

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

COLLETON RIVER PLANTATION)
CLUB, INC.,)
)
Plaintiff,)

Civil Action No. 2018-CP-07-00422
Civil Action No. 2018-CP-07-00424

vs.)

**ORDER DENYING MOTION FOR
SUMMARY JUDGMENT**

EQUIVEST FINANCIAL, LLC,)
SWEETCO PROPERTIES, LLC, JOHN)
DOE AND MARY ROE,)
)
Defendant.)

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SC Court of Appeals

This matter came before me for a hearing on August 21, 2019, on motions for summary judgment filed by defendant Equivest Financial, LLC (“Equivest”). Having reviewed the memoranda and supporting materials filed by the parties, and heard the arguments of counsel, the Court concludes the motions for summary judgment should be denied.

FACTUAL & PROCEDURAL BACKGROUND

The plaintiff Colleton River Planation Club, Inc. (the “Club”) filed these actions to collect unpaid homeowners’ association assessments from Equivest in connection with lots it purported to convey to defendant SweetCo Properties, LLC (“SweetCo”). The Club is a non-profit corporation whose members are owners of real property (the “Owners”) within Colleton River Plantation (“Colleton”), a planned residential community in Bluffton, South Carolina. Among other things, the Club collects assessments from Owners to operate and maintain infrastructure and amenities for the Colleton community.

The original Declaration of Covenants and Restrictions for Colleton River Plantation was recorded in the office of the Beaufort County Register of Deeds on July 22, 1991, at Book 3204,

Page 1016 (the "Original Covenants"). The Original Covenants attached the Bylaws of Colleton River Plantation Club, Inc. (the "Original Bylaws"). The Original Bylaws and the Original Covenants were amended several times in subsequent years, but they always required Owners to pay assessments and authorized the Club to sue to collect unpaid assessments.

The central issue raised in Equivest's motions for summary judgment concerns the validity of the Fourth Amended Covenants, which were recorded on April 26, 2007 in Book 02559 at page 2357. The Fourth Amended Covenants added certain requirements related to transfers of lots within the community. For example, Section 7.1(c) of the Fourth Amended Covenants states as follows:

Transfer of Title. Subject to Section 19.2, any Owner desiring to sell or otherwise transfer title to his or her Lot shall give the Board at least 30 days' prior written notice of the name and address of the purchaser or transferee, the date of such transfer of title, and such other information as the Board may reasonably require. The Person transferring title shall continue to be jointly and severally responsible with the Person accepting title for all obligations of the Owner, including assessment obligations, until the date upon which the Board receives such notice and all amounts outstanding prior to transfer are paid in full, notwithstanding the transfer of title.

In addition, Section 14 requires any entity purchasing a lot to provide to the Club's Board of Directors for approval a candidate as designated user who meets the standards of Section 14.2(e) ("including, but not limited to, standards related to conduct and credit worthiness") in the judgment of the Board. Further, Section 19.2 grants the Club the right to purchase any lot offered for sale in the community on the same terms as any bona fide purchase offer, and it requires the Owner to provide written notice to the Club of his intention to sell, after which the Club has 30 days in which to exercise the option. Under the Fourth Amended Covenants, an Owner remains liable for assessments, despite any purported conveyance of the lot, unless and until these transfer

requirements are satisfied. There is no dispute that these requirements were not met in connection with the purported transfers from Equivest to SweetCo.

Equivest argues these transfer requirements do not apply here because the Fourth Amended Covenants, in which the restrictions first appeared, were not adopted in accordance with an amendment procedure described in the prior version, the Third Amended Covenants, as amended by the Third Amendment to the Third Amended Covenants.¹ Section 14.1 of the Third Amended Covenants states as follows regarding amendments:

[T]he procedure for amendment shall be as follows: all proposed amendments shall be submitted to the vote of the Owners at a duly called meeting of the Club for which notice of the proposed amendment has been given to the Owners in the official Notice for the meeting, subject to the quorum requirements set forth above, and any such proposed amendment shall be deemed approved in three-fourths (3/4) of the votes cast at such meeting at which such proposed amendment is to be considered are in favor of the amendment.

Although this provision calls for a meeting of the Owners, the Third Amended Bylaws² expressly permit voting by written ballot in lieu of a meeting in any circumstance where the members may take action at a meeting. Section 2.10 of the Third Amended and Restated By-laws, entitled "Action Without a Meeting," states in relevant part:

Any action that may be taken by the Owners at any annual, regular, or special meeting *may be taken without a meeting* if the Club delivers a written ballot to every Owner entitled to vote on the matter.

(emphasis added).

¹ The Third Amended Covenants are the Third Amended and Restated Colleton River Plantation Declaration of Covenants and Provisions for Membership in Colleton River Plantation Club, Inc. recorded on May 24, 2002 in Book 01585 at page 1072 in the Office of the Register of Deeds for Beaufort County. The Third Amendment to the Third Amended Covenants was recorded on February 22, 2006 in Book 02324 at page 0239 in the Office of the Register of Deeds for Beaufort County. For brevity, only the Third Amended Covenants will be referenced in this discussion.

² The Third Amended and Restated By-laws of the Colleton River Plantation Club, Inc. were recorded on December 8, 2006 in Book 02487 at page 1036 in the Office of the Register of Deeds for Beaufort County.

In 2007, in accordance with the Third Amended Bylaws, the Club approved the Fourth Amended Covenants by written ballot without a meeting. The Club asserts that many Owners do not live in Colleton year-round and that mail-in balloting provides more Owners the opportunity to vote than would a live meeting. It also submitted documentation which it argues establishes that the Club Board informed the Owners in advance of the 2007 vote of its intention to use mail-in ballots in lieu of a meeting, that the Club members were given an opportunity to comment on the draft amendment as well as the voting plan, and that the Board made changes to the proposed amendment based upon input from the Owners. Upon approval by the requisite supermajority, the Fourth Amended Covenants were recorded on April 26, 2007.

Six years later, in 2013, Equivest acquired the two undeveloped lots at issue in these cases, lot K-39 and lot E-34 (the "Lots"), at a tax sale. When Equivest failed to pay assessments on the Lots in 2013, Colleton sued Equivest in this Court and obtained a judgment by default for unpaid assessments dated January 17, 2014. *Colleton River Plantation Club, Inc. v. Equivest Financial, LLC*, Judgment No. 2013-CP-07-01092. Thereafter, Equivest again became delinquent, and Colleton sued Equivest again. *Colleton River Plantation Club, Inc. v. Equivest Financial, LLC*, Case No.: 2015-CP-07-02568. The second action resulted in a settlement dated June 28, 2016, under which Equivest agreed to pay Colleton \$165,000 for past due assessments and other charges through June 15, 2016.

Less than three months after the settlement, Equivest purported to convey the Lots to SweetCo via quit claim deed recorded on September 19, 2016, in Book 3516, Page 240. The Club alleges the transfer from Equivest to SweetCo was not arm's length. It argues that Kenneth Foote, who was Vice President of Equivest, was also the sole member of SweetCo at the time of the transfer, that Foote subsequently dissolved SweetCo by filing a notice of dissolution with the

Delaware Secretary of State on December 4, 2017, that SweetCo provided no notice of dissolution to Colleton or any other creditors, and that SweetCo made no provision for payment of its debts.³ The Club alleges the principals of Equivest, including Foote, purported to convey the Lots to SweetCo for the sole purpose of avoiding Equivest's obligation to pay assessments to the Club.

After Equivest did not pay assessments and other charges as they came due for 2016, the Club demanded payment. Equivest refused, claiming it sold the Lots to SweetCo and therefore was no longer liable for assessments to the Club. Counsel for the Club responded that Equivest failed to comply with the transfer restrictions in the Fourth Amended Covenants, and that the conveyance appeared to be a fraudulent transfer, such that Equivest remained liable for assessments despite the purported transfer. After Equivest refused to pay, the Club brought this action to recover the delinquent assessments. In addition to requesting recovery pursuant to the Fourth Amended Covenants, the Club asserts a claim for civil conspiracy against all defendants and seeks to invalidate Equivest's transfer of the Lots to SweetCo pursuant to the Statute of Elizabeth, S.C. Code Ann. Section 27-23-10(A).

ANALYSIS

Equivest argues it is entitled to summary judgment on its declaratory judgment counterclaim that the Fourth Amended Covenants and all subsequent amendments are invalid. Equivest also seeks summary judgment on the Club's claims under the Statute of Elizabeth.

A trial court may properly grant a motion for summary judgment only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. Summary judgment is not appropriate when

³ SweetCo did not respond to the complaints in these actions, and the Clerk has entered defaults against it.

further inquiry into the facts of the case is desirable to clarify the application of the law. *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts. *Id.* In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24 (1988).

I. Adoption of the Fourth Amended Covenants by written ballot, rather than at a meeting, did not render the covenants invalid.

Equivest argues a conflict exists between Section 14.1 of the Third Amended Covenants, which states any amendments to the Covenants shall be approved by the Owners at a meeting, and Section 2.10 of the Third Amended Bylaws, which states that any action that can be taken at a meeting may be approved by the Owners via written ballots without a meeting. In addition, according to Equivest, Section 9.3 of the Third Amended Bylaws provides that the Covenants trump the Bylaws, such that the Club was required to hold a meeting to amend the Third Amended Covenants.

The Court concludes there is no conflict among these provisions, and, even if the documents did conflict, the South Carolina Nonprofit Corporations Act (the "Nonprofit Act") would trump the Covenants and the Bylaws, and the Act expressly authorized the Club to amend the Covenants by written balloting without a meeting.

A. There is no conflict between the Third Amended Covenants and the Third Amended Bylaws.

Section 2.10 of the Third Amended Bylaws is reconcilable with Section 14.1 of the Covenants. The Covenants require a membership vote on proposed amendments. Section 2.10 of

the Bylaws permit voting by written ballot in lieu of a meeting in any circumstance where the Owners may act at a meeting. Because voting on amendments to the Covenants is something the Owners may do at a meeting, the two documents, read together, permit the Club to approve amendments to the Covenants via written ballot without a meeting.

This reading of the governing documents is consistent with the respective roles of restrictive covenants and corporate bylaws in homeowners' association governance. The covenants contain the owners' rights and duties with respect to the property, while the bylaws govern internal management of the association, including voting and meeting procedures. *See, e.g.*, S.C. Code Ann. § 33-31-206(b) (reporter's comment) (stating bylaws of a non-profit corporation may contain provisions related "to voting rights procedures governing admission, expulsion, suspension and other matters").

Moreover, this reading of the governing documents is bolstered by the Nonprofit Act, which also provides that, unless prohibited or limited by the articles of incorporation or bylaws, any action that may be taken at any annual, regular or special meeting of the owners may be taken without a meeting by the ballot method. S.C. Code Ann. § 33-31-708. Neither the Club's articles of incorporation nor the Bylaws prohibit or limit the use of ballots in lieu of voting at a meeting. Thus, the Club was entitled to approve the subject amendment via written ballot without a meeting irrespective of Section 2.10 of the Bylaws.

Moreover, the Court concludes that the intention of the Section 14.1 of the Third Amended Covenants, when read together with the Nonprofit Act and the Third Amended Bylaws, is not to require that any vote concerning a proposed amendment occur *at a meeting*. Rather, the intention is to require that any proposed amendment be *approved by the requisite supermajority of the*

Owners, as opposed to approved by the developer or the Board of Directors.⁴ Whether the Owners cast their votes by mail or in person at a meeting is immaterial, provided the members receive adequate notice and opportunity to vote as expressly required by the Third Amended Bylaws.

Section 16.8 of the Third Amended Covenants further supports the Club's interpretation of the governing documents. That section states the Covenants should be interpreted liberally in favor of modern governance practices:

Section 16.8: Interpretation. *In all cases*, the provisions of this Third Amended Declaration *shall be given that reasonable interpretation or construction* which will best effect consummation of the general plan of land use restrictions and affirmative obligations of the Property, and which will preserve the Property as a situs for a high amenity, attractive, well maintained, privately-governed residential community. *Contrary to the restrictive common law rule of construction, this Third Amended Declaration shall by this Covenant be interpreted broadly* to touch and concern the Property with recognition of modern economic, land use planning and real estate finance and development principles, theories and practices.

(emphasis added). Section 16.8 expressly rejects the notion that the Covenants must be strictly construed. Instead, it states the Covenants must be interpreted broadly and reasonably in a manner to best effectuate the purposes of the Club.⁵ A broad and reasonable interpretation of Section 14.1

⁴ Importantly, Section 33-31-140(1) of the Nonprofit Act defines the phrases "approved by the members" and "approval by the members" as follows:

"(1) "Approved by the members" or "approval by the members" means approved or ratified by the members entitled to vote on the issue through either:

(a) the affirmative vote of a majority of the votes of the members represented and voting at a duly held meeting at which a quorum is present or the affirmative vote of the greater proportion including the votes of any required proportion of the members of any class as the articles, bylaws, or this chapter may provide for specified types of member action; or

(b) *a written ballot* or written consent *in conformity with this chapter.*" (emphasis added).

⁵ Equivest cites *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006), for the proposition that South Carolina law requires a homeowner's association to strictly comply with any procedures contained in the covenants relating to amendments. But that is not what *Queen's Grant* says. The Court of Appeals in *Queen's Grant* announced five requirements for a developer to unilaterally amend restrictive covenants, one of which was that the developer must strictly comply with any reserved power to amend. *Id.* at 350, 628 S.E.2d at 907. The policy concerns that caused the court to require strict compliance of a developer exercising a unilateral right to amend covenants simply are not present here, where the homeowners overwhelmingly approved the amendment by written ballots.

of the Third Amended Covenants would look to and incorporate the provisions of the Nonprofit Act and Section 2.10 of the Third Amended Bylaws (which mirror Section 33-31-708 of the Nonprofit Act), both of which expressly allow approval by ballots without a meeting for any action of the Owners that can be taken at a meeting. And such an interpretation would accommodate the need for mail-in balloting at modern resort communities where many owners may not reside at the community year-round and may often be unable to vote on association affairs in person. Conversely, a narrow interpretation of Section 14.1 to require the Owners to be physically present at a meeting would serve no legitimate purpose and could deprive many Owners of the practical ability to vote on amendments, in violation of Section 16.8 of Third Amended Covenants. Thus, there is no conflict between the governing documents, and, read together, they permitted the use of written ballots in lieu of a meeting for approval of the Fourth Amended Covenants.

B. Any conflict between the Covenants and the Bylaws must be resolved by reference to the Nonprofit Corporation Act, which permits voting by written ballot in lieu of a meeting.

Equivest argues the alleged conflict between Section 14.1 of the Third Amended Covenants and Section 2.10 of the Third Amended Bylaws must be resolved pursuant to the conflict resolution provision in Section 9.3 of the Third Amended Bylaws and that this provision requires resolution in favor of the Covenants. But Section 9.3 requires no such thing. Rather, assuming *arguendo* that there is a conflict between the Covenants and the Bylaws (and the Court concludes there is not), Section 9.3 provides that the applicable provisions of the Nonprofit Act trump both documents, and the Nonprofit Act (like the Bylaws) expressly provides that any action that can be taken at a meeting of the members of a South Carolina nonprofit corporation may be approved by the members through a vote using written ballots without a meeting. S.C. Code Ann. § 33-31-708.

Section 9.3 of the Third Amended Bylaws, to which Equivest asserts this Court must look to resolve the alleged conflict, states in relevant part:

If there are conflicts among the provisions of South Carolina law, the Articles of Incorporation, the Declaration, and these By-Laws, ***the provisions of South Carolina law, the Declaration, the Articles of Incorporation, and the By-Laws (in that order)*** shall prevail.

(emphasis added). As a South Carolina nonprofit corporation, the Club is subject to the Nonprofit Act. *See, e.g., Callawassie Island Members Club, Inc., v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018) (applying the Nonprofit Act to a homeowners' association organized as a nonprofit corporation); *Lovering v. Seabrook Island Property Owners Ass'n*, 289 S.C. 77, 344 S.E.2d 862 (Ct. App. 1986) (same). As discussed above, the Nonprofit Act expressly permits voting by ballot without a meeting for any action that can be approved at a meeting of the members of a nonprofit corporation. S.C. Code Ann. § 33-31-708. The only actions to which section 33-31-708 does not apply are actions for which the *articles of incorporation* or the *bylaws* of the corporation specifically prohibit vote by ballot without a meeting. *Id.* In this case, the articles of incorporation do not speak to the issue, and the Bylaws expressly permit voting by written ballot without a meeting.⁶ Accordingly, if there is a conflict to resolve pursuant to Section 9.3 of the Bylaws, the Nonprofit Act resolves it in favor of the written ballot procedure described in S.C. Code Ann. § 33-31-708 and used by the Club to approve the Fourth Amended Covenants.

⁶ At the hearing, counsel for Equivest argued the covenants are the "functional equivalent" of the Bylaws, and therefore the exception in S.C. Code § 33-31-708 should be interpreted to include situations where the articles of incorporation, bylaws, ***or the covenants*** provide otherwise. But the Covenants are not the articles of incorporation for the corporation. Section 33-31-140(2) of the Nonprofit Act defines articles of incorporation as follows: "(2) 'Articles of incorporation' or 'articles' include amended and restated articles of incorporation and articles of merger." In addition, Section 33-31-202 of the Nonprofit Act lists items that must be set forth in articles of incorporation, and these items typically are not found in restrictive covenants. Moreover, Section 33-31-203 of the Nonprofit Act requires articles of incorporation to be filed with the Secretary of State's office, while restrictive covenants are not. Thus, restrictive covenants and articles of incorporation plainly are not the same thing.

II. Equivest is not entitled to summary judgment on the Club's claims based on the Statute of Elizabeth.

The Court concludes that there is a genuine issue of material fact whether Equivest conveyed the Lots to SweetCo to avoid Equivest's obligation to pay assessments to the Club. In fact, counsel for Equivest did not even argue to the contrary at the hearing. Rather, Equivest argues simply that the Club cannot state a claim for application of the Statute of Elizabeth under the factual situation presented here. The Court disagrees.

South Carolina's version of the Statute of Elizabeth provides as follows:

Every gift, grant, alienation, bargain, transfer, and ***conveyance of lands***, tenements, or hereditaments, goods and chattels or any of them, or of any lease, rent, commons, or other profit or charge out of the same, by writing or otherwise, and every bond, suit, judgment, and execution which may be had or made to or ***for any intent or purpose*** to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every one of them whose actions, suits, debts, accounts, damages, penalties, and forfeitures by guileful, covinous, or fraudulent devices and practices are, must, or might be in any ways disturbed, hindered, delayed, or defrauded) ***to be clearly and utterly void***, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or ***any other matter or thing to the contrary notwithstanding***.

S.C. Code Ann. Section 27-23-10(A). Here, there is at least a factual dispute whether Equivest made a "conveyance of lands" to "hinder or defraud creditors of their just and lawful . . . debts." The plain language of the statute squarely fits the factual allegations of this case.

Equivest argues the Court should impose an *additional* requirement for application of the statute—that the plaintiff must seek its remedy from the fraudulently conveyed property. But the statute quoted above contains no such requirement, and Equivest cites no authority for it. Had the legislature intended to limit the statute's application in that manner, it would have written the limitation into the statute. This Court may not apply a limitation the legislature elected not to include. *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)

“The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. In doing so, we must give the words found in the statute their ‘plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.’” (quoting *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007)).

Moreover, Equivest’s reliance upon *First Citizens Bank and Trust Company, Inc. v. Blue Ox, LLC*, 422 S.C. 461, 469-470, 812 S.E.2d 418, 422 (Ct. App. 2018) is misplaced. In *Blue Ox*, the Court of Appeals did not purport to limit application of the Statute of Elizabeth or to define the universe of factual situations to which it applies. Rather, the court merely analyzed whether the plaintiff should be required to prove the defendant *actually intended* to defraud his creditors. The court ultimately concluded that the Statute of Elizabeth did not apply because the defendant did not convey title to assets by placing them in his 401(k). In other words, the court concluded there was no “conveyance” to which the statute could apply. That is not this case. Here, there is no dispute Equivest conveyed title to the Lots to SweetCo, so there clearly has been a “conveyance” to which the statute may apply. Thus, *Blue Ox* does not support Equivest’s position that the statute does not apply on these facts.

Next, the Court disagrees with Equivest’s position that application of the Statute of Elizabeth here would impose an unreasonable limitation on the power of alienation. Courts in this state and around the country have used the Statute of Elizabeth for years to invalidate fraudulent transfers of real estate. Equivest has not cited a single opinion in which a court held application of the statute to real estate transfers constitutes an unreasonable restriction on the power of alienation. That is because the Statute of Elizabeth does not *unreasonably* restrict alienation of property. It invalidates only the *fraudulent* alienation of property.

Finally, the Court concludes the South Carolina Supreme Court's decision in *Callawassie Island Members Club, Inc., v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018) does not support Equivest's position regarding the Statute of Elizabeth. First, the language from *Callawassie* on which Equivest relies is dicta. The court's holding was that the governing documents for *Callawassie* unambiguously required a resigned member to continue to pay dues until the membership is reissued and that these provisions do not violate the Nonprofit Act. In the language relied upon by Equivest, the court merely responded to the dissent's argument that the majority's conclusion was a harsh result. The language was not material to the court's holding, and therefore is not a statement of the law.⁷ *Nash v. Tindall Corp.*, 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007) (stating judicial dicta is an opinion expressed by a court that is not essential to the court's holding and that dicta is "not the court's decision") (internal citations omitted); *Gordon v. Lancaster*, 425 S.C. 386, 395, 823 S.E.2d 173, 177 (2018) (Few, J., concurring) (stating an expansive statement of the court that is not necessary to the decision of the case is dictum and "[d]ictum is not the law").

Next, and more importantly, the language cited by Equivest does not support its position. The Statute of Elizabeth was not at issue, or even mentioned, in the *Callawassie* opinion. And in the passage quoted by Equivest, the court merely pointed out that, because the obligation to pay membership dues to the Club was tied to lot ownership, *Callawassie* homeowners could avoid the obligation to pay dues by selling their lots to shift the dues obligation to the buyer: *Callawassie*,

⁷ The court even stated in the opinion that the passage relied upon by Equivest was not part of its holding:

The Dennises have not asked the circuit court, the court of appeals, nor this Court to decide the case based on any alleged harshness of having to pay dues. Because the dissent has made it an issue, however, we note our decision by no means renders a harsh result.

Callawassie, 425 S.C. at 202-203, 821 S.E.2d at 671 (emphasis added).

425 S.C. at 202-203, 821 S.E.2d at 671. Equivest argues the court thereby approved of a lot owner selling its lot to escape the obligation to pay dues. Perhaps, if the sale is *bona fide*. But the Supreme Court plainly did not sanction fraudulent transfers to accomplish the same result.

Rather, the Court concludes *Callawassie* supports application of the Statute of Elizabeth in the factual situation alleged in this case because the Supreme Court forcefully upheld a homeowner's association's right to enforce against lot owners the obligation to pay assessments as required in the governing documents. The court held assessments are critical to a community association's financial viability and that, despite the harshness of the result in some instances, it is not unfair to enforce the payment obligation against members who resigned their memberships:

The provisions of the membership documents that require members to continue to pay their membership dues until their membership is reissued are necessary to ensure the Club will remain viable in the future. When the Dennises entered into this membership agreement, they accepted the obligation to continue to pay their membership dues even under difficult circumstances, such as a financial downturn, a health crisis, or a sudden disinterest in being members in the Club. In doing so, however, they also received the benefit of knowing that if other members experienced those circumstances, the other members would likewise be obligated to continue to make their payments. Without these provisions, members could default on their payments whenever it became convenient to do so, and the non-defaulting members would be forced to absorb the costs. Therefore, these provisions are not "unfair" or "unreasonable," but rather are the very feature of the membership documents that enables the Dennises and other members to sustain a viable Members' Club on Callawassie Island, which in turn increases the value of their membership and their property.

Id., at 202, 821 S.E.2d at 671 (emphasis added). The conduct alleged here implicates precisely the same concerns that underlay the Supreme Court's decision in *Callawassie*. If owners were permitted to escape the obligation to pay assessment through fraudulent conveyances of property, the ability of a community association to operate and maintain the community could be jeopardized.

Finally, at a minimum, there are genuine issues of material fact regarding application of the Statute of Elizabeth that preclude summary judgment. The fact that Kenneth Foote was an officer of Equivest and was also the sole member of SweetCo, the amount of the consideration for the transfer, and the subsequent dissolution of SweetCo without provision for payment to Colleton, are clearly enough to create a factual dispute for trial as to whether the transfers were fraudulent. Moreover, summary judgement would be premature at this stage before the Club has had an opportunity to complete discovery. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (“[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.”).

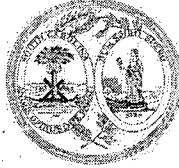
CONCLUSION

Equivest has failed to establish that it is entitled to summary judgment on the counterclaim and claims referenced in its motion. Therefore, Equivest’s motion for summary judgment is DENIED.

AND IT IS SO ORDERED.

Carmen T. Mullen
Circuit Court Judge
Fourteenth Judicial Circuit

September __, 2019



Beaufort Common Pleas

Case Caption: Colleton River Plantation Club Inc VS Equivest Financial Llc ,
defendant, et al
Case Number: 2018CP0700424
Type: Order/Other

So Ordered

s/Carmen T Mullen 2142