

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III,
Master-in-Equity

Appellate Case No. 2020-001275

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Jun 30 2021

SC Court of Appeals

Westbury Park Residential Association, Inc.....Respondent,

v.

Estate at Westbury Owners Association, Inc.....Appellant.

RECORD ON APPEAL
Vol. 4 of 4

Ian S. Ford
Ainsley F. Tillman
FORD WALLACE THOMSON LLC
715 King Street | Charleston, SC 29403
(843) 277-2011

Evan K. Bromley
BROMLEY LAW FIRM LLC
211 Goethe Road, Suite B
Bluffton, South Carolina 29910
(843) 868-2801

*Attorneys for Appellant Estate at Westbury
Owners Association, Inc*

Benjamin T. Shelton
SHELTON LAW FIRM, LLC
P.O. Box 21069
Hilton Head Island, SC 29925-1069
(843) 802-0087

Kathleen Chewning Barnes
BARNES LAW FIRM, LLC
P.O. Box 897
Hampton, SC 29924
(803) 943-4529

*Attorneys for Respondent Westbury Park
Residential Association, Inc*

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18 assessments. And this is a question for Your Honor
19 because there's -- they are different -- they deal
20 with different parts of the declaration in terms of
21 the declaration. And so I don't know whether it's
22 easier for Your Honor to have the Plaintiff address
23 arguments, just me, as to the --

24 JUDGE DUKES: Let me -- let me ask
25 the Plaintiff. Do you want to address the issues

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1 one at a time, the easement first and then we'll get
2 into it?

3 MR. SHELTON: I think that they kind
4 of created this kind of dovetail, this cascading
5 waterfall of -- the way that the Plaintiffs and
6 Plaintiff's design is somewhat in the alternative,
7 in the alternative, in the alternative, in the
8 alternative to a certain extent, I believe that the
9 issues that -- with the assessment dovetail with the
10 issues with the easement whether it may be
11 terminated by breach or otherwise. So I'd rather
12 them compete their argument and then --

13 JUDGE DUKES: Okay.

14 MR. SHELTON: Tell me if that's okay.
15 JUDGE DUKES: Yeah. Why don't we --
16 we'll do it that way.
17 MS. TILLMAN: Yes.
18 JUDGE DUKES: Do you need a break
19 before you go on to the next one or are you good?
20 MS. TILLMAN: Oh, no. I will keep
21 going.
22 MR. FORD: She loves this stuff.
23 JUDGE DUKES: All right. Go ahead.
24 MS. TILLMAN: Well, I will say that
25 Ian is often mocking me about how much I love

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1 property law as if it is wizardry or witchcraft or
2 some strange thing. But property law is really
3 contract law with teeth that are embedded in the
4 land. But it has -- it's not gotten serious. And
5 the basis for interpretation is the same. Its just
6 rather than going to the individual signatories of
7 the contract, it goes with the land which is kind of
8 fun.

9 MR. FORD: Is that fun?

10 MS. TILLMAN: It is fun. So, at any
11 rate, Your Honor, so that -- the other argument that
12 the Plaintiff has -- so we're seeking a ruling in
13 our favor, in Defendant's favor, is as to the
14 question of whether the apartment declaration was
15 ever renewed. And this gets a little more
16 complicated. It involves even more pieces of paper.
17 But in the end, the answer is found within the four
18 corners of the governing documents, the documents
19 that govern the parties. And so it is right for
20 determination by this court. It is a question of
21 law.

22 And the -- so, with that, Exhibit 2 which
23 was the declaration of covenants, conditions,
24 restrictions and easements for the apartment parcel,
25 the Palmetto Lake Apartment. And this is a document

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1 that was drafted by the declarant, the developer of
2 the property, and governs the relationship between
3 the developer and the owner of the apartment parcel,
4 who's the Defendant's predecessor in title. And it

5 had been a lengthy document. And toward the end of
6 it, it has two provisions that are important in this
7 lawsuit.

8 And one of them is Section 8.02 -- 8.01.
9 And this is the assessment. And what Section 8.01
10 says is it puts an obligation on the owner of the
11 property. It says the owner, by accepting a deed to
12 the property, is deemed to covenant and agree to pay
13 an assessment to the declarant or its assigns, on an
14 annual basis, the sum of \$17,500 as its, that's the
15 owners, share of the cost of maintenance of the
16 required streets and landscaping along the required
17 streets and around and within the parks within
18 Westbury Park residential and commercial area.

19 And it talks about how the assessment is
20 payable and all those sorts of thing. And then it
21 reiterates at the end the passage that I just read
22 that despite the assessment payment, the reasonable
23 care and replacement of the required street remains
24 the responsibility of the Westbury Park residential
25 area, which is the point.

1 So this is a covenant and an obligation on
2 behalf of the owner to pay an assessment which it
3 dutifully did for years and years and years. And in
4 fact, in 2005, this is -- well, there's another
5 piece of paper. In 2005, a new owner acquired the
6 apartment parcel. And the new owner was Montecito
7 Westbury.

8 And Montecito Westbury wanted to transform
9 the apartment parcel into a condominium regime. And
10 so it new that this declaration existed because it
11 ran with its title. So it, we can only presume,
12 called up the developer, Plantation Properties, and
13 it said, hey, I see that I can't have a condominium
14 regime under the terms of your declaration. But I'd
15 like to talk about that possibility. And the two
16 entities came to a deal. And that's the 2005
17 amendment to the apartment declaration which is
18 Exhibit 3 to our memorandum in support of our motion
19 for summary judgment.

20 And Exhibit 3 is an agreement you'll see
21 if you flip to the end. There's an agreement
22 between the declarant or the developer under the
23 apartment parcel and the owner, Montecito Westbury,
24 to increase the amount of the assessment payment.

25 And the amendment, specifically, in Paragraph 4,

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1 replaces the first two sections of Section 8.01, the
2 assessment obligation.

3 And it says those two sentences, which
4 have to do with the amount of the assessment, shall
5 be deleted. And the following sentences shall be
6 inserted. The owner, its successors or assigns by
7 accepting a deed to the property is deemed to
8 covenant, agree to pay an assessment to the
9 declarant, that's Plantation Properties, or its
10 assigns on a monthly basis in the amount of \$7,200.
11 That's the base. Then it talks -- well, and -- for
12 its share of the cost of maintenance of the required
13 streets and landscaping along the required streets
14 within the residential area.

15 And then it talks about the terms of the
16 (inaudible) and how it will the increase by ten
17 percent per annum. And it -- at the end of the day,
18 that is -- that is the amendment. That's the
19 amended agreement on the assessment pages.

20 And then if you flip to Paragraph 8 --

21 well, if you flip to Paragraph 8, the amendment --
22 forgive me. If you flip to right under Paragraph 8,
23 I don't know whether it actually is Paragraph, it
24 says in all other respects, the declaration is
25 hereby ratified and confirmed. So the amendment to

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1 the apartment declaration increased the amount of
2 the assessment obligation. And it permitted the new
3 owner to convert the property into a condominium
4 regime, bringing all other -- in all other aspects,
5 it remained the same.

6 Every other part of this original
7 declaration was unchanged. And that is important
8 because if you look to the way that the -- this
9 original declaration as it was originally written
10 can be modified or extended or terminated.

11 It is -- there are two paragraphs that go
12 to that. And it is the Article 9 of the declaration
13 which is found -- it's Exhibit 2 to our memo. And
14 it is Page 9. And the first part, 9.01, is -- says
15 in clear and unambiguous terms that the declaration

16 and every provision hereof and every covenant -- and
17 remember the assessment payment is a covenant to
18 pay. Every covenant, condition and restriction
19 contained hereon -- herein shall continue in full
20 force and effect for a period of 20 years.

21 Now, that -- again, the assessment payment
22 was a covenant. In this sense, it would continue
23 for a period of 20 years. And then it says provided
24 the rights and easements which are stated herein to
25 have a longer duration shall have a longer duration.

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1 And if you remember, we read the grant and language
2 of the easements in Section 7.01, which specifically
3 nominates them as perpetually. That's what this
4 sentence -- this clause is referring to is the
5 easements that are perpetual, they are perpetual.
6 They have a longer duration.

7 Then we come the sentence that the
8 Plaintiff makes much of. And that is, it says in
9 Section 9.01 that this declaration may be renewed
10 for an unlimited number of successive 10-year
11 periods by the declarant, its successors or assigns,

12 filing a notice of extension with the office of the
13 register of mean conveys -- I'll say it because I'm
14 not a classics mayor -- major -- for Beaufort
15 County, South Carolina prior to the expiration of
16 any term.

17 And the Plaintiff contends that that
18 clause gave it the right to extend the declaration.
19 But in that argument, the Plaintiff would like this
20 court to entirely disregard the rest of the language
21 in Article 9 of the declaration. And this court
22 needs to continue reading to Section 9.02 which
23 talks about, specifically, how this declaration can
24 be extended.

25 And it says very clearly -- Section 9.02,

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1 termination and modification. This declaration or
2 any provision hereof or any covenant, condition or
3 restriction contained herein may only be terminated,
4 extended, modified or amended as to the whole of the
5 property by the declarant and the owner jointly.
6 And within that Section 9.02, which I will not read

7 in its entirety, it uses the word extension three
8 times. And it requires that any extension be done
9 jointly by the owner and the declarant.

10 And that's, in fact, as to the
11 modification of the declaration, that's what was
12 done. Exhibit 3, the amendment to the declaration
13 was created and signed by the declarant and the
14 owner, jointly. That's how they -- that's how they
15 increased the assessment payment that is also the
16 subject of this litigation. And they did that
17 because it was -- that was the contractual framework
18 for extending this declaration. And there is no
19 instance where the declarant unilaterally extended
20 the declaration except for the Plaintiff's claim
21 that it unilaterally extended the declaration in
22 2018 on the eve of its expiration. And for three
23 separate reasons, that unilateral extension was
24 invalid.

25 And the first is the language that I just

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1 read to you. The plain language of the contract,
2 which determines the rights and obligation of the

3 parties, is clear that the declaration can only be
4 extended jointly and properly. If in 2018 this
5 declaration were to be extended, it would have to be
6 done by the declarant, who is, arguably, Plantation
7 Properties, and the owner -- and this is the
8 important part -- the owner jointly. And the owner
9 at this moment are 320 individual unit holders
10 within the (inaudible).

11 And so the plain language of the contract
12 requires joint agreement in order the terms, like
13 assessment payment, to be extended. And that
14 dovetails, we can only assume, that the drafter of
15 this declaration put that language in there because
16 it's the law in South Carolina. It is property law
17 and contract law. Both require agreement of a party
18 that rights are going to be affected before those
19 rights can be changed.

20 And so property law first -- we know that
21 the declaration is a covenant that runs with the
22 land. And when it was recorded, it attached and the
23 -- and the property was subjected to it. Every
24 owner who took title (inaudible) property interest
25 in these terms of this declaration.

1 And so whoever owns Unit 302, the
2 Defendant -- the Defendant property regime has a
3 property interest in the easements but also had --
4 up until 2018 when the 20-year term expired, had a
5 property obligation as to the assessment payment.
6 And those are vested interests. And the law in
7 South Carolina is in -- as to servitudes in
8 particular, which this is servitude, that they can't
9 be modified by one property owner without the
10 consent of the other party to the servitude.

11 And there I've cited that law or
12 (inaudible) in my memorandum, it is the Corbin case
13 which -- and also if Your Honor wants to look at it,
14 there's another case called Ralph v. McLaughlin
15 which goes into great detail. It's a recent
16 decision by the Court of Appeals which goes into the
17 great -- into great detail about how servitudes can
18 be altered unilaterally by one party. And so we
19 know that this language in the declaration was
20 drafted to comply with that property law. It
21 requires the consent of an owner before its
22 servitude is altered.

23 And that's also true because this
24 declaration is in the nature of a contract as well.
25 And contract law, also, in South Carolina is there

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1 that the -- that the material terms of a contract
2 and a \$90,000 a year assessment payment sure would
3 be a material term. They can't be modified without
4 the given consent of one of the signatories to this.
5 They can't be unilaterally modified by one party of
6 the contract. It required the consent of both
7 parties.

8 And so, what we have here with this
9 declaration is -- was a contract. It's a covenant
10 in the nature of a contract that determines the
11 rights and obligations of all the owners. And one
12 of their rights and obligations was to pay an
13 assessment. And if you read a contract, in the fine
14 print of the contract, there's (inaudible) owner who
15 purchased property did, it was very clear that that
16 obligation, that covenant lasted for a term of 20
17 years. That's an express provision of the
18 declaration. And that was the understanding of

19 every unitholder and every owner, independence
20 horizontal property regime.

21 But that's what they were signing up for.
22 That's what they were buying into was a 20-year
23 obligation of payment assessment beginning in 1998
24 when the declaration was recorded and running until
25 20 years thereafter which was in November 2018. And

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1 those owners also understood that if that assessment
2 period were going to be changed in any way, as it
3 was in 2005, that it would require their consent.
4 And so, they never gave that consent, Your Honor.
5 And the Plaintiffs attempted unilateral extension.

6 We're asking for a ruling from this court
7 was in that -- it was void under the law. It was
8 void under the contract. And that is the --
9 determining back at which cause of action that is by
10 the Plaintiff. That's part of the Plaintiff's third
11 cause of action for alleged termination by breach.
12 They're claiming that the Defendants breached the
13 declaration by failing to continue to pay

14 assessments after that 20-year term expired. And
15 therefore, they should be able to terminate the
16 easement access.

17 And that's incorrect as a matter of law
18 because you can't just terminate a perpetual
19 easement. But also, it's incorrect under the terms
20 of the contract itself, which assigns the penalty
21 for failure to pay an assessment. And that is it --
22 a lien on the property, not the termination of
23 perpetual easements.

24 Sorry. And that is also the Plaintiff's
25 second cause of action. And we're also seeking --

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1 the Defendant is seeking judgment in its favor as to
2 the Plaintiff's second cause of action which is that
3 the apartment declaration -- the apartment
4 declaration was renewed. And our argument as I just
5 said is that it could not have been renewed. Any
6 purported unilateral renewal was invalid under the
7 terms of the contract, contract law and property
8 law.

9 All right. I'm still going, Your Honor,

10 unless you want a break because --

11 JUDGE DUKES: No. I'm good.

12 Deborah, you need a break? Okay. We're all good.

13 MS. TILLMAN: All right. This is
14 scintillating, and you all are wide awake, I know.

15 So, the Defendant is also seeking judgment
16 as to the Plaintiff's cause of action for unjust
17 enrichment. Just reading the Plaintiff's cause of
18 action, it is very apparent that the Plaintiff's
19 real complaint lies with the developer rather than
20 with the Defendant. In fact, the Plaintiff
21 complains that the scheme of creating a single
22 access to the Defendant Estates through Westbury
23 Park was created by a developer for the benefit of
24 the developer and to the detriment of the
25 communities and residents that will otherwise suffer

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1 the burden of the scheme after the developer derived
2 inequitable benefits from the scheme.

3 That's not a cause of action against the
4 Defendant. That's a potential cause of action

5 against the developer. But again, the developer is
6 not a party to this lawsuit. And the Plaintiff
7 contends that it's not fair that the Plaintiff has
8 to maintain these required streets.

9 But the Defendant's understanding is that
10 it was paying for 20 years, \$1.3 million for the
11 maintenance of those required streets. It paid not
12 to the Plaintiff but to the developer who -- and
13 this goes into our -- one of our counterclaims for
14 accounting. But the developer, as the Defendant
15 paid that money over the course of years, had a
16 fiduciary duty to be using that money for the
17 maintenance of the required streets. That's what it
18 says in the declaration.

19 That was our understanding as we made
20 those payment, that they were -- and if you look at
21 Section 8.02, Exhibit 2, which is the apartment
22 declaration, those payments were for the Defendant's
23 share of the maintenance of the required streets.
24 And the developer had a fiduciary duty to use it for
25 that. And maintenance of streets is actually all

1 that expensive.

2 And the developer -- who knows what the
3 developer should have, could have, would have been
4 doing. But it should have been saving that money to
5 use for maintenance as it became necessary over the
6 course of the 20-year life of the asphalt or
7 whatever it was. But what happened, in fact, to
8 that money, we don't know. I think we heard
9 testimony earlier that at some point the developer
10 starting paying some of that money to the Plaintiff.

11 And then we also have the Plaintiffs --
12 has produced -- and we have attached it as Exhibit 5
13 to our memorandum in support of our motion for
14 summary judgment. This is actually an agreement
15 between the developer, Plantation Lakes -- I'm sorry
16 -- Plantation Properties, LLC and the Plaintiff.
17 And also the commercial property owners' association
18 which is not a party to this action. It's an
19 agreement for what they're going to do with that
20 assessment money, which was hitherto-fore going
21 straight to the developer.

22 And we don't know the background to how
23 this agreement came about. But what we know from
24 this agreement is that the developer agreed to --
25 that the Plaintiff could then -- starting in 2015

1 when this agreement was made, could start receiving
2 the assessment payments, which at that point were
3 \$90,000 a year. And so -- and it wasn't just the
4 Plaintiff. It was also the commercial association.
5 The Plaintiff was to receive 80 percent of those
6 assessment payments. And the commercial association
7 was to receive 20 percent of those assessment
8 payments.

9 And this payment division and agreement
10 specifically references the apartment declaration
11 and the assessment payment. And actually, it
12 specifically -- let me correct that. It
13 specifically references the amendment to the
14 apartment declaration which was the 2005 agreement,
15 jointly between Montecito Westbury and Plantation
16 Properties, which increased the assessment amount,
17 giving all of the respects, didn't change the
18 apartment declaration.

19 But this agreement, we know, allowed the
20 Plaintiff to start receiving \$90,000 a year from the

21 Defendant. And whatever the back story is, the
22 Plaintiff inherited that right from the developer
23 and proceeded to collect that money until the term
24 expired in 2018.

25 And so, again, this is -- this evidence is

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1 that if the Plaintiff has any complaint, it would be
2 with the developer. The developer -- the developer
3 also devised this plan with the Plaintiff -- with
4 the Plaintiff for the payment of those assessments
5 which the Plaintiff now contends were unjustly
6 enriching the developer.

7 And the Defendant is an innocent party.
8 And all of -- and all the Defendant was doing as far
9 as it was concerned was paying its money as it was
10 obligated to do for 20 years under the declaration
11 as it ran with his property. And it did that. And
12 the term expired. It paid a total of \$1.3 million
13 which should, arguably, have been put into a reserve
14 fund for the -- as it says, for the Defendant's
15 share of the maintenance of the required streets and
16 the landscaping.

17 And so that is also our sixth cause of
18 action or -- against the (inaudible) Defendant's
19 counterclaim for an accounting. But it's also the
20 Plaintiff's sixth cause of action for unjustly --
21 unjust enrichment. The two dovetail with one
22 another.

23 First we're asking for a ruling from this
24 court that the Plaintiff's cause of action for
25 unjust enrichment must fail because the -- as a

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1 matter of equity. The Plaintiffs -- again, as I
2 said earlier, equitable remedies are only available
3 when there is no contractual remedy. In this
4 instance, the contractual terms are clear that the
5 assessment was paid.

6 Therein lies the Plaintiff's rights that
7 they're clear under the terms of the contract, which
8 is Exhibit 5, as well as Exhibit 3 and Exhibit 1.
9 There's three contracts. The amended apartment
10 declaration, the original apartment declaration and
11 the Estate payment division agreement make it clear

12 that the Plaintiff does have contractual remedies
13 and has no need to seek equity from this court -- an
14 equitable remedy.

15 And then also because the Plaintiff's true
16 complaint as to unjust enrichment, as it's drafted
17 in its complaint, lies with the developer and not
18 with the Defendant.

19 And let me make sure that I'm getting
20 through all of this paper adequately. Bear with me,
21 Your Honor.

22 JUDGE DUKES: No. We're good.

23 MS. TILLMAN: (Inaudible). So, our
24 final cause of action in which we're seeking a
25 judgment from this court in our favor is as to our

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1 counterclaim for an accounting. And I talked a
2 moment ago about terms in Exhibit 1 in the
3 assessment provision that required that the
4 assessment be used, originally, by the developer for
5 the Defendants or the Defendants' predecessor in
6 title. But now the Defendants share of the
7 maintenance of the required streets and landscaping.

8 And I talked about earlier that was a
9 fiduciary duty on the part of the developer to use
10 that money for that purpose. It's a promise within
11 the declaration that that's how it would be used.

12 And then we know in 2015, from Exhibit 5,
13 which is, again, the Estate payment division
14 improvement, that the developer assigned the right
15 to collect that assessment to the Plaintiff. And by
16 assigning that right to collect the money, it also
17 assigned the obligation to use that money for the
18 Defendant's share of the required street. That's
19 what that money was for. That was the purpose of
20 the assessment. It was not to mow people's lawns.
21 It -- within the -- within the Plaintiff's
22 development. It was to be shored up and saved for
23 the purpose of maintaining those streets.

24 And so our -- the Defendants have brought
25 a counterclaim for an accounting against the

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1 Plaintiff, asking -- because they have a right to
2 know since the Plaintiff owes it from a fiduciary

3 duty to use the money for that purpose. Asking to
4 see how that money has indeed been used. And we're
5 asking Your Honor for a ruling in our favor as to
6 that cause of action.

7 And that concludes my soliloquy at this
8 time. And if Your Honor has any questions, I would
9 be glad to answer them. It's a lot of material.

10 JUDGE DUKES: You know what? I think
11 I'll hold any questions and hear from counsel first.
12 But thank you so much.

13 MR. SHELTON: Thank you, Your Honor.
14 Mr. and Ms. Tillman, may it please the court.

15 I believe that in reality, the Defendant's
16 counsel and I agree on much of the theories
17 involved, but we absolutely defer on the result.
18 The law's the law. The contracts are the contracts.
19 I want to start off kind of in retrograde, if you
20 will, from the Defendant's arguments. And start
21 with the question as to the renewal of the
22 declaration by my client which is the successor in
23 interest and the assignee of declarant rights as to
24 the assessment payments.

25 This, Your Honor, is Section 9.01 that was

1 referenced. And if Your Honor has -- I have a copy
2 of mine. I don't know I'm allowed to hand it up,
3 but I do have a copy of the memorandum if you don't
4 already have it in front of you.

5 JUDGE DUKES: I've got it. I was on
6 Exhibit 2, right now, 9.01. Is that the case?

7 MR. SHELTON: Yes. Thank you. And
8 if you look the 9.01, Exhibit Number 2. For
9 example, as to the law and the theories of the
10 matter. We absolutely understand and agree that
11 owners gave -- can give consent and understand and
12 take their property subject to the declarations and
13 covenants that are in place. Each of the owners of
14 the Estate took their ownership rights, their
15 interest subject to the apartment declaration, the
16 one you're looking at right there. And each of them
17 took it subject to 9.01.

18 Now, a lot -- we've heard a lot and the
19 Defendant's brief has a lot about how you cannot
20 modify an agreement. You cannot alter an agreement
21 without consents of both parties. We don't dispute
22 that. We agree with that. That's the reason that
23 the amendment required two signatures.

24 However, each of the owners, when they
25 took their property subject to this declaration,

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1 took it subject to 9.01. By filing a renewal,
2 nothing was modified in this agreement. Nothing was
3 changed. Nothing was changed to the amendment.
4 Indeed, the renewal is contemplated when the parties
5 first signed the agreement in 1998 that ran with the
6 land as the Defendants are arguing. And each of
7 them took it subject to those provisions.

8 If you accept the Defendant -- if one is
9 to accept the Defendant's arguments that 9.02 bars
10 the declarant or successors and assigns from filing
11 a renewal unilaterally, then you have to completely
12 ignore much of the language in 9.01 that is
13 different from 9.02.

14 Ms. Tillman referenced part of that. For
15 example, in 9.02, it would -- if you -- if you
16 interpret the two as all as being absolutely meaning
17 to apply through a renewal by the declarant, it
18 would be impossible for a successor or assign to

19 renew the declaration because in 9.02.

20 Your Honor, it states that the declarant
21 -- that the -- this declaration, or any provision
22 hereof, or any covenant, condition or restriction
23 contained herein, may only be terminated, extended,
24 modified or amended as to the whole of said property
25 or any portion thereof by the declarant and owner

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1 jointly. It doesn't say anything about the assigns
2 or successors. It says the declarant and the owner
3 jointly.

4 Further, it states that no determination
5 -- such termination, extension, modification or
6 amendment shall be effective until the proper
7 instrument in writing has been executed and
8 acknowledged and recorded in the office of register
9 of mesne conveyance -- mesne conveyance for Beaufort
10 County, South Carolina.

11 No such termination, extension,
12 modification or amendment shall be in violation of
13 county requirements and/or ordinances. Now, compare
14 that with 9.01. And 9.01 references term. This

15 declaration, every provision hereof and every
16 covenant, condition and restriction contained herein
17 shall continue in full force and effect for a period
18 of 20 years from and after the date of recording of
19 this declaration provided that rights and easements
20 which are stated herein to have a longer duration
21 shall have such longer duration.

22 This declaration may be renewed for an
23 unlimited number of successive 10-year periods by
24 the declarant, its successors or assigns, filing a
25 notice of extension with the office of the register

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1 of mesne conveyance for Beaufort County, South
2 Carolina prior to the expiration of any term.

3 There is no requirement for renewal to be
4 signed on to by a separate party. This is because
5 it was never intended to be that way. The renewal
6 does not change anything in the declaration except
7 its length. That it does not modify any term,
8 whatsoever. It does not alter any term, whatsoever.
9 Just as a lease that states that a tenant by

10 providing notice three months before the end of the
11 lease may renew the lease by filing a notice with
12 the landlord that it be renewed without the
13 landlords consent. That's in contracts all the
14 time.

15 The same rules of construction and the
16 rules of contract would apply to this. It was
17 contemplated and decided upon when the declaration
18 was first drafted. And every single property owner
19 who took their property subject to this declaration
20 assented to it when they took title.

21 So, subsequently, in 2018, my client,
22 Westbury Park, did file a notice of extension by
23 renewing -- and thereby renewing the declaration,
24 specifically by the terms contained within the
25 declaration. However, the Estate has not made any

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1 payment whatsoever since that time.

2 We believe that it's clear by it's terms
3 that the renewal provision does not require a
4 signatory from the Estate, or at the time the
5 apartments. It's clear from this language.

6 Otherwise, the language has no meaning. There's
7 language in this document that has no meaning. Why
8 is successors and assigns there. Why does the 9.02
9 require the document to be acknowledged. And why
10 does it specify it's only by the declarant and the
11 owner, not the owner and the successor and assigns
12 and not the declarant. Why does it state -- say
13 that it must be executed and acknowledged where in
14 9.01 none of that language is contained in that
15 section.

16 So, we believe that it's clear that they
17 must read together. But it's clear that they have
18 two separate meanings. We would state that it is
19 unclear that in -- that breeds ambiguity. And
20 unfortunately for everyone's clarity, it would
21 require further discovery to attend what -- to
22 determine what is the intent of the parties. But we
23 do not believe that's so. We believe that it is
24 right for summary judgment as to our client. But we
25 did not file that since we were waiting to hear on

1 summary judgment from the Defendant as to that
2 issue.

3 Now, this -- as I said, this kind of --
4 all these this/that section and that crux, if you
5 will, then flows into the Plaintiff's other causes
6 of action. For example, termination by a breach.
7 That's a drastic remedy. We understand that.
8 However, the Defendants unilaterally informed the
9 Plaintiff that it was not going to abide by the
10 declaration anymore. Unilaterally told the
11 Plaintiff that we're not going to pay you anymore.
12 They unilaterally breached the contract by not
13 recognizing the extension.

14 The extension was filed per the terms of
15 the declaration. Multiple notices and demands were
16 sent to pay the back amounts over years. Not a dime
17 has been paid. Not even an undisputed amount. Not
18 even the amount that they would be subject to pay
19 under the common law rule that a dominant estate has
20 responsibility to maintain the easement. Nothing.

21 That is a breach that is beyond a normal
22 breach where you seek back payments. That is
23 something that requires a drastic remedy. We
24 believe that because it was extended properly, the
25 termination by breach cause of action should at

1 least go forward past summary judgment stage.

2 Alleged term of the Plaintiff's fourth
3 cause of action is alleged declaratory judgment that
4 any easement conveyed was an easement in gross.
5 This is a residential easement. This is an easement
6 that applies to property, residential properties,
7 particularly when it was converted to an HP owner, a
8 horizon property regime. This easement is for the
9 benefit of each individual owner thereof.

10 Now, that's different under the case law
11 than a commercial easement. Typically, an easement
12 is granted in gross unless it's specifically states
13 otherwise. Even -- it said it's perpetual. And we
14 acknowledge that. However, this property has
15 changed hands multiple times. And we do not believe
16 that it shouldn't exist in perpetuity. And believe
17 that particularly after the breach of the covenant
18 that it may be -- that it can be considered an
19 easement in gross.

20 Now, let's talk about -- I'm going to jump
21 around a little bit. And let's talk about the

22 landlock provision, the arguments here. What is not
23 shown on this map that you have in front of you is
24 that Plantation Parkway was extended. Now, if you
25 drive onto Sheridan -- I believe it's Sheridan Road

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1 or Sheridan Parkway in Bluffton, there's a back
2 entrance that drives -- that comes around and
3 connects with Westbury Parkway, all the way through
4 Plantation Business Park.

5 It was that development by the County in
6 2008, 2009 that spurred the conversation and the
7 possibility of the separate entrance. Also, the
8 documents appear to contemplate a second entrance.
9 If you look at the declaration, and if you look at
10 the term contained within 7.02(a) of the
11 declaration, it actually states within the body of
12 that paragraph that -- referring to the right-of-way
13 that heads towards Highway 278, it states that this
14 right-of-way is relocatable by declarant and/or Buck
15 Island, LLC provided such relocated easement affords
16 the property adequate and proper access to and from

17 U.S. Highways 278.

18 On that, I'm going to move past that. But
19 I believe that it's just an early state. We've
20 taken a few depositions and it -- if we had not --
21 if the language is deemed to be ambiguous, then
22 there's a lot more discovery to be done in this case
23 to determine the issues between the parties.

24 Plaintiff's fourth cause of action,
25 alleged declaratory judgment that -- excuse me.

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1 Plaintiff's fifth cause of action alleged
2 alternative declaratory judgment that no easement
3 exists and requiring Defendant to construct
4 alternative access to the property. This argument
5 rests on the fact that the original declaration --
6 and this isn't an alternative. The original
7 declaration contains no acknowledgment.

8 The acknowledgment -- the acknowledgments
9 acts wasn't in force and effect in 1998. So is the
10 requirement that any document that affects real
11 property must be acknowledged or otherwise approved
12 by the notary per Section -- I don't want to cite a

13 section because I can't remember it precisely. But
14 I believe it's 23-30 et seq. -- 10 et seq. But I
15 could be mistaken. I believe the court is familiar
16 with that act I was speaking of -- speaking on.

17 It was not acknowledged. There's no
18 acknowledgment in the document. It was recorded, of
19 course. Don't know why it was recorded, but it was
20 recorded. So there is a question of the legal
21 effect -- permanent legal effect as to the easement
22 document, as to the declaration itself. That's what
23 that cause of action is mostly premised in.

24 Now, moving on to the Plaintiff's sixth
25 cause of action, alleged unjust enrichment. That

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1 language is in the Plaintiff's sixth cause of
2 action. If that isn't in the court's file, we can
3 always -- we could amend the complaint. However,
4 the cause of action contains other paragraphs
5 alleging that it's unjust for the Defendant to
6 derive a benefit from the easement when they're the
7 dominant estate.

8 The common law requires the dominant
9 estate to pay its portion of the share of the
10 maintenance and costs of the easement while the
11 Plaintiff has to bear all of that cost.
12 Notwithstanding what's in the Plaintiff's -- it
13 doesn't matter what's in the Plaintiff's covenants
14 as to that point. Of course, it matters what's in
15 the Plaintiff's covenants. But it doesn't matter as
16 to the Plaintiff's covenants what's to that point.
17 They have an obligation to maintain their common
18 areas. Of course, they do.

19 But if someone else is using their common
20 area for their benefit as a dominant estate does,
21 then there's a common law, equitable right to obtain
22 a benefit that -- to be paid for that.

23 Further, if the Defendant is right, if the
24 Plaintiff loses its arguments on the renewal of a
25 declaration, which we say we don't. But if that

1 happens, then what are we left with in this
2 declaration? What is left? There's nothing there
3 that has any specific term in the declaration other

4 than the perpetual right-of-way, the perpetual
5 easement. If everything else falls apart except for
6 that for my client, which we state it should not.
7 We adamantly state that should not happen. But if
8 it were to happen, then we're entitled to a cause of
9 action for unjust enrichment for every other benefit
10 that is not specifically prescribed by the easement
11 language.

12 For example, the gates, the security,
13 beautification, the things that the Estate of
14 Westbury has articulated all the way back to 2010.
15 There's a benefit to them. In their minutes that we
16 heard earlier today in testimony these things that
17 are a benefit to them, the beautiful access to their
18 -- to their premises. All these things are a
19 benefit to the Estate that my client unjust bears.
20 That is the crux of the unjust enrichment cause of
21 action which is in the alternative.

22 In Plaintiff's seventh cause of action,
23 alleged termination via changed conditions. We do
24 not believe that it was ever, ever contemplated by
25 the documents that there'd be a situation where the

1 residential association is required to provide all
2 the security, the gate access, the maintenance of
3 the streets, the beautification of the streets, the
4 beautification of the corridor, all of these things,
5 when -- and be stuck leaving that -- hold that bag,
6 so-to-speak, with absolutely no contribution
7 whatsoever or any type of help from the Estate.

8 We do not believe that would bear out ever
9 in common law. Even if it would -- if this case
10 boils down to nothing but an easement by necessity,
11 we do not believe that that would bear out under any
12 circumstance. That is a changed condition as to
13 what we believe that the documents state. And we
14 are in a changed condition circumstance now with
15 this material breach. We simply do not have any
16 payment for the work, for the monies, for the
17 maintenance or to put into the additional reserve
18 fund for this -- for the burden that the easement
19 creates for my client.

20 I think I've covered the -- our causes of
21 action as to the summary judgment motions on each of
22 those items. Moving to the Defendant's
23 counterclaims.

24 Defendant's fourth counterclaim for
25 declaratory judgment for express appurtenant

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1 easement. Now, I -- we again -- we agree on the
2 law. We agree on the theory. We do not agree that
3 it's an express appurtenant easement. We believe
4 that this is a resident -- easement of residential
5 character. We believe that there is absolutely
6 another means of access that was contemplated from
7 the beginning, even within the documents, that now
8 there is Plantation Parkway that exists. There is a
9 possibly -- there is an absolute possibility. Not
10 just possibility. There is an ability to access the
11 Estate from a different direction. We do not
12 believe that that express appurtenant easement
13 exists.

14 JUDGE DUKES: Can't we have an
15 express appurtenant easement subject to the
16 condition though in the covenants that say that when
17 you come up with a better way or another way that
18 goes to 278, then you can substitute that? I mean,
19 can't you just --

20 MR. SHELTON: I don't --
21 JUDGE DUKES: Can't you just --
22 MR. SHELTON: I don't disagree with
23 that. I don't disagree with that. We'd concede
24 that. We concede that. And we absolutely concede
25 that, Your Honor.

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1 We believe that is absolutely possible.
2 But we also believe that this is -- if you look at
3 -- express appurtenant is -- must follow every
4 single requirement of law to be created. And this
5 also goes back to the fact that the acknowledgment
6 not existing on the declaration.

7 But -- and so, I would submit to the court
8 that as to the Defendant's summary judgment motions,
9 of all the motions, the one that may be in any way
10 subject to that, either it's now or later, is that
11 cause of -- that is the fourth counterclaim, as an
12 officer of the court.

13 Defendant's fifth counterclaim,
14 alternative for easement by necessity. We simply

15 believe that that must fail because there is an
16 alternative access. There could have been an
17 alternative access. This actually happened in
18 practicality. There was almost an alternative
19 access. It was offered and it was declined. It
20 could have happened. It could happen today.

21 And then Defendant's eighth counterclaim
22 for an accounting. Your Honor, I have looked in the
23 documents for this promise that is being asserted as
24 to what these -- what this payment was specifically
25 for. We understand that it states for declarants

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1 and assigns on a monthly basis to pay for the --
2 excuse me. The owner, its successor and assigns to
3 pay the declarant for its assigns on a monthly basis
4 in the amount of \$7,200 as its share of the cost for
5 maintenance of the required streets and landscaping.

6 The issue with that, with the accounting
7 and also the issue with any other, which is not
8 specifically -- I address in my brief it's not
9 specifically requested, but I do think that it
10 dovetails in with other causes of actions of the

11 Defendant is that Section 8.02 has a floor to what
12 it could be. The floor is \$86,400 per year.

13 We do not believe that -- and then this
14 also goes to the fact that they never raised this
15 issue for 20 years. In 2018, they raised the issue
16 for the first time, the very first time requesting
17 an accounting. And what is there to call back?
18 What is there to use? They had to pay that amount
19 every single year as it was.

20 We do not believe that the language allows
21 -- creates any type of fiduciary duty. We do not --
22 we have to look at the language of the contract.
23 Understanding the common law, we do not believe the
24 language of this -- of this contract creates any
25 fiduciary duty as to my client or even Plantation

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1 Properties over those amounts. And again, it went
2 on for 20 years and it was never requested.

3 We believe that moving for summary
4 judgment on that issue now is not ripe, first of
5 all. And, secondly, should not be granted at any

6 time. It simply was not what it was contemplated to
7 be for.

8 Also, it's -- I think it's also
9 interesting to look at the language of Section 4 of
10 the amendment which states that that amount is not
11 only for landscaping along the required streets.
12 It's also for around and within parks within
13 Westbury Park Residential Association and the
14 Westbury Park Commercial Area.

15 Your Honor, we just do not believe there's
16 an accounting cause of action to be had based on the
17 language of the contract. And I would circle back
18 to this section -- the sections of the declaration
19 9.01 and 9.02. And offer to the court that those
20 two sections truly are the crux of the dispute
21 between the parties. That is what has lead to this
22 dispute and us being here today, we believe. And we
23 believe, from the Plaintiff's point of view, that
24 it's absolutely clear that 9.01 has a different
25 intent and it's for a different purpose than 9.02.

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1 If, again -- and my brief sets forth this

2 in detail if the court has had an opportunity to
3 review it or not. I'm sorry I sent it to you so
4 late last night. But it sets forth in detail what
5 those differences are. And what would be -- and
6 should the court or should one accept the
7 Defendant's arguments that it may not be renewed
8 unilaterally, there is language in the agreement
9 that has no meaning. We must assume that the
10 language that is contained in the agreement has
11 meaning, that the words have meaning.

12 And I understand the Defendants state that
13 the agreement may not be extended with joint
14 agreement. But that is not what -- not what 9.01
15 does. There's a notice of extension where the
16 agreement is being renewed. The agreement is being
17 renewed for successive 10-year terms.

18 A notice of extension is filed. That's
19 the mechanism for renewing the agreement. But the
20 agreement is not being broadened as far as it's
21 substance or form. The declaration is not being
22 broadened as to the additional acreage or additional
23 units or anything along those lines. It's not being
24 extended as to those terms.

25 The declaration is remaining exactly the

1 same. Nothing is being altered. And I keep saying
2 these -- this over and over, again. But I believe
3 it's very important. And it's the crux of the
4 Plaintiff's case. Nothing is being changed. And
5 9.01 states that you may renew it unilaterally.

6 Again, this declaration may be renewed for
7 an unlimited number of successive 10-year periods by
8 the declarant, its successors or assigns filing a
9 notice of extension with the office of the register
10 of mesne conveyance for Beaufort County, South
11 Carolina prior to the expiration of any term. That
12 was done. And it was renewed. And that is what our
13 declaratory judgment action is asking for, a court's
14 order stating that. We are not at summary judgment.
15 We're not -- we did not file for summary judgment on
16 that issue. But we believe that that -- summary
17 judgment on that issue should certainly be denied
18 from the Defendant's motion, that is.

19 JUDGE DUKES: All right.

20 MR. SHELTON: Thank you, Your Honor.

21 JUDGE DUKES: Thank you so much.

22 We've still got a few more minutes. So, anything
23 else from anybody?

24 MS. TILLMAN: Yes, Your Honor, if I
25 could briefly address just Ben's arguments. And I

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1 agree with Ben that the crux of this case is it's a
2 question of whether this declaration was a validly
3 renewed or extended. And Plaintiff's entire hat in
4 this regard hangs on that one provision in 9.01.

5 But this court -- it is within the
6 jurisdiction of this court to interpret contracts
7 based on their four corners. And the four corners
8 of this contract are very clear that the word
9 extensions, as used, are -- has meaning. That's, in
10 fact, what the Plaintiff did.

11 Exhibit 6 is a notice of extension that
12 the Plaintiff unilaterally filed seeking to extend
13 the term of this declaration. And for -- if that
14 term is used, the term extension, then this court
15 should resort to the language of 9.02 which uses the
16 word extension within that paragraph three times to
17 say that the declaration can only be extended by the

18 declarant and the owner jointly. No such extension
19 shall be effective until a property instrument in
20 writing has been executed and acknowledged and
21 recorded. No such extension shall be in violation
22 of County requirements or ordinances.

23 So, Section 9.02 is the paragraph to look
24 to for this court to discern whether the declaration
25 was properly extended. And again, we argue that it

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1 wasn't because the extension must be done by the
2 declarant and the owner jointly.

3 And also in our memorandum, I didn't touch
4 on this earlier. But -- all right. I'll address
5 the Plaintiff's argument that it somehow has the
6 right under the declaration to extend it in the
7 first place which is -- we contend that it doesn't,
8 that Plaintiff argues that by that Estate agreement,
9 which is Exhibit 5 that it inherited the declarant
10 rights that would entitle it to extend the
11 declaration.

12 And the Exhibit 5 is an unrecorded

13 instrument that -- it's a contractual agreement
14 between the developer, Plantation Properties, and
15 the Plaintiff and then a third party, which isn't a
16 party to this lawsuit, the commercial association.
17 And this contract is very, very specific that what
18 it deals with is the money, the assessment money.

19 And in this contract, unrecorded contract,
20 the developer gave the Plaintiff the right to
21 collect that assessment money. And -- but not just
22 the Plaintiff. Another entity. And you'll see this
23 all throughout the agreement. It refers to the
24 (inaudible). That's the Plaintiff. And the COA.
25 That's the commercial association.

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1 And so, first, we contend that this
2 document doesn't assign declarant rights. It just
3 assigns an ability to collect the money. But,
4 secondly, even if it does assign declarant rights,
5 it assigns them jointly with another entity. The
6 Plaintiff doesn't hold this declarant rights, if
7 they exist, if this contract assigns them, which it
8 doesn't, but it doesn't assign anything to the

9 Plaintiff alone. It assigns them jointly to the
10 Plaintiff and another entity.

11 And then we can only assume that if they
12 pulled them together, then they would have to act
13 together to extend the declaration, if they have
14 that right.

15 And the notice of extension which is
16 Exhibit 6 was, again, unilateral by the Plaintiff,
17 by the residential owners association. The
18 commercial association is not a signatory to the
19 (inaudible). And so, again, for that reason, we
20 contend, in addition to the fact that contracts
21 can't be materially altered. And servitudes can't
22 be materially changed unilaterally. But in addition
23 to that, we contend that the Plaintiff didn't have
24 any right to extend the declaration. And the
25 Plaintiff argues that it's just renewal. And

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1 nothing's changed.

2 What has changed is the difference between
3 paying \$1.3 million in assessments over the course

4 of 20 years and extending that obligation, a
5 significant change. Because if that obligation were
6 extended for 20 years, that would be \$90,000 and
7 counting per year. And I'm not great with math, but
8 that is millions of dollars. That is a significant
9 alteration in the agreement and understanding of the
10 party which would require a consent of the owner.

11 And the owner is specifically defined --
12 Ben touched on this a little bit, the owner is a
13 defined term in the declaration. It includes every
14 single one, it's the titleholder of the property.
15 It includes every single one of the Defendants,
16 every single one of them as a matter of law would
17 need to be a signatory to any extension or any
18 modification of their rights under that original
19 declaration.

20 And the other thing that I will address is
21 Ben's argument that other access was contemplated
22 from the beginning. And Ben points to Section
23 7.02(a) of the declaration in making that argument.
24 And that argument fails for two reasons. The
25 easement grants by the developer -- there wasn't

1 just one easement grant. The developer granted an
2 easement over Kensington Boulevard, which is
3 separate subsection, Subsection (b).

4 And then in Subsection 7.02(a), it then
5 talks about that's the access through the commercial
6 property. And if you look in the -- if you look at
7 the apartment declaration, Exhibit 2 to our
8 memorandum, you'll see where the end of the
9 commercial -- the owner of the commercial property,
10 and this is Buck Island, LLC, joined in the
11 declaration for the sole purpose of confirming the
12 easements granted in Paragraph 7.02(a). And the
13 reason for that is because Buck Island, LLC owned
14 Westbury Park Way. It owned that section of the
15 road at the time that this declaration was drafted.

16 And so, therefore, it had to -- it had to
17 agree to that grant. And -- however, 7.02(a) with
18 its language saying that it could be relocated only
19 goes to that part that goes over the commercial road
20 -- the commercial property. It goes to Westbury
21 Park Way. And Buck Island, LLC as one of the
22 signatories to the declaration could perhaps have
23 come up with some different route. So -- through
24 it's shopping center or whatever. That's what that

25 language in 7.02(a) means.

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1 It does not -- it is separate and distinct
2 from the perpetual easement grant in 7.02(b) over
3 Kensington Boulevard. And there's no limiting or
4 limited language or opportunity to alter that access
5 which was always contemplated as we know from the
6 master plan and from the words on the page.

7 And then also in -- now I'm starting to
8 lose my memory of what Ben said. But Ben talked
9 about how, you know, that there would be nothing
10 left in this declaration if it were not renewed or
11 whatever. And that's incorrect because we know from
12 the scheme of this development that, actually, the
13 only thing that really is meant to be left are the
14 easements because if you look at the amendment that
15 happened in 2005 when the property -- and that's
16 Exhibit 3.

17 And when the property -- the Defendants,
18 predecessor in titled, converted the property to a
19 horizontal property regime. It was understood that

20 the horizontal property regime would take over the
21 declarant duties for the parcel. That provision
22 against clotheslines and the provisions against what
23 color the property could be painted and all those
24 sorts of things that are contained within the
25 apartment declarations were meant to become obsolete

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1 by the master deed to the condominium regime which
2 then set forth in much more detail the nitty gritty
3 of how the property was to be developed.

4 And so it makes sense that this apartment
5 declaration terminated. Because, it wasn't intended
6 to last forever. It was intended to last for the
7 time the developer was involved in this property.
8 This was the developers business. It was the
9 development of this property. The assessment
10 payments were how it perhaps lined its pockets. It
11 was developing the property.

12 So the developer knew that it wouldn't be
13 involved in this property. And that ultimately in
14 the end of the day, it would have conveyed all of
15 its land. And that would have been a successful

16 development. And that's what it did. And that is
17 why, Your Honor, the term was intended to expire
18 after 20 years.

19 And so, just looking at the four corners
20 of the document, and also with the recorded
21 instruments that are in the Plaintiff's and
22 Defendant's chain of title, this court can construe
23 the intent of that declaration to grant perpetual
24 appurtenant easements over the streets that are the
25 subject of this litigation to have a limited term of

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1 20 years that could not be extended without the
2 consent of every owner and declarant together. And
3 to use all the money from the assessment that was
4 collected over those 20 years for the purpose of
5 shoring up a reserve for the maintenance of the
6 required streets on behalf of the Defendant.

7 And it is for those reasons as well as the
8 ones that are set forth in our memorandum that we
9 are asking the court to give us guidance and
10 direction as this lawsuit proceeds. We're asking

11 for summary judgment, I think, on eight different
12 causes of action, but there are many more within
13 this lawsuit. This is a very large lawsuit.

14 And the parties are looking for judgment
15 on this issue that are strictly contractual, that
16 don't require any further discovery or fact finding
17 so that going forward on the causes of action that
18 do, the parties can have direction. And that is the
19 purpose of our motion for summary judgment. And
20 we're asking, Your Honor, to grant it. Thank you.

21 JUDGE DUKES: Thank you so much. One
22 quick question.

23 MR. SHELTON: Certainly.

24 JUDGE DUKES: Something that maybe
25 you all have talked about all day, but somehow I

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1 just caught when it was mentioned a moment ago. How
2 is the Plaintiff the declarant, the successor and
3 interest to the declarant at this point?

4 MR. SHELTON: The Estate payment
5 division agreement and assignment, first of all,
6 they're now -- they run the association. They run

7 Westbury Park Residential Association. But as to
8 the Estate, the Estate payment division agreement,
9 Exhibit A that is attached to Plaintiff's Exhibit
10 Number 5 --

11 JUDGE DUKES: Plaintiff's 5 to the
12 summons and complaint? No.

13 MR. SHELTON: No. No. No. I
14 apologize. The Plaintiff's -- it may be Plaintiff's
15 5 in the summons and complaint. And I have that in
16 front of me. It's Plaintiff's Exhibit 5 to its
17 memorandum which is the -- which is a part of the
18 notice of extension, the renewal agreement.

19 JUDGE DUKES: Okay. I see it.

20 MS. TILLMAN: And (inaudible) is the
21 Defendant's Exhibit 5, I think.

22 MR. SHELTON: I made it Exhibit 5 as
23 well.

24 MS. TILLMAN: Perfect.

25 MR. SHELTON: Sorry. But thank you,

1 though. So either the Plaintiff's or Defendant's

2 Exhibit 5. But it's Exhibit A to -- on the -- on
3 the Plaintiff's filing of Exhibit 5 is -- we have
4 included the notice of extension of the declaration
5 of covenants. In that -- within the notice of
6 extension, it is filed with the register of deeds as
7 Exhibit A. And Exhibit A is the Estate payment
8 division agreement and assignment.

9 And it states, agreement. Whereas, on
10 November 1st, 2005, Plantation -- excuse me.
11 Plantation Park, LLC entered into a amendment to the
12 declaration of covenants, conditions and
13 restrictions and easements for Palmetto Lakes
14 Apartments at Westbury Park with Montecito Westbury,
15 LLC, pursuant to which certain assessment funds,
16 paid to PPLLC on a monthly basis in connection with
17 the Estate of Westbury Park Condominiums which is
18 incorporated herein by reference and referred to as
19 the Estate agreement.

20 It goes on to a now therefore clause. For
21 and in consideration of a lump sum of \$10 paid in
22 hand by the ROA and COA to PPLLC, which is the
23 declarant, their sufficiency whereof is hereby
24 acknowledged. PPLLC does hereby assign, set over,
25 transfer and convey to the ROA and COA and their

1 respective successors and assigns, pay all of
2 PPLLC's rights, title and interest in and to the
3 Estate agreement.

4 And that was signed by Plantation
5 Properties, LLC, not Plantation Park. I apologize.
6 Westbury Park Residential Association and also
7 Westbury Park Commercial Center Association.
8 Further -- so that is the document that grants the
9 assign and makes its succession under the easement
10 agreement possible to Westbury Park Residential
11 Association.

12 JUDGE DUKES: Okay.

13 MR. SHELTON: Did you find it, Your
14 Honor?

15 JUDGE DUKES: I did. So, I mean,
16 it's assigning all the right, title and interest to
17 the Estate agreement.

18 MR. SHELTON: Correct. And the
19 Estate agreement, it references as covenants,
20 conditions, restrictions and easements for Palmetto
21 Lakes Apartments at Westbury Park. And that
22 agreement is the amendment -- is the amendment --

23 amended amendments to declaration of covenants,
24 condition, restrictions and easements for Palmetto
25 Lakes Apartments at Westbury Park.

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1 JUDGE DUKES: Okay. All right.

2 Thank --

3 MR. SHELTON: That incorporates the
4 declaration therein.

5 JUDGE DUKES: Did you have anything
6 else you wanted to add. I'm sorry I interrupted
7 you.

8 MR. SHELTON: Well, no. It's okay
9 because that was actually one of the points I wanted
10 to add. You didn't interrupt me at all, Your Honor.
11 Thank you.

12 I'd like to point out again that, first of
13 all, unjust enrichment is not a contractual cause of
14 action which they're seeking summary judgment on.
15 But also, the only place you find the word renew in
16 the declaration is in 9.01. And again, the word --
17 that word has meaning, significance. And it is

18 different from what is -- what the contemplated
19 actions require under 9.02.

20 JUDGE DUKES: I'll have to read some
21 of this. And let's see what my schedule is. Maybe
22 we can do a conference call so to keep the fire lit
23 under me. Let's see. We can go off the record for
24 a second.

25 (OFF RECORD DISCUSSION)

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1 JUDGE DUKES: While we were off the
2 record, we scheduled a follow-up conference call
3 just to keep the fire under me on figuring this
4 stuff out for Monday the 21st at 2:30 using our free
5 conference call .com number. And so that's what
6 we'll do. We'll talk then and see if either I've
7 got any follow-up questions or I can at least
8 discuss what my thinking is at that point.

9 So anything else for today's record, then?

10 MR. SHELTON: No, Your Honor. Thank
11 you. We appreciate you holding this in person.
12 It's been quite a long day. And it was good to see
13 everyone. And it's nice to be back in court.

14 JUDGE DUKES: It's good to see
15 everybody. Thank you all so much.
16 (Whereupon, the hearing was concluded
17 at 4:50 p.m.)
18 (MARKED PLAINTIFF'S EXHIBIT NO. 1)

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1 Certificate of Reporter

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3 I, Deborah S. Thomas, Certified Verbatim
4 Reporter and Notary Public in and for the State of
5 South Carolina, do hereby certify that I reported
6 the hearing of 2020-CP-07-00158, Westbury Park
7 Residential Association, Inc. v. Estate at Westbury
8 Owners Association, Inc., on the 16th day of
September, 2020; and that the foregoing pages
constitute a true and correct transcription of the
said hearing.

8 I further certify that I am neither
attorney nor counsel for, nor related to or employed

9 by, any of the parties connected with this action,
10 nor am I financially interested in said cause.

11 I further certify that the original of
12 said transcript shall be hereafter delivered to
13 Ainsley Fisher Tillman, Ford Wallace Thomson, LLC,
715 King Street, Charleston, South Carolina 29403.

14 In witness whereof, I set my hand and
15 sealed this 27th day of December, 2020.

16

17 My Commission
18 expires 2/7/28

Deborah S. Thomas, CVRM
and Notary Public for the
State of South Carolina

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