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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY

COURT OF COMMON PLEAS FOR SPARTANBURG COUNTY

The Honorable Gordon G. Cooper, Master-in-Equity

Case Number: 2009-CP-42-5129

Katheryna Mulholland-Mertz.....Appellant.

v.

Corie Crest Homeowners Association of Spartanburg, Inc., Richard T. Biggs, Kathleen A. Biggs, James Hannah, and Elizabeth A. Hannah .....Respondents

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BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the lower court commit error when it found that Appellant did not show any right to relief pursuant to Rule 41(b), SCRCP even though the court was required to view all evidence most favorable to the Appellant under the motion for Summary Judgment standard?

II. Did the lower court commit error when it found that the amendments to the Restrictions recorded after the temporary restraining order was issued did not violate Section 41 of the Restrictions because Section 41 gave the Respondent, Corie Crest Homeowners Association of Spartanburg, Inc. (**Association**), the right to amend the Restrictions before October 1, 2040?

III. Did the lower court commit error when it found that Section 41 of the Restrictions prohibited only termination of the Restrictions until October 1, 2004, thus misapprehending the language of such section?

IV. Did the lower court commit error when it failed to consider that the Appellant and other homeowners of the **Association** were denied the opportunity to vote on amendments to the Restrictions, in violation of Section 38 of the Restrictions and Article II, Section 2 of the By-Laws of the Association?

V. Did the lower court commit error when it failed to find that Respondents violated Section 2, 7 and 41 of the Restrictions, thus preventing the requirement to consider equitable doctrines over enforcement of such Restrictions?

STATEMENT OF THE CASE

On September 17, 2009, Appellant brought this action against Respondents alleging violations of Declarations of Protective Covenants, Conditions Restrictions, and Easements of Corie Crest Subdivision (**Restrictions**) seeking a temporary and permanent injunction to prohibit the construction of storage buildings onto the property of Corie Crest Subdivision. Appellant also requested an award of attorney's fees and costs to enforce compliance of the Restrictions.

The Respondents filed an Answer on October 22, 2009, denying the relief sought by the Appellant, demanded a jury trial and requested an award of attorney's fees.

Initially, a Joseph P. Denicola was named a party defendant to the this case because he had a detached storage building on his property when Appellant filed this action. Mr. Denicola subsequently removed that building through an agreement between counsel who signed a stipulation of dismissal which allowed him to be struck from the case along with the provision that the Appellant and Mr. Denicola be responsible for his/her own attorney's fees.

After certain discovery had taken place, Respondents filed a Motion for Summary Judgment and a Motion to strike Appellant's husband from the case.

On May 15, 2010, Circuit Court Judge J. Derham Cole heard the Respondents' motions and Appellant's motion for her Temporary Injunction.

Circuit Judge Cole filed his Order on June 15, 2010, denying Respondents' Motion for Summary Judgment, and granting Appellant's Motion for Temporary

Restraining Order. Judge Cole granted Respondents' Motion to Strike Appellant's husband from the case without objection from Appellant's counsel.

Appellant subsequently filed an Amended Complaint on January 13, 2011, which alleged that subsequent to the Temporary Restraining Order issued against Respondents on June 15, 2010, the Respondent **Association**, without notice or vote from Appellant and others, amended the Restrictions on August 25, 2010, and recorded the same at the Register of Deeds for Spartanburg County on August 26, 2010. Appellant requested the lower court, in addition to the original relief sought, that it prohibit the enforcement of the Amended Restrictions, declare the Amended Restrictions null and void, and grant her additional attorney's fees and costs. Respondents on April 28, 2011, filed their Amended Answer denying Appellant's amended relief and requested attorney's fees and costs..

This case was subsequently referred to the Honorable Gordon G. Cooper, Master-in-Equity for Spartanburg County, through a Consent Order of Reference signed by Circuit Judge Mark Hayes on March 24, 2011.

The Master-in- Equity heard testimony on August 24, 2011, and August 25, 2011, and at the close of Appellant's case, granted Respondents' Motion to Dismiss the case pursuant to Rule 41(b), SCRCP. A written Order was issued confirming the court's verbal findings on September 9, 2011.

On September 22, 2011, Appellant filed a Motion to Amend Findings of Facts and Conclusions of Law and a Motion for New Trial pursuant to Rule 52(b), SCRCP. A

hearing on these motions was held on February 23, 2012, and the Court issued an Order denying Appellant's post-trial motions on March 8, 2012.

On March 20, 2012, Appellant served her Notice of Appeal upon counsel for Respondents.

ARGUMENT I

THE APPELLANT PRESENTED EVIDENCE SUFFICIENT TO WITHSTAND THE MOTION TO DISMISS HER CASE PURSUANT TO RULE 41(b), SCRCP.

This case involves an action to enforce Restrictive Covenants by injunction; therefore, this action is one in equity. Buffington v. T.O.E. Enterprises, 383 S.C. 388, 680 SE2d 289 (2009). Since this case is an appeal from an equitable proceeding, the Appellate Court may find facts in accordance with its own view of evidence. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 86, 211 SE 2d 773, 775 (1976). This standard permits a broad scope of review. Buffington v. T.O.E. Enterprises, 383 S.C. 389, 680 SE2d 293 (2009).

Rule 41(b), SCRCP, allows a defendant to move for a dismissal in cases tried without a jury on the ground that Plaintiff has shown no right for relief based upon the facts and the law. When a lower court is considering a dismissal under those circumstances, the standard for summary judgment applies. The lower court must view all evidence in the light most favorable to the non-moving party. It is only appropriate to grant judgment for the moving party when there is no genuine issue of material fact. Ex Parte: USAA,, 365 S.C. 50, 614 SE2d 652, 653 (Ct. App. 2005).

In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the non-moving party. Sauner v. Public Service Authority of S.C. 354 S.C. 397, 404, 581 SE2d 161, 165 (2003). Summary judgment is improper when there is an issue as to the

construction of a written contract and the contract is ambiguous because intent of the parties cannot be gathered from the four corners of the instrument. Construction of an ambiguous contract is a question of fact to be decided by the trier of fact. Restrictive covenants are construed like contracts. See Matsell v. Crowfield Plantation, 393 S.C. 65, 710 S.E. 2d 90 (Ct. App. 2011).

Appellant presented her testimony, and testimony of witnesses Christine Stenger, Terry Burgess, Robert Mark Cramer and real estate appraiser Woodrow W. Willard, Jr. On August 24, 2011, and a Robert B. Perry, III, on August 25, 2011. She also introduced seventeen (17) exhibits in support of her injunctive relief.

Appellant claimed that Respondents Richard T. Biggs and Kathleen A. Biggs (**BIGGS**) constructed a garden shed, and Respondents James Hannah and Elizabeth A. Hannah (**HANNAH**) constructed a "lean-to" building in violation of the restrictions. Defendant Corie Crest Homeowners Association of Spartanburg, Inc. **(ASSOCIATION)**, through its Architectural Committee, approved these off-site constructed storage buildings.

Appellant emphasized that these buildings are prohibited under Section 2 of the Restrictions.

> [Single Family Residential use]: "no lot shall be used except for private, single family, residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than one detached single-family dwelling, not to

exceed two (2) stories in height, and, if approved in advanced in writing, a private detached garage."

Appellant further cites Section 7 of the Restrictions in part:

[Approval of Building Plans - Special Conditions]: "No building or structure, whether it is a dwelling, garage, fence, or driveway shall be erected or altered on any lot until building plans, elevations, location and specifications have been approved in writing by the developer or its nominee."

Appellant furthermore makes reference to Section 18 of Restrictions

[Portable or Metal Buildings Prohibited]: "Portable buildings, metal storage buildings or other similar off-site constructed storage buildings are prohibited to be placed or remain on any lot unless approved by Developer and Association."

[Plaintiff's Exhibit 1, R. pp.268-281]

After Respondents' Motion for Summary Judgment was denied by Judge Cole and Appellant's Motion for Temporary Restraining Order was granted, the Respondent **Association** amended Section 2 of the Restrictions and Section 7 of the Restrictions.

Section 2 of the Amended Restrictions read as follows:

"No lot shall be used except for private, single family residential purposes, and no residence shall exceed two (2) stories in height. No lot or portion thereof shall be used as a

road or easement or other means of access to adjoining property without the express consent of the Association."

The second sentence of Section 2 of the Restrictions was deleted in its entirety which prohibited any other buildings other than a private detached garage. [Plaintiff's Exhibit 10, R. p. 295]

Section 7 of the Restrictions was amended in pertinent parts:

"A. No detached garage, outbuildings, hobby-type structures, fences or roofed structures, shall be erected, altered, or placed on any lot unless the building plans, specifications, and plot have been approved in writing by the Architectural Committee of the Board of Directors."

"C The pitch for the roof of each outbuilding or other approved structures shall be in harmony with the dwelling." [Plaintiff's' Exhibit 10, R pp. 295-298]

This section added *inter alia* the phrases "outbuildings" and "hobby-type structures" which could be approved by the Architectural Committee. Section 7(C) of the Amended Restrictions deleted the minimum pitch of the 6/12 for a roof. The amendment struck the word "dwellings" and replaced it with the word "outbuilding".

The only reasonable inference that can be drawn to amend the Restrictions was to delete the clear language of Section 2, sentence 2 of the Restrictions, and add phrases of "outbuildings", " hobby-type structures", under Section 7(A) and "outbuilding

under Section 7(C) of the Restrictions so Respondents **Biggs** and **Hannah** would be in conformity with their structures already placed upon their property. Alternatively, the other reasonable inference drawn would be to strike conflicting sections and to make ambiguous phrases unambiguous and free of more than one interpretation.

Appellant had a legitimate argument to the lower court when Respondent **Association** made the decision to amend the Restrictions. It wanted to do away with clear sections of the Restrictions or by this action Respondent **Association** admitted that it needed to make language of Section 2 and Section 7 uniform, unambiguous, and with one interpretation. The lower court needed to hear testimony and other evidence of the Respondents before it made a decision in this case. For this reason, granting Respondents' motion under Rule 41(b), SCRCP was made in error and should be reversed.

Testimony further supported Appellant's argument in this instance.

In her testimony, Appellant recalls a conversation with Respondent **Richard Biggs** when he told her the Martins' shed and Denicola's shed were temporary structures and the only thing could be built was a detached garage. [R, page 103, lines 1-11]

Appellant makes further reference that Respondent **Richard Biggs** constructed a garden shed similar to the one he complained about regarding Mr. Denicola. [R, p. 115, lines 1-17].

Ms. Mulholland further testified that the application for the garden shed by Respondents **Biggs** was approved under Section 7(A) of Restrictions which makes no description of this structure being subject to review and approval by the **Association** or the Architectural Committee. [R, p. 117 and p. 118, lines 1-9]. Section 7(A) does not allow a garden shed to be constructed on approval by any entity.

Appellant identified Respondents **Hannah**'s application to the Architectural Committee as a patio cover storage or a "lean-to" building. She testified it is not a detached garage and not in harmony with the **Hannahs**' home. [R, p. 124, lines 1-15]. Throughout Appellant's testimony, she was clear about her opinion that Respondents had violated the Restrictions. [R, p. 144, lines 22-23].

Even on cross-examination, opposing counsel ask Appellant to admit the Restrictions are ambiguous because Section 2 says one thing and Section 8 says something else. [R, p. 159, lines 1-9]. Counsel for Respondents requests Appellant to admit Section 2 and Section 20 of the Restrictions are ambiguous [R, p. 161, lines 6-12]. Counsel again sought admission of Appellant that certain sections were ambiguous. [R, p. 162, lines 13-15]

Witness Christine Stenger testified that she had read the Restrictions and there could be no detached structures within the subdivision [R, p. 175, lines 7-20]. She further testified that Section 7-A of the Restrictions made no reference for a patio cover for pool support equipment such as Respondents **Hannah**. [R, p. 177, lines 18-24].

Opposing counsel also sought an admission from Ms. Stenger that Section 2 and 20 were conflicting, and thus ambiguous. [R p. 183, lines 3-9]

Witness Terry Burgess testified Respondent **Richard T. Biggs** complained about the detached structures that the Martins and Mr. Denicola had built within the subdivision and did go to an attorney to discuss removal of the said buildings. [R p. 191, lines 1-24]. Mr. Burgess further testified that the construction of the garden shed by Respondents **Biggs** violated the Restrictions. [R, p. 124, lines 17-25].

Witness Robert Marc Cramer testified that Respondent **Richard T. Biggs** complained about sheds prior to construction of his own and also wanted him to go voice his concern to Hinson Management Agency (Property Manager). Mr. Cramer also testified that the "lean-to" building of the **Hannahs** was not in harmony with their existing structure and that **Hannahs'** application for approval under Section 7 made no reference to approval of such structure.

Witness Woodrow W. Willard Jr. testified as an expert witness and on cross-examination he stated there seem to be a contradiction of Section 2 and 18 of the Restrictions. Even opposing counsel agreed with Mr. Willard's opinion. [R, p. 229, lines 6-19].

Viewing the above testimony as most favorable to the Appellant and supported by referenced exhibits, the court should have heard the defense and reply from the Respondents in their actions to approve their storage buildings, to allow construction of these buildings, and their reasons to draft and record the Amended Restrictions before

issuing any decision upon the merits. The lower court's decision to grant the Motion under Rule 41(b), SCRCP was improper and erroneous.

ARGUMENT II

THE LOWER COURT COMMITTED ERROR WHEN IT FOUND THAT THE AMENDED RESTRICTIONS DID NOT VIOLATE SECTION 41 OF THE RESTRICTIONS THAT PROHIBITED ANY AMENDMENTS UNTIL OCTOBER 1, 2040.

Section 41 of the Restrictions [Terms of Enforcement And Amendments] contains the following language in part:

> "These covenants, conditions, easements and restrictions shall be binding upon the Developer, its successors and assigns, and upon all future owners, their respective heirs, successors, and assigns, and all parties claiming under them until October 1, 2040, at which time the terms hereof shall be automatically extended for successive periods of ten (10) years thereafter, unless the then owners owning at least two-thirds (2/3rds) of the lots in Corie Crest agree in writing to terminate or change the same. The terms and conditions of this instrument may be amended or changed only upon written agreement of the owners owning at least two-thirds (2/3rds) of the lots in Corie Crest."

After the Motion for Summary Judgment was denied and the Temporary Restraining Order was granted in June 2010, the **Association** through its Board of Directors prepared and recorded Amended Restrictions on August 26, 2010.

The language is unambiguous and capable of just one interpretation. Section 41 clearly prohibits any amendment or termination of the Restrictions of Corie Crest Subdivision until October 1, 2040. If the Restrictions are not changed or terminated, the Restrictions can go for another ten (10) years.

> "Words of restrictive covenants will be given the common, ordinary meaning attributed to them at the time of execution. Restrictive Covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." Taylor vs. Lindsey, 332 S.C. 1, 498 S.E. 2d 862 (1998).

Respondents did not like the decision of the lower court when it denied their Motion for Summary Judgment and issued a Temporary Restraining Order for prohibition of detached structures; therefore, they prepared and recorded the Amended Restrictions approximately forty-five (45) days later. They did so in total disregard of the clear language of Section 41 that required them to wait another thirty (30) years.

Section 41 was inserted to make it clear to all present and future property owners of the subdivision that for thirty-five (35) years the Developer, Board of Directors for the **Association** or property owners could not add or delete language that would

adversely affect the value of their homes, the amenities of the community, and the maintenance of any common areas. In the preamble of the Restrictions, the developer represented that his subdivision would be a residential community. He wanted to protect and preserve the property values and amenities of the subdivision, and he wanted to provide maintenance of the common areas. A property owner had the absolute right to rely on and be guided by the Restrictions and further be assured and confident that no amendment could be made at any time before October 1, 2040, which could cause a decline in the value of his/her home, create a mix use development or altogether terminate the Restrictions and leave the use and development of the subdivision unrestricted and at the arbitrary whim and wish of each owner. Prior to August 26, 2010, each property owner knew the time frame for any amendments. The Amended Restrictions now creates uncertainty and runs completely contrary to the original Restrictions.

The lower court incorrectly interpreted Section 41 and committed error when it approved the Amended Restrictions.

ARGUMENT III

THE LOWER COURT COMMITTED ERROR WHEN IT FOUND THAT SECTION 41 OF THE RESTRICTIONS ONLY PROHIBITED "TERMINATION" OF THE RESTRICTIONS UNTIL OCTOBER 1, 2040. (*EMPHASIS mine*)

The Order of the lower court found that Section 41 had levels that were distinguishable from each other. The first level was that the Restrictions could not be terminated. The second level was that the Restrictions can be amended or changed upon two-thirds (2/3rds) vote of the owners at any time.

Appellant respectfully argues the lower court has misapprehended the language of Section 41. The language must be read as a whole and it does not contain two (2) levels. The "second" level reaffirms the procedure on the requirements to amend the Restrictions and not make it independent of the "first" level. The reasoning underlying this facet of the order of the lower court is constrained because, theoretically, a Board with approval of required percentage of votes could draft and record amendments to Restrictions that could eviscerate the original Restrictions but nonetheless claim it never **terminated** the instrument.[*emphasis mine*] In its Order, the lower court incorrectly construed the intent of the developer that was not expressed in the Restrictions.

> "A court is without authority to consider parties' intention; therefore, words cannot be read into a contract to impart an

intent." Pee Dee Stores, Inc. V. Doyle, 381 S.C. 234, 241

672 SE 2d, 799, 802 (Ct App. 2009)

Witness Christine Stenger testified that Section 41 was clear and the Respondent **Association** had no need or right to amend the Restrictions on August 25, 2010. [R, p 17, lines 23-25, p 18, lines 1-11.]

Appellant testified that her interpretation of Section 41 was that the Restrictions could not be changed until the year 2040. [R, p. 136, p. 137, lines 1-19].

Appellant further testified that Respondent **Kathleen A. Biggs** admitted to her that Restrictions could not be changed until 2040. [R, p 138, lines 3-11].

Notwithstanding the premise the Board was without authority to amend the Restrictions, the Appellant can make a legitimate claim that Section 41 has conflicting language and is subject to more than one reasonable interpretation. The lower court needed to hear evidence from Respondents, including testimony of the available developer about the meaning of Section 41.

The lower court committed error when it granted Respondents' Motion pursuant to Rule 41(b), SCRCP, upon the ground Section 41 allowed amendments to Restrictions without requiring testimony from Respondents as to their purpose, rationale and authority under Section 41.

ARGUMENT IV

THE LOWER COURT COMMITTED ERROR WHEN IT DISREGARDED THE TESTIMONY OF THE APPELLANT AND OTHER WITNESSES THAT THEY WERE DENIED THE OPPORTUNITY TO VOTE ON THE AMENDED RESTRICTIONS

The testimony of Appellant, witnesses Stenger, Cramer, Burgess, and Perry was not in dispute to the assertion that none of them were aware of an effort to amend the Restrictions.

It is further undisputed they were not given an opportunity to vote on any amendments. Apparently, there were other property owners who also did not know about the amendments since presumably twenty-four (24) owners voted and twelve (12) did not vote [Plaintiff's Exhibit 11, R. pp. 299-300]. Appellant and other witnesses learned that certain members of the Board went to doors of selected property owners during the night to solicit their vote for proposed restrictions.

Section 36(B) of Restrictions [MEMBERSHIP AND VOTING RIGHTS IN THE ASSOCIATION] states Class A members [Appellant and her witnesses] shall be entitled to one (1) vote for each lot they hold an interest in either a single or joint manner. In Appellant's case, she held complete title to her home. Article II of the By-Laws [Membership] states in Section 2 that all persons who hold interest shall be members and entitled to vote. [Plaintiff's Exhibits 13, 14, 15, and 16, R. pp. 303-327].

Article III of the By-Laws, Section 2, provides the mechanism for Special Meetings being called by the Board of Directors. Section 4 of the By-Laws contains procedural notification of a Special Meeting through a printed notice to members and the method of delivery. [Plaintiff's Exhibit 13, Article III, Section 2 and Section 3, R. pp 303-304].

Respondent **Association** not only failed but consciously refused to allow all members to exercise their right to vote on one of the most fundamental aspects of a community subject to Restrictive Covenants. A vote in the middle of a night is such a dark abuse of due process that one lawful voter and concerned citizen can imagine in our country.

It is most ironic that the Appellant brings her case in a court of equity. Equitable principles should apply in the manner and procedure that amendments to Restrictions are voted on before it can be properly identified as a valid instrument. Any governmental entity that denied a citizen the legitimate right to vote would be met with severe denunciation and with profound consequences, including an Order for a new election. There should be no difference if an attempt was exercised to deny members right to vote on fundamental issues within their community. The consequence of such egregious conduct would be replaced with a call for a special meeting with required advanced written notice given to all members, stating the purpose of such meetings and an opportunity to vote for proposed amendments to Restrictions.

The lower court committed error when it failed to consider the process implemented by Respondents that excluded the voting rights the Appellant and eleven (11) other owners of Corie Crest when it recorded the Amended Restrictions.

ARGUMENT V

THE LOWER COURT COMMITTED ERROR WHEN IT FAILED TO FIND RESPONDENTS VIOLATED SECTIONS 2, 7, AND 41 OF THE RESTRICTIONS AND, AS SUCH, DID NOT CONSIDER THE EQUITABLE DOCTRINES OVER ENFORCEMENT OF SUCH RESTRICTIONS.

The Appellant has provided reasons in preceding Arguments that Respondent **Association** had violated Section 2, 7, and 41 of the Restrictions, and Respondents **Biggs** and **Hannahs** have violated Section 2 and 7 of the Restrictions.

Appellant has sought a permanent injunction against Respondents **Biggs** and **Hannahs**. Appellant had sought permanent injunction against Respondent **Association** and a declaration that the lower court determine Amended Restrictions *null* and *void*.

The Appellate Court has the discretion to find facts with its own view of evidence. If the Court finds Respondents have violated one or more sections of the Restrictions, and remands this case to the lower court, then Appellant requests what doctrines of equity, if any, should the lower court consider for Respondents in this action. Buffington v. T.O.E. Enterprises, 383 S.C. 388, 680 SE2d 289 (2009).

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the lower court.

Respectfully submitted,

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October 10, 2012

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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COURT OF COMMON PLEAS FOR SPARTANBURG COUNTY

THE HONORABLE GORDON G. COOPER, MASTER-IN-EQUITY

CASE NUMBER: 2009-CP-42-5129

KATHERYNA MULHOLLAND-MERTZ.....APPELLANT.

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief complies with Rule 211(b), SCARC.

October /0 **2012**

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PROOF OF SERVICE

I certify that I have served the **FINAL BRIEF OF APPELLANT** on ***A. TODD DARWIN JR.,*** Esquire, Attorney for the Respondents, by depositing a copy in the United States Mail, postage prepaid, on October 11, 2012, addressed to him at Holcombe Bomar, P.A., Post Office Box 1897, Spartanburg, South Carolina 29304

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