

RECEIVED

Sep 21 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
The Honorable Marvin H. Dukes, III, Circuit Court Judge

CIRCUIT COURT CASE NO.: 2015-CP-07-02722

APPELLATE CASE NO. 2020-001309

Colleton River Plantation Club, Inc.

Respondent-Appellant,

vs.

Joel S. Lee,

Appellant-Respondent.

RESPONDENT-APPELLANT
COLLETON RIVER PLANTATION CLUB, INC.'S FINAL RESPONSE BRIEF

/s/ S. Harrison Williams

Barry L. Johnson, Attorney at Law
S. Harrison Williams, Attorney at Law
William Lamar Johnson, II, Attorney at Law
JOHNSON & DAVIS, PA
The Victoria Building, Suite 200
10 Pinckney Colony Road
Bluffton, SC 29909
(843) 815-7121
Barry@jd-pa.com
Harrison@jd-pa.com
Lamar@jd-pa.com

*Attorneys for Respondent-Appellant,
Colleton River Club Plantation, Inc.*

Bluffton, SC
September 21, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE..... 1

STANDARD OF REVIEW 5

ARGUMENT 6

 I. The Master-in-Equity properly ruled that Lee breached his contractual obligations to Colleton..... 7

 a. Lee’s transfer of the Lot violated the clear and unambiguous terms of the covenants to which Lee was bound..... 7

 II. The Covenants do not violate public policy. 14

 a. The Covenants allow for the free transfer of real property. 14

 b. Lee was treated in the same manner as any other property owner in Colleton..... 15

CONCLUSION..... 16

TABLE OF AUTHORITIES

Cases

Callawassie Island Members Club v. Dennis, 425 S.C.193, 821 S.E.2d 667 (2018)..... 9, 12

Chapman c. Allstate Ins. Co., 263 S.C. 565, 211 S.E.2d 876 (1975). 5

Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, 357 S.C. 363, 593 S.E.2d 170 (Ct. App. 2004) 5

Hammond v. Tilghman Lakes, Inc. case that he cites. 295 S.C. 152, 367 S.E.2d 446 (Ct. App. 1987) 11

Mason v. Mason, 412 S.C. 28, 770 S.E.2d 405 (Ct. App. 2015) 5

Peoples Fed. Sav. And Loan Ass’n of S.C. v. Res. Planning Corp., 358 S.C. 460, 596 S.E.2d 51 (2004)..... 14, 15

S.C. Dep’t of Natural Res. v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299 (2001)... 8, 9

S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E Underwriters Risk Retention Group, 347 S.C. 333, 554 S.E.2d 870 (Ct. App. 2001)..... 5

Stringer v. State Farm Mut. Auto. Ins. Co., 386 S.C. 188, 687 S.E.2d 58 (Ct. App. 2009) 5

Taylor v. Lindsey, 332 S.C. 1, 498 S.E.2d 862 (1998) 8

Webb v. Reames, 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997) 14

Statutes

S.C. Code Ann. 33-31-620(b) (2006) 12

STATEMENT OF THE CASE

This case arises out of alleged unpaid dues and fees owed to the Respondent-Appellant, Colleton River Plantation Club, Inc. (“Colleton”), a not-for-profit property owners association located in Bluffton, South Carolina by the Appellant-Respondent, Joel Lee (“Lee”), a previous owner of record of Lot A02 (“Lot”) within Colleton River Plantation Club described as follows:

ALL that certain piece, parcel or lot of land, lying and being in Beaufort County, South Carolina and being shown and described as Lot A02, Phase I, Colleton River Plantation, on a plat thereof entitled "A Plat of Colleton River Plantation, Phase 1, Beaufort County, South Carolina", said plat being prepared by Thomas & Hutton Engineering Co., Savannah, Georgia, Boyce L. Young, S.C.R.L.S. No. 11079, said plat being dated August 1, 1990, last revised November 18, 1991, Sheets 1 through 3, and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Plat Book 43 at Page 100. For a more detailed description as to the courses and distances, metes and bounds of the above-mentioned lot, reference is had to said plat of record.

This conveyance is subject to all easements as shown on the plat of record and to that certain Colleton River Plantation Declaration of Covenants and Provisions for Membership in Colleton River Plantation Club, Inc., which Declaration is dated June 11, 1991, and recorded in the Office of the Register of Mesne Conveyances for Beaufort County, South Carolina, in Deed Book 579 at Page 1796, and as may be amended from time to time.

This is the same property conveyed to Joel S. Lee, by Deed from Colleton River Company, L.P., dated September 20, 1993, and recorded on October 7, 1993 in the Office of the Register of Deeds for Beaufort County, South Carolina, in Deed Book 656 at Page 1816.

Beaufort County Tax Map Reference:
R600-025-00A-0005-0000.

(R. pp. 28-29).

The trial court action was initiated on November 17, 2015, wherein Colleton filed a Summons and Complaint against Lee alleging two separate causes of action: breach of contract

and breach of contract accompanied by a fraudulent act. This case arises out of a debt owed to Colleton by Lee by virtue of Lee's ownership of a Lot A02 in Colleton River Plantation, which lot is subject to the Amendment to the Third Amended and Restated Colleton River Plantation Declaration of Covenants and Provisions for Membership in Colleton River Plantation Club Inc. ("Covenants"). Section 12.6 of the Covenants provides "by accepting a deed or entering into a recorded contract to purchase any Lot, each Owner covenants and agrees to pay all assessments authorized in the Governing Documents,¹ together with any collection costs, interest or late charges equal to 1.5% per month of the unpaid amount . . . Any delinquency shall be the personal obligation of each Owner and a lien upon each Lot until paid in full." (R. p. 300). Section 7.1(c) of the Covenants provides that

"...any Owner desiring to sell or otherwise transfer title to his or her Lot shall give the Board at least 30 days' prior written notice of the name and address of the purchaser or transferee, the date of such transfer of title, and such other information as the Board may reasonably require. *The Person transferring title shall continue to be jointly and severally responsible with the Person accepting title for all obligations of the Owner, including assessment obligations, until the date upon which the Board receives such notice and all amounts outstanding prior to transfer are paid in full, notwithstanding the transfer of title.*"

(R. p. 287 (emphasis added)) .

Furthermore, section 14.2(a)(ii) provides that when a lot is owned by a legal entity, the owners of the lot are required to designate one of the owners or the legal entity as the designated user, subject to the approval of the Board of Directors of the designated user. (R. p. 309). The designated user is then allowed access to Colleton's amenities, and is responsible for the payment of the annual operating assessments for the lot. (R. p. 309).

¹ Section 1 of the Covenants lists the By-Laws and Covenants as "Governing Documents" in its definition of said term.

This action was commenced after Colleton learned that Lee transferred the subject-lot to an entity named Bluffton Properties, LLC in an attempt to avoid payment of the assessments, fees, and dues owed to Colleton as required in the Covenants. Once Colleton learned of the transfer to Bluffton Properties, LLC, it requested that Lee comply with the covenants and name a designated user to be financially responsible for the annual operating assessments. (R. p. 14). Lee, through his attorney Thomas Burke (“Burke”) refused to so comply. (R. p. 15). Burke testified in his deposition² that he set up Bluffton Properties, LLC³, a Nevada LLC,⁴ for estate planning purposes for Lee. However, Lee testified at trial that he set up Bluffton Properties, LLC in order to gift the Lot to his attorney and friend, Burke. (R. pp. 184, 204). Lee also testified at trial that he owned other property in the Hilton Head area that he did not transfer into Bluffton Properties, LLC for estate planning purposes.⁵ As recognized by the trial court, Lee’s testimony about his purpose of transferring the Lot into Bluffton Properties, LLC lacked any credibility, as Lee and his own lawyer, who prepared the deed in violation of South Carolina law,⁶ could not agree on the purpose of the transfer.

Further, Lee failed to comply with the Covenants, including their requirement that he provide the required thirty-day notice of transfer, and related details, to Colleton’s Board, and as

² Thomas Burke unfortunately passed away between being deposed and the trial of this matter.

³ Lee states in his brief’s statement of the case that Colleton sued Bluffton Properties, LLC for lack of payment of assessments and fees, which Colleton did do and Colleton was awarded a default judgment as Lee states in his brief. However, Lee’s statements are misleading to this Court as the Bluffton Properties, LLC that Colleton sued was the incorrect Bluffton Properties, LLC. Colleton sued a South Carolina entity named Bluffton Properties, LLC as Colleton had no other information to know that Lee’s Bluffton Properties, LLC was a Nevada corporation. Once Colleton received its default judgment, Colleton discovered that the entity it sued was the wrong entity. Lee would like this Court to believe that Colleton is attempting to double collect against Lee and Bluffton Properties, LLC for Lee’s violations of the Covenants, but this is simply not the case, and if Lee had complied with the Covenants, Colleton would have been aware of the true identity of Lee’s Bluffton Properties, LLC.

⁴ According to the Nevada Secretary of State’s website, Bluffton Properties, LLC’s registration status is “permanently revoked.”

⁵ Interestingly, the property on Hilton Head that Lee owns and that he did not transfer into Bluffton Properties, LLC is property that is not subject to large HOA fees and assessments.

⁶ Attorney Burke prepared and filed the deed while not being licensed to practice law in South Carolina.

such, Lee remains personally liable for the annual operating assessments and costs of collection that Colleton has incurred since Lee's lack of payment beginning in October 2012.

The parties participated in extensive discovery and motions practice, which culminated in a nonjury trial before the Honorable Marvin Dukes, on December 5, 2018. The trial court then issued its Trial Order on February 13, 2020, wherein the trial court found in favor of Colleton on its breach of contract cause of action, but the trial court denied Colleton's breach of contract accompanied by a fraudulent act cause of action, despite stating that "significant evidence was presented in favor of Colleton's position" on the breach of contract accompanied by a fraudulent act. (R. p. 5).

Then, both Lee and Colleton filed motions to reconsider, wherein Lee sought to relitigate all the issues raised in the trial and sought the trial court to reverse itself on granting Colleton breach of contract cause of action against Lee, and Colleton moved the trial court to amend its Trial Order to rule in favor of Colleton on its cause of action for breach of contract accompanied by a fraudulent act. The trial court held a hearing on Colleton's motion, and, as well, on Lee's motion, to reconsider, on April 24, 2020. Thereafter, the trial court issued its order on September 1, 2020, denying all motions to reconsider and affirming the Trial Order as the final order in the case. Then, the parties timely filed notices of appeal to this Court.

Colleton filed its Respondent-Appellant initial brief in the cross appeal on April 20, 2021, which Colleton hereby incorporates by reference herein.

STANDARD OF REVIEW

This matter is an action at law. *Mason v. Mason*, 412 S.C. 28, 56, 770 S.E.2d 405, 420 (Ct. App. 2015) (quoting *Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004)).

In an action at law tried without a jury, the appellate court is “limited to determining whether the trial court based its ruling on an error of law or on a factual conclusion without evidentiary support.” *Stringer v. State Farm Mut. Auto. Ins. Co.*, 386 S.C. 188, 192, 687 S.E.2d 58, 60 (Ct. App. 2009) (citing *S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E Underwriters Risk Retention Group*, 347 S.C. 333, 338, 554 S.E.2d 870, 873 (Ct. App. 2001)). Further, “where a law case is tried by a judge without a jury, his findings of fact have the force and effect of a jury verdict upon the issues, and are conclusive upon appeal when supported by competent evidence.” *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975).

ARGUMENT

The Appellant-Respondent Lee goes to great lengths to attempt to argue against what the Master-in-Equity clearly saw, and ruled, in this case: That Lee violated his contractual obligations by transferring the Lot into his shell company, Bluffton Properties, LLC, in violation of the Covenants and in an effort to escape his financial obligations to Colleton.

Lee first argues that his contractual obligations to Colleton were severed when he, without proper notice, deeded the subject-Lot to his shell company, Bluffton Properties, LLC. Lee argues this point without supporting caselaw, as Lee states it is “ripe for appellate decision.” (Lee Initial Br. 8). However, this argument is a misinterpretation of the terms of the Covenants and the terms of the Trial Order. Lee is bound by the clear terms of the Covenants, post transfer, because his transfer of the Lot was a violation of the Covenants. As explained in more detail herein, Lee was required to comply with multiple Covenant provisions to effectuate a proper transfer of the Lot to his entity, yet he failed to comply with a single provision as his intent was to escape his obligations to Colleton without the required notice and with use of his shell LLC.

Second, Lee argues that his transfer *did* in fact comply with the covenants, and, therefore, Lee is not liable for any post-conveyance liability and that Lee is not liable for the acts of Bluffton Properties, LLC. This argument also fails as Lee’s transfer did not comply with the Covenants in multiple respects, not the least of which is he was not current on his obligations to Colleton at the time of transfer, yet Lee argues that he was. (R. p. 366). Further, Lee’s argument fails to mention the joint and several liability provisions of the Covenants and how those provisions do cause Lee to be liable for the acts of Bluffton Properties, LLC because he is held jointly and severally liable when a transfer to a legal entity is made in violation of the Covenants. (R. p. 287).

Third, Lee makes various arguments in his attempt to invalidate the clear and unambiguous Covenant provisions he has violated, namely, that the Covenants violate public policy, they are an unreasonable restraint on the alienation of property, the Covenants violate the South Carolina Nonprofit Corporation Act, among various others. As argued below, these arguments lack any merit as the terms of the Covenants, to which Lee agreed and was contractually bound, are clear and unambiguous. As the Master-in-Equity found in the Trial Order, Lee's defenses failed as a matter of law and Lee breached his contractual obligations to Colleton, causing Colleton to suffer monetary damages.

Therefore, Colleton respectfully requests that this Court affirm the Master-in-Equity's Trial Order granting Colleton's cause of action for breach of contract.

I. The Master-in-Equity properly ruled that Lee breached his contractual obligations to Colleton.

a. Lee's transfer of the Lot violated the clear and unambiguous terms of the covenants to which Lee was bound.

It is undisputed that the at-issue Lot is subject to the Covenants. It is also undisputed that Section 12.6 of the Covenants provides "by accepting a deed or entering into a recorded contract to purchase any Lot, each Owner covenants and agrees to pay all assessments authorized in the Governing Documents,⁷ together with any collection costs, interest or late charges equal to 1.5% per month of the unpaid amount . . . Any delinquency shall be the personal obligation of each Owner and a lien upon each Lot until paid in full." (R. p. 300). Section 7.1(c) of the Covenants provides that

Subject to Section 19.2 any Owner desiring to sell or otherwise transfer title to his or her Lot shall give the Board at least 30 days'

⁷ Section 1 of the Covenants lists the By-Laws and Covenants as "Governing Documents" in its definition of said term.

prior written notice of the name and address of the purchaser or transferee, the date of such transfer of title, and such other information as the Board may reasonably require. *The Person transferring title shall continue to be jointly and severally responsible with the Person accepting title for all obligations of the Owner, including assessment obligations, until the date upon which the Board receives such notice and all amounts outstanding prior to transfer are paid in full, notwithstanding the transfer of title.*

(R. p. 287 (emphasis added)).

Furthermore, section 14.2(a)(ii) provides that when a lot is owned by a legal entity, the owners of the lot are required to designate one of the owners or the legal entity as the designated user, subject to the approval of the Board of Directors of the designated user. (R. p. 309). The designated user is then allowed access to Colleton's amenities, and is responsible for the payment of the annual operating assessments for the lot. (R. p. 309).

The rule for interpretation of restrictive covenants in this state has been described by our Supreme Court as follows:

Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document. The court may not limit a restriction in a deed, *nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written.* It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and *all doubts resolved in favor of free use of the property*, subject, however, to the provision that this rule of strict construction should not be applied so as to defeat the plain and obvious purpose of the instrument. It follows, of course, that where the language of the restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property. *A restriction on the use of property must be created in express terms or by plain and unmistakable implication*, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.

S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) (quoting *Taylor v. Lindsey*, 332 S.C. 1, 4–5, 498 S.E.2d 862, 863–64 (1998)).

As stated by the court in *Town of McClellanville*, the court is to read restrictive covenants in their entirety to ascertain and give effect to the intent of the parties. *Id.* In *Town of McClellanville*, the court ruled that the town could enact an ordinance to charge for the use of a public boat landing, despite language in the deed that stated the boat ramp was to remain accessible and available for use by the public. *Id.* at 623, 550 S.E.2d 302. The court reasoned that the argument by DNR, that the word “remain” meant remain free for use, was an enlargement of the restriction in the deed that the boat ramp remain accessible and available for use by the public. *Id.* In reading the covenant as a whole and ascertaining the intent of the parties, the court ruled that the town had the right to manage its own property while also complying with the restrictive covenant because the word remain was not meant to be read as restrictively as DNR had argued, thus, when read in the proper context, the town could charge for use of the boat ramp without violating the restrictive covenant. *Id.* at 624, 550 S.E.2d at 303.

This Court should also read Colleton’s restrictive covenants in the same manner—in their entirety to ascertain and give effect to the intent of the parties. The fundamental purpose of the Covenants is to create, pay for, and govern the use of property in a private community with an abundance of high-end amenities. (R. pp. 7, 12). It was, presumably, these high-end amenities, including two private golf courses, that attracted Lee to purchase the Lot in Colleton. (R. p. 215). In so purchasing the Lot, Lee, as a former lawyer himself and a businessman in the area of real estate, was a sophisticated enough party to know what he was getting himself into, that is, committing himself to being personally liable for the payment of assessments and fees per the Covenants as required as any owner of a lot in Colleton, and understanding the requirements for the transfer of the Lot. (R. p. 12); *see also Callawassie Island Members Club v. Dennis*, 425

S.C.193, 203, 821 S.E.2d 667, 672 (2018) (“Rather, this is precisely the result to which these sophisticated purchasers of a resort home agreed when they decided to purchase property and abide by the terms of the governing documents.”). If the Covenants cannot require the owners to pay their assessments and hold owners responsible when they try and dump their lots into shell companies to avoid payment, the community as a whole would fail.

The Covenants in this case are clear, in order to transfer title you must provide Colleton’s Board with thirty days’ written notice, with the prescribed information, and until you do so you remain jointly and severally liable with the Person⁸ accepting title. (R. p. 287). Further, under the designated user provision, if you transfer your interest to a legal entity, you must designate someone, subject to approval by Colleton’s Board, as the financially responsible individual for the payment of assessments. (R. p. 309). It is clear in this case that Lee did not provide the prescribed written notice, he was not current on his obligations at the time of transfer, and he did not proffer the designated user. (R. pp. 4-23, 366). Even though Lee argues that Colleton had notice, if only through Colleton’s own happenstance in finding the recorded deed, and Lee argues that somehow Lee was current on his obligations through a settlement payment to a debt collector for a debt related to another period of time, these arguments are not in accord with the clear facts and evidence in this case.

In the trial record is Colleton’s Account Statement of the Lot, which clearly shows that Lee was not current on his obligations when he recorded the deed to Bluffton Properties, LLC on May 28, 2013. (R. p. 366). And, Lee presented no evidence whatsoever that shows he provided any notice at all of the at-issue transfer to Colleton’s board. Lee tries to argue that Colleton had both actual and constructive notice by way of the recorded deed, though not the prescribed written

⁸ Defined in the Covenants as “References in the Governing Documents to a ‘Person’ or ‘Persons’ shall refer to an individual, a corporation, a partnership, a limited liability company, or any other legal entity.” (Covenants § 1.5).

notice as required by the Covenants and not the prescribed notice containing the information required by the Covenants. (R. p. 287). Lee attempts this after-the-fact argument so that he can attempt to explain away his fraud against Colleton in hiding his transfer to Bluffton Properties, LLC. However, Lee's notice argument fails to meet the requirements of the *Hammond v. Tilghman Lakes, Inc.* case that he cites. 295 S.C. 152, 154, 367 S.E.2d 446, 447 (Ct. App. 1987). As cited in Lee's brief, there has to be no prejudice suffered by the party which was to receive notice, if that notice is not given in the contractually prescribed manner. *Id.* In this case, Colleton did suffer prejudice by Lee's failure to give written notice, and, thus, constructive notice is not effective, nor is Colleton's actual notice when it finally found the recorded deed by its own luck. Colleton's prejudice is multifaceted, in that Colleton was unable to investigate the credit worthiness of Bluffton Properties, LLC or any proffered designated user, nor was Colleton even alerted to the identity or state of organization of Bluffton Properties, LLC, and Colleton suffered monetary damages because Lee transferred his lot to an uncapped shell corporation that Lee used fraudulently to avoid his debts to Colleton. (R. p. 309).

This action was commenced after Colleton learned that Lee transferred the subject-lot to Bluffton Properties, LLC in an attempt to avoid payment of the assessments, fees, and dues owed to Colleton as required in the Covenants. Once Colleton learned of the transfer to Bluffton Properties, LLC, Colleton, through Lee's lawyer Burke, requested that Lee comply with the covenants and name a designated user to be financially responsible for the annual operating assessments. Lee refused to so comply, and Lee failed to provide the required thirty-day prescribed notice and information to Colleton's Board, and as such, Lee remains jointly and severally liable with Bluffton Properties, LLC for the annual operating assessments and costs of collection that Colleton has incurred since Lee's lack of payment beginning in October 2012.

Lee's argument that his transfer of the Lot to Bluffton Properties, LLC divests himself of his further liability pursuant to the Covenants fails in its own reasoning and fails in its ability to find supporting caselaw. Lee attempts to cite to the recent *Dennis* decision to support his argument that this Court should condone Lee's actions and agree with his argument that once he transferred the Lot all liability to Colleton was cut off. But, Lee's citation of *Dennis* lacks context. Lee cites to a portion of the decision that is *dicta*, and in which the court stated the Dennises could simply sell their house to avoid paying their membership dues. Lee fails to provide context to this citation wherein the court later cites to the South Carolina Nonprofit Corporation Act which states that "the resignation of a member does not relieve the member for any obligations the member may have to the corporation as a result of obligations incurred or commitments made before resignation." *Dennis*, 425 S.C. at 205, 821 S.E.2d at 673 (quoting S.C. Code Ann. 33-31-620(b) (2006)). This is also the proposition the *Dennis* court cites to negate the argument that Callawassie created a perpetual contract obligation situation—the same argument raised by Lee in this case, that Lee's obligations to Colleton are perpetual in nature. The *Dennis* court held that the obligations were not perpetual in nature, and that the South Carolina Nonprofit Corporation Act was not violated, because even though a member can resign at anytime, resignation does not permit a member to escape their obligations incurred and commitments made while they were a member. *Id.*

The same reasoning applies in the instant case, Lee cannot escape his obligations incurred and commitments made to Colleton by simply divesting himself of ownership of the Lot in violation of the Covenants. Lee made a commitment to abide by the terms of the Covenants while he was a member of Colleton, and he admitted that his transfer of the Lot was in violation of his commitments. (R. pp. 272, 211). Thus, under the reasoning of *Dennis*, Lee is still contractually

obligated to his commitments made while he was a member, meaning he is jointly and severally liable for the ongoing assessments related to the Lot. (R. p. 287).

Accordingly, what Lee is asking this Court to do is essentially condone fraud. Lee's argument cannot address his actions in violating the Covenants while he was an owner because there is no defense. Lee violated the Covenants by making the transfer to Bluffton Properties, LLC without giving the prescribed notice and other required information, without being current on his obligations, nor abiding by the designated user provisions of the Covenants—the Covenants are clear that liability for failure to comply with the transfer requirements is joint and several with the transferee. Further, Lee wants this Court to make new law in this state that would allow anyone bound by restrictive covenants to decide that they no longer want to abide by rules and contractual obligations they agreed to and escape liability with a simple, no consideration transfer⁹, to a foreign LLC with no capital to pay the debt, all through the guise of “estate planning.”

Finally, Lee's real property law argument leaves out an essential phrase in the Covenants, that “any delinquency shall be the personal obligation of each Owner.” (R. p. 300). While an Owner is bound by the Covenants by virtue of his ownership of real property in the Colleton development, the delinquency in payment is both a lien on the respective real property and the personal obligation of the Owner. Further, when Lee failed to abide by the transfer provisions in the Covenants, he became jointly and severally liable with the new Owner, Bluffton Properties, LLC, for the ongoing assessments, an obligation that is personal to Bluffton Properties, LLC and to Lee as the Covenant-violating transferor. Lee's arguments that the trial court should not have considered the actions of Bluffton Properties, LLC, that the trial court imputed Bluffton Properties,

⁹ The consideration for the transfer to Bluffton Properties, LLC was \$1. (Tr. Ex. Deed).

LLC's actions to Lee, and that it is Colleton's fault that Bluffton Properties, LLC was not a party¹⁰ are all red herrings to what is clearly the trial court's holding—that Lee is jointly and severally liable with Bluffton Properties, LLC for the assessments for the Lot because Lee did not abide by the Covenants when he made the at-issue transfer. (R. pp. 287, 11).

II. The Covenants do not violate public policy.

a. The Covenants allow for the free transfer of real property.

Lee argues that the Covenants are an unreasonable restraint on the alienation of real property and are therefore void; specifically, Lee argues that the right of first refusal granted to Colleton in the Covenants is void as in violation of the rule against perpetuities. This is simply a misstatement of the caselaw in this state. Additionally, the caselaw dictates that unless there is pending offer for the purchase of the property, there is no justiciable controversy for the court to address. Thus, this argument of Lee's should be ignored by this Court. *Peoples Fed. Sav. And Loan Ass'n of S.C. v. Res. Planning Corp.*, 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004).

In *Peoples*, the court considered whether a special referee's ruling that a right of first refusal was void as it violated the rule against perpetuities was in error. In sum, the court ruled that the referee's ruling was in error because "there is no justiciable controversy." *Id.* Specifically, the court reasoned that in the *Webb* case the court held "a case or controversy regarding the validity of a pre-emptive right does not accrue until the right has been asserted" so that in the *Peoples* case there was no justiciable controversy for the court, nor the referee, to consider because there was no pending offer for the purchase of the at-issue property. *Id.* (citing *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997)). Thus, absent a pending offer to purchase property burdened by a right of first refusal, the court should not rule on whether or not the right of first refusal is

¹⁰ Further, Lee waived this argument at the trial level by never making a motion under Rule 12(b)(7), SCRPC, to join a necessary party.

valid.

The same is true in the instant case, and Lee's argument is a misapplication of the law and facts to this case. This is because Lee's argument that the trial court "improperly found – Section 7.1(c) and 19.2 work together to prevent a fee simple owner from conveying his property as he sees fit" is a trial court holding that Lee has created himself in his brief and that does not exist in the Trial Order. (R. pp. 4-23) Nowhere in the Trial Order does it state that section 19.2 was invoked to prevent Lee's transfer of his property, nor does the Trial Order state that Lee violated section 19.2. (R. pp. 4-23). Lee is attempting to inject this argument into this appeal so as to try and invalidate a Covenant section that doesn't even apply to Lee's actions, all, assumedly, to try and justify Lee's fraudulent actions in transferring the Lot in violation of the Covenants.

This Court should ignore Lee's arguments regarding section 19.2 and the rule against perpetuities just as the *Peoples* case directs. There was no pending offer for purchase, thus, no justiciable controversy exists as to the validity of section 19.2 of the Covenants. *Id.* Further, Lee's argument neglects the language in section 7.1(c) that it applies to "any Owner desiring to sell *or otherwise transfer title* to his or her Lot . . ." which makes section 7.1(c) clearly applicable to Lee's act of transferring his Lot to Bluffton Properties, LLC in violation of the Covenants and in order to avoid his obligations to Colleton. (R. p. 287).

b. Lee was treated in the same manner as any other property owner in Colleton.

One of Lee's final arguments is that he was treated differently than other property owners in Colleton, which is plainly false and clearly lacks any supporting facts in the record or any supporting law cited in his brief. A simple search of the public index would show Lee that Colleton seeks to enforce its Covenants uniformly for the same violations that Lee has made—dumping property into shell companies for the purpose of avoiding debts to Colleton.

Additionally, this argument is dealt with by the Covenants as well, wherein they state “Owners may not claim a reduction in their assessments due to action or inaction by the Club.” (R. p. 300). This is exactly what Lee is trying to do, claim that Colleton took actions which he does not agree with, and that Colleton did not take actions which he wants to hold against them, all in an effort in this case to reduce the amount of assessments and fees he owns to Colleton. Lee’s argument fails under the facts of this case and the law of this state.

CONCLUSION

Colleton respectfully requests this Court to affirm the trial court’s Trial Order granting Colleton relief for its cause of action against Lee for breach of contract and remand this case for a further damages hearing.¹¹

¹¹ In so doing, Colleton respectfully seeks this Court’s grant to Colleton of its appeal regarding Lee’s fraudulent conduct.