

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No. 2009-CP-15-469
Appellate Case No. 2013-001642

The Retreat at Edisto Co-owners Association, Inc., Gerald Bachelor, Lisa Bachelor, James Currell, Rose Marie Currell, Jervey McKelvey, Barry Smith, Joseph Zuyus, and Emily Zuyus, Plaintiffs

Of whom The Retreat at Edisto Co-owners Association, Inc., Gerald Bachelor, Lisa Bachelor, James Currell, Rose Marie Currell, Jervey McKelvey, Barry Smith are the Respondents,

v.

The Retreat at Edisto, LLC, W. Mark Steedley, individually, Terry Hoff d/b/a Terry Hoff Construction, Handcrafted Homes, LLC, G & S Supply Co., Georgia-Pacific Building Products, LLC, Georgia-Pacific Wood Products, LLC, General PreCast Manufacturing Co., Inc., Banks Construction Company, Stroble Site Services, LLC, Eugene H. Brislin, P.E., James J. Barlow Engineering, P.C., PFS Corporation, James Glenn, Waynes Reeves, and Mike Miller, Defendants.

Of whom The Retreat at Edisto, LLC is the Appellant.

And

G & S Supply Co., Inc.,

Third-Party Plaintiff.

vs.

James Pritchard d/b/a Low Country Exteriors and Edson A. Barros d/b/a Sunshine Vinyl Siding,

Third Party Defendants.

FINAL BRIEF OF APPELLANT

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February 11, 2014

Charleston, South Carolina

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court err in allowing the testimony of Howard Yates, Esquire, as an expert in real estate law?
2. Did the trial court err in interpreting the Master Deed such that the Appellant/Grantor lost any right to develop Phase II of The Retreat at Edisto Horizontal Property Regime?

STATEMENT OF THE CASE

Appellant The Retreat at Edisto, LLC seeks reversal of the Court of Common Pleas for Colleton County's judgment to the respondents on the interpretation of a Horizontal Property Regime Master Deed. The core issue between the parties is whether the appellant properly elected to develop a second phase of the project. Respondents brought suit against appellant and others claiming construction defects¹ in an ocean side condominium complex and against this appellant on the development rights issue. Appellant cross-claimed for declaratory relief in its favor on the same deed issue.

Respondents filed for summary judgment on September 9, 2010. The appellant also sought summary judgment, and the trial court heard the motions on February 9, 2011. By order dated April 20, 2011, the trial court granted the respondents' motion and denied the appellant's motion.

¹ All construction issues have been settled.

Appellant appealed and the Court of Appeals reversed and remanded for a trial on the Grantor's intention. Unpublished Opinion No. 2012-UP-558.

The matter was tried non-jury on April 29, 2013, before the Honorable Perry M. Buckner. Judge Buckner issued an Order on June 6, 2013, finding the Grantor (1) did not have the right or ability to amend the Master Deed to reserve a right to develop the property in phases; (2) even if the Grantor had such a right, it failed to satisfy the 'conditions precedent' to vest the 'option' the amendment created; and (3) even if the Grantor had exercised its rights, it failed to complete the project by the deadline the Court found the phases were required to be finished. Appellant/ Grantor timely filed a motion pursuant to SCRCR Rule 59, which Judge Buckner denied. This appeal followed.

STATEMENT OF THE FACTS

At trial, two witnesses were called. The Co-owners called Howard Yates, Esq., who the trial court certified as an expert in real estate law over Grantor's objection. R. p. 116, lines 12-17. Grantor called W. Mark Steedley, its manager. The parties stipulated into evidence the Master Deed, the First Amendment of the Master Deed, and the plat of the property. At the court's behest, a copy of the South Carolina Horizontal Property Regime Act was also admitted into evidence.

The Retreat at Edisto, LLC was formed for the purpose of developing a multi-family development called The Retreat at Edisto on Edisto Beach in Colleton County. R. p. 157, lines 14-23. Grantor then created a horizontal property regime by Master Deed dated December 13, 2000, and recorded January 11, 2001 in Deed Book 924, Page 138 with the Clerk of Court for Colleton County. Co-owner Association is comprised of the owners of the ocean view condominiums known as The Retreat at Edisto. R. p. 158, lines 4-15; pp. 201-285. The other named plaintiffs are condominium owners in the Retreat at Edisto development.

At the time the Master Deed was filed, the town of Edisto Beach had approved a twenty-eight (28) unit condominium development. R. p. 157, lines 14-15. The deed provided that each unit owner would be granted a proportional interest in the common area pursuant to a table incorporated by reference into the Master Deed. R. p. 256. Relevant to this appeal, “[g]eneral common elements mean and include: (1) the land on which the building stands, more fully described above, together with all other real property described in Exhibit ‘A.’” R. p. 206.

After the Master Deed was filed, but before construction had begun and any units sold by the Appellant/ Grantor, the town granted final approval for only (12) units. R. pp. 159-160, lines 17-14. Thus, as allowed by Article XXV of

the Master Deed of the Retreat at Edisto, Grantor amended the Master Deed by way of the First Amendment to the Master Deed of the Retreat at Edisto Horizontal Property Regime dated July 27, 2001, and recorded in Deed Book 945, Page 150 with Clerk of Court for Colleton County ("First Amendment"). R. p. 159, lines 1-16; p. 286-294. Grantor added Article XXXV to the Master Deed in this First Amendment, which reads in part:

The Grantor, its successors and assigns, or any person or entity owning the right to develop and construct Proposed Phase II, Buildings 1, 2, 3, and 4 as shown on Exhibit B to the Master Deed may, at their sole discretion, stage the development and construction of the improvements into two stages or phases, with no guarantee to the purchasers of the Apartments in Phase I that subsequent stages or phases will be developed. ***It is the Grantor's intention to develop the proposed Phase II, Buildings 1, 2, 3, and 4 as Phase II of the regime. The Grantor, its successors and assigns or persons/entities owning the adjoining property hereby reserve the right and privilege to determine on or before July 31, 2005, whether or not to proceed with the additional stage of development and the parties hereto agree that if the Grantor so decides, the Apartments shall be in a regime which consists of two stages or phases.*** The determination of the Grantor, its successors and assigns or persons/entities owning the adjoining property as to the stages of the project may be on, before, or after the sale of the Apartments in Phase I.

(emphasis added). R. p. 290. Phase II will be developed on property described as part of the general common elements. R. p. 290.

Phase I was completed and Grantor eventually sold all of the condominium units pursuant to the terms and conditions of the Master Deed

and its First Amendment. R. p. 139 lines 5-11. Thereafter, Grantor continued to address various permitting and zoning issues associated with Phase II and constantly asserted its right to develop it. From late 2004 or early 2005 until the events that lead to this suit, the Grantor:

- Hired Horner, Eelman, & Geerhart Engineering Consultants ("HEG") for various surveying, wetland delineation, and other construction preparation activities for Phase II. HEG began this work in January of 2005.
- Actively sought to obtain the needed storm water management permits from SCDHEC for Phase II.
- The Company also hired Kevin Coffey of Lowcountry Land Consultants who continued to help The Company develop the SCDHEC-mandated storm water plan for Phase II until the filing of suit.
- Defended itself, with the HOA as co-defendant, against an action brought by a neighboring property owner over the condition of the area around Phase II.
- Continued to work with the Town of Edisto Beach for more advantageous zoning to allow for development of the property.

R. pp. 164-166, lines 20-3. In addition to these due diligence efforts, Grantor continued and still continues to assert its development rights for Phase II of the Retreat at Edisto development. R. p. 166, lines 4-6.

In 2009, Co-Owners brought this suit claiming Grantor had no further right to develop Phase II. Grantor filed a *lis pendens* and brought a counter-claim seeking a declaration that it retained a right to develop Phase II under

the deed. The parties filed cross-motions for summary judgment. Judge Mullen ruled in favor of the Co-owners. The Court of Appeals reversed and required the circuit court to hold a trial focused on the Grantor's intent. Unpublished Opinion No. 2012-UP-558.

Mr. Yates, the only witness called by the respondents, testified that Grantor had not properly exercised its right to develop Phase II because it had not filed any writing with the election with the Register of Deeds. R. p. 130-131, lines 2-3. However, he acknowledged that neither the deed nor the Horizontal Property Regime Act requires any such writing. R. p. 144, lines 1-4. Yates further opined that the Master Deed was an option contract by which the Grantor contracted for the option to build a Phase II of the development no later than July 31, 2005, provided the Grantor satisfied certain conditions precedent. R. p. 135, line 16.

Mr. Steedley, who signed both the Master Deed and the First Amendment on behalf of the Grantor and caused it to be drafted, testified that it was the Grantor's intention to develop Phase II and to reserve for itself in the deed the right to develop Phase II to the further extent allowed by law. R. pp. 162-163, lines 19-8.

ARGUMENTS

1. THE TRIAL COURT ERRED IN ACCEPTING THE TESTIMONY OF HOWARD YATES AS AN EXPERT IN REAL ESTATE LAW.

Respondents offered a single witness: Howard Yates, Esq., an attorney licensed to practice law in South Carolina. The trial judge, “qualified Yates as an expert in real estate law.” R. p. 5. Because expert testimony on the law is inadmissible, Yates’ testimony should be stricken. Further, because respondents could not and did not offer any other evidence, the trial court should have directed a verdict in the Appellant/Grantor’s favor.

Only relevant evidence is admissible at trial. Rule 401, SCRE. Evidence is relevant if it has, “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Id.* Expert testimony is permissible to explain *factual* evidence that a layperson would not otherwise understand. Rule 702, SCRE. In general, expert testimony on issues of *law* is not permitted. *State v. Green*, 351 S.C. 184, 569 S.E.2d 318 (2002); *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003).

Dawkins is instructive to this matter. In *Dawkins*, the defendants offered the testimony of Professor John Freeman on issues of fiduciary duty and corporate law. *Id.* at 66, 437. The Supreme Court affirmed the trial court’s

decision to exclude Prof. Freeman's affidavit. The Court held that while some portions of Prof. Freeman's testimony contained, "some helpful factual information... the overwhelming majority of the affidavit is simply legal argument as to why summary judgment should be denied." *Id.* at 67, 437.

Here, there is no subterfuge as to why Mr. Yates was offered or admitted. The court's order admits to allowing Yates to testify as an expert in real estate law and he was offered for that purpose. It then accepted his testimony on the law and based its order almost exclusively on it. Among other things, the trial court concluded as fact that:

- "Yates opined to a reasonable degree of certainty that the entire 3.724 acres was submitted to the Regime by the Master Deed and the Amendment and the Defendants did not have any vested property rights in the property at any time from July 27, 2001 up to the time of the hearing in this matter." R. p. 5.
- "Yates testified to a reasonable degree of certainty that because the Amendment did not vest any property rights in Defendants, it was necessary pursuant to the language of the Amendment to have a subsequent filing that was required to vest a property right in the Defendants." R. p. 5.

- “Yates testified that [the First Amendment] created an option to develop Phase II and that there were conditions precedent necessary to exercise the option, most important the recordation of an instrument showing that Phase II was to be developed.” R. p. 11.

The interpretation of the deed requires determining the intention of the grantor. *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (Ct. App. 1987). The grantor’s intent must be found from the four corners of the deed, giving the entire deed its fair reading. *Id.* The action was before the trial court on remand from the Court of Appeals on the sole question of the Appellant/Grantor’s intention. Instead, the trial court qualified Yates as an expert on the law (an act in and of itself impermissible) and then relied on Yates legal conclusions to draft its order determining that as a matter of *law* the document created an option, had conditions precedent, and require the Appellant to make a public filing to comply with the Statute of Frauds. Like *Dawkins*, Yates’ testimony, “reads as if it could have been respondents’ oral argument to the trial court.” *Id.* at 66, 437. Yates’ testimony was clearly impermissible and an abuse of discretion. *Busillo v. City of North Charleston*, 404 S.C. 604, 745 S.E.2d 142 (Ct. App. 2013)(Trial court’s rulings on admission of evidence will only be disturbed where there is an abuse of discretion).

Once Yates' testimony is stricken, there is no evidence to support the Respondents' claims. As a result, the trial court's rulings should be reversed and judgment entered in the Appellant/Grantor's favor.

2. THE TRIAL COURT ERRED IN DETERMINING THAT THE APPELLANT/GRANTOR LOST ANY RIGHT TO DEVELOP PHASE II OF THE RETREAT AT EDISTO HORIZONTAL PROPERTY REGIME, THAT THE MASTER DEED WAS AN OPTION CONTRACT WITH CONDITIONS PRECEDENT, AND THAT A WRITING MUST BE FILED TO COMPLY WITH THE OPTION.

A. Standard of Review.

Declaratory judgment actions are reviewed on the basis of the underlying claim. *Eldridge v. City of Greenwood*, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (1998). "In construing a deed, the intention of the grantor must be ascertained and effectuated unless that intention contravenes some well-settled rule of law or public policy." *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (Ct. App. 1987). The grantor's intent must be found from the four corners of the deed, giving the entire deed its fair reading. *Id.*²

- B. The Master Deed and the South Carolina Horizontal Property Regime Act allows the deed to be amended to develop the property in phases and the Grantor properly did so.**

² The Court of Appeals found there were genuine issues of material fact relating to the Grantor's intention of the meaning of the July 31, 2005 date and whether the deed contained "conditions precedent" to that election.

The Master Deed allowed the Grantor to amend it while Grantor controlled the development. There is no dispute that the First Amendment was amended in this time period; in fact, all of the Co-owners purchased their units with the First Amendment in place. Our courts have recognized and upheld a developer's right to amend a Master Deed to ensure consistency with its intention. *Heritage Fed. Sav. & Loan Ass'n v. Eagle Lake & Golf Condo.*, 318 S.C. 535, 458 S.E.2d 561 (Ct. App. 1995) *interpreting* S.C. Code Ann §27-31-100(g). In *Heritage Federal*, a developer amended the master deed to allow for development of a condominium project into stages pursuant to a similar amendment provision held by Grantor. In holding amendments could include division into phases, the Court of Appeals there held, "...the provision is designed to permit changes to the master deed necessary to carry out the intentions of the developer in establishing the regime and ensuring the recorded documents comply with the requirements of the Horizontal Property Regime Act." *Id.* at 541, 565. Hence, to the extent Co-owners contend Grantor cannot amend the Master Deed to later allow for development into phases, that argument has already been rejected by the Court of Appeals.

The First Amendment is clear as to the Grantor's intention: "It is the Grantor's intention to develop the proposed Phase II, Buildings 1, 2, 3, and 4 as Phase II of the regime." R. p. 290. It further provides:

The Grantor, its successors and assigns or persons/entities owning the adjoining property hereby reserve the right and privilege to determine on or before July 31, 2005, whether or not to proceed with the additional stage of development and the parties hereto agree that if the Grantor so decides, the Apartments shall be in a regime which consists of two stages or phases.

R. p. 290. Reading this language with the Grantor's stated intention, it is clear the Grantor reserved the right to decide by July 31, 2005, whether to build Phase II.

The language in the First Amendment is consistent with the South Carolina Horizontal Property Regime Act. The Act allows for developers to build developments such as The Retreat in phases, provided that the developer states in the deed, "The dates by which the owner submitting such property to condominium ownership *will elect* whether or not he will proceed with each stage of development." S.C. Code Ann. §27-31-100(g)(2)(emphasis added). At trial, even Mr. Yates acknowledged that the First Amendment's language was consistent with the Act. R. p. 143, lines 2-11. Inasmuch as the deed complies with the Act, the court was compelled to read the deed and apply the Grantor's stated intention that it intends to develop

Phase II and simply had to make an election to do so by July 31, 2005. R. p. 163, lines 2-4. Accordingly, the language means that The Retreat at Edisto, LLC may elect by July 31, 2005 whether to build Phase II and the only deadline is to make that election. The trial court's holding otherwise is error.

C. The Statute of Frauds is inapplicable to this case because the First Amendment—a writing of record before the respondents purchased their units—stated the Grantor's interest.

There is no dispute that Grantor decided to proceed with Phase II by July 31, 2005, and was actively pursuing that direction. Instead, Co-owners assert the election must be made in writing and, failing to file a writing voids the Grantor's election. While acknowledging that neither the Master Deed, First Amendment, nor the Act requires a writing, Co-owners point to the Statute of Frauds for the requirement of a filed writing. S.C. Code Ann. § 32-3-10. The Statute of Frauds, requires a writing, "to charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them." S.C. Code Ann. 32-3-10(d).

However, the First Amendment is a writing. The deed specifically states (1) what the Co-owners receive (a proportional interest in the common

elements)³and, (2) what the Grantor retains (a right to develop Phase II)⁴. The Co-owners retain that identical proportional interest with Phase II or without the development of new buildings. Each of the Co-owners knew at the time of purchase of their units what they were getting and what the Grantor retained. Further, had the General Assembly wished to impose a further duty on developers to file a writing to make their election, it would have said so. *S.C. Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct.App.1989) (“Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy.”)

While the Co-owners argue that the reading requested by the Grantor makes it impossible for the future owners to know what they are purchasing and for their closing attorneys to bind title, each of the Co-owners obtained when they bought their units only a proportional interest in the common areas, which includes only the land under the buildings of Phase II, not the

³ “General common elements mean and include: (1) the land on which the building stands, more fully described above, together with all other real property described in Exhibit “A;” R. p. 206.

⁴ “The Grantor, its successors and assigns, or any person or entity owning the right to develop and construct Proposed Phase II, Buildings 1, 2, 3, and 4 as shown on Exhibit B to the Master Deed may, at their sole discretion, stage the development and construction of the improvements into two stages or phases, with no guarantee to the purchasers of the Apartments in Phase I that subsequent stages or phases will be developed.” R. p. 290.

buildings themselves. Hence, whether the election is made or not does not alter what current or future Co-owners have in the property—a percentage interest in the common elements as a whole. See Table of Values, Exhibit E to Master Deed; R. p. 256. Accordingly, this argument lacks merit and the trial court should be reversed.

D. The trial court erred in holding the First Amendment created an option contract that could only become effective for the Appellant/Grantor by the completion of conditions precedent because the Amendment does not contain the elements of either an option contract or conditions precedents.

Co-owners further argue the First Amendment is an option contract that must be specifically complied with. However, the deed does not contain any of the characteristics of an option contract:

(1) they are unilateral contracts where the optionor, for a valuable consideration, grants the optionee a right to make a contract of purchase but does not bind the optionee to do so; (2) they are continuing offers to sell, irrevocable during the option period; and (3) the transition of an option into a contract of purchase and sale can only be effected by an unqualified and unconditional acceptance of the offer in accordance with the terms and within the time specified in the option contract.

Alexander's Land Co. v. M&M&K Corp., et al., 703 S.E.2d 207, 390 S.C. 582 (2010). Even Mr. Yates acknowledged that, though the deed contains the word “option” in it, it does not meet the requirements of an option contract. R.

p. 148-149, lines 12-2. Under the respondents' theory, the Grantor optioned to itself, for no consideration, the right to build in phases—a right it had under state law. Reading the deed with the Grantor's unequivocal intention, the trial court erred in finding the First Amendment is an option contract.

Co-owners argue the First Amendment contains conditions precedent to the Grantor's election, namely zoning and permitting approval, relying on this language: "... and Phase II may include a maximum of four (4) apartments each, pending zoning approval by the Town and the election of Grantor to proceed with the development with all or a portion of Phase II." R. p. 290. The trial court's holding that the First Amendment contains conditions precedent for the Grantor's election to build Phase II is error.

"A condition precedent is an act which must occur before performance by the other party is due." *Alexander's Land Co. v. M&M&K Corp., et al.*, 703 S.E.2d 207, 390 S.C. 582 (2010). Unlike the option contract in *Alexander's Land*, which specifically used the term "condition precedent," there is nothing in the language that indicates the Grantor required itself to satisfy any act to make its election to proceed with Phase II. Reading the provisions relied on by the Co-owners with the Grantor's unequivocal intention, it is clear the intent is to allow the Grantor to make its election and continue to work on zoning and permit issues.

E. The July 31, 2005 date contained in the First Amendment will not be strictly applied where, like here, it is unreasonable.

Co-owner's point to language in the First Amendment reserving for the Grantor a commercial easement to build Phase II that claims to "automatically terminate on July 31, 2005" as requiring completion of Phase II by the Grantor. R. p. 291. "In equity, strict compliance with time limits contained in a contract will not ordinarily be enforced, except in regards to option contracts." *Alexander's Land Co. v. M&M&K Corp., et al.*, 703 S.E.2d 207, 390 S.C. 582 (2010). What constitutes a reasonable amount of time is determined on a case-by-case basis. *S.C.E.&G. v. Hartough*, 654 S.E.2d 87, 375 S.C. 541 (Ct. App. 2007) citing *Wall v. Huguenin*, 305 S.C. 100, 103, 406 S.E.2d 347, 349 (1991)(holding a delay of thirteen years was reasonable where the property was the subject of two lawsuits) and *Ridglea Interests, Inc. v. Gen. Lumber Co.*, 343 S.W.2d 490, 493 (Tex.Civ.App.1961) ("noting that a reasonable time is such time as is necessary conveniently to do what the contract requires to be done as soon as circumstances will permit and that what is a reasonable time depends on the nature and character of the thing to be done, the circumstances of the particular case, and the difficulties surrounding its accomplishment").

Like *Wall*, this case has been the subject of two lawsuits and multiple permitting issues. R. p. However, the record is undisputed that Grantor has continued to work toward development of Phase II. Reading the language of the deed as a whole with the unequivocal intention of the Grantor in the First Amendment on its right to elect to proceed with Phase II and intent to do so, the court should not hold the date as a hard and fast deadline as doing so undermines the overall intention and is unreasonable given the circumstances.

CONCLUSION

The trial court's ruling is not supported by proper evidence or the Grantor's intention. The Court of Appeals remanded this matter for a trial on the *facts* of the Grantor's intention. Respondents had no facts to support its theories, so it was forced to call a lawyer to make legal arguments on the stand that contradicted the words of the deed and create facts that were not there. The Grantor's intention is clear. The intention comports with state law. Respondents' attempts to circumvent this intention requires it to alter the General Assembly's view of how horizontal property regimes can be built. Such a result is impermissible.

For the reasons stated herein, the Appellant prays the trial court's order be reversed and for such other relief as the court deems just, prudent, and proper.

HALLER LAW FIRM, P.C.

A handwritten signature in black ink, appearing to read "D. K. Haller", written over a horizontal line.

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12th day of February, 2014

Charleston, South Carolina

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Third Party Defendants.

Proof of Service

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FEB 19 2014
SC Court of Appeals

I certify that I caused to be served the APPELLANT'S FINAL BRIEF on counsel for the

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February 14th, 2014

Charleston, South Carolina