THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master in Equity

Appellate Case No. 2012-213333

The St. Clements Homeowners Association, Inc., Appellant,

v.

BE-MI, Inc., Respondent.

REPLY BRIEF

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FACTS

Appellant respectfully disagrees with most of the contentions of the Initial Brief of Respondent, but many of those contentions are already rebutted in the Initial Brief of Appellant, so Appellant will try to limit repetition while replying here to a few specific allegations of Respondent's Brief.

Respondent repeatedly contends that Appellant's board of directors approved construction of the side deck, but the record is devoid of evidence of such approval. To the contrary, the record contains abundant evidence that the board never voted to grant such approval (R. p. 110, line 17 - p. 111, line 5; p. 321, line 23 – p. 322, line 5; p. 322, line 23 - p. 323, line 14). Respondent knew or should have known that no unit owner at St. Clements was or is allowed to affix any object to a common area without the written consent of the board, since Respondent was on record notice of this restriction in the Master Deed when it purchased its pool bar commercial unit [R. p. 420, 7.0(d)].

Respondent repeatedly contends that Dwight Cox was the developer of St. Clements, but the developer was St. Clements, Limited, a California limited partnership of which Mr. Cox was the president (R. p. 415, p. 440, p. 473). Any consent or actions by Dwight Cox in connection with the construction of the side deck in 1990 are irrelevant because all occurred well after the filing of the Master Deed in 1987, and there is no evidence that Mr. Cox or the developer had any authority to bind Appellant or to modify the restrictions of the Master Deed to allow the side deck.

Respondent contends that various members of Appellant's board and past presidents have enjoyed frequenting the side deck, but the record is devoid of any such evidence except that Mr. Melton used it many years ago.

Respondent contends that when Appellant decided to enhance access to the beach at St. Clements in 1996, it utilized the side deck and integrated it into the construction of its own deck. To the contrary, Appellant merely constructed a "bypass" wooden walkway [not a deck] around the edge of the side deck so as to allow homeowners' access to the wooden, dunes walkover to the beach that the side deck obstructs (R. pp. 491-497; pp. 535-540; p. 254, lines 8-11). At the same time, yellow stripes were painted for safety to indicate the step up onto the new beach access walkway (R. p. 254, lines 21-25). None of this was any indication of Appellant's enhancement, acceptance or approval of the side deck.

RES JUDICATA ISSUES

Respondent cites the case of Judy v. Judy, 393 S.C. 160, 712 S.E.2d 408 (S.C. 2011) for the proposition that the defense of *res judicata* will bar the raising of "...any issues which **might have been raised** in the former suit." However, Judy affirms that the four tests cited on pages 17 and 18 of the Initial Brief of Appellant should be considered as factors in determining whether a claim might or should have been raised in a prior suit. As explained in that Brief, none of those 4 tests can be met in the present case. Furthermore, in Judy the Supreme Court applied *res judicata* because the Complaints in both suits alleged intentional destruction of a pond and dam, and in the first suit expert testimony was presented as to the value of the subject Pond Tract had the dam and pond not been destroyed. In the present case, as Respondent admits on page 4 of its Brief, Appellant sued Respondent in 2003 alleging that Respondent's use [emphasis added] of the pool bar violated the Master Deed but did not claim in that first suit that the side deck violated the Master Deed. As explained in the Initial Brief of Appellant, the 2003 suit

alleged only bad behavior [i.e., noise – R. p. 400, line 17- p. 403, line 9] at the pool bar, while the current suit alleges only the physical encroachment of the side deck onto a common area. The subject matter, primary wrong, evidence, and claims in the 2003 suit are all different from those in the present suit, so *res judicata* should not apply.

ESTOPPEL ISSUES

Respondent cites Archambault, *et al* v. Sprouse, 215 S.C. 336, 55 S.E.2d 70 (S.C. 1949) to argue unreasonable delay in asserting claims, but in that same case the Supreme Court stated: "After the right has been invaded under circumstances which would not defeat a plaintiff in seeking relief, and no substantial harm is shown to have accrued to the wrongdoer from delay, there is not the same imminent necessity for early enforcement of demands as exists before conditions become fixed. Mere lapse of time...is not necessarily a decisive consideration." *Id,* p. 341. This quote is applicable to the present case. It is uncontested that the side deck was constructed without Appellant board's written consent, as was required by the Master Deed for any object to be affixed to a common area, and there is no evidence that Respondent has been substantially harmed by Appellant's delay in forcing removal of the side deck.

Shortly after the side deck was constructed, Appellant made inquiry (R. pp. 487-488) of Respondent as to whether Respondent had received written approval from Appellant to cover common area parking spaces with the side deck. Respondent's president misled Appellant by giving false, verbal assurance to Appellant that he did have written permission for use of the parking spaces (R. pp. 489-490), even though at the trial of this case Respondent's president admitted that he never had any such written consent

from Appellant's board to build on the parking spaces (R. p. 293, lines 15–25[1]). Furthermore, when Respondent failed to produce any written consent (R. p. 290, lines 10-23) the Appellant notified Respondent in 1992 that the side deck was in violation of the Master Deed, that Appellant had the right to compel removal of the structure, and that any failure to enforce that right, however long continued, would not be deemed a waiver of the right to do so thereafter [R. pp. 500-501; See also R. p. 437, 14.0 (d)-(f)]. A party seeking equity must do equity. As this Court found in Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 259, 715 S.E.2d 348, 358 (Ct. App. 2011):

> This equitable maxim is commonly phrased as "[h]e who seeks equity must do equity." Provident Life & Accident Ins. Co. v. Driver, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (1994). This principle applies to one who affirmatively seeks equitable relief. City of Columbus v. Mercantile Trust & Deposit Co., 218 U.S. 645, 662, 31 S. Ct. 105, 54 L. Ed. 1193 (1910). In order for justice to be done between parties, a party is required to do equity when asking the court to invoke the aid of equity. *See* Ingram v. Kasey's Assocs., 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000) (declining to grant a plaintiff's request for specific performance where the plaintiff misled the defendants)....

Respondent misled Appellant and is seeking equity without clean hands. Respondent should not prevail in seeking its affirmative equitable defenses on the basis that Appellant has delayed enforcement of its right to have the side deck removed, especially since there

[1] The "piece of paper" referenced here was a 2002 letter from Mr. Melton to Respondent's attorney that was ruled inadmissible at trial (R. p. 192, line 18 – p.197, line 11), and the only evidence of any permission Respondent obtained "orally" was from Marshall Melton and Dwight Cox (R. p. 239, line 20 – p. 240, line 1).

is no evidence that Respondent has been harmed by such delay.

Respondent contends that Appellant does not contest that Respondent meets the elements of an estopped party. This is incorrect as shown by the Initial Brief of Appellant. Respondent further argues that review of the Master Deed would not have revealed to Respondent whether the board had given written approval for the construction of the side deck, but Appellant has never contended that it would. When the Master Deed requires that, "No unit owner shall cause any object to be fixed to common areas...without the written consent of the board of the Association being first had and obtained," [R. p. 420, 7.0(d)] it clearly places upon the unit owner [Respondent] the obligation to acquire such written consent before proceeding with construction.

The side deck was constructed in the spring of 1990 (R. p. 242, lines 6 – 10). Even though Mr. Melton was the Association's president during that time and was serving as one of three members of the board (R. 321, lines 11-19), at no time between Respondent's purchase of the pool bar commercial unit in the summer of 1988 (R. p. 472-474) and the construction of the side deck in 1990 did Appellant's board ever receive any request from Respondent to construct the side deck, discuss the construction of the side deck, or vote to approve construction of the side deck (R. p. 321, line 8 – p. 323, line 14; p. 110, line 17 – p. 111, line 5). Although Respondent contends that Appellant somehow "affirmatively misled" Respondent based upon Mr. Melton's statements to Mr. Goude, there is no evidence that anyone on the board except Mr. Melton ever knew in advance that the side deck was being proposed or constructed (R. p. 323, lines 15-24), no evidence that Mr. Melton ever mentioned the side deck to any other board member, and no evidence that Mr. Melton ever told the Respondent that the board had approved the

side deck. Mr. Melton and Mr. Goude were consistent in their testimonies that the only evidence of any Appellant approval Mr. Goude received was a statement by Mr. Melton that he (Mr. Melton) had approved the side deck. (R. p. 191, lines 1-2, lines 19–22; p. 239, lines 20–25.)

It should be noted that Mr. Goude, Mr. Melton, and Mr. Cox were not "arms length" parties in this matter. Mr. Cox was the President of the development company, Mr. Melton was responsible for the sale of approximately one-third of the units in the St. Clements project (R. p. 185, line 8 – line 17; p. 186, line 24 – p. 187, line 7), and Mr. Goude was the developer's sales and marketing director for the project and helped sell quite a few of the units (R. p. 278, line 19 – p. 279, line 9). Mr. Cox is the one who approached Mr. Melton to say that he wanted to add some additional seating for the guests at the pool area, Mr. Melton as one of the principal sales agents for the developer said he thought that would be a good idea (R. p.190, lines 11-22), and Mr. Melton told Mr. Goude, another principal sales agent for the developer, that he (not the board) approved construction of the side deck (R. 191, lines 1-2; 19-22). It is disingenuous under these circumstances for Respondent to contend that it was "misled" by Appellant into believing it had valid approval to construct the side deck in a paved common parking area.

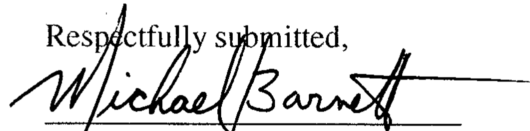
CONCLUSION

The little 9' X 13' (R. p. 239, lines 13-15) side deck was constructed for the relatively small sum of up to $11,000.00[2] in a paved common parking area without the Appellant's consent within a period of 3 or 4 days (R. p. 280, line 19 – p. 281, line 11) in

[2] Part of that $11,000.00 may have been spent on the pool bar commercial unit and not just the side deck (R. p. 235, line 25 – p. 236, line 2).

the spring of 1990 in violation of the SC Horizontal Property Act., numerous provisions of the Master Deed, and the Myrtle Beach Zoning Ordinance as more fully explained in the Initial Brief of Appellant. The side deck consists of merely a wooden deck, railings and canopy (R. p. 235, lines 6-11; R. pp. 491-497). It is a rather inexpensive, unsubstantial structure. It has been allowed to exist for more than a reasonable time. Rather than being harmed by Appellant's delay in forcing its removal, Respondent has more than gotten his "money's worth" out of the improvement by using it for commercial purposes. For the reasons stated in the Appellant's Briefs, this Court should grant the relief sought by Appellant.

Respectfully submitted,



April 15, 2013

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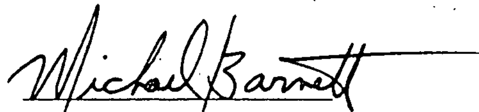
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the final Brief of Appellant and the final Reply Brief filed herein comply with Rule 211(b), SCACR.

April 16, 2013



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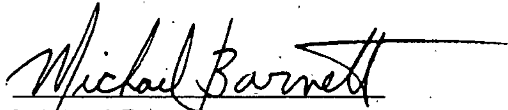
PROOF OF SERVICE

I certify that I have served the final Brief of Appellant and the final Reply Brief on the Respondent by depositing copies of them it in the United States Mail, postage prepaid, on April 16, 2013, addressed to its attorney of record, Fred B. Newby, Newby Sartip Masel & Casper, LLC, 4593 Oleander Drive, Myrtle Beach, South Carolina 29577.

April 16, 2013



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