

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No.: 2019-002038

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

..... Respondents,

vs

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

..... Defendants/Counterclaimants,

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

..... Appellants

And

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

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

vs

Joseph P. D'Ambrosio, Mary D'Ambrosio, Michael Powers, Harriett Bosiack, Robert Wolfson, James Hayes, Steve Andrews, Ron Lambe, Dave Prezvys, Rivers Reach at Pocotaligo, LLC, Rivers Reach Realty, LLC, and Jon Does 1-10, Third-Party Defendants.

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ARGUMENT

In their responsive brief, Respondents appear to base their arguments on an misapprehension of the record, and also have stated arguments that do not stand appellate scrutiny, as set forth below.

I. RESPONDENTS FAIL TO ADDRESS THE FATAL FLAW IN THEIR ARGUMENT RELATED TO SECTION 1.01(J) OF THE DECLARATION.

In their appellate brief, Respondents again attempt to beguile judicial authority by bidding them to focus solely and exclusively on Section 1.01(j) of the Declaration to determine if, and how, the Declarant's Rights of the Bull Point development can be assigned from one Declarant to another. In doing so, they bid the Court to ignore established rules of contractual construction, to ignore the entirety of the Declaration, and to ignore the actual history of the Bull Point development.

As an initial matter, Respondents entirely ignore the cardinal rule of contractual construction, where the Court's "primary objective is to ascertain and give effect to the intention of the parties" and **"[t]he parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof."** *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 498, 649 S.E.2d 494, 502 (S.C. App. 2007).

Contrary to Respondents' characterization of Section 1.01(j) of the Declaration as "unambiguous," this section is hardly a model of clarity. It states:

"Declarant" shall mean and refer to Bull Point, LLC which has executed this Declaration with respect to the Property and the Additional Property at the time of such transfer to said successor-in-title, or any party which acquires said Declarant's entire interest with respect to the Property and the Additional Property at the time of such acquisition pursuant to Foreclosure of a Mortgage encumbering said Declarant's interest in the Property and the Additional Property.

(Declaration, ROA, 395). Respondents claim that this section unambiguously restricts the right of the Declarant to assign “Declarant Rights” to another party. It does no such thing.¹

Section 1.01(j) states absolutely nothing about restricting the assignability of Declarant Rights. In the first instance, Section 1.01(j) refers to Bull Point, LLC as the Declarant. In the second instance, it also states that a Declarant could be a would-be party that – however unlikely – acquired the “entire interest” of Bull Point, LLC with respect to the “Property” and “Additional Property” by foreclosure.²

In their appellate brief, Respondents continue to mistakenly rely on *Highlands Prop. Owners Ass’n, Inc. v. Shumaker Land, LLC*, 397 S.C. 432, 724 S.E.2d 685 (S.C. App. 2012), to support their argument that the Declarant’s Rights could not be assigned to GSI, LLC or to Bull Point SC, LLC. Again, Respondents fail to address the fundamental flaw in their reliance on *Shumaker* – the covenants at issue in *Shumaker* are quite different from the Declaration at issue in the instant case. In *Shumaker*, the covenants required that an assignment of Declarant rights could be effective “if the instrument of sale or assignment expressly so provides.” 397 S.C. at 437, 724 S.E.2d at 689. Because the deed to Shumaker Land, LLC did not reference the rights of the Declarant, it did not receive an assignment of these rights.³

¹ In light of the actual language of Section 1.01(j), it is difficult to comprehend Respondents’ statement that “the Declaration in this case provides only one way for a successor to acquire the Declarant’s rights.” (Respondents’ Brief, p. 20). The phrase “Declarant Rights” does not even appear in Section 1.01(j).

² While the “Declarant Rights” of Bull Point have been assigned several times in the past, they have never transferred from one party to another via foreclosure. (Appellants’ Brief, p. 7). Plaintiffs have previously acknowledged that these assignments were legal, long before their newly-found objections to the assignability of Declarant Rights. (Appellants’ Brief, p. 22)

³ Ironically, the Master’s decision in *Shumaker* was reversed because the Master “failed to read the provisions of the Covenants together. ‘It is fundamental that in the construction of the language of a [contract], it is proper to read together the different provisions therein dealing with

No such impediment exists here. Indeed, Section 1.01(j) of the Declaration does not address “assignability” of Declarant Rights in any regard. Elsewhere, the Declaration references the Declarant’s “assigns” at numerous occasions.

In fact, Respondents’ statement that the “transferability of Declarant’s rights depends on whether the Declarations make them transferable” [sic] is only too true. (Respondents’ Brief, p. 17). The Declaration decidedly does not forbid transfer of Declarant Rights by assignment, and as set forth at length in Appellants’ Brief, it actually references a Declarant’s “assigns” on numerous occasions.

In this regard, Respondents’ argument that Declarant Rights purchased from DB Aster, LLC by GSI, LLC must be construed “in favor of the homeowners” is particularly non-sensical. First, Respondents comprise a decidedly small minority of the “homeowners” of the Bull Point development. Second, Respondents were not a party to the transaction of Declarant Rights between DB Aster, LLC and GSI, LLC, or between GSI, LLC and Bull Point SC, LLC. The argument is, however, illustrative of the over-reaching nature of Respondents’ attempt to seize the property of Bull Point SC, LLC.

To deprive Bull Point SC, LLC of its Declarant Rights – the property for which it paid – by a narrow and flawed reading of a single section of the Declaration, to the exclusion of the entirety of the Declaration and without regard to the other evidence in the record, was manifestly unjust and finds no legitimate basis in either the facts of this case or the applicable law.

For this reason alone, the decision of the lower court should be reversed.

the same subject matter, and where possible, all the language used should be given a reasonable meaning.’ ” 397 S.C. at 438, 724 S.E.2d at 688 (citations omitted). The trial court’s decision in the instant case suffers from the same defect.

II. RESPONDENTS' ARGUMENTS REGARDING THEIR OWN PAST ACTIONS AND SWORN STATEMENTS FAIL UNDER THEIR OWN CONTRADICTIONS.

In an attempt to disavow their prior representations that Declarant Rights were lawfully transferred by assignment, or that Bull Point SC, LLC was the lawful Declarant, Respondents now argue that their “affidavits are not inconsistent with the position that Plaintiffs [sic] have taken from the outset of this litigation.” (Respondents’ Brief, p. 21). Such an assertion is, on its face, incomprehensible.

Confronted with such an argument, it is helpful to refer to the actual sworn statements filed in this action that are at issue:

- Respondent Russell Dimke identified Bull Point SC, LLC as the “developer and Declarant of Bull Point POA...” and attested that “Mr. Gavigan became the new developer/Declarant and took over control of the POA Board.” Dimke also attested under oath that “[a]s managing member of the developer/Declarant, Bull Point SC, LLC, Mr. Gavigan has control over the POA Board, including the power to appoint and remove any member or members of Board of Directors and/or any other officers of the Association.” (Affidavit of Russell G. Dimke, ¶¶ 6, 11, and 15, ROA, 526).
- In his sworn affidavit, Respondent Gary Okey represented that he resigned shortly after “William Gavigan and Bull Point SC, LLC took over as Declarant.” (Affidavit of Gary Okey, ¶ 5, ROA, 533).
- In his sworn affidavit, Respondent Peter W. Marzluff specifically identifies the Declarant as Bull Point SC, LLC. (Affidavit of Peter W. Marzluff, ¶ 8, ROA, 536).

These sworn statements are not ambiguous, and Respondents’ sophistry in attempting to state that they are “not inconsistent” with the position they are now taking – that Bull Point SC, LLC is not the Declarant – simply begs credulity. These sworn statements are exactly opposite to

Respondents' current argument. The contradictory nature of Respondents' current position is especially apparent in light of Respondents' own attempts to do what DB Aster, LLC, GSI, LLC and Bull Point SC, LLC did – purchase the Declarant Rights by assignment.

Indeed, given the lengthy record before this Court, it is not surprising that Respondents simply do not address the Appellants' arguments regarding (1) estoppel or (2) laches, especially given the fact that Respondents submitted their earlier representations to Gavigan, upon which Gavigan (through GSI, LLC) relied and acted in completing the purchase of the property and Declarant's Rights at the Bull Point development. (ROA, 450).

III. RESPONDENTS' ARGUMENTS REGARDING BOARD ELECTIONS ALSO FAIL UNDER THEIR OWN CONTRADICTIONS.

As they must, Respondents admit that the Association's Articles of Incorporation incorporate the Declaration. (Respondents' Brief, p. 26). Indeed, the Association's Articles of Incorporation not only wholly incorporate the Declaration "as if set forth verbatim," the Declaration clearly sets forth that its provisions **take precedence** over other provisions of the Articles of Incorporation, or the By-Laws. Declaration, Section 8.02. In two separate sections of the Declaration, 8.01 and 13.01, and in the clearest possible terms, the Declarant has the right to appoint or remove any member or members of the Board of Directors or any officer or officers of the Association.

Even faced with these facts, Respondents argue that "there still exist both the Articles and the Declaration, which have conflicting provisions." (Respondents' Brief, p. 26). This argument makes no sense, as it bids the Court to ignore what Respondents cannot deny – that the Articles of Incorporation incorporate the Declaration *verbatim*.

In this regard, Respondents' argument founders on applicable statutes of the South Carolina Non-Profit Corporations Act. S.C. Code § 33-31-206 explicitly states:

- (a) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation.
- (b) The bylaws may contain any provision for regulating and managing the affairs of the corporation **that is not inconsistent with law or the articles of incorporation.**

(emphasis added). Similarly, regarding election, designation, and appointment of directors, South Carolina's Non-Profit Corporation Act provides as follows:

If the corporation has members entitled to vote for directors, all the directors, except the initial directors, must be elected at the first annual meeting of members, and at each annual meeting thereafter, **unless the articles or bylaws provide some other time or method of election, or provide that some of the directors are appointed by some other person or designated.**

S.C. Code Ann. § 33-31-804(a) (emphasis added).

In short, there are simply no grounds to support the trial court's order regarding elections for the Board of Directors. For these reasons, the Court should reverse the trial court's order.

IV. THE INJUNCTIVE RELIEF THE CIRCUIT COURT GRANTED WAS NOT APPROPRIATE.

In their discussion of the injunctive relief granted by the trial court, Respondents simply do not address the overarching defect in that part of the trial court's order. The relief granted was not a part of the hearing, not addressed in the motions before the trial court, and not addressed at the hearing before the trial court. In this regard, Respondents have failed to show that Appellants were actually permitted to have what law and equity require – a meaningful hearing on the measures of injunctive relief ordered by the trial court. *McIntyre v. Sec. Comm'r*

of S.C., 425 S.C. 439, 445, 823 S.E.2d 193, 196 (S.C. App. 2018) (quoting *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 68-69, 492 S.E.2d 62, 71-72 (1997)).

For this reason alone, the Court should reverse the trial court's order.

V. THE FACTUAL RECORD RAISES THE ISSUE OF COURT'S JURISDICTION IN THIS MATTER.

Respondents have, throughout this case, alleged that they filed this case "in their derivative capacity on behalf of Bull Point Plantation Property Owners Association."⁴ This was their original description of the entity in their initial pleading, and is consistent with the entity referenced in the affidavits filed by Marzluff, Okey, and Dimke. (ROA, 526, 533, and 536).

The "Bull Point Plantation Property Owners Association" is not the "Association" referenced in this matter. The "Bull Point Plantation Property Owners Association" is a separate entity that was incorporated on January 2, 2007 and dissolved on March 21, 2013. (ROA, 471).⁵ This entity has never been the "Association" referenced in the Declaration.

Indeed, if the Declaration is as unambiguous as Respondents have argued, the entire case must be dismissed for lack of proper jurisdiction, which may be raised at any time, including on

⁴ Indeed, Respondents appear to attempt to change the parties to the case in their Brief to this Court. First, they have used the name "Bull Point Property Owners Association" as the entity for which they are suing in derivative capacity. This entity is not known to the Appellants. Further, Respondents have added the "Bull Point Plantation Property Owners Association, Inc." as a named Defendant. This entity was not sued in the Respondents' Amended Complaint, and cannot be added now. This is particularly important, as the South Carolina Non-Profit Corporations Act requires the proper corporation be made a party defendant in any judicial proceeding to "remove any director of the corporation from office." S.C. Code Ann. § 33-31-810.

⁵ These dates are also established by articles filed with the South Carolina Secretary of State, which are public records of which this Court may take judicial notice. Rule 201(b), SCRE.

appeal. *State v. Downs*, 361 S.C. 141, 147, 604 S.E.2d 377, 380 (2004). The Declaration defines the “Association” at Section 1.01(e) as follows:

“Association” shall mean and refer to **Bull Point Plantation Owners Association, Inc.**, a South Carolina non-profit corporation.

(emphasis added).

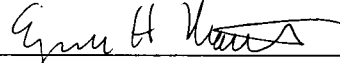
At no time have any of the Respondents filed a derivative claim as a member of an entity existing under the name “Bull Point Plantation Owners Association, Inc.” or even been a member of such an entity. As referenced in the Statement of Facts, Respondents have at various times been members of other entities claiming to act as the “Association,” but none have conformed to the actual corporate identity set forth in the Declaration.

Further, this is not a mere misnomer. The entities known as the “Bull Point Plantation Property Owners Association,” the “Bull Point Plantation Property Owners Association, Inc.,” and the “Bull Point Plantation Owners Association, Inc.” each exist separately as legal corporate entities. For that reason, because this is not the case of a mere misnomer, the rule that “failure to correct the corporate name does not invalidate the process or the judgment where the misnomer causes the corporation no prejudice” does not apply. *See Griffin v. Capital Cash*, 310 S.C. 288, 292, 423 S.E.2d 143, 146 (S.C. App. 1992).

Ironically, in this regard, Respondents have hoisted themselves on their own petard. By insisting that the Declaration is “unambiguous” in order to relieve Bull Point SC, LLC of its rightful property and to punish their adversaries living in the Bull Point community, they must live with the consequences of such insistence. Because the Court – and the trial court – have never entertained jurisdiction over the separate corporate entity the Declaration defines as the “Association,” this case should be dismissed for lack of proper jurisdiction.

CONCLUSION

For the forgoing reasons, this Court should reverse the trial court's decision, and direct to grant the relief requested by Respondents in their Motion for Partial Summary Judgment.



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August 31, 2020

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CERTIFICATE OF COUNSEL

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

Dated this 31st day of August, 2020.

Respectfully submitted,

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