

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

APPELLATE COURT CASE NO. 2019-000928
COMMON PLEAS CASE NO. 2017-CP-07-00851

River City Developers, LLC Appellant,

v.

The Marshes at Lady's Island Homeowners' Association, Bundy Appraisal & Management, First Green, LLC, Tige Howie & Stephen Scott Respondents.

INITIAL BRIEF OF APPELLANT

RECEIVED
OCT 17 2019
SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. Substantively, did the master-in-equity err in finding the subject lots are encumbered by the covenants and restrictions absent the filing of a supplemental declaration where the declaration provides a procedure for annexing and encumbering new lots, any ambiguities should be resolved in favor of free use of the land, and public policy considerations support the filing of a supplemental declaration?
2. Procedurally, did the master-in-equity err in granting summary judgment where the case involves genuine issues of material fact, a novel question of law, and important policy and equitable considerations that should be examined by the lower court after fully developing the factual record at trial?

STATEMENT OF THE CASE

River City Developers, LLC (“River City”) filed the Summons and Complaint in Beaufort County, seeking declaratory judgment that five lots within The Marshes at Lady’s Island community were not encumbered by certain covenants, conditions, and restrictions, along with damages based on additional causes of action, against the Defendants (collectively “Marshes”) on May 2, 2017. Thereafter, both parties filed cross motions for summary judgment on June 19, 2018, and June 21, 2018, respectively.

After a hearing on October 16, 2018, before the Honorable Marvin H. Dukes, III, Master-in-Equity for Beaufort County, the court entered an initial order on January 3, 2019, granting summary judgment to Marshes and denying summary judgment to River City as to all claims and awarding outstanding HOA fees and assessments, as well as attorney’s fees and costs, to Marshes. Following River City’s Rule 59 motion for reconsideration, the court entered an Order on May 2, 2019, replacing the former Order, granting Marshes’ motion for summary judgment, denying River City’s motion for summary judgment, and reserving the issue of attorney’s fees and costs for consideration at a separate hearing.

River City filed this appeal and served the Respondents on May 31, 2019.

STANDARD OF REVIEW

A trial court should grant summary judgment where there is no genuine issue of material fact and it is clear that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC. An appellate court applies this same standard in reviewing a grant of summary judgment. Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006). When determining whether triable issues of fact exist, a court must view the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party. Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 673 S.E.2d 801 (2009).

A declaratory judgment action is neither legal nor equitable; therefore, the standard of review is determined by the nature of the underlying issue. Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009). An action to enforce restrictive covenants is an equitable one. S.C. Dep't of Natural Resources v. Town of Mclellanville, 345 S.C. 617, 550 S.E.2d 299 (2001). On appeal of an equitable action tried by a Master, the Court can find facts in accordance with its own view of the evidence. Id. The construction and interpretation of a clear and unambiguous restrictive covenant is a question of law for the court. See id. Similarly, the determination of whether the language contains ambiguity is a question of law. Id. If the court decides the language is ambiguous, the parties may present evidence to show the parties' intent, and the determination of that intent is a question of fact. Id.

FACTS

This case involves a dispute regarding the proper procedure to expand The Marshes at Lady's Island community in Beaufort County and subject five newly formed lots owned by River City to the enforceability of restrictive covenants. Compl. The Declaration of Covenants, Conditions and Restrictions for the Marshes at Lady's Island (the "Declaration") was filed in the

Beaufort County Register of Deeds Office and recorded in Book 2301, at Page 662, on January 10, 2006. Decl.

As described in the Table of Exhibits for the Declaration, Exhibit A describes the land initially submitted to the restrictive covenants, and Exhibit B describes the land subject to annexation. Decl. Exhibit A to the Declaration refers to a 2005 plat in Plat Book 111, at Page 17 (“2005 Plat”) and some lots surveyed and numbered on other recorded plats, none of which are the lots subject of this action. Decl. Rather, the plat shows the area where the subject lots are now located as a “Future Development” tract. 2005 Plat. Exhibit A-1 has a list of the initial lots and does not include the subject lots. Decl. Exhibit B describes and includes Plat Book 75, at Page 874 (“2000 Boundary Survey”), which is a boundary survey of 86.03 acres that also shows the acreage including River City’s future lots. Decl.; 2000 Boundary Survey.

Article IX of the Declaration spells out the method to effect an annexation. Decl. Section 9.1 states, “Declarant may, from time to time, subject to the provisions of this Declaration all or any portion of the property described in Exhibit “B” by Recording a Supplemental Declaration describing the property being subjected.” Decl. Similarly, section 9.2 provides a procedure for expansion by the homeowners’ association, allowing the association to subject property to the Declaration by recording a supplemental declaration. Decl. Section 9.4 provides, “A Supplemental Declaration shall be effective upon Recording unless otherwise specified. Any property subjected to this Declaration shall be assigned voting rights in the Association and assessment liability in accordance with the provisions of this Declaration.” Decl.

Subsequently, in 2007, a new plat which created an entirely new subdivision with new lot lines and new open space areas, and thus an expanded and reconfigured community compared to the original 2005 plat, was filed and recorded in Plat Book 118, at Page 131 (“2007 Plat”). 2007

Plat. River City acquired the subject lots in 2014, the deeds for which reference the 2007 plat. Deeds. After purchasing the lots, River City became aware that the new plat and new lots were not accompanied by a supplemental declaration and that there were problems and confusion associated with the applicability of the covenants to those lots. Gecy Aff.

River City engaged in lengthy efforts to pursue the filing of a supplemental declaration to encumber the subject lots for the purpose of clarifying and formalizing the liabilities, rights, and protections due to the lot owners. Gecy Aff. However, Marshes maintained a conflicting interpretation of the Declaration and argued the lots were already encumbered based only on the lots' designation as "future development" on the 2005 Plat, thus rendering a supplemental declaration unnecessary. Gecy Aff.; Defs.' Mot. Summ. J. **Local real property attorneys and experts filed opposing affidavits** to support the parties' conflicting interpretations of the Declaration and dispute about whether a supplemental declaration should be filed. Mikell Letter; Williams Aff.; Coltrane Aff.

ARGUMENTS

- I. As a substantive argument, the subject lots are not encumbered by the covenants and restrictions absent the filing of a supplemental declaration.

River City respectfully submits that the master-in-equity erred in finding the subject lots are encumbered by the covenants and restrictions absent the filing of a supplemental declaration. The Declaration provides a procedure for annexing and encumbering new lots in Article IX and Exhibit B, and this procedure requires the filing of a supplemental declaration in these circumstances. Marshes failed to follow this procedure. Furthermore, any ambiguities in the Declaration should be resolved in favor of free use of the land. Finally, there are significant public policy considerations that support the filing of a supplemental declaration.

- A. The master-in-equity's reliance on Cullen is misplaced because the Declaration

provides a procedure to annex lots into the development and subject the newly platted lots to the covenants and restrictions by recording a supplemental declaration.

Marshes and the master-in-equity's order relied on Cullen v. McNeal, 390 S.C. 470, 702 S.E.2d 378 (Ct. App. 2010) for the premise that the applicability of a declaration's covenants and restrictions is not limited to the first phase of a community and may include undeveloped land identified as "future development" on the recorded plat referenced in the declaration. Id. at 484-86, 702 S.E.2d at 385-86.

In Cullen, like the present case, the developer filed a declaration of covenants and restrictions for a community that included subdivided lots and undeveloped land, and the question arose whether lots created out of future development initially submitted to the declaration were subject to the covenants. Id. The Court of Appeals affirmed the circuit court's finding that the declaration defined the community as including the future phases and future development designated on the recorded plat, and thus, the covenants and restrictions extended to those future phases and development. Id.

The present case is quite distinguishable, however, because the Declaration at issue provides a specific procedure for annexing and subjecting new lots to the covenants and restrictions through Article IX and Exhibit B, a procedure which Marshes failed to follow. Decl. Although the declarant in Cullen may have intended to encumber more real estate than certain platted lots, that is not the case here. Decl.; Cullen, 390 S.C. at 484-86, 702 S.E.2d at 385-86. In addition, the developer in Cullen did, in fact, document certain changes to the future development by filing a supplemental declaration. Cullen, 390 S.C. at 484-86, 702-S.E.2d at 385-86; Cullen Supp. Decl. Here, the Table of Exhibits in the Declaration states that Exhibit A describes the land initially submitted to the restrictive covenants and Exhibit B describes the land

subject to annexation (emphasis added). Decl. The land initially submitted to the Declaration did not identify River City's lots; the acreage where the lots were located, however, was subject to annexation and thus could be encumbered by the restrictive covenants if Marshes followed the procedural requirement of filing a supplemental declaration. Decl. Although the future development acreage containing River City's future lots may have been submitted as part of Exhibit A, the individual lots subsequently carved out of the future development were not initially submitted. Decl. **In order to subject River City's lots to the restrictive covenants, and the obligations and protections that ensue from those covenants, a supplemental declaration that identifies and describes those new lots should be filed.** Decl.; see also Mikell Letter; Williams Aff.

Accordingly, the master-in-equity erred in strictly relying on Cullen and this Court should find that River City's lots are not encumbered absent the filing of a supplemental declaration.

B. If any ambiguity exists in the Declaration, such ambiguity should be resolved in favor of free use of the land and by filing a supplemental declaration.

A restriction on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property. Hardy v. Aiken, 369 S.C. 160, 631 S.E.2d 539 (2006). Thus, if an ambiguity is found in the Declaration, that ambiguity should be construed in favor of River City and the free use of the subject lots absent a supplemental declaration. See id.

The opposing interpretations offered by the parties and supported by local attorneys and real property law experts, whose opinions and affidavits were made part of the record before the master-in-equity, suggest the language of the Declaration is ambiguous as to whether River City's lots were intended to be subject to the covenants and

restrictions. Mikell Letter; Williams Aff.; Coltrane Aff. Specifically, with respect to the property descriptions in Exhibits A and B, Marshes argues the land “subject to annexation” must have meant the land outside of the development while River City insists that the undeveloped land initially submitted as part of Exhibit A was also included in Exhibit B in the event that undeveloped land was later subdivided or rearranged to create different or new parcels which were not shown or described in Exhibit A. Pl.’s Mot. Recons.; Pl.’s Mem. Supp. Mot. Recons.

The parties’ experts, Raymond Williams, J. Thomas Mikell, and Curtis Coltrane, who are prominent, experienced real estate attorneys, support these opposing interpretations of the Declaration and differ in their conclusions as to whether a supplemental declaration is necessary to encumber River City’s lots. Mikell Letter; Williams Aff.; Coltrane Aff.

In the event the Court agrees that the Declaration provides language that is unclear and ambiguous, the ambiguity should be resolved in favor of clarifying the intent and effect of the Declaration with a supplemental declaration to encumber River City’s lots.

C. Significant public policy considerations support the filing of a supplemental declaration.

The conclusion in this case has important policy implications which the Court should consider. See Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev., 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006) (stating principle that restrictive covenants are enforceable unless they are indefinite or against public policy). River City is not attempting to avoid fees and assessments as Marshes may assert, but rather, River City is advocating for the filing of a supplemental declaration to encumber its lots and clarify that the covenants and restrictions do in fact apply to trigger the assessment liability and voting power. Pl.’s Mot. Recons. River City has invested substantial amounts of money in building upscale homes in the Marshes subdivision,

and a supplemental declaration is necessary and important to protect its interest, as well as the interest of similarly situated lot owners in Marshes. Pl.'s Mot. Recons.; Gecy Aff.

The master-in-equity's ruling for Marshes could have many negative impacts for similarly situated parties. If Marshes' interpretation of the Declaration prevails, a developer could file a boundary survey with a similar declaration of restrictive covenants and never have to supplement those covenants in order to restructure lots, common areas, open spaces, roads, and dues liability and voting rights. Pl.'s Mem. Supp. Mot. Recons. Marshes, and developers in future cases, could freely subdivide "future development" or other similarly designated parcels at will by simply recording a new plat without ever having to file a supplemental declaration or provide any further documents to clarify the applicability of the covenants. Pl.'s Mem. Supp. Mot. Recons. This result will cause confusion within community associations as to membership, governance, assignments, voting, dues liability, and applicability of all the benefits and burdens that arise from an HOA membership. Pl.'s Mem. Supp. Mot. Recons.; Gecy Aff. Also, for developer controlled communities in which a developer will eventually deed the roads, open space, and amenities to an association or membership, the members will have no formalized guidance with respect to the management and administration of those roads, open space, and amenities without supplemental filings. See Pl.'s Mem. Supp. Mot. Recons.; Gecy Aff. **River City respectfully submits that a certain level of formality and documentation should be required to effect such changes to communities, as well as the liabilities and protections afforded to the lot owners which arise under those changes.** Pl.'s Mot. Recons. River City urges this Court to consider the significant benefits of requiring a supplemental declaration in these circumstances and to establish a clear rule going forward regarding community developments and the applicability of restrictive covenants. The Court should reverse the grant

of summary judgment to Marshes and find that River City's lots are not encumbered by the Declaration absent the filing of a supplemental declaration.

- II. Alternatively, as a procedural argument, summary judgment should not have been granted in this case.

As an alternative argument, River City respectfully submits that the extreme remedy of summary judgment was not appropriate in this case, and the Court should remand the case to the master-in-equity for trial. Genuine issues of material fact exist in this case, which is demonstrated by the conflicting opinions of local, well-respected real property law experts, which were filed with the pleadings. Rule 56(c), SCRPC; Mikell Letter; Williams Aff.; Coltrane Aff. Furthermore, this case is factually different than Cullen and presents a novel issue of law. 390 S.C. 470, 702 S.E.2d 378. Finally, this case presents important public policy arguments which should be considered to establish a clear precedent for developers and community associations going forward. Pl.'s Mot. Recons.; Pl.'s Mem. Supp. Mot. Recons.

Counsel for River City acknowledge that this argument is contrary to the request for review made to the master-in-equity. Pl.'s Mot. Summ. J; Defs.' Mot. Summ. J. However, after reviewing the record and briefing the arguments on appeal, it is apparent to **new** counsel, who inherited the case, that this case presents genuine issues of material fact and a new question of law with significant policy considerations. Furthermore, the Court's consideration of this argument would not be incongruous with preservation requirements. Rather, preservation rules are meant to enable a lower court to rule properly after it has considered all relevant facts, law, and arguments. See I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). Here, the conflicting expert affidavits were before the master-in-equity, as were the arguments about the potentially confusing and ambiguous nature of the Declaration language and public policy considerations. Mikell Letter; Williams Aff.; Coltrane Aff.; Pl.'s Mot. Summ. J; Pl.'s

Mot. Recons.; Pl.'s Mem. Supp. Mot. Recons. Also, any arguments of previous counsel made before the master-in-equity regarding the propriety of summary judgment should not preclude the Court's consideration of this procedural argument. See Carrigg v. Cannon, 347 S.C. 75, 82-83, 552 S.E.2d 767, 771 (Ct. App. 2001) (stating that judicial estoppel does not prevent the assertion of alternative legal theories); Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) (stating rule that arguments of counsel are not evidence). Accordingly, River City asks this Court to consider this procedural argument and find summary judgment was not appropriate in this case and improvidently granted.

- A. This case presents genuine issues of material fact, as evidenced by the opposing affidavits filed in support of the parties' conflicting interpretations of the documents.

Summary judgment is an extreme remedy and only appropriate in a case where there is no genuine issue of material fact and it is clear that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC. When further inquiry into the facts of the case is desirable to clarify the application of the law, summary judgment should not be granted. McAlhany v. Carter, 415 S.C. 54, 781 S.E.2d 105 (Ct. App. 2015). Furthermore, summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is a dispute as to the conclusion to be drawn from those facts. Id. at 62, 781 S.E.2d at 110. Also, if a provision of a contract is deemed ambiguous, summary judgment may not be proper. See Gilliland v. Elmwood Props., 301 S.C. 295, 391 S.E.2d 577 (1990). A contractual provision is ambiguous if it is "capable of being understood in more senses than one . . . obscure in meaning, through indefiniteness of expression, or have a double meaning." Id. at 299-300, 391 S.E.2d at 579.

In the lower court, the parties filed the affidavits and opinions of Williams, Mikell, and Coltrane, all experts who are knowledgeable and experienced in local real estate property law,

which present opposing interpretations of the Declaration, the land described in Exhibits A and B, and the requirement of filing a supplemental declaration. Mikell Letter; Williams Aff.; Coltrane Aff. These conflicting opinions support a finding of ambiguity in the Declaration and show the need for further inquiry into the facts, such as the various relevant documents, communications between and intent of the parties, and community expansions and changes, and the conclusions that can be drawn from those facts. Mikell Letter; Williams Aff.; Coltrane Aff.; Gecy Aff.; Decl.; Deeds; 2000 Boundary Survey; 2005 Plat; 2007 Plat. This Court should find that summary judgment was not appropriate and remand the case to the lower court in order to resolve the genuine issues of material fact.

- B. The master-in-equity's reliance on Cullen is misplaced because the present circumstances are factually different; summary judgment should be reversed to consider the genuine issues of material fact present in this novel issue of law.

River City acknowledges that the mere fact that a case involves a novel issue does not render summary judgment inappropriate. Houck v. State Farm Fire & Cas. Ins. Co., 366 S.C. 7, 620 S.E.2d 326 (2005). Furthermore, in a case raising a novel question of law, this Court may decide the question with no particular deference to the lower court. I'On, LLC, 338 S.C. 406, 526 S.E.2d 716. However, as stated, summary judgment is not appropriate where the parties **dispute the conclusions** that can be drawn from the facts even if there is no dispute as to evidentiary facts. McAlhany, 415 S.C. 54, 781 S.E.2d 105.

This case is distinguishable from Cullen and thus presents a novel issue because the Declaration here provides a procedure for annexing newly formed lots, subjecting those newly formed lots to the covenants and restrictions with the filing of a supplemental declaration, and creating assessment liability and voting rights for the owners of the newly formed lots. Decl.; Cullen, 390 S.C. 470, 702 S.E.2d 378. The facts that distinguish this case from Cullen are

disputed, thus rendering summary judgment inappropriate. Rule 56(c), SCRCP. River City respectfully asks the Court to reverse the master-in-equity's judgment and remand the case to develop and consider the disputed factual record as presenting a distinct issue from the one posed in the Cullen case.

- C. Summary judgment should be reversed to allow the lower court to consider the fully developed factual record and establish a clear precedent based on sound public policy.

Summary judgment is not appropriate if further inquiry into the facts is desirable to clarify the application of law. See McAlhany, 415 S.C. 54, 781 S.E.2d 105.

In this case, the genuine issues of material fact need to be developed and addressed by the lower court in light of the significant public policy considerations. If a declaration provides a procedure for annexing new lots, subjecting those lots to the restrictive covenants, and expanding the membership, a developer and association should be required to follow that procedure. Mikell Letter; Williams Aff. **The filing of a supplemental declaration is necessary in these circumstances to trigger lot owners' voting rights and obligation to pay assessments and to generally protect these lot owners' investments and interests in their properties.** Mikell Letter; Williams Aff; Gecy Aff. If a developer is not required to formalize the rights and duties of newly formed lots through a supplemental declaration, a developer could subdivide and restructure parcels designated as future development by filing new plats without any further clarification as to the rights and obligations imposed on newly formed lot owners. Pl.'s Mot. Recons.; Pl.'s Mem. Supp. Mot. Recons. Similarly, a homeowners' association has the obligation to follow the expansion procedure provided in the covenants and restrictions. The failure of a developer and association to document expansions in a supplemental declaration leads to uncertainty and the lack of any formal records among community associations and lot owners

with respect to the membership and their protections and liabilities. Pl.'s Mot. Recons.; Pl.'s Mem. Supp. Mot. Recons.

The Court should reverse the master-in-equity's decision and remand the case so that the lower court can inquire further into the facts and conflicting conclusions that the parties, and their supporting expert affidavits, have drawn from their interpretations of the documents. These conflicting conclusions should be considered in light of the significant public policies that support the filing of a supplemental declaration so that a clear precedent may be established.

CONCLUSION

Based on the foregoing, River City first asks the Court to reverse the grant of summary judgment to Marshes and find that River City's lots are not encumbered by the Declaration absent the filing of a supplemental declaration. Alternatively, River City asserts that the case presents genuine issues of material fact, rendering summary judgment inappropriate, and respectfully requests the Court to remand the case for trial.

Respectfully submitted,

October 14, 2019



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PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal by depositing a copy of it in the United States Mail, postage prepaid, on October 14, 2019, addressed to their attorneys of record, Kevin W. Mims, Whidbee S. Perrin, and J. Barnwell Fishburne at 50 Immigration Street, Suite 200, Charleston, SC 29403 as well as Michael A. Timbes at 15 Middle Atlantic Wharf, Charleston, SC 29401.

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October 14, 2019

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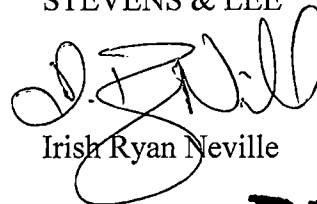
**Re: River City Developers, LLC v. The Marshes at Lady's Island Homeowners'
Association, Bundy Appraisal & Management, First Green, LLC, Tige Howie &
Stephen Scott**
Case No.: 2017-CP-07-00851
Our File No.: 113518-00001

Dear Ms. Kitchings:

Enclosed for filing, please find an original and one copy of the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal, along with the Proof of Service. Please file the original, time-stamp the copy, and return the copy to me via the enclosed prepaid envelope. If you have any questions, please do not hesitate to contact us.

Best regards,

STEVENS & LEE



Irish Ryan Neville

Enclosures

Cc: Kevin W. Mims, Esq.
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