

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Kevin O’Hara, Rebekah H.)
O’Hara and Krebone Enterprises, LLC)
)
Plaintiff-Petitioner,)
)
v.)
)
Middleborough Horizontal)
Property Regime,)
)
Defendant-Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Case No. 2019-CP-40-01231

ORDER

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INTRODUCTION

This matter came to trial before this Court on January 29, 2021 and was conducted by remote technology. Kevin and Rebekah O’Hara (the “O’Haras” or “Co-Owners”) and Krebone Enterprises (“Krebone”) were represented by Wesley Peel of Bruner, Powell, Wall & Mullins, LLC. The Defendant, Middleborough Horizontal Property Regime (“Middleborough” or the “Regime”), was represented by Christian Saville of McCabe, Trotter & Beverly PC and Kirby Shealy of Adams and Reese LLP. The parties consented to the introduction of eighteen exhibits. Each party presented one witness. The Plaintiffs called Mr. Kevin O’Hara and the Defendant called Mr. Ken Baker, a board member of the regime. This Court has reviewed the pleadings and briefs filed in this matter, as well as the exhibits and witness testimony presented at trial. Based on careful consideration of the foregoing, this Court finds as follows:

I. PROCEDURAL HISTORY

Plaintiffs Kevin O’Hara and Rebekah H. O’Hara own two condominium units in

Middleborough, which are within the horizontal property regime managed by Defendant. Plaintiffs filed their Summons and Complaint on February 28, 2019 seeking a declaratory judgment and an order restraining and enjoining Defendant Middleborough from prohibiting the O’Haras from renting out their units in Middleborough on a short-term basis, interfering with the renters’ rights to use the common areas, and “otherwise violating the Master Deed regarding any restrictions on the O’Haras’ leases not set forth in the Master Deed.” Plaintiffs alleged in their Complaint that a 2019 Regulation passed by Middleborough, which provided that the offering of a rental of any residential unit for a term of less than thirty days was deemed by the Board of Directors to violate Article II of the Bylaws of Middleborough Horizontal Property Regime (the “Bylaws”), constituted an illegal attempt to restrain the Plaintiffs from renting their units on a short-term basis. It was Plaintiffs’ position that the 2019 Regulation was illegal and ineffectual under the Horizontal Property Act, which provides at S.C. Code § 27-31-100(h) that a master deed shall express, among other things, any restrictions or limitations on the lease of a unit including, but not limited to, the amount and term of the lease.

Defendant Middleborough filed its Amended Answer and Counterclaim on May 30, 2019, seeking a declaratory judgment and an order enjoining Plaintiffs from facilitating the short-term rental of their units.¹ While Plaintiffs challenged the validity of the 2019 Regulation regarding short-term rentals, Defendant made it clear that it was actually a provision of the Bylaws, which are an exhibit to and incorporated into the Master Deed, not the 2019 Regulation, that prohibits short-term rentals. Specifically, Defendant relies upon Article XI, Section A(1) of the Bylaws, which provides “Apartments in Phase 1 shall be used only as residences.”

¹ Defendant also named Plaintiff Krebone Enterprises, LLC (“Krebone”) in the suit on the basis that Krebone was a corporation through which Defendant alleged the O’Haras facilitated the rental of the units.

The Co-Owners and the Regime seek declaratory judgments to determine the parties' rights related to the Co-Owners' short-term rental of Units 2J and 14G in Middleborough and renters use of the common area. The parties reached a temporary agreement shortly after litigation began to preserve the status quo regarding the rentals until this Court issued a ruling. Therefore, the Plaintiff's request for damages is not an issue and the sole matter before the court is the resolution of the parties' rights regarding the rental terms allowed for Apartment Owners in Middleborough and the Regime's ability to restrict the Co-Owners' and renters' rights for full and complete use of the property.

II. SUMMARY OF FACTS

Middleborough is a Horizontal Property Regime created under a Master Deed duly executed and recorded pursuant to the South Carolina Horizontal Property Act (SCHPA), S.C. Code Ann. § 27-31-10 *et seq.* As provided in the Master Deed, Middleborough consists of two phases: Phase 1 under the Master Deed consists of 192 residential apartments. Phase 2 was created by amendment to the Master Deed dated December 21, 1984, adding the first floor and basement as residential rental space and allowing use of those areas as residential rental space or as commercial retail or office space. The Bylaws of Middleborough Horizontal Property Regime (the "Bylaws") were recorded as Exhibit D to the Master Deed and incorporated therein. Article XI, Section A(1) of the Bylaws, captioned "Restrictions," provides as follows: "Apartments in Phase I shall be used only as residences."

Plaintiffs Kevin O'Hara and Rebekah H. O'Hara purchased Apartment Unit 2J and Unit 14G, both in Phase I of Middleborough, on March 31, 2015, and August 25, 2017, respectively. Plaintiffs renovated and furnished the apartments so as to be suitable for short-term rentals and established an LLC, Krebone Enterprises ("Krebone"), along with a website for Krebone, to

facilitate the rental of the units. However, Mr. O'Hara testified that Plaintiffs decided not to use Krebone to rent out the units once they learned about the online platforms of Airbnb and VRBO. While Plaintiffs have and continue to rent out Unit 2J for terms as brief as two nights, they have not engaged in this activity with Unit 14G but are interested in doing so if they prevail in this action. Mr. O'Hara confirmed that neither he nor Ms. O'Hara live at Middleborough. According to Mr. O'Hara, Plaintiffs stayed at Middleborough temporarily while their residence elsewhere in Columbia was undergoing renovations, but that was many years ago. They own other investment properties in addition to their units at Middleborough. Plaintiffs do not stay at Middleborough while their property there is being rented.

Middleborough Horizontal Property Regime is an eighteen-story high rise condominium in Columbia, South Carolina, with approximately 192 apartments. The O'Haras purchased Middleborough Unit 2-J on March 31, 2015 (Exhibit 1) and Unit 14-G on August 25, 2017 (Exhibit 2) (collectively, the "Units"). Mr. O'Hara testified that he purchased the Units with the intention of leasing them for short-term rentals for terms of less than ninety days. Mr. O'Hara reviewed the Middleborough Master Deed (Exhibit 3) and By-Laws (Exhibit 5) prior to purchasing the Units to ensure that there were no restrictions in either document that would restrict his ability to lease the Units as short-term rentals. Mr. O'Hara informed the City of Columbia of his plans to rent the Units short-term and obtained rental permits from the City (Exhibit 6). The City of Columbia Rental Housing Regulations (Columbia Municipal Ordinance Section 5-325, et seq.) define Mr. O'Hara's apartments as "Residential rental units" and therefore the city requires Mr. O'Hara to obtain rental permits.

The O'Haras originally planned to rent the units through their company, Krebone Enterprises, but discovered that it was much easier to rent the units through online platforms, such

as Airbnb and VRBO. Although Krebone has a website promoting the units, Mr. O'Hara testified that they have never rented the Units through Krebone and Krebone has no relation to the Units other than the defunct website that Mr. O'Hara is uncertain how to disable.

Since purchasing the Units, the O'Haras advertised and continuously rented Unit 2J through Airbnb and VRBO. Individuals can rent Unit 2J for two-night minimums, and the average rental since 2015 has been for 4.4 nights. Unit 14G is only rented on a 30-day minimum basis at the current time; however, the O'Haras contemplate renting it for shorter terms in the future. The Units do not have a front desk or office for customer service, they do not have a centralized telephone system, nor do the O'Haras provide housekeeping services to their renters.

The Defendant, Middleborough, is a horizontal property regime established pursuant to South Carolina Code Section 27-31-30 and its Master Deed, filed on November 12, 1981, and amended on December 21, 1984 (Exhibits 3 and 4). Middleborough is governed by the South Carolina Horizontal Property Act (SCHPA) (S.C. Code Section 27-31-10 *et. seq.*), the Master Deed, its amendment, and the By-laws of Middleborough Horizontal Property Regime (Exhibit 5). Some Middleborough apartments are owned by business entities and previously some apartment's terms of lease have been for less than a year—as demonstrated in the Bob Capes advertisement for 3-month rentals of a furnished Middleborough apartment (Exhibit 13).

On July 14, 2016, the then-president of the Middleborough Board of Directors' (the "Board") sent Mr. O'Hara a letter demanding that the O'Haras "cease and desist" from renting Unit 2J on a short-term basis. (Exhibit 8). The letter stated that Mr. O'Hara was violating Bylaw Article XI.A.(1), which states, "Apartments in Phase 1 shall be used only as residences" and classified the O'Haras short-term rental as a "commercial activity." On August 29, 2016, through counsel, Mr. O'Hara responded to the Board's letter. (Exhibit 9). Mr. O'Hara's letter stated that

there were no restrictions in the Master Deed restricting lease terms and that short term rentals constituted residential use. Subsequently, Mr. O'Hara heard nothing in response until the Board issued a document entitled "Middleborough Horizontal Property Regime Rules and Regulations, Revised January 7, 2019" (the "Revised Rules"). (Exhibit 10).

The Revised Rules appear to be an indirect attempt by the Board to stop the O'Haras from renting the Units short-term as the O'Haras had planned, and to restrict the O'Haras' guests from having the full and complete enjoyment of the common areas. It is undisputed that the Revised Rules were adopted by the Board only and that the Revised Rules were not put to a vote by the Apartment Co-owners of Middleborough. The Revised Rules contain various restrictions on short-term rentals and the use of common areas in Middleborough, including but not limited to the following.

On Revised Rules page 2, the Revised Rules define "co-owner," "residents," "guest," and "tenant" as:

A co-owner is a person who owns the condominium unit and pays the regime fees, assessments, and property taxes. A resident is a person who resides in the condominium. Residency is established by receiving mail at Middleborough under the unit number occupied and paying utility costs and other related expenses for the unit. A guest is a person whose mailing address is not that of any Middleborough unit and who is temporarily housed for any length of time in a co-owner's or resident's unit. A tenant is a person who is leasing any of the commercial spaces at Middleborough.

Revised Rules Sections VII through X address the use of the common areas.

Revised Rule Section XXI is a direct prohibition by the Board, without vote of the co-owners, restricting a Co-Owner's ability to lease their units for less than thirty days and defines that type of rental as "non-residential". The Revised Rule does not differentiate the character of the use of the units by a two-night term, a two-week term, a three-month term, or a yearly rental

of a unit at Middleborough. This section prohibits Mr. O'Hara's use of Airbnb and VRBO to lease his Units as planned and provides for a \$10.00 per day penalty for violation of this rule. None of these limitations are contained in the Middleborough Master Deed or By-laws or were approved by a vote of the co-owners.

The O'Haras seek (1) an injunction order finding that Middleborough cannot restrict rental terms for less than thirty days or renter's rights to the common areas pursuant to the Master Deed, By-Laws, common and statutory law; (2) a declaratory judgement declaring that the Revised Rules are unenforceable and a violation of the Master Deed and the South Carolina Horizontal Property Act, S.C. Code Section 27-31-10 *et. seq* which requires all lease term restrictions be stated in the Master Deed and; (3) a declaratory judgement declaring that any co-owner may rent their units without restriction as to term; and (4) Krebone seeks a dismissal and a determination that it was not engaged in the rental of any Middleborough units.

Conversely, Middleborough seeks (1) a declaratory judgment that the O'Haras' and Krebone's short-term rental of Units 2J and 14G is a non-residential use that violates Middleborough's Master Deed and By-laws; (2) injunctive relief; (3) a finding against Plaintiffs for Breach of Covenants; (4) enforcement of restrictive covenants; and (5) specific performance. As a matter of procedure, Middleborough sought to add Krebone as a Third-Party Defendant. The parties reached an agreement to join Krebone as a Plaintiff-Petitioner.

III. DISCUSSION

As a preliminary matter, Plaintiffs have challenged the legality and enforceability of the 2019 Revised Regulation passed by Middleborough which construes rentals of residential units for terms of less than thirty (30) days as prohibited non-residential uses of the property. This Court agrees with Plaintiffs that the 2019 Regulation is, in fact, ineffectual under S.C. Code § 27-31-

100(h) because it constitutes a restriction on terms of leases which is not set forth by the Master Deed. However, Defendant does not rely on the 2019 Regulation as a basis for prohibiting Plaintiffs' current and intended use of the property. Rather, Defendant Middleborough argues that Plaintiffs' use of the units as a short term-rental is prohibited by Article XI, Section A(1) of Middleborough's Bylaws, which is an exhibit to and incorporated into the Master Deed. Section A(1) provides, "Apartments in Phase I shall be used only as residences."

Plaintiff argues that the provision in the Bylaws limiting the units to be used "only as residences" does not prohibit short-term rentals. The court agrees.

Conflicts regarding restrictive covenants are to be resolved in favor of the free use of the property. "Restrictive covenants are contractual in nature,' so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863-64 (1998) (quoting *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (1985)). "When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect and the court must construe it according to its plain, ordinary, and popular meaning." *Moser v. Gosnell*, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999).

"A restriction on the use of the property must be created in express terms or by plain and unmistakable implication." *Id.* (quoting *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980)). "The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms["] even to accomplish what it may be thought the parties would have. *Cnty. Servs Asssocs. v. Wall*, 421 S.C. 575, 581, 808 S.E.2d 831, 834 (Ct. App 2017). If the language used in the

restriction is capable of two or more different constructions, the court must use the interpretation that “least restricts the use of the property.” *Taylor*, 332 S.C. at 4, 498 S.E.2d at 864.

“A restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.” *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 392, 680 S.E.2d 289, 291 (2009). “Thus, courts tend to strictly interpret restrictive covenants, and to enforce a restrictive covenant, a party must show that the restriction applies to the property either by the covenant's express language or by a plain and unmistakable implication.” *Id*

The Middleborough Horizontal Property Regime was formed pursuant to the South Carolina Horizontal Property Act, S.C. Code Section 27-31-10 *et. seq* (SCHPA), on October 14, 1981 by and through its Master Deed duly recorded in the Richland County Register of Deeds. (Exhibit 3). The SCHPA states that a regime is established when the owners record a Master Deed which sets forth certain particular items as required by Section 37-31-100. *See* S.C. Code § 27-31-30.

South Carolina Code Section 37-31-100 requires that certain items must be contained in the Master Deed. These items include, among other things, a description of the land, a general description of each apartment, the common elements, and the name of the regime. Specifically, Section 27-31-100(h) requires that the Master Deed must express “(a)ny restrictions or limitations on the lease of a unit including, but not limited to, the amount and **term** of the lease.” (emphasis added). During his testimony, Mr. Baker admitted that the Master Deed does not restrict or limit the term of a leased unit. Mr. O’Hara testified that he relied on the Master Deed when he purchased the Units, and particularly reviewed it to assure himself that there were no restrictions on lease terms. Despite Master Deed Section IX.A. providing that an amendment to the Master Deed must

be done by the written agreement of all of the Co-owners, Mr. Baker admitted that the co-owners had not voted to amend the Master Deed to restrict lease terms. (Exhibit 3).

Our courts have already determined that the short-term rental of condos does not constitute a hotel operation. In *Landing Development Company v. City of Myrtle Beach*, 285 S.C. 216, 329 S.E.2d 423 (1985) the plaintiff sued Myrtle Beach to enjoin the City from denying rental permits for short-term rentals in a condominium that it was managing for individual apartment owners. The city refused to issue the permits alleging that short-term rentals were not permitted in that particular zoning district. The City argued that the management company renting the units was operating a “motel operation,” just as Middleborough frames its argument against the O’Haras. The court in *Landing Development Company* found the units were individually owned and offered for rental through the management company and that “the fact of short-term rentals and the availability of convenience services to tenants do not operate to convert individually owned condominium units into a motel” *Id.* at 221, 425. The City also argued that its zoning ordinance required the units to be used for “permanent occupancy,” much like Middleborough argues that its By-laws restrict use to “residential use.” The court in *Landing Development Company* found that the term “permanent occupancy” was not defined in the ordinance nor law equating that term with being a permanent residence. *Id.* at 219, 424.

Similarly, Middleborough’s Master Deed and By-Laws do not define the term “residential use.” “Generally speaking, ‘residential use’ is one that involves activities generally associated with a personal dwelling.” 20 *Am. Jur. 2d Covenants, Etc.* § 179. “Similarly, a ‘residential building’ is a building which is used for residential purposes or in which people reside, dwell, or make their homes, as distinguished from one which is used for commercial or business purposes.” *Id.* “The phrase ‘residential purposes’ does not mean only the occupying of a premises for the

purpose of making it one's 'usual' place of abode; a building is a residence if it is 'a' place of abode." *Id.* "The word 'residence' is one of multiple meanings, however, and hence the context in which it is used must be taken into consideration in determining its meaning in any particular case." *Id.*

In *Community Services Assocs. V. Wall*, 421 S.C. 575, 808 S.E.2d 831 (Ct. App. 2017), the Court of Appeals found that the short-term rental of a portion of a villa in Sea Pines Plantation complied with the "Residential Purposes" requirement of the community's restrictive covenants. The Sea Pines restrictive covenants stated that "All lots in said Residential Areas shall be for residential purposes exclusively." *Id.* at 579, 833. The court found that the owners' short-term rental of a portion of their villa "do[es] not violate the requirement that all lots shall be used for residential purposes." *Id.* at 585, 836.

This court finds that the term "residential purposes" generally relates to the character of the use, not its term, and that short-term rentals are not precluded as inconsistent with residential use. Other states have considered this issue and similarly held that a "residential purposes" restriction in a restrictive covenant did not prohibit short-term rentals. As long as the property is being used for living purposes, it does not cease being "residential" simply because the use is temporary instead of permanent. See *Houston v. Wilson Mesa Ranch Homeowners Assoc. Inc.*, 360 P.3d 255 (Colo. Ct. App. 2015); *Ross v. Bennett*, 203 P.3d 383 (Wash. Ct. App. 2008); *Lowden v. Bosley*, 909 A.2d 261 (Md. 2006); *Pinehaven Planning Board v. Brooks*, 70 P.3d 664 (Idaho 2003); *Slaby v. Mountain River Estates Residential Ass'n*, 100 So. 3d 569 (Ala. Civ. App. 2012).

Short-term rentals of condominium apartments are common in this state. Middleborough argues that the O'Haras are engaged in a business or are running a hotel and are a lodging establishment. Short-term rentals directly by real property owners or through a management

company do not subject the O'Haras to the Lodging Establishment Act, S.C. Code Section 45-2-10. Rather, rentals such as the O'Haras come under the South Carolina Vacation Rental Act, S.C. Code Section 27-50-210 *et seq.* The Vacation Rental Act applies to "Residential property" which includes apartments and condominiums, "devoted to residential use or occupancy by one or more persons for a definite or indefinite period." A "vacation rental" is a "lease, sublease, or other rental of residential property for a period of fewer than ninety days," but does not apply to rentals that would otherwise come under the South Carolina Residential Landlord and Tenant Act. *See* S.C. Code Section 27-50-220. The Vacation Rental Act excludes lodging provided by hotels or other entities that provide a front desk for customer service, or a centralized telephone system, or provide housekeeping services at no additional charge. *See* S.C. Code Section 27-50-220 (B)(3). The General Assembly has therefore determined that rentals such as the O'Haras are for a residential use as the South Carolina Vacation Rental Act defines their units as "Residential Property."

Middleborough's attempt to restrict the rights of owner's and renter's rights to use the common areas is a violation of the SCHPA, the Middleborough Master Deed, and the Middleborough By-Laws. Middleborough has gone even farther and has restricted the use of the Common Areas to people that do not receive their mail at Middleborough, regardless of their status as an owner or renter. Middleborough cannot restrict an owner's or renter's use of the commons areas as defined by the Master Deed. Such action is prohibited by SCHPA. *See* S.C. Code Section 27-31-120 ("Any conveyance or lease of an individual apartment is deemed to also convey or lease the undivided interest of the owner in the common elements, both general and limited, appertaining to the apartment without specifically or particularly referring to same."). Therefore, any rental of a unit conveys with the owner's right to use the common areas.

The Master Deed defines “Co-owner” as “an individual, firm, corporation, partnership, associations, trust or other legal entity, or any combination thereof, of who owns an apartment.” (Exhibit 3, p.3.) As set forth in Master Deed Article IX.A., this definition cannot be changed except by written consent of all the unit owners. (Exhibit 3., p. 7). In the 2019 Rules, the Board changed the definition of a Co-owner to a “person who owns the condominium unit and pays the regime fees, assessments, and property taxes.” By this definition, none of the corporations or partnerships that own units are “Co-owners” in Middleborough. Article IV of the Master Deed provides that Each Co-owner is entitled to the use of the Common Elements for the purpose they were intended. (Ex. 3, page 4). Article X.A., provides that all Co-owners and their tenants are subject to the SCHPA, the Master Deed and the By-Laws. (Ex. 3, p. 8).

In addition to the Board’s Revised Rules that violate the SCHPA and the Master Deed, the Board has also violated the By-Laws. By-Laws Section X.B provides in relevant part:

. . . the consent of the Owners of Apartment units to which at least sixty-seven percent (67%) of the votes in the Council of Co-Owners are allocated and the approval of holders of mortgages on Apartment Units which have at least fifty-one percent (51%) of the votes of Apartment units subject to mortgages, shall be required to add or amend any material provisions of these Bylaws, the Master Deed or **other Regime documents of the Property** which establish, provide for, govern, or regulate any of the following: . . . 5. Rights to use the common areas; . . . 11. Leasing of Apartment Units . . . (Exhibit 5, Article X, B.).

Therefore, any of the changes made by Middleborough that relate to the use of the common areas and the leasing of the units cannot be taken by Board action and require an approval of 67% of the Co-Owners. Mr. Baker admitted that no such vote was taken in approving the 2019 Rules.

Based upon the above, and pursuant to the South Carolina Uniform Declaratory Judgment Act, this court finds that the Revised Rules—as cited above and that in any way restrict the O’Haras from renting the unit lawfully or that discriminate against short-term rentals and/or tenants—are

unenforceable and are in violation of the Master Deed and the SCHA. Further, this Court finds that Middleborough may not restrict the rights of the O'Haras or any Middleborough Co-Owners to lease their units as short-term rentals. The court further finds the O'Haras short-term lease of the Units constitutes a residential use under the Master Deed pursuant to South Carolina Law.

Additionally, pursuant to Master Deed and By-Laws, which contain no restrictions on the use of common areas, renters are entitled to the same use and enjoyment as a Co-Owner and Middleborough may not restrict Mr. O'Hara or any renters of Middleborough units from the full use and enjoyment of any of the common areas. The Revised Rules, particularly the sections as cited above defining residential use, restricting common area use, and limiting terms of lease, are not effective and may not be used to restrict the rights of the O'Hara's, their renters, or other co-owners as they conflict with the SCHA, the Master Deed and By-Laws and were not approved by the Co-Owners as required by the Master Deed.

AND IT IS SO ORDERED.

Signature Page to Follow



Richland Common Pleas

Case Caption: Kevin O'Hara , plaintiff, et al vs Middleborough Horizontal Property Regime , defendant, et al

Case Number: 2019CP4001231

Type: Order/Other

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762