App. 2017).

This court also used a similar analysis in First Fed. Sav. and Loan Ass'n of Charleston v. Bailey. In that case, this Court was tasked with determining the priority between an HOA lien and a purchase-money mortgage. First Fed. Sav. and Loan Ass'n of Charleston v. Bailey, 316 S.C. 350, 450 S.E.2d 77 (1994). The court held that the HOA had an equitable lien that arose when the assessment was fixed and became due. Id. at S.C. 357. The Court cited the S.C. Horizontal Property Act and The Uniform Condominium Act as support for its conclusion. Id. Significantly, this court specifically noted that the restrictive covenants at issue did "not provide a method for enforcing the nonpayment of the assessment charge and lien," therefore, the HOA had to "resort to equity to enforce its charge and lien . . . ." Id. at 355-356. Thus, it is reasonable to infer that had the HOA's covenants provided for foreclosure of the lien, as the Appellants argue here, the HOA would not have had to "resort" to equity to enforce the lien. Instead, the court would have "enforced [the covenants] according to their obvious meaning." Id. at 354.

While our appellate courts have not had an opportunity to rule directly on this issue, several circuit courts have. See Crickentree Homeowners' Ass'n, Inc. v. Manning, 2011-CP-40-7557 (Richland County, Strickland, J.); Farming Creek Homeowners' Ass'n, Inc. v. Barnes, 2013-CP-32-1262 (Russo, J.); Summit Comm. Ass'n, Inc. v. Mullen, 2013-CP-40-1553 (G. Thomas Cooper, Jr., J.); South Wood Comm. Ass'n, Inc. v. Samuel, 2013-CP-40-0147 (Lee, J.); and Woodcreek Farms Homeowners' Ass'n, Inc. v. Weiss, 2014-CP-40-0036 (Lee, J.). The

United States Bankruptcy Court for the District of South Carolina has also held that unpaid assessments attach to an owner's property as a contractual lien when the restrictive covenants so provide. In re: Foster, 552 B.R. 102 (Bankr. D.S.C. 2016).

Additionally, other jurisdictions across the country have found that a homeowner accepting a deed with constructive notice of restrictions granting the lien and foreclosure power "manifest[s] an intent to let the real property stand as security for the obligation," thus creating a valid contractual lien that may be foreclosed in a manner like a mortgage. Bessemer v. Gersten, 381 So. 2d 1344, 1348 (Fla. 1980); see also Leisuretowne Ass'n, Inc. v. McCarthy, 193 N.J.Super 494 (1984) ("foreclosure as a means of enforcing a lien [for unpaid homeowners' associations assessments] has been approved both general authority and case law in other jurisdictions"); Boyle v. Lake Forest Property Owners' Ass'n, 538 F.Supp. 765, 769 (S.D.Ala. 1982); Brendonwood Common v. Franklin, 403 N.E.2d. 1136, 1141 (Ind.App. 1980) (reversing the trial court that failed to order foreclosure of valid liens); Kell v. Bella Vista Vil. Prop. Owners Ass'n., 258 Ark. 757, 528 S.W.2d 651, 653 (1975) (affirming trial court's judgment allowing foreclosure of unpaid assessment liens); Travis v. Trustees of Lakewood Park, 2010WL3488522 (Tenn. Ct. App. 2010) (holding a community association was entitled to seek a personal judgment for unpaid assessments or foreclosure of the subject real property); Inwood, 736 S.W.2d at 636 (holding state homestead provisions does not prohibit foreclosure of homeowners' association assessments liens).[3] The courts in Leisuretown and Inwood specifically noted that they were unable to locate any reported opinion finding that a community association did not have the authority to foreclose a lien for unpaid assessments. Leisuretown, 193 N.J.Super at 502; Inwood, 736 S.W.2d at 636, n.1. Further, the Mississippi Supreme Court

[3] Some of the states referenced have since enacted statutory provisions authorizing the right to file and foreclose liens for unpaid community association assessments. (Fla. Stat. § 720.3085;

even went so far as to say "it would be useless and ineffectual to create a covenant running with the land unless it also imposed on the property a lien for its enforcement. Nor is it necessary that the deed containing a covenant of this type expressly state that it shall constitute a lien." Mendrop v. Harrell, 233 Miss. 679, 692, 103 So. 2d 418, 424 (1958).

Appellants unambiguously granted Respondent a lien on their property for unpaid assessments by accepting and agreeing to the terms of the Declaration. The Declaration is a contract that must be enforced by its plain terms. Because Appellants granted Respondent a contractual lien, Respondent need not resort to statutory authority to perfect a lien and foreclose the lien for unpaid assessments. Therefore, Respondent was acting within its previously agreed upon authority when it foreclosed on Appellants' property for their unpaid assessments.

IV. Respondent has an equitable lien in the subject property; therefore, statutory grounds are unnecessary.

In addition to a contractual right to lien, Respondent also has an equitable lien. "In equity, to charge property means to impose a burden, duty, obligation or lien; to create a claim against the property." Bailey, 316 S.C at 356, 450 S.E.2d at 80. "A charge is a lien, encumbrance, or claim which is to be satisfied out of the specific thing, or proceeds thereof, to which it applies." Id. 316 S.C at 356, 450 S.E.2d at 80. As to equitable liens, this court has held:

> For an equitable lien to arise, there must be a debt, specific property to which the debt attaches, and an expressed or implied intent that the property serve as security for payment of the debt. . . Even though an equitable lien is not judicially recognized until a judgment is entered declaring its existence, the lien relates back to the time it was created by the conduct of the parties.

Regions Bank v. Wingard Prop., Inc., 394 S.C. 241, 250, 715 S.E.2d 348, 353 (Ct. App. 2011) (internal citations omitted).

Burns Ind. Code Ann. § 32-28-14-9; and Tex. Prop. Code § 204.010). However, each of the decisions cited herein were decided before such statutory provisions were in effect.

In the context of homeowners' associations, our courts have held that when covenants sufficiently identify property subject to an equitable lien, the lien attaches when lot owners fail to pay assessments as they come due. Bailey, 316 S.C at 357, 450 S.E.2d at 81.

Here, the Declaration specifically identifies the property subject to the Declaration and the covenants contained therein are part of Appellants' chain of title. The Declaration also expressly demonstrates the intent for this property to serve as security for the payment of assessment debt. (R. p. 75, § 1). Therefore, Respondent's lien was created by Appellants' failure to pay assessments when they became due. Because Respondent's equitable lien right is clearly established, there is no need to resort to statutory authority to file a notice of lien or foreclose that lien. As a result, Respondent's foreclosure is a proper remedy.

V. An action to foreclose an HOA lien is an action in equity; therefore, foreclosure is a proper remedy.

It is well settled law in South Carolina that lien holders are entitled to foreclosure of their lien, a money judgment, or both. Our Supreme Court has stated that "[a] mortgagee who has a note and mortgage to secure a debt has the option to either bring an action on the note ***or to pursue a foreclosure action.***" Lever v. Lighting Galleries, Inc., 374 S.C. 30, 33, 347 S.E.2d 214, 216 (2007) (emphasis added). As previously discussed, this Court recently held that "[a]n action to foreclose a lien for unpaid assessments of a homeowners' association is an action in equity." Wachesaw, 420 S.C. at 256, 802 S.E.2d at 638, n.1. In support of this holding, the court cited S.C. Code § 27-31-210(a) ("providing for an action to foreclose a lien for unpaid condominium regime fees and allowing the action to be brought 'in like manner as a mortgage of real property'") and Dockside v. Detyens, 294 S.C. 86, 88, 362 S.E.2d 874, 875 (1987) ("interpreting section 27-31-210(a) to require the 'treatment of assessment lien foreclosures as actions in equity'"). In doing so, this court clearly indicated that foreclosure of a lien for unpaid homeowners' association assessments is to be handled like an action to foreclose a condominium

lien. Further, our Supreme Court has previously held those condominium assessment liens are equitable actions that are to be handled in the same manner as a mortgage of real property. Dockside, 294 S.C. at 87-88, 362 S.E.2d at 875.

Accordingly, all assessment lien foreclosures, whether by a horizontal property regime or an HOA, are equitable actions and the associations are afforded the same options as the mortgagees in Lever v. Lighting Galleries. Therefore, the assessment lien in this case should be treated no differently and Respondent should be allowed to pursue the foreclosure.

CONCLUSION

The lower court's Order Granting Plaintiff's Motion for Summary Judgment as to Defendants' Counterclaims and Denying Plaintiff's Claim for Foreclosure was proper based on the contradictory nature of Appellants' deposition testimony in comparison to the allegations in their counterclaims. Specifically, their testimony admitting to both unpaid assessments and no attempts, other than proposing payment plans to Respondent, cannot support allegations of abuse of process or breach of contract as a matter of law.

Further, in the event an action of foreclosure for unpaid HOA assessments is properly before this Court, Respondent's lien arose out of an agreement between the parties for specifically identified property; therefore, Respondent has an equitable lien for which foreclosure is a proper remedy.

Based on the foregoing, the lower court's order should be affirmed and this case should be returned to the Master-in-Equity for a foreclosure hearing.

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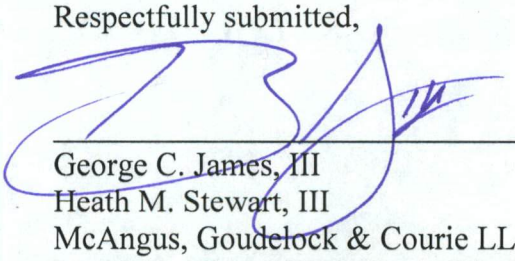
Respectfully submitted,



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February 13, 2019
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Master-In-Equity

The Honorable Joseph M. Strickland, Master-In-Equity

Case No. 2017-CP-40-06634

The Homestead Property Owners Association, Inc.,.....Respondent,

v.

Wanda J. Miller & Orlando F. Miller,.....Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Respondent's Brief of The Homestead Property Owners Association, Inc., complies with Rule 211(b), SCACR.

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