THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Richland County Master In Equity
Joseph M. Strickland, Master in Equity

Civil Action No. 2018-001577

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

v.

Wanda J. Miller and Orlando F. Miller.....Appellants

APPELLANTS' BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the master-in-equity err in denying Appellant's motion to transfer the case to the general docket for jury cases after the assertion of compulsory, at-law counterclaims and no waiver of Appellant's jury demand had occurred?

II. Does the Master-in-Equity have jurisdiction to hear substantive motions after legal counterclaims have been pled?

III. Did the Master-in-Equity err that Respondents had the right pursue foreclosure when he granted Respondent's motion for summary judgment?

STATEMENT OF THE CASE

Respondent The Homestead Property Owners Association, Inc (hereinafter "Respondents") brought this foreclosure action against the Appellants, Wanda J. Miller and Orlando F. Miller (hereinafter "Appellants.") Attached to the summons and complaint filed by Respondents on October 30, 2017. Respondents did not timely answer, but filed a motion for Relief of Judgment on May 14, 2018. After a brief hearing, the Master-In-Equity granted Appellants' motion for relief from judgment and directed Appellants to file an answer. Appellants filed their answer on June 1, 2018 and asserted the compulsory counterclaim Abuse of process and Breach of contract. The Answer and Counterclaim on its face contained a demand for jury trial. (R. pp. 47-51.)

The Master-in-Equity then inadvertently signed an order judgment on June 4, 2018 which had submitted to the Master-in-Equity by Respondents prior to the hearing on May 14, 2018. While the case was technically dismissed, Respondents filed a reply to counterclaims on and a motion for summary judgment on July 20, 2018. Appellant filed a motion to be relieved of this judgment and to refer the case back to the Circuit Court on July 27, 2018. The Court granted Appellants' motion to be relieved of judgment but denied Appellants' motion to refer the case back to the Circuit Court at a hearing on July 30, 2018. The Master-in-Equity granted Respondent's motion for summary judgment, and a formal order was entered on August 13, 2018. This appeal follows.

STATEMENT OF THE FACTS

The instant action was initiated by Respondents on October 30, 2017 to foreclose a lien on behalf of the Respondent homeowners association. Respondent's complaint asserts that Appellants have failed to pay a debt arising out of the Covenants and Restrictions for the Association.

Appellants further assert the failure to pay this contractual debt entitles it to foreclose a lien—created by the contract and statue—and take Appellants' property.

Appellants made this argument to the Master-in-Equity as part of their attempt to get relief from judgment. Instead of dismissing the instant action, the Master-in-Equity relieved Appellants of the judgment and to file an answer.

The Master-in-Equity scheduled a hearing on Respondent's Motion for Summary Judgment for July 30, 2018. Prior to that hearing, Appellant's filed another motion for relief of judgment to correct the Master's erroneous entry of judgment. Appellant also filed a motion to refer the matter back to the Circuit Court in light of Appellants' assertion of legal counterclaims. (R. pp. 61-63) The Master agreed with the motion for relief from judgment, but denied Appellants' motion to refer the legal counterclaims back to the Circuit Court. (R. pp. 97-151.) Instead, the Master asserted that he could make dispositive rulings on Respondent's motion for summary judgment under the previously filed Order of Reference and ordered the hearing on the motion for summary judgment to proceed over Appellants' objections. (R. pp. 97-151).) Respondent asserted that Appellants there was no question of fact. Appellant specifically adopted the reasoning behind their previously filed motion regarding the ability of Respondent to pursue a foreclosure remedy. (R. pp. 97-151).) Appellants also asserted that they should be allowed to amend their pleadings since the action had been technically dismissed and an opportunity to conduct discovery. (R. pp. 97-151).) The Master-in-Equity agreed with Respondent and granted summary judgment. (R. pp. 1-6)

ARGUMENT

I. Rule 53(b) SCRCP required the Master-In-Equity to immediately return the instant action to the Circuit Court.

The Master-in-Equity did not have subject matter jurisdiction to hear Respondent's Motion for Summary Judgment because the action should have been returned to the Circuit Court once Appellants filed their Answer with legal counterclaims.

Pursuant to Rule 53(b), SCRCP, the Master-in-Equity "**shall**" return the matter to Circuit Court "**upon the filing** of a jury demand." (Emphasis added.) Defendant have made a valid demand for a jury trial. Appellants asserted two counterclaims for Abuse of Process and Breach of Contract in their Answer and Counterclaims filed on June 1, 2018. Both of these causes of action are actions at law. Pope v. Gordon, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006); Electro-lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004). The demand of jury trial was timely filed. See Rule 38(b), SCRCP (stating a party may serve a jury demand "not later than 10 days after the service of the last pleading" or the demand "may be endorsed upon a pleading of [a] party").

Appellants are entitled to a jury trial in this equitable action "if the counterclaims are legal and compulsory." Carolina First Bank v. BADD, L.L.C., 414 S.C. 289, 295, 778 S.E.2d 106, 109 (2015). "A counterclaim is compulsory if it arises out of the same transaction or occurrence as the party's claim." Id. (citing Rule 13(a), SCRCP). No waiver exists when there are legal and compulsory counterclaims. Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 329, 755 S.E.2d 437, 441 (2014); Johnson v. S.C. Nat'l Bank (Johnson II), 292 S.C. 51, 55–56, 354 S.E.2d 895, 897 (1987). The master shall not dispose of the foreclosure action until all legal issues raised compulsory counterclaims until those claims have been disposed of by jury trial. Gardner v.

Travis, 316 S.C. 315, 318–19, 450 S.E.2d 54, 56–57 (Ct. App. 1994)

The "return to the circuit court" described in Rule 53(b) is automatic, per the language of the Rule. It is not discretionary, and it should have been done by the Master-In-Equity on June 1, 2018 when the legal counterclaims and jury demand were made. If a decision is to be made concerning whether Appellants' legal counterclaims are compulsory (thus entitling Appellants to a jury trial on them), that decision will need to be made by the circuit court after this action is returned to the circuit court's general docket for jury cases per the mandatory language of Rule 53(b).

The master's decision to deny the motion to transfer this case to the general docket for jury cases was prejudicial error because Appellants are entitled to a jury trial in this case. Appellants asserted compulsory at-law counterclaims in their answer. Rule 13(a), SCRCP. A counterclaim is compulsory if it arises out of the same transaction or occurrence that is the subject of the plaintiff's claim and it does not require that third parties be added as parties to the case. Rule 13(a), SCRCP. The counterclaims are conditioned on the transaction involved and the method of collection employed by the Plaintiff in the instant action. Additionally, Appellants previously challenged the right of Respondents to pursue a foreclosure action based on the restrictive covenants.

This Court was confronted with a nearly identical situation in S.C. Community Bank v. Salon Proz, LLC, 420 S.C. 89, 97, 800 S.E.2d 488, 492 (Ct. App. 2017). The Court of Appeals reversed the same master and determined that the matter should have been returned to the Circuit Court immediately upon the assertion of a legal counterclaim. As this Court ruled in Salon Prez, the assertion of the jury demand in the pleadings should have caused the Master and Clerk to automatically return the action to the Circuit Court. There is no discretion to be exercised by the

Master. This Court should apply the precedent in Salon Proz and reverse the order of the Master-in-Equity.

II. Respondent's use of foreclosure supports a claim for abuse of process and breach of contract.

Respondent is not entitled to equitable relief. This action—although pled as one in equity—is really an action at law which prevents the application of an equitable remedy like foreclosure or an equitable lien. The trial court erred by not allowing Appellants to amend their counterclaims to include previously asserted bad conduct. Appellants have thereby properly states causes of action for abuse of process and breach contract.

Thus, this Court should reverse the Master-In-Equity's grant of summary judgment in favor of the Respondents. This Court should allow amendments to the pleadings and discovery to proceed on whether Respondent committed abuse of process and breach of contract. In the alternative, this Court should determine as a matter of law that Respondent cannot use the equitable remedy of foreclosure to collect what is otherwise a contract. In so doing, Respondent has abused the process and has breach its contract with the Appellant.

A. Causes of action for abuse of process and breach of contract are properly alleged and pled.

Appellants have properly alleged the abuse of process and breach of contract. These causes of action should be allowed to be amended and proceed to discovery in the instant action.

An abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure. Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 69–70, 567 S.E.2d 251, 253 (Ct. App. 2002) "[A]n abuse of process is the employment of legal process for some purpose other than that which it was

intended by the law to effect-the improper use of a regularly issued process." Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 210, 153 S.E.2d 693, 695 (1967)

A plaintiff alleging abuse of process in South Carolina must assert two essential elements: 1) an "ulterior purpose," and 2) a "willful act in the use of the process not proper in the conduct of the proceeding." Hainer v. Am. Med. Int'l, Inc., 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997); LaMotte v. Punch Line of Columbia, Inc., 296 S.C. 66, 370 S.E.2d 711 (1988). "An ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process." First Union Mortgage Corp. v. Thomas, 317 S.C. 63, 74, 451 S.E.2d 907, 914 (Ct.App.1994); Davis v. Epting, 317 S.C. 315, 454 S.E.2d 325 (Ct.App.1994).

An action for a breach of contract is an action at law. Milliken & Co. v. Morin, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012). "Whether a contract is against public policy or is otherwise illegal or unenforceable is generally a question of law for the court." Id. (quoting 17B C.J.S. Contracts § 1030). "The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach." Branche Builders, Inc. v. Coggins, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009).

B. Appellants have not had adequate time for discovery

Appellants have only had 10 days (if the dismissal is given effect) in which to do discovery on the counterclaims that they have asserted. The plain language of Rule 56(c) mandates that summary judgment is proper only after "adequate time for discovery" has been had. Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 114–15–410 S.E.2d 537, 545 (1991). Summary judgment was premature because (1) plaintiffs

demonstrated a likelihood that further discovery would uncover additional relevant evidence, and (2) plaintiffs were not dilatory in seeking discovery. Id.

The issue is whether it was proper to serve and conduct discovery while the case was dismissed. Appellant did not move for the dismissal. Instead, it was error that committed by the Master-In-Equity and corrected in a timely fashion. Respondent filed their reply to the counterclaims and the motion for summary judgment on July 20, 2018. The hearing on the motion for summary judgment was held exactly ten days later.

In contrast, summary judgment entered five months after defendant's answer was filed was premature. Doe ex rel. Doe v. Batson, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001) (citing J.S. v. R.T.H., 155 N.J. 330, 714 A.2d 924, 936 (1998))

C. Respondent is not entitled to use foreclosure remedy.

Respondents' mishmash of contractual claims and equitable remedies is an abuse of process. It is beyond dispute that restrictive covenants are contractual in nature. Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). Restrictive covenants have been defined as "agreement[s] ... to do, or refrain from doing, certain things with respect to real property." 20 Am.Jur.2d Covenants, Conditions, and Restrictions § 1 (2005) Covenants "are contractual in nature and bind the parties thereto in the same manner as would any other contract." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006). Covenants requiring the payment of maintenance assessments are contractual in nature. Seabrook Island Prop. Owners Assoc. v. Pelzer, 292 S.C. 343, 356 S.E.2d 411 (Ct.App.1987). Respondent also asserts it has suffered monetary damages. (Complaint ¶ 10)

The existence of a contract almost always provides as adequate remedy at law. Nutt Corp. v. Howell Rd., LLC, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011); Equitable relief is

unnecessary when an adequate remedy for money damages is available at law. Monteith v. Harby, 190 S.C. 453, 3 S.E.2d 250, 251 (1939); Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 61, 644 S.E.2d 675, 678 (2007). A party that pleads money damages in the alternative to equitable relief has a duty to show why the money damages are inadequate. Carolina Park Assocs., LLC v. Marino, 400 S.C. 1, 8, 732 S.E.2d 876, 879–80 (2012). Respondent in the instant action does not plead equitable remedy in the alternative. It pleads it is contractually entitled to an equitable remedy. However, Respondent asserts no authority for the proposition that it can contractually—and by contract alone—create the equitable remedy of foreclosure.

But, the foreclosure remedy sought by the Respondent sounds in equity. E.g., Wilder Corp. v. Wilke, 324 S.C. 570, 479 S.E.2d 510 (Ct. App. 1996), *aff'd*, 330 S.C. 71, 497 S.E.2d 731 (1998). Where there is an adequate remedy at law, equitable relief is not generally available. Van Robinson Ins. Agency, Inc. v. Harleysville Mut. Ins. Co., 272 S.C. 127, 128-29, 249 S.E.2d 744, 745 (1978) Nutt, supra. Where a party "possesses an adequate remedy at law, equity will not intervene." Id., 272 S.C. at 128-29.

Our Supreme Court has said:

> To entitle the Respondent to the equitable interposition of the Court, he must show a proper case for the interference of a court of chancery, **and one in which he has no adequate and complete relief at law.** The very basis of the granting of equitable relief is the conclusion, in view of all the circumstances of the particular case, that full and adequate compensation **cannot be had at law.**

Monteith, 3 S.E.2d at 251 (emphasis added).

This Court, citing Monteith, had this to say in a case in which it applied this principle to determine a Respondent was not entitled to equitable relief, even though the statute of limitations on its at-law breach of contract claim had run:

> "The function of equity is to supplement the law, not to displace it." Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 117, 580 S.E.2d 100, 108 (2003) (internal quotations and citation omitted). The basis for granting equitable relief is the impracticability of obtaining full and adequate compensation at law. Monteith v. Harby, 100 S.C. 453, 3 S.E.2d 250, 251 (1939). Accordingly, equity is generally only available when a party is without an adequate remedy at law. EllisDon Constr., Inc. v. Clemson Univ., 391 S.C. 552, 555, 707 S.E.2d 399, 401 (2011). "[E]quity will not impose an equitable lien where there is an adequate remedy at law." Carolina Attractions, Inc. v. Courtney, 287 S.C. 140, 146, 337 S.E.2d 244, 247 (Ct. App. 1985). "An 'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." Milliken & Co. v. Morin, 386 S.C. 1, 8, 685 S.E.2d 828, 832 (Ct. App. 2009) (internal quotations omitted).

Nutt, 396 S.C. at 327-28.

The cases of Bartles v. Livingston, 282 S.C. 448, 455, 319 S.E.2d 707 (Ct. App. 1984), and Perpetual Bldg. & Loan Assn. of Anderson v. Braun, 270 S.C. 338, 242 S.E.2d 407 (1978), discuss the impact of the Act of 1791 (now embodied in Chapter 3 of Title 29 of the South Carolina Code) on mortgage foreclosure law in South Carolina. They reveal that the now-common procedure for the foreclosure of mortgages – in which a judgment for the debt and foreclosure by sale of the landowner's equity of redemption are sought in the same suit – is purely a statutory creation, fashioned by the legislature. Perpetual, 270 S.C. at 341-42; Bartles, 282 S.C. at 455-61. "Prior to 1791, South Carolina adhered to the common law principle of mortgages whereby an action to foreclose a mortgage was regarded as strictly *in rem*." Perpetual, 270 S.C. at 341.

At common law, an action for mortgage foreclosure sounds purely in equity and is an *in rem* proceeding only. Bartles, 282 S.C. at 455-56. It was "the Act of 1791 [that] integrated the action for foreclosure and the action for the deficiency after sale, abandoning the strict distinction between actions *in rem* and *in personam*." Perpetual, 270 S.C. at 342. It is the Act of 1791, by creating a statutory hybrid creature that grafted an at-law claim on to an equitable one that allowed

a mortgagee to seek a deficiency judgment in foreclosure without the proceeding being one at law. See Perpetual, 270 S.C. at 341-42; Bartles, 282 S.C. at 455-61. It created a statutory scheme that supplanted the rule that equitable relief is not available where an adequate remedy at law exists. Id.

Importantly for the instant case, the Act of 1791 changed the process for the foreclosure of *mortgages*, not for liens imposed by restrictive covenant. Perpetual, 270 S.C. at 341-42; Bartles, 282 S.C. at 455-61. As now shown in S.C. Code Ann. § 29-3-660, the Act changed the law to provide:

> In actions **to foreclose mortgages** the court may adjudge and direct the payment by the mortgagor of any residue of the **mortgage debt that** may remain unsatisfied after a sale of the mortgaged premises . . .

(Emphasis added.)

The rule that equitable relief is not available where a party possesses an adequate remedy at law has not been supplanted with regard to the foreclosure of other liens, except where provided by statute. It is not so provided by statute in the instant case.

As our Supreme Court has appeared to recognize, Dockside Assn., Inc. v. Detyens, 294 S.C. 86, 87-88, 362 S.E.2d 874, 875 (1987), S.C. Code Ann. § 27-31-210(a), which applies only to restrictions and associations created under the Horizontal Property Regime Act, is the only law in this state that permits a lien for homeowners' associations to be foreclosed in the manner of a mortgage foreclosure. The Horizontal Property Regime Act does not apply in the instant action because Respondent is not a condominium.

Moreover, Respondent has pled it is entitled to actual damages. (R, p. 18.) Actual damages is not an equitable remedy. Kiriakides v. Atlas Food Sys. & Servs., Inc., 338 S.C. 572, 580, 527 S.E.2d 371, 375 (Ct. App. 2000), *aff'd as modified and remanded*, 343 S.C. 587, 541 S.E.2d 257

(2001). At common law, a proceeding in which a judgment for money is sought sounds in law. Cooper v. Poston, 326 S.C. 46, 48, 483 S.E.2d 750 (1997). Respondent's pleading of actual damages demonstrates it is not entitled to equitable relief even assuming *arguendo* that Respondent is entitled to a payment of unpaid assessments.

Also, the collectability of a judgment from an action at law does not impact its adequacy as a remedy and is an improper justification for reliance upon equity. Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc., 361 S.C. 117, 122, 603 S.E.2d 905, 908 (2004). Equity cannot be used to enforce a money judgment. Time Warner Cable v. Condo Servs., Inc., 381 S.C. 275, 284, 672 S.E.2d 816, 820 (Ct. App. 2009) Equity will also not enforce a penalty for breach of contract. Lewis v. Premium Inv. Corp., 351 S.C. 167, 568 S.E.2d 361 (2002).

The equitable remedies of specific performance and rescission are also reasons to reject Respondent's argument. These equitable remedies relate to contracts all require the absence of an adequate remedy at law. Nutt, supra; Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000); Mortgage Elec. Sys., Inc. v. White, 384 S.C. 606, 615, 682 S.E.2d 498, 502 (Ct.App.2009); Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 616, 703 S.E.2d 221, 225 (2010). These remedies—like all equitable remedies—exist independent of any provision in a contract.

In the instant action, Respondent has plead it is entitled to the equitable remedy of foreclosure because Defendants failed to pay their dues. Respondent is attempting to use the equitable power of this court to collect damages for a simple breach of contract. Respondent cannot have it both ways. Respondent has an action for law, but their prayer for relief is purely equitable. Therefore, the Respondent's judgment for foreclosure should be denied.

1. There is no statutory or common law basis for the assertion of a pre-suit lien and foreclosure.

Respondent attempts to analogize to other circumstances where a party to a contract may assert the equitable remedy of foreclosure. All of the circumstances the Respondent could mention have been specifically created and/or authorized by statute. There is no statutory or common law basis for the assertion of a pre-suit lien and foreclosure by a non-condominium homeowners association.

Almost all liens in South Carolina are created by statute, and all pre-suit liens which allow for repossession/dispossession are purely statutory. The issuance and foreclosure of tax liens are governed strictly by statute, S.C. Code Ann. §§ 12-49-10 *et seq.*; F.C. Enterprises, Inc. v. Dibble, 335 S.C. 260, 263–64, 516 S.E.2d 459, 461 (Ct. App. 1999). There is a "charging lien" for the foreclosure of an interest in a limited liability company § 33–44–504(b). Judgment liens are a matter of statute. S.C. Code § 15-35-810. A workers compensation insurance carrier has a lien for funds paid by a third party tortfeasor. S.C. Code Ann. § 42–1–560(b).

A secured creditor has the right to file a lien and resort to the remedies of repossession in the event of a default under the Uniform Commercial Code, S.C. Code Ann. § 36-9-601 et seq. A health insurance company has the statutory right to assert a subrogation lien for payments made by a party at fault for causing injuries to its insured. S.C Code Ann. § 38-71-190. South Carolina also allows for reverse mortgages pursuant to S.C. Code Ann. § 29-4-10, et seq. A lender has a lien on a motor vehicle as part its security interest which can be repossessed for nonpayment. § 56-19-390 et seq.

There are mechanics' liens for unpaid improvements to real property with a right of foreclosure, and there is a first lien on funds to protect subcontractors. S.C. Code Ann. § 29-5-10, et seq. S.C. Code Ann. § 29-6-10, et seq., 29-6-210, et seq. There are liens for work performed on

ships and vessels. S.C. Code Ann. § 29-9-10, et seq. Every employee of factories, mines, mills, and distilleries have a lien for unpaid wages on the goods they produce. S.C. Code Ann. § 29-11-10, et seq. There is a "sharecropper's lien" for landlords on unpaid rent for agricultural goods produced on rented land. S.C. Code Ann. § 29-13-10, et seq. There is even an "artisan's lien" or "repairmen lien" which allows for a repairman to recover funds by selling abandoned or unpaid for goods in his or her possession. S.C. Code Ann, § 29-15-10, et seq.

The State has a "general lien" on the real and personal property of any person who is or has received care by the South Carolina Department of Mental Health. S.C. Code Ann, § 44-23-1140. The Department of Mental Health's lien is limited to the property and estate of the patient, and there is no common law right to assert a lien against the husband of a patient. S.C. Dep't of Mental Health v. Turbeville, 273 S.C. 311, 315, 257 S.E.2d 493, 494 (1979). Any incorporated city or town has the right to issue a lien and foreclose that lien to pay for the improvement of its streets and sidewalks. S.C. Code Ann. § 5-27-310 et seq. The state has also created a lien on the retirement funds of any public officer, official, etc. convicted of embezzlement or misappropriation of public funds. S.C. Code Ann. § 8–1–115.

A landlord has the statutory right to assert a lien for unpaid rent and hold personal property in distraint. S.C. Code Ann, § 27-39-210. A landlord has a right to distrain a tenant's property which arises automatically when the lease commences, but an actual lien does not attach until the tenant defaults and the landlord levies for distress. In re J.M. Smith Corp., 341 S.C. 442, 535 S.E.2d 131 (2000); Burnett v. Boukedes, 240 S.C. 144, 125 S.E.2d 10 (1962).

There are three more three statutory liens which are particularly relevant to the instant action. There is a lien and right to foreclose an interest in a timeshare under the South Carolina Timeshare Lien Foreclosure Act (SCTLFA.) S.C. Code Ann. § 27-32-300, et seq. A timeshare is

defined as an interest in real property used for vacations instead of as a homestead. S.C. Code Ann. § 27-32-305(1).The SCTLFA sets out the requirement to file a lien and then foreclose the lien only as to the portion of the timeshare estate belonging to a single debtor. S.C. Code Ann. § 27-32-320. The SCTLFA also requires the appointment of a trustee to oversee the process and protect the interests of the other fractional owners. S.C. Code Ann. § 27-32-315. By its plain terms, the SCTLFA is limited to timeshare estates and does not apply to non-timeshare homeowners associations like Respondent in this case.

The General Assembly also created a right to a lien for unpaid condominium assessments and the foreclosure of the same in the South Carolina Horizontal Property Regime Act., S.C. Code Ann. § 27-31-210. This statutory provision allows for the lien to be foreclosed "in like manner as a mortgage of real property." S.C. Code Ann. § 27-31-210(a). The Horizontal Property Regime Act is limited to properties purchased and owned as a condominium or "slice of air." S.C. Code Ann. § 27-31-20. There are specific requirements for the preparation of the declaration, deeds, etc. to create a horizontal property regime. S.C. Code Ann. § 27-31-30. An action to foreclose a lien under this action is one in equity as is one to foreclose a real estate mortgage. Dockside, supra. Here is no such analogous statutory provision which authorizes a non-condominium homeowners association to create and foreclose a lien.

Finally, there is the mortgage lien. The mortgagor of land is the owner in fee and has title to the land so mortgaged, but the mortgagee has a lien upon the land to secure his debt. Epstein v. Coastal Timber Co., 393 S.C. 276, 282, 711 S.E.2d 912, 915 (2011); Simms v. Kearse, 42 S.C. 43, 20 S.E. 19 (1894); S.C. Code Ann. § 29–3–10 "A mortgage and a note are separate securities for the same debt, and a mortgagee who has a note and a mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action." U.S. Bank Trust Nat'l Ass'n

v. Bell, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct.App.2009). A mortgage lien for property was once a feature of common law. But the mortgage lien was codified by the General Assembly in 1791 and is now found in S.C. Code Ann. § 29-3-10, *et. seq.* Carolina First Bank v. BADD, L.L.C., 414 S.C. 289, 293–94, 778 S.E.2d 106, 108 (2015); Berry v. Caldwell, 121 S.C. 418, 114 S.E. 405 (1922); Union Nat. Bank of Columbia v. Cook, 110 S.C. 99, 96 S.E. 484, 488 (1918). The common law right of mortgage foreclosure has never existed in South Carolina. Bartles, supra.

As the Supreme Court recognized in Carolina First, the foreclosure of a mortgage sounds in equity because the Act of 1791 vested the courts of equity with exclusive jurisdiction for foreclosure prior to the adoption of the 1868 Constitution. Williams v. Beard, 1 S.C. 309, 324 (1870). This Court has also stated the Act of 1791 changed the nature of a mortgage from that of a conveyance on condition to a mere lien. Perpetual, supra. Mortgage foreclosure proceedings are regulated by statutes, and those statutes should be substantially followed. 27 S.C. Jur. Mortgages § 103; Carolina First, supra. The rights of lenders and debtors are also further elaborated under the Negotiable Instruments provision of the South Carolina Uniform Commercial Code, S.C. Code Ann. § 36-6-101, *et seq.*

Respondent does not meet any of these statutory tests or definitions. Respondent specifically disclaims it is a mortgage. Respondent is neither a horizontal property regime nor a time share. Therefore, this Court should deny foreclosure.

2. Respondent cannot receive an equitable lien.

For equitable lien 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." Regions Bank v. Wingard Props., Inc., 394 S.C. 241, 250, 715 S.E.2d 348, 353 (Ct.App.2011); Nutt, supra. An equitable lien or charge **is neither an estate or property in the thing itself, nor a right to**

recover the thing, but is simply a right of a special nature over the thing, which constitutes a charge upon the thing so that the very thing itself may be proceeded against in equity for payment of a claim. Carolina Attractions, Inc. v. Courtney, 287 S.C. 140, 145, 337 S.E.2d 244, 247 (Ct. App. 1985)(Emphasis added.)

This equitable interest arises from the payment of the money and does not depend upon the purchaser's taking possession of the real estate. S.C. Fed. Sav. Bank v. San-A-Bel Corp., 307 S.C. 76, 79, 413 S.E.2d 852, 854 (Ct. App. 1992). It generally relates to the lien a purchaser under an executory contract for the purchase and sale of real property. Id. An equitable lien is a "mere floating equity until a judgment or decree subjecting the property to the payment of the debt or claim is rendered." Horry Cnty. v. Ray, 382 S.C. 76, 83–84, 674 S.E.2d 519, 524 (Ct.App.2009) 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. Id. at 84, 674 S.E.2d at 524. Moreover, a mere breach of contract does not give rise to an equitable lien. Regions, supra. A court cannot impose an equitable lien where there is an adequate remedy at law." Nutt, supra.

As with foreclosure, Respondent's assertion of contractual damages is fatal to its claim for an equitable lien.

3. Language that provides for foreclosure within the covenant is invalid.

Respondent will argue that the appeal within the covenants to the "manner" of a mortgage creates right to a lien and foreclosure. These provisions within the covenants merely appeal to a method and do not create a substantive right under an inapplicable statute. It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question. Smith v. Tiffany, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017). To do otherwise elevates form over

substance. Chapman v. S.C. Dep't of Soc. Servs., 420 S.C. 184, 189, 801 S.E.2d 401, 404 (Ct. App. 2017); Gordon v. Busbee, 367 S.C. 116, 120-21, 623 S.E.2d 857, 859-60 (Ct. App. 2005).

Artful drafting and/or pleading do not transform the plain words in a statute. Blue Cross Blue Shield of Massachusetts, Inc. v. BCS Ins. Co., 671 F.3d 635, 637–38 (7th Cir. 2011). Abraham Lincoln's saying that "calling a tail a leg doesn't make it a leg" is particularly apt in this circumstance. "[T]he logic of words should yield to the logic of realities." Di Santo v. Pennsylvania, 273 U.S. 34, 43, 47 S.Ct. 267, 71 L.Ed. 524 (1927). The words and labels in a contract do not override statutory or common law. Righthaven LLC v. Hoehn, 716 F.3d 1166, 1168 (9th Cir. 2013). The language in restrictive covenants cannot create rights for the parties born out of inapplicable statutes no matter how clearly the covenants call tails legs.

CONCLUSION

For the reasons set forth herein, Appellants herein requests this Court REVERSE the order of the Master-in-Equity.

Respectfully submitted,

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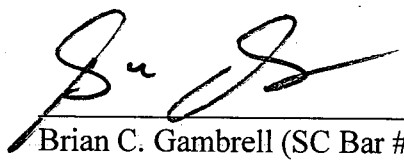

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Richland County Master In Equity
Joseph M. Strickland, Master in Equity

Civil Action No. 2017-CP-40-06634

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

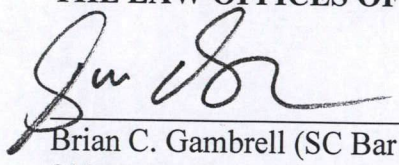
v.

Wanda J. Miller and Orlando F. Miller.....Appellants

CERTIFICATE OF COUNSEL

Undersigned counsel hereby certifies the final briefs of Appellants comply with Rule 211(b) of the South Carolina Rules of Appellate Procedure.

THE LAW OFFICES OF JASON E. TAYLOR, P.C.



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