THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Appellate Case No.: 2020-001030

Appeal from Charleston County
Court of Common Pleas, Ninth Judicial Circuit
Hon. Bentley D. Price, Circuit Court Judge

2020-CP-10-00209

Maybank 2754, LLC, ... Appellant,

v.

Eugene Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11,1997; 1776, LLC; Beach Fenwick, LLC; The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny Creek Associates, LLC; John Doe and Mary Roe …….. Respondents.

INITIAL BRIEF OF RESPONDENTS BEACH FENWICK, LLC AND THE BEACH COMPANY [sic]

/s/ Cheryl D. Shoun
Cheryl D. Shoun
Chase C. Keibler
NEXSEN PRUET, LLC
PO Box 486
Charleston, SC 29402
843-577-9440

Attorneys for Beach Fenwick, LLC, and The Beach Company[*sic*]

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1. Did the trial court have jurisdiction over Respondents' motions for summary judgment where the motions were not a matter affected by Appellant's appeal regarding the mode of trial, and where Appellant did not preserve and affirmatively waived its jurisdictional argument, and the jurisdictional argument is moot.

2. Did the trial court properly grant Respondents' motions for summary judgment pursuant to its determination that Appellant was never granted an easement over the subject property; the document(s) upon which Appellant relies is merely an agreement to agree, and thus not enforceable and the document(s) upon which Appellant relies violates the statute of frauds, and, alternatively, any easement created was one in gross and not appurtenant?

3. Did the trial court properly grant Respondents' motions for summary judgment where it is undisputed that the first-in-time mortgage on the property was never subordinated to Appellant's alleged unrecorded easement and where Appellant's alleged easement was extinguished by a foreclosure of the mortgage?

STATEMENT OF THE CASE

This action was commenced by the filing of a Complaint on January 13, 2020 by Maybank 2754, LLC ("Maybank" or "Appellant") against Beach Fenwick, LLC ("Beach Fenwick") and The Beach Company [sic] ("Beach") (Beach Fenwick and Beach collectively and interchangeably referred to as the "Beach Entities" or "Respondents"), Eugene Zurlo, individually, and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997 ("Zurlo"), 1776, LLC ("1776"), Seamon Whiteside & Associates, Inc. ("SWA") and Penny Creek Associates ("PCA").

On February 17, 2020, the Beach Entities filed a Motion of Dismiss, pursuant to Rule 12(b)(6), SCRCP seeking to dismiss Maybank's claims. On the same date, the Beach Entities also filed their Motion for Order of Reference to Master-In-Equity, pursuant to Rule 53, SCRCP as well as the Foreclosure Order. Similar motions followed on behalf of 1776 and Zurlo, individually, as well as the Eugene J. Zurlo Living Trust Dated December 11, 1997 (the "Zurlo Trust") (collectively, with Zurlo, the "Zurlo Entities"). Maybank filed a Motion for Temporary Injunction on March 11, 2020.

On June 16, 2020 and again on June 25, 2020, The Honorable Bentley D. Price, held hearings on the outstanding motions. Following the two hearings, the Court issued its Form 4 Order, on June 30, 2020, with the following statement:

> Plaintiff Maybank 2754 LLC's Motion/Temporary Injunction is denied. Defendant Beech Company's Motion to Dismiss and Refer to the Master, along with all outstanding motions to refer to the master, are granted.

Thereafter, on July 1, 2020, Maybank filed a Motion to Reconsider pursuant to Rule 59, SCRCP. The Court entered its Order denying Maybank's Motion for Temporary

Restraining Order and Maybank's Motion to Reconsider on July 13, 2020. The July 13 Order also referred the entire case and all pending Motions to the Master-in-Equity, pursuant to and consistent with Rule 53, SCRCP, finding all pre-trial matters, including the parties' motions, shall be referred to the Master-In-Equity, with finality, with appeal directly to the South Carolina Court of Appeals or the South Carolina Supreme Court. The July 13 Order likewise corrected a scrivener's error by the Court, noting the Motion to Dismiss filed on behalf of the Beach Entities was not argued and not considered by the Court, but was to be transferred, with other motions, to the Master-in-Equity.

On July 15, 2020, Maybank filed a Notice of Appeal, indicating its appeal from the Trial Court's Form 4 Order entered on June 30, 2020 and from the Trial Court's Order of July 13, 2020 indicating both Orders refer the entire case to the Master-in-Equity, and thus, are immediately appealable because they affect the mode of trial. Respondents filed their Motion to Dismiss Appeal and Memorandum in Support Thereof with this Honorable Court on or about September 15, 2020. In response thereto, this Court issued its Order, filed November 12, 2020, denying Respondents' Motion to Dismiss.

By letter dated July 24, 2020, counsel for the Beach Entities requested a status conference with the Honorable Mikell R. Scarborough, Master-in-Equity for Charleston County, South Carolina. Following a brief procedural history, counsel requested a status conference to allow the Court and the parties to determine a path for moving forward, in consideration of the pending appeal. In response to this letter, counsel for Maybank advised Judge Scarborough of Maybank's position that a status conference before the Master-in Equity would be improper, in consideration of the pending appeal. Citing Rule 205, SCACR and the Trial Court's Order of July 13, 2020, counsel for the Beach Entities

responded to Maybank's position against the opportunity for a status conference before the Master-in-Equity, agreeing with Appellant's position that should the Master-in-Equity determine the matter should be in Circuit Court or there were no matters not affected by the appeal, the parties would proceed accordingly.

Following a status conference, the Master-in-Equity issued a Form 4 Order, filed on August 18, 2020, which concluded, in part:

> "[t]he matter should be returned to the circuit court for disposition under Rule 38 and 53(b) and that this ruling would moot Plaintiff's appeal."

Thereafter, on August 19, 2020, the Beach Entities filed their Motion for Summary Judgment. The Beach Entities' Memorandum of Law in Support of Motion for Summary Judgment was filed with the Court on September 18, 2020. The Beach Entities' Motion for Summary Judgment, along with dispositive Motions on behalf of the Zurlo Entities and SWA were heard before The Honorable Bentley D. Price on September 24, 2020. The Court entered a Form 4 Order on October 7, 2020, granting summary judgment to the Zurlo Entities and to The Beach Co. By that Order, the Court also granted the Motion to Dismiss on behalf of SWA and denied Plaintiff's Motion to Amend Complaint. By a Form 4 Order entered October 8, 2020, the Court supplemented the Form 4 Order entered on October 7, 2020, granting 1776's Motion for Summary Judgment and clarifying that the Motion for Summary Judgment on behalf of Beach Fenwick was also granted. The Court followed with its Order Granting All Defendants Summary Judgment, entered on October 12, 2020. Maybank filed its Motion to Alter or Amend Order Entered on October 7, 2020, Order Entered on October 8, 2020, and Order Granting All Defendants Summary Judgment; Motion to Amend and/or Vacate Findings of Fact; Request for Ruling on Issues

Raised and Request for Expedited Hearing on October 16, 2020. The Beach Entities, the Zurlo Entities and 1776 filed Memoranda in Opposition to Maybank's Motion to Alter or Amend. Maybank filed and served its Notice of Appeal on November 5, 2020.

The Trial Court entered its Form 4 Order denying Maybank's Motion to Alter or Amend Order dated October 7, 2020 on November 6, 2020. On November 9, 2020 Maybank filed its Notice of Appeal from the Trial Court's Form 4 Order filed October 7, 2020; the Trial Court's Form 4 Order filed on October 8, 2020; the Trial Court's Order Granting All Defendants Summary Judgment entered October 12, 2020 and the Trial Court's Form 4 Order filed November 6, 2020.

STATEMENT OF FACTS

On January 18, 1999, PCA was formed as a South Carolina limited liability company. Upon information, Michel Laplante ("Laplante") and members of his family[1] ("Laplante Family") were 50% members of PCA. The Zurlo Trust was the other 50% member. Although the overall ownership was split 50/50 between the Zurlo Trust and the Laplante Family, Michel Laplante and the Zurlo Trust were the sole voting members of PCA.

In March, 1999, PCA purchased certain property located along Maybank Highway in Johns Island, South Carolina ("Original Tract"). In August, 2000, PCA executed and delivered a note, in favor of First Union National Bank, secured by a mortgage upon the

[1] The Laplante Family, as referenced herein, consists of John H. Laplante (now deceased), Peter F. Laplante and Marianne Laplante-Scarlata, in addition to Michel Laplante.

Original Tract. In April, 2006, PCA executed and delivered a promissory note in favor of Wachovia Bank, National Association, also secured by a mortgage on the Original Tract.[2] These notes were ultimately consolidated and the respective mortgages modified. Certain properties encumbered by the mortgages were released from the liens, leaving others secured by the mortgages, including the one parcel at issue in this action.

On April 19, 2006, Maybank was formed as a South Carolina limited liability company to acquire a small parcel of property (the "Maybank Tract") adjacent to the Original Tract. Until October, 2013, PCA was the sole member of Maybank. On or about October 7, 2013, a Resolution of the Sole Shareholder of Penny Creek Associates, L.L.C., was executed by Laplante and purportedly executed by Gene Zurlo on behalf of the Zurlo Trust.[3] The Resolution references a Contract for Assignment of Interest dated October 7, 2013, pursuant to which PCA agreed to sell its entire membership interest in Maybank to the Laplante Family, for cited consideration. Relevant here, the Resolution also states, *inter alia*:

> WHEREAS, as a condition of closing, [PCA] has agreed to grant, transfer, sell and convey to [Laplante Family], their successors and assigns, an access easement for pedestrian and vehicular ingress egress and access to, from and over that portion of the lands of [PCA] known as "Residual Tract B-2-2" … ("30' Private R/W), the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road ("Pitch Fork Road"). Upon the completion of Pitch Fork Road, the Parties hereto

[2] Wells Fargo Bank, N.A. is the successor by merger to Wachovia Bank, National Association that is the successor by merger to First Union and was, at all times relevant to this action, the owner and holder of both notes executed and delivered by PCA.

[3] While the Resolution was purportedly signed by Gene Zurlo, Eugene J. Zurlo and Charlotte Zurlo were and remain Co-Trustees.

> shall execute and record an Easement Agreement to memorialize the 30' Private R/W.

This Resolution and other documents purporting to transfer the interests of PCA in Maybank to the Laplante Family are the sole documents upon which Maybank relies for its claim of an easement upon property now owned by Beach Fenwick.

Maybank admits, in its Complaint, that only upon completion of Pitch Fork Road would an easement agreement be executed and recorded by the parties privy to the Resolution, and only then would the parties agree as to the location and condition of the access easement. Maybank also admits that Pitch Fork Road has not been completed, the Resolution was never recorded, there is no agreement as to the location of any easement nor has any other interest allegedly held by Maybank upon Beach Fenwick's property ever been recorded.

The parties to the Resolution and other supporting documents never located the alleged easement. In fact, Laplante testified he wanted to be "flexible" with regard to the location of an easement and did not intend to specifically locate one until the completion of Pitch Fork Road. (June 6, 2020, Testimony of Michele F. Laplante at 47:15-25.) Laplante recognized that "if in fact [an easement] was set in one location it would make marketing [the PCA Parcel] very, very different if it was set, so that's why we agreed [to agree on a location in the future upon completion of Pitch Fork Road]." Id. at 47:20-24. Further, the parties to the transaction effecting the transfer of interest in Maybank "did not want to encumber the sale [of the PCA Parcel]." Id. at 46:6-7. At the time, Laplante believed that, as manager of PCA, "if we located the exact alignment [of an easement], we would have encumbered the sale of [the PCA Parcel] and [he] would not have met

[his] fiduciary duties to Penny Creek by subdividing the property in that fashion." *Id*. at 46:7-11.

In December, 2013, Respondent Zurlo commenced a derivative action against PCA and others, including Laplante, individually, seeking a judicial dissolution of PCA and other remedies including the appointment of a new manager for PCA. That case was resolved in February 2016 by way of a settlement made a part of the record before Judge Markley Dennis. ("Dissolution Action"). The settlement resulted in, among other things, PCA executing and delivering to the Zurlo Trust a promissory note in the amount of $3,250,000, which note was secured by a mortgage on the Original Tract. The mortgages[4] held by Wells Fargo were unaffected. Ultimately, the note and the mortgage delivered by PCA in favor of Zurlo were assigned to 1776.

On August 14, 2014, Wells Fargo, as mortgagee, initiated a foreclosure action upon the Original Tract, naming PCA, Laplante and others, with actual, recorded interests in the Original Tract, as defendants ("Foreclosure Action"). Through the pendency of the Foreclosure Action, Laplante answered, through counsel, and took affirmative action by way of cross claims and third-party claims as well as motions for an injunction and a temporary restraining order.

The Foreclosure Action resulted in the entry of Master-In-Equity's Order and Judgment of Foreclosure and Sale, filed in the office of the Clerk of Court for Charleston

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[4] The mortgages securing the indebtedness to Wells Fargo's predecessors, then ultimately Wells Fargo, were modified, see Modification of Mortgages dated October 1, 2102 and recorded in the office of the Register of Deeds for Charleston County on October 15, 2012, in Book 0284, Page 614.

County on June 23, 2017 ("Foreclosure Order"). The Original Tract was subject to a Master's sale on September 7, 2017, pursuant to which 1776 credit bid its lien upon the Original Tract and became the title holder by way of Master's Deed dated August 29, 2017 and recorded in the office of the Register of Deeds for Charleston County at Book 0662, Page 915. There is no purported easement mentioned in the Foreclosure Action, and consequently, none mentioned in the deed to 1776.

1776 conveyed a portion of the Original Tract to Beach Fenwick by way of deed dated December 12, 2019 and recorded in the office of the Register of Deeds for Charleston County at Book 0846, Page 268 (the "Subject Property"). Again, there is no language evidencing any easement, as there is no documentation memorializing the alleged easement, including its location, condition, or otherwise, prepared or recorded, as admitted by Maybank.

Maybank's Complaint asserts multiple causes of action against the various Defendants, including declaratory judgment, both as to an easement and to a restrictive covenant and civil conspiracy. Maybank also frames its request for a temporary injunction as a cause of action.

The Beach Entities, in their Amended Answer, deny the existence of any valid, legitimate or enforceable easement in favor of Maybank, and thus deny any notice thereof. The Beach Entities further aver, in their response, that because there is no valid, legitimate or enforceable easement in favor of Maybank, there is no justiciable controversy supporting Maybank's causes of action seeking an Order of the Court relative to the existence of an easement or as to a restrictive covenant. The Beach Entities, consistently denying the existence of a valid, legitimate or enforceable easement over

and across the subject property, also assert there can be no conspiracy to conceal an easement when no easement exists, and further deny that Maybank has suffered any damages, including special damages required to support a cause of action for civil conspiracy. The Beach Entities likewise deny that Maybank can suffer any harm, irreparable or otherwise, as no valid, legitimate or enforceable easement exists, in response to Maybank's claim for a temporary injunction. The Beach Entities also raise a number of affirmative defenses in response to the Complaint, including collateral estoppel, the South Carolina Statute of Frauds, S.C. Code Ann. § 30-7-10, waiver, unclean hands, estoppel by silence, a bar of Maybank's claim upon Beach Fenwick's position as a *bona fide* purchaser and the doctrine of laches. The Beach Entities also assert bars and/or limitations relevant to punitive damages, which are not at issue in this Appeal.

ARGUMENT

I. The First appeal is moot or, alternatively, Appellant waived any appeal based upon jurisdiction

On July 13, 2020, the Circuit Court issued an order denying Appellant's Motion to Reconsider and clarifying its previous Order transferring the matter to the Master-In-Equity. (July 13, Order.) In so clarifying, the Circuit Court concluded that the case and pending motions are "referred to the Master-in-Equity, pursuant to and consistent with South Carolina Rules of Civil Procedure, Rule 53." (July 13, Order). The Circuit Court continued, "[**a]ll pre-trial matters, including the parties' motions**, shall be and are hereby referred to the Master-in-Equity." (July 13, Order.) (emphasis added). Thus, at a minimum, the Master-In-Equity had authority, pursuant to Rule 53, SCRCP, to hear pre-

trial matters, and transfer any matter back to the Circuit Court for a jury trial, where appropriate

Rule 53(b), SCRCP provides that any party may move for some or all of the causes of action in a case to be referred to the Master-In-Equity. The Beach Entities, and other Respondents, moved to refer all non-jury trial matters to the Master-In-Equity.

Appellant appealed the Circuit Court's June 26 and July 13 orders referring "all pre-trial matters" to the Master-In-Equity. After a status conference with the Master-In-Equity, the Master-In-Equity returned the case to the circuit court. Rule 53(b), SCRCP continues, "[a]ny party may request a jury pursuant to Rule 38, SCRCP on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court." Appellant now maintains the Master-In-Equity did not have jurisdiction to return the case to Circuit Court – the precise relief Appellant seeks from this Court. Regardless, the Master-In-Equity, at the status conference, sent the entire matter back to circuit court, which is exactly what Maybank requested, thus making Appellant's first appeal moot.

The Master-In-Equity's Order Returning the Case to Circuit Court is unambiguous; it found that "[Maybank] objects to the court's jurisdiction as it has filed a Notice of Appeal of the Order of Reference on the basis of its Mode of trial for which Plaintiff demands trial by jury. . . This court concludes that the matter should be returned to the circuit court for disposition under Rule 38, SCRCP and 53(b), SCRCP and that this ruling would moot Plaintiff's appeal."

"[M]oot appeals result when intervening events render a case nonjusticiable." *McClam v. State*, 386 S.C. 49, 55, 686 S.E.2d 203, 206 (Ct. App. 2009) (citing *Sloan v.*

Greenville County, 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct.App.2003) ("the function of appellate courts is not to give opinions on merely abstract of theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation.")). A matter becomes moot "when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Collins Music Co. v. IGT*, 365 S.C. 544, 549, 619 S.E.2d 1, 3 (Ct. App. 2005) (citing *Curtis v. State*, 345 S.C. 557, 567–68, 549 S.E.2d 591, 596 (2001)).

"In civil cases, there are three exceptions to the mootness doctrine: (1) an appellate court can retain jurisdiction if the issue is capable of repetition yet evading review, (2) an appellate court can decide cases of urgency to establish a rule for future conduct in matters of important public interest, and (3) if the decision by the trial court can affect future events or have collateral consequences to the parties, the appellate court can take jurisdiction." *Id*. None of the exceptions apply in the instant case.

The issue Maybank raises in its First Notice of Appeal is whether the Circuit Court's Order Referring the matter to the Master-In-Equity affects its "mode of trial." The Master-In-Equity, in line with its authority granted by Rule 53(b), SCRCP, subsequently sent this matter back to circuit court and, therefore, Appellants "mode of trial" is no longer affected. This intervening event rendered this appeal nonjusticiable. Appellant's relief sought by this court is "impossible" because it already enjoys the relief requested. Appellant's first appeal would result in this Court overruling the Circuit Court's July 13, 2020 Order transferring the case to the Master-In-Equity and, therefore, place remaining matters back

in front of the Circuit Court. In actuality, this is what occurred. The Master-In-Equity returned the entire matter back to the Circuit Court and the case progressed.

This appeal, therefore, is mooted by the Master-In-Equity's August 18, 2020 Order Returning Case to Circuit Court that explicitly provides its "ruling would moot Plaintiff's appeal." Of particular note, Appellant did not notice an appeal of the Master-In-Equity's August 18, 2020 Order based on its lack of jurisdiction over the issue – likely because it received the relief requested.

Moreover, the relief requested, if granted, leads to an absurd result with no practical relief because it would seemingly place the matter back in Circuit Court (where it was ultimately disposed) and re-litigate summary judgment on facts and issues that have not changed, thereby unnecessarily protracting this litigation.[5] In addition, Rule 1, SCRCP mandates that "in all South Carolina courts in all suits of a civil nature," the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

Alternatively, and in addition, Appellant waived its right to maintain the first appeal by (1) failing to prosecute the appeal, (2) agreeing the issue is resolved, and (3) by its actions and conduct in moving forward with the matter in Circuit Court. On July 15, 2020,

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[5] Even if the Circuit Court had committed an error in ruling on Respondents' motions for summary judgment—which it did not—any such error would be harmless and therefore would not justify sending this case back to the Circuit Court and requiring the Circuit Court to rule on the same motions a second time before this Court reaches the merits of the appeal. *See State v. Jenkins*, 412 S.C. 643, 651, 773 S.E.2d 906, 909–10 (2015) ("Harmless error analyses are fact-intensive inquiries and are not governed by a definite set of rules. Rather, appellate courts must determine the materiality and prejudicial character of the error in relation to the entire case.") (internal citations omitted).

Appellant filed and served its original Notice of Appeal of the Trial Court's June 20 and July 13, 2020 Orders. Appellant failed to prosecute its first appeal and, therefore, has waived any arguments made in that regard. Appellant failed to file its initial brief within 30 days "after receiving the transcript or, if no transcript is ordered, within 30 days after serving the notice of appeal." Rule 208(a)(1), SCACR. Nonetheless, Appellant filed its initial brief regarding its July 15, 2020 Notice of Appeal on February 22, 2021 – 192 days beyond the 30 days allotted by Rule 208, SCACR. While this Court consolidated Appellants' appeals in a November 11, 2020 letter, Appellant still had not yet filed its initial brief regarding its July 15, 2020 Notice of Appeal. Appellant failed to timely move forward with its initial July 15, 2020 Appeal and, indeed, it took Appellant over seven months to file its initial brief.

After the Master-In-Equity's August 18, 2020 Order Returning Case to Circuit Court, the Appellant already enjoyed the relief it sought from its first appeal. Moreover, in its Return to Respondents' Joint Motion to Dismiss the First Appeal, Appellant noted "it appears from Respondents' motion to dismiss that they would be willing to execute a consent order for this Court's consideration, with all parties consenting to the jurisdiction of the Circuit Court for a trial by jury in this matter." While Respondents did not respond to this invitation, Maybank's failure to appeal the Master-In-Equity Order and its repeated acts availing itself of the Circuit Court's jurisdiction demonstrated its affirmation of that court's jurisdiction.

Indeed, Appellant moved forward in Circuit Court and did not raise or argue the Circuit Court lacked subject matter jurisdiction in either its memorandum in opposition to Respondents' Motions for summary judgment or Appellant's 43-page motion to alter or

amend the Circuit Court's Order granting summary judgment. (*See generally*, App. Mem. Opp.; App. Mot. Alter or Am.) Appellant filed several filings in Circuit Court including a Motion to Compel and Motion to Amend its Complaint, which was ultimately denied.

Moreover, at the Hearing on Respondents' Motions for Summary Judgment, counsel for Appellant affirmatively argued, "I believe we can still proceed forward today … We're ready to proceed. We have a pending motion to amend the complaint. And we're ready to proceed on that. And we're also ready to dive into the substance of the Defendants' motions for summary judgment, as well." (September 24, 2020 Hr'g Tr. at 6:11-15; 8:7 - 25.)

For the above stated reasons, Respondents respectfully request this Court find Appellant's First Appeal is moot and/or waived by Appellant.

II. There is no, nor was there ever, an easement; the trial court did not err in granting Respondents' Motions for Summary Judgment finding no easement exists

The appropriate standard of review applicable to an order granting of summary judgment is *de novo*. On review from a grant of summary judgment, the Court applies the same standard applied by the circuit court pursuant to Rule 56(c), SCRCP. *Bluestein v. Town of Sullivan's Island*, 429 S.C. 458, 462, 839 S.E.2d 879, 881 (2020) (citing *Turner v. Milliman*, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011)). "Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Id*. "When determining if any triable issues of fact exist, the evidence and all

reasonable inferences must be viewed in the light most favorable to the non-moving party." *Id*.

Although the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, "this initial responsibility may be discharged by 'showing' – that is, pointing out to the trial court – that there is an absence of evidence to support the nonmoving party's case." *Baughman v. American Telephone and Telegraph Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Under South Carolina law, where "plain, palpable and indisputable facts exist on which reasonable minds cannot differ," summary judgment in favor of the moving party is proper. W*illiams v. Chesterfield Lumber Co.*, 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976). The Appellant must "do more than simply show that there is some metaphysical doubt as to the material facts" but "must come forward with 'specific facts showing that there is *a genuine issue for trial*.'" B*aughman*, 306 S.C. at 115, 410 S.E.2d at 545 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986) (emphasis in original).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 576, 762 S.E.2d 696, 700 (2014) *(*citing *Dawkins v. Fields,* 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003)).

In reviewing the appeal of a grant of summary judgment, this Court applies the same standard as the Circuit Court. Therefore, if this Court finds no valid and enforceable easement or property right exists in favor of Appellant, the order granting Respondents' Motion for Summary Judgment should be upheld.

Appellant's Initial Brief misses the forest through its critique of scattered trees. This case – in essence – turns on whether Appellant has an easement over the Subject Property. The Court of Common Pleas correctly held no, Appellant does not have an easement over the Subject Property. In doing so, the Court thoroughly analyzed a variety of reasons as to why an easement does not exist, and, even if some property right did exist, Appellants' failure to record the right, coupled with its failure to secure a subordination of the Wells Fargo Mortgages, resulted in the extinguishment of any purported property right held by Maybank.

Appellant, in its Initial Brief and Complaint, repeatedly and falsely claims it maintains an easement encumbering the Subject Property; however, that simply is not true.[6] Instead, Appellant has a 2013 document (the Resolution) in which the Seller, PCA (50/50 owned by Laplante Family and Zurlo Trust), agreed to sell its membership interest in Maybank to four members of the Laplante Family, the Buyers. According to Appellant, that agreement provided:

> "to grant … an access easement…over that portion of lands of (PCA). … the **location and condition** of which **shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road** ("Pitch Fork Road"). Upon the completion of Pitch Fork Road, the (PCA and the Laplante Family) shall execute and record an Easement Agreement to memorialize the 30' Private R/W."
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> * * *

[6] And, in doing so, Appellant's brief wrongfully claims The Beach Co. had "actual notice" of an easement. However, neither The Beach Co. nor any individual or entity can have notice of what does not exist.

> "upon the completion of Pitch Fork Road [PCA] shall grant to [the Laplante Family] … an easement … the location and condition of which shall be mutually agreed upon at a future date."

(Resolution.) (emphasis added). Indeed, Appellant's initial brief admits, "**upon completion of Pitchfork (sic) Road, an easement agreement** to memorialize the thirty foot right of way easement **would follow**." (Appellant's Initial Brief at 7) (emphasis added). As of the date of filing of the Complaint and filing of this Brief, Pitch Fork Road is not complete. (Complaint; Appellant's Initial Brief at 7).

Instead of an easement, Appellant relies upon a contract, to which it was not a party, which provides PCA will "mutually agree" with the Laplante Family to create an easement over the PCA Parcel at some undefined point in the future.

Appellant failed to record the Resolution, the Contract or the Assignment upon which it depends. (Complaint; Appellant's Initial Brief at 7.) The Resolution provides that once Pitch Fork Road is complete, and once the parties to the Resolution "mutually agree" on the "location and condition," only then will the parties "**execute and record an Easement**." None of these events occurred.

Plainly stated – neither the Resolution, nor the other two documents upon which Appellant relies, is an easement nor does it grant an easement. For Appellant to insist and assert to the Court that it, in fact, has an easement over the PCA Property and, therefore, over the Subject Property is disingenuous. At best, Appellant makes its claims pursuant to an agreement to agree, which is not enforceable in South Carolina – particularly between two non-parties to the agreement. *See BCD LLC v. BMW Mfg. Co., LLC*, 360 F. App'x 428, 435 (4th Cir. 2010).

Now – after a judicial dissolution of PCA (50/50 owned by Laplante and Zurlo), in which there was no assertion of any right to an easement; the Wells Fargo Foreclosure, again in which there was no claim of an easement and any such easement would have nevertheless been extinguished; a sale of the PCA Property to 1776, and a sale of a portion of the property to Beach Fenwick, Appellant maintains an easement exists. Such is an astronomical reach and is not supported by South Carolina law.

Appellants are requesting this Court make unprecedented leaps – first, it seeks to recognize a property right based on an agreement to agree in the future, second, it seeks to circumvent recording statutes maintaining this unrecorded future easement encumbers all current and future landowners, then it requests the court enforce the unrecorded, unidentified, undescribed easement in favor of a party not subject to the Resolution and against a party not subject to the Resolution.

However, the Circuit Court rightfully disagreed with Appellant, and refused. Upon the finding that "no easement exists," for whatever reason, all of Appellant's claims fail.

a. <u>An easement does not exist because no property right was granted to Appellant</u>

First, the Resolution, Contract for Assignment, and Assignment of Interest all fail to meet the essential elements required in order to create a valid property right. "South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (citing *Hughes v. Edwards*, 265 S.C. 529 (1975)).

Shockingly absent from Appellant's Initial Brief is the definition of an easement. In South Carolina, an easement is a right that one person has to use the land of another for a specific purpose. *Frierson v. Watson*, 371 S.C. 60, 67, 636 S.E.2d 872, 875 (Ct. App. 2006). This right of way may arise by grant, from necessity, by prescription, or by implication by prior use. *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 416, 633 S.E.2d 136, 139 (2006).[7]

"A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) (citing 28A C.J.S. Easements § 57, at 235 (1996)). "The language of an easement determines its extent." *Binkley*, 348 S.C. at 67, 558 S.E.2d at 906–07. "Clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in [the] plain, ordinary, and popular sense." *Id.* (citation omitted). While it "is not essential to the validity of a grant of an easement that it be described by metes and bounds or by figures giving definite dimensions of the easement," "[a] description of an easement in a **recorded document** is sufficient when it contains language that acts as a guide to the location of the easement on the land such that the easement is 'capable of being rendered to a certainty [by reference] to something extrinsic ... to which it refer[s] (such as a plat or map)'" *Id.*, at 72, 558 S.E.2d at 909 (citations omitted) (emphasis added). "While a property description need not be perfect, it must

[7] This case does not involve an easement by necessity, by prescription, or by implication and, therefore, an analysis of those types of easements is not necessary.

allow one examining it to identify the property conveyed; otherwise, the conveyance is void." *Hoyler*, 428 S.C. at 295, 833 S.E.2d at 853. Moreover, the Resolution that Appellant relies on for its alleged "easement" or "property right" violates the statute of frauds. S.C. Code Ann. § 32-2-10(4) ("No action shall be brought whereby: … (5) to charge any person upon any agreement that is not to be performed within the space of one year from the making").

Here, Appellant, admittedly, was never granted an easement. Instead, Appellant relies on three documents – the Resolution, Contract for Assignment of Interest,[8] and Assignment of Membership Interest – which each contain the same language providing the parties thereto will mutually agree upon the location and condition of an access easement upon the completion of Pitch Fork Road. The documents also provide that upon the parties reaching mutual agreement as to the location and condition of the access easement and the completion of Pitch Fork Road, PCA and the Laplante Family "shall execute and record an Easement agreement."[9] To date – almost 7 years later, Pitch Fork Road is not complete. Even if this portion of the Resolution is enforceable, Appellant's position fails. Maybank claims to be the assignee of this alleged easement, with no

[8] The Contract of Assignment of Interest is a contract between PCA and the Laplante Family for the transfer of Appellant, Maybank, from PCA to the Laplante Family. Michel Laplante signed on behalf of two parties on the Contract – he signed on behalf of Penny Creek Associates, LLC as its Manager, and on behalf of Maybank as its sole member. Laplante was supposed to also sign personally, as the purchaser, but he failed to do so.

[9] For purposes of Respondents' Initial Brief, unless otherwise provided, Respondents' will refer to the Resolution as the source upon which Maybank relies.

foundation. Additionally, PCA no longer owns the relevant portion of the Original Tract and thus, performance is impossible.

Nonetheless, after two changes in ownership over the PCA Parcel, and a subdivision into what is now the Subject Property, Maybank now seeks to enforce the Resolution, to which it is not a party, to classify it as an "easement" – one not defined or located, and one that only comes into existence upon an agreement by PCA and the Laplante Family upon the unknown completion of Pitch Fork Road.

In South Carolina, this is not an easement – there is no language determining its extent, it does not contain a "description … in a recorded document sufficient … as to guide the location of the easement on the land such that the easement is 'capable of being rendered to a certainty,'" and because there is no description "allow[ing] one examining it to identify the property conveyed … the conveyance (if any) is void." *Binkley*, 348 S.C. at 67, 558 S.E.2d at 906–07; *Hoyler*, 428 S.C. at 295, 833 S.E.2d at 853.

The Resolution provides, "the location and condition of [the easement] shall be mutually agreed upon at a future date." As such, the document upon which Maybank relies for its purported easement is clearly lacking any sort of description of the land impacted by such easement and is not "capable of being rendered to a certainty [by reference] to something extrinsic." *Id.* The Resolution lacks a clear and unambiguous description of the location, extent and type of easement sufficient to allow any party examining it to be able to identify the location and nature thereof. Indeed, no such description exists because no grant of an easement ever occurred.

Instead, what is "clear and unambiguous" in the Resolution is the parties to the Resolution agreed that "upon the completion of Pitch Fork Road" they would "mutually agree" on the "location and condition" of the easement and only at that point would they "execute and record an easement agreement." *Binkley*, 348 S.C. at 67, 558 S.E.2d at 906–07. None of this has occurred.

Maybank's testimony and its Manager, Laplante's, affidavit reflect that, at the time he entered into the Resolution, he did not intend to create an easement or define with any particularity its location and condition. (Affidavit of Michel F. Laplante – September 17, 2020.) His decision to not create or define the easement was purposeful. Laplante, speaking on behalf of Appellant, testified at the June 25, 2020 hearing that, at the time PCA and the Laplante family executed the Resolution, they did not agree on the location or condition of the easement because he wanted to be "flexible" with its location, he "didn't care where it was located," he recognized "it would make marketing [the PCA Parcel] very, very different if it was set," that if he "located the exact alignment [of the easement, he] would have encumbered the sale [of the PCA Parcel] and [he] would not have met [his] fiduciary duties to Penny Creek." (June 25, 2020, Testimony of Michel F. Laplante at 46:1-47:25). Therefore, Laplante, continued, "that's why we agreed [to agree on the condition and location in the future upon completion of Pitch Fork Road.]" *Id*.

He affirmed in his Sept. 17, 2020 Affidavit that "the reason why the easement was not specifically located at that time was because of my duties and obligations to PCA. As manager of PCA, I did not want to permanently locate the easement in a premature and arbitrary fashion during this time to avoid unnecessarily restricting the Property because

it was being marketed for sale in dividable parcels." (Affidavit of Michel F. Laplante – September 17, 2020.)

Accordingly, the Resolution, even if it could stand as a foundation of a valid legal interest, which it cannot, fails to establish essential terms of the very interest Maybank claims it creates and, as such, cannot as a matter of law, constitute a valid and enforceable property right.

The Resolution undisputedly requires the location and condition of the "easement" contemplated therein be agreed upon by the parties to the Resolution. PCA no longer owns the Subject Property, thus rendering such an agreement impossible. However, almost four years passed before PCA lost ownership of the Subject Property and, at no point during those years did the Laplante Family, the alleged recipient of an easement interest, accomplish an agreement with PCA sufficient to establish a valid easement. Moreover, a lengthy judicial dissolution of PCA occurred in which Laplante was directly involved – again, at no point did he attempt to accomplish an agreement with PCA sufficient to establish a valid easement.

As established by the foregoing, the Resolution, Contract for Assignment, and Assignment of Interest all lack a clear and unambiguous description of the location, extent, and type of easement. In fact, they completely lack *any* description of the location, extent or type of easement, and by their mere terms fail. Therefore, the Resolution never created an easement or property right, and alternatively, to the extent it did "convey" any type of right, that right is void *ab initio* because it fails to provide a description of a recorded document capable of being rendered to a certainty. *Binkley*, 348 S.C. at 67, 558 S.E.2d at 906–07.

b. Even if Appellant maintained some type of easement or property right over the Subject Property, the easement was extinguished by the Foreclosure Action

Even if the Resolution and various other documents created a property right or easement, which they did not, any such property right would have been foreclosed upon in 2017, rendering the purported property right, or easement, void and of no effect. See S.C. Code Ann. § 30-7-20 ("The recordation of any contract in the nature of a subordination, waiver or extension of any lien on real property, created by law or by agreement of the parties, shall be upon the record of the recorded mortgage or other written instrument…").[10] Moreover, the law is well-settled that a mortgage foreclosure extinguishes any junior liens or later-in-time easements on the property, unless the mortgagee agrees to subordinate its mortgage to the junior lien or easement. *See, e.g.*, 25 Am. Jur.2d. 515, *Easements and Licenses*, § 112 ("Generally, an easement is lost by the foreclosure of a mortgage or trust deed on the servient tenement, where such mortgage or trust deed was executed prior to creation of the easement."). And the facts supporting this conclusion are all matters of public record over which there can be no dispute. *See* Complaint at ¶ 14; *Wells Fargo v. Penny Creek Associates, et al.*, Civil Action No. 2014-CP- 10-4946 (Charleston County, Filed May 26, 2014); Mortgage recorded in the Register of Deeds in Charleston County on August 8, 2000, in Book P-

[10] Appellant does not cite to this statute in its Initial Brief and its omission is obvious – the foreclosure action extinguished any "property right" because of Maybank's failure to record whatever "right" it claims to have existed.

532, at Page 613; Mortgage recorded in the Register of Deeds in Charleston County on April 7, 2006, in Book G-579, at Page 249.

Even if there was an easement, which there was not, it did not survive the recent foreclosure of first-in-time, prior-recorded, bank-owned mortgages arising in 2000 and 2006 that never were subordinated by the bank to the later-in-time, unrecorded purported easement, alleged by Maybank to have arisen in 2013 by way of a Resolution referencing the grant of some future easement.

Wells Fargo commenced a foreclosure action in 2014 against PCA and its members, pursuant to which it foreclosed its lien upon the Original Tract. (*See*, Case No.: 2014-CP-10-04946, filed with the Charleston County Clerk of Court). The Master-in-Equity's Foreclosure Order, dated June 23, 2017 foreclosed and barred any and all future claims related to the property or any interest in the property in question. Laplante was a named Defendant in the foreclosure action; was Manager of PCA; was the controlling member of Maybank; was represented by counsel; filed cross claims in the foreclosure action; and was present at the June 19, 2017 hearing when testimony and exhibits concerning the foreclosure were presented to the Court. The June 23, 2017 Foreclosure Order made no exception for or mention of an easement and there was no easement noted on any plat.

Indeed, the Master-In-Equity further entered a Consent Order amending the property description of the Original Tract because the parties identified a mistake in the legal description. (The Beach Entities' Memorandum in Support of their Motion for Summary Judgment, Exhibit 2). Laplante, as the manager of PCA and controlling member of Maybank and a self-touted real estate developer, failed to mention the

existence of the "easement" and now, years later, attempts to relitigate the issue. See (Affidavit of Michel F. Laplante – September 17, 2020.)

"Collateral estoppel will bar the relitigation of an issue which was actually litigated and necessary to the outcome of a prior lawsuit." *McNaughton–McKay Elec. Co. of N.C. v. Andrich*, 324 S.C. 275, 279, 482 S.E.2d 564, 566 (Ct. App. 1997).[11] Under South Carolina law, the party asserting collateral estoppel must show that the issue of fact or law in the present lawsuit was: "(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Meyer v. McGowan*, No. 2:16-CV-00777-RMG, 2018 WL 4300121, at *2 (D.S.C. Sept. 10, 2018) (citing *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554 (S.C. Ct. App. 2009)). Maybank's "absence from the previous … lawsuit does not insulate it from issue preclusion." *Carolina Renewal, Inc.*, 385 S.C. at 555, 684 S.E.2d at 782.

Here, Maybank was not a party to the foreclosure action because it did not possess any interest in the property. Nonetheless, Laplante's knowledge is imputed to Plaintiff. S.C. Code Ann. § 33-44-102. Maybank, through its manager and member, Laplante, had a "full and fair opportunity to previously litigate the issue" in the foreclosure action. *See Carolina Renewal, Inc.*, 385 S.C. at 555, 684 S.E.2d at 782. The record of the foreclosure action reveals that Laplante actively participated in that proceeding, making no mention

[11] "Laches is an equitable doctrine defined as 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.'" *Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007) (citation omitted). Plaintiff's unreasonable delay in asserting its rights has resulted and continues to result in prejudice to the Beach Entities and other defendants.

in any of his pleadings or at the foreclosure hearing of any alleged property interest of Maybank.

This issue of a description of property rights and existing easements on the Original Tract, including the Subject Property, was actually litigated in the foreclosure; the Master-In-Equity fully determined the property rights to be sold, leaving no question what the buyer was acquiring. The breadth of the property rights was further solidified upon the revision of the original Order to amend the property description. Lastly, estopping Plaintiff is necessary to support the prior judgment/foreclosure order because the sale of the subject property could be revisited if the rights acquired/sold through the foreclosure subsequently changed.

Moreover, "it is a well-established principle in South Carolina that estoppel by silence arises when one party observes another dealing with his property in a manner inconsistent with his rights and makes no objection while the other party changes his position based on the party's silence." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 358, 628 S.E.2d 902, 911 (Ct. App. 2006) (citing *Seabrook Island Property Owners Association v. Pelzer*, 292 S.C. 343, 356 S.E.2d 411 (Ct. App.1987)). Maybank's silence, through its controlling member and current manager, Laplante, constitutes estoppel by silence. Laplante maintained silence through the Dissolution Action as to any purported right of Maybank to an easement, and likewise maintained silence through the Foreclosure Action, thus constituting estoppel by silence, preventing Maybank from making claims at this point, in this action, as to an easement. While Maybank had actual knowledge of the foreclosure action (through its Manager,

Laplante), it also had constructive knowledge by way of the public filing of the foreclosure action and the requisite publication of the notice of sale.

The June 23, 2017 Foreclosure Order is now the law of the case because it involves the same parties and the same property. By bringing this action and subsequent appeal, Maybank seeks to have this Court collaterally attack the Master's Foreclosure Order. It is a cardinal rule in South Carolina that the Circuit Court should not overrule another, especially when the other circuit court judge has retained jurisdiction. *See Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003) (holding that a family court judge could not overrule the prior unappealed order of another family court judge because it had become law of the case); *In re Morrison*, 321 S.C. 370 n. 2, 468 S.E.2d 651 n. 2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); *Cooper Tire & Rubber Co. v. Perry et al.*, 261 S.C. 538, 201 S.E.2d 245 (1973) (holding that where a ruling on a demurrer to complaint is not appealed from, it becomes the law of the case); *Watkins v. Hodge*, 232 S.C. 245, 247–48, 101 S.E.2d 657, 658 (1958) (refusing to consider jurisdictional matter of underlying case where issue had been ruled upon and not challenged on appeal). *Judy v. Martin*, 381 S.C. 455, 458–59, 674 S.E.2d 151, 153 (2009).

For the reasons provided above, the Beach Entities respectfully request this Court find that even if the Resolution or other supporting documents granted an easement, which they do not, it did not survive the Wells Forgo Foreclosure action of first-in-time, prior recorded, bank-owned mortgages arising in 2000 and 2006 that never were subordinated by the bank to the later-in-time unrecorded purported easement. Moreover, Maybank is collaterally estopped from raising issues already litigated – the issue of what

property rights were foreclosed and sold in the 2017 Foreclosure Order. Maybank, through its manager and controlling member, actively participated in and had a full and fair opportunity to raise the issue of any purported property interest in the foreclosure action. Additionally, the Beach Entities respectfully request this Court find Maybank is estopped by its silence as a result of its failure to raise any claim to a reputed easement either during the dissolution action or the foreclosure action.

c. Alternatively, if the Resolution created any right, it created an unenforceable "agreement to agree"

Pursuant to Rule 220(c) SCACR, Respondent respectfully requests this Court affirm the Order granting Respondents' motion for summary judgment finding that the Resolution is an unenforceable agreement to agree. Appellant's Resolution, Contract for Assignment, and Assignment of Interest do not constitute an easement or property right, but rather at best, they are an unenforceable "agreement to agree." "South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." *Player*, 299 S.C. at 105, 382 S.E.2d at 893. "There can be no contract so long as, in the contemplation of the parties thereto, something remains to be done to establish contract relations." *Hughes v. Edwards*, 265 S.C. 529, 536 (1975) (citing *Insurance Company of North America v. United States*, 159 F. 2d. 699 (4th Cir. 1947)).

In short, an "agreement to agree" does not amount to a contract under South Carolina law. *BCD LLC*, 360 F. App'x at 435[12] (citing *Trident Constr. Co., Inc. v. Austin Co.*, 272 F.Supp.2d 566, 575 (D.S.C. 2003)). "The parties merely agreed to enter into negotiations to reach an agreement, but subsequently failed to reach an actual agreement on essential terms pertaining to land allocations, divisions of parcels, and restrictive covenants for the property." *Id*. (citing *Fici v. Koon*, 372 S.C. 341, 642 S.E.2d 602, 604–05 (2007) (noting that, in a real estate contract, a description sufficient to show with reasonable certainty the location of the land and its boundaries is necessary); *Player*, 382 S.E.2d at 893–94 (finding a description of the extent and boundary of the property to be an essential term of a contract pertaining to real estate).

This is precisely what happened here, and Plaintiff admits as much. (See June 25, 2020 Tr., 47:20 – 48:1.) The unrecorded Resolution, Contract for Assignment, and Assignment of Interest, purportedly is a contractual right for the Seller (PCA) and Buyer (Laplante Family) to agree in the future to create an easement. In South Carolina, this agreement to agree does not amount to a contract and cannot detrimentally impact future purchases of the property because the parties "subsequently failed to reach an actual agreement on essential terms pertaining to land allocations … and restrictive covenants

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[12] While *BCD LLC v. BMW Mfg. Co., LLC* is an unreported Fourth Circuit case applying South Carolina law, the facts are similar. 360 F. App'x 428, 434 (4th Cir. 2010) In *BCD LLC*, Rosen entered into a nine page contract with Clemson University to develop a wind tunnel. The contract further stated the parties would meet and agree on "covenants, conditions, restrictions, and easements" on the subject property. The Fourth Circuit, interpreting South Carolina law, found that is an agreement to agree and, therefore is unenforceable in South Carolina.

for the property." *BCD LLC*, at 435; *see also Burbach Broadcasting Co. of Delaware v. Elkins Radio Corp.*, 278 F.3d 401, 407 (4th Cir.2002) (stating that, in preliminary negotiations, when terms are indefinite and basic terms have not been agreed upon, there is no basis to fashion a remedy, and thus no enforceable contract).

d. Alternatively, if an easement was created, which it was not, it was an easement in gross and not an easement appurtenant

Pursuant to Rule 220(c) SCACR, Respondent respectfully requests this Court affirm the Order granting Respondents' motion for summary judgment finding that, even if the purported easement existed, it was an easement in gross and not an easement appurtenant. An easement is either appurtenant or in gross. *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965). An appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, *and* is essentially necessary to the enjoyment thereof. *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997); *Windham v. Riddle*, 381 S.C. 192, 672 S.E.2d 578, (2009) (citations omitted) (emphasis added). It also passes with the dominant estate upon conveyance. *Id.* (citing *Carolina Land Co., Inc. v. Bland,* 265 S.C. 98, 217 S.E.2d 16 (1975)). Unless an easement has all the aforementioned elements necessary to establish an appurtenant easement, it will be characterized as an easement in gross. *Id.* (citing 12 S.C. Juris. *Easements* § 3(c)). "An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer." *Id.* 381 S.C. at 201-02, 672 S.E.2d at 583. Where language in a plat reflecting an easement is capable of more than one construction, that construction which least restricts the property will be adopted. *Hamilton v. CCM, Inc.,* 274 S.C. 152, 263 S.E.2d 378 (1980).

If the Resolution created some easement interest, which it did not, the agreement to agree upon an easement was between PCA and the Laplante Family; the Resolution and related documents upon which Appellant relies, created no property interest for the benefit of Maybank. Therefore, because the Laplante Family did not own the property that would be benefitted by this reputed easement, the essential element that an appurtenant easement has "one terminus on the land of the party claiming it" is not met. Moreover, Appellant's Initial Brief appears to cite the Resolution as the document in which "Maybank was assigned rights to" an easement. (Appellant's Initial Brief, at 7). However, nowhere in the Resolution does the Laplante Family "assign" rights to Maybank and Maybank admitted "there is no recorded deed specifically from Penny Creek Associates, LLC, as grantor or transferor, to Maybank 2754, LLC, as grantee or transferee, for the real property that is the subject of this case." (Maybank Resp. to Zurlo's First Requests to Admit, March 10, 2020.)

Maybank is unable to establish another essential element of an appurtenant easement, *to wit*: it must be essentially necessary to the enjoyment of the dominant parcel. It is undisputed that Maybank's property fronts on Maybank Highway. Maybank, therefore, has ready access to its property. While Maybank may wish it had other, additional access, such is not an entitlement and cannot unilaterally create such an encumbrance upon the Subject Property. Because the reputed "easement" is not necessary for the use of Maybank's property, and because Maybank fails to meet other, requisite elements of an appurtenant easement, any such easement would be an easement in gross. See *Ballington v. Paxton* 327 S.C. 372, 488 S.E.2d 882 (1997). Thus, if an easement was created by virtue of the Resolution, which it was not, such would have

been an easement in gross which is a mere personal privilege and incapable of transfer or assignment.

e. Maybank admitted, in its pleadings and by sworn testimony, that it does not have a valid, enforceable easement

Maybank acknowledges it does not have a valid easement through its pursuit of a claim against its former legal counsel alleging professional negligence on the part of counsel for failing to perfect the "easement" (Case No. 2020-CP-10-02180). In that matter, Plaintiff states, *inter alia*:

> BBT and Byars breached their professional obligation and fiduciary duty to Maybank to provide legal services…by failing to prepare and record a document, in the office of the Register of Deeds…so as to provide constructive knowledge to the public of the existence of the thirty (30) foot right of way easement. BBT and Byars were careless and negligent failing to record the Resolution, or failing to prepare and record a document… Maybank has suffered special damages in that its adjacent lot has lost the value of a (30) foot private right of way easement across the Property.
> Comp. ¶¶ 21 – 23.

By Maybank's admission, the Resolution, upon which it relies as the basis for the claim of an easement, fails to meet the statute of frauds. In order to satisfy the statute of frauds, there must be a writing that, by its terms, establishes the essential terms of the agreement without resort to parol evidence, **signed by the party against whom enforcement is sought**. *Springbob v. University of South Carolina*, 407 S.C. 490, 757 S.E.2d 384 (2014) (emphasis added). Maybank admits the failure to memorialize any easement in a manner sufficient to satisfy the requisite elements therefor. Additionally, the Resolution is not and could not have been signed by the Beach Entities. Thus, the

claim to an easement is further defeated pursuant to the statute of frauds. See S.C. Code Ann. §30-7-10

Moreover, Appellant seeks to recover in its malpractice action the lost value of the supposed easement. However, Appellant only lost the value – or suffered damages recoverable from its prior attorneys – if it, in fact, lost an easement (and therefore, Appellant maintains in a separate action that no easement exists).

Based upon the forgoing admissions alone, Maybank's claims fail as a matter of law.

III. The trial court did not abuse its discretion in denying the Appellant's motion to amend its complaint.

In the October 7, 2020 order, the trial judge held "Plaintiff's Motion to Amend Complaint is DENIED." The appropriate standard of review in reviewing a Circuit Court's denial of an Appellant's motion to amend under Rule 15, SCRCP is abuse of discretion. A denial of a motion to amend under Rule 15, SCRCP or a motion under Rule 60(b), SCRCP is within the sound discretion of the circuit court. *Oulla v. Velazques*, 427 S.C. 428, 435, 831 S.E.2d 450, 453 (Ct. App. 2019) (citation omitted). Because a motion to amend complaint is subject to the sound discretion of the circuit court, they "will rarely be disturbed on appeal. The [circuit court's] finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Id*. (citing *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 153, 723 S.E.2d 835, 840 (Ct. App. 2012).

Here, Appellant does not allege or maintain the Circuit Court abused its discretion or that it faces a "manifest injustice" by the Court's denial of its motion to amend. In regard

to its Motion to Amend, the October 12, 2020 order noted the "that the most significant addition to the proposed Amended Complaint is the addition of the City of Charleston as a named Defendant, but no relief is sought from the City." (October 12, 2020 Order, at 2). It was within the trial judge's discretion to deny Appellant's Rule 15, SCRCP motion to amend and the trial Judge did not abuse its discretion in denying the motion – nor does the Appellant maintain he did. Moreover, Appellant does not allege and does not face a manifest injustice as a result of the trial court's denial because the only major inclusion in the proposed amended complaint was adding the City of Charleston as a party against whom Appellant did not raise an additional cause of action. Therefore, the ultimate issue remained – Appellant does not maintain an easement over the Subject Property.

Therefore, Respondents respectfully request this Court uphold the Trial Court denying Appellant's Motion to Amend.

IV. Respondents incorporate by reference the arguments set forth in the Initial Briefs filed by the other Respondents in this action.

Pursuant to South Carolina Appellate Court Rule 208(b)(6), SCACR, Respondents hereby incorporate by reference all arguments advanced in the Initial Briefs filed by the other Respondents in this matter.

CONCLUSION

The Respondents, Beach Fenwick and The Beach Co., respectfully prays that this Court will uphold the Orders granting Respondents' Motions for Summary Judgment, uphold the Order denying Appellant's Rule 15 Motion to Amend, dismiss Appellant's First

Notice of Appeal as moot, waived, and/or, alternatively, in the interest of judicial economy, and for any further relief the Court deems appropriate and necessary.

/s/ Cheryl D. Shoun

Cheryl D. Shoun
Chase C. Keibler
NEXSEN PRUET, LLC
PO Box 486
Charleston, SC 29402
843-577-9440

Attorneys for Beach Fenwick, LLC, and The Beach Company

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Appellate Case No.: 2020-001030

Appeal from Charleston County
Court of Common Pleas, Ninth Judicial Circuit
Hon. Bentley D. Price, Circuit Court Judge

2020-CP-10-00209

Maybank 2754, LLC, ... Appellant,

v.

Eugene Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11,1997; 1776, LLC; Beach Fenwick, LLC; The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny Creek Associates, LLC; John Doe and Mary Roe ..... Respondents.

PROOF OF SERVICE

I hereby certify that on this date I have served the **INITIAL BRIEF OF RESPONDENTS BEACH FENWICK, LLC AND THE BEACH COMPANY [sic]** on Appellant and all other parties to their respective e-mail addresses, pursuant to the Order of the Supreme Court Appellate Case No. 2020-000447(g)(3) on April 7, 2021.

Jason Tarokh, Esq.
jason@tarokhlaw.com

Scarlet B. Moore, Esq.
Scarlet28@msn.com

Kent Taylor Stair, Esq.
kstair@cskl.law
Jordan N. Teich, Esq.

Jason S. Smith, Esq.
js@hellmanyates.com

Brian A. Hellman, Esq.
bh@hellmanyates.com

Thomas Bacot Pritchard, Esq.
tpritchard@pnalaw.net
J. Rutledge Young, Jr.

jteich@cskl.law

John Patrick Turner Norris, Esq.
pnorris@cskl.law

jry@duffyandyoung.com

Patrick C. Wooten
pwooten@duffyandyoung.com

/s/ Cheryl D. Shoun

Cheryl D. Shoun
Chase C. Keibler
Nexsen Pruet, LLC
PO Box 486
Charleston, SC 29402
843-577-9440

Attorneys for Beach Fenwick, LLC, and The Beach Company