STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Stonington Community Association, Inc.,

Plaintiff,

vs.

Carl D. Taylor, Jonathan Stevens, Veronica Stevens, Lena M. Bretous, Vickie M. Wise, Gerald Maynard, Lisa Maynard, Reginald Dalton, Donna Dalton, Thomas Lafayette Brown a/k/a Thomas L. Brown, Sharline Brown, Derrick L. Taylor, Gaye S. Taylor, Syrecea Parker, Carolyn L. Austin, Richea G. House, Sr., Gayle D. House, Larkin Hancock, Jr., Katrina Hancock, Jeffery M. Farmer, Kelly S. Farmer, Anthony T. Reddish, Diann Reddish, Joel H. Daley, Syreta L. Daley, Judy Dove, Henry Faison, Dorothy Brisbon, George L. Lawrence, Annette M. Lawrence, Devinci L. Fulton, and John A Francis,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
C/A No.: 2018-CP-40-06557

AMENDED ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANTS' COUNTERCLAIM

This matter came before the Court on Plaintiff's Motions for Partial Summary Judgment and Summary Judgment against Defendants' Counterclaim for Abuse of Process. A hearing was held on the Motions on January 4, 2021. After hearing the evidence presented and viewing it in the light most favorable to the Defendants as the non-moving party, this Court granted Plaintiff's Motions in an Order Granting Partial Summary Judgment filed April 1, 2021, finding there are no genuine issues of material fact to be determined by the trier of fact, and further that Plaintiffs are entitled to judgment as a matter of law. On April 12, 2021, Defendants filed a Motion to Alter or Amend the Order Granting Partial Summary Judgment. Subsequently, Plaintiff filed a

Memorandum in Response to Defendants' Motion to Alter or Amend. It is questionable whether this Court has jurisdiction to hear the Defendant's Motion to Alter or Amend as the Motion was not properly served upon the Court pursuant to Rule 59(g). Nonetheless, having reviewed the evidence presented and viewing it in the light most favorable to the Defendants, as well as Defendants' Motion to Alter or Amend and Plaintiff's Memorandum, and determining to further elaborate on its ruling and further address arguments of the parties, this Court hereby issues this Amended Order Granting Plaintiff's Motion for Partial Summary Judgment and Motion for Summary Judgment as to Defendants' Counterclaim.

Facts/Procedural History

Stonington Development, LLC was organized and purchased an approximately one-hundred sixty-five (165) acre portion of land, comprised of multiple parcels, located in Richland County, South Carolina in 2000. On June 4, 2001, the Richland County Planning Commission approved preliminary plans for Phase I of Stonington. On June 10, 2001, Stonington Development, LLC recorded a "Bonded Plat of Stonington – Phase I" ("Phase I Plat") showing a portion of the property subdivided into fifty-five (55) residential lots and the various infrastructure articles necessary to support the lots. On November 5, 2002, Stonington Development, LLC recorded the Stonington Declaration of Covenants, Conditions, Restrictions and Easements (Amended) (the "Original Declarations") with the Richland County Register of Deeds outlining the various rights, restrictions, easements, etc. in which Stonington Development, LLC intended to subject the land. On May 26, 2004, Phase II-A and Phase II-B were created. On September 6, 2005, Stonington Development, LLC recorded the Amended and Restated Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Stonington (the "Amended Declarations"). In 2008, Carolina First Bank, Stonington Development, LLC's lender, brought a foreclosure action

against a portion of the land owned by Stonington Development, LLC. This suit resulted in the transfer of a portion of the land to Carolina First Bank.

On December 16, 2009, a group of homeowners (including some and/or all of the named Defendants) filed for a temporary injunction against Stonington Development, LLC and others. On January 15, 2020, the Honorable G. Thomas Cooper, Jr. issued a Consent Order Withdrawing Injunction, Dismissing Parties and Confirming Partial Settlement in favor of the Plaintiffs. On December 17, 2018, Plaintiff filed the present action seeking Declaratory Judgment, Enforcement of Covenants, Specific Performance, and Quantum Meruit. Since the filing of the action, various Defendants have been dismissed. On August 27, 2021, Plaintiff filed its Motion for Partial Summary Judgment on the applicability of Stonington's restrictive covenants to the subject lots owned by the remaining Defendants.

Standard of Review

Summary judgment in South Carolina is appropriate if the moving party can "show that there is no genuine issue as to any material fact and that the moving party is entitle to judgment as a matter of law." Rule 56(c), SCRCP; *See Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). In ruling on a motion for summary judgment, the court may consider only the evidence in the record. *See* Rule 56, SCRCP (the court may properly grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law"). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003); *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment

should be granted." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653-654, 661 S.E.2d 791, 796 (2008). "In determining whether any triable issues of fact exist, the evidence and all inferences must be viewed in the light most favorable to the non-moving party." *Coastal States Bank v. Hanover Homes of S.C., LLC*, 408 S.C. 510, 516, 759 S.E.2d 152, 156 (Ct. Ap. 2014).

Law/Analysis

I. Defendants are Judicially Estopped from Denying HOA Membership and Obligations, and therefore, Stonington's restrictive covenants apply to Defendants personally.

Defendants contest the application of the restrictive covenants in a deficient manner. Defendants allege that Plaintiff's failure to amend its Declarations to specifically include subsequent phases of the development is a complete bar to the application of the restrictive covenants to subject lots owned by the Defendants.

This Court finds Defendants are undoubtedly subject to Stonington's restrictive covenants pursuant to the doctrine of judicial estoppel. The Supreme Court has expressly adopted the doctrine of judicial estoppel as it relates to matters of fact. *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997). The doctrine precludes a party from adopting conflicting positions in the same or related litigation. *Id.* "When a party has formally asserted a certain version of facts in litigation, he cannot later change those facts when the initial version no longer suits him." *Id.* at 252, 489 S.E.2d at 477. The following elements are necessary for the doctrine to apply: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining the position and have received some benefit; (4) the inconsistency must be part of an intentional

effort to mislead the court; and (5) the two positions must be totally inconsistent. *See Carrig v. Cannon*, 347 S.C. 75, 83, 552 S.E.2d 767, 772 (Ct. App. 2001).

In *Hayne Federal Credit Union*; the Court determined that because the father previously claimed his son owed the property, he was judicially estopped form subsequently claiming he owned the property. Applying the same analysis to the present facts, it is undisputed that the Defendants previously participated in the HOA by making past assessment payments, paying HOA fees, signing HOA acknowledgement forms, and even conduct pursuant to the restrictive covenants. All the more, six of the defendants in this action directly asserted they were members of the HOA in a previous court action (2009-CP-40-7819). Stonington Development, LLC, and others were sued in 2009 by a group of homeowners (including some of the named defendants) for various causes of action. On January 15, 2010, the Honorable G. Thomas Cooper, Jr. issued a Consent Order Withdrawing Injunction, Dismissing Parties and Confirming Partial Settlement ultimately in favor of the Defendants in this action.

In 2015, seven of the named Defendants in this action filed a lawsuit against the HOA, the Stonington Developers, both in their corporate capacity and as individuals, and the HOA's property management company asserting that they were members of the HOA.[1] The same homeowners prevailed in that suit and received control over and management of the HOA, seats as interim directors of the HOA, court ordered member meeting/election, attorney fees and costs as part of a Consent Order Confirming Settlement Agreement.

Despite Defendants' assertion that only five Defendants should be estopped because only they were personally party to the 2015 action, the fact conclusively remains that all Defendants collectively, who are all so identified in interest that they represent the same legal right and all

[1] Defendants Carl Taylor, Carolyn Austin, Derrick Taylor, Gaye Taylor, Judy Dove, Syrecea Parker and Vickie Wise were Plaintiffs in Richland County Docket Number 2015-CP-40-6957.

bought properties under the same documents they now wish to deny, are in privity as sufficient under the case law for judicial estoppel. *Carrigg v. Cannon*, 347 S.C. 75, 83, 552 S.E.2d 767, 772 (Ct. App. 2001) (Judicial estoppel may preclude a party from adopting a position in conflict with one earlier taken in the same or related litigation where "the same party or parties in privity with each other" has taken an inconsistent position in a prior proceeding.")

Defendants either were parties to the prior legal proceedings or are in privity with the thirteen Defendants who were parties to the prior legal proceedings, in which they took totally inconsistent positions than their position in this legal proceeding to their benefit, and shall not be permitted to argue the opposite to avoid the obligations of said membership and subjection. *Id.* Accordingly, having further addressed the arguments raised by Defendants', this Court's finding remains that Defendants are members of the HOA and subject to the Stonington Declarations under the doctrine of judicial estoppel.

II. Defendants and Defendants' properties are subject to the covenants set forth in the Stonington Declarations by way of reciprocal negative easements.

Defendants also contend that Article 1, Section 1(R) of the Amended Declarations regarding implied reciprocal covenants prevents the Plaintiff from applying the Amended Declarations to any subsequent phases of the development. Article 1, Section 1(R) of the Amended Declarations states:

> "In addition to, no implied reciprocal covenants or obligation to develop shall arise with respect to lands that have been retained by the Developer for future development. The Developer shall not be bound by any master plan, use or restriction or use shown on any master plan, and may in its sole discretion at any time change or revise said master plan, develop or not develop the remaining undeveloped property or common area or amenities shown on any master plan."

This Court finds that this provision does not bar the Court from applying a theory of implied reciprocal covenants. Moreover, this Court finds that all of Defendants' properties subject to this

action are indeed subject to the restrictive covenants in the Stonington Declaration and Amended Declaration by way of reciprocal negative easements.

Restrictive covenants are frequently imposed on land by implication. *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 362, 628 S.E.2d 902, 913 (Ct. App. 2006). When they arise by implication, a reciprocal negative easement has been created. *Bomar v. Echols*, 270 S.C. 676, 679, 244 S.E.2d 308 (1978). Four elements must be satisfied to establish reciprocal negative easements:

1. There must be a common grantor;
2. There must be a designation of the land or tract subject to restrictions;
3. There must be a general plan or scheme of restriction in existence for the designated land or tract; and
4. The restrictive covenants must run with the land.

Bomar at 679-680.

As to the first element, being a common grantor, it is well-established and undisputed that Stonington Development, LLC acquired title to the real property that is subject to this action and then developed into Stonington as shown on Exhibit A to Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment.

The second element, designation of land or tract subject to restrictions, is also indisputably satisfied. As noted in Plaintiff's Memorandum, Developer expressly designated the land subject to the Declarations in both the Original Declaration and Amended Declaration, and Defendants cannot deny in good faith their Lots were designated as part of Stonington. Defendants' Lots are even assigned consecutive identifying numbers on plats designated as "Bonded Plat of Stonington – Phase II-A & II-B" and "Resubdivision of Lots 7-10, Lots 12-16, and Lots 21-28 in Stonington – Phase II-A & II-B."

As to the third element, the presence of a general plan or scheme of restriction is indisputably demonstrated by the development documents, Stonington Declarations, consistent lot sizes and shapes throughout the subdivision, consistent aesthetics throughout the subdivision, and prominent "Stonington" branding throughout the subdivision to include prominent "Stonington" signs at the entrance, and four large stone "Stonington" signs. Furthermore, consecutive numbering, such as that of Defendants' Lots on the aforementioned plats, is further indication of a single plan of development, as noted by the court in *Kinard v. Richardson*, 407 S.C. 247, 260, 754 S.E.2d 888 (Ct. App. 2014). Moreover, both the uncontradicted affidavits of Developer Stephen Lipscomb and Developer David Hilburn, which were exhibits to Plaintiff's motion memorandums, confirm the common plan and scheme of development and its applicability to the subject properties. Defendants offered no evidence, affidavits or otherwise, to rebut this fact.

As to the final element, the Stonington Declarations indisputably run with the land. A covenant may run with the land where there is "an indication that the parties intended for the covenant to run with the land." *Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 270, 628 S.E.2d 284, 292 (Ct. App. 2006). As noted in Plaintiff's Memorandum for Partial Summary Judgment, the Stonington Declarations expressly announce Developer's intent that the covenants, restrictions, easements, charges and liens therein shall run with the land and be binding on all owners.

Therefore, Plaintiff has conclusively established that all elements are met for the applicability of the Original Declaration and Amended Declarations' covenants to apply to the Phase II properties within Stonington, including Defendants' Lots, by way of reciprocal negative easements. It is admitted and undisputed that Defendants own the Lots subject to this action. Therefore, the restrictive covenants apply to the Defendants as record owners. Defendants have

done and offered nothing to refute or call into dispute the provided bases for the necessary elements. Accordingly, this Court finds that the Original Declaration and Amended Declarations' covenants apply to the Defendants and Defendants' Lots and there is no genuine issue of material fact as to this issue. Therefore, Plaintiff is entitled to judgment as a matter of law that Defendants and Defendants' Lots are subject to the restrictive covenants of Stonington's Original Declaration and Amended Declaration.

III. Defendants' Affirmative Defenses

Defendants allege in their Motion to Alter or Amend that they have raised viable affirmative defenses and ask the Court to rule on whether they raise questions of material fact to be resolved by the trial of this action. This Court observes Plaintiff's Motion for Partial Summary Judgment was merely on its claim for Declaratory Judgment that the covenants of the Stonington Declarations are applicable to Defendants and Defendants' Lots. As this Court declined to rule on Defendants' affirmative defenses, this Court finds no grounds to alter or amend this portion of the Court's decision filed on April 1, 2021.

IV. Defendants' Counterclaim for Abuse of Process

The Defendant's counterclaim alleges Abuse of Process, based upon the Plaintiffs filing of a lis pendens on the subject lots. A cause of action for abuse of process must contain two essential elements: (1) an ulterior purpose, and (2) a willful act in the use of the process that is not proper in the regular conduct of the proceeding. *Argoe v. Three Rivers Behavioral Health Ctr. & Psychiatric Solutions*, 388 S.C. 394,697 S.E.2d 551 (2010); *Hainer v. Am. Med. Int'/, Inc.*, 328 S.C. 128, 492 S.E.2d 103 (1997); *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988). There is nothing in the record to suggest that Plaintiff has acted with any ulterior purpose. Rather, the filing of the lis pendens is appropriate in light of Plaintiff's complaint seeking declaratory judgment as to the enforceability of the Stonington Covenants. Plaintiff filed

a lis pendens upon all the lots in dispute. Plaintiff has used the lis pendens filing for which it was designed. The lis pendens provides potential subsequent purchasers with notice that the property is subject to the direction by and assessment of an HOA assessment. This is not an abuse of the legal process, but rather the appropriate legal remedy for seeking redress.

Therefore, this Court finds that the Defendants have failed to state a claim upon which relief can be granted because the notice of lis pendens is not abusive when used to put prospective purchasers on notice of pending litigation.

CONCLUSION

Therefore, having further addressed the arguments of the parties and elaborated on this Court's original Grant of Partial Summary Judgment and Summary Judgment against Defendants' counterclaim filed April 1, 2021, Plaintiff's motion for Partial Summary Judgment and motion for Summary Judgment against Defendants' counterclaim is **GRANTED.**

THEREFORE, IT IS HEREBY ORDERED THAT Plaintiff is entitled to Partial Summary Judgment on its claim for declaratory judgment that the restrictive covenants of the Stonington Declaration and Amended Declaration apply to Defendants and all Phase II properties in Stonington, which include Defendants' Lots.

IT IS FURTHER ORDERED THAT Plaintiff's motion for Summary Judgment against Defendants' counterclaim is granted and Defendants' abuse of process counterclaim is dismissed.

IT IS SO ORDERED.

{Signature page to follow}

Richland Common Pleas

Case Caption: Stonington Community Association Inc vs Carl D Taylor , defendant, et al

Case Number: 2018CP4006557

Type: Order/Amend

So Ordered

s/DeAndrea Gist Benjamin, #2161