

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas

Marvin H. Dukes, III, Master-in-Equity

Appellate Case No. 2016-001789

RECEIVED
NOV 13 2018
SC Court of Appeals

The Edgewater on Broad Creek Owners Association, Inc. /
and
the Council of Co-Owners of the Edgewater on Broad Creek Horizontal
Property Regime Phase I, Plaintiffs

Of which The Edgewater on Broad Creek Owners Association, Inc. is the Respondent

v.

Ephesian Ventures, LLC Appellant.

APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

The court below was tasked with determining whether the plain language of the controlling Master Deed was so clear and unambiguous that no genuine dispute of material fact remained as to its meaning and intent. In its initial brief, Respondent The Edgewater on Broad Creek Owners Association, Inc. (“Edgewater”) raises a number of different arguments intended to underpin and support its own interpretation of the Deed, ranging from a vague analysis of the condominium development process generally to fiduciary and public policy theories apparently rooted in equity. These arguments minimize the import of the plain language in the Master Deed and Bankruptcy Order of Sale in favor of alternative theories that, as a matter of law, carry less weight than the instruments themselves and in any event cannot form the basis for an award of summary judgment. If anything, Respondent’s arguments only serve to support reversal. Even accepting Respondent’s contentions as true, the terms of this Master Deed are at least ambiguous, and the lower court’s award of partial summary judgment was improper where so many issues of fact remain unresolved.

I. Respondent’s arguments do not support a conclusion that the Master Deed unambiguously denies Ephesian continuing rights and interests in the Phase I property.

The dispute before the lower court relied entirely on the interpretation of written instruments: the Master Deed, which created the Edgewater Regime while reserving certain rights and interests to the initial developer; and the United States Bankruptcy Court Order Approving Sale, which further clarifies the rights and interests that were conveyed to Ephesian as a successor in interest. But contrary to decades of controlling law on the interpretation of deeds and other written instruments, Respondent almost completely disregards the primary source of evidence—the plain language itself—and instead attempts

to redirect this Court's attention to almost anything else: the context of the condominium development process generally, cases from other jurisdictions, public policy, or general principles of law and equity. None of these are a substitute for the first and best resource in the interpretation of deeds, which point to the conclusion that Ephesian has specifically and intentionally retained the right to restrict or limit certain alterations to the Phase I Edgewater property. At most, Respondent's arguments only show that the language of the Master Deed and its potential impact on subsequent development on both parcels is ambiguous, and therefore not suitable for summary judgment.

Respondent's arguments rely almost entirely on secondary evidence—evidence that the court below need not have even considered if the Master Deed itself unambiguously expressed what Respondent purports it to express. And where Respondent does address the plain language of the Master Deed and other relevant documents, it is only to point out what it has identified as inconsistencies or ambiguities, which only serves to establish that the intent of the parties—a question of fact—is unresolved, and therefore unsuitable for summary judgment. Respondent points to

the overall plan of the Horizontal Property Act; parts of the regime papers which touch upon the specific question at bar; South Carolina caselaw, and cases from other jurisdictions; the nature of the duty owed by the developer to the Homeowners and to the regime; public policy; general principles of law and equity; and, most importantly, justice and common sense.

Resp't's Br. 4. Only one of these "sources" includes the actual language of the Master Deed or any other relevant instruments, and even then, Respondent's arguments only highlight what are, at best, ambiguities that can only be resolved by making a determination as to the disputed facts regarding the intent of the parties and the equities involved.

A. Respondent relies on evidence and theories beyond the four corners of the Master Deed.

The bulk of Respondent's arguments rely on sources beyond the Master Deed itself, in contravention to well-established construction principles. Collectively, the sum total of these arguments is apparently the principle that once a developer can no longer submit additional property to the regime, it has "no further role to play" and all control has "transitioned" to the regime. Resp't's Br. 3. Not only does this position overlook the primary source of available evidence, but it is completely undermined by the very sources on which Respondent relies for support.

Construction of deeds, including any restrictive covenants, reservations, or other limitations, is governed by the same principles applied to interpretation of contracts generally: the court's primary purpose is to give effect to the intent of the parties. S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 301 (2001); Taylor v. Lindsey, 332 S.C. 1, 4-5; 498 S.E.2d 862, 863-64 (1998); Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001). "One of the first canons of construction of a deed is that the intention of the grantor must be ascertained and effectuated if no settled rule of law is contravened." Bennett v. Investors Title Ins. Co., 370 S.C. 578, 590, 635 S.E.2d 649, 655 (Ct. App. 2006). The first and best evidence of the grantor's intent is the language of the deed itself; only when that language is ambiguous, unclear, or reasonably susceptible to more than one interpretation should the court look beyond the instrument itself. Blakeley v. Rabon, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976).

Instead of restricting its analysis to the plain language of the Master Deed, Respondent raises a number of unrelated arguments, none of which can support the summary judgment award. First, Respondent embarks on a general discussion of "how a condominium

regime is created and matures.” Resp’t’s Br. 3. Respondent also draws on the South Carolina Horizontal Property Act, asserting generally that both necessarily require the developer’s complete renunciation of any and all rights or duties over any property submitted to the regime. However, the Horizontal Property Act itself specifically references the developer’s obligation and right to set forth “[a] description of the full legal rights and obligations, both currently existing and which may occur, of the . . . person establishing the regime.” S.C. Code Ann. § 27-31-100(f). Clearly, the Act recognizes that a developer can reserve certain rights over development property even after a regime has been established. As the original owner of both of the parcels involved in this dispute, the developer retained any rights not conveyed by the Master Deed, and in particular those specific rights it expressly reserved to itself under the Horizontal Property Act. In this case, Broad Creek, as developer, retained the right to limit or restrict the construction of new amenities on the Phase I property in order to protect its interests and ability to develop, maintain, and improve the Additional Property, whether or not that property was ever submitted to the Edgewater Regime. Respondent cannot point to anything in the general development procedure or the South Carolina Horizontal Property Act that precludes this.

With no direct support for its position in the Horizontal Property Act, Edgewater turns to public policy arguments, arguing that South Carolina case law prohibits “perpetual control by a condominium developer.” Resp’t’s Br. 8. First, Ephesian does not claim or assert a right to “perpetual control” over the Edgewater common property. To the contrary, Ephesian claims only a limited right to an option over the construction of additional amenities—a right that is consistent with Ephesian’s other clearly reserved ownership rights and interests in certain components of the Phase I property necessary for the development of

the adjacent Additional Property. Second, Edgewater’s “public policy” argument relies on Queen’s Grant II Horizontal Property Regime v. Greenwood Development Corp., 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006), a case that purportedly represents the proposition that a developer’s powers and rights must expire “when the developer no longer possesse[s] a sufficient property interest in the development.” Resp’t’s Br. 8. Respondent misstates both the import and the holding of Queen’s Grant; in fact, the case points to the opposite conclusion.

In Queen’s Grant, the Court of Appeals was asked to determine whether Greenwood Development, as the successor in interest to the original developer of the Queen’s Grant regime, maintained the right to amend the Queen’s Grant restrictive covenants even though it did not purchase the adjacent property until after all of the Queen’s Grant units and regime property had been conveyed. Id. at 350–55, 628 S.E.2d at 907–909. The relevant Master Deed expressly reserved to the original developer the right to modify or impose additional covenants at any time in its sole discretion. Id. at 352, 628 S.E.2d at 908. In 1981, Greenwood Development exercised its right to amend the original 1972 Covenants and recorded an amendment increasing the annual maintenance assessment. Id. at 353–54, 628 S.E.2d at 908–09. Later, as the individual Queen’s Grant units were sold, Greenwood Development gave notice of the amendment to the new owners by, in most cases, specifically referencing the 1981 Covenants both in the deeds and in a “Waiver Agreement” signed by the new purchasers. Id. at 354–55, 628 S.E.2d at 909. In five cases, however, Greenwood Development obtained only Waiver Agreements that did not specifically reference the 1981 Covenants. Id.

Years later, in 2000, Queen's Grant filed suit after Greenwood Development refused to reimburse it for a \$175 road repair, claiming that Greenwood Development had not retained the ability to amend the Queen's Grant Covenants and therefore could not enforce the 1981 Covenant amendment. *Id.* at 355, 628 S.E.2d 909–10. In characterizing the Queen's Grant holding, Respondent claims that the Court of Appeals rejected the developer's claim to a right to amend the regime's restrictive covenants by holding "that such a right expired when the developer no longer possessed a sufficient property interest in the development." Resp't's Br. 8. To the contrary, the Queen's Grant court expressly rejected this argument and affirmed the developer's right, acknowledging that a developer may retain certain rights over a subdivision even when it no longer owns any development property, especially where it continues to hold obligations and interests in adjacent property:

Queen's Grant argues that Greenwood Development lacked authority to amend the restrictive covenants because it bought Palmetto Dunes after all the units in the Queen's Grant regime had been sold, and thus Greenwood Development "cannot impose covenants/restrictions on property that it does not own." This argument is unavailable, for Queen's Grant misapprehends the *purpose* of the assessment under the 1972 Covenants and the 1981 Covenants Greenwood Development's lack of a direct ownership interest in the property of Queen's Grant in no manner impedes its continuing rights as Declarant under the 1972 Covenants, including its ability to amend the covenants. As noted, Palmetto Dunes does not merely consist of a single horizontal property regime, and Queen's Grant comprises just a small part of Palmetto Dunes.

Queen's Grant asks us to follow the rule that a developer of a subdivision who reserves authority respecting restrictive covenants running with the land loses that authority when he divests himself of his interest in the subdivision. Armstrong v. Roberts, 254 Ga. 15, 325 S.E.2 769, 770 (1985). This rule has no application here, for Greenwood Development maintains a substantial interest in Palmetto Dunes. Queen's Grant's narrow view – limiting the analysis to the confines of its regime – is myopic and fails to recognize Greenwood Development's interest in Palmetto Dunes and its corresponding obligation to maintain resort properties far beyond the Queen's Grant Regime.

Queen's Grant, 368 S.C. at 363–64, 628 S.E.2d at 914. Contrary to Respondent's representation, the Queen's Grant court did not reject the developer's continuing right to amend the regime's covenants. Just the opposite: the Court of Appeals affirmed (except as to the five units with only Waiver Agreements not referencing the 1981 Covenants), holding that "because the Declaration of Covenants reserved to Palmetto Dunes Resort, and hence Greenwood Development as successor, the right to amend the restrictive covenants, purchasers of units in the Queen's Grant regime accepted their respective deeds subject to this right." Id. at 370, 628 S.E.2d at 918.

As in the Queen's Grant case relied on by Respondents, Broad Creek, as the original developer, expressly retained and reserved certain rights and interests over the Phase I property, including an option over additional amenities or recreational facilities; this right now belongs to Ephesian as successor in interest. And, as in Queen's Grant, Ephesian continues to hold an interest sufficient to support those reservations and rights by virtue of its ownership of and rights to adjacent development property outside of the Edgewater Regime. Moreover, just as in Queen's Grant, Ephesian's lack of a direct ownership interest in the property of Edgewater in no manner impedes its continuing rights as Declarant under the Master Deed. Queen's Grant does not represent the "public policy" that Respondent describes, and in fact expressly rejects the applicability of Armstrong v. Roberts, 254 Ga. 15, 325 S.E.2d 769 (1985) under a similar set of facts. If anything, Queen's Grant sets forth a policy in favor of preserving Ephesian's continuing limited rights over Edgewater regime property; if a developer's successor in interest can retain the right to unilaterally amend the Covenants and Restrictions, surely it can also retain the more limited right to exercise an

option over certain new constructions. At the very minimum, the issue presents numerous disputed questions of material fact not ripe for adjudication on summary judgment.

Respondent's final argument arising outside of the actual Master Deed language asserts the existence and breach of a "fiduciary duty" owed to the homeowners of Edgewater. This argument was not raised to the trial court. Respondent asserts the existence of a general fiduciary duty owed by a developer and makes a conclusory allegation that Ephesian has somehow breached this duty. Even assuming without admitting that such a duty exists, both the extent of that duty and whether Ephesian has, by opposing the contemplated construction, breached it, is clearly a disputed issue of fact. Neither this Court nor the Master-in-Equity can rely on Edgewater's mere assertion that Appellant not only owes an unspecified duty to Respondent, but has also somehow failed to carry it out.

South Carolina law has clearly established that the construction and interpretation of written instruments, including Master Deeds, must begin with an evaluation of the plain language of the instrument itself. Only if this language is ambiguous should the court consider other sources, with the primary objective being the enforcement of the intent of the parties as long as no well-established public policy is violated. But many of Respondent's arguments entirely sidestep the best evidence of the parties' intent, instead relying on external sources that, on closer review, do not necessarily lend any support at all to its positions, and in some cases suggest just the opposite.

B. Respondent's arguments regarding the text of the Master Deed suggest ambiguities not suitable for resolution on summary judgment.

As opposed to the arguments addressed above, a handful of Edgewater's arguments actually do arise out of the language of the Master Deed itself. However, nothing in these arguments supports the conclusion that the Master Deed and other supporting instruments

clearly and unambiguously deny Ephesian the rights it now seeks to assert as a matter of law. Just the opposite: even when Respondent does refer to the language of the Master Deed, it is only to point out purported ambiguities or inconsistencies. First, Edgewater argues that certain language expressly reserving rights to the developer should be disregarded or given no effect because “even closing attorneys” probably would not have read it. Resp’t’s Br. 5. Second, Edgewater asserts that the rights reserved by the developer conflict with other provisions of the Master Deed, and that these provisions should therefore be read narrowly. To the extent that this Court accepts these arguments, they require reversal because the underlying intent of the parties, necessary to resolving the ambiguities Edgewater describes, remains in dispute.

1. Edgewater cannot avoid the reservations contained in the Master Deed by claiming that its attorneys were unlikely to have read them.

Edgewater acknowledges Master Deed language reserving certain rights and interests to the developer but apparently claims that this language should not be given its rational meaning or effect because of its placement within the Master Deed. Instead, Edgewater argues that this language “should have been placed in the *text* of the Master Deed, where they would have been seen.” Resp’t’s Br. 5. Because these reservations are in a “misleadingly labeled” document, “no one—not even lawyers at closing—would be likely to discover them.” *Id.* Nothing in South Carolina law or the record in this case supports a conclusion that Respondent may avoid the terms of the Master Deed on these grounds. At most, Respondent’s argument raises yet another genuine dispute of material fact, requiring reversal of the Master’s partial summary judgment order.

Respondent offers no South Carolina authority supporting the proposition that Edgewater should be excused from the reservations plainly set forth in Exhibit A of the

Master Deed—which is mentioned and incorporated by reference in the very first paragraph of the Deed’s text—merely because its own attorneys may not have read it. With limited exceptions, our courts have consistently held the opposite: a party to a contract, who has had ample opportunity to read and review it, is charged with notice of its contents. See Herron v. Century BMW, 387 S.C. 525, 693 S.E.2d 394 (2010), *vacated on unrelated grounds by Sonic Auto., Inc. v. Watts*, 563 U.S. 971 (2011) (holding that parties to contract for purchase of a vehicle could not avoid enforcement of the arbitration clause because they did not read it); Mid-Continent Refrigerator Co. v. Dean, 256 S.C. 99, 101, 180 S.E.2d 893, 893 (1971) (holding that lessee’s failure to read contract was “no excuse for his failure to comply”); Maye v. Wilson Motors, Inc., 253 S.C. 471, 480, 176 S.E.2d 147, 152 (1970) (“The fact that the Respondent may not have familiarized himself with the provisions of his policy does not permit him to complain when the insurer exercises a right reserved therein.”). Clearly established South Carolina jurisprudence “forbids” courts from invalidating an otherwise enforceable agreement merely because one party did not read it. Herron, 387 S.C. at 533, 693 S.E.2d at 398 (“Our jurisprudence forbids us to allow the [Plaintiffs] to invalidate the enforceability of the arbitration agreement by claiming they did not read it.”); see also Sims v. Tyler, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981) (“A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it.”).

The Master Deed at issue has been available in the public record since 2002, and the Edgewater Homeowners Association and all individual unit owners are presumed to have accepted and executed their respective deeds subject to its provisions, reservations, and limitations. South Carolina law does not permit Respondent to disregard and avoid

provisions of the Master Deed on the grounds that “not even lawyers at closing [] would be likely to discover them.” Resp’t’s Br. 5. At a minimum, the argument that Respondent now attempts to raise—that the contents of the property description were somehow hidden or misleading—presents a question of fact that cannot be resolved on the record currently before the Court. Respondent has not even put forward evidence as to whether or not its agents and attorneys actually did fail to read or discover the contents of Exhibit A. The placement of the reservation clauses, coupled with Respondent’s unsupported assertion that its agents and attorneys probably would not have read them, do not support partial summary judgment.

2. If the provisions of the Master Deed are conflicting, then the contract is ambiguous and the Master erred by granting partial summary judgment.

Respondent also argues that provisions purporting to reserve certain rights should be read narrowly or construed to have an implied expiration date, because if given their plain meaning they “would conflict with other provisions of the Master Deed and with the overall plan of the Horizontal Property Act.” Resp’t’s Br. 5. When read as a whole, Respondent argues, the Master Deed, construed in light of the Horizontal Property Act and the association by-laws, contemplates a scheme wherein the declarant’s reserved rights, if any, expired by implication no later than December 31, 2010. But while certain rights and reservations under the Master Deed did expressly expire, others did not. Respondent’s attempt to extend the applicability of the expiration date to other provisions by pointing out purported “inconsistencies” only serves to show that the Master Deed is ambiguous, creating a material dispute of fact as to the intent of the parties and with it, reversible error.

“A contract is ambiguous when the terms of the contract are inconsistent on their face, or are reasonably susceptible of more than one interpretation.” Hawkins v. Greenwood

Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). To address these ambiguities and resolve any inconsistencies, the court may consider evidence outside of the instruments in order to determine the intent of the parties—a question of fact. Id., 493 S.E.2d at 878–79. Respondent claims not only that the provisions of the Master Deed are in conflict, but that the court can and should resolve them as a matter of law by reading implied limitations into the rights expressly reserved by the declarant. South Carolina law does not empower the Master to unilaterally reform contracts at the summary judgment stage, without any evidence as to the parties’ intent. As set forth above, no public policy consideration uniformly prohibits a declarant from retaining certain rights over regime property even after the developer no longer possesses an interest in any property within the boundaries of the regime. See Queen’s Grant II, 368 S.C. at 32, 628 S.E.2d at 902. But Respondent argues that the rights expressly reserved by the declarant conflict with other provisions, hinting that these reservations were actually intended to be temporary. Resolving this alleged conflict would require the court to make a factual determination as to the intent of the parties. Because this fact is in dispute, the Master’s order for partial summary judgment must be reversed.

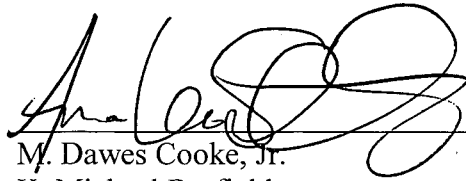
II. This Court may vacate language and reasoning that may adversely affect Appellant’s rights.

In its initial brief, Edgewater generally concedes that much of the Master’s order is irrelevant and unnecessary to the judgment, and therefore cannot be applied against the Appellant in subsequent proceedings. However, the demarcation between the Master’s essential reasoning and unnecessary speculation within the underlying order is not as clear, and portions of the holding itself could be readily construed to extend to other rights and interests claimed by Appellant but not presently at issue before the Court. For example, the Order broadly concludes that there is “no restrictive covenant that prohibits [Respondent]

from making improvements on the property of the Regime; any claim of the [Appellant] of a right to improve the 7.64-acre Regime is non-exclusive and is expressly limited to improvements ‘pertaining to The Edgewater on Broad Creek Horizontal Property Regime.’” (R. p. 7). Contrary to Respondent’s characterization, this holding is not “narrow” or strictly limited only to the proposed pool and tabby walk. Instead, it makes a blanket finding that nothing in the Master Deed or other relevant instruments precludes Respondent from making any improvements at all on any Regime property—an issue that Respondent concedes is still in dispute. To the extent that the lower court’s order is overly broad and could be construed to implicate issues beyond the narrow dispute before it, Respondent respectfully requests that the Order be vacated or amended as appropriate to preserve Appellant’s rights.

CONCLUSION

Appellant Ephesian appeals from an Order for Partial Summary Judgment constructing a written instrument that, even taking Respondent’s arguments as true, is at best ambiguous, requiring the court to make a finding of fact as to the intent of the parties. Respondent’s own brief raises numerous questions of material fact that were not and could not have been resolved on the record before the court below, and particularly not under a summary judgment standard that requires the court to make all inferences in favor of the Respondent. Respondent Ephesian therefore respectfully requests that this Court reverse the Master in Equity’s Orders granting partial summary judgment and denying Appellant’s Rule 59(e) Motion to Alter or Amend, or in the alternative for an order vacating those portions of the Master’s Order that extend beyond the issues before the court.



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RULE 211 CERTIFICATE

I hereby certify that this Appellant's Final Reply Brief complies with Rule 211(b),
S.C.A.C.R.

11/7/2018
Date


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