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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2021-000465
Circuit Court Case No. 2019-CP-40-01231

Kevin O'Hara, Rebekah H. O'Hara and Krebone Enterprises, LLC……Respondents,

v.

Middleborough Horizontal Property Regime,……..……..Appellant.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FINDING THAT THE APPELLANT'S MASTER DEED DOES NOT PROHOBIT SHORT-TERM RENTALS OF APARTMENTS WITHIN THE HORIZONTAL PROPERTY REGIME BECAUSE NO SUCH RESTRICTION IS CONTAINED IN THE REGIME'S MASTER DEED?

STATEMENT OF THE CASE

The Appellant, Middleborough Horizontal Property Regime (Middleborough or Appellant) appeals the circuit court's order declaring that Middleborough may not limit the term for which the Respondents rent their units in Middleborough or otherwise restrict the Respondents' tenants' use of the common property, because there is no restriction on rental terms contained in Middleborough's Master Deed.

The Respondents Kevin O'Hara and Rebekah O'Hara (the O'Haras or Respondents) commenced this action on February 28, 2019, seeking a declaratory judgment that Middleborough, could not restrict the term for which the O'Haras elected to rent their Middleborough Apartments or otherwise restrict, the O'Haras or the O'Haras' renters' free use of the common property. (R. pp. 19-83) Respondent Krebone Enterprises was later added as a Plaintiff by consent, where the Appellants alleged that Krebone was an entity owned by the O'Haras and was used to rent the O'Haras' Middleborough Apartments. This turned out not to be accurate, although it was owned by the O'Haras it was never used as a vehicle to rent the apartments.

The Appellant filed an Amended Answer and Counterclaim on May 30, 2019, seeking an order preventing the O'Haras from renting their Apartments as "short-term" rentals, but did not assert what rental term Middleborough considered "short-term," and what rental term it considered "long-term." (R. pp. 156-233). Appellants asserted that the

Middleborough By-Laws declaration that the Apartments could only be used "as residences," impliedly restricted the term for which owners could rent the apartments.

The Honorable Kristi F. Curtis presided over the non-jury trial of this case on January 29, 2021, via the virtual courtroom. The court ruled in favor of the Respondents in an order dated March 3, 2021, finding that the Appellant could not restrict the O'Haras' free use of their property by restricting the rental terms and the tenants' use of the common areas. (R. Pp. 1-15). Appellant moved to alter or amend the judgment on March 15, 2021, which Judge Curtis denied in an order dated April 12, 2021. (R. pp. 16-18). The Appellant filed its notice of Appeal on April 30, 2021.

STANDARD OF REVIEW

> Declaratory judgment actions are neither legal nor equitable and are therefore determined by the nature of the underlying issue. Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). An action seeking to enforce a restrictive covenant is an action in equity. Buffington v. T.O.E. Enters., 383 S.C. 388, 393, 680 S.E.2d 289, 291 (2009). In an equitable action, this court can make findings of fact according to its own view of the evidence. S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001). However, a finding by the circuit court will not be disturbed on appeal unless it is found without evidentiary support or against the preponderance of the evidence.

Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E .2d 773, 775-76 (1976).

Restrictions on the use of property shall be construed with all doubts resolved in favor of the free use of property. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998). It is Middleborough's burden to demonstrate the restriction that it seeks to enforce against the O'Haras is expressly stated or unmistakably implied.

> A restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property. Buffington v. T.O.E. Enters., 383 S.C. 388, 392, 680 S.E.2d 289, 291 (2009). In order to enforce a restrictive covenant, "a party must show

> that the restriction applies to the property either by the covenant's express language or by a plain and unmistakable implication." *Id.; see* also Sea Pines Plantation Co., 294 S.C. at 269, 363 S.E.2d at 894 ("A restrictive covenant will be enforced if the covenant expresses the party's intent or purpose, and this rule will not be used to defeat the clear express language of the covenant."). "Courts shall enforce such covenants unless they are indefinite or contravene public policy." Sea Pines Plantation Co., 294 S.C. at 270, 363 S.E.2d at 894. As with any other action on a contract, the party who ***84** seeks to enforce a restrictive covenant has the burden of proving that the non-moving party intended to create a covenant. Charping v. J.P. Scurry & Co., 296 S.C. 312, 314, 372 S.E.2d 120, 121 (Ct.App.1988).

SPUR at Williams Brice Owners Ass'n, Inc. v. Lalla, 415 S.C. 72, 83–84, 781 S.E.2d 115, 121 (Ct. App. 2015).

FACTS

The O'Haras own apartments 2J and 14G in Phase 1 of Middleborough Horizontal Property Regime's property located in Richland County. Middleborough is a horizontal property regime established pursuant to South Carolina Code Annotated Section 27-31-30 (1976), its Master Deed, filed on November 12, 1981 (R. pp. 319-327), and amended on December 21, 1984 (R. pp. 328-333). Middleborough is governed by the provisions of the South Carolina Horizontal Property Act (SCHPA) (S.C. Code Ann. Section 27-31-10 *et. seq*.), the Master Deed, the amendment to the Master Deed, and the Bylaws of Middleborough Horizontal Property Regime. (R. pp. 334-348). Middleborough's Master Deed does not contain any restrictions or limitations relating to an owner leasing a unit and it does not restrict lease terms. (R. pp. 319-327)

The O'Haras bought apartment 2J on March 31, 2015 (R. pp. 315-316), and apartment 14G on August 25, 2017, (R. pp. 317-318), and are the sole owners of the apartments. The O'Haras purchased Unit 2J with the intent to rent the apartment as a short-term rental through Airbnb, VRBO, and other online rental platforms. The O'Haras bought the units with the intention of leasing them both short and long-term and specifically

reviewed the master deed and by-laws for any restrictions that would prohibit their plans. (R. p. 248, line 18 – p. 250, line 18).

Despite listing Unit 2J on Krebone's webpage, the O'Haras chose to use third-party rental sites instead. Krebone's webpage was never used to rent the units and it never produced an inquiry for rental. (R. p. 252, line 5 – p. 253, line 4). Since the O'Hara's purchase of Unit 2J in 2015, they advertised and continuously rented Unit 2J through Airbnb and other online platforms. (R. p. 279, line 22 – p. 281, line 7). Individuals can rent Unit 2J for two-night minimums, and the average rental since 2015 has been 4.6 days. Unit 14G is only rented on a 30-day minimum basis at the current time. (R. p. 292, lines 14-24). Some units in Middleborough are owned by business entities and are rented for a period of less than a year. (R. p. 260, line 20 – p. 261, line 14).

On July 14, 2016, the Middleborough Board of Directors' president sent Mr. O'Hara a letter demanding that the O'Haras "cease and desist" from renting Unit 2J on a short-term basis. The letter stated that Mr. O'Hara was violating Bylaw Article XIA(1), which states, "Apartments in Phase 1 shall be used only as residences" and classified the O'Haras short-term rental as a "commercial activity." (R. p. 349). Mr. O'Hara responded to the letter and pointed out that there were no restrictions in the Master Deed restricting the lease terms. (R. pp. 350-353). On January 7, 2019, the Middleborough board approved revisions to the regime's rules and regulations which restricted the O'Hara's short-term rental of the apartments and placed limitations on the terms of leases that are not set forth in the Master Deed and placed restrictions on renters' use of the common areas, including the pool. (R. pp. 354-376).

ARGUMENT

I. THE LENGTH OF LEASE TERMS FOR APARTMENTS IN A HORIZONTAL PROPERTY REGIME MAY ONLY BE RESTRICTED THROUGH NOTICE IN THE MASTER DEED PURSUANT TO SOUTH CAROLINA CODE SECTION 27-31-100(h).

The Middleborough Horizontal Property Regime was formed pursuant to the South Carolina Horizontal Property Act, S.C. Code Ann. Section 27-31-10 *et. seq* (SCHPA), on October 14, 1981, by the recording of its Master Deed with the Richland County Register of Deeds. (R. pp. 319-327). The Master Deed must contain certain items required by S. C. Code Ann. Section 37-31-100. *See* S.C. Code Ann. § 27-31-30 (1976). The Master Deed must include a description of the land, a general description of each apartment, the common elements, and the name of the regime. S. C. Code Ann. Section 27-31-100(h) requires that the Master Deed must express "(a)ny restrictions or limitations on the lease of a unit including, but not limited to, the amount and term of the lease."

The Middleborough Master Deed does not contain any restriction or limitations related to the term of a lease. (R. pp. 319-327). In fact, the Master Deed does not contain any restrictions or limitations on leasing units. The Master Deed describes the property as containing ". . .192 residential apartments ("Apartments") and a three (3) deck parking garage. . .." (Id.). Middleborough's representative at trial, Ken Baker agreed that the Master Deed does not contain any provisions limiting the length of rental terms for the Apartments. (R. p. 307, lines 6-9). Mr. O'Hara relied on the Master Deed when he purchased the Units, and particularly reviewed the Master Deed to assure himself that there were no restrictions on lease terms. (R. pp. 249, line 19 – p. 250, line 19). If Middleborough wanted to restrict or limit Apartment leases, Master Deed Section IX.A. allows the Master Deed to be amended by the written agreement of all the Co-owners. (R.

pp. 319-327). Mr. O'Hara is not aware of any vote being taken to change the lease terms or any of the rules as required by the Master Deed. (R. p. 264, line 7 – p. 266, line 14).

II. MIDDLEBOROUGH'S ARGUMENT THAT THE RESPONDENTS WERE NOT USING THEIR APARTMENTS AS RESIDENCES DUE TO RENTAL TERM DOES NOT MATTER AS THE BY-LAWS CANNOT CHANGE THE MASTER DEED AND THE APPELLANTS CONFLATE THE TERM "RESIDENCE" WITH "DOMICILE."

The Master Deed describes the property, its common elements, and any restrictions on use of the real property. (S.C. Code Ann. § 27-31-100 (1976)). A regime's By-Laws control the administration of the property and cannot change the character of the property as defined in the Master Deed. "The administration of the property constituted into horizontal property, whether incorporated or unincorporated, shall be governed by bylaws which shall be inserted in or appended to and recorded with the master deed or lease." (S.C. Code Ann. § 27-31-150 (1976)). The by-laws therefore cannot affect the nature of the fee simple title, particularly in how the Apartments are generally used or leased. That is the sole province of the Master Deed.

Middleborough attempts to make a distinction between "used only as residences" and "residential purpose" or "residential use." Defendant fails to clarify how one term is different from the other. A purpose is the reason that something was created or for which it exists. "Use" is to employ something for a purpose. Appellant's only arguments is that the amount of time a person spends in the unit can change the character of the Apartment's use. Appellant argues that the different lease terms change the character of the use of the Apartment in aberration of the Apartment's original purpose. The definition of use relates to the person occupying the unit, not the fee simple owner. Therefore, if someone is using a unit as a residence, they are also using it for "residential purposes." Even if "only as

residences" takes on the meaning suggested by Middleborough, it would not matter because the lease term is not a matter of administration of the property, but it is restricting the use of the fee simple owner, which must be in the Master Deed. Even if the intent in the By-laws was as argued by the Middleborough, it would not matter because the By-Laws cannot change the covenants in the Master Deed.

The terms "residential use," "residential purposes," "used only as a residence," and "residential" all have the same meaning. They are all either adverbs, adverbial phrases, or adjectives that describe the manner in which the Apartments may be utilized. The Master Deed states that the property consists of "192 Residential Apartments." (R. pp. 319-327). Middleborough's argument regarding what is meant by using the Apartments as residences would mean that there is a long list of owners and potential owners that could not use their Apartments for their intended purposes. This group would include transient students, owners that held the Apartment only to stay in when they are in Columbia, Apartments owned by corporations, and annual leaseholders that do not intend to make Middleborough their residence but continue receiving mail at their domicile.

The court below correctly stated that "As long as the property is being used for living purposes, it does not cease being "residential" simply because the use is temporary instead of permanent. (R. p. 11). Neither the Master Deed or the By-Laws define the terms "residence" or "residential." (R. pp. 319-327 and R. pp. 334-348). Middleborough, through its Amended Rules is attempting to require that a person be domiciled in the Apartment instead of using it as a residence. There is nothing in the Master Deed that would require an owner or tenant to intend to make the Apartment their permanent home. "It has been held that 'residence' is a more elastic and flexible term than domicile or citizenship. A person may have only one domicile but may have several residences." Cook v. Fed. Ins.

Co., 263 S.C. 575, 582, 211 S.E.2d 881, 884 (1975). "[A] person's "legal residence" is often determined by his or her domicile, a person's "actual residence" will be determined by his or her "present physical location." 25 Am. Jur.2d Domicile § 9 (2008). This distinction between actual residence and legal residence has long been recognized." Est. of Nicholson ex rel. Nicholson v. S.C. Dep't of Health & Hum. Servs., 377 S.C. 590, 597, 660 S.E.2d 303, 306 (Ct. App. 2008). Therefore, a person lawfully inhabiting a Middleborough Apartment whether as an owner or a tenant of any lease term, is using the Apartment as a residence.

Additionally, there are commercial units in the building in Phase II-A as shown in the Amendment to the Master Deed (R. pp. 328-333). Those units "may be used for residential purposes, including but not limited to, rental residential space, or any commercial purpose allowed by applicable law, including but not limited to, use of such Apartments as commercial retail space or commercial office space." (*Id*.). The developers could have placed further restrictions on the units when filing the amendment. Master Deed Amended Section 5, states that the terms used in the amendment have the same meaning as in the Master Deed. Therefore, when it states that the units may be used for residential purposes, those purposes must include the same purposes as allowed in the original Master Deed, which the amendment makes clear was envisioned to include "rental residential space." The Amendment also makes clear that the intent of the Master Deed as to residential use, includes renting of the residential units and distinguishes what is commercial purpose with retail or office space.

The Appellant cites a portion of the definition of the term "residence" from the 1979 edition of *Black's Law Dictionary* to try and place the definition it is using close to the time of filing the Master Deed. However, Middleborough only quoted a portion of the

definition of "residence," from this vintage edition of *Black's*. The definition was continued: "Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile." Black's Law Dictionary, (Fifth Edition 1979). This definition matches our courts' consistent interpretation of the term. Therefore, a renter of any term meets this definition as they have a bodily presence inhabiting the Apartment.

"Generally speaking, 'residential use' is one that involves activities generally associated with a personal dwelling." 20 Am. Jur. 2d Covenants, § 179. "Similarly, a 'residential building' is a building which is used for residential purposes or in which people reside, dwell, or make their homes, as distinguished from one which is used for commercial or business purposes." Id. "The phrase 'residential purposes' does not mean only the occupying of a premises for the purpose of making it one's 'usual' place of abode; a building is a residence if it is 'a' place of abode." Id. "The word 'residence' is one of multiple meanings, however, and hence the context in which it is used must be taken into consideration in determining its meaning in any particular case." Id.

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

III. THE RENTAL OF APARTMENTS IN MIDDLEBOROUGH IS GOVERNED BY THE VACATION RENTAL ACT

Middleborough cites S.C. Code Section 45-1-90 (2015) in an attempt to define the O'Hara's rentals as "transient housing." The short-term rentals of condominium apartments in South Carolina are common and have been for years. Rentals, such as the O'Hara's, are governed by the South Carolina Vacation Rental Act, S.C. Code Section 27-50-210 *et seq*. The Vacation Rental Act applies to "Residential property" which includes apartments and condominiums, "devoted to residential use or occupancy by one or more persons for a definite or indefinite period." A "vacation rental" is a "lease, sublease, or other rental of residential property for a period of fewer than ninety days," but does not apply to rentals that would otherwise come under the South Carolina Residential Landlord and Tenant Act. *See* S.C. Code Ann. § 27-50-220 (1976). The Vacation Rental Act excludes lodging provided by hotels or other entities that provide a front desk for customer service, or a centralized telephone system, or provide housekeeping services at no additional charge. *See* S.C. Code Ann. § 27-50-220 (B)(3)(1976). Therefore, the General Assembly has determined that rentals such as the O'Hara's are for a residential use as the South Carolina Vacation Rental Act defines their units as "Residential Property."

The short-term rental of condos does not constitute a hotel operation. In Landing Development Company v. City of Myrtle Beach, 285 S.C. 216, 329 S.E.2d 423 (1985) the plaintiff sued Myrtle Beach to enjoin the City from denying rental permits for short-term rentals in a condominium that it was managing for individual apartment owners. Despite Middleborough's representation that the opinion does not contain the word "residence," the issue was short-term rental in A-3 zoning districts which are described as "accommodation, multi-family **residential** district." One of the issues was the definition

of the term "permanent occupancy" and that local ordinance required "occupancy by a permanent **resident."** The city refused to issue the permits alleging that short-term rentals were not permitted in that particular zoning district The City argued that the management company renting the units was operating a "motel operation," just as Middleborough frames its argument against the O'Haras. The court in Landing found the units were individually owned and offered for rental through the management company and that "the fact of short-term rentals and the availability of convenience services to tenants do not operate to convert individually owned condominium units into a motel." Id. at 221, 425. The city also argued that its zoning ordinance required the units to be used for "permanent occupancy," much like Middleborough argues that its By-laws restrict use to "residential use." The court in Landing found that the term "permanent occupancy" was not defined in the ordinance nor law equating that term with being a permanent **residence**. *Id*. at 219, 424.

Middleborough cites South Carolina Public Interest Foundation v. City of Columbia, 431 S.C. 164, 847 S.E.2d257 (Ct. App. 2020) which found that the building in question was a dormitory eligible for tax credits. The subject of this case was an entire building, built for the purpose of housing students, where the parties stipulated that the dormitories "engage in the continuous activity of letting beds to students through the entering of a lease or other contractual arrangements between the student and the developer or property manager." The question before that court was whether the dormitories were eligible for tax credits. But again, the O'Hara's Apartments are governed by the South Carolina Vacation Rental Act and the South Carolina Horizontal Property Regime.

Middleborough's discussion of the South Carolina cases dealing with short-term rentals attempt to distinguish between "use" and "purpose." Clearly these are all the same

discussion regardless of the word chosen. Defendant cites the Kentucky case of Hensley v. Gadd 560 S.W.3d 516 (Ky. 2018) for the proposition that short-term rental is not a residential use. Defendant fails to address that Hensley is not governed by the Horizontal Property Act but relates only to restrictive covenants in a sub-division. The South Carolina Horizontal Property Act specifically requires that restrictions on terms of rental be placed in the Master Deed. S.C. Code Section 37-31-100(h) (1976). The restriction in Hensley also contained specific definitions regarding commercial activity. That is not true of the Middleborough Master Deed or Amendment which only lists retail and office use as specific commercial activities. (R. pp. 319-327 and R. pp. 328-333).

CONCLUSION

Because the Middleborough Horizontal Property Regime's Master Deed does not contain a restriction on rental terms as required by the Horizontal Property Act, and that the Respondents' renters are using the apartments for their intended use, this Court should affirm the judgment of the circuit court.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent complies with Rule 211(b) of the SCACR.

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