

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Carmen Mullen, Circuit Court Judge

RECEIVED

Dec 14 2020

SC Court of Appeals

Appellate Case No. 2019-002038

Jon H. Attridge and Janet L. Attridge, Robert W. Bankov, Virginia J. Bankov, Tom Bolton, Guy I. Collier, Nancy L. Collier, Richard Jay Coleman, Marlene Coleman, Russell G. Dimke, Sandra A. Dimke, James G. Goodwin, Jr., Carol A. Goodwin, George J. Lovett, Wilna W. Lovett, Peter Marzluff, Deborah C. Marzluff, Gary Okey, Nancy Okey, Michael Pellecchia, Janice S. Pellecchia, Frank H. Roberts, Sr., Richard Swilpa, Michele Gallant, Phyllis K. Kaupp-Seas, Robert P. Brendza and Robin E. Brendza individually and in their derivative capacity on behalf of Bull Point Property Owners Association,

..... Respondents,

v.

The Board of Directors of Bull Point Plantation Property Owners Association, Inc.; Bull Point Plantation Property Owners Association, Inc.; Bull Point SC, LLC; William E. Gavigan; Michael Carey; Christopher J. Quick; James Riordan; DB Aster, LLC; and GSI, LLC,

..... Defendants/Counterclaimants,

Of which Christopher J. Quick; James Riordan; DB Aster, LLC; and GSI, LLC are

..... Appellants,

And

Bull Point, SC, LLC and William E. Gavigan,

..... Third-Party Plaintiffs/Appellants,

v.

Joseph P. D'Ambrosio, Mary D'Ambrosio, Michael Powers, Harriet Bosiack, Robert Wolfson, James Hayes, Steve Andrews, Ron Lambe, Dave Prezvys, Rivers Reach at Pocatoligo, LLC, Rivers Reach Realty, LLC and John Does 1-10,

..... Third-Party Defendants.

RESPONDENTS' RETURN TO APPELLANTS' MOTION FOR LEAVE
TO FILE MOTION PURSUANT TO RULE 60(b)

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Respondents hereby respectfully submit this Return to Appellants' Motion for Leave to File Motion Pursuant to Rule 60(b). For the reasons stated below, Appellants' Motion should be denied because their proposed Rule 60(b) Motion is facially without merit and granting leave for them to file it in the circuit court would be futile and would unduly delay this appeal.

On November 18, 2019, Judge Carmen Mullen entered an Order granting Respondents' Motion for Partial Summary Judgment and denying Appellants' cross Motion for Partial Summary Judgment (hereinafter the "November 18 Order"). (R.p.630). This order is the sole subject of the appeal. In the November 18 Order, Judge Mullen found that because Respondent Bull Point SC, LLC did not meet the definition of Declarant in the Declaration of Covenants, Conditions and Restrictions for Bull Point Plantation ("Declaration"), it was not and never was the Declarant of Bull Point Plantation and, therefore, the other Appellants that Bull Point SC, LLC appointed to Bull Point Plantation Property Owners Association, Inc.'s (hereinafter the "POA") Board of Directors were not members of the board and their actions as board members are invalid. In particular, the Order nullified the Defendants' purported amendment to the Declaration to dissolve the POA's contingency fund oversight committee and turn the contingency fund over to the Defendants. Judge Mullen denied Appellants' Rule 59(e) Motion after a hearing, and Appellants filed a Notice of Appeal. This appeal has been fully briefed since September 2020.

First, if this Court grants leave to make the Rule 60 motion, the motion will be untimely. Appellants propose to make a motion under Rule 60(b)(1) ("mistake, inadvertence, surprise, or excusable neglect") and 60(b)(2) ("newly discovered evidence

which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)).¹ “The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. ...During the pendency of an appeal, leave to make the motion must be obtained from the appellate court.” Rule 60(b). Appellants have not yet made their Rule 60 motion. They waited until November 17, 2020 – one day before the first anniversary of the judgment from which they seek relief – to request leave to make the motion. Clearly, it was impossible for this Court to grant leave in time for them to make their Rule 60 motion within one year of the entry of the judgment. Appellants’ motion for leave to file a Rule 60 motion should be denied because the Rule 60 motion would be too late to afford them any relief from the judgment.

The motion should also be denied because the proposed Rule 60 motion is meritless on its face. Appellants’ first argument is that this action was brought derivatively on behalf of “Bull Point Plantation Property Owners Association” (a dissolved entity that had no members according to its Articles of Incorporation) as opposed to Bull Point Plantation Property Owners Association, Inc. Appellants go on to argue that the only party that could bring this case is the “Association” as defined in the Declarations – “Bull Point Plantation Owners Association, Inc” (which Defendant Gavigan incorporated in February 2020).

¹ Appellants also wish to seek relief under Rule 60(b)(4) (“the judgment is void”), which must be asserted “within a reasonable time.” The basis for the claim that the judgment is void is that three of Defendant Gavigan’s companies, Bull Point, LLC, Bull Point Plantation Owners Association, Inc., and Bull Point Plantation, LLC were not included as parties. Mr. Gavigan incorporated Bull Point Plantation Owners Association, Inc. and organized Bull Point Plantation, LLC on February 5, 2020 and January 25, 2020 respectively, so they obviously were not indispensable or even possible parties to the lawsuit when the judgment was entered. The Defendants never moved under Rule 19 to require joinder of Bull Point, LLC, and Bull Point, LLC did not move to intervene in the nearly twelve months that the case was pending before the judgment was entered. Clearly the nonjoinder of these companies cannot void the judgment even if they could or should have been made parties. In any event, waiting a year after the judgment to raise nonjoinder for the first time is not “within a reasonable time.”

Even if these claims were correct – which they are not – they are all arguments that could have been or were made before the trial court and therefore do not support relief under Rule 60(b). All of Appellants’ proffered grounds for relief under Rule 60(b)(1) are that the trial court was mistaken in various ways in its interpretation of the Declaration. Yet, the interpretation of the Declaration was precisely the subject of the parties’ cross motions for summary judgment upon which the challenged was entered and is the subject of the appeal pending before this Court. The trial court does not have jurisdiction to revisit its interpretation of the Declaration while this appeal is pending.

Appellants also argue that Plaintiffs did not bring this action derivatively on behalf of Bull Point Plantation Property Owners Association, Inc. The Amended Complaint in this case filed in June, 2019 identified, both in the caption and the body, that the case was indeed being brought by the Respondents individually and on behalf of “Bull Point Plantation Property Owners Association, Inc.” (R.pp. 99-104). Defendants had ample opportunity to raise any issue about Plaintiffs’ standing before the trial court entered its judgment in November, 2019. This argument clearly is Defendants’ afterthought, conceived too late to plead in response to the Amended Complaint, to assert in opposition to Plaintiffs’ Motion for Partial Summary Judgment, to raise in Defendants’ Rule 59 motion, or to assert as a ground of their appeal. Appellants offer no reason why they have waited until a year after the judgment was entered to seek relief based on this argument, the basis of which – though specious – existed long before judgment was entered. In any event, Judge Mullen recently considered these arguments as part of another motion filed in this case and dismissed them, finding that “Bull Point Plantation Property Owners

Association, Inc. is and has been the Bull Point POA.” See Order entered December 4, 2020 at pp.10-11, attached hereto as Exhibit A.

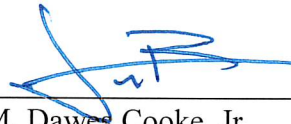
Appellants next argue that they have “newly discovered evidence” that the Respondents and others were part of a conspiracy to “bog down defendant Gavigan with litigation so that he could not afford to operate as the developer of Bull Point.” This argument is both baseless and wholly irrelevant to the merits of the November 18, 2019 Order. More importantly for purposes of the instant motion, it is hardly based on newly discovered evidence; Appellant Gavigan has been complaining to be a victim of this alleged conspiracy since this case began. Defendants’ Answer, Cross-Claim, and Third Party Claim filed January 15, 2019 alleged that the Plaintiffs and others conspired to acquire the declarancy of Bull Point Plantation for themselves and to interfere with Mr. Gavigan’s efforts to obtain the declarancy by defaming him in various ways (R.p. 190 ¶¶47-49). They further alleged that “[e]arly on their association, the Investor Group [comprising some of the Plaintiffs herein and others] determined that one approach to weaken Gavigan, and thus the Declarant, would be to embroil him in multiple legal actions as a way of tying up his time, money, and resources.” (R.p. 200, ¶93). Appellants then made this argument to Judge Mullen at the hearing on the cross-motions for Partial Summary Judgment:

Mr. Matthews: . . . If you want to know what the problem is, why we are here, it is because they want to be the declarant and they will do anything to get it, including raising every lawsuit they can possibly raise. This is not the only lawsuit that they have raised. This is number - - by my count number four since Mr. Gavigan has been president.

(R.p.583). Appellants argue, at best, that newly discovered evidence (the “Johnson File”)² supports their conspiracy theories by confirming that a group of homeowners once considered acquiring the declarancy that the original developer had abandoned. Appellants can hardly claim that any newfound evidence gives rise to their conspiracy theories. Moreover, Appellants do not explain how their conspiracy claim, even if true, affects the validity of the November 18, 2019 Order. That Order decided a very specific question of law, whether Mr. Gavigan’s company Bull Point SC, LLC was the Declarant as defined in the Declaration. That decision in no way turned upon the purity of Plaintiffs’ motives in challenging the Defendants’ authority over the POA and its money.

Conclusion

A full rebuttal of the substance of Appellants’ proffered Rule 60(b) motion is beyond the scope of this Opposition. Rather, this Opposition is meant to demonstrate only that the proffered motion does not even meet the threshold requirements of Rule 60(b) and the instant motion should be denied for for that reason.



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² It should be noted that the Johnson File was not sought or obtained in this litigation. Rather, it was subpoenaed in other litigation.

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EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2018-CP-07-02345

JON H. ATTRIDGE and JANET L. ATTRIDGE, ROBERT W. BANKOV, VIRGINIA J. BANKOV, TOM BOLTON, GUY I. COLLIER, NANCY L. COLLIER, RICHARD JAY COLEMAN, MARLENE COLEMAN, RUSSELL G. DIMKE, SANDRA A. DIMKE, JAMES G. GOODWIN JR., CAROL A. GOODWIN, GEORGE J. LOVETT, WILNA W. LOVETT, PETER MARZLUFF, DEBORAH C. MARZLUFF, GARY OKEY, NANCY OKEY, MICHAEL PELLECCIA, JANICE S. PELLECHIA, FRANK H. ROBERTS SR., RICHARD SWILPA, MICHELE GALLANT, PHYLLIS K. KAUPP-SEAS, ROBERT P. BRENDZA, and ROBIN E. BRENDZA individually and in their derivative capacity on behalf of BULL POINT PLANTATION PROPERTY OWNERS ASSOCIATION, INC.,

Plaintiffs/Counterclaim Defendants,

-vs-

THE BOARD OF DIRECTORS OF BULL POINT PLANTATION PROPERTY OWNERS ASSOCIATION, INC.; BULL POINT SC, LLC; WILLIAM E. GAVIGAN; MICHAEL CAREY; CHRISTOPHER J. QUICK; JAMES RIORDAN; DB ASTER, LLC; AND GSI, LLC,

Defendants/Counterclaimants,

and

BULL POINT SC, LLC; GSI, LLC; and WILLIAM E. GAVIGAN,

Third-Party Plaintiffs,

-vs-

**ORDER GRANTING IN PART AND
DENYING IN PART
PLAINTIFFS' SUPPLEMENTAL
MOTION FOR PRELIMINARY
INJUNCTION AND MOTION/PETITION
FOR RULE TO SHOW CAUSE**

STEVE ANDREWS, HARRIET BOSIACK,
JOSEPH P. D'AMBROSIO, MARY
D'AMBROSIO, RON LAMBE, MICHAEL
POWERS, ROBERT WOLFSON, HUSPAH
PROPERTIES, LLC, AND RIVERS REACH
AT POCOTALIGO, LLC

Third-Party Defendants.

This matter is before the Court on Plaintiffs' Supplemental Motion for Preliminary Injunction and Motion/Petition for Rule to Show Cause. Plaintiffs filed this motion on September 29, 2020, supplementing the motion that they filed on February 13, 2020, which the Court has under advisement. Also under advisement is the Motion of Defendants Gavigan and Bull Point SC, LLC for Preliminary Injunction and/or Rule to Show Cause Via Evidentiary Hearing filed on May 8, 2020. The Court heard the previously filed motions on June 1, 2020 and allowed the parties until September 4 to supplement the record on them.

Plaintiffs' Supplemental Motion is based upon actions of certain Defendants that have occurred since the record closed on the previously filed motions. Plaintiffs requested an expedited hearing and moved for a temporary restraining order until the matter could be heard on the merits. The Court granted the temporary restraining order on October 13 and heard argument on the motion on Friday, October 16. The Court informed the parties that it did not intend to take live testimony on the motion. See SCRCP 43(e). The Court heard the motion by videoconference on October 16 as provided in the Supreme Court's Order on the Operation of the Trial Courts During the Coronavirus Emergency as last amended on April 22, 2020. The Court received and considered briefs, affidavits, and other documents submitted by the parties. The Plaintiffs were represented at the hearing by Dawes Cooke, Esq. and the Defendants were represented by Ryan Neville, Esq. and Eugene Matthews, Esq.

Plaintiffs' motion states that it was filed to enforce the judgment that this Court entered in this matter on November 18, 2019, granting Plaintiffs' Motion for Partial Summary Judgment and denying Defendants' cross Motion for Partial Summary Judgment and ordering that governance of the Bull Point Plantation property owners' association (the "POA") be turned over to a Board of Directors to be elected by the members of the POA. That judgment is currently on appeal. Defendants did not request a stay of the judgment pending appeal.

Plaintiffs contend, in essence, that the Defendants – particularly Defendants William Gavigan and Christopher Quick -- have purported to take over the POA in violation of this Court's order that enjoined the Defendants from "taking any actions in further governance of the POA", ordered that Defendants "immediately cease acting as the POA's Board of Directors", and directed that the POA's members be allowed to elect its Directors. Plaintiffs' motion focuses on two significant recent acts by the Defendants. First, Defendants Gavigan and Quick, along with non-party Rich Riney, have formed a putative Board of Directors of the POA and filed a lawsuit in the name of the POA to enjoin the current, elected Board from acting on behalf of the POA. Second, the Defendant Gavigan has pronounced his corporation Bull Point, LLC to be the Declarant of Bull Point Plantation and has recorded another amendment¹ to the Declaration of Covenants, Conditions, and Restrictions for Bull Point Plantation (the "Declaration").

The Court's Order

This Court's November 18, 2019 Order provides that "Defendants are enjoined from serving on the POA's Board of Directors (unless elected by the POA members); Defendants are enjoined from taking any actions in further governance of the POA..." (Order, paragraph 4, p. 18). The Court appointed an interim Board of Directors and directed that the members of the POA

¹ The twentieth amendment was recorded on September 25, 2020. The nineteenth amendment, recorded on January 24, 2020 was one of the subjects of Plaintiffs' February 13 motion.

elect a Board: “The Court orders that an election will take place within 90 days of the date of this Order. ... In the meantime, upon entry of this Order, the Defendants, and anyone they appointed to serve, will immediately cease acting as the POA’s Board of Directors.”

Defendants contend that they did not violate this Order because the Order is addressed to some other POA, not Bull Point Plantation Property Owners Association, Inc. Specifically, Defendants contend that Plaintiffs brought this suit for the benefit of either an unincorporated association or another corporation that was dissolved in 2013, named “Bull Point Plantation Property Owners Association” (without an “Inc.”). Defendants base this contention on the fact that the captions of Plaintiffs’ Complaint and this Court’s November 18, 2019 Order state that Plaintiffs bring this action “individually and in their derivative capacity on behalf of Bull Point Plantation Property Owners Association.” (without the “Inc.”). Therefore, Defendants contend, they are not enjoined from serving on the Board of, or taking actions in further governance of, Bull Point Plantation Property Owners Association, Inc. The Court finds this contention without merit. The omission of “Inc.” in part of the caption notwithstanding, there is no mistaking what POA the Order refers to. The Order (at p. 3) recites that “On September 26, 1995 the Bull Point Plantation Homeowners Association, Inc. was incorporated by filing Articles of Incorporation (hereinafter ‘Articles’) with the State of South Carolina Secretary of State.” Footnote 1 to that sentence explains, “The Articles have been amended to change the name of the entity from Bull Point Homeowners Association, Inc. to Bull Point Plantation Property Owners Association, Inc.” This much is uncontested; the Defendants do not deny that Bull Point Plantation Property Owners Association, Inc. is the same corporation as Bull Point Homeowners Association, Inc. This entity is referred to as the POA throughout the Order. Clearly the POA that the Order refers to is Bull Point Plantation Property Owners Association, Inc. It is obvious that the omission of the “Inc.”

from the Plaintiff side of the caption was a typographical error. The caption includes the “Inc.” on the Defendant side of the caption (“The Board of Directors of Bull Point Plantation Property Owners Association, Inc.; ...”).² The original Complaint omitted the “Inc.”, but the body of the Complaint clearly stated that Plaintiffs were bringing the case for the benefit of Bull Point Plantation Property Owners Association, Inc. The caption was corrected on June 13, 2019 when Plaintiffs filed their Amended Complaint including the “Inc.” in the caption. Defendants contend that the amendment was not authorized, but this is incorrect. Plaintiffs moved to amend their Complaint on April 22, 2019, attaching the proposed Amended Complaint as an exhibit to the motion. The proposed Amended Complaint included the “Inc.” on both sides of the caption. Nobody objected to the addition of the “Inc.”, and Judge Maite Murphy granted the motion to amend on June 13, 2019. Thus, since June 13, 2019 the correct caption of this case has included the “Inc.” on both sides.

This Court’s November 18, 2019 Order clearly enjoins the Defendants from acting as the Board of Directors of the Bull Point Plantation POA, Bull Point Plantation Property Owners Association, Inc.

Defendants’ Recent Actions

On September 14, 2020, the Defendants Gavigan, Quick, and another former Gavigan-appointed Director Rich Riney, each “in his capacity as a Director of Bull Point Plantation Property Owners Association, Inc.” executed an “Action by Unanimous Written Consent of the Board of

² The Court notes that the Order was prepared by Plaintiffs’ counsel as a proposed Order. It is evident that the proposed Order used the original caption of the case, as the original Complaint also omitted the “Inc.” The proposed Order was presented to the Defendants for comment before the Court signed it. While the Defendants made numerous comments on the proposed Order and a number of changes were made, no mention was made of the omission of the “Inc.” from the caption.

Directors of Bull Point Plantation Property Owners Association, Inc.” The resolution acknowledges this Court’s November 18, 2019 Order:

WHEREAS, in or about November 2019, the court in the Attridge Action issued an order (the ‘2019 Order’), which, among other things, directed that an Interim Board of Directors be appointed for the POA;

Then the resolution misstates the Order’s import by incorrectly reciting that the POA was not referenced in the Order and that the Plaintiffs are not members of the POA:

WHEREAS, following the 2019 Order, the Interim Board for the POA held an election for and on behalf of this Corporation, which was not a party to the Attridge Action, which was not referenced in the 2019 Order, which none of the plaintiffs therein are members, and which no one at the election is a member, rather than for the POA as mandated by the 2019 Order;

The resolution goes on to declare all of the actions of the Court-ordered Board of Directors to be ultra vires, and it then resolves “that this Corporation shall be and hereby is authorized to commence a legal action, among other things, for declaratory relief and to enjoin all Ultra Vires Actions” of the elected Board. Defendants Gavigan and Quick and Mr. Riney then made good on their resolution, filing suit on September 16 to declare that the Directors who were elected pursuant to this Court’s Order are not authorized to serve on the POA’s Board and to enjoin them from doing so.

The Court finds that these actions by the Defendants Gavigan and Quick violate this Court’s November 18, 2019 Order because the Defendants purport to serve on the POA’s Board of Directors without being elected by the POA’s members and because they purport to take actions in further governance of the POA, which the Order enjoins them from doing.

Defendant Gavigan's Actions as Purported Declarant

On January 24, 2020, Mr. Gavigan, acting as Manager of the original developer Bull Point, LLC³, recorded the “Nineteenth Amendment” to the Declaration. This was one of the subjects of Plaintiffs’ February 13 motion, which the Court has under advisement. Now Mr. Gavigan, again as Manager of Bull Point, LLC, has recorded the “Twentieth Amendment”. The Amendment recites that until 2020 the POA was “an unincorporated nonprofit association” and was finally incorporated on February 5, 2020. Contrary to this recitation, this Court’s November 18, 2019 Order – as explained above -- provides that the POA is Bull Point Plantation Property Owners Association, Inc. On February 5, 2020 Mr. Gavigan filed with the Secretary of State articles of incorporation for “Bull Point Plantation Owners Association, Inc.” In other words, the Twentieth Amendment purports to nullify this Court’s Order by deeming Mr. Gavigan’s new corporation to be the POA. The Twentieth Amendment also purports to ratify all prior acts of the previous Declarants, including specifically Gavigan’s companies Defendants GSI, LLC and Bull Point SC, LLC. This Court’s November 18, 2019 Order found that “Defendants [including specifically Bull Point SC, LLC] did not have the authority to amend the Declarations to eliminate the Fifteenth Amendment....” (Order, paragraph 3, p. 18). The Order enjoined the Defendants “from repealing or refusing to comply with the Fifteenth Amendment of the Declarations.” (Id. at paragraph 4). The Order declared that “Defendant Bull Point SC, LLC is not and never was the Declarant and, therefore, all actions it took as purported Declarant, including appointing the POA’s directors and

³ The Court assumes, without finding, that Mr. Gavigan is in fact the owner and Manager of Bull Point, LLC. Bull Point, LLC was the developer and original Declarant of Bull Point Plantation. It defaulted on its development loan in 2011, filed for bankruptcy protection in 2012, and subsequently surrendered its properties through foreclosure. Bull Point, LLC has exercised none of the rights and performed none of the duties of the Declarant since at least December 2012, when it purported to assign its Declarant rights to DB Aster.

amending the Declarations, are void.” (Id. at paragraph 5). The Order invalidated the Defendants’ Eighteenth Amendment (that had turned the Contingency Fund over to the Defendants) and reinstated the Fifteenth Amendment (giving control of the Contingency Fund to the POA’s Contingency Fund Committee) (Id. at paragraph 7). In purporting to ratify all of the acts of Defendant Bull Point SC, LLC, the purported Twentieth Amendment would nullify this Court’s Order.

The Amendment also purports to change numerous other provisions of the Declaration, evidently to improve Mr. Gavigan’s arguments that Bull Point, LLC is the Declarant and that Mr. Gavigan’s new property owners’ association is the real POA. In the process, it would remove Phases III and V-B from the POA. This would expel forty to fifty members from the POA, both depriving them of the benefits of membership and depriving the POA of the ability to assess them for their share of the cost of maintaining Bull Point Plantation. This would cause a significant increase in assessments to other members who would have to absorb the lost assessments.

Plaintiffs strenuously contest the Defendants’ claim that Bull Point, LLC is the Declarant. They point out that Bull Point, LLC abandoned its claim to the Declarancy in 2012 when it executed a purported assignment of Declarant’s rights to DB Aster; that since that time Bull Point, LLC never performed any of the obligations or exercised any of the rights of the Declarant; and that Bull Point, LLC relinquished all of its property interests in Bull Point Plantation. The Declaration does not require there always to be a Declarant; the Declarancy is not permanent anyway, and the POA is designed to operate in perpetuity without a Declarant. Plaintiffs contend that if anyone is the Declarant, it is the POA itself because in 2015 the POA acquired Bull Point, LLC’s entire remaining property interest in Bull Point Plantation through foreclosure of the mortgage on Lot 223 – which satisfies the Declaration’s definition of Declarant. The question of

who, if anyone, is the Declarant is not before the Court, however. Indeed, Bull Point, LLC is not a party to this case and had not claimed to be the Declarant when this Court issued its November, 2018 Order.⁴ Nevertheless, the Court finds that Defendant Gavigan's attempts to exercise the authority of the Declarant through his company Bull Point, LLC violated this Court's November 18, 2019 Order. Mr. Gavigan initiated and signed the Nineteenth and Twentieth Amendments to the Declaration. He also executed the "Consent and Approval" to the Twentieth Amendment on behalf of Defendants Bull Point SC, LLC and GSI, LLC. The Twentieth Amendment radically changes the structure of Bull Point Plantation, among other ways by excluding many property owners from the POA. Perhaps most significantly, the amendment changes Bull Point Plantation Property Owners Association, Inc. from the POA into the "Declarant Holding Company", and it makes Mr. Gavigan's new company, Bull Point Plantation Owners Association, Inc., the POA. The Order enjoins the Defendants "from taking any actions in further governance of the POA." The purported enactment of these amendments are unquestionably actions in further governance of the POA.

The Court finds unavailing Defendant Gavigan's contention that he did not take any actions in further governance of the POA, but rather his company, Bull Point, LLC did. One is not insulated from responsibility for his own acts because he performed them in the name of an LLC. *16 Jade St., LLC v. R. Design Constr. Co.*, 398 S.C. 338, 728 S.E.2d 448 (S.C. 2012). This Court enjoined the Defendants, including Mr. Gavigan, from taking *any* actions in furtherance of the governance of the POA. The Court finds that Defendant Gavigan did take actions in further governance of the POA. If, as he contends, he is the Manager and sole member of Bull Point,

⁴ On January 10, 2020 Bull Point, LLC filed a "Petition for Interpleader", the substance of which appeared to be a motion to intervene as a party to claim the status of Declarant. However, it withdrew its petition before it could be heard.

LLC, then only he could cause that company to enact and record purported amendments to the Declaration. The purported enactment of amendments to the Declaration – and other instances that the Plaintiffs have brought to the Court’s attention where Mr. Gavigan has purported to represent the Declarant – were undeniably intended to govern the POA.

The Court also finds unavailing Defendant Gavigan’s argument that Bull Point Plantation Property Owners Association, Inc. was never the real Bull Point POA. Defendants argue that Bull Point Plantation Property Owners Association, Inc. is not the POA because the Declaration defines the “Association” as “Bull Point Plantation Owners Association, Inc., a South Carolina non-profit corporation.” Defendants point out that this name is different than Bull Point Plantation Homeowners Association, Inc., the predecessor of Bull Point Plantation Property Owners Association, Inc. On February 5, 2020 Defendant Gavigan filed Articles of Incorporation for a company called Bull Point Plantation Owners Association, Inc. He subsequently conveyed to this new corporation some of the POA’s common properties that he conveyed from Bull Point Plantation Property Owners Association, Inc. to Bull Point, LLC in October 2019. He contends that his new corporation is the rightful POA because it has the same name as the “Association” defined in the Declaration. This argument overlooks the undisputed facts surrounding the POA. The Articles of Incorporation for the original Bull Point Plantation Homeowners Association, Inc. were filed in September 1995, contemporaneously with the recordation of the Declaration. The name itself suggests that the corporation is a property owners’ association, and the Articles of Incorporation specifically say so. In fact, they say that the corporation’s purpose is to “exercise all of the powers and privileges and to perform all of the duties and obligations of the Association as set forth in that certain Declaration of Covenants, Conditions and Restrictions (hereinafter referred to as the ‘Declaration’).” All of the duties and powers described in the Articles are those

of a property owners' association. The Articles also provide that "Every person or entity who is a record owner of a fee or undivided fee interest in any lot which is subject by covenants of record to assessment by the Association, including contracts, shall be a member of the Association." This corporation has served as the Bull Point Plantation POA since its inception, including the two-plus years of Defendant Gavigan's tenure as its president. Mr. Gavigan himself executed numerous documents as president of Bull Point Plantation Property Owners' Association, Inc., including a recorded affidavit attesting to the authenticity of the company's Bylaws and including the deeds to the POA's common properties that he had the POA convey to Bull Point, LLC. While the name of the corporation is slightly different than the one specified in the Declaration, it is the only corporation that was created contemporaneously with the Declaration and it meets every substantive requirement of the Association described in the Declaration. The Declaration certainly does not provide for the POA to remain an unincorporated association for twenty-five years and then blossom into a corporation, as Defendant Gavigan contends. The Court readily concludes that Bull Point Plantation Property Owners Association, Inc. is and has been the Bull Point Plantation POA.

Even if this were not the case, this Court's November 18, 2019 Order enjoins the Defendants from taking any actions in further governance of the POA. As described at length above, it is unmistakable that the Order addresses the governance of the Bull Point Plantation property owners' association. The Order is on appeal, so this Court retains jurisdiction to enforce it but not to change it. *Arnal v. Fraser*, 641 S.E.2d 419, 371 S.C. 512 (2007); *Wingate v. Wingate*, 259 S.C. 574, 575, 347 S.E.2d 878, 878 (1985). This Court must require the parties to adhere to this Order unless and until it is overturned on appeal. The Order unambiguously enjoins the Defendants from attempting to govern the property owners' association.

For the foregoing reasons, Plaintiffs' Supplemental Motion for Injunctive relief is GRANTED.

Defendants' Request for Appointment of a Receiver

After Plaintiffs filed their original Motion for Preliminary Injunction and Rule to Show Cause, Defendants filed their own motion. On May 8 they filed their Motion for Preliminary Injunction and/or Rule to Show Cause, in which they sought to enjoin the elected Board of Directors from operating the POA. At the hearing on all motions on June 1, Defendants modified their motion to request appointment of a Receiver for the POA rather than entry of an injunction. The Court permitted the parties to supplement the record after the hearing, finally closing the record on September 4. The Court finds no basis upon which to appoint a Receiver at this time.

“‘The appointment of a receiver is a drastic remedy and should be granted only with reluctance and caution.’ [Midlands Utility, Inc. v. South Carolina Dept. of Health and Environmental Control, 391 S.E.2d 535, 301 S.C. 224 (S.C. 1989)] (citing Vasiliades v. Vasiliades, 231 S.C. 366, 98 S.E.2d 810 (1957)). ‘[A]s a rule, a receiver will not be appointed during the progress of a cause, unless there is the strongest reason to believe that the plaintiff is entitled to the relief demanded in his complaint, and there is danger that the property will be materially injured before the case can be determined.’ Pelzer v. Hughes, 27 S.C. 408, 416, 3 S.E. 781, 785 (1887) (internal quotation marks and citation omitted).” Richland County v. S.C. Dep't of Revenue, 811 S.E.2d 758, 422 S.C. 292 (2018). The statutory grounds for appointing a receiver are set out in S.C. Code Ann. §15-65-10, and the Court has seen no evidence that any of these grounds are met. Among the accusations that Defendants have made against the elected Board are that it improperly transferred five hundred thousand dollars in contingency funds to an out-of-state bank; that it used contingency fund money without proper authority; that it purchased frivolous items such as a

silencer and a meat processor; that it disturbed historic archaeological sites; and that it improperly authorized installation of utilities. Defendants also claim that the election of Directors violated this Court's Order. All of these claims are without merit. The questioned transfer of contingency funds occurred in 2016, long before the current Board took office, as did the allegedly unauthorized expenditures. Further, the Quick Group audit that Defendant Gavigan commissioned in 2017 revealed that the Contingency Fund was all properly accounted for and that the "transfer" was to purchase certificates of deposit to increase the rate of return. The POA owned a silencer for culling deer long before the current Board took office. The POA does not own a meat processor. There is no evidence that the current Board has ever disturbed a protected archaeological site. The evidence shows that Dominion Energy installed utilities pursuant to an easement that Defendant Gavigan granted in September 2017 on behalf of the then-putative Declarant Bull Point SC, LLC. In short, there is no evidence whatsoever of misfeasance by the current Board of Directors. To the contrary, the evidence demonstrates that the elected Board has brought stability and sound fiscal management to the POA. Plaintiffs submitted an affidavit of support signed by more than seventy members of the POA. Despite Defendant Gavigan's parting shot in announcing that many Bull Point Plantation properties are not actually in Bull Point Plantation and do not have to pay assessments, the current Board has paid off significant debts left by the prior board and is on track to operate the POA in the black in 2020 – which never happened during the prior board's tenure.

The Court is also not persuaded that the Court-ordered election of the Board was handled improperly. Notice of the members' meeting was disseminated through the Constant Contact system, which is how POA meetings and other events have been announced for years. Defendants moved to enjoin the meeting, but Judge Marvin Dukes denied their motion and directed that the meeting go forward. Defendants challenge the validity of the election of the Board because

members who live in the allegedly excluded phases were allowed to vote and some members were not allowed to vote because they were not current on their payment of assessments. The evidence reflects that the vote was overwhelmingly in favor of the slate of current Board members, so any irregularity in voting eligibility could not have affected the outcome. There is no evidence that proper voting procedures under the governing documents were not followed in connection with the disallowed voters. Further, Board members do not have to be members of the POA, so it makes no difference whether any of the elected Board members live in excluded phases.

In conclusion, the Court finds no basis to appoint a receiver for the POA. The current Board appears to be performing just as this Court intended in its November 18, 2019 Order. The Court will consider any claims of misfeasance that might arise in the future, but the record contains no evidence of misfeasance by the current Board. At this time, Defendants' request for appointment of a receiver is DENIED.

Relief Granted

The Court found in its November 18, 2019 that Bull Point SC, LLC is not and never was the Declarant of Bull Point Plantation and that its actions – including enacting the Eighteenth Amendment and appointing the Board of Directors of the POA – were invalid. The Court granted injunctive relief in recognition of the vital need to restore financial and operational stability to Bull Point Plantation. The evidence before the Court shows every indication that this has occurred, except for the Defendants' interference. The members of the Bull Point Plantation POA have elected a board by an overwhelming majority. The elected Board has restored financial stability, paying off debts that were left by the prior Board and operating the POA within budget for the first time since 2017. The Board has repaired roads and corrected other deferred maintenance within the community infrastructure. In short, it appears that the results intended by the Court's

November 18, 2019 Order are being accomplished except for the uncertainty and discord that the Defendants' self-help actions are causing. As this Court observed at the June 1, 2020 hearing on the parties' previous motions, a court should not have to enjoin parties from disregarding its orders. However, this appears to be necessary due to the Defendants' determination to avoid the mandates of this Court's previous Order. Accordingly, Plaintiffs' motion for relief is GRANTED as follows:

1. The Court declares that the Nineteenth and Twentieth Amendments are null and void, and the Defendants (acting directly or indirectly, individually or through any other entity) are enjoined from enforcing those amendments;
2. The Court declares that the purported Resolution authorizing Bull Point Plantation Property Owners Association, Inc. to sue the Court-ordered elected Board of Directors is null and void. This Court will assume jurisdiction over the lawsuit that Bull Point Plantation Property Owners Association, Inc. filed against the elected Board of Directors.
3. The Defendants are enjoined from acting, directly or indirectly, individually or through any other entity, as the Declarant of Bull Point Plantation or otherwise purporting in any way to govern or act on behalf of the Bull Point Plantation property owners' association (whether under the name Bull Point Plantation Property Owners Association, Inc. or any other name).
4. The captions of all filings in this case since the amendment of Plaintiffs' Complaint on June 13, 2019 shall be deemed amended to reflect that Plaintiffs are suing individually "and in their derivative capacity on behalf of Bull Point Plantation Property Owners Association, Inc."

Sanctions

Plaintiffs ask for an award of sanctions for the Defendants Gavigan's and Quick's violations of this Court's November 18, 2019 Order. Specifically, they ask that the Defendants be required to pay Plaintiffs' costs and legal fees incurred in pursuing their February Motion for Preliminary Injunction and Rule to Show Cause, in defending against Defendants' Motion for Preliminary Injunction and Rule to Show Cause, and in pursuing Plaintiffs' instant Supplemental Motion for Preliminary Injunction. "Even though a party is found to have violated a court order, the question of whether or not to impose sanctions remains a matter for the court's discretion." *Metts v. Mims*, 384 S.C. 491, 682 S.E.2d 813 (S.C. 2009), quoting *Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct.App.1997). As detailed above, the Court finds that the Defendants Gavigan and Quick have violated the Court's Order. Nevertheless, Defendants have articulated at least a colorable explanation why they did not believe that their actions violated the Order, including the inadvertent omission of the "Inc." on the Plaintiff side of the caption of the Order. While the Court does not find the Order ambiguous, in its discretion it declines to impose sanctions at this time. For this reason, Plaintiffs' motion for sanctions is DENIED. The Court reserves the right to impose appropriate sanctions for any further violations of its Orders.

AND IT IS SO ORDERED!

Carmen T. Mullen
Presiding Judge, Fourteenth Judicial Circuit

October __, 2020



Beaufort Common Pleas

Case Caption: Jon H. Attridge , plaintiff, et al VS Bull Point Plantation Property Owners Association Inc Board , defendant, et al
Case Number: 2018CP0702345
Type: Order/Other

So Ordered

s/Carmen T Mullen 2142

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Carmen Mullen, Circuit Court Judge

RECEIVED

Dec 14 2020

SC Court of Appeals

Appellate Case No. 2019-002038

Jon H. Attridge and Janet L. Attridge, Robert W. Bankov, Virginia J. Bankov, Tom Bolton, Guy I. Collier, Nancy L. Collier, Richard Jay Coleman, Marlene Coleman, Russell G. Dimke, Sandra A. Dimke, James G. Goodwin, Jr., Carol A. Goodwin, George J. Lovett, Wilna W. Lovett, Peter Marzluff, Deborah C. Marzluff, Gary Okey, Nancy Okey, Michael Pellecchia, Janice S. Pellecchia, Frank H. Roberts, Sr., Richard Swilpa, Michele Gallant, Phyllis K. Kaupp-Seas, Robert P. Brendza and Robin E. Brendza individually and in their derivative capacity on behalf of Bull Point Property Owners Association, Inc.

..... Respondents,

v.

The Board of Directors of Bull Point Plantation Property Owners Association, Inc.; Bull Point Plantation Property Owners Association, Inc.; Bull Point SC, LLC; William E. Gavigan; Michael Carey; Christopher J. Quick; James Riordan; DB Aster, LLC; and GSI, LLC,

..... Defendants/Counterclaimants,

Of which Bull Point SC, LLC; William E. Gavigan; Michael Carey; Christopher J. Quick; James Riordan; and GSI, LLC are

..... Appellants,

And

Bull Point, SC, LLC and William E. Gavigan,

..... Third-Party Plaintiffs/Appellants,

v.

Joseph P. D'Ambrosio, Mary D'Ambrosio, Michael Powers, Harriet Bosiack, Robert Wolfson, James Hayes, Steve Andrews, Ron Lambe, Dave Prezvyts, Rivers Reach at Pocatoligo, LLC, Rivers Reach Realty, LLC and John Does 1-10,

..... Third-Party Defendants.

PROOF OF SERVICE

I certify that I have served the Respondents' Return to Appellants' Motion for Leave to File Motion Pursuant to Rule 60(b) on the above-referenced Appellants by depositing a copy of it in the United States Mail, postage prepaid, on December 14, 2020, addressed to them as follows:

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