ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2013-001812

Callawassie Island Members Club, Inc., Respondents

v.

Arthur Applegate, Appellant

FINAL REPLY BRIEF OF APPELLANT

Brian D. McDaniel
Law Office Of Brian McDaniel, LLC
Post Office Box 2085
Beaufort, South Carolina 29901
SC Bar # 68618
(843) 379-5117
Attorney for the Appellant

Other Counsel of Record:

Minor, Haight & Arundell, P.C.
Ehrick K. Haight, Jr., Esquire
P.O. Drawer 6067
Hilton Head Island, SC 29938
Attorney for the Plaintiff / Respondent

Howell, Gibson & Hughes, P.A.
Stephen P. Hughes, Esquire
William T. Young, III, Esquire
P. O. Drawer 40
Beaufort, SC 29901-0040
Attorney for the Plaintiff/ Respondent

Jennifer I. Campbell, Esquire
2008 Spectable Street
Beaufort, South Carolina 29902
Attorney for the Defendant

TABLE OF CONTENTS

TABLE OF CASES FOR REPLY BRIEF

The Appellant submits this Reply Brief responding to the Brief of the Respondent making objections to "factual" allegations set forth in the Respondent's Brief and replying to the arguments of the Respondent.

Respondent's Brief alleges facts without support

First, in its Brief the Respondent sets forth alleged "Facts" (Respondent's Brief pp. 2 -6), which are contested, and in making those allegations the Respondent fails to provide a reference to the record in support of those facts in violation of Rule 208(b) SCACR. Rather than summarizing the contentions of the Respondent, per the Rule, the Respondent's Brief attempts to present to the appeals court what it alleges are "facts", for which there is either no evidentiary or testimonial support, or there is no reference given to the record from where those alleged "facts" are being derived. For instance, the Respondent asserts that "*In order to associate a membership with every parcel of property on Callawassie Island*, the Callawassie Island Property Owners Association ('CIPOA')... amended its Declaration (covenants)..." (emphasis added), but the Respondent fails to provide any factual support for this allegation purporting to explain why CIPOA amended its Declaration. In fact, there is no testimony in this case from any representative of CIPOA nor are there are references in the Brief that would demonstrate that this allegation was even presented to the trial court. Likewise, Respondent's references to depositions of Applegate and CIMC on page 3 of the Respondent's Brief are improper since those documents were not filed in the underlying action nor presented to the trial court. While it is believed that there

are some excerpted passages of the Applegate deposition referenced in previous court filing, the Appellant has found no previous introduction of the CIMC deposition cited nor most of the Applegate deposition references. Therefore, the introduction of these depositions is improper material for appellate review because they are not filed in the case and/or were not presented in argument to Judge Miller. The inclusion of these matters not previously filed and made part of the courts record would violate Rule 210(c) SCACR.

Likewise, the Respondent's brief improperly references and cites to various documents it alleges are the governing documents of the Respondent (see pages 4, 5, 6 of Respondent's Brief) including reference to the CIPOA covenants (p.4), CIMC Bylaws (p.4), CIMC Plan for Offering of Membership (p.4, 5), and CIMC General Club Rules (p.6) without reference to the record in the case. In fact in their brief Respondent recites select excerpts from some of the various versions of these documents whereas in the Designation of Matter to be included on the Record on Appeal the Respondent does not limit or specify which version of those documents it is referencing. Likewise, the Designation seeks to include the entire document not just select pages which might be referenced in their Brief (See Designation of Respondent (m), (n) and (o)). Simply put, the Respondent can not now seek to introduce evidence and opinions which have not been presented to the trial court and those materials and related arguments should be stricken or disregarded for that reason.

However, even if the court were to believe that these matters are properly presented for its review, even those "facts" would support that the Appellant is

entitled to a jury trial. Again, the Respondent does not deny that a jury trial has been demanded. The matter was in fact prepared for a jury trial on May 13, 2013, when in a pre-trial conference discussing the basic facts of the dispute and whether settlement was possible, Judge Miller said that the case sounded like one better heard by the Master in Equity. Judge Miller momentarily left counsel for both parties in his chambers and upon returning to counsel stated that the matter had been moved to the Master in Equity. At that time the Appellant objected to the transfer but was not given any basis for the ruling [R. p. 3-4] (See Form 4 of May 14, 2013). Having not formally argued any motions before Judge Miller, it was not until the parties filed opposing motions to reconsider the Form 4 Order transferring the case that the Court provided some basis for its ruling [R. p. 5-6] (see Order of July 17, 2013) claiming to grant the Respondent's motion to transfer to non-jury, from which the current appeal is taken. Those Orders exceed the limit and scope of the motion to transfer to non-jury filed by the Respondent and should be reversed. Wells Fargo Bank NA v. Smith, 398 S.C. 487 at 499 (S.C.App. 2012).

Reply to Arguments of the Respondent

The Respondent relies upon two unsupported arguments to contest this appeal 1) that there are no factual issues remaining in the case, which is simply an untenable claim, and 2) the proposition that "if the contract is determined to be unambiguous, there is no triable issue of fact for a jury."(Respondent's Brief p. 8) a legal conclusion for which the Respondent provided no citation nor any direct

legal support. As referenced in the Appellant's Brief, Ward v. West Oil Company, Inc., 379 S.C. 225 at 238 (S.C. App. 2008) refutes the assertion upon which the Respondent's entire argument is built, indicating that even an action to **construe** an **unambiguous** contract is an action at law. While Appellant disagrees that the Respondent has proven the contract is unambiguous, if they had, the effect would only be to limit what information the jury can review as they "construe" the contract documents to determine the intent of the parties, it does not require that the Appellant no longer be entitled to a jury, nor does it mean that the jury would construe the contract in the Respondent's favor. The Appellant in fact has cited numerous provisions in the "governing" or "contract" documents which would refute the claims alleged in the case, as set forth in the Amended Answer at p.3 lines 11-20; p.6 lines 37-44, and p8. Lines 45-47 [R. p 37-38, p.40-42] (Amended Answer reference to General Club Rules requirement for expulsion of members after 4 months of delinquency). These matters along with other questions of fact, such as, was the Defendant expelled from the Club, can the Club allow some members to concede memberships while refusing to allow other members of the same class to concede their memberships back to the Club, did the Appellant resign from the Club, and does the Appellant owe money to the Club, all demand that the Appellant be allowed a jury trial in this matter.

Previous Orders in the Case on the same issues:

In its Brief the Respondent asserts at p. 9 and 11 that the issue of ambiguity has not been previously ruled upon by the Court. This is contradicted

by the record in this case in which the Respondent has argued and lost its summary judgment motions on multiple occasions. In fact judge Mullen's order of June 7, 2011 specifically states that "the Court finds that **amongst the governing documents** under which the Plaintiff is seeking Summary Judgment in this case there **exists questions of fact in dispute** to warrant denying the current motion for Summary Judgment." (Emphasis Added) [R. p.11-12] These are the same governing documents to which the Respondent in its brief to this court continues to assert that there exists no question of fact in dispute, despite Judge Mullen's ruling. The Respondent's brief refuses to acknowledge the plain language of these past rulings in which these summary judgment motion issues were heard on the record (not in chambers), were based upon the presentation of the memorandum and arguments of counsel, and were all denied. In fact, two circuit court judges have fully heard the Plaintiff's Summary Judgment motions and have found that there exists questions of fact in dispute [R. p.7-8] [R. p.9-10] [R. p. 11-12] (Order J. Ernest Kinard May 9, 2013, Order J. Ernest Kinard June 28, 2013, Order of Judge Carmen T. Mullen dated June 10, 2011). The Appellant has a right to a jury trial as those questions of fact. Also please note that Judge Miller did not hear summary judgment motions in the case and made his findings of his July 17, 2013 Order without oral arguments and in response to Respondent's motion to Reconsider the Form 4 Order transferring the matter to the Master in Equity.

Issue of Notice not provided to the Appellant:

In its brief the Respondent contends that the issue of notice was not raised prior to the current appeal and was not ruled upon by the trial court and is therefore not preserved. Further, the Respondent claims that dismissal of the Defendant's counterclaims somehow justifies the lack of notice. However, because the causes of action of the Respondent against the Appellant in this case are actions at law, to which a jury trial is a matter of right, this argument is unpersuasive. Furthermore, it was not until the Court issued the July 17, 2013 Order, denying the Appellant's Motion to Reconsider the Form 4 Order of May 14, 2013, and granting the Respondent's Motion to reconsider that the Appellant was aware of any basis upon which he was being denied a jury trial. Although an objection to the order denying the jury trial was made by counsel for the Appellant at the time of the pre-trial conference, and subsequently in writing, the Appellant contends that the manner in which the Order was issued effectively denied him the ability to create a record by which his objections could be made. By providing the motion for non-jury trial so late in the evening on the Friday before Monday jury trial and because the trial judge made his ruling after an in-chambers pre-trial conference in which the parties discussed the case in general terms but did not fully present any particular motions, the Appellant was put in a position where, after seeking some clarification for the basis of the denial of the jury trial, the current appeal was his only option.

Response to claims of a Concession

At page eleven of the Respondent's Brief the Respondent claims that the Appellant's Brief concedes that Respondent will prevail in the case. This is incorrect and the Appellant makes no such concession now or in any previous filings in this case or Appeal.

Conclusion

For these reasons and as set forth in the Initial Brief of the Appellant the Orders of the May 14, 2013 and July 17, 2013 should be reversed and a jury trial should be ordered.

Brian D. McDaniel
Law Office Of Brian McDaniel, LLC
Post Office Box 2085
Beaufort, South Carolina 29901
SC Bar # 68618
(843) 379-5117

Attorney for the Appellant

March 26, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2013-001812

The Callawassie Island
Members Club, Inc.,

Respondent,

v.

Arthur H. Applegate

Appellant.

PROOF OF SERVICE

I certify that I have served the Final Reply Brief of Appellant upon The Callawassie Island Members Club, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on March 28, 2014, addressed to its attorneys of record, Stephen P. Hughes, Esquire, William T. Young, Esquire, P. O. Drawer 40, Beaufort, SC 29901-0040.

March 28, 2014

Teresa McDaniel

Law Office of Brian McDaniel, LLC
Post Office Box 2085
Beaufort, South Carolina 29901
(843) 379-5117
Attorney for Appellant

Appellate Case No. 2013-001812

Other Counsel of Record:

Minor, Haight & Arundell, P.C.
Ehrick K. Haight, Jr., Esquire
P.O. Drawer 6067
Hilton Head Island, SC 29938
Attorney for the Plaintiff/ Respondent

Howell, Gibson & Hughes, P.A.
Stephen P. Hughes, Esquire
William T. Young, Esquire
P. O. Drawer 40
Beaufort, SC 29901-0040
Attorney for the Plaintiff / Respondent

Jennifer I Campbell, Esquire
2008 Spectable Street
Beaufort, South Carolina 29902
Attorney for the Defendant/ Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2009-CP-07-05410

The Callawassie Island
Members Club, Inc.,

Respondent,

v.

Arthur H. Applegate

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that the submitted final Reply Brief of the Appellant complies with Rule 211(b), SCACR.

April 21, 2014

Brian D. McDaniel
Law Office of Brian McDaniel, LLC
Post Office Box 2085
Beaufort, South Carolina 29901
(843) 379-5117
Attorney for Appellant

CC: Other Counsel of Record

Minor, Haight & Arundell, P.C.
Ehrick K. Haight, Jr., Esquire
P.O. Drawer 6067
Hilton Head Island, SC 29938
Attorney for the Plaintiff/ Respondent

Howell, Gibson & Hughes, P.A.
Stephen P. Hughes, Esquire
William T. Young, Esquire
P. O. Drawer 40
Beaufort, SC 29901-0040
Attorney for the Plaintiff / Respondent

Jennifer I Campbell, Esquire
2008 Spectable Street
Beaufort, South Carolina 29902
Attorney for the Defendant/ Appellant