

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
C/A No.: 2018-CP-40-04658

Sterling Hills Homeowners' Association, Inc.,
Plaintiff,

vs.

Elliot Hayes,
Defendant.

**ORDER DISMISSING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT,
GRANTING PLAINTIFF'S MOTION TO
DISMISS AND MOTION FOR SUMMARY
JUDGMENT, AND ORDER OF
REFERENCE TO MASTER IN EQUITY**

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INTRODUCTION

SC Court of Appeals

This matter came before the Court on October 14, 2019, for a hearing at the Richland County Courthouse on Plaintiff's Motion to Dismiss Defendant's Counterclaims and for Order of Reference to the Master in Equity, Plaintiff's Motion for Summary Judgment as to Defendant's Counterclaims, and Defendant's Motion for Summary Judgment as to Plaintiff's Claims. Appearing on behalf of Plaintiff was Christian Saville, Esquire, of the firm McCabe, Trotter & Beverly, P.C. Appearing on behalf of Defendant was Andrew S. Radeker, Esquire, of the firm Harrison, Radeker & Smith, P.A.

This Court has reviewed the pleadings, memorandums, affidavits, and evidence filed for these motions and heard arguments from both parties. For the reasons set forth below, this Court grants Plaintiff's Motion to Dismiss Defendant's Counterclaims and for Order of Reference to the Master in Equity, this Court grants Plaintiff's Motion for Summary Judgment as to Defendant's Counterclaims, and this Court denies Defendant's Motion for Summary Judgment as to Plaintiff's Claims. This Court also finds Defendant expressly waived its counterclaim for

Failure to Allow Access Records at the hearing upon Defendant's admission that no written request for access to records had been made by Defendant.

I. PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS

On August 12, 2019, Plaintiff filed a Motion to Dismiss as to Defendant's counterclaims for (1) breach of contract and (2) violation of the Unfair Trade Practices Act pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. This Court finds both above-listed counterclaims fail to state a claim upon which relief can be granted, and Plaintiff's Motion to dismiss these counterclaims is granted accordingly.

Standard of Review

Under Rule 12(b)(6), SCRCP, a party may move to dismiss claims against them for failure to state a claim upon which relief can be granted. When considering a motion to dismiss for failure to state a claim, the trial court must base its ruling solely upon the allegations set forth on the face of the complaint. *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007). The question to be considered is whether, when viewed in the light most favorable to the complainant, the complaint states any valid claim for relief. *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004). A Rule 12(b)(6) motion should not be granted if the facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. *Id.*

Discussion

i. Defendant's Counterclaim for Breach of Contract

This Court finds that Defendant's counterclaim for breach of contract shall be dismissed for failing to state a claim upon which relief can be granted. The elements of a cause of action for

a breach of contract are (1) the existence of the contract, (2) its breach, and (3) damages caused by such breach. *Southern Glass & Plastics Co., Inc. v. Kemper*, 399 SC 483, 491-492, 732 S.E.2d 205, 209 (Ct. App. 2012) (citing *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). In the present case, Defendant has failed to allege any facts sufficient to identify a *breach* of a contract. In Defendant's counterclaim for breach of contract, Defendant effectively recites the elements of a breach of contract cause of action while alleging with no specificity as to what constituted a breach of the contract. The obligation to provide grounds of entitlement to relief requires more than mere labels and conclusions, and a formulaic recitation of the elements of a cause of action is not adequate. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-1965 (2007). Defendant includes in his Counterclaim, "The Plaintiff has breached the contract between it and Hayes as noted above," but nowhere in Defendant's Answer and Counterclaim pleading does Defendant articulate what constituted a breach of a contract. It is therefore impossible to deduce the nature of the allegation Plaintiff must defend against with regard to this counterclaim. Therefore, Defendant has failed to allege facts sufficient to support his counterclaim for breach of contract, and accordingly, Plaintiff's motion to dismiss the counterclaim is granted.

ii. Defendant's Counterclaim for Violation of Unfair Trade Practices Act

This Court finds Defendant's counterclaim for violation of the Unfair Trade Practices Act, S.C. Code § 39-5-10 et seq. shall also be dismissed for failing to state a claim upon which relief can be granted because the Unfair Trade Practices Act is inapplicable to Plaintiff and its conduct. S.C. Code § 39-5-20(a) provides that unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful. S.C. Code § 39-5-10(b) defines "trade" and "commerce" to include advertising, offering for sale, sale or

distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State. This Court finds Plaintiff is a homeowners association and not an entity engaged in trade or commerce as defined by the Unfair Trade Practices Act. Accordingly the Unfair Trade Practices Act is inapplicable, and Defendant's counterclaim under the same fails to state a cognizable claim. Therefore, Plaintiff's motion to dismiss this counterclaim is granted.

II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On October 4, 2019, Plaintiff filed a Motion for Summary Judgment as to Defendant's counterclaims for (1) violation of the Unfair Trade Practices Act; (2) failure to allow access to records; (3) breach of contract; and (4) declaratory judgment that Plaintiff has been operating *ultra vires*. As noted above, Defendant expressly waived its counterclaim for failure to allow access to records at the hearing, and is therefore dismissed. Moreover, the counterclaims for violation of the Unfair Trade Practices Act and breach of contract are already dismissed under Rule 12(b)(6), SCRCP, although this Court does observe no evidence has been produced by Defendant to provide any evidentiary support for the two dismissed counterclaims. Therefore, this Court has only Defendant's counterclaim for a declaratory judgment that Plaintiff has been operating *ultra vires* left to consider. This Court finds there is no genuine issue of material fact as to this counterclaim, and for the reasons set forth below, Plaintiff's motion for summary judgment as to Defendant's counterclaim for declaratory judgment is granted.

Standard of Review

A trial court may grant summary judgment "if 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 summary judgment as a matter of law. Rule 56(c), SCRCP. “The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

“A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). “When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavit or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial.” Rule 56(e), SCRCP.

Discussion

This court finds there is no general issue of material fact as to Defendant’s counterclaim for declaratory judgment. Defendant has alleged the Board of Directors of Plaintiff Association has been operating *ultra vires* and requests a declaratory judgment to that effect. Defendant’s Answer and Counterclaim merely alleged “Plaintiff is and for quite some time has been operating in an *ultra vires* state.” In support of this assertion, Defendant has claimed in Paragraph 2 of Defendant’s Responses to Plaintiff’s Discovery Request as follows:

Plaintiff is operated unlawfully by persons claiming to be its directors although the required quorum of Plaintiff’s members to elect directors has not participated

in a director's election "since at least 2002; that the supposed "board of directors" of the Plaintiff simply purports to appoint themselves as the Plaintiff's putative directors...

This allegation that Plaintiff's Board of Directors has been operating *ultra vires* merely because there are "holdover" directors on the board is refuted by South Carolina's Nonprofit Corporation Act, S.C. Code § 33-31-101 et seq. Plaintiff is a nonprofit corporation and therefore subject to the provisions of the Nonprofit Corporation Act. Under S.C. Code § 33-31-803(a), a board of directors must consist of no less than three directors. Pursuant to S.C. Code § 33-31-805(d), despite the expiration of a director's term, the director continues to serve until the director's successor is elected, designated or appointed, and qualifies, or until there is a decrease in the number of directors. Therefore, if the required quorum of Members to elect new Directors has not participated, as Defendant's own discovery response indicates, then Plaintiff's Board of Directors is merely complying with the Nonprofit Corporation Act in maintaining its current Directors. Furthermore, this Court has reviewed the affidavits of Director Ella Calvert and Property Manager Kayla Stokes presented by Plaintiff which further assert the historical lack of the requisite quorum of Members necessary to elect new directors.

Therefore, Defendant's allegation concerning *ultra vires* action by Plaintiff is refuted by Defendant's own assertions, the Nonprofit Corporation Act, and the affidavits presented by Plaintiff. Defendant has failed to provide any evidence or legally sufficient basis to evidence invalidity or *ultra vires* status of Plaintiff's Board of Directors despite being requested to produce any evidence supporting his claims in discovery, and has provided no scintilla of evidence to substantiate allegations of *ultra vires* acts to date.. Accordingly, as there exists is no issue of material fact, Plaintiff's motion for summary judgment as to this allegation is granted.

III. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On July 24, 2019, Defendant filed a Motion for Summary Judgment as to Plaintiff's Claims in which Defendant moved for summary judgment on the grounds that Plaintiff would not be able to make a showing of evidence to support each element of its claims; that Plaintiff seeks to enforce restrictive covenants and by-laws so vague that they are unenforceable; that Plaintiff's by-laws, rules, and regulations are unenforceable as they have not been recorded pursuant to S.C. Code Ann. § 27-30-130; and generally that the covenants, by-laws, rules, and/or restrictions are unenforceable. This Court finds that genuine issues of material fact exist as to each of Plaintiff's claims against Defendant, and accordingly, Defendant's motion for summary judgment is hereby denied.

In this action, Plaintiff has enumerated causes of action for (1) breach of covenants; (2) enforcement of said restrictive covenants; (3) specific performance; (4) injunctive relief; and (5) declaratory judgment. In summary, Plaintiff seeks to enforce the provisions of Plaintiff's Declaration enumerated in its Complaint to include the provision regarding underbrush, unfinished yards, and landscaping; the provision for Owners' Maintenance Responsibilities; the provision for remedies for failure to maintain the exterior of a dwelling or lot; and the provision allowing for attorney's fees and costs incurred in enforcement of the covenants.

First, this Court observes that the provisions Plaintiff seeks to enforce are in *the Declaration*, and the Declaration was in fact recorded, contrary to Defendant's claim, in 2000 in the Office of the Register of Deeds for Richland County in Deed Book R413 at Page 92, and the Declaration is not rendered unenforceable as claimed by Defendant.

Moreover, Plaintiff has presented numerous photographs of the subject property as well as an affidavit from Property Manager Kayla Stokes attesting to the property's current and

ongoing condition. This Court has reviewed these materials and found that genuine issues of material fact exist as to each of Plaintiff's allegations. Plaintiff has alleged that Defendant has failed to keep the subject property in a good state of maintenance and repair, to include violations of the Declaration's Article VIII, Section 1 requirements that the Owner be responsible for painting, maintenance, repair, and replacement of fences, siding, fixtures, lawns, shrubs, grass, and numerous other portions and improvements on lots in Sterling Hills. Moreover, Plaintiff alleges Defendant has violated the Declaration's Article II, Section 13 restriction against underbrush, weeds, or other unsightly plants growing upon the lot. The affidavit of Kayla Stokes provided by Plaintiff included photographs of the property and the affirmation that the photographs represent the ongoing and current condition of the property. This Court finds the affidavit as well as photographs provided by Plaintiff do provide ample evidence of violations of the Declaration's provisions regarding the upkeep and maintenance to yards and landscaping pursuant to Article II, Section 13 of the Declaration, as well as the maintenance responsibilities for fences, siding, and fixtures of the dwelling provided by Article VIII, Section 1 of the Declaration. The provisions enumerated in Plaintiff's Complaint clearly and specifically list the features of the property which must be maintained and/or repaired, and Plaintiff's photographs evidence such failures. As Plaintiff noted at the hearing, the photographs evidence unsightly yard conditions, exterior walls in need of pressure-washing, siding in need of maintenance, and fencing in need of maintenance. Accordingly, this Court does find that Plaintiff has produced enough evidence for its claims to create genuine issues of material fact, and Defendant's motion for summary judgment is denied.

IV. ORDER OF REFERENCE TO MASTER IN EQUITY

On August 12, 2019, Plaintiff moved for an Order of Reference to the Master in Equity

under Rule 53, SCRCP. The circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case. Rule 53(b), SCRCP. This Court heard arguments from both parties on this matter. In light of the dismissal of Defendant's legal counterclaims, and the fact that Plaintiff's claims resound in equity, Plaintiff's motion for an Order of Reference is granted.

IT IS HEREBY ORDERED that this action is referred to the Honorable Joseph M. Strickland to take testimony and to direct entry of final judgment in this action under Rule 53(b), SCRCP, and all matters arising from or reasonably related to such action and shall retain jurisdiction to perform all necessary acts incident to this action as well as any actions contesting the validity of the specific performance action pursuant to the South Carolina Rules of Civil Procedure. Any appeal shall be to the South Carolina Supreme Court or Court of Appeals, as provided by the South Carolina Appellate Court Rules.

CONCLUSION

As set forth above, IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that:

1. Plaintiff's Motion to Dismiss Defendant's Counterclaims is **granted**;
2. Plaintiff's Motion for Summary Judgment as to Defendant's Counterclaims is **granted**;
3. Defendant's Motion for Summary Judgment is **denied**; and
4. Plaintiff's Motion for Order of Reference to Master in Equity is **granted**.

AND IT IS SO ORDERED.

{Signature page to follow}



Richland Common Pleas

Case Caption: Sterling Hills Homeowners Association Inc vs Elliot Hayes
Case Number: 2018CP4004658
Type: Order/Other

So Ordered

s/Thomas A. Russo #2141