THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2018-000728

Christie MacConnell,

Appellant,

v.

Frances C. Welch, Respondent.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

CASES

RULES

STATEMENT OF REPLIES

1. AMENDMENT TO THE MASTER DEED IS MINISTERIAL ONLY.

2. THE AMENDED MASTER DEED DEMONSTRATES A DISPUTE OF MATERIAL FACT

3. THE RESPONDENT'S CONTEST OF THE COURT'S RULING ON LACHES IS NOT PROPERLY BEFORE THE COURT

1. The Amended Master Deed Demonstrates that Amendment is Ministerial Only

Though the Amended Master Deed was not considered by the trial court in the grant of summary judgment, it is further evidence that there is a genuine dispute of fact in this case. On the one hand, the Respondent asserts that strict compliance with the Master Deed is necessary to create a Limited Common Elements parking space; and in the opinion of Respondent, strict compliance means that the owner must designate the space as a Limited Common Elements Space **and** that the Master Deed must be amended to reflect the same. Respondent's Brief, Page 4. On the other hand, the position of the Appellant is that the act of amending the Master Deed is purely ministerial, and that it is the election of the purchaser that defines the essence of the parking space. The Amended Master Deed is definitive proof that the Homeowners' Association agrees with the Appellant's construction and rejects the Respondent's.

The Amended Master Deed explicitly notes that

> the Association has discovered that additional parking spaces were assigned by the Declarant to Co-Owners in various ways, and in many instances such additional parking spaces were designated as Limited Common Elements but that no amendments to the Master Deed were recorded to reflect such designations as required by Section 24 of the Master Deed... . (R. p. 154, 6th Whereas Clause)

If, as Respondent asserts, both an election and an amendment were necessary to effect the change in character, then the matter would have ended at that point. However, the Amended Master Deed continues to state:

> in an effort to clarify what additional parking spaces have been assigned to the Co-Owners and whether parking spaces are Limited Common Elements or General Common Element/Assignable parking spaces, the Association conducted research of the Charleston County public records, and thereafter delivered to the Co-Owners the result of that research. After having received comments from the Co-Owners concerning the result of that research, the Association now desires to record this Amendment to the Master Deed to confirm what parking spaces have been assigned to what Residences and whether the parking spaces are Limited Common Elements or General Common Element/Assignable parking spaces. (R. pp. 154-55, 7th Whereas Clause, Pages 1 and 2)

The Homeowners' Association acknowledges that the amendment only reflects what has been already accomplished by the previous elections made by the owners at the time of the purchases. The purpose of the amendment is "to reflect such designations [previously made]." (R. p. 154, 6th Whereas Clause) The amendment does nothing but "confirm what parking spaces have been assigned to what Residences and whether the parking spaces are Limited Common Elements or General Common Element/Assignable parking spaces." (R. pp. 154-55, 7th Whereas Clause, Pages 1 and 2)What was done at the time of the assignment controls, and the actions of the Homeowners' Association, and their own words as contained in the Master Deed clearly show that the Association's position is the same as the Appellants in regard to the ministerial nature of the amendment.

Respondent further argues that the amendment requirement is more than ministerial as it is a notice issue for prospective purchasers. On the contrary, it would appear from the "Whereas" language of the master deeds that properties have been bought and sold quite effectively without Master Deed amendment from 2004 until 2017. Moreover, Respondent's argument is belied by the fact that both the assignments of spaces are independently recorded in the RMC Office.

At a minimum, in the light most favorable to the Plaintiff, it is clear that a reasonable finder of fact could find the amendment of the master deed to be purely ministerial.

2. The Amended Master Deed Demonstrates a Dispute of Fact

The Amended Master Deed reflects the parking space in question as a Limited Common Elements space. The question then arises as to how did it become a Limited Common Element? As Section 24 of the Master Deed makes clear, a General Common Element/Assignable Space remains such unless and until the purchaser of the residence elects to change it. More importantly, there is a specific time for changing the designation which the Respondent ignores. Under Section 24, the election must be made at the "the time of the closing of the purchase of his residence." The Maiers acquired the space at the time they purchased the residence. The essence of the space was defined at that time.

There are only two documents reflecting the essence of the grant. The first is the deed to the Maiers. The second is the Assignment to the Respondent. There are no other records concerning the property before the Court. The latter clearly states that the space is a General Common Element Space. However, the Homeowners' Association concluded that the space was a limited Common Element space. The only document from which this can be deduced is the deed to the Maiers. Thus, there is some additional evidence, which if viewed in the light most favorable to the non-moving party demonstrating a question as to whether or not the space was a General Common Element or a Limited Common Element. In the face of that dispute of fact, the grant of summary judgment was improper.

It should be parenthetically noted that the essence of the space could not have changed afterwards during the ownership of Respondent. Section 24 indicates that the election must be made at the time of the purchase of the residence to which the space is appended. The transfer to Respondent occurred independent of a residential transfer. If the Maiers owned a General

Common Elements / Assignable space, then the Defendant holds the same. However, the Amended Master Deed shows that the space is not a General Common Elements Assignable. If the space was a Limited Common Elements space, then the Maiers had no ability to assign it.

3. The Respondent's Challenge to the Court's Ruling on Laches is Not Properly Before The Court

The Respondent has asserted that the trial court erred in declining to grant summary judgment for the Respondent based upon the equitable doctrine of laches. The argument is problematic for two distinct reasons. Firstly, the Respondent failed to appeal the Court's decision to decline to grant summary judgment or to alter or amend the original judgment which did grant summary judgment on laches. Secondly, the denial of summary judgment is not appealable.

A. Had the Respondent wished to challenge the decision of the court to deny summary judgment based upon the equitable doctrine of laches, the Respondent was not at liberty to rest upon the fact that the matter had been appealed to a higher tribunal. Rule 203(c) of the South Carolina Rules of Appellate Procedure required Respondent to have served a cross appeal on the Appellant within five days of having received the Appellant's notice of appeal. Failure to file a cross appeal as outlined in SCRAP 203(c) effectively means that the matter is not properly before the Court, and is not proper for consideration.

B. Even if, *arguendo*, a timely cross-appeal had been filed, the appeal would have to be denied. It is black letter law in the State of South Carolina that "the denial of summary judgment is not directly appealable." *Ballenger v. Bowen,* 313 S.C. 476, 443 S.E.2d 379, 380 (1994). In fact, an order denying summary judgment is not reviewable in South Carolina "even in an appeal from final judgment." *Id.*, citing *Raino v. Goodyear Tire*, 309 S.C. 255, 422 S.E.2d 98 (1992), and *Holloman v. McAllister*, 289 S.C. 183, 345 S.E.2d 728 (1986).

Therefore, even if a timely cross appeal had been filed on the trial court's declination to award summary judgment on the theory of laches, the matter was not appealable, and is not proper for consideration.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

8 December 2018

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

8 Nov 2018

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